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Manuel D. Leal

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DISCOVERY UNDER BANKRUPTCY PROCEDURE:
A “TRAP DOOR?”

MANUEL D. LEAL*

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I. INTRODUCTION

The President of the United States, William Jefferson Clinton, was adjudged to be in contempt of court for his willful failure to obey a federal court’s discovery order, and consequently was sanctioned pursuant to Federal Rule of Civil Procedure 37 during the proceedings of a lawsuit filed by Paula Jones.¹ Prior to being found in contempt of court, then-President Clinton had fiercely resisted to comply with the court’s discovery orders, including his filing more than fifty motions challenging discovery.²

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1. *Jones v. Clinton*, 36 F. Supp. 2d 1118, 1120 (E.D. Ark. 1999). Plaintiff Paula Corbin Jones filed a lawsuit seeking civil damages from William Jefferson Clinton, President of the United States, and Danny Ferguson, a former Arkansas State Police Officer, for alleged actions beginning with an incident in a hotel suite in Little Rock, Arkansas when President Clinton was governor of the State of Arkansas. *Id.*

2. *Id.* at 1121.

Discovery in this case proved to be contentious and time-consuming. During the course of discovery, over [fifty] motions were filed, the Court entered some [thirty] orders, and telephone conferences were held on an almost weekly basis to address various disputes and resolve motions. In addition, the Court traveled to Washington, D.C. at the request of the President to preside over his civil deposition on January 17, 1998. It was at a hearing on January 12, 1998 to address issues surrounding the President’s deposition and at the deposition itself that the Court first learned of

Eventually the United States District Court for the Eastern District of Arkansas found President Clinton in contempt of court³ for disobedience of discovery orders.⁴

Bankruptcy was not at issue in *Jones v. Clinton*.⁵ However, it is interesting that bankruptcy statute 11 U.S.C. § 362 was cited in support of President Clinton's request to defer the lawsuit.⁶ If Jones or Clinton had been in bankruptcy, the economics and self interests as handled pursuant to the current bankruptcy model could have been so significantly different that a contrary outcome likely would have been predictable.

A. PREVIEW

This article attempts to point out that although the rules of discovery for bankruptcy adopt the Federal Rules of Civil Procedure, their application in the context of bankruptcy practice provides an entirely different context. Thus, for example, because civil rules may impose monetary sanctions against a debtor, the application of existing bankruptcy rules may well make the sanction ineffective, allowing the debtor to escape. The risk is that monetary sanctions might be dischargeable through bankruptcy or ultimately paid from assets that belong to the creditors,⁷ limiting the debtor's incentive and therefore the effectiveness of the rules.

This article points out that the bankruptcy process requires total honesty, candor, and cooperation. Disclosure through discovery becomes the practitioner's means of obtaining an "honest" disclosure of the debtor's financial picture. The necessity of special examination rules—applicable only to bankruptcy—have emerged even though bankruptcy courts apply the Federal Rules of Civil Procedure. The fact that contempt sanctions

Monica Lewinsky, a former White House intern and employee, and her alleged involvement in this case.

Id.

3. *Id.* at 1131. Pursuant to Rule 37(b)(2) of the Federal Rules of Civil Procedure, the court found President Clinton to be in civil contempt of court for failing to obey the court's discovery orders. *Id.*

4. *See id.* at 1127.

[T]he record demonstrates by clear and convincing evidence that the President responded to plaintiff's questions by giving false, misleading and evasive answers that were designed to obstruct the judicial process. The President acknowledged as much in his public admission that he 'misled people' because, among other things, the questions posed to him 'were being asked in a politically inspired lawsuit, which has since been dismissed.'

Id.

5. 520 U.S. 681 (1997).

6. *Clinton*, 520 U.S. at 709.

7. *See* 11 U.S.C. §§ 541, 550, 551, 726 (2004) (bringing all property of the debtor and of certain third parties into the bankruptcy estate for distribution to creditors).

often become ineffective is a prime focus of this article because parties may employ techniques to escape these mechanisms. This article explores the contours of the restrictiveness of contempt and suggests that courts consider the incorporation of scientific knowledge, such as from the field of neuro-economics, to obtain obedience to court orders. The article then makes an argument for some changes to existing law for closing existing “trap doors” that allow recalcitrant debtors and creditors to escape disclosure sanctions.

Discovery generates large revenues for attorneys and law firms.⁸ When any such revenues are expected from bankruptcy cases, one might want to think very carefully about the consequences.

B. GENESIS

Disputes between parties, in many instances and under certain circumstances, may be brought for decision before a sovereign’s governmental body, i.e., courts. These intervening governmental entities must be able to understand the actual points at issue in order to perform their assigned obligations to render a decision.⁹ There are several ways to do this, such as questioning by a judge or exchanging written statements, now called *pleadings*, by the parties prior to appearing before a judge.¹⁰ Initially in England and later in the United States, pleadings had to follow certain rigid formulae all pointing towards framing the *issues* for decision by the courts.¹¹ These common law developed issue pleadings became highly technical and formalistic legal documents framed by attorneys for the parties.¹² Under common law, drafting written pleadings consumed huge amounts of legal resources, requiring tremendous training and expertise in order for the disputed issues between parties to be successfully presented to the English law courts.¹³

8. See Leigh Jones, *More Firms Using Temp Attorneys*, 28 NAT’L L.J. 1, 236 (2005) (showing that in the year 2007 the estimates were that the costs of discovery were expected to rise to \$2.9 billion, causing many law firms to hire temporary attorneys to handle this labor intensive work).

9. CHARLES E. CLARK, CLARK ON CODE PLEADING 2-5 (1947).

10. *Id.*

11. *Id.* at 15.

Hence the common-law system was limited in the extent of the relief which it could grant and the manner of granting it to the arbitrary units comprising the forms of action. Coupled with this were the refinements enforced to induce the production of an issue, resulting in a highly technical system which afforded none too complete relief.

Id.

12. *Id.* at 12-15.

13. Christine L. Childers, *Keep on Pleading: The Co-Existence of Notice Pleading and the New Scope of Discovery Standard of Federal Rule of Civil Procedure 26(b)(1)*, 36 VAL. U. L. REV. 677, 683 (2002).

In England, equity courts developed quite differently than common law courts, having their birth in the exercise of the king's conscience to do justice wherever the courts were so restricted by law that justice was not available.¹⁴ Pleading in equity court was very flexible, but required that the petitioner give a sworn, very detailed statement of facts.¹⁵ Over time, the preparation of written "issue" pleadings became a very refined mixture of art and science subject to many traps,¹⁶ such that major reforms were seriously urged by the law and equity courts in England and in the United States.¹⁷ This reformation included merging the common law courts with the equity courts under a unified pleading code, not surprisingly called "code pleading,"¹⁸ which eventually became the precursor of our current Federal Rules of Civil Procedure.¹⁹

C. THE FEDERAL RULES OF CIVIL PROCEDURE

In 1789, shortly after ratification of the United States Constitution, Congress ordered that federal courts in civil actions at law apply state procedural rules, which were usually written and enacted by state legislatures.²⁰ This proved to be immensely complex and subjected federal courts

[A]t common law the pleadings were a very important, if not the most important, element in a lawsuit and could continue indefinitely until a single issue of law or fact was produced for trial. Strict rules developed because of the importance of the pleadings. As a result, defects in the pleadings led to an early disposition of the lawsuit, not based upon the merits of the claims, but instead based on their failure to perform the required functions.

Id.

14. *See* CLARK, *supra* note 9, at 16 ("The equity courts developed from the exercise by the king of his royal prerogative through his chancellor to do justice where the courts failed to do so.").

15. *See id.* at 17 ("But equity jurisprudence, too, had tended to become rigid; the procedure seems to have aggravated the delays apparently natural to all systems of law, and hence it also came to the point where it was not fulfilling the needs of a growing and developing system of law.").

16. *See id.* at 11 ("In common-law procedure, the two main stages of the suit—pleading and trial—were made entirely distinct: and if a party did not act at the appointed stage, he lost his opportunity and was later precluded from doing what otherwise he might have done.")

17. *Id.* at 17-21.

18. *See* BLACK'S LAW DICTIONARY 273 (8th ed. 2004) ("Code. . . . A complete system of positive law, carefully arranged and officially promulgated."). The term "code pleading" in the United States generally refers to adoption by legislative enactments of codes for court practice and procedure and made mandatory upon particular jurisdictions. *Id.*

19. CLARK, *supra* note 9, at 31, 34-41.

20. CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 399 (4th ed. 1983).

Although the Judiciary Act of 1789 gave the federal courts power to make necessary rules for the orderly conduct of business in those courts, another statute, enacted five days later, provided that in actions at law procedure in federal court should be the same in each state 'as are now used or allowed in the supreme courts of the same.'

Id.

to state jurisprudence, thus imposing variances and uncertainties²¹ in applying federal law.²² Finally, Congress passed a statute authorizing the United States Supreme Court to enact rules for unified civil practice and procedure rules²³ with a recognition that “procedure is better regulated by the courts than by legislative bodies [and] seen to be the key to the problem.”²⁴

The United States Supreme Court responded by promulgating the Federal Rules of Civil Procedure, which were purposely designed to avoid the significant problems of lack of uniformity and overwhelmingly difficult pleading procedure.²⁵ One of the hallmarks of the new federal rules was the simplicity of pleading embodied in Rule 8(a)(2), which states that pleadings need only contain a *short and plain statement of the claim* showing that the pleader is entitled to relief.²⁶ Thus, the federal rules changed the nature of

21. See Amelia F. Burroughs, *Mythed It Again: The Myth of Discovery Abuse and Federal Rule of Civil Procedure 26(b)(1)*, 33 MCGEORGE L. REV. 75, 77 (2001) (“One result was that predicting which procedures would apply in federal civil cases was difficult.”).

22. Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2002 (1989).

The pro-uniform procedural rules advocates argued that the alleged nonconformity caused the following inefficiencies: 1) the waste in time and money of judges and lawyers trying to ascertain when in a particular federal district court to conform or not to conform to state procedure; 2) the time and expense of appealing such decisions; and 3) the cost to clients, particularly corporations engaged in interstate commerce, of having to retain different lawyers or law firms in federal courts in different states, since experts on the state procedure were required.

Id.

23. Rules Enabling Act of 1934, 73 Pub. L. No. 415 chs. 651, 652 (1934).

Be it enacted by the Senate and House of Representatives of the United States. . . . That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States . . . the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. . . . The Court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both.

Id.

24. WRIGHT, *supra* note 20, at 402.

25. 8 WRIGHT & MILLER, FED. PRAC. & PROC. CIV. § 2001 (2d ed. 1973).

[T]he federal rules relieved the pleadings of their top-heavy burden of formulating issues and disclosing facts. Under the present procedure the pleadings are called upon only to give notice generally of the issue involved in the case. The discovery procedures of Rules 26 to 37, together with pretrial hearings under Rule 16, provide the means for determining the precise issues and obtaining the information that each party needs to prepare for trial.

Id. at 40.

26. FED. R. CIV. P. 8(a)(2) (emphasis added).

A pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the grounds upon which the court’s jurisdiction depends . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks.

Id.

pleadings from issue pleading to notice pleading.²⁷ This point was made emphatically clear by the Supreme Court in the case of *Conley v. Gibson*,²⁸ which rejected the argument that pleadings must be very fact specific.²⁹ Further refinement was made fifty years later when the Court in *Bell Atlantic Corporation v. Twombly*³⁰ raised the bare minimum pleading standard by requiring something more than bare notice pleading.³¹

The Federal Rules of Civil Procedure were designed such that once an action is commenced by the filing of simplified pleadings, generally known as notice-giving, the attention of the parties is to shift towards obtaining disclosure through discovery³² of all relevant information from all parties to the litigation prior to going to trial.³³ The objective of these rules is to promote free and full disclosure prior to trial of relevant, non-privileged information.³⁴ The purpose is to reach the merits of the case in the most expeditious and cost effective manner by making available the legal devices

27. WRIGHT & MILLER, *supra* note 25, § 2001.

28. 355 U.S. 41 (1957).

29. *Conley*, 355 U.S. at 47-48.

The respondents also argue that the complaint failed to set forth specific facts to support its general allegations of discrimination and that its dismissal is therefore proper. The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. Such simplified 'notice pleading' is made possible by the liberal opportunity for *discovery* and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.

Id. (emphasis added).

30. 127 S. Ct. 1955 (2007).

31. *Twombly*, 127 S. Ct. at 1959

While a complaint . . . does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true.

Id.

32. FED. R. CIV. P. 26-37.

33. WRIGHT & MILLER, *supra* note 25, § 2001. "The basic philosophy underlying this procedure was that prior to trial every party to a civil action is entitled to the disclosure of all relevant information in the possession of any person, unless the information is privileged." *Id.*

The Federal Rules of Civil Procedure, however, represented a shift to short and plain pleadings, and one result was that pleadings alone were not sufficient to prepare the disposition of a case. The inadequacy of the disclosure given by the pleadings as a basis for trial . . . led to the utilization of depositions and other discovery devices which allowed the parties to investigate the factual basis of the litigation.

Id.

34. See Maurice Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 COLUM. L. REV. 480, 482 (1958) ("That purpose, widely applauded in the abstract, meets with resistance in practice.").

for full disclosure of any and all information relevant to the dispute.³⁵ An important aspect is that settlement of the dispute prior to or during trial often occurs.³⁶

II. BANKRUPTCY DISCOVERY

Discovery of information is integral to the functioning of the Federal Rules of Bankruptcy Procedure, which incorporate by adoption the Federal Rules of Civil Procedure.³⁷ Federal discovery Rules 26 to 37 are critical to federal court practice under the Federal Rules of Civil Procedure. Equally critical to bankruptcy procedure are Rules 7026 through 7037 of the Federal Rules of Bankruptcy Procedure, which are expressly made applicable to all adversary proceedings in bankruptcy.³⁸ With respect to contested matters under Bankruptcy Rule 9014,³⁹ these twelve discovery rules of bankruptcy procedure apply, except that Bankruptcy Rule 7026 has some modifications as to certain subdivisions of Federal Rule of Civil Procedure 26.⁴⁰ Furthermore, bankruptcy has additional special bankruptcy rules such as Bankruptcy Rules 2004, 2005, and 4002 to assist in disclosure of financial data, as will be addressed later in this article. Great latitude is given to the parties for learning or at least discovering all pertinent non-privileged information from all sides of the litigation concerning the issues involved in

35. WRIGHT & MILLER, *supra* note 25, § 2001.

The draftsmen held a utopian combination of hopes about the gains from discovery. They expected that the exchange of information between the litigants would bring to the court more facts, better reasoned arguments, and a fuller knowledge of the merits of the suit. Part of their hopes has been fulfilled.

Id.

36. *See id.* (“It was thought that better mutual knowledge would enable the two sides to agree on the facts and issues, settle more cases, and reduce the number of issues and length of trials.”).

37. *See Hickman v. Taylor*, 329 U.S. 495, 501 (1947) (“The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial.”).

38. *See generally* FED. R. BANKR. P. 7026-37 (containing all of the main bankruptcy discovery rules adopted from the Federal Rules of Civil Procedure); *see also id.* 7001 (listing ten types of causes of action that are, by definition, adversary proceedings).

39. *Id.* 9014.

In a contested matter . . . not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court orders an answer to the motion.

Id.

40. *See id.* 9014(c) (“The following subdivisions of Fed. R. Civ. P. 26, as incorporated by Rule 7026, shall not apply in a contested matter unless the court directs otherwise; 26(a)(1) (mandatory disclosure), 26(a)(2) (disclosures regarding expert testimony) and 26(a)(3) (additional pre-trial disclosure), and 26(f) (mandatory meeting before scheduling conference/discovery plan).”).

their dispute prior to trial.⁴¹ Thus, attorneys may be apprised of the strength and weaknesses not only of their opponent's side, but also of their own.⁴² The liberality of the discovery rules permits litigants to seriously consider settlement, and at the very least, expedite the administration of justice.⁴³

A. BANKRUPTCY RULE 7037 ERGO FEDERAL RULE OF CIVIL PROCEDURE 37

The legal device that was pivotal in the *Jones v. Clinton* civil case, Rule 37, is expressly adopted in its entirety by Federal Rule of Bankruptcy Procedure 7037 without modification.⁴⁴ Therefore, some analysis of the effectiveness of Rule 37 sanctions in bankruptcy proceedings, through Bankruptcy Rule 7037 for coercing compliance with discovery law, is necessary.⁴⁵ This article uses Rule 7037, which by definition includes Rule 37, and where possible will attempt to be consistent except where necessary to refer to Rule 37.

Thus, Rule 7037 has inherited all of the Rule 37 rationale and design theory heavily influenced by historical precedential experiences. In an attempt to write about bankruptcy discovery sanctions, it may be instructive to delve into where Rule 7037 is today, where it came from, and forecast where it might be going. It even seems possible that Rule 7037 will need to change in order to be in concert with bankruptcy law.

Federal Rule of Bankruptcy Procedure 7037, ergo Rule 37 of the Federal Rules of Civil Procedure, was promulgated to give trial courts arguably⁴⁶ the single exclusive tool for enforcement of discovery rules,⁴⁷ ensuring that disclosures are made pursuant to Rules 7026 through 7036 pursuant to the Federal Rules of Civil Procedure. Any failure to disclose pursuant to discovery activates Rule 7037 sanctions.⁴⁸ The reasons for the

41. William H. Speck, *The Use of Discovery in United States District Courts*, 60 YALE L.J. 1132, 1132 (1951).

42. *Id.*

43. *Id.*

44. See FED. R. BANKR. P. 7037 ("Rule 37 Fed. R. Civ. P. applies in adversary proceedings."); see also *Jones v. Clinton*, 36 F. Supp. 2d 1118, 1120 (D. Ark. 1999) (Rule 37 of the Federal Rules of Civil Procedure was the rule under which then President Clinton was sanctioned.).

45. See FED. R. CIV. P. 37 (setting forth the rule on the failure to make disclosures or to cooperate in discovery and sanctions).

46. Use of the word "arguably" is necessary because other rules of procedure and statutes, such as 28 U.S.C. § 1927, FED. R. CIV. P. 11, 26(g), 37, 41, 56, have been used by courts in sanctioning discovery abuse.

47. See FED. R. BANKR. P. 7037 ("Rule 37 Fed. R. Civ. P. applies in adversary proceedings.").

48. See *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 763 (1980) ("Federal Rule of Civil Procedure 37(b) authorizes sanctions for failure to comply with discovery orders.").

failure to comply and the willfulness or good faith of the party do not affect noncompliance.⁴⁹ The reason for the failure to comply, however, is important and relevant in determining the sanction to impose.⁵⁰ This is especially true when it comes to a debtor in bankruptcy which so critically depends on the debtor's full candor, honesty, and complete disclosure of assets, property, and liabilities.

Courts are constrained in applying Rule 7037 and must consider the nature, attributes, characteristics, and circumstances of the issue presented on a case by case basis.⁵¹ Rule 7037 requires good faith.⁵² Furthermore, pervading Rule 7037 are the principles of fairness, reasonableness, and justice that must always be in the forefront when considering sanctions. The phrase "other circumstances make and award of expenses (including attorney's fees)" is laced throughout the rule.⁵³ In considering an award of fees and expenses, the rule uses the word "reasonable" in front of the sanction.⁵⁴

The Supreme Court of the United States held, in *Societe Internationale v. Rogers*,⁵⁵ that Rule 37 addresses with particularity the consequences of a failure to make discovery, by listing an inventory of sanctions that a court may enlist, as well as by authorizing any orders by the court that are "just."⁵⁶ The Court stated that Rule 37 is exclusive and there is no need for courts to employ other rules.⁵⁷ In construing Rule 37, the Supreme Court

49. WRIGHT & MILLER, *supra* note 25, § 2281.

50. *See id.* § 2284 ("This has made it clear that even an innocent failure is subject to sanctions, though the reason for the failure is relevant in determining what sanction, if any, to impose.").

51. *See* *Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 707 (1982) ("Rule 37(b)(2) contains two standards—one general and one specific—that limit a district court's discretion. First, any sanction must be "just"; second, the sanction must be specifically related to the particular "claim" which was at issue in the order to provide discovery.").

52. *See* FED. R. CIV. P. 37(a)(1), (a)(5)(A)(i), (d)(1)(B) (expressly writing the words "good faith" into these rules).

53. *Id.* 37(a)(5)(B), (b)(2)(C), (d)(3).

54. *Id.* 37(a)(5)(B)-(C), (b)(2)(C), (c)(1)(C), (d)(3), (f).

55. 357 U.S. 197 (1958).

56. *Societe Internationale*, 357 U.S. at 207.

57. *Id.*

In our opinion, whether a court has power to dismiss a complaint because of noncompliance with a production order depends exclusively upon Rule 37, which addresses itself with particularity to the consequences of a failure to make discovery by listing a variety of remedies which a court may employ as well as by authorizing any order which is 'just.' There is no need to resort to Rule 41(b), which appears in that part of the Rules concerned with trials and which lacks such specific references to discovery. Further, that Rule is on its face appropriate only as a defendant's remedy, while Rule 37 provides more expansive coverage by comprehending disobedience of production orders by any party.

Id.

has long held that strict adherence to the exact wording in the rule is not necessarily appropriate, as the rule has flexibility in allowing a court to interpret it to do justice to the problem.⁵⁸ There are due process considerations that permeate the rule's application. For example, inability to comply is a defense where there is a showing of extensive efforts to comply.⁵⁹

Generally, in order for the court to impose sanctions under Rule 7037, the discovering party must first obtain a court order to compel the responding person to cooperate or to disclose the requested information.⁶⁰ Rule 7037 allows a limited number of sanctions in certain situations without first getting an order to compel discovery from the trial court.⁶¹ However, caution needs to be exercised, as some circuit courts have interpreted Rule 37 as requiring an order to compel and a violation of the order prior to issuing some of the above sanctions, particularly with regard to one of the most severe, rendering a default judgment against the disobeying party.⁶² One important sanction, contempt, is expressly not available without violation of a prior enforceable court order to compel.⁶³ The sanctions available to the trial judge for abuse of discovery range from the most mild—that of ordering the losing party to pay reasonable expenses caused by the failure to comply with the discovery rules—to the most severe sanction of terminating the suit against the losing party prior to trial.⁶⁴ Between these extremes lie other sanctions such as striking of pleadings, default judgment, contempt, deeming disputed issues established against the disobedient, staying proceedings until compliance, and prohibiting introduction of evidence favorable to the losing person.⁶⁵ Most sanctions are discretionary with the

58. *Id.*

59. *See id.* at 200 (“[D]isclosure of the required bank records would violate Swiss penal laws and consequently might lead to imposition of criminal sanctions, including fine and imprisonment, on those responsible for disclosure.”).

60. *See* *Schleper v. Ford Motor Co.*, 585 F.2d 1367, 1370-71 (8th Cir. 1978) (“Two recent Eighth Circuit opinions clearly hold that the sanctions of Rule 37(b) are not applicable until there has been an order by the court compelling discovery.”).

61. FED. R. CIV. P. 37(c)(1).

If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.

Id.

62. *Id.* 37(a)(2)(a).

63. *Id.* 37(d).

64. WRIGHT, *supra* note 20, at 596. Rule 37, and therefore Rule 7037, deals with the consequences of failure to make discovery that include assessment of attorney's fees and costs, imprisonment for contempt of court, designating facts as established, not allowing the disobedient party to support or oppose claims or defenses, striking out pleadings, rendering a default judgment, or dismissal of claims or defenses. *Id.*

65. *Id.*

judge.⁶⁶ One is not. Unless the failure was substantially justified or other circumstances make an award of expenses unjust, Rule 37 requires the judge to order payment by the losing party of reasonable expenses, including attorney's fees.⁶⁷

While the authors of the rules and some leading judges had intended that punishment be forthcoming against any abuser of discovery, statistics and over seventy years of history show that trial judges are sometimes reluctant to impose anything but the mildest reprimand. These reprimands are mainly remedial in objective and are not intended to deter future or other abuse.⁶⁸ As a result, in the years of federal practice pursuant to the Federal Rules of Civil Procedure, legal devices other than Rule 37 have been used to deter or punish wrongful pretrial discovery behavior.⁶⁹ However, opinions from the United States Supreme Court, coupled with the actions taken by federal trial judges, clearly indicate support for the deterrent purpose of Rule 37 and its use as the sole sanctioning device.⁷⁰

B. BANKRUPTCY'S DIVERGENCE FROM THE CIVIL DISCOVERY MODEL

The economic model forming bankruptcy law's domain significantly departs from the non-bankruptcy paradigm, such that the theoretical and realistic rationale that forms the basis for sanctions pursuant to the federal rules of discovery inherently could lead to false expectations when applied to debtors within a bankruptcy litigation theater. As an example, the fee shifting sanctions of Bankruptcy Rule 7037 may not be effective where the party sanctioned is the debtor or the bankruptcy trustee. They may be ineffective because such funds usually would not come from the debtor personally or trustee, but rather from the pool of assets designated for

66. *Id.*

67. FED. R. CIV. P. 37(a)(4).

68. *See* Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1967 (2007) ("It is no answer to say that a claim just shy of plausible entitlement to relief can, if groundless, be weeded out early in the discovery process . . . given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side.").

69. *See* FED. R. CIV. P. 41(b) ("If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or of an action or of any claim against it.").

70. *Societe Internationale v. Rogers*, 357 U.S. 197, 207 (1958).

In our opinion, whether a court has power to dismiss a complaint because of noncompliance with a production order depends exclusively upon Rule 37, which addresses itself with particularity to the consequences of a failure to make discovery by listing a variety of remedies which a court may employ as well as by authorizing any order which is 'just.'

Id.

paying creditors who likely had nothing to do with debtor's misbehavior.⁷¹ Also, fee shifting payment obligations may be dischargeable through other provisions of the bankruptcy code.⁷²

Further, any pre-petition monetary obligation imposed or incurred, other than a fine payable to a governmental unit,⁷³ is dischargeable. This may include fee shifting sanctions pursuant to Bankruptcy Rule 7037 if incurred prior to the debtor's bankruptcy.⁷⁴ If the monetary sanction occurs during a bankruptcy proceeding and if allowed as a claim, it could possibly be classified as an administrative expense. In that situation, there may not be enough money for payment; if paid, this would come from the assets earmarked for distribution to unsecured creditors.⁷⁵ Should the debtor be reorganizing pursuant to the Chapter 13 bankruptcy plan, then debts provided in Chapter 13, including monetary sanctions, could be discharged subject to several exceptions.⁷⁶ Likewise, reorganizing under Chapter 11 could discharge monetary sanctions if one is not careful.⁷⁷ A creditor's right to payment will be honored in bankruptcy if it is allowed, for only allowed claims can share in any bankruptcy distribution.⁷⁸ Whether or not a creditor's claim is allowed generally has no relevancy on a debtor's discharge of his personal liability on that debt.⁷⁹

Suppose that a debtor in bankruptcy is ordered by the court to respond to discovery pursuant to Rule 7037 and the debtor fails to obey. There is a provision in the bankruptcy statute denying the debtor a total discharge for refusing to obey a lawful court order that, on its face, might appear useful

71. See 11 U.S.C. §§ 502, 523, 541, 726, 727, 1141, 1328 (2004) (allowing creditors' claims to be paid from assets of the bankruptcy estate, excepting certain creditor claims from being discharged, and binding creditors to the orders of the court).

72. See *id.* §§ 727, 523, 524 (providing for a debtor's discharge).

73. *Id.* § 523(a)(7).

A discharge under [S]ection 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss.

Id.

74. See *id.* § 727(b) (“Except as provided in [S]ection 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter.”).

75. See *id.* § 523(a)(1) (directing readers to Section 507).

76. See *id.* § 1328(a) (“As soon as practicable after completion by the debtor of all payments under the plan . . . the court shall grant the debtor a discharge of all debts provided for by the plan.”).

77. *Id.* § 1141(d)(1)(A) (“[T]he confirmation of a plan . . . discharges the debtor from any debt that arose before the date of such confirmation.”).

78. DAVID G. EPSTEIN & STEVE H. NICKLES, 2008-2009 BANKRUPTCY CODE AND RELATED MATERIALS 79 (2008).

79. *Id.*

as a discovery sanction.⁸⁰ However, there are problems. The word “refused” appearing in the statute probably will not be construed the same as the phrase “failure to obey” as used in Rule 7037.⁸¹ A majority of court opinions interpret the word “refused” as requiring a willful or intentional act as opposed to merely a mistake or inability to comply, thus providing a recalcitrant debtor with possible defenses.⁸² These are not the only hurdles that any party in interest would have to overcome in order to implement the refusal to obey for denying the debtor’s discharge. Any attempt to block the entire discharge of a debtor must be brought as an adversary (lawsuit) rather than as a contested motion.⁸³ Litigating a lawsuit is usually significantly more costly than proceeding as a contested motion to the court.⁸⁴ This might be more expensive for the party that is bringing the complaint than any recovery as a discovery sanction. Still, there are more problems for the complaining party. In a Chapter 7 bankruptcy there is only a sixty-day statute of limitations, which can be extended, in which to file an adversary proceeding for denial of a debtor’s discharge.⁸⁵ Chapter 11 bankruptcies require that a complaint to bar a total discharge be filed no later than the date set for the first meeting of creditors.⁸⁶ Assuming that a complaining party overcomes these mentioned obstacles and now is in trial before a judge, reported opinions reflect a policy of favoring a debtor where a single or few creditors attempt to prevent a debtor from obtaining a discharge as to all creditors.⁸⁷ At the end of the day, and after the complaining party has satisfied all legal and procedural requirements, appellate courts have pretty well left it to the discretion of the bankruptcy judge whether to deny discharge.⁸⁸ Therefore, the certainty of Section 727(a)(6) as an effective discovery sanction is questionable.

80. See 11 U.S.C. § 727(a)(6)(A) (2004) (“The court shall grant the debtor a discharge, unless . . . the debtor has refused, in the case— to obey any lawful order of the court, other than an order to respond to a material question or to testify.”).

81. WEBSTER’S NEW WORLD DICTIONARY 486, 1129 (3d Coll. Ed. 1988).

82. *Jordan v. Smith*, 356 B.R. 656, 659-60 (E.D. Va. 2006) (“From the cases of record, a majority of courts hold that the use of the word ‘refused’ in [Section] 727(a)(6)(A) requires a willful or intentional act, as opposed to merely a mistake or inability to comply.”).

83. FED. R. BANKR. P. 7001.

84. *Id.* 9014.

85. *Id.* 4004(a).

86. *Id.*

87. See *Friendly Finance Discount Corp. v. Jones*, 490 F.2d 452, 456 (5th Cir. 1974) (“First, the right to discharge is statutory, and the provisions . . . of the Act relating to discharge should be construed liberally in favor of the bankrupt and strictly against the objecting creditor.”).

88. See *United States v. Cluck*, 87 F.3d 138, 140 (5th Cir. 1996) (“The right to a discharge in bankruptcy is addressed to the sound discretion of the bankruptcy court, and appellate courts should interfere only for the most cogent, compelling reasons in situations of gross abuse.” (quoting *In re Jones*, 490 F.2d 452, 455 (5th Cir. 1974))); see also *In re Devers*, 759 F.2d 751, 755

C. IMPOSITION OF ECONOMIC COSTS THROUGH DISCOVERY

Discovery is the bridge that connects the filing of short and simple statement pleadings to being fully prepared for actual litigation before a trial court on the merits.⁸⁹ Whichever party undertook to obtain information and data by discovery invested time, effort, and money and arguably acquired property rights to the discovered information. This very likely has value, and thus is considered to be an asset of the discovering party.⁹⁰ This value may be measured at a minimum by the financial investment made in acquiring the discovered information, by the net value added to the anticipated or actual success of the litigation, or by the net settlement value.⁹¹ There may well be other external or internal valuable benefits to the discovering party. However, inevitably there are costs incurred by the discovering party which, under the standard economic paradigm, such party would be fully liable for their payment.⁹² Likewise, the responding party may have no choice other than to also incur costs directly caused by the requesting party.⁹³ At a bare minimum, both the discovering party and the

(9th Cir. 1985) (“[I]t is totally within the discretion of the bankruptcy court to find a particular violation of the court’s order so serious as to require denial of discharge.”) (citation omitted).

89. See WRIGHT & MILLER, *supra* note 25, § 2001 (“Discovery is a method enabling adversaries to acquire information.”).

90. *Id.*

But in an adversarial situation, information is an asset: instead of concluding that the adversary’s position is just and strong, each side may think that it can gain victory from the new information. The total judicial system may be better off because of the greater amount of information before the court, but it may have acquired these gains at additional net costs in work and money.

Id. (quoting GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 234 (1968)).

91. *Id.*

92. See John K. Setear, *Discovery Abuse Under the Federal Rules: Causes and Cures*, 92 YALE L.J. 352, 353 (1982) (stating that under the American system, a client must pay his or her attorney for the services rendered regardless of the outcome of litigation; he or she must also bear the costs of any non-monetary expenses which can include loss of time and any psychological consequences as a result of litigation).

93. *Id.* at 353-56.

By making a request for . . . information . . . a party in a civil suit in federal court can impose multiple, costly obligations on his opponent. In response to a discovery request, a litigant must make himself available in person to answer the questions of the opposing side, and must, to the extent of his knowledge after a reasonable search, respond in writing to his opponent’s interrogatories. He must allow his opponent access to his property, both real and personal. If his opponent requests that he admit a certain fact as true or a particular matter of law as decided, a litigant must make a reasonable effort to determine the veracity of the assertion before denying that it is true. He may have to submit to a medical examination. The litigant must amend any response to a discovery request upon ascertaining that it is no longer accurate.

Id.

responding party may have to engage legal counsel⁹⁴ and under the American Rule, each is responsible for payment of their own legal fees and attendant costs since historically this country's jurisprudence will not obligate the losing party to pay any of the prevailing party's attorney's fees.⁹⁵ The reason for the American Rule lies in its history. Early American legislatures severely restricted English law, whereby the losing party bore the legal responsibility of paying the prevailing party's attorney fees.⁹⁶ In 1796, the American Rule was validated by the United States Supreme Court.⁹⁷ The American Rule rested on the notion that fee shifting could "punish litigants for the honest exercise of their rights to go to court and could discourage valid and even important claims and defenses."⁹⁸

Discovery can be very expensive for both sides of the litigation.⁹⁹ The discovering party has the power to impose costs upon the responding party by unilaterally making a discovery request and can logically do so as long as the benefits to him or her are worth the effort.¹⁰⁰ These discovery costs can be huge: according to one publication, these costs could rise to \$2.9 billion dollars in 2007.¹⁰¹

94. *Id.* at 357-58.

[T]he vast majority of litigants do not represent themselves in litigation. . . . [T]he attorney employed by a litigant as his agent presumably attempts to maximize his own utility. Because an attorney gains some benefits from discovery that do not accrue to his client, and particularly because the attorney incurs few of the costs of discovery, the litigant's employment of an attorney to serve as his agent in litigation creates additional incentives for excessive discovery.

Id.

95. *See* Alyska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975) (validating and declaring the American Rule that the prevailing party in a lawsuit is normally not entitled to recover attorney's fees from the losing party).

96. *See* John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1575-78 (1993) (discussing how the English Rule provides that the losing party pays for the prevailing parties' fee). Early American statutes severely restricted the amount that the attorney could actually collect from the losing party, making it impractical; the attorney would in fact be able to collect a higher fee from his or her client than from the losing party, thus the American Rule of a client being responsible for his or her own attorney's fees was established. *Id.*

97. *Arcambel v. Wiseman*, 3 U.S. 306 (1796).

98. *See* 1 DAN B. DOBBS, *HANDBOOK OF THE LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION* § 3.10(1) (2d ed. 1993) (stating that litigants may well forego their valuable legal rights simply because of a risk of losing any litigation and consequently having to pay for the prevailing side's attorney's fees and costs, thus possibly giving the other side incentives to drive up costs).

99. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1966 (2007).

100. *Setear*, *supra* note 92, at 354.

101. *See* Jones, *supra* note 8, at 1.

Fueled in large part by electronic correspondence and data, the accelerating costs of document discovery by some estimates is (sic) expected to rise to \$2.9 billion by 2007. . . . And although some firms reported that they hired fewer . . . attorneys this year,

The traditional economic solution to a cost externality is to charge the decisionmaker for the costs that he or she imposes upon [the] other, thus ‘internalizing’ the externality. In the case of discovery, [under the traditional economic model] the requesting party would be charged for all of the costs incurred by the responding party in complying with the request.¹⁰²

However, since under the American Rule each party is responsible for their own attorneys’ fees and costs, the discovering party causes the responding party to incur costs whenever it becomes necessary for the latter to hire and pay for an attorney.

D. PRISONER’S DILEMMA

The problem that individuals face when individual self interests may run counter to the best interest of the group of persons is called the prisoner’s dilemma.¹⁰³ In our scenario we have a single group made up of two parties: a discovering party and a responding party whose self interest is selfish. Collectively their behavior can be more costly to the group. The consequence of these opposing litigants making discovery requests of the other is that the behavior of both will cause expenditures such that each litigant has the effect of imposing costs of discovery on the other.¹⁰⁴ To get some insight as to how each litigant’s brain behaves in making these decisions we can use the following example of the prisoner’s dilemma.

[Two persons] have been arrested for robbing [a bank] and placed in separate isolation cells. Both care much more about their own personal freedom than about the welfare of their accomplice. A clever prosecutor makes the following offer to each prisoner without the knowledge of the other prisoner. ‘You may choose to confess or remain silent. If you confess and your accomplice remains silent I will drop all charges against you and use your testimony to ensure that your accomplice does serious time.

those firms that brought in more . . . pointed to the burden of document discovery as the main reason.

Id.

102. Setear, *supra* note 92, at 358.

103. THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 10 (1986). A ‘prisoner’s dilemma’ rests (as does a common pool problem) on three essential premises. One, that the participants are unable (for one reason or another) to get together and make a collective decision. Two, that the participants are selfish (or cold and calculating) and not altruistic. Three, the result reached by individual action is worse than a cooperative solution.

Id.

104. Setear, *supra* note 92, at 361.

Likewise, if your accomplice confesses while you remain silent, they will go free while you do the time. If you both confess I get two convictions, but I'll see to it that you both get early parole. If you both remain silent, I'll have to settle for token sentences on [lesser misdemeanor charges or maybe dismiss the charges].'¹⁰⁵

The dilemma faced by the prisoners here is that whatever the other does, each is better off confessing than remaining silent.¹⁰⁶ However, the outcome obtained when both confess is worse than the outcome they would have obtained had both remained silent.¹⁰⁷ This game illustrates a conflict between individual versus group rationality.¹⁰⁸ A group whose members pursue rational self-interest may all end up worse off than a group whose members act contrary to rational self-interest.¹⁰⁹ The "prisoner's dilemma" puzzle illustrates a situation having several players in a group in which it is difficult to get rational, selfish persons to cooperate for their common good.¹¹⁰ This takes the game to represent a choice between selfish behaviors on the one hand, and socially desirable altruism on the other.¹¹¹ In the prisoner's dilemma game, both players would be better off and would prefer the outcome with the altruistic moves to that with the selfish choices.¹¹² In our hypothesis we will have a group of two opposing litigants who entertain imposing discovery on the other.

It has been said that the current federal rules of discovery position the litigants in a prisoner's dilemma because the rules allow "a litigant to impose costs upon the opposing side."¹¹³ This takes on a particular bite when each forces the other to respond to what is perceived as harassing discovery, and thus imposing without consent unreasonable costs on the responding party.¹¹⁴ Bankruptcy Rule 7037 attempts to mitigate the impact of the prisoner's dilemma through an inventory of discovery sanctions. This rule includes sanctions designed to be compensatory.¹¹⁵ Other sanctions in the

105. Steven Kuhn, *Prisoner's Dilemma*, Stanford Encyclopedia of Philosophy, October 22, 2007, <http://plato.stanford.edu/entries/prisoner-dilemma/>.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. Setear, *supra* note 92, at 363.

114. See Rosenberg, *supra* note 34, at 482 ("Laymen do not view with unbounded enthusiasm the prospect of expending their time and money in pretrial procedures that are expressly designed to produce information or evidence to help their adversary's case. And the longer and costlier the proceedings, the more irked the client becomes.").

115. FED. R. CIV. P. 37(a)(5)(A)-(B), (b)(2)(C), (c)(1)(A), (d)(3).

rule are retributory through the court ordering incarceration for a fixed time period, payment of fixed fines, or both.¹¹⁶ The contempt sanction can be coercive by providing for conditional incarceration or conditional payment of fines until the moment there is obedience with the discovery court orders.¹¹⁷ There are other sanctions that prejudice the recalcitrant party such as striking the pleadings and rendering a default judgment.¹¹⁸ While nowhere in the language of Rule 7037 are there any words indicating that the sanctions are punitive in design, the United States Supreme Court in several opinions has nevertheless emphasized this retributory attribute.¹¹⁹ The punitive nature of Rule 7037 may present a problem when imposing discovery sanctions where one of the affected litigants files for bankruptcy protection.

E. HONESTY AND CANDOR

Honesty, candor, and good faith, particularly as to disclosures, are absolutely critical for the intended functioning of bankruptcy law. Without these, the bankruptcy jurisprudential process designed for the honest but unfortunate debtor simply cannot function correctly.¹²⁰ Honesty is the foundation for the entire bankruptcy law regardless of whether the discovery rules are implicated. Although all bankruptcies must be filed with an authorized federal court, only a comparatively small number require judicial intervention.¹²¹ Regardless, all bankruptcies depend on absolute honesty whether some pleading is filed for determination by a judge.¹²² Several

116. *Id.* 37(b)(1), (2)(A)(vii).

117. *Id.*

118. *Id.* 37(b)(2)(A)(i)-(vi).

119. *See* *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980) (“Rule 37 sanctions must be applied diligently both to penalize those whose conduct may be deemed to warrant such a sanction, and to deter those who might be tempted to such conduct in the absence of such a deterrent.”).

120. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

One of the primary purposes of the bankruptcy act is to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start a fresh life free from the obligations and responsibilities consequent upon business misfortunes. . . . It gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.

Id. (citation omitted).

121. James C. Duff, *2006 Annual Report of the Director: Judicial Business of the United States Courts*, <http://www.uscourts.gov/library/statisticalreports.html>. In the year 2006, 1,112,542 bankruptcy cases and 65,208 adversaries were filed. *Id.* By comparison, 1,782,642 cases and 80,495 adversaries were filed in the preceding year. *Id.*

122. *See* *United States v. Gellene*, 182 F.3d 578, 587 (7th Cir. 1999) (“The orientation of [T]itle 11 toward debtors’ rehabilitation and equitable distribution to creditors relies heavily upon the participants’ honesty.”). In *Gellene*, a partner with a prestigious law firm was convicted of a

sections of the bankruptcy code affecting the rights and duties of debtors reflect the necessity of good faith.¹²³

Section 727 of Title 11, dealing with a debtor's general discharge of personal liability, mandates that a debtor cannot obtain a discharge; a court is not authorized to grant a discharge to a debtor who has or attempted to dishonestly or wrongfully remove property away from reach of creditors.¹²⁴ Hiding or lying about financial information will prevent a debtor from getting a discharge.¹²⁵ Dishonesty and lack of candor in dealing with the debtor's bankruptcy case will also prevent a discharge through bankruptcy.¹²⁶ Where there has been any lost property or loss in asset value without satisfactory explanation, the bankruptcy code prevents a debtor from receiving a discharge.¹²⁷

Section 523 of Title 11 provides exceptions to discharge of specific creditors' claims should a debtor wrongfully obtain asset value.¹²⁸ Debtors'

bankruptcy crime and sentenced to fifteen months in the penitentiary plus a fine for not disclosing his law firm's connections with certain creditors. *Id.* at 581. Mr. Gellene was convicted of using a document while under oath, knowing that it contained a material falsehood, a charge which arose from the bankruptcy court's hearing to consider Milbank's fee application. *Id.* at 590.

123. *See In re Little Creek Dev. Co.*, 779 F.2d 1068, 1072 (5th Cir. 1986) ("Like its predecessor statutes, and based on the foregoing considerations, the Bankruptcy Code of 1978 has been endowed with requirements of good faith in the construction of many of its provisions.").

124. 11 U.S.C. § 727(a)(2)(A), (B) (2004).

The court shall grant the debtor a discharge, unless the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed property of the debtor, within one year before the date of the filing of the petition or, property of the estate, after the date of the filing of the petition.

Id.

125. *Id.* § 727(a)(3)

[T]he debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case.

Id.

126. *Id.* § 727(a)(4).

[T]he debtor knowingly and fraudulently, in or in connection with the case—(A) made a false oath or account; (B) presented or used a false claim; (C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; (D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books documents, records, and paper, relating to the debtor's property or financial affairs.

Id.

127. *See id.* § 727(a)(5) ("The debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities.").

128. *Id.* § 523(a)(2).

failure to list the names of known creditors in the bankruptcy documents within certain time periods may prevent the discharge of creditors' particular debt.¹²⁹ Embezzlement, larceny, fraud, or defalcation by the debtor—while acting in a fiduciary capacity—is statutorily excepted from a debtor's bankruptcy discharge.¹³⁰

F. FEE SHIFTING IN BANKRUPTCY RULE 7037

Fee shifting in bankruptcy may be ineffective as a discovery sanction levied at a debtor if the debtor can get the fees discharged through the bankruptcy process and, if allowed¹³¹ and paid, would completely come from the pool of assets earmarked for the debtor's creditors.¹³² The American Rule's disallowed attorney fee shifting¹³³ is significantly altered by Bankruptcy Rule 7037 (adopting Federal Rule of Civil Procedure 37). There are no less than six places in Rule 7037 where the discovery sanction calls for shifting the attorney's fees and expenses incurred by a party onto the opposing litigant, which may become ineffective when a sanctioned party is a debtor in bankruptcy or a bankruptcy trustee.¹³⁴ The various rationales for each part require analysis in order to display incongruence with bankruptcy law. Prior to that analysis, a brief discussion of the main attributes of the rule is necessary.

Under Rule 7037, when a party successfully obtains a court order compelling disclosure or discovery, the court must require the party or deponent whose conduct caused the motion, the attorney who advised the conduct, or both, to pay the movant's reasonable expenses incurred including attorney's fees.¹³⁵ In contrast, if a party moves to get a discovery court order and is unsuccessful, Rule 7037 mandates that the court require the

[F]or money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition; (B) use of a state in writing—(i) that is materially false; (ii) respecting the debtor's or an insider's financial condition; (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and (iv) that the debtor caused to be made or published with intent to deceive.

Id.

129. *Id.* § 523(a)(3)(A), (B).

130. *Id.* § 523(a)(4).

131. *See id.* § 502 (setting forth allowance of claims or interests).

132. *See id.* §§ 502, 541, 726, 727, 523, 1328, 1141 (permitting allowed creditors' claims to be paid from assets of the bankruptcy estate, excepting certain creditors' claims from being discharged, and binding creditors to the orders of the court).

133. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975) (stating that even a prevailing litigant generally will not be entitled to attorney's fees from the opposition).

134. FED. R. CIV. P. 37.

135. *Id.* 37(a)(5)(A).

moving party, his attorney, or both, to pay the party or deponent who opposed the motion reasonable expenses including attorney's fees incurred in opposing the motion.¹³⁶ Where a court order is issued and not obeyed, (other than contempt, which will be discussed in more detail below) the court "must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust."¹³⁷

When a party fails to supplement an earlier response or to make a disclosure as required by the federal discovery rules, the court in its discretion may require the non-responsive party to pay the reasonable expenses including attorney's fees caused by the failure.¹³⁸ Where the party failed to admit in response to a request for admissions, the discovering party may request from the court that the failing party pay the reasonable expenses including attorney's fees incurred in making that proof unless any of four specified grounds are found to exist.¹³⁹

If a party has been properly served for the taking of his or her deposition and fails to appear or has been properly served with interrogatories or a request for inspection and fails to respond, the court, in addition to other non-monetary sanctions, must require the failing party or the attorney advising that party (or both) to pay the reasonable expenses. The expenses include attorney's fees.¹⁴⁰ However, if the failure was substantially justified or if there were other circumstances that would make it unjust to award expenses, then the court in its discretion may excuse the behavior and not impose sanctions.¹⁴¹

Rule 7026(f) requires that all parties to the litigation jointly participate in the preparation and submission of a discovery plan. Good faith in participation is mandated. Should a party or its attorney fail to do this, the court in its discretion may require that party or attorney to pay any other party reasonable expenses including attorney's fees caused by the failure.¹⁴²

1. *Rationales Implicated in Fee Shifting Sanctions*

There appears to be no single coherent rationale that explains fee shifting in Rule 7037. Rather, there are multiple reasons that may become

136. *Id.* 37(a)(5)(B).

137. *Id.* 37(b)(2)(C).

138. *Id.* 37(c)(1)(A).

139. *Id.* 37(c)(2).

140. *Id.* 37(d)(3).

141. *Id.*

142. *Id.* 37(f).

ineffective when applied within a bankruptcy regime, for reasons to be explained later.¹⁴³ Fee shifting is allowed and is indeed often mandated under Federal Civil Rule 7037 out of a sense of fairness, compensation, deterrence, and punishment. It further impacts the comparative strengths of the parties, economic incentives to settle the dispute, and/or conclusion of the litigation in a cost effective manner.¹⁴⁴

2. *Punishment and Deterrence*

Much of the reported cases and literature¹⁴⁵ have characterized Rule 37 fee shifting sanctions as punishment for past behavior and as a deterrent to future noncompliance with the federal discovery rules, which have received considerable acceptance.¹⁴⁶ Noticeably absent in Rule 7037 is express language of deterrence or punishment. However, the United States Supreme Court expressly validated retribution and deterrence in at least two opinions. In *Roadway Express v. Piper*,¹⁴⁷ the Court addressed the authority of a federal court to assess attorney's fees directly against counsel pursuant to Rule 37 sanctions or a court's inherent power.¹⁴⁸ In this case three plaintiffs sued an employer pursuant to the federal civil rights statutes alleging employment racial discrimination practices.¹⁴⁹ During litigation, the defendant propounded a set of interrogatories upon the three plaintiffs who failed to respond, resulting in a motion to compel answers.¹⁵⁰ The trial court ordered the plaintiffs to answer the interrogatories, which they disobeyed by never responding.¹⁵¹ The defendant sent notices to the three plaintiffs for the taking of their depositions and one of them failed to appear and was never deposed.¹⁵² At the request of the defendant, pursuant to Federal Rule of Civil Procedure 37 and after notice and hearing, the district

143. See Thomas D. Rove, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L. J. 651, 651 (1982) ("There exist, indeed, several different sorts of reasons why a legal system might choose a policy of requiring losing litigants to pay winners' legal fees in some or all cases.").

144. *Id.* at 653.

145. See Rosenberg, *supra* note 34, at 482 ("In the federal system, the main objective of a set of rules punishing evasion of pretrial discovery procedures is to promote free and full disclosure of relevant, non-privileged information and evidence.").

146. See Rove, *supra* note 143, at 660 ("Punishment for unjustified or undesirable behavior . . . finds considerable acceptance as a reason to shift fees in certain situations."); see also Rosenberg, *supra* note 34, at 483 ("[U]ndoubtedly all forms of discovery evasion could be stamped out by stern enough penalties.").

147. 447 U.S. 752 (1980).

148. *Piper*, 447 U.S. at 755-56.

149. *Id.* at 754-55.

150. *Id.* at 755.

151. *Id.*

152. *Id.*

court dismissed the plaintiffs' lawsuit and ordered the plaintiffs to pay the defendant \$17,000 for costs and attorney's fees,¹⁵³ basing its authority on the civil rights statutes allowing the prevailing party to recover attorney's fees.¹⁵⁴ On appeal, the Supreme Court unanimously held that Federal Rule of Civil Procedure 37 permitted sanctioning the parties and their counsel by making them personally liable for attorney's fees and costs caused by the failure to comply with discovery orders.¹⁵⁵ The Court was somewhat split on the issue of a court's inherent power to assess costs and attorney's fees.¹⁵⁶ It said that "Rule 37 sanctions must be applied diligently both to penalize those whose conduct may be deemed to warrant such a sanction and to deter those who might be tempted to such conduct in the absence of such a deterrent."¹⁵⁷ The Court cited *National Hockey League v. Metropolitan Hockey Club*¹⁵⁸ for the principles of deterrence and punishment.¹⁵⁹

Connecting discovery sanctions to punishment and deterrence escapes logical deductive and inductive reasoning¹⁶⁰ other than to recognize that ingrained in our law punishment is often an unquestioned fundamental principle for fee shifting.¹⁶¹ Human conduct is largely controlled by the human brain, which due to its complexity, is mostly not understood. Social science and law have focused not on the brain as an organ but rather on human behavior.¹⁶² So far, a couple of punishment theories seem to contain some

153. *Id.* at 756.

154. *Id.* (citing 42 U.S.C. §§ 1988, 2000e-5(k), 28 U.S.C. § 1927).

155. *Id.* at 763.

156. *Id.* at 768-71.

157. *Id.* at 764.

158. 427 U.S. 639 (1976). The appeal to the Supreme Court arose from a district court's dismissal of a lawsuit pursuant to Federal Rule of Civil Procedure 37 for failure to answer, after seventeen months, interrogatories as ordered. *National Hockey League*, 427 U.S. at 640. In its opinion the Supreme Court stated:

[The] most severe in the spectrum of sanctions provided by statute or rule must be available to the district court . . . 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.

Id. at 643. In further support of its declaration the Court opined that while the present parties before the Court would faithfully obey future discovery orders, it felt compelled to strongly assert the inevitability of Rule 37 sanctions where other parties to other lawsuits before other courts might be tempted to "flout other discovery orders." *Id.*

159. *Roadway Express v. Piper*, 447 U.S. 752 (1980) (citing *NHL*, 427 U.S. at 643).

160. See Rove, *supra* note 143, at 652 ("Despite its currency as a basis for fee awards, only in certain situations does punishment . . . have any proper relationship to fee shifting.")

161. *Id.* at 660.

162. Terrence Chorvat & Kevin McCabe, *The Brain and the Law*, 359 PHIL. TRANSACTIONS OF THE ROYAL SOC'Y OF LONDON B 1727, 1727 (2004).

Because of recent advances in a variety of disciplines, we are now beginning to witness a merging of the hard and social science. Many researchers in human

logical attraction that could support a relationship to discovery abuse.¹⁶³ One theory holds simply that the justification for punishment is retribution, or that people who engage in legally unacceptable behavior deserve to be punished for past behavior.¹⁶⁴ Retributivism is not primarily concerned with future social wellbeing but rather with the past.¹⁶⁵ However, another theory looks not at past misbehavior but rather to the prevention of future misconduct.¹⁶⁶ “According to the forward-looking, consequentialist theory punishment is justified by its future beneficial effects. Chief among them is the prevention of future legal misconduct through the deterrent effect of the law.”¹⁶⁷ Retributivism and consequentialism can both appear in a single act of legally unacceptable behavior. Disobedience of the rules of litigation by one party can cause undeserved financial costs on another party, and thus punishment and compensation may coincide.¹⁶⁸ Whatever explanation there might be, our law often regards punishment as a basis for fee shifting.¹⁶⁹ Then again, in the normative non-bankruptcy civil case, fee shifting of attorney’s fees exerts pressure on a responding party to comply with Rule 37; otherwise he or she will have to pay money. This should be felt where court ordered fees come from the sanctioned litigants’ pockets. Yet, not so if fees are not paid by a debtor in bankruptcy, but rather by the unsecured creditors who are not parties to the litigation.¹⁷⁰

3. *Fairness*

Taking the fairness rationale as justification for altering the American Rule, existing literature is very sparse to explain two-way fee shifting.¹⁷¹ This fairness or indemnification rationale takes pains to convince that shifting the fees is not “to punish a losing party but rather to provide indem-

behaviour and biology have adopted an approach . . . that integrates psychology, biochemistry, neurology, evolutionary biology and related sciences to further our understanding of human behaviour.

Id.

163. Joshua Greene & Jonathan Cohen, *For the Law, Neuroscience Changes Nothing and Everything*, 359 PHIL. TRANSACTIONS OF THE ROYAL SOCIETY OF LONDON B 1775, 1776 (2004).

164. *Id.*

165. *Id.* at 1777.

166. *See id.* at 1776 (“[S]o far as deterrence is concerned, it is the *threat* of punishment that is justified and not the punishment itself.”).

167. *Id.*

168. Rove, *supra* note 143, at 660.

169. *Id.*

170. 11 U.S.C. §§ 502, 541, 726, 727, 523, 1328, 1141 (2004).

171. *See* DOBBS, *supra* note 98, § 3.10(1) (“[T]wo way fee-shifting meaning . . . the prevailing plaintiff would recover fees from the losing defendant and equally the prevailing defendant would recover fees for the losing plaintiff.”).

nity for the winner.”¹⁷² Conspicuously absent is any explanation as to why the losing party will not feel the punishment for being forced to reimburse the winning party’s attorney’s fees.¹⁷³ One writer has stated that “[t]he argument having greatest intuitive appeal is that the prevailing party, having been adjudged to be in the right, should not suffer financially for having to prove the justice of his position.”¹⁷⁴ However, this has a counter balancing argument where the losing party likewise has a very strong and well-grounded case for opposing the discovery request, but simply fails in persuading the court. Also, it is unsure how this will fit in bankruptcy where the prevailing underlying goal is to decide who gets what and in what order,¹⁷⁵ and where the debtor—who has no assets for payment to creditors—will be discharged of allowed claims.

4. *Compensation*

Another argument for fee shifting is compensation. The rationale is to make whole the prevailing party where it incurred legal fees caused by the losing party’s fault, and therefore the prevailing party is entitled to compensation from the losing party.¹⁷⁶ This stems from strong intuitive reasoning that “refusing to award fees denies a wronged party full compensation for his injury.”¹⁷⁷ The accepted thought supporting compensation rationale for fee shifting envisions an injury for which the law compensates with money as a substitute for the actual injury.¹⁷⁸ The injury in discovery sanctions is that a requesting or responding party suffered a wrong of being denied a legal right to discovery that is remediable by compensation. If the idea is to make the prevailing litigant whole by fee shifting, there is an inherent fallacy: the compensatory attorney’s fees cannot be a substitute for the discovery because the discovering party never had the information. The compensatory theory for discovery sanctions appears to have problems outside of bankruptcy that are not cured by a debtor filing bankruptcy,

172. Rove, *supra* note 143, at 654.

173. *Id.*

174. *Id.*

175. JACKSON, *supra* note 103, at 20.

176. *See* DOBBS, *supra* note 98, § 3.10(1) (“A litigant in the role of a plaintiff entitled to recover damages is also entitled to recover the reasonable costs of recovering those damages, because otherwise the aggrieved plaintiff is not made whole.”).

177. Rove, *supra* note 143, at 657.

178. *Dep’t of the Army v. Blue Fox*, 525 U.S. 255, 262 (1999).

The term ‘money damages’ . . . we think, normally refers to a sum of money used as compensatory relief. Damages are given to the plaintiff to substitute for a suffered loss, whereas specific remedies are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.

Id. (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 895 (1988)).

where any compensation would come from the bankruptcy estate and not from the debtor.

Where one of the parties is a *debtor* in bankruptcy, any pre-bankruptcy monetary discovery sanctions against the debtor, if allowed,¹⁷⁹ would normally be paid from property of the bankruptcy estate.¹⁸⁰ Property of the bankruptcy estate is distributed under bankruptcy laws to eligible creditors who probably were not parties to the litigation.¹⁸¹ Payment of the discovery sanction would in effect come from funds belonging to creditors. Any personal liability of a debtor in bankruptcy for these discovery sanctions and costs could be, and probably will be, discharged pursuant to either a Chapter 7 bankruptcy if incurred prior to the bankruptcy filing,¹⁸² or in a reorganization Chapter 13 or Chapter 11 bankruptcy if provided for in a confirmed plan.¹⁸³ Monetary discovery sanctions ordered to be paid as a fine are not dischargeable.¹⁸⁴

Outside of bankruptcy in a normative world, the impact of a relationship between a debtor and a single creditor is usually legally irrelevant to any relationship that a debtor may have with his or her other creditors except possibly when the debtor does not have sufficient assets to pay for all of his or her liabilities.¹⁸⁵ In other words, when the discovery costs in bankruptcy—whether from sanctions or discovery expenditures—are incurred by an entity with an interest in the assets, bankruptcy law imposes restrictions on payment that are not expressly accommodated in Rule 37 or Rule 7037.¹⁸⁶

179. *See* 11 U.S.C. §502 (2004 & Supp. 2007) (setting forth allowance of claims or interests).

180. *Id.* § 541 (Property of the estate).

181. *Id.* § 726 (Distribution of property of the estate).

182. *Id.* §§ 523, 727.

183. *Id.* §§ 1141, 1328.

184. *Id.* § 523(a)(7).

185. JACKSON, *supra* note 103, at 10.

The basic problem that bankruptcy law is designed to handle, both as a normative matter and as a positive matter, is that the system of individual creditor remedies may be bad for the creditors as a group when there are not enough assets to go around. Because creditors have conflicting rights, there is a tendency in their debt-collection efforts to make a bad situation worse.

Id.

186. *See id.* at 8 (“[T]he effect of the debtor’s obligation to repay Creditor A on its remaining creditors takes on particular bite only when the debtor does not have enough to repay everyone in full.”).

III. CONTEMPT PURSUANT TO BANKRUPTCY RULE 7037

Bankruptcy Rule 7037 authorizes a court to use its contempt power upon a party's failure to comply with a discovery court order.¹⁸⁷ Therefore, a discussion about basic contempt law is absolutely necessary because of some very critical and strict requirements concerning contempt, which in turn is encapsulated by the constraints of our federal constitutional system. The body of law on the subject of contempt is overwhelmingly immense and sometimes confusing, causing some trepidation in writing about the topic. Nevertheless, since bankruptcy law and procedure incorporate contempt law, there is no alternative other than to briefly discuss it.

Contempt uses the sovereign's force to coerce compliance or to punish noncompliance and its proceedings can be complex and full of pitfalls. These complicated proceedings can trap an inexperienced or unprepared lawyer, allowing the offending party to escape enforcement. There are many different types of contempt actions,¹⁸⁸ each with their own characteristics that must be strictly accommodated or else the action will fail. Contempt actions include direct, constructive, coercive, punitive, civil, criminal, compensatory, prospective, and retrospective contempt. While courts sometimes use combinations of these to try and convince an uncooperative party to obey a court order, the United States Supreme Court has ruled that a court should use the least power adequate to the end proposed.¹⁸⁹

Extracting obedience to a prior court order through the use of either coercive or punitive contempt action requires strict observance of statutes and court established rules. Unfortunately, contempt has so many escape mechanisms that it often becomes ineffective in obtaining compliance with discovery court orders. Failure to comply with these time honored restrictions will probably render any attempt to punish disobedience or to coerce compliance through the use of contempt actions unenforceable. With one exception, Bankruptcy Rule 7037 specifically authorizes the trial judge to punish by contempt any party who fails to comply with a discovery order.¹⁹⁰ Incorporating contempt into the array of available sanctions of the

187. FED. R. CIV. P. 37(b)(1), (b)(2)(A).

188. See RONALD L. GOLDFARB, *THE CONTEMPT POWER* 46 (1963) ("Contempt of Court is the Proteus of the Legal World, assuming an almost infinite diversity of forms.").

189. See *Pounders v. Watson*, 521 U.S. 982, 990 (1997) ("[W]e have approved, in the context of reviewing a federal contempt order, the equitable principle that only 'the least possible power adequate to the end proposed' should be used in contempt cases." (quoting *United States v. Wilson*, 421 U.S. 309, 319 (1975))).

190. FED. R. CIV. P. 37(b)(2)(B).

For Not Producing a Person for Examination. If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may

discovery rules of bankruptcy procedure opens access to a very large, well established, and sometimes confusing body of law.

The most significant impediment that likely disables a federal bankruptcy judge is that lower federal appellate courts are divided, mostly based on their interpretation of Section 105,¹⁹¹ as to whether federal bankruptcy judges lack jurisdiction to conduct criminal contempt proceedings.¹⁹² The Supreme Court has yet to rule on this point. However, as developed further in this article there is ample authority supporting lower federal courts' jurisdiction over civil contempt.¹⁹³

Contempt is a very old method with ancient underpinnings for forcing obedience to court orders.¹⁹⁴ By far the most commonly used proceeding by courts for enforcing court orders, the power of contempt can be evolutionarily traced to early England and the product of kingly rule.¹⁹⁵ One

issue any of the orders listed in Rule 37(b)(2)(A)(i)-(vi), unless the disobedient party shows that it cannot produce the other person.

Id. Notice that contempt does not appear in the list (i)-(vi) and therefore is not authorized for failure to produce a person for physical or mental examination. *Id.*

191. See 11 U.S.C. § 105(a) (2004) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.").

192. See *In re Hipp, Inc.*, 895 F.2d 1503, 1515 (5th Cir. 1990) ("We conclude, however, that [S]ection 105 does not purport to authorize bankruptcy courts to punish for criminal contempts. . . . Criminal contempt is not 'necessary or appropriate to enforce or implement' the court's rules or orders, but is instead intended to vindicate the authority of the court." (quoting *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 498 (1911))). *But see In re Ragar*, 3 F.3d 1174, 1178-79 (8th Cir. 1993) (analyzing criminal contempt):

The plain meaning of the statute authorizes at least as much as what was done here. We recognize that this conclusion places us at odds with *In re Hipp, Inc.*, where the Fifth Circuit said that 'criminal contempt is not necessary or appropriate to enforce or implement the court's rules or orders, but is instead intended to vindicate the authority of the court.' With all respect, we think this is simply wrong. An order of criminal contempt, no less than one of civil contempt, is necessary or appropriate to enforce the order for whose violation it is imposed, and the statute in pursuance of which that order was itself entered.

Id. (citation omitted).

193. See, e.g., *In re Terrebonne Fuel & Lube*, 108 F.3d 609, 612-13 (5th Cir. 1997) ("A court of bankruptcy has authority under [Section 105] to issue any order necessary or appropriate to carry out the provisions of the bankruptcy code."); *In re Rainbow Magazine, Inc.*, 77 F.3d 278, 284 (9th Cir. 1996) ("There can be little doubt that bankruptcy courts have the inherent power to sanction vexatious conduct [under Section 105]."); *In re Hardy*, 97 F.3d 1384, 1389 (11th Cir. 1996) ("Section 105 grants statutory contempt powers in the bankruptcy context."); *In re Power Recovery Sys., Inc.*, 950 F.2d 798, 802 (1st Cir. 1991) ("Bankruptcy Rule 9020(b) specifically provides that a bankruptcy court may issue an order of contempt if proper notice of procedures are given."); *In re Skinner*, 917 F.2d 444, 447 (10th Cir. 1990) (holding that Congress granted bankruptcy courts civil contempt power under 11 U.S.C. § 105); *In re Walters*, 868 F.2d 665, 669 (4th Cir. 1989) ("A court of bankruptcy has authority [under Section 105] to issue any order necessary or appropriate to carry out the provisions of the bankruptcy code.").

194. GOLDFARB, *supra* note 188, at 9-10.

195. *Id.* at 10.

The power of courts to punish contempt is one which wends historically back to the early days of England and the crown. . . . There is some evidence that schemes akin to

commentator states that the “law of contempt is not the law of men, it is the law of kings.”¹⁹⁶ In England, common law courts issued judgments which could be enforced only by seizure of property and not the body of a person.¹⁹⁷ Therefore, it was left to the equity courts to fashion devices for coercing compliance with orders of the courts through the use or the threat of discomfort, pain, and suffering by seizure of a person’s body and incarcerating the non criminal defendant in the king’s prison. Because of the abuses inflicted on English subjects, those Americans who wrote the United States Constitution enacted safeguards as the supreme law in this country against cruelty by government.¹⁹⁸ Consequently, in the United States contempt sanctions are strictly scrutinized against the United States Constitution for ensuring compliance with due process safeguards.¹⁹⁹

The threat of contempt has long been observed as a means to alter human behavior for extracting compliance with law.²⁰⁰ Human beings have long known the effectiveness of using discomfort, pain, and suffering, or at least the threat of it, to force compliance and submission by others. Furthermore, judicial institutions have historically embraced this observable

contempt were thought of in more antiquated societies. The writings of Emperor Justinian refer to certain judicial punishing powers which were conceded to be necessary means of official force, and which resembles contempt . . . the religious rules of the Roman Popes contain sections which deal with disciplinary or penal powers akin to judicial contempt as we know it.

Id.

196. *Id.* at 11.

197. DOBBS, *supra* note 98, at 93-94.

198. See GOLDFARB, *supra* note 188, at 173 (“With respect to the right to trial by jury, article III, [S]ection 2 of the Constitution provides that: ‘The trial of all crimes, except in cases of Impeachment, shall be by Jury. . . . The deprivation of this right was one of the serious grievances which the American settlers held against the King.’”).

199. See *id.* at 162-63.

In a government of laws such as ours, it is not unusual for disputes to ultimately be resolved by resort to the most fundamental, enduring, and decisive of our laws, the United States Constitution. Few legal devices find conflict within the pages of our [C]onstitution with the ubiquity of the contempt power. . . . [T]here are civil liberties issues arising out of the conflict between the use of the contempt power and such vital procedural protections as the right to trial by jury, freedom from self incrimination, double jeopardy and indictment. . . . Also, there are issues of freedom of speech, association and religion.

Id.

200. *United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 831 (1994).

The traditional justification for the relative breadth of the contempt power has been necessity: Courts independently must be vested with ‘power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and . . . to preserve themselves and their officers from the approach and insults of pollution.’

Id. (citing *Anderson v. Dunn*, 6 Wheat. 204, 227 (1821)).

human reaction where necessary to coerce obedience to their orders.²⁰¹ One well respected theory describes law as coercive orders which start from the perfectly correct appreciation of the fact that where there is law, human conduct is made in some sense non-optional or obligatory.²⁰² It seems clear that we should not think of anyone as obliged to do something if the threatened harm was, according to common judgment, trivial in comparison to the serious consequences of not complying with the orders.²⁰³ Nor perhaps would we say that the victim was obliged if there were no reasonable grounds for thinking that the ordering party could or would probably implement his threat of relatively serious harm.²⁰⁴ The statement that a person is obliged to obey someone is psychological, as it refers to the beliefs and motives with which an action is done.²⁰⁵ Some theorists, perhaps seeing the general irrelevance of a person's beliefs, fears, and motives to the question—as an obligation to do something—have defined this notion. The idea is defined not in terms of these subjective facts, but in terms of the *chances* or *likelihood* that the person having the obligation will suffer a punishment at the hands of others in the event of disobedience.²⁰⁶ This treats statements of obligation not as psychological statements or metaphysical conceptions of obligation, mysteriously existing above or behind the world of ordinary observable facts, but as assessments of chances or probabilities of incurring punishment.²⁰⁷ This appears to simplify an

201. See H. L. A. HART, *THE CONCEPT OF LAW* 97 (2d ed. 1997) (“[T]he foundations of a legal system consist of the situation in which the majority of a social group habitually obey the orders backed by threats of the sovereign person or persons, who themselves habitually obey no one.”).

202. *Id.* at 80-81. The respected scholar on jurisprudence H. L. A. Hart posits the following concerning obliged and obligation:

A orders B to hand over his money and threatens to shoot him if he does not comply.

B, if he obeyed, was ‘*obliged*’ to hand over his money . . . [It would be a mis-description to say that B] had an *obligation* to [hand over his money]. There is a difference between the assertion that someone was *obliged* to do something and the assertion that he had an *obligation* to do it.

Id. That a person has an obligation to tell the truth “remains true even if he believed . . . that he would never be [discovered] and had nothing to fear from [not telling the truth].” *Id.* The first is often a statement about the beliefs and motives with which an action is done. *Id.* B was *obliged* to hand over his money may simply mean that he believed some harm or other unpleasant consequences would befall him if he did not hand it over and he handed it over to avoid those consequences. *Id.* The prospect of what would happen to B if he disobeyed has rendered something he would otherwise have preferred to have done, keep the money, less eligible. *Id.*

203. *Id.* at 80. For example, if a stranger approaches someone and threatens to pinch him if he does not hand over his wallet, the consequence of not obeying is trivial compared to the consequence of handing over his wallet. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

elusive notion and restate it in the same clear, hard, and empirical terms as used in science.²⁰⁸

Law traditionally has not been concerned about the scientific biological mechanisms triggering disobedient human behavior. Instead, it depends on a person's respect for authority supported by the latter's latent threat of harm in the event of disobedience.²⁰⁹ When people feel comfortable disobeying the law they will do so, and the law has long used this observable trait by making disobedience considerably uncomfortable or unbearable, such as through the use of sanctions. As an example, it can be demonstrated that an individual who is intentionally excluded from society against his will, such as through incarceration, is likely to experience discomfort and suffering similar to what one experiences when actual physical pain occurs.²¹⁰ Thus, culture can constrain individuals, and penalties meted out by legal authorities can either conflict with or align themselves with group pressures. When the latter occurs, laws may be more effective and cheaper.²¹¹ Because social pressure can create actual pain, laws can attempt to align this social discomfort with socially desired behavior and thereby hopefully obtain much better compliance with court orders. Where societal values are of no concern to the recalcitrant defendant, other methods appear to be available such as striking the offending party's pleadings and entering judgment as will be developed in this article.

A. DIRECT AND INDIRECT CONTEMPT

It is important to distinguish direct from indirect contempt since the rules of procedure and substantive law treat them differently. Direct contempt occurs during court session directly in the presence of the judge and involves a person's disruptive conduct that interferes with a court's process, such as in a discovery sanction hearing or in a hearing to show cause why sanctions should not be imposed.²¹² Since it occurs in the judge's presence and in the presence of who witnessed the offending behavior first hand, the judge may punish the contemnor on the spot and eliminate the need for a separate evidentiary hearing with advance notice to

208. *Id.*

209. *Id.* at 20.

210. *Id.* See Chorvat & McCabe, *supra* note 162, at 1732 (explaining that scientific research shows evidence that social exclusion is encoded as pain in the human brain which, if correct, can be used as a very significant enforcement mechanism by simply removing a party from society for not cooperating with discovery).

211. HART, *supra* note 201, at 20.

212. See *Ex parte Terry*, 128 U.S. 289, 308 (1888) ("When the contempt is committed in the presence of the court, and the court acts upon view and without trial and inflicts the punishment, there will be no charge, no plea, no issue and no trial.").

prove to the judge what he or she witnessed.²¹³ Surprisingly, the Supreme Court twice reversed a contempt conviction where the contemnor, while on trial in open court, told the trial judge on the record the following:²¹⁴

That while on trial . . . on November 29, 1966, he, the defendant, threatened to blow the trial judge's head off, by saying, 'If I have to blow your head off, that's exactly what I'll do. I don't give a damn if it's on the record or not. If I got to use force, I will. That's what the hell I'm going to do.' . . . That while on trial as aforesaid on December 1, 1966, he, the defendant, accused and threatened the court by saying, 'Like I told you, you force this trial on me—you going to give me an illegal trial, I told you before what I was going to do to you, and I mean it. Now I refuse to go on with this trial if you are going to railroad me and badger my witnesses, force me to an unfair trial, that is exactly what I am going to do, punk. I'm going to blow your head off. You understand that?' . . . That while on trial as aforesaid on December 9, 1966, he, the defendant, threatened the life of the court by saying, 'I object to what you did to my two codefendants and I swear on my mother's name that I will keep my promise to you, the two threats I made. Don't worry about me interrupting during your summation. I won't even dignify these stinking proceedings, punk, go to hell, and I will shake hands in hell with you. I will be damned to you.' Also, he, the defendant, said, 'You are a dead man, stone dead. Your Honor.'²¹⁵

At the conclusion of the criminal trial, the trial judge additionally found the contemnor guilty of six counts of contempt and sentenced him to one to two years in prison for each contempt count for a total of six to twelve years.²¹⁶ The first time the case went to the United States Supreme Court, the Court reversed with instructions that another judge conduct the contempt actions who would "not bear the sting of these slanderous remarks and having the impersonal authority of the law, sit in judgment on the conduct of petitioner as shown by the record."²¹⁷ The second time the case went before the Supreme Court, it reversed the lower court because the right to a jury trial had been denied.

213. *See id.* at 309 ("For a direct contempt the offender may be punished instantly by arrest and fine or imprisonment, upon no further proof or examination than what is known to the judges by their senses of seeing, hearing, etc.").

214. *Codispoti v. Pennsylvania*, 418 U.S. 506, 509 n.2 (1974).

214. *Id.* at 509-10.

215. *Id.*

217. *Mayberry v. Pennsylvania*, 400 U.S. 455, 466 (1971).

The biggest difference between direct contempt and indirect contempt lies in the location of the behavior. Offending behavior that takes place outside the courtroom and away from the judge is adjudicated as indirect contempt.²¹⁸ Parties guilty of indirect contempt—parties whose conduct occurred outside of the presence of the judge—are entitled to a separate trial since a fact finding process is necessary after proper notice.²¹⁹ The Supreme Court in *Bloom v. Illinois*²²⁰ held that:

Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed.²²¹

Therefore, attorneys contemplating the prosecution of an indirect contempt court action against a non-complying discovery defendant need to prepare for litigation that strictly complies with constitutional due process.²²²

B. CIVIL AND CRIMINAL CONTEMPT

Another critical distinction that activates different bodies of contempt law is whether it is classified as civil or criminal contempt. As mentioned earlier in this article, according to some appellate court decisions federal bankruptcy judges lack jurisdiction to conduct criminal contempt proceedings.²²³ Complicating this further, one needs to keep in mind that the same

218. See *Codispoti*, 418 U.S. at 534 (“[A] classic case of ‘indirect contempt,’ one which occurred outside of the presence of the court.”)

219. KENNETH H. YORK, JOHN A. BAUMAN & DOUG RENDLEMAN, *REMEDIES* 258 (5th ed. 1992).

220. 391 U.S. 194 (1968).

221. *Bloom*, 391 U.S. at 205.

222. Earl C. Dudley, Jr., *Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts*, 79 VA. L. REV. 1025, 1082-83 (1993).

Some procedural safeguards are so fundamental to the integrity of adjudicative proceedings that they should be afforded in all indirect contempt proceedings. Preeminent among these are the rights to adequate notice of the charges, to prepare an adequate defense, and to present that defense. . . . These basic protections are part of minimal due process in adjudicative proceedings potentially leading to the imposition of penalties.

Id.

223. See *In re Hipp, Inc.*, 895 F.2d 1503, 1509 (5th Cir. 1990) (concluding that bankruptcy courts did not have the power to hear and determine criminal contempt at least as to criminal contempt committed outside of the court’s presence).

misbehavior can give rise to both civil and criminal contempt.²²⁴ Generally, if the purpose or the outcome is to punish an offending party for past behavior, then the contempt is classified as criminal, and a much stricter standard must be followed for criminal contempt because it is administered within the framework of criminal procedures.²²⁵ The rules of criminal procedure are the entire attendant United States Constitution protections afforded to those accused of a crime.²²⁶ The Supreme Court appears to state that failure to comply with discovery rules implicates the central rationale for contempt power, but there are other non-criminal sanctions available to courts.²²⁷

Criminal contempt sanctions are characterized by punishment in the form of incarceration for a fixed term or payment of fines.²²⁸ Fines payable to a governmental unit are not dischargeable through bankruptcy.²²⁹ In

224. *See* United States v. United Mine Workers of Am., 330 U.S. 258, 298-300 (1947) (distinguishing criminal and civil contempt).

Common sense would recognize that conduct can amount to both civil and criminal contempt. The same acts may justify a court in resorting to coercive and to punitive measures. Disposing of both aspects of the contempt in a single proceeding would seem at least a convenient practice . . . [A] mingling of civil and criminal contempt proceedings must . . . be shown to result in substantial prejudice before a reversal will be required.

Id.

225. Federal Rule of Criminal Procedure 42, in part, states that criminal contempt requires notice, the appointment of a prosecutor, and finally trial and disposition:

A person being prosecuted for criminal contempt is entitled to a jury trial in any case in which federal law so provides. . . . If the criminal contempt involves disrespect toward or criticism of a judge, that judge is disqualified from presiding at the contempt trial or hearing unless the defendant consents. Upon a finding or verdict of guilty, the court must impose the punishment.

FED. R. CRIM P. 42(a)(3).

226. United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 826-27 (1994). “Criminal contempt is a crime in the ordinary sense and criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings” such as double jeopardy, the right to notice of charges, assistance of counsel, summary process, to present a defense, privilege against self-incrimination, right to proof beyond a reasonable doubt, for serious criminal contempt involving imprisonment of more than six months, and the right to a jury trial. *Id.*

227. *Id.* at 833.

Courts traditionally have broad authority through means other than contempt—such as by striking pleadings, assessing costs, excluding evidence, and entering default judgment—to penalize a party’s failure to comply with rules of conduct governing the litigation process. Such judicial sanctions never have been considered criminal, and the imposition of civil, coercive fines to police the litigation process appears consistent with this authority.

Id. (citations omitted).

228. *See* Bloom v. Illinois, 391 U.S. 194, 201 (1968) (“Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both.”).

229. 11 U.S.C. § 523(a) (2004).

contrast, “civil contempt sanctions or those penalties designed to coerce future compliance with a court order are avoidable through obedience of an existing court order, and thus may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard.”²³⁰ Since the whole purpose of civil contempt proceedings is to get the disobedient party to obey and not to punish for past behavior, some due process requirements such as a right to trial by a jury or conviction beyond a reasonable doubt are dispelled.²³¹ Completely different rules of procedure are involved in civil contempt.²³² Coercive civil sanctions are prospective in nature and are designed to assist the plaintiff by bringing a recalcitrant party into obedience with the court order or by assuring a contumacious party’s compliance with a court order by setting forth, in advance, the consequences the court will impose if the party deviates from obedience.²³³ Thus, should a defiant party be taken into custody and incarcerated as the result of civil or coercive contempt, he or she may be discharged simply by complying with the court order or, as commonly stated, a contemnor always has the keys to his jail in his pocket.²³⁴

As to whether bankruptcy judges have jurisdiction over civil contempt actions, appellate courts in the past have been divided and the Supreme Court has not yet addressed the question. Initially, the United States Court of Appeals for the Ninth Circuit held that bankruptcy courts do not have civil contempt power since these are neither Article III courts nor courts of the United States, and Congress expressly repealed prior statutes that had

A discharge under [S]ection 727, 1141, 1228(a), or 1328(b) . . . does not discharge an individual debtor from any debt . . . (7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty.

Id.

230. *Id.*

231. *Bagwell*, 512 U.S. at 827.

In contrast, civil contempt sanctions, or those penalties designed to compel future compliance with a court order, are considered to be coercive and avoidable through obedience, and thus may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard. Neither a jury trial nor proof beyond a reasonable doubt is required.

Id.

232. See FED. R. BANKR. P. 9020, 9014 (governing a motion for an order of contempt made by the United States trustee or a party in interest).

233. *Latrobe Steel Co. v. United Steelworkers*, 545 F.2d 1336, 1344 (3d Cir. 1976).

234. *Bagwell*, 512 U.S. at 828.

Imprisonment for a fixed term similarly is coercive when the contemnor is given the option of earlier release if he complies. In these circumstances, the contemnor is able to purge the contempt and obtain his release by committing an affirmative act, and thus carries the keys of his prison in his own pocket.

Id.

given bankruptcy judges civil contempt authority.²³⁵ Other federal courts of appeals have disagreed and have ruled that bankruptcy courts have civil contempt jurisdiction.²³⁶ In addition to the Tenth Circuit Court of Appeals holding that bankruptcy courts have civil contempt authority, other United States Circuit Courts of Appeal have likewise ruled.²³⁷ Even the Ninth Circuit reversed itself and now holds that bankruptcy courts have civil contempt jurisdiction.²³⁸

C. FORCING HUMAN BEHAVIOR

When an individual faces court orders and chooses to disobey, it can be said that he or she was merely exercising his or her free will in choosing not to obey.²³⁹ Free will is defined by at least one dictionary as “freely given or

235. *In re Sequoia Auto Brokers, Ltd.*, 827 F.2d 1281, 1289-91 (9th Cir. 1987).

236. *In re Skinner*, 917 F.2d 444, 447 (10th Cir. 1990).

While bankruptcy courts do not have inherent civil contempt power, . . . we conclude that Congress has granted them civil contempt power by statute. This statutory authority derives from 11 U.S.C. § 105 and 28 U.S.C. § 157. . . . While we are mindful of the opinion of the Ninth Circuit in *In re Sequoia Auto Brokers, Ltd.*, that civil contempt powers should not be implied from [S]ection 105(a) . . . we disagree that the language of [S]ection 105(a) is ambiguous, and, therefore, we do not think the Ninth Circuit’s reasoning is sufficient to overcome the plain language of the section.

Id. (citation omitted).

237. The Second, Fifth, Sixth, Seventh, Eighth, and the Ninth Circuit Courts have decided that bankruptcy courts have civil contempt jurisdiction. *See, e.g.*, *Cox v. Zale Del., Inc.*, 239 F.3d 910, 916 (7th Cir. 2001) (stating that the Debtor could ask the bankruptcy court to hold a creditor in contempt of the discharge order); *Bartel v. Eastern Airlines*, 1998 U.S. App. LEXIS 71, at *2 (2d Cir. 1998) (“Bankruptcy courts have the power to impose civil contempt sanctions.”); *In re Lazy Acres Farms, Inc.*, 1997 U.S. App. LEXIS 36575, at *1 (6th Cir. 1997) (“Rule 9020(b) governs contempt proceedings in the bankruptcy court where the contempt was committed outside of the presence of the bankruptcy judge. It provides that contempt may be determined only after ‘hearing on notice.’”); *In re Terrebonne Fuel & Lube*, 108 F.3d 609, 613 (5th Cir. 1997) (“‘Bankruptcy Rule 9020(b) specifically provides that a bankruptcy court may issue an order of contempt if proper notice of procedures are given.’”) (citations omitted); *Sosne v. Reiner & Duree, P.C.*, 108 F.3d 881, 885 (8th Cir. 1997) (declaring that whether bankruptcy courts seriously have contempt powers, these courts do have broad equitable powers to remedy violations of the automatic stay and notice was taken that many courts have held that bankruptcy courts have civil contempt powers over those who violate the bankruptcy automatic stay); *In re Rainbow Magazine*, 77 F.3d 278, 283 (9th Cir. 1996) (explaining that while contempt committed outside of the presence of the judge may be determined by the bankruptcy judge only after a hearing on notice, “[c]ontempt committed in the presence of a bankruptcy judge may be determined summarily by a bankruptcy judge”).

238. *In re Rainbow Magazine*, 77 F.3d at 283-84.

Our holding in *Sequoia* was based on a thorough review of the then-existing legislative history of the Bankruptcy Code. However, . . . two significant changes have occurred. In 1987, Congress reformed Bankruptcy Rule 9020. . . . Additionally the Supreme Court announced its decision . . . that courts created by Congress have inherent powers, unless Congress intentionally restricts those powers.

Id. (citations omitted).

239. S. Zeki & O. R. Goodenough, *Law and the Brain: Introduction*, 359 PHIL. TRANSACTIONS OF THE ROYAL SOC’Y OF LONDON B 1661, 1662 (2004).

done voluntarily; freedom of decision or of choice between alternatives; the freedom of the will to choose a course of action without external coercion but in accordance with the ideals or moral outlook of the individual.”²⁴⁰ In this country, a consequence of such disobedient behavior is brute force exerted by the sovereign’s contempt power to coerce or punish through incarceration, fines, or both. In other words, the sovereign imposes its will for the free will of the individual. No accommodation to the free will of the king’s subjects was made in the origins from where Anglo American contempt developed.²⁴¹ In England, the monarchs adapted their rules of enforcement as the population grew by altering the manner of governing, emphasizing the education of their subjects on obedience to existing laws rather than by displaying the sword.²⁴² Nevertheless, because of the abuses inflicted on English subjects, the framers of the United States Constitution created safeguards against denial of justice by government.²⁴³ In this country there is a protective spherical shield surrounding humans, insulating them from any governmental attempt to deprive them of their liberties without due process of law.²⁴⁴ Consequently in the United States, contempt sanctions always need to be carefully scrutinized against the United States Constitution to ensure compliance with due process and other constitutional safeguards.²⁴⁵

The linked problems of free will, the degree to which the legal system may assume that the actions of any individual, whether criminal or not, are determined by a free will and, interestingly, the extent to which those dispensing punishment may so interpret the mind and brain of the offender, together take a prominent place.

Id.

240. WEBSTER’S NEW WORLD DICTIONARY 538 (3d ed. 1988).

241. See GOLDFARB, *supra* note 188, at 11 (“And the law of contempt is not the law of men, it is the law of kings. It is not law which representative legislators responsible, reflecting the *vox populi* originally wrote, but is rather evolved from the divine law of kings.”).

242. *Id.* at 10. However, as societies developed and became organized, governing systems became more sophisticated and the intercomplexity of the relationships between sovereigns and men required that some form of physical “force within a rule of law scheme was necessary to replace the caveman’s club as a means of enforcing obedience.” *Id.*

243. *Id.* at 173-74.

244. U.S. CONST. amend XIV.

245. GOLDFARB, *supra* note 188, at 162.

In a government of laws such as ours, it is not unusual for disputes to ultimately be resolved by resort to the most fundamental, enduring, and decisive of our laws, the United States Constitution. Few legal devices find conflict within the pages of our Constitution with the ubiquity of the contempt power. . . . [T]here are civil liberties issues arising out of the conflict between the use of the contempt power and such vital procedural protections as the right to trial by jury, freedom from self incrimination, double jeopardy, and indictment. . . . [Also,] there are issues of civil rights, such as freedom of speech, association, and religion.

Id.

There are few cases where this traditional enforcement device has been ineffective in that the defendant simply will not obey a court. The latter area is open to alternatives. The United States Court of Appeals for the Second Circuit recently stated that “[c]ourts must exercise caution in their use of the contempt power and must recognize when it has reached the limits of its utility.”²⁴⁶

D. RESTRICTIONS ON THE USE OF CONTEMPT

1. *Clear and Unambiguous Orders*

One of the most significant court developed limitations, which must be observed prior to initiating contempt proceedings, is that there must be a prior court order in existence specifying what a party is to do, or not to do, in very specific, clear, and unambiguous language.²⁴⁷ There must be an unequivocal command of *who* is to do *what*, *when*, and *where* somewhere in the court’s record.²⁴⁸ Before the coercive aspects of a court’s civil contempt power can be brought into play, there first must have been disobedience of a court order that was capable of being obeyed and enforced.²⁴⁹ As an example, if “a judgment does not use language which turns a

246. *Armstrong v. Guccione*, 470 F.3d 89, 116 (2d Cir. 2006). Armstrong had spent almost seven years in confinement for civil contempt for refusing to obey a court order to turn over \$15 million in gold and antiques, as well as documents, in a twenty-four count indictment for securities fraud arising from a massive pyramid (Ponzi) scheme. *Id.* at 93. His confinement was to last until he either complied with the turnover orders or demonstrated that it would be impossible for him to do so. *Id.* at 92. “Where defiance leads to the contemnor’s incarceration, compliance is his salvation.” *Id.* The appellate court recognized that his compliance was seemingly not forthcoming. *Id.* at 96-97. After nearly seven years of incarceration for civil contempt, a question arises as to whether any amount of jail time will compel a person to obey a court order. *Id.* at 116. Justice Sotomayor, concurring, further stated that at some point, the federal district court must turn to other tools for securing obedience. *Id.* (Sotomayor, J., concurring).

247. *See* FED. R. CIV. P. 65(d) (providing the contents and scope of every injunction and restraining order).

248. *See* *Schmidt v. Lessard*, 414 U.S. 473, 477 (1974) (“The requirement of specificity in injunction orders performs a second important function. Unless the trial court carefully fames its orders of injunctive relief, it is impossible for an appellate tribunal to know precisely what it is reviewing.”).

249. *See, e.g., Int’l Longshoremen’s Ass’n, Local 1291 v. Phila. Marine Trade Ass’n.*, 389 U.S. 64, 76 (1967) (explaining that since the effects of a contempt order are so onerous on the contemnor, great care must be exercised in the drafting of court orders, particularly when a court is endeavoring to enforce its commands through incarceration, fines, or both).

The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one. Congress responded to that danger by requiring that a federal court frame its orders so that those who must obey them will know what the court intends to require and what it means to forbid. . . . The most fundamental postulates of our legal order forbid the imposition of a penalty for disobeying a command that defies comprehension.

Id.

contractual duty into an obligation to obey an operative command” it cannot support an action for contempt.²⁵⁰ “An unclear order provides insufficient notice to justify a sanction as harsh as contempt.”²⁵¹ Finally, the order must be sufficiently specific. An example of an order which is not specific enough is a court order that requires a person to behave in a good moral manner. While almost all of us could have a very good idea what that command means, it fails to state with sufficient specificity exactly the behavior that is required.

2. *Ability to Purge Contempt*

Closely related to the clear and unambiguous language restriction discussed above in this article is the requirement that a recalcitrant respondent have the ability to purge him- or herself of civil contempt.²⁵² At the moment that the court’s order has been obeyed, a defendant can end his or her confinement and the court’s coercive power.²⁵³ A court order clearly written with specificity needs to be in place and must objectively tell the defendant exactly what he or she must do in order to be released from the coercive sanction, through either incarceration or payment of a fine. Upon the recalcitrant’s obedience the reason for the imposition of coercion ceases to exist and there is nothing further to do. A contempt sanction involving imprisonment remains coercive, and therefore civil, if the contemnor is able to purge the contempt and thereby obtain his or her release by performing an affirmative act.²⁵⁴ A question remains, however: How do the contemnor and the outside world know when that point is reached?

One way is to issue court orders containing very clear, unambiguous, and explicit language with regard to discovery. The case of *United States v.*

250. *H. K. Porter Co. v. Nat’l Friction Prods. Corp.*, 568 F.2d 24, 26 (7th Cir. 1977).

Before either the compensatory or coercive aspects of a court’s civil contempt power can be brought into play first, there must have been disobedience of “an operative command capable of enforcement.” Of course, a party may incur a legal duty by entering into a settlement agreement, and a court may, pursuant to that agreement, incorporate the terms of the party’s obligation in its judgment; but to furnish support for a contempt order the judgment must set forth in specific detail an unequivocal command.

Id.

251. *United States v. Int’l Bhd. of Teamsters*, 899 F.2d 143, 146 (2d Cir. 1990).

252. *See United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 828 (1994) (“In these circumstances, the contemnor is able to purge the contempt and obtain his release by committing an affirmative act, and thus ‘carries the keys of his prison in his own pocket.’”).

253. *See id.* (“The paradigmatic coercive, civil contempt sanction . . . involves confining a contemnor indefinitely until he complies with an affirmative command.”)

254. *See Penfield Co. v. Sec. & Exch. Comm’n*, 330 U.S. 585, 590 (1947) (“And those who are imprisoned until they obey the order, carry the key of their prison in their own pocket.”).

*Conces*²⁵⁵ is illustrative.²⁵⁶ Here, the United States Government sought an injunction against Conces in a United States District Court from promoting a tax fraud scheme and from engaging in conduct that interfered with federal tax laws.²⁵⁷ During pendency of the suit, the government obtained a court order for Conces to make discovery pursuant to Federal Rule of Civil Procedure 26(a) and was warned by the court, concerning discovery sanctions including a default judgment, for not disclosing information sought through discovery.²⁵⁸ Conces failed to respond to discovery as required by Rule 26(a), resulting in a default judgment taken against him, granting permanent injunction, and giving permission to the government to pursue post-judgment discovery.²⁵⁹

Not satisfied with Conces's responses to discovery, the government obtained an order from the court compelling Conces to respond to discovery.²⁶⁰ Conces failed to obey several subsequent court orders to produce discovery disclosures.²⁶¹ Ultimately, Conces was found to be in contempt and was ordered imprisoned until he provided complete answers to the government's discovery requests.²⁶² Conces appealed this last sentence.²⁶³

The United States Court of Appeals for the Sixth Circuit upheld the trial court's ruling, holding Conces in civil contempt until he complied with the court orders to compel discovery.²⁶⁴ The court ruled that contempt had to be proven by clear and convincing evidence that the orders had been in "definite and specific language with any ambiguities . . . resolved in favor of persons charged with contempt."²⁶⁵ Conces had been ordered that he "shall answer the Government's interrogatories Nos. 3, 4, and 5, and request to produce No. 1 by 5:00 p.m. on February 16, 2007."²⁶⁶ Again, Conces did not comply.²⁶⁷ A subsequent hearing was held where the district court found Conces in contempt and ordered him to be placed in custody of the United States Marshall until he purged himself by fully answering the discovery requests.²⁶⁸

255. 507 F.3d 1028 (6th Cir. 2007).

256. *Conces*, 507 F.3d at 1033.

257. *Id.*

258. *Id.* at 1034.

259. *Id.*

260. *Id.* at 1036.

261. *Id.*

262. *Id.*

263. *Id.* at 1036-37.

264. *Id.*

265. *Id.* at 1041-42.

266. *Id.* at 1042.

267. *Id.*

268. *Id.*

Other courts of appeal had likewise ruled for the existence of a specific, unambiguous, and clear language in contempt orders.²⁶⁹ At the same time, courts of appeal have reversed contempt decisions where the language was ambiguous.²⁷⁰

3. *Inability to Comply as a Defense*

The Supreme Court of the United States long ago stated that contempt should not be issued unless there is a present ability to comply.²⁷¹ Absent this element, the disobeying party escapes forced obedience from standard contempt proceedings. The justification for coercive imprisonment or payments of a fine, as applied to civil contempt, depends on the defendant's ability to comply with the court's order.²⁷² This imposes another limitation which can defeat an attempt to use coercive contempt to get a party to obey a court order. There are some defenses that emanate out of the doctrine of the inability to comply with a court order, since the essence of civil contempt is to coerce obedience to an existing lawful mandate, and the sanction ends upon the contemnor's compliance. What is to be done when the contemnor simply cannot comply? In the bankruptcy case *Maggio v. Zeit*,²⁷³ the Supreme Court reversed the United States Bankruptcy Court, District Court, and Court of Appeals when it was handed a case that dealt with an inability to comply defense.²⁷⁴

In *Maggio*, the defendant in the civil contempt proceeding was the president of the debtor (then deemed bankrupt). The debtor was a business corporation that went into bankruptcy.²⁷⁵ The bankruptcy trustee dis-

269. *In re Lucre Mgmt. Group, LLC*, 365 F.3d 874, 875 (10th Cir. 2004) ("To be held in contempt, 'a court must find the party violated a specific and definite court order and the party had notice of the order.'").

270. *See, e.g., United States v. O'Rourke*, 943 F.2d 180, 189 (2d Cir. 1991) (reversing a contempt decision).

As we have stated, parties may be held in civil contempt for 'failure to comply with an order of the court if the order being enforced is 'clear and unambiguous, the proof of noncompliance is clear and convincing,' and [they] have not 'been reasonably diligent and energetic in attempting to accomplish what was ordered.'

Id.

271. *Maggio v. Zeit*, 333 U.S. 56, 76 (1948).

The trial court is obliged to weigh not merely the two facts, that a turnover order has issued and that it has not been obeyed, but all the evidence properly before it in the contempt proceeding in determining whether or not there is actually a present ability to comply and whether failure so to do constitutes deliberate defiance which a jail term will break.

Id.

272. *Shillitani v. United States*, 384 U.S. 364, 371 (1966).

273. 333 U.S. 56 (1948).

274. *Maggio*, 333 U.S. at 56.

275. *Id.* at 58.

covered a very large amount of missing merchandise and filed a turn over action against Maggio, because admittedly he had taken possession of the merchandise some time prior to the bankruptcy.²⁷⁶ The bankruptcy referee, by clear and convincing evidence, held that Maggio knowingly and fraudulently concealed the merchandise and further held that the merchandise was in Maggio's possession.²⁷⁷ The district court affirmed the bankruptcy referee's ruling and ordered Maggio to turn over the missing merchandise.²⁷⁸ On appeal the United States Court of Appeals for the Second Circuit unanimously affirmed the district court's turn over decision.²⁷⁹ Maggio failed to deliver the merchandise, was found guilty of contempt, and was ordered jailed until he complied or until further order of the court.²⁸⁰ The court of appeals affirmed the contempt and opined that it knew Maggio could not comply with the court order to turn over the merchandise.²⁸¹ The lower courts were convinced that Maggio had removed the merchandise several months prior to bankruptcy, and over a year before the turn over action and subsequent contempt hearings.²⁸² However, the court of appeals expressly and clearly ruled in its decision that Maggio could not comply in turning over the missing merchandise.²⁸³ The court concluded that the rulings were *res judicata* and beyond review on appeal.²⁸⁴ Because of conflicting opinions among appellate courts and the importance of the issue, the Supreme Court granted review.²⁸⁵

The Supreme Court reversed the contempt rulings and focused on the characteristics of a turn over remedy in order to accomplish the bankruptcy statutory obligation of marshalling all of the debtor's assets that, in theory, belong to its creditors.²⁸⁶ The essential attribute of the turn over remedy is

276. *Id.* at 58-59.

277. *Id.* at 59.

278. *Id.*

279. *Id.*

280. *Id.*

281. *See id.* ("Although we know that Maggio cannot comply with the order, we must keep a straight face and pretend that he can, and must thus affirm orders which first direct Maggio 'to do an impossibility, and then punish him for refusal to perform it.'").

282. *Id.* at 60.

283. *Id.*

The only evidence that the goods then were in the possession or control of Maggio was the proof of his onetime possession supplemented by a 'presumption' that, in the absence of a credible explanation by Maggio of his disposition of the goods, he continues in possession of them or their proceeds.

Id.

284. *Id.*

285. *Id.* at 58.

286. *Id.* at 61.

to acquire possession of the property.²⁸⁷ The remedy is used only upon evidence that at the time of the court proceeding, the property both exists and is in the possession of the defendant.²⁸⁸ The court proceeding to enforce a court order to turn over of property in bankruptcy is to coerce obedience, which is the essential attribute of civil contempt.²⁸⁹ For a court to confine someone to jail for failure to perform an act that he or she is convincingly powerless to do would turn a civil contempt remedy into criminal contempt and would not add to the bankruptcy estate, which is the entire purpose of the turn over order.²⁹⁰ Thus, when a court comes to a conclusion based on its belief that the defendant is not in possession of the property, the civil inquiry is at an end.²⁹¹ This is a strong rule that, in imposing a contempt sanction, the court must consider the nature of the underlying court order to arrive at a sanction that is appropriate to cure the problem.

The courts of bankruptcy are invested 'with such jurisdiction in law and in equity as will enable them' to 'Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto. . . .' And the function to collect and reduce to money the property of the estates is also laid upon the trustee. A correlative duty is imposed upon the bankrupt fully and effectually to turn over all of his property and interests, and in case of a corporation the duty rests upon its officers, directors or stockholders.

Id. (internal citations omitted).

287. *Id.* at 65-68.

The proceeding before us sought only a coercive or enforcement sanction. The petition asked commitment 'until he shall have complied with the aforesaid turnover order.' The commitment was only until he 'shall have purged himself of such contempt by complying with said turnover order, or until the further order of this Court. Thus no punishment whatever was imposed for past disobedience, and every penalty was contingent upon failure to obey. This is a decisive characteristic of civil contempt and of the truly coercive commitment for enforcement purposes.'

Id. at 67-68.

288. *Id.* at 63. "[T]urnover orders should not be issued, or approved on appeal, merely on proof that at some past time property was in possession or control of the accused party, unless the time element and other factors make that a fair and reasonable inference." *Id.* at 65.

289. *Id.* at 72.

[A] motion to commit the bankrupt for failure to obey an order of the Court to turn over to the receiver in bankruptcy the property of the bankrupt is a civil contempt and is to be treated as a mere step in the proceedings to administer the assets of the bankrupt as provided by law, and in aid of the seizure of those assets and their proper distribution. While in a sense they are punitive, they are not mere punishment—they are administrative but coercive, and intended to compel, against the reluctance of the bankrupt, performance by him of his lawful duty.

Id.

290. *Id.* at 73. "Where [confinement] has failed and where a reasonable interval of time has made sufficiently certain what was doubtful before, namely, the bankrupt's inability to obey the order . . . he will always have the right to be released, as soon as the fact becomes clear that he can not obey." *Id.* at 72.

291. *Id.*

4. *Indigents' Right to Counsel*

Care and caution should be exercised when attempting to impose discovery contempt sanctions on a debtor who is indigent and not represented by counsel because there are particular due process issues. The Sixth Amendment to the United States Constitution holds that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.”²⁹² The Supreme Court has construed this individual right to mean that in any criminal proceeding where incarceration of an indigent person is the result, the indigent has the right to be advised that he is entitled to counsel and to have one appointed for him.²⁹³ There is no question that in criminal cases where an indigent defendant is actually sentenced to imprisonment, but the sentence is suspended, the right to appointed counsel paid for by the state is extraordinarily broad.²⁹⁴

The question is whether the right to have counsel appointed extends to civil contempt sanctions. Although the Supreme Court has yet to rule on this point, the answer is likely in the affirmative²⁹⁵ according to opinions from various United States Courts of Appeal.²⁹⁶ For example, in the case of

292. U.S. CONST. amend VI.

293. *See* *Alabama v. Shelton*, 535 U.S. 654, 657 (2002) (“The Court held that defense counsel must be appointed in any criminal prosecution, whether classified as petty, misdemeanor, or felony, that actually leads to imprisonment even for a brief period. . . . The Court drew the line at actual imprisonment, holding that counsel need not be appointed.” (citing *Argersing v. Hamlin*, 417 U.S. 25 (1972))).

294. *Id.* at 662. Even a suspended sentence conditioned on the defendant’s violation of the terms of probation requires that the State provide counsel to an indigent defendant. *Id.*

295. *See* *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 25 (1981) (“The pre-eminent generalization that emerges from this Court’s precedents on an indigent’s right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation.”).

296. Various U.S. Courts of Appeal have held that, when determining if a defendant is entitled to counsel during a contempt proceeding, the question does not hang on whether the proceeding is civil or criminal in nature but instead on whether there is a risk of incarceration which would trigger the Sixth Amendment. *See, e.g.,* *Sevier v. Turner*, 742 F.2d 262, 266-67 (6th Cir. 1984) (“[T]he relevant question in determining if a defendant is entitled to counsel during this type of contempt proceeding is not whether the proceeding be denominated civil or criminal, but rather is whether the court in fact elects to incarcerate the defendant.”); *Ridgway v. Baker*, 720 F.2d 1409, 1415 (5th Cir. 1983) (finding a Sixth Amendment right to counsel); *In re Di Bella*, 518 F.2d 955, 959 (2d Cir. 1975) (“[A]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense . . . unless he is represented by counsel . . . this right must be extended to a contempt proceeding . . . where the defendant is faced with the prospect of imprisonment.”); *Henkel v. Bradshaw*, 483 F.2d 1386, 1390 (9th Cir. 1973) (“[A] jail sentence may not be imposed upon an indigent unrepresented by counsel, absent the indigent’s knowing and intelligent waiver.”).

In addition, the federal courts have uniformly recognized the right to appointed counsel in other types of civil contempt proceedings. *See, e.g.,* *United States v. Anderson*, 553 F.2d 1154, 1156 (8th Cir. 1977) (finding contempt for refusing to comply with grand jury summons); *In re Kilgo*, 484 F.2d 1215, 1221 (4th Cir. 1973) (“There can be no doubt that Kilgo was entitled to counsel at the civil contempt hearing.”); *In re Grand Jury Proceedings: United States v. Sun Kung*

Walker v. McClain,²⁹⁷ the court analyzed “whether an indigent person facing incarceration in a civil contempt action for nonsupport is entitled to have appointed counsel.”²⁹⁸ The court ruled that a defendant has a vested legal interest in his personal freedom that activates the right to appointed counsel.²⁹⁹ The court also declared that incarceration remains the same in the eyes of the defendant because, whether incarcerated via criminal or civil procedure, the jail cell “is just as bleak.”³⁰⁰ What controls is whether the proceeding could result in a deprivation of liberty, not whether the contempt proceeding is classified as criminal or civil.³⁰¹ The oft used phrase that in civil contempt “the contemnor has the keys to the jailhouse door” is not true if he or she has no way to pay the price.³⁰²

5. *The Defendant’s Right to Trial by Jury*

The right to a jury trial is generally not available in civil contempt actions, regardless of the length of confinement, so long as the defendant can be released from confinement upon compliance with the court’s order.³⁰³ Where the contempt sanction is punitive, a right to a jury trial exists if the punishment is severe.³⁰⁴ The defendant has a right to a jury trial if the confinement ordered is in excess of six months.³⁰⁵ However,

Kang, 468 F.2d 1368, 1368 (9th Cir. 1972) (“[A]n indigent witness is entitled to appointed counsel in such a proceeding. Threat of imprisonment is the coercion that makes a civil contempt proceeding effective. The civil label does not obscure its penal nature.”).

297. 768 F.2d 1181 (10th Cir. 1985).

298. *Walker*, 768 F.2d at 1182.

299. *See id.* at 1183 (“It is the defendant’s interest in personal freedom, and not simply the special [S]ixth and [F]ourteenth [A]mendment right to counsel in criminal cases, which triggers the right to appointed counsel.”).

300. *See id.* (“It would be absurd to distinguish criminal and civil incarceration; from the perspective of the person incarcerated, the jail is just as bleak no matter which label is used.”).

301. *Id.*

302. *Id.* at 1184.

The fact that he should not have been jailed if he is truly indigent only highlights the need for counsel, for the assistance of a lawyer would have greatly aided him in establishing his indigence and ensuring that he was not improperly incarcerated. The argument that the petitioner has the keys to the jailhouse door does not apply to diminish petitioner’s liberty interest.

Id.

303. *United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 827 (1994).

For ‘serious’ criminal contempts involving imprisonment of more than six months, these protections include the right to jury trial. In contrast, civil contempt sanctions, or those penalties designed to compel future compliance with a court order, are considered to be coercive and avoidable through obedience, and thus may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard. Neither a jury trial nor proof beyond a reasonable doubt is required.

Id. at 826-27.

304. *Bloom v. Illinois*, 391 U.S. 194, 198 (1968).

305. *Cheff v. Schnackenberg*, 384 U.S. 373, 380 (1966).

where the confinement is for a determinate six months or less there is no right to a trial by jury.³⁰⁶ States often have legislative declarations which may impose somewhat different requirements.

In *Taylor v. Hayes*,³⁰⁷ the trial judge held one of the trial attorneys in contempt of court for offensive conduct during what was described as a turbulent trial.³⁰⁸ During the trial the judge informed counsel nine times that he was in contempt of court but did not pronounce sentence until the conclusion of the trial and jury verdict.³⁰⁹ During the rendition of the judge's contempt sentencing, which included several admonishments, the attorney attempted to respond to the judge's statements as to which the judge did not permit.³¹⁰ The judge sanctioned the lawyer to almost four and a half years in jail, later changing the confinement terms to six months for each of the remaining eight counts in a corrected judgment.³¹¹ On appeal, the Kentucky Court of Appeals affirmed the trial judge's ruling and further ruled that the six-month jail terms were to run concurrently, and thus the contempt sanctions issued without a jury were constitutionally proper.³¹² The United States Supreme Court upheld the ruling as constitutionally permissible stating, "our cases hold that petty contempt like other petty criminal offenses may be tried without a jury and that contempt of court is a petty offense when the penalty actually imposed does not exceed six months or a longer penalty has not been expressly authorized by statute."³¹³ However, the Supreme Court reversed the sanction because the contemnor had not been allowed to present his defense, which violated constitutional due process.³¹⁴

The message appears to be that where the purpose is to obtain compliance with a court order, and upon compliance there is immediate release from jail or payment of fines, due process does not require a right to a jury trial. On the other hand, where the primary goal is retribution, apparently societal interest in punitive contempt lies more towards the contemnor's complete removal from the general population at large. In this instance

306. See *Taylor v. Hayes*, 418 U.S. 488, 495 (1974) ("Our cases hold that petty contempt like other petty criminal offenses may be tried without a jury and that contempt of court is a petty offense when the penalty actually imposed does not exceed six months or a longer penalty has not been expressly authorized by statute.").

307. 418 U.S. 488 (1974).

308. *Taylor*, 418 U.S. at 490.

309. *Id.*

310. *Id.* at 490-91.

311. *Id.* at 492-93.

312. *Id.* at 494-95.

313. *Id.* at 495.

314. *Id.* at 496-97, 500.

there is no major effort in altering the contemnor's behavior so as to obey court orders.

6. *Fifth Amendment Rights Limit Contempt*

The Fifth Amendment to the United States Constitution states, in pertinent part, that “[n]o person shall . . . be compelled in any criminal case to be a witness against himself.”³¹⁵ The Supreme Court has held that the Fifth Amendment's protection applies when the accused is compelled to make a testimonial communication that is incriminating.³¹⁶ Particularly in bankruptcy cases, as in other litigation, there is often a need and a right for public access to the debtor's books and records which may contain incriminating evidence. The information is often in the exclusive possession of the debtor who may not want to produce the books and records because disclosures contained in those items could raise possible criminal liability.

The Supreme Court addressed the issue of the availability of the Fifth Amendment to a debtor in bankruptcy, when the debtor was ordered by a federal district court to deliver the books of account to a receiver for use in administration of the bankruptcy, in *In re Harris*.³¹⁷ The bankrupt (debtor) had previously made a written statement of his assets and liabilities and was now refusing to testify concerning the statement as he felt that it would incriminate him.³¹⁸ He additionally raised the Fifth Amendment privilege as to producing the books and records because these contained evidence that might tend to incriminate him.³¹⁹ Supreme Court Justice Oliver Wendell Holmes wrote the opinion for the Court:

[N]o constitutional rights are touched. The question is not of testimony but of surrender—not of compelling the bankrupt to be a witness against himself in a criminal case, present or future, but of compelling him to yield possession of property that he no longer is entitled to keep.³²⁰

However, the Supreme Court in *United States v. Hubbell*³²¹ appears to have introduced some refinement to its rule of whether a compelled act of producing something can be incriminating.³²² The Court ruled that where

315. U.S. CONST. amend. V.

316. *Baltimore City Dep't of Soc. Servs. v. Bouknight*, 493 U.S. 549, 554 (1990).

317. 221 U.S. 274, 278-79 (1911).

318. *In re Harris*, 221 U.S. at 278-79.

319. *Id.*

320. *Id.* at 279.

321. 530 U.S. 27 (2000).

322. *Hubbell*, 530 U.S. at 36-37.

the mere act of production may have a testimonial aspect with respect to the existence and location of the documents, a person cannot be compelled to produce these documents without first receiving a grant of immunity.³²³

7. *Statutes of Limitation*

Another pitfall for the unwary is that there might be a time limitation in which to bring a contempt action. The Supreme Court has declared that “[t]he power to punish for contempt must have some limit in time, and in defining that limit we should have regard to what has been the policy of the law from the foundation of the government. By analogy if not by enactment the limit is three years.”³²⁴ Nonetheless, there appears to be no federal statute of limitation applicable to civil or coercive contempt.³²⁵

There are numerous federal statutes of limitation with respect to criminal contempt, requiring research into the relevant federal criminal statutes from which criminal liability is expressly defined by Congress. However, since bankruptcy judges lack authority to enforce criminal contempt, this area of the law does not apply to them, although it is very relevant to Article III judges in instances where they preside.³²⁶ To date, all United States Circuit Courts of Appeal that have ruled on this issue have held that

On the other hand, we have also made it clear that the act of producing documents in response to a subpoena may have a compelled testimonial aspect. We have held that ‘the act of production’ itself may implicitly communicate ‘statements of fact.’ By ‘producing documents in compliance with a subpoena, the witness would admit that the papers existed, were in his possession or control, and were authentic.’ Moreover, as was true in this case, when the custodian of documents responds to a subpoena, he may be compelled to take the witness stand and answer questions designed to determine whether he has produced everything demanded by the subpoena. The answers to those questions, as well as the act of production itself, may certainly communicate information about the existence, custody, and authenticity of the documents.

Id. (internal citations omitted).

323. *Id.* at 45. “The act of production itself may certainly communicate information about the existence, custody and authenticity of the documents.” *Id.* at 37. “The compelled testimony relevant here is not to be found in the contents of the documents produced, but is the testimony inherent in the act of producing those documents.” *Id.* at 40.

324. *Gompers v. United States*, 233 U.S. 604, 612 (1914).

325. *See Reich v. Sea Sprite Boat Co.*, 50 F.3d 413, 417 (7th Cir. 1995) (“Yet no statute of limitations applies to civil contempt proceedings, which means that the Secretary may commence an action at any time.”); *see also Adcor Indus. v. Bevcorp, LLC*, 411 F. Supp. 2d 778, 799 (D. Ohio 2005) (“It is noteworthy that criminal contempt has a one-year statute of limitations whereas there is no statute of limitations for civil contempt.”).

326. In 1984, two judges from the United States Circuit Court of Appeals for the Fifth Circuit presided over bankruptcy matters as trial judges, in order to assist bankruptcy judges with an overwhelming number of cases.

bankruptcy judges do have jurisdiction to conduct and enforce civil contempt actions.³²⁷

8. *Notice and Proper Service*

Counsel and judges must be very careful to avoid violating the rules and case law concerning notices that have been strictly construed by appellate courts.³²⁸ The value in issuance of proper notice for contempt proceedings can be demonstrated in the bankruptcy case of *In the Matter of Teknek, LLC, Debtor*.³²⁹ In *Teknek*, an officer and principal equity owner of the debtor in bankruptcy was held in contempt for failure to make disclosures by the United States Bankruptcy Court, but later vacated by the United States Court of Appeals for the Seventh Circuit for lack of proper notice. The defect cited by the court of appeals was the failure to affect proper service and notice on Sheila Hamilton, the debtor's principal investor and officer.³³⁰ However, Hamilton was served with process at her residence in Scotland one day before the contempt hearing, although a copy of the summons had been mailed to her attorney in Chicago where the hearing was scheduled.³³¹ The bankruptcy judge conducted the hearing as scheduled and ruled that Hamilton was in contempt and sanctioned her with a \$1000 fine for every day that she failed to supply the key to the code.³³² On appeal, the district court held that since Hamilton had not raised lack of service at the hearing before the bankruptcy judge, she voluntarily had submitted to the court's jurisdiction.³³³ The United States Court of Appeals for the Seventh Circuit reversed, holding that the requirements of

327. See discussion *supra* note 237 (showing that seven United States Courts of Appeal have ruled to uphold federal bankruptcy court civil contempt jurisdiction).

328. *In re Lazy Acres Farm*, 1997 U.S. App. LEXIS 71, at *2 (6th Cir. 1997).

We do not agree with the District Court that the failure of the bankruptcy court to comply with Rule 9020(b) requiring a notice in writing stating 'the essential facts constituting the contempt charged' and describing 'the contempt as criminal or civil' was harmless error. . . . In . . . light of the clear language of the bankruptcy rule on contempt, the bankruptcy court should have given Parsons the notice required under the rule. . . . Such rules are written to be complied with, not ignored either by parties or by courts.

Id.

329. No. 071498, 2007 U.S. App. LEXIS 29856 (N.D. Ill. Dec. 28, 2007).

330. *Teknek*, 2007 U.S. App. LEXIS 29856, at *4-5.

331. *Id.* at *6.

332. *Id.* at *2.

333. *Id.* at *6.

Bankruptcy Rule 9014(b) had not been followed because Rule 7004 requires personal service.³³⁴

What appears to have bothered the judges at the various levels was that the debtor's two insiders transferred large sums of money to themselves and charged large business expenses, leaving the debtor company with \$73.22 in assets and \$3,788,609.57 in liabilities.³³⁵ This picture does not appear in the court's opinion, which only dealt with the contempt proceeding, but is reported in a separate lawsuit, *Fisher v. Hamilton*.³³⁶ The court's opinion emphasizes that fraudulent conveyance issues were evident with respect to the bankruptcy case and suggests that the United States Attorney pursue criminal contempt.³³⁷ Nevertheless, since there was a defect in effecting service on Hamilton the ruling on contempt by the lower courts had to be vacated and remanded.³³⁸ The lesson is that all of the steps required under the rules of procedure must be followed or there will be a failure of due process.³³⁹

IV. MISCELLANEOUS BANKRUPTCY DISCLOSURE SANCTIONS

Courts are empowered with wide latitude in structuring specific sanctions for discovery abuse or failure to make disclosure and are not constrained to use only existing discovery sanctioning statutes and rules.³⁴⁰

334. *Id.* Hamilton lived in Scotland and instead of serving her there, the required documents were mailed to her attorney in Chicago, which does not satisfy the requirement of personal service on a putative litigant. *Id.* at *6, 8.

335. *In re Teknek*, 343 B.R. 850, 858 (Bankr. D. Ill. 2006).

For the fiscal year of 2003 and prior to paying Kennett and Hamilton the \$722,967, the debtor began taking business-expense deductions from income for 'intercompany services fees' paid to an overseas Teknek company in the amount of \$400,000, though certain corresponding financial statements did not show the same intercompany payments. Then . . . Kennett and Hamilton anticipated and justified the facial 'reorganization' by concluding that the debtor Teknek LLC was suffering from the post-September 11 recession and that it needed the name 'America' in the company title. For the fiscal year . . . however, the debtor grossed around \$4,219,817 in sales, leaving over \$457,829 in net income. Income tax documents reveal that prior to 'going out of business,' Kennett and Hamilton transferred to themselves more than the net-income amount in nonpayroll, LLC-member distributions and returns of capital.

Id. at 859-60.

336. *Id.*

337. *Id.* at 870-71.

338. *Id.* at 881-82.

339. *See Taylor v. Hayes*, 418 U.S. 488, 498 (1974) ("We have stated time and again that reasonable notice of a charge and an opportunity to be heard in defense before punishment is imposed are basic in our system of jurisprudence.").

340. *See, e.g., Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991) (suggesting that courts may rely on its inherent power to impose sanctions).

There is, therefore, nothing in the other sanctioning mechanisms or prior cases interpreting them that warrants a conclusion that a federal court may not, as a matter of law, resort to its inherent power to impose attorney's fees as a sanction for bad-faith

In addition to Rule 7037, other rules such as Rule 9011, Rule 7041, Rule 7056, 28 U.S.C. § 1927, and the inherent power of the court are very pragmatic. However, courts are not authorized to *carte blanche* impose whatever suits them on a particular day. As an example, Rule 9011 is expressly limited to “what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated.”³⁴¹ It is also clear that courts are armed with the authority to impose non-monetary sanctions such as strike pleadings, public or private reprimand, and payment of a penalty into the court which is not affected by a bankruptcy discharge.³⁴² On the other hand, wherever a rule provides that a court may order payment to the moving party of “some or all of the reasonable attorneys’ fees and other expenses incurred as a direct result of the violation,”³⁴³ the discharge provisions of the bankruptcy code may neutralize the rule.

A. SPECIAL BANKRUPTCY EXAMINATION RULES

The Bankruptcy Code and the Federal Rules of Bankruptcy Procedure contain several provisions beyond the normal discovery rules such as Rules 2004 and 2005 for extracting disclosures not only from the debtor but also from other persons, as this term is defined by the Code.³⁴⁴ For enforcement, the subpoena power is available pursuant to Bankruptcy Rule 9016, which in turn adopts Federal Rule of Civil Procedure 45 to compel attendance and production of documents, and noncompliance is punishable by contempt.³⁴⁵ If necessary, the court can order the United States Marshall or other officer of the law to bring an entity to be examined before the court.³⁴⁶

These bankruptcy examinations are permitted even where there is no litigation or when none is contemplated. A debtor has a fundamental statutory obligation to submit to an examination by any creditor, trustee, examiner or the United States Trustee under oath at the meeting of creditors

conduct. . . . But if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power.

Id.

341. FED. R. BANKR. P. 9011(c)(2).

342. *See* 11 U.S.C. § 523(a)(7) (2004) (“A discharge under this title does not discharge an individual from any debt—(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss.”).

343. FED. R. BANKR. P. 9011(c)(2).

344. *See* 11 U.S.C. § 101(41) (2004) (“[P]erson’ includes individual, partnership, and corporation.”).

345. FED. R. CIV. P. 45(e).

346. FED. R. BANKR. P. 2005(a)-(b).

pursuant to bankruptcy law.³⁴⁷ Additionally, Bankruptcy Rule 4002 obligates a debtor to submit to any examination ordered by the court.³⁴⁸ However, examination in bankruptcy is not restricted to a debtor.³⁴⁹ Under Bankruptcy Rule 2004 *any* party having an interest in a debtor's bankruptcy may request that the court order an examination of *any* entity.³⁵⁰ The scope of what may be examined is very broad, so long as it relates solely to "the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge."³⁵¹ Additionally, where the debtor is attempting to reorganize under Chapters 11, 12, or 13 instead of liquidating pursuant to Chapter 7, the examination can cover anything related to:

[the] operation of any business and the desirability of its continuance, the source of any money or property acquired or to be acquired by the debtor for purposes of consummating a plan and the consideration given or offered, and any other matter relevant to the case or to the formulation of a plan.³⁵²

Notice may be made that these special bankruptcy disclosure or examination provisions have tailor-made sanctions more suited for bankruptcy processes. First, there are no monetary fines or assessment of fees against a debtor for noncompliance with examination orders, thus avoiding possible ineffective civil procedure fee shifting sanctions.³⁵³ Second, failure to cooperate for examination under the bankruptcy rules can result in law enforcement officials taking physical custody of a debtor who is not cooperating with disclosures.³⁵⁴ Bankruptcy Rule 2005 provides:

[T]he court may issue to the marshal, or some other officer authorized by law, an order directing the officer to bring the debtor before the court without unnecessary delay.³⁵⁵ If, after hearing, the court finds the allegations to be true, the court shall thereupon cause the debtor to be examined forthwith.³⁵⁶ If necessary, the

347. 11 U.S.C. § 343 (2004).

348. FED. R. BANKR. P. 4002(1).

349. *Id.* 2004.

350. *Id.*

351. *Id.* 2004(b).

352. *Id.*

353. *Id.*

354. *Id.* 2005(a)-(b).

355. *Id.*

356. *Id.*

court shall fix conditions for further examination and for the debtor's obedience to all orders made in reference thereto.³⁵⁷

The result is logical, for coercion is made upon the physical mind and body rather than in the pocketbook of a debtor who admittedly lacks sufficient funds to pay creditors.

B. DISCLOSURE SANCTIONS PURSUANT TO BANKRUPTCY RULES 9011 AND 7026(G)

Bankruptcy Rule 9011 applies to all aspects of a bankruptcy case except discovery.³⁵⁸ However, it has been used to sanction parties and attorneys who present signed papers to a court that are not truthful.³⁵⁹ The rule requires that a party not represented by an attorney or an attorney who represents a client sign as certification any paper presented to a court.³⁶⁰ The excluded provisions of Rule 9011 are replicated in discovery Rule 7026(g), made applicable in adversary proceedings³⁶¹ and to contested motions.³⁶² Therefore, obligations of signing papers to be presented to a court with respect to disclosures, discovery, request, responses, and objections are alive and well in bankruptcy discovery Rule 7026.³⁶³ There scarcely are reported cases concerning Rule 7026, and courts and counsel may have to rely on Rule 26(g) rationale for imposition of discovery sanctions. The main thrust of Bankruptcy Rule 9011 is much broader than discovery, for it provides disciplinary action against attorneys and parties without legal counsel who violate the rule's mandate of truthfulness and candor not only in litigation, but in any written paper presented to a court. Bankruptcy Rule 9011 is therefore very significant in bankruptcy cases.

The rule seeks to ensure honesty by requiring a signature certifying that in essence there is good ground to support the signed document.³⁶⁴ Also, an attorney must engage in reasonable investigation to determine the probability of any proposition that he or she proposes to allege in a pleading.³⁶⁵

357. *Id.*

358. *See id.* 9011(d) ("Inapplicability to discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 7026 through 7037.").

359. *Id.* 9011(b). The rule sets out the requisites of a truthful petition, pleading, written motion or other paper and that the attorney, by signing, is certifying that its contents falls within these requisites. *Id.*

360. *Id.* 9011(a).

361. *Id.* 7026.

362. *Id.* 9014.

363. *Id.* 7026.

364. D. Micheal Risinger, *Honesty in Pleadings and Its Enforcement: Some "Striking" Problems With Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 5-8 (1976).

365. *Id.*

In essence, attorneys have a responsibility before subscribing their names to written pleadings to ascertain that a reasonable basis exists for the allegations.³⁶⁶ Few cases are reported concerning Bankruptcy Rule 9011. Nevertheless, two cases bear discussion because of the importance of emphasizing the pursuit of honesty and candor, which are extremely vital to the functioning of bankruptcy law. Both cases deal with serious concerns regarding the lack of candor, honesty and cooperation in representations within a bankruptcy case.

The first regards a somewhat unusual sanction involving Federal Rules of Bankruptcy Procedure 9011 reported from the United States Court of Appeals for the Fifth Circuit, affirming sanctions imposed on a bankruptcy attorney.³⁶⁷ The behavior had nothing to do with discovery, but did deal with disclosures. The case is presented here to show the importance of honesty and candor, as well as to show how far-reaching Rule 9011 is in bankruptcy practice. The bankruptcy judge sanctioned the debtors' counsel by ordering him to employ a law professor who taught legal ethics and to receive not less than ten hours of personal instruction on the subject of an attorney's obligation of candor and honesty.³⁶⁸ The bankruptcy attorney was experienced in bankruptcy matters, having filed over 5000 bankruptcy cases.³⁶⁹ The dispute arose out of a Chapter 13 bankruptcy petition prepared and filed by the debtors' bankruptcy attorney.³⁷⁰ He also prepared the required list of creditors and listed the Internal Revenue Service (IRS) as having a \$0.00 claim, although the bankruptcy attorney knew that the IRS had previously issued the debtors a \$32,520.80 Statutory Notice of Deficiency.³⁷¹ After the bankruptcy filing, the debtors through their bankruptcy attorney prepared and filed sworn bankruptcy schedules listing the IRS with a \$20,000 claim, but continuously failed to disclose that the IRS prior to the bankruptcy filing issued a \$32,520.80 deficiency notice.³⁷² Almost two months later, bankruptcy counsel filed an amended bankruptcy schedule reducing the IRS claim from \$20,000 to \$5000 without any basis in fact or law and further filed an amended Chapter 13 plan summary which

366. See *Miller v. Schweickart*, 413 F. Supp. 1059, 1061 (S.D.N.Y. 1976) ("Lawyers have a responsibility before subscribing their names to complaints which contain serious charges to ascertain that a reasonable basis exists for the allegations, even if they are made upon information and belief. That is one of the purposes of Rule 11 of the Federal Rules of Civil Procedure.").

367. *In re Thomas*, 223 F. App'x. 310, 311 (5th Cir. 2007).

368. *In re Thomas*, 337 B.R. 879, 895 (Bankr. S.D. Tex. 2007).

369. *Id.* at 886.

370. *Id.* at 881.

371. *Id.* at 881, 883.

372. *Id.*

proposed to pay \$5000 to the IRS.³⁷³ The Chapter 13 plan was confirmed by the bankruptcy court.³⁷⁴ Two months later, the debtors' counsel signed and filed a \$5000 proof of claim on behalf of the IRS.³⁷⁵ After confirmation of the Chapter 13 plan, the IRS filed a \$32,247.67 proof of claim as to which the debtors filed an objection.³⁷⁶ An uncontested motion for summary judgment filed by the IRS resulted in an agreed order establishing a \$34,822.78 claim.³⁷⁷

Based on all of the above, the bankruptcy court scheduled and noticed a hearing to consider imposing sanctions on the debtors and their attorney.³⁷⁸ At the hearing, counsel and the debtors declined to present any evidence, and counsel further expressly refused to acknowledge any duty of candor to the court, recognizing only an obligation to his client of aggressive representation.³⁷⁹ Concluding that the bankruptcy counsel had prepared, signed, and filed false documents with the court, the court sanctioned the attorney by the above stated order to receive lessons on legal ethics pursuant to Federal Rules of Bankruptcy Procedure 9011(c)'s provision that "sanctions . . . 'shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated.'"³⁸⁰ The district court affirmed, and on appeal to the United States Court of Appeals for the Fifth Circuit the sanctions were likewise affirmed, expressly ruling that "[b]ankruptcy courts are courts of equity and rely on the good faith of parties to function efficiently."³⁸¹

A separate case reported from the United States Court of Appeals for the Fourth Circuit reversed a monetary sanction issued by a bankruptcy

373. *Id.* at 884.

374. *Id.*

375. *Id.*

Counsel intentionally omitted from the proof of claim any details about the tax liability. . . . The purpose of omitting these details was to try to prevent the IRS from 'amending' the proof of claim to show the amount that the IRS had actually claimed in its Statutory Notice of Deficiency. When the proof of claim was filed, the Debtors and Counsel were aware of the Statutory Notice of Deficiency.

Id.

376. *Id.* at 885.

377. *Id.*

378. *Id.*

379. *Id.* at 886. "Counsel argues that he filed the false statements of the IRS claim as a litigation strategy. He contends that if the IRS did not timely respond, it is bound by plan confirmation." *Id.* at 891.

380. *Id.* at 895.

381. *See In re Thomas*, 223 F. App'x. 310, 315 (5th Cir. 2007) ("Although these sanctions are strong, they are not an abuse of discretion. . . . Barry signed documents containing intentional misrepresentations in an attempt to abuse the bankruptcy process by discharging debts his client could not challenge in good faith. Strong sanctions are necessary to deter this type of behavior.").

court against a bankruptcy attorney pursuant to Rule 9011.³⁸² Here, the issue revolved around disclosure, not regarding discovery but rather in the debtor's bankruptcy statements and schedules. At the first meeting of creditors,³⁸³ the Chapter 7 trustee asked the debtor whether any further amendments needed to be made and the debtor responded in the negative.³⁸⁴ The trustee then followed with a question to the debtor about a teacher's pension annuity listed on the debtor's schedules.³⁸⁵ The debtor verbally explained that it was an inheritance and the debtor's bankruptcy attorney then interjected that the schedules may have to be amended to reflect information about the source of the pension annuity just verbally disclosed by the debtor.³⁸⁶ Under the belief that the debtor had not been completely honest by intentionally mischaracterizing the annuity, the trustee abruptly terminated the creditors' meeting and moved to have the bankruptcy court sanction the debtor's attorney pursuant to Rule 9011.³⁸⁷ The bankruptcy judge sanctioned the debtor's counsel by ordering payment of \$500 in attorney's fees to the trustee and payment of \$2500 as penalty to the court.³⁸⁸ However, the United States Court of Appeals for the Fourth Circuit reversed the lower court on two grounds. The court's first holding was that the standard of review for Rule 9011 was the same for Federal Rule of Civil Procedure 11.³⁸⁹ The second holding further recognized that a bankruptcy court has the power to sanction beyond Rule 9011, such as Federal Rules Bankruptcy Procedure 7037, and also under the court's inherent power.³⁹⁰ It declared that the "attorney's conduct must be evaluated according to an objective standard of reasonableness."³⁹¹ Applying these standards, the appellate court ruled that while false and deceptive schedules and statements would not be tolerated and are subject to sanctions,³⁹² there had been no falsehood or deception because the debtor

382. *In re Hardee*, No. 96-1968, 1998 U.S. App. LEXIS 26859, at *15 (4th Cir. Apr. 10, 1998).

383. See 11 U.S.C. § 341(a) (2004) (requiring the convening of a meeting of creditors shortly after the filing of a bankruptcy case, and absolutely requiring the debtor to appear at that meeting for examination under oath by any creditor and the bankruptcy trustee).

384. *Hardee*, 1998 U.S. App. LEXIS 26859, at *3.

385. *Id.*

386. *Id.*

387. *Id.* at *3-5.

388. *Id.* at *5.

389. *Id.* When reviewing an award of sanctions under Rule 9011, the court may follow the corresponding provision under Federal Rule of Civil Procedure 11. *Id.*

390. *Id.* "Bankruptcy courts also possess the inherent power to regulate litigants' behavior and to sanction wrongdoing by litigants. This inherent power may be used in combination with, or instead of, the bankruptcy courts' other powers to sanction." *Id.* at *10.

391. *Id.* at *14.

392. *Id.* at *13.

had accurately disclosed the pension on her schedules and statement.³⁹³ The court recognized that although the trustee may have been under pressure to process cases, “he could have taken a couple of minutes to inquire into the source of an asset rather than close the creditors’ meeting and move for sanctions.”³⁹⁴ The bankruptcy trustee, bankruptcy court, and appellate court were concerned about the debtor’s honesty and candor.

Sometimes sanctions for abuse of discovery have been denied under Rule 7037, but have been granted pursuant to Bankruptcy Rule 9011. In *In re Alderson*,³⁹⁵ the court held that the debtor had “permeated fraud” in his Chapter 12 bankruptcy to cause conversion to Chapter 7.³⁹⁶ In addition, the court held that the debtor’s bookkeeping methods had “made it possible for the debtor to conceal his true financial condition and hamper his attorney’s ability to verify the accuracy of the information provided by the debtor.”³⁹⁷ The court took notice of the debtor’s history of deception.³⁹⁸ The bankruptcy court concluded that the debtor’s bankruptcy attorney was not responsible for his client’s lack of candor with respect to his bankruptcy, and therefore the attorney was not sanctioned under Rule 9011.³⁹⁹ However, the debtor was sanctioned per Rule 7037 because he failed to obey a court order to provide or permit discovery.⁴⁰⁰ On the other hand, the opposite result may occur where discovery sanctions are granted pursuant to Rule 11 but are denied under Rule 37, as was the case in *Payne v. Howard*,⁴⁰¹ a dental malpractice suit.

C. STRIKING PLEADINGS, DISMISSAL, AND SUMMARY JUDGMENT

In cases where neither fee shifting nor contempt is an effective discovery sanction, other remedies are available. These include the issuance of further orders that are just,⁴⁰² designating facts be taken as established,⁴⁰³ and prohibiting the disobedient party from supporting or opposing

393. *Id.*

394. *Id.* at *14.

395. 114 B.R. 672 (S.D. 1990).

396. *Alderson*, 114 B.R. at 675.

397. *Id.* at 677.

398. *Id.*

399. *Id.*

400. *Id.* at 678. The debtor’s lack of cooperation in disclosing the nature and financial condition was evidenced by his intentional omissions, evasive responses, and fraudulent misrepresentations. *Id.*

401. *See* 75 F.R.D. 465 (D. D.C. 1977) (explaining that where none of the litigants persuade a court for sanctions pursuant to Federal Rule of Civil Procedure 37, the court nevertheless on its own can strike pleadings as a discovery sanction under Federal Rule of Civil Procedure 11).

402. FED. R. CIV. P. 37(b)(2)(A).

403. *Id.* 37(b)(2)(A)(i).

designated claims of defenses or from introducing designated matters in evidence.⁴⁰⁴ Others include striking pleadings in whole or in part,⁴⁰⁵ staying further proceedings until the order is obeyed,⁴⁰⁶ dismissing the action or proceeding in whole or in part,⁴⁰⁷ and rendering a default judgment against the disobedient party.⁴⁰⁸ Care must be taken, as legal defenses are available to these sanctions as in dismissal.⁴⁰⁹ Any sanction that imposes a financial liability other than a fine upon a debtor in bankruptcy could be discharged or paid from the assets of innocent creditors.⁴¹⁰

Bankruptcy summary judgment Rule 7056 has been used to sanction dilatory or abusive discovery conduct sometimes in conjunction with preclusion of other evidence.⁴¹¹ Rule 7056 is a drastic sanction summarily granting a judgment prior to trial when there is no genuine issue as to any material fact.⁴¹² The court is simply to determine whether there are issues to be tried and is not to resolve any disputed issues of fact.⁴¹³ The underlying purpose of the summary judgment procedure is to pierce the pleading so that the burden and expense of a trial will not be wasted on baseless claims or phantom issues.⁴¹⁴ Rule 56(f), made applicable to bankruptcy adversaries, provides that a party resisting a motion for summary judgment obtain from the court a continuance or denial of the motion if it

404. *Id.* 37(b)(2)(A)(ii).

405. *Id.* 37(b)(2)(A)(iii).

406. *Id.* 37(b)(2)(A)(iv).

407. *Id.* 37(b)(2)(A)(v).

408. *Id.* 37(b)(2)(A)(vi).

409. *See Societe Internationale v. Rogers*, 357 U.S. 197, 212 (1958) (reversing the dismissal of plaintiff's lawsuit because "Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production 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").

410. 11 U.S.C. §§ 502, 523, 541, 726, 727, 1141, 1328 (2004).

411. *See In re Klem*, 362 B.R. 585, 593-94 (Bankr. W.D.N.Y. 2007) (precluding the debtor from introducing at trial any evidence that he should have and could have submitted to the plaintiff's discovery demands). Because the debtor failed to produce the necessary evidence during pre-trial discovery, his testimony by itself was not sufficient in shifting the burden to the plaintiff. *Id.* at 594. Therefore, summary judgment in favor of the plaintiff was granted. *Id.* at 596. Ironically, if the debtor had complied with the discovery he would have prevailed. *Id.* at 595-96.

412. *See Midway Airlines, Inc. v. Tollman-Hundley No. 91B06449*, 1995 Bankr. LEXIS 1007 (N.D. Ill. Jul. 11, 1995) ("Tollman's failure to answer the Trustee's requests for admission warrants the imposition of summary judgment in this matter as there are no disputed issues of material fact, and the Trustee is entitled to judgment as a matter of law.").

413. *See Donovan v. Carl's Drug Co.*, 703 F.2d 650, 651 (2d Cir. 1983) (holding that failure to respond to a request for Admission of Fact under the Federal Rule of Civil Procedure 36 is an admission and calls for a Rule 56 summary judgment).

414. WRIGHT & MILLER, *supra* note 25, § 2739.

appears from the affidavit that he or she cannot, for reasons stated, present facts essential to justify opposition and needs time to take depositions or obtain discovery.⁴¹⁵ Rule 56(g) gives the court power to punish by contempt or to order fee shifting of reasonable expenses, including attorney's fees, if it finds that affidavits are presented in bad faith or solely for the purpose of delay.⁴¹⁶ Although there is no impediment to the use of contempt in bankruptcy, the fee shifting sanction possibly could be rendered ineffective.

V. CLOSING THE "TRAP DOORS": ARGUMENT FOR CHANGING EXISTING LAW

In this country, Congress creates federal statutory laws and the judges interpret them.⁴¹⁷ Therefore, judicial interpretation of statutes is incredibly and profoundly powerful to defining law in our society. Oliver Wendell Holmes, Jr. best stated this fact of life:

[T]hat the march of the common law is like the march of evolution—not guided by any external goals, (i.e. 'natural law') but rather shaped by the interaction of individual judges' proximate decisions and the ultimate judgment of precedent. Judges push the boundaries of the law just enough to accommodate what their experience tells them should be an acceptable result in a single case. Rules that work (that is, rules that are accepted over time) survive as precedent. Rules that do not work, die.⁴¹⁸

In bankruptcy, some current rules relating to discovery, disclosure obligation, examinations, and enforcement should at least be modified to require a focus on the substance of the claim for productive and effective results. There are effective alternatives to the traditional, archaic approaches.⁴¹⁹ This is particularly necessary in bankruptcy to quash sanctions, which could be satisfied from creditors' assets, before they transfer monetary duty onto a party with no financial resources.

Courts have been active in formulating common law with respect to disclosure and should continue in order to remain effective with respect to

415. FED. R. CIV. P. 56(f).

416. *Id.* 56(g).

417. *See* *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.").

418. Morris B. Hoffman, *The Neuroeconomic Path of the Law*, 359 PHIL. TRANSACTIONS OF THE ROYAL SOC'Y OF LONDON B 1667, 1667 (2004).

419. *See* GOLDFARB, *supra* note 188, at 294-95 (stating that there are efficient alternatives to the use of brute force contempt power that would not conflict with the Constitution).

bankruptcy disclosure. The Supreme Court authorizes wide discretion to federal trial courts to proceed in any manner that they consider most effective with respect to discovery sanctions.⁴²⁰ Therefore, existing law can and should be changed to require that special and concentrated serious efforts be expended in determining why a party cannot or is not willing to comply with disclosure obligations under bankruptcy law prior to adverse sanctioning.⁴²¹ The efforts expended should be well documented, made part of the record, and if necessary be sealed by the court. Through development of common law it should be made an abuse of discretion for a judge not to consider the circumstances reflected in a pre-contempt study. The basis is that all roads point to the human brain, particularly of the debtor, for it is well accepted that all human volitional behavior and all activity is a product of the organization and functioning of the brain. These determine how we enact and obey laws.⁴²² The effort itself should provide ample direction to an appropriate sanction that is effective in producing the desired result.⁴²³ On the other hand, serious and documented analyses may disclose that no amount of incarceration will be of benefit other than a sense that what the debtor did was wrong and should be punished. Such serious pre-contempt studies could indicate that incarceration would achieve compliance, such as where social exclusion may induce sufficient behavior-altering pain.⁴²⁴

A debtor who voluntarily submits to bankruptcy is obviously willing to surrender property rights in exchange for release of existing debt in spite of a natural innate predisposition to hold on to property.⁴²⁵ Discharge of personal liabilities is a very strong attraction to an individual who is willing

420. *Societe Internationale v. Rogers*, 357 U.S. 197, 213 (1958).

421. *Zeki & Goodenough*, *supra* note 239, at 1661-62.

[O]f the practical ones, the simplest example is the use of modern technology as an improvement and eventual replacement of older, unreliable and controversial techniques. It is quite possible that, in the very near future brain-imaging techniques will replace finger printing and lie detector tests as reliable indices of identity and of the truthfulness of a witness's statement . . . that will probably provoke changes in the law.

Id.

422. *Id.*

423. *See id.* ("The more we probe into the brain, and especially the emotional brain and the reasoning brain, the more we are likely to be confronted with mitigating neurological reasons with reason for weighing carefully the type and degree of punishment.").

424. *See Chorvat & McCabe*, *supra* note 162, at 1732 ("Some evolutionary psychologists argue that social rejection might be encoded in our brain as pain. . . . If these models are correct then, social exclusion can be a significant enforcement mechanism.").

425. *See Jeffrey Evans Stake, The Property 'Instinct,'* 359 PHIL. TRANSACTIONS OF THE ROYAL SOC'Y OF LONDON B 1763, 1763 (2004) ("Evolutionary theory and empirical studies suggest that many. . . humans, have a genetic pre-disposition to acquire and retain property. . . . Fundamental principles of property are encoded in the human brain.").

to part with property rights.⁴²⁶ Therefore, in considering sanctions against a debtor in bankruptcy it would seem sensible to consider interfering with the discharge of a particular creditor's claim. Furthermore, it is sensible to consider discharge either under a rationale of compensation or retribution, because a discharge is most likely what a debtor in bankruptcy is not willing to surrender, and instead would choose cooperation. As it is under current rule, imposition of monetary coercive sanctions on a debtor may be of no incentive where there would be no impact on the debtor's discharge, or if allowed will ultimately be paid from the pool of assets to be distributed to creditors, unless ordered as a fine payable to a governmental unit.⁴²⁷ Bankruptcy statutes dealing with exceptions to discharge should be modified to include, where appropriate, fee shifting sanctions.⁴²⁸

With respect to the classification of bankruptcy judges conducting criminal contempt actions as petty,⁴²⁹ a recommendation is made that all appellate courts adopt a similar procedure used by the United States Court of Appeals for the Eighth Circuit,⁴³⁰ where the bankruptcy court conducts the contempt evidentiary hearing. If at the conclusion the court finds the party in criminal contempt, it will enter the following order:

This order of contempt shall become effective as a final order ten days after service of the order on defendant unless, within the ten-day period, defendant serves and files with the bankruptcy clerk an objection to this order of contempt as provided by Federal Rule of Bankruptcy Procedure 9033(b). If an objection is filed this Order shall be subject to review by the United States District Court pursuant to Federal Rule of Bankruptcy Procedure 9003.⁴³¹

Should the defendant timely file objections, the district court can review the bankruptcy judge's proposed findings along with the defendant's objections and render the following decision, if applicable:

The Court has received Proposed Findings of Fact and Conclusions of Law in a Non-Core Proceeding from the Honorable [United States Bankruptcy Judge]. Having carefully reviewed the

426. See JACKSON, *supra* note 103, at 225 ("Indeed, the principal advantage bankruptcy offers a debtor that is an individual lies in the benefits associated with discharge.").

427. See STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 475 (2004) ("The assets of a party must be sufficient to pay for the harm; otherwise, the party will not generally be induced to act optimally and may engage excessively in harmful acts.").

428. 11 U.S.C. § 523 (2004).

429. See *Taylor v. Hayes*, 418 U.S. 488, 495 (1974) (stating that petty criminal contempt occurs when the jail sentence is not more than six months, and therefore the defendant may be tried without a jury).

430. *In re Ragar*, 3 F.3d 1174, 1177-78 (8th Cir. 1993).

431. *Id.* at 1177.

Proposed Findings and the Objections filed on [date certain], the Court finds that the Bankruptcy Judge's Proposed Findings should be adopted in their entirety. Accordingly, [the defendant] is found in contempt and is assessed a fine in the sum of \$[XXX].⁴³²

As reflected in the opinion, it is important to note that the bankruptcy judge is not simply entering his or her own judgment of criminal contempt effective immediately of the judgment's own force and subject to review only by appeal to the district court.⁴³³ The bankruptcy judge enters an order holding the defendant in criminal contempt, but this order has no immediate effect. It provides by its own terms that if the defendant files objections within ten days the order will be reviewed de novo by the district court under Bankruptcy Rule 9033(d). Here, the bankruptcy judge is not exercising the criminal contempt power directly, but is making proposed findings of fact and conclusions of law in a non-core proceeding. The judge's action would become final and effective only if the defendant has not filed timely objections. Thus, the bankruptcy judge acts much as a United States Magistrate Judge on a matter lawfully assigned to him or her for a report and recommendation under Section 636 of United States Code Title 28. Such action would not be contrary to Article III of the United States Constitution.

VI. CONCLUSION

Honesty, candor, full disclosure, and cooperation are the basic attributes forming the foundation of this country's bankruptcy law inherited from English bankruptcy law.⁴³⁴ The essence of bankruptcy law is that in return for discharging debt, an honest debtor turns over all of his or her non-exempt assets or future income for distribution to existing creditors. The debtor fully cooperates with his or her creditors, all of whom are in a

432. *Id.*

433. *Id.*

434. John C. McCoid II, *Discharge: The Most Important Development in Bankruptcy History*, 70 AM. BANKR. L.J. 163, 167 (1996).

The bankrupt was then obliged to submit to examination under oath and there to disclose any disposition of assets (and writings related thereto) in which the bankrupt had an interest at any time before or after issuance of the commission. Lastly, the bankrupt was required to turn over assets (and writings related thereto), necessary wearing apparel excepted, in the bankrupt's possession at the time of the examination. In effect, what was demanded was total cooperation with the commissioners. The statute did more than confer benefits on a debtor who complied with its terms, however. It also contained a sanction for noncompliance. For a failure to meet the statutory requirements, the bankrupt was to 'suffer as a felon, without benefit of clergy,' language at that time used to prescribe the death penalty.

Id.

compulsory debt collection procedure under federal law. Of course, there must be absolute and full disclosure of all information concerning the financial picture of the debtor. Discharge of debt and debt collection are not logically related, as each may exist independently of the other.⁴³⁵ In this country, however, debt and debt collection are connected so that a debtor is enticed to submit to federal bankruptcy law by discharging his debt, provided that he or she fully cooperates and is candid with all parties who have or could have an interest in the debtor's assets or in anything of value that the debtor might have a legal or equitable interest. Creditors therefore have a right to any and all information about the debtor including discovery of all information about his or her financial picture. The United States Supreme Court, by virtue of congressional enactments, has provided legally enforceable rules that allow creditors and other parties in interest to discover relevant information about and from the debtor.

While civil litigation or criminal proceedings disallow—with certain exceptions—enforced or permitted discovery unless and until there is actual court litigation initiated or in progress,⁴³⁶ this is not so in bankruptcy. Parties who have an interest in the debtor or the bankruptcy estate assets are entitled to know everything about the debtor's finances, both past and future, regardless of whether there is a dispute or litigation. Full disclosure requires honesty; not hiding or concealing facts, and requires complete candor with the public, all parties that have an interest in the bankruptcy, and especially the court. All of the promulgated Federal Rules of Bankruptcy Procedure with respect to discovery simply adopt the Federal Rules of Civil Procedure wherever parties resort to the government for resolution of their disputed issues.

Great caution and care should be observed in enforcing discovery rules, because under the Federal Rules of Civil Procedure monetary sanctions are intended, and indeed are expected, to result in compliance since the funds come from the sanctioned party. This may not apply to a debtor in bankruptcy because there is a possibility that any incentive to cooperate through imposition of a financial obligation might be dischargeable through bankruptcy or paid from innocent creditors' assets. This, of course, would not apply where the monetary sanction is a fine. Otherwise, most of the adopted federal civil discovery rules may be effective if used wisely.

435. JACKSON, *supra* note 103, at 227.

436. Federal Rule of Bankruptcy Procedure 7027, which adopts Federal Rule of Civil Procedure 27 (Depositions Before Action or Pending Appeal), permits under prescribed conditions the taking of depositions to perpetuate testimony regarding any matter that may be cognizable in any court of the United States. FED. R. BANKR. P. 7027.