The Availability of Discovery Sanctions for Violations of Protective Orders

Adam M. Josephs†

INTRODUCTION

Protective orders require protection. They play a key role in the discovery process and are relied upon by courts and litigants to facilitate efficient discovery and protect the parties' confidential information.[1] The orders, however, are only as valuable as they are enforceable. If a party cannot fully trust that its information will be adequately protected, it will be less likely to cooperate in producing the information, thus leading to more discovery disputes and nullifying the benefits of protective orders. Courts play the primary role in enforcing protective orders through the issuance of sanctions.

Consider the situation of Arlin Valdez-Castillo.[2] A housekeeper at the Hampton Inn, she was tasked with cleaning the rooms of the members of "Wildlife on Wheels," agents of Busch Entertainment Corp.[3] The agents had brought animals with them to the hotel, and the trauma resulting from having to clean up after the animals led Ms. Valdez-Castillo to file suit against Busch. The court issued a protective order under Rule 26,[4] imposing stringent requirements on the plaintiff and counsel regarding the permissible use of materials that Busch had marked confidential. Ms. Valdez-Castillo's attorney, freshly admitted to the bar, sent a copy of Busch's confidential "Travel Protocol" to *The Miami Herald*; his copy, for whatever reason, had not been marked confidential. The information leaked, and Busch suffered harm. If Ms. Valdez-Castillo and her attorney violated the

† BA 2010, University of Virginia; JD Candidate 2014, The University of Chicago Law School.

1 See Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 Cornell L Rev 1, 1 (1983).

2 This example is taken from the facts of *Valdez-Castillo v Busch Entertainment Corp*, 2008 WL 4999175, *1–2 (SD Fla).

3 Id at *1.

4 See FRCP 26(c).

protective order, what recourse does the aggrieved corporation have?

One part of any such recourse might be court-ordered sanctions against the plaintiff and her attorney for violating the protective order. In the context of discovery, courts derive this sanctioning ability from two sources: the Federal Rules of Civil Procedure[5] and, alternatively, the courts' own inherent powers.[6] This Comment argues that the current Federal Rules allowing for sanctions in response to violations of *discovery orders* are not applicable to the vast majority of *protective orders* in discovery. This interpretation, if adopted by courts, would be a significant change, considering that many courts have relied on the Rules as sanctioning authority for some time. Though an imperfect and temporary solution, inherent authority can work partially to fill in this gap in rule-based sanctioning authority and ease the transition from current practice. Ultimately, an amendment to the Federal Rules of Civil Procedure specifically granting sanctioning authority for protective order violations is preferable.

As past cases suggest, parties will often ground their motions for such sanctions on Rule 37(b) of the Federal Rules of Civil Procedure, which allows for "further just orders" when a party "fails to obey an order to provide or permit discovery."[7] Courts, however, have disagreed over whether these sanctions can be applied to Rule 26(c) protective orders, though the vast majority of courts have held that they can.[8] The discrepancy largely stems from the debate over whether protective orders issued during discovery are discovery orders for purposes of Rule 37.

This Comment aims to resolve this disagreement, arguing that the text of the Rule—along with Advisory Committee Notes overlooked by every court that has analyzed the issue—suggests that Rule 37(b) sanctions may only be applied to a narrow set of protective orders. Thus, referring back to the example, this Comment argues that Busch could not justify a motion for sanctions under Rule 37(b). If Rule 37(b) is unavailable, Busch

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5 See FRCP 37(b)(2).

6 See *Chambers v NASCO, Inc*, 501 US 32, 41, 46–47 (1991).

7 FRCP 37(b)(2)(A).

8 See, for example, *Smith & Fuller, PA v Cooper Tire & Rubber Co*, 685 F3d 486, 487, 489 (5th Cir 2012) (upholding sanctions against attorneys who violated a protective order by disseminating protected information at a conference). But see *Lipscher v LRP Publications, Inc*, 266 F3d 1305, 1323 (11th Cir 2001) (overturning sanctions for the violation of a protective order on the grounds that Rule 26(c) protective orders are not within the purview of Rule 37(b) sanctions).

next might try to seek sanctions based on the court's inherent sanctioning authority, which is not grounded in any statute or rule. This Comment ultimately argues that inherent authority is currently the proper mechanism by which courts should enforce protective orders.

Part I discusses the background of this issue, including the rules concerning protective orders and discovery sanctions. Part II details the history of how courts have analyzed the issue and outlines their lines of analysis. Part III first proposes a solution of how courts should apply Rule 37(b) sanctions. It argues that the evidence suggests the vast majority of protective order violations are not amenable to discovery sanctions. This Comment proposes carving a middle path between the all-or-nothing approaches courts have taken. Namely, it argues that sanctions are only available for the violations of protective orders that mimic discovery orders: those that place a burden on the *disclosing* party, rather than the party seeking discovery. Part III then proposes a potential alternative source of power—the inherent authority to sanction—that courts can use to fill the gaps of protective order enforcement. Ultimately, the Federal Rules should be amended to legitimize the enforcement of all protective orders.

I. AUTHORIZED ORDERS AND SANCTIONS UNDER THE FEDERAL RULES

Protective orders are a tool used by courts to facilitate the discovery process by controlling the behavior of litigants. Broadly, they include "a wide variety of orders for the protection of parties and witnesses in the discovery process."[9] It is currently unclear what, if anything, gives courts the authority to sanction parties for violating protective orders. The Federal Rules of Civil Procedure expressly grant courts authority to issue sanctions in response to violations of "order[s] to provide or permit discovery."[10] In addition to this explicit grant of authority, the inherent power of courts to sanction operates in the background, filling in gaps left by the Federal Rules under certain circumstances.[11]

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9 Charles Alan Wright, Arthur R. Miller, and Richard L. Marcus, 8A *Federal Practice and Procedure* § 2035 at 141 (Thomson Reuters 3d ed 2010).

10 FRCP 37(b)(2)(A).

11 See Part III.D.1 (giving a brief outline of the current state of inherent judicial authority based on the most recent line of Supreme Court decisions).

A. Orders under Rule 26(c)

To assess the applicability of discovery sanctions to violations of protective orders, familiarity with the underlying rules defining these concepts is imperative. Rule 26(c) of the Federal Rules sets out the regulations regarding the granting of protective orders during discovery.[12] A court can, "for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."[13] The Rule describes eight different actions a protective order can take:

> (A) forbidding the disclosure or discovery;
> (B) specifying terms, including time and place, for the disclosure or discovery;
> (C) prescribing a discovery method other than the one selected by the party seeking discovery;
> (D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;
> (E) designating the persons who may be present while the discovery is conducted;
> (F) requiring that a deposition be sealed and opened only on court order;
> (G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and
> (H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.[14]

Notice that some of these actions, for example (D), specifically restrict the party seeking discovery, while others, such as (B) and (C), primarily direct the disclosing party. Though Rule 26 does not make the distinction, this Comment argues in Part III.C that which party is targeted by the order and what the order commands matter in determining whether the order's violation is sanctionable under Rule 37(b).

Significantly, Rule 26(c)(2) allows a *second* type of order, in addition to the protective order previously described. The Rule states that "[i]f a motion for a [Rule 26(c)(1)] protective order is wholly or partly denied, the court may . . . order that any party

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12 See FRCP 26(c).
13 FRCP 26(c)(1).
14 FRCP 26(c)(1).

or person provide or permit discovery."[15] This is important because some courts have overlooked the fact that there are two distinct types of orders authorized by this rule: protective orders under Rule 26(c)(1) and subsequent discovery orders under Rule 26(c)(2).[16] As will be discussed below, the question this Comment seeks to answer partially hinges on the meaning of the phrase "orders for discovery"[17] under Rule 26(c)—and whether this phrase includes Rule 26(c)(1) protective orders, Rule 26(c)(2) discovery orders, or both.[18]

B. Sanctions under Rule 37(b)

The other half of the equation is Rule 37(b). The Rule outlines the available sanctions a court may impose for violations of discovery orders.[19] Again, this Comment aims to clarify the extent to which Rule 37(b) encompasses Rule 26 protective orders. For an inquiry like this, the first place to look is the text of the Rule. Rule 37(b)(2) states:

> If a party or a party's officer, director, or managing agent . . . fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders.[20]

The Rule itself does not explicitly answer whether protective orders are covered, but the text indicates that the scope of Rule 37(b) sanctions should include whatever is considered "an order to provide or permit discovery." What constitutes "an order to provide or permit discovery," however, is not plainly obvious, though the example orders cited may be helpful in determining what fits in this group. Rule 26(f) discusses discovery conferences, allowing courts to issue orders compelling the parties to attend in person.[21] Rule 35 grants authority to the courts to "order a party whose mental or physical condition . . . is in

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15 FRCP 26(c)(2).

16 See, for example, *Westinghouse Electric Corp v Newman & Holtzinger, PC*, 992 F2d 932, 934–35 (9th Cir 1993), quoting FRCP 37(b)(2), Advisory Committee Notes to the 1970 Amendment; *Poliquin v Garden Way, Inc*, 154 FRD 29, 31 (D Me 1994).

17 See FRCP 37(b), Advisory Committee Notes to the 1970 Amendment.

18 See Part III.B (arguing that the evidence suggests that the mention of Rule 26(c) "orders for discovery" in the Rule 37 Notes refers to Rule 26(c)(2) responsive discovery orders, not Rule 26(c)(1) protective orders).

19 See FRCP 37(b)(2)(A).

20 FRCP 37(b)(2)(A).

21 See FRCP 26(f)(2).

controversy to submit to a physical or mental examination."[22] Lastly, Rule 37(a) permits the standard discovery order "compelling disclosure or discovery."[23]

Each of these example orders either compels a party to furnish material or information—Rules 35 and 37(f)—or directs a party to confer, make initial disclosures, and develop a discovery plan—Rule 26(f). At first blush, it is unclear how protective orders, which for the most part restrict the party *seeking* discovery, fit in with these example orders of Rule 37(b). This fact alone does not mean that protective orders are not within Rule 37(b)'s purview, however. In fact, barring a few exceptions, most courts have found discovery sanctions applicable to protective orders.

II. TREATMENT FROM THE COURTS

For a period of time, a number of courts allowed discovery sanctions for protective order violations, simply assuming Rule 37(b) gave them the power to do so.[24] But those courts that have chosen to analyze the issue generally have had three reactions when deciding whether to issue Rule 37(b) sanctions for violations of Rule 26(c) protective orders or to uphold such an issuance. This Part describes the three routes courts have taken: simply assuming Rule 37(b) applies based on Rule 37's Advisory Committee Notes, categorically excluding protective order violations from Rule 37(b), and concluding that protective order violations are sanctionable based on a broad conception of what "allows" discovery to proceed.

Part II.A discusses the cases where courts relied on the Advisory Committee Notes accompanying the 1970 amendment to Rule 37 ("Rule 37 Notes") in permitting Rule 37(b) sanctions for protective order violations. Part II.B introduces a pair of opinions that took an alternative view: that Rule 37(b) does not cover protective orders at all. Lastly, Part II.C details subsequent

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22 FRCP 35(a)(1).

23 See FRCP 37(a)(1).

24 See, for example, *United States v National Medical Enterprises, Inc*, 792 F2d 906, 910 (9th Cir 1986) (allowing Rule 37(b) sanctions under the assumption, without comment, that protective order violations fall within the Rule's authority to sanction "if a party fails to comply with a discovery order"); *Falstaff Brewing Corp v Miller Brewing Co*, 702 F2d 770, 784 (9th Cir 1983) (upholding Rule 37(b) sanctions for a protective order violation without discussing the Rule's applicability to protective orders).

cases, most recently *Smith & Fuller, PA v Cooper Tire & Rubber Co*,[25] that repudiate this alternative view.

A. Using the Rule 37 Advisory Committee Notes

In some of the earliest cases, Rule 37(b) sanctions were deemed to be acceptable for protective order violations. These courts did not consider the issue to be a close question requiring deep analysis.[26] Instead, they read the Advisory Committee Notes of the 1970 amendment to Rule 37, which were included by the drafting committee along with the amended set of Federal Rules, as expressly including Rule 26(c) *protective* orders.[27]

The Rule 37 Notes aim to clarify Rule 37(b)'s authorization of sanctions against a party that "fails to obey an order to provide or permit discovery."[28] The Notes state:

> The scope of Rule 37(b)(2) is broadened by extending it to include any order "to provide or permit discovery," including orders issued under Rules 37(a) and 35. Various rules authorize orders for discovery—*e.g.*, Rule 35(b)(1), Rule 26(c) as revised, Rule 37(d). Rule 37(b)(2) should provide comprehensively for enforcement of all these orders.[29]

With this explicit mention of Rule 26(c), the Rule 37 Notes affirm Rule 37's authorization of sanctions to enforce "*orders for discovery*," but not necessarily *protective* orders, under Rule 26(c).[30]

In *Westinghouse Electric Corp v Newman & Holtzinger, PC*,[31] however, the Ninth Circuit made the assumption that the Rule 37 Notes referred to protective orders. The case concerned abuses that had occurred in previous litigation between Westinghouse Electric Corporation and Southern California Edison Company, two power companies.[32] In discovery, Westinghouse made an agreement with Southern California Edison's counsel, Newman & Holtzinger, PC, that it would provide certain docu-

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25 685 F3d 486 (5th Cir 2012).

26 See *Westinghouse Electric Corp v Newman & Holtzinger, PC*, 992 F2d 932, 935 (9th Cir 1993); *Poliquin v Garden Way, Inc*, 154 FRD 29, 31 (D Me 1994).

27 See *Westinghouse Electric*, 992 F2d at 935, quoting FRCP 37(b), Advisory Committee Notes to the 1970 Amendment; *Poliquin*, 154 FRD at 31.

28 FRCP 37(b)(2)(A).

29 FRCP 37(b), Advisory Committee Notes to the 1970 Amendment (citation omitted).

30 Id (emphasis added).

31 992 F2d 932 (9th Cir 1993).

32 Id at 933.

ments if the law firm would not disclose or misuse them, and the court issued a corresponding protective order.[33] After the firm released the materials to an outside law firm, Westinghouse brought a state court suit for breach of the agreement and an additional tort claim; Newman & Holtzinger removed the case to federal court.[34] On appeal from the district court's dismissal, the Ninth Circuit analyzed whether the district court had subject matter jurisdiction over Westinghouse's claims.[35] In dicta, the court considered a counterfactual scenario: had Westinghouse sought to enforce the protective order violation through Rule 37(b) sanctions, the court would have had original jurisdiction.[36] As support for this statement, the court cited the Rule 37 Notes, describing the Notes in a parenthetical as stating that "'Rule 37(b)(2) should provide comprehensively for enforcement of all [discovery] orders,' including Rule 26(c) protective orders."[37] But, as noted above, contrary to the court's description, nowhere in the Rule 37 Notes are protective orders specifically mentioned. Yet the Ninth Circuit made this assumption without qualification.

Although *Westinghouse Electric*'s gloss on the Rule 37 Notes was dicta, the District of Maine subsequently used it to justify imposing sanctions for the violation of a protective order. *Poliquin v Garden Way, Inc*[38] concerned an accusation of an alleged protective order violation stemming from a products liability suit that had recently settled.[39] The defendant corporation, Garden Way, sought sanctions against the plaintiff's counsel for helping a third party obtain confidential information for a subsequent products liability suit against Garden Way, in violation of the protective order.[40] The *Poliquin* court granted the motion for sanctions without considering that protective orders might not be sanctionable under Rule 37(b). The court held:

> [Rule] 37(b) grants federal courts wide discretion in patterning sanctions to respond to a party's failure to comply with discovery orders. Discovery orders that can be enforced

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33 Id.

34 Id at 933–34.

35 See *Westinghouse Electric*, 992 F2d at 934–37.

36 Id at 934–35.

37 Id at 935 (brackets in original).

38 154 FRD 29 (D Me 1994).

39 Id at 30.

40 Id.

> through Rule 37(b) include protective orders issued under Federal Rule of Civil Procedure 26(c).[41]

As in *Westinghouse Electric*, the *Poliquin* court assumed the Rule 37 Notes endorsed issuing sanctions for protective order violations. In this instance, the *Poliquin* court used the dicta from *Westinghouse Electric* partially to justify this view.[42]

B. An Alternative View: Excluding Rule 26(c) Protective Orders

Not all courts, however, have been so willing to allow Rule 37(b) sanctions for protective order violations. The first suggestion of an alternative view was featured in a dissenting opinion in the Sixth Circuit case *Coleman v American Red Cross*.[43] The original dispute involved a patient, Coleman, who sued the American Red Cross for infecting her with HIV through a blood transfusion.[44] On a discovery document, the American Red Cross forgot to redact the confidential identifying information of the HIV-positive blood donor.[45] The court granted a protective order to prevent Coleman from acting on this information; Coleman violated the order when she found out and attempted to bring suit against the donor.[46] As a sanction for Coleman's violation of the protective order, the district court dismissed her suit against the American Red Cross after applying a Rule 37 test, while also citing Rule 41(b)[47] and the court's inherent powers as authority.[48] The Sixth Circuit overturned this dismissal on account of the American Red Cross not having proved it was prejudiced by the protective order violation.[49] In his dissent, however, Judge

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41 Id at 31. (citing *Westinghouse Electric* and its reading of the Rule 37 Notes as stating that "'Rule 37(b)(2) should provide comprehensively for enforcement of all [discovery] orders,' including Rule 26(c) protective orders"), quoting FRCP 37(b), Advisory Committee Notes to the 1970 Amendment.

42 See *Poliquin*, 154 FRD at 31, 33 (issuing sanctions under Rule 37(b) without further comment as to the legal authority for issuing sanctions).

43 23 F3d 1091 (6th Cir 1994).

44 See *Coleman v American Red Cross*, 979 F2d 1135, 1136 (6th Cir 1992).

45 See id at 1137.

46 See id at 1138.

47 FRCP 41(b) ("If the plaintiff fails to prosecute or to comply with . . . a court order, a defendant may move to dismiss the action or any claim against it.").

48 See *Coleman v American Red Cross*, 145 FRD 422, 429–30 (ED Mich 1993). For a description of inherent authority and its limits, see text accompanying notes 135–47.

49 See *Coleman*, 23 F3d at 1096.

James L. Ryan took issue with the court even applying a Rule 37 framework in this case.[50]

The Ryan dissent made several arguments as to why Rule 37(b) sanctions are not applicable to violations of protective orders. Judge Ryan's first argument was textual:

> Rule 37(b) is primarily concerned with sanctions for failure to conduct or to cooperate in discovery. The text of Rule 37(b) refers to the situations in which it applies, and they include discovery orders pursuant to Rule 26(f). Nowhere does the rule mention protective orders or Rule 26(c), which is concerned with protective orders.[51]

Beyond this, he argued that the test of whether dismissal under Rule 37(b) is appropriate—including a determination of the prejudice suffered—is ill suited to judge the harm of protective order violations. This further reinforced the argument that Rule 37(b) is inapplicable:

> In analyzing the prejudice factor of the test, a few courts have held that whatever sanction under Rule 37(b) a district court selects must relate directly to the prejudice suffered. The rationale, of course, is that because discovery orders usually apply to the moving party's attempt to procure discovery with respect to a particular claim or defense, it is fairly easy to relate the misconduct to a narrowly tailored sanction. If the disobedient party has refused to cooperate in discovery relating to a particular claim, a proper and adequate sanction might include striking that claim. . . . [M]isconduct and sanction do not coincide so neatly when a protective order is violated. That is because a protective order rarely relates directly to a single claim or defense. Protective orders more often deal with such amorphous concerns as "embarrassment [or] oppression," . . . or broader considerations of public policy such as not discouraging blood donations.[52]

In other words, since Rule 37(b) sanctions in practice must be narrowly tailored to correspond to a discrete prejudice suffered—like that resulting from many discovery order violations—these sanctions are not available to rectify the more

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50 See id at 1098–99 (Ryan dissenting).

51 Id at 1099 (Ryan dissenting).

52 Id (Ryan dissenting).

nebulous prejudice resulting from most protective order violations. Judge Ryan thus concluded that the *Coleman* majority erred in applying Rule 37(b) and should have instead relied on the court's inherent powers.[53]

The Eleventh Circuit in *Lipscher v LRP Publications, Inc*[54] issued the first majority opinion to closely analyze this problem, and its holding was relatively surprising. Unlike the courts before it—and unlike any subsequent court to date—the *Lipscher* court held that protective orders were not sanctionable under Rule 37(b) whatsoever.[55] The case arose from a conflict between two legal publishers, Law Bulletin Publishing Company (Law Bulletin) and LRP Publications, Inc (LRP).[56] The litigation contained numerous discovery disputes, and as part of discovery during the damages phase of the trial, the district court judge issued a Rule 26(c) protective order "that information relating to LRP's profits and other sensitive financial information was not discoverable."[57] Law Bulletin proceeded to acquire documents from LRP's bank, and after it refused to return them, the district court imposed monetary sanctions through Rule 37(b) on Law Bulletin and its attorneys, Lipscher and Kehoe.[58]

On appeal, the Eleventh Circuit overturned the sanctions based on its interpretation of the Rule 37 Notes. The court first noted that the text of Rule 37(b) does not mention protective orders.[59] Next, it considered the mention of Rule 26(c) in the Rule 37 Notes.[60] Given that the Notes state only that Rule 26(c) "orders *for discovery*" are applicable, the court reasoned that it was Rule 26(c)(2) discovery orders—not Rule 26(c)(1) protective orders—to which the Notes refer.[61] It concluded, citing the text of Rule 37(b)(2), that "a Rule 26(c) protective order is not 'an order

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53 Judge Ryan additionally considered Rule 41(b) to be equally inapplicable to sanctioning protective order violations. He reasoned that "Rule 41(b) deals primarily with motions to dismiss for want of prosecution. There was no want of prosecution in this case; to the contrary, the problem is that the plaintiff's counsel prosecuted too zealously, indeed contumaciously." *Coleman*, 23 F3d at 1099 (Ryan dissenting) (citation omitted), citing *Societe Internationale pour Participations Industrielles et Commerciales, SA v Rogers*, 357 US 197, 206–07 (1958).

54 266 F3d 1305 (11th Cir 2001).

55 See id at 1323.

56 See id at 1308–09.

57 Id at 1309–10.

58 See *Lipscher*, 266 F3d at 1321–22.

59 See id at 1323.

60 See id.

61 Id.

to provide or permit discovery,' and therefore, such orders do not fall within the scope of Rule 37(b)(2)."[62] Accordingly, *Lipscher* stands for the principle that discovery sanctions are categorically unavailable for the violation of protective orders.

C. Rejecting *Lipscher*: Treating Protective Orders as Discovery Orders

Though *Lipscher* staked out a novel position on the issue, it did not seem to influence subsequent courts. Notwithstanding the fact that the question now had been raised and given significant treatment at the appellate level, some district courts continued to issue sanctions for violations of protective orders without comment.[63] Others brought up *Lipscher*'s holding before dismissing it and following previous cases that reached different results.[64]

In *Valdez-Castillo v Busch Entertainment Corp*,[65] the facts of which comprise the example discussed in the Introduction, a district court in the Southern District of Florida suggested a broad interpretation of the "provide or permit discovery" language of Rule 37 to hold that protective orders should fit within this category and thus be enforced through Rule 37(b).[66] Recall that Valdez-Castillo, a housekeeper at the Hampton Inn, sued a corporation, Busch, for the distress she suffered from having to clean up after animals the corporation's agents brought to the hotel.[67] The parties agreed to a protective order for confidentiality in discovery.[68] After the plaintiff's attorney leaked some of Busch's confidential material to *The Miami Herald*, the corporation sought sanctions for violation of the protective order.

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62 *Lipscher*, 266 F3d at 1323.

63 See, for example, *American National Bank and Trust Co of Chicago v AXA Client Solutions, LLC*, 2002 WL 1067696, *5 (ND Ill) (holding that, based on Rule 37(b), "[t]he appropriate sanction for Equitable's violations of the protective order is for Equitable to pay to Emerald an amount equal to the attorney's fees and expenses that Emerald has incurred as a result of the investigation into this dispute"); *Frazier v Layne Christensen Co*, 2005 WL 372253, *4 (WD Wis) ("Pursuant to Rule 37(b)(2) I am imposing a fine of $1000 for each of the four violations of the protective order.").

64 See *Whitehead v Gateway Chevrolet, Oldsmobile*, 2004 WL 1459478, *3 (ND Ill) (discussing *Lipscher* and cases that disagree with it before choosing not to follow *Lipscher*); *Schiller v The City of New York*, 2007 WL 1623108, *3 (SDNY); *Lambright v Ryan*, 2010 WL 1780878, *5 (D Ariz); *Lewis v Wal-Mart Stores, Inc*, 2006 WL 1892583, *3 (ND Okla).

65 2008 WL 4999175 (SD Fla).

66 See id at *6.

67 Id at *1.

68 Id.

Since the plaintiff's attorney had only recently become licensed, and the specific copy of the document he leaked had not been marked as confidential, the court found no bad faith in the violation and thus refused to use its inherent powers to issue sanctions.[69] The court then turned to Rule 37(b). Considering the *Lipscher* court's distinction between Rule 26(c) discovery orders and protective orders, it stated:

> It may not be entirely obvious to some why Rule 26(c) protective orders do not enjoy the protections of Rule 37(b) while other discovery orders issued pursuant to Rule 26(c) do, since an agreed protective order may be viewed as allowing discovery to proceed, albeit without the need to litigate over the terms of the protective order first.[70]

Because they allow discovery to proceed, the court reasoned that protective orders qualify as "order[s] to provide or permit discovery" under Rule 37.[71] Ultimately, however, the court was bound by the precedent of *Lipscher* and thus denied the motion for sanctions.[72]

The most recent decision on the issue is *Smith & Fuller, PA v Cooper Tire & Rubber Co*.[73] Like the Southern District of Florida, the Fifth Circuit took the view that protective orders should generally be enforceable by sanctions under Rule 37(b). It suggested, however, that even under the *Lipscher* standard, the protective order at issue was one that permitted discovery.[74] Initially, the Trenado family was the plaintiff in a products liability suit against Cooper Tire & Rubber Company (Cooper Tire).[75] Before the trial, the district court judge issued a Rule 26(c) protective order limiting who could have access to Cooper Tire's trade secrets and other confidential information and for what purpose.[76] However, before the court reached a verdict, the attorneys representing the Trenado family "inadvertently disseminated Cooper's trade secrets and confidential information to a number of personal injury lawyers during a conference," violating

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69 See *Valdez-Castillo*, 2008 WL 4999175 at *4–5.

70 Id at *6.

71 FRCP 37(b)(2)(A). See also *Valdez-Castillo*, 2008 WL 4999175 at *6.

72 *Valdez-Castillo*, 2008 WL 4999175 at *6.

73 685 F3d 486 (5th Cir 2012).

74 See id at 489.

75 Id at 487.

76 Id.

the protective order.[77] The district court imposed sanctions on the attorneys per Rule 37(b), requiring that they compensate Cooper Tire for attorneys' fees and expenses.[78]

The Fifth Circuit, in reviewing whether Rule 37(b) sanctions were appropriate, stated that "[t]he Eleventh Circuit's narrow application of Rule 37(b) [in *Lipscher*] has been questioned by several courts" and that "[t]here is [ ] significant authority in support of the imposition of Rule 37(b) sanctions for violation[s] of Rule 26(c) protective orders."[79] The court hedged, however, by stating that the protective order in the instant case would have been found to be sanctionable even under the *Lipscher* standard because it allowed discovery to proceed.[80]

It seems as though the Fifth Circuit underestimated the narrowness of the Eleventh Circuit's reading in *Lipscher*. The *Lipscher* court said without qualification that "a Rule 26(c) protective order is not 'an order to provide or permit discovery,' and therefore, such orders do not fall within the scope of Rule 37(b)(2)."[81] Thus, regardless of how the protective order in *Smith & Fuller* encouraged discovery, it seems unlikely that the *Lipscher* court would have found it sanctionable under Rule 37(b).

In sum, courts have taken several different lines of analysis in judging the applicability of Rule 37(b) discovery sanctions to Rule 26(c) protective orders. Some courts have read the Rule 37 Notes to expressly endorse the applicability to protective orders by the simple mention of Rule 26(c).[82] Another opinion suggested that protective orders are not sanctionable under Rule 37(b) because the amorphous nature of protective orders—and the corresponding differences in the prejudice suffered from their violations—distinguishes them from discovery orders.[83] *Lipscher* concluded that the Rule 37 Notes suggest Rule 26(c)(2) *discovery* orders are within the purview of discovery sanctions, but Rule 26(c)(1) *protective* orders are not.[84] And lastly, other courts have taken an expansive view of what it means to be "an order to

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77 *Smith & Fuller*, 685 F3d at 487.

78 Id at 488.

79 Id at 489.

80 See id at 489–90 (pointing out that "no one disputes that Cooper produced thousands of pages of trade secrets or confidential information in reliance on the Protective Order").

81 *Lipscher*, 266 F3d at 1323.

82 See *Westinghouse Electric*, 992 F2d at 934–35; *Poliquin*, 154 FRD at 31 (relying on *Westinghouse Electric*).

83 See *Coleman*, 23 F3d at 1098–99 (Ryan dissenting).

84 See *Lipscher*, 266 F3d at 1323.

provide or permit discovery,"[85] reasoning that protective orders can, and perhaps always, permit discovery by allowing it to proceed, rendering them sanctionable under Rule 37(b).[86]

III. A CONSERVATIVE APPROACH TO APPLYING DISCOVERY SANCTIONS

While a number of courts have engaged with this question, as outlined in Part II, they have largely resisted grappling closely with the text of the Rules and their respective Advisory Committee Notes. In fact, courts have not even mentioned the Rule 26 Advisory Committee Notes, a seemingly crucial piece of evidence. This leaves open the opportunity to use these tools to critique the past decisions on both sides of the issue and ultimately formulate a new solution for future courts to implement. This Part tackles the question of how courts should apply Rule 37(b) sanctions for the violations of Rule 26(c) protective orders.

Part III.A analyzes the language of Rule 37(b) to counter the broad scope that some courts have given it. Next, Part III.B takes a close look at the Advisory Committee Notes of *both* rules to suggest that there is a strong likelihood that the reference to Rule 26(c) in the Rule 37 Notes refers specifically to Rule 26(c) discovery orders, as distinct from Rule 26(c) protective orders. This does not, however, altogether rule out the possibility of sanctions for the violation of protective orders. Part III.C takes the previous analysis into account and proposes that only violations of a narrow subset of protective orders—those that mimic traditional discovery orders by controlling the disclosing party—should be sanctionable under Rule 37(b). Lastly, Part III.D puts forth alternatives, including the inherent authority to sanction, that courts may try to use to enforce protective orders in light of the unavailability of Rule 37(b).

A. A Closer Look at the Text of Rule 37(b)

The strongest argument courts have made for including protective orders in the Rule 37(b) sanctioning scheme appears to be that protective orders enable discovery to take place. The text

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[85] FRCP 37(b)(2)(A).

[86] See *Smith & Fuller*, 685 F3d at 489 (suggesting that certain protective orders permit discovery). See also *Valdez-Castillo*, 2008 WL 4999175 at *6 (taking this notion even further by suggesting that *all* protective orders are discovery orders because they allow discovery to proceed).

of Rule 37(b) itself, however, challenges the notion that Rule 37 sanctions enforce all orders that merely allow discovery—in an abstract sense—as cases like *Valdez-Castillo* and *Smith & Fuller* would suggest.[87] Recall that Rule 37(b) states:

> If a party or a party's officer, director, or managing agent . . . fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders.[88]

The *Valdez-Castillo* court suggested that protective orders should be treated like discovery orders because, for example, "an agreed protective order may be viewed as allowing discovery to proceed, albeit without the need to litigate over the terms of the protective order first."[89] Likewise, in *Smith & Fuller*, the Fifth Circuit cited the fact that "Cooper produced thousands of pages of trade secrets or confidential information in reliance on the Protective Order" as evidence that the protective order enabled discovery and was thus sanctionable under Rule 37(b).[90]

But this reasoning could be taken to the absurd. In addition to protective orders, the same phenomenon could also be true for a nearly endless number of orders that most would agree fall outside the scope of Rule 37(b). Plenty of orders are issued, even outside of discovery, that technically permit discovery to proceed; does this mean they should all be enforceable by sanction under Rule 37(b)? Imagine a court, at the beginning of litigation, ordering that neither party may leave the country until final judgment. The order is one that likely makes discovery more convenient (for example, by making the parties more easily reachable), even though it really has nothing specifically to do with discovery itself. Although it is unlikely that the courts intended such a result, under the *Valdez-Castillo* and *Smith & Fuller* interpretation, there is no obvious reason why this order would not be enforceable by sanction as a discovery order. Surely, the courts must have had some required nexus with discovery in mind, but where would one draw the line? With such an abstract concept, it would be very hard to separate orders that are proximate enough to "allow[ ]"[91] discovery from those that are

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87 See Part II.C.

88 FRCP 37(b)(2)(A).

89 *Valdez-Castillo*, 2008 WL 4999175 at *6.

90 *Smith & Fuller*, 685 F3d at 489–90.

91 *Valdez-Castillo*, 2008 WL 4999175 at *6.

too remote from the discovery process. Without a coherent limiting principle, any order issued before or during discovery, no matter how unrelated to the discovery process, may potentially be seen as somehow affecting discovery. Thus since the *Valdez-Castillo* and *Smith & Fuller* reasoning could apply just the same to such a wide and amorphous range of orders as it would to protective orders, it is not a persuasive argument for including protective order violations within Rule 37(b).

However, the specific language utilized by Rule 37(b) makes it so that courts need not engage in this abstract analysis of what orders "allow[ ]" discovery to proceed at all. The *Valdez-Castillo* and *Smith & Fuller* "enabling discovery" argument is predicated on Rule 37(b) allowing sanctions for violations of orders providing or permitting discovery. But, looking closely at the Rule, it does *not* allow sanctions for orders providing or permitting discovery; it endorses sanctions for violations of "order[s] *to* provide or permit discovery."[92] The use of the adjectival-participial phrase, "providing or permitting discovery," would suggest that Rule 37(b) covers situations in which *the order* is providing or permitting discovery, thus supporting the *Valdez-Castillo–Smith & Fuller* interpretation. On the other hand, the use of the infinitive, "*to* provide or permit discovery," indicates that the object of the "order"—what the order demands—is that the party at whom the order is directed provide or permit discovery. That is, "provide or permit discovery" does not describe the *effect* of the order, but what the order calls on a party to do.[93] This subtle distinction suggests that Rule 37(b) is not governing orders that permit discovery in an indirect sense, but only those where the court is directly commanding a party to provide or

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92 FRCP 37(b)(2)(A) (emphasis added).

93 An argument could be made that the infinitive form can also be used to describe what the order itself is doing—for example, "an order to compel arbitration." This would suggest that the infinitive can be used for both meanings, while the adjectival-participial form can only be used in one way—to describe the effect of the order itself. To avoid confusion, the Federal Rules should thus be expected to use the infinitive form only to describe what the order directs a party to do and the participle form to detail an order's effect. Rule 37 itself confirms this hypothesis. Compare FRCP 37(b)(2)(A)(vii) ("an order to submit to a physical or mental examination"), with FRCP 37(a)(1) ("an order compelling disclosure or discovery") and FRCP 37(a)(3)(B) ("an order compelling an answer, designation, production, or inspection"). If a Federal Rule means to refer to an order's effect, principles of drafting suggest it would undoubtedly use the adjectival participle form to avoid confusion.

permit discovery. And barring a few narrow exceptions,[94] protective orders do not usually directly order a party to produce in discovery. This significantly undermines the argument that all protective orders are within the purview of Rule 37(b).

B. Inferences from the Advisory Committee Notes

Interpretations in the Advisory Committee Notes that accompany amendments of the Federal Rules of Civil Procedure, "[a]lthough not binding . . . are nearly universally accorded great weight in interpreting federal rules."[95] The Supreme Court has used them on numerous occasions, for example, to determine the "purpose" of a federal rule.[96] Even Justice Antonin Scalia, who often expresses his disdain for the use of legislative history in judicial opinions,[97] has described Advisory Committee Notes as "ordinarily *the* most persuasive [scholarly commentaries] concerning the meaning" of federal rules.[98]

Since Rule 37's text alone is ambiguous,[99] the Advisory Committee Notes to the 1970 amendment of both Rule 37(b)[100] and Rule 26(c)[101] are helpful in gauging Rule 37(b)'s scope and thus are seemingly invaluable to any court's analysis of the

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94 See Part III.C (discussing how certain protective orders mimic the function of traditional discovery orders).

95 *Horenkamp v Van Winkle and Company, Inc*, 402 F3d 1129, 1132 (11th Cir 2005) (quotation marks omitted), quoting *Vergis v Grand Victoria Casino & Resort*, 199 FRD 216, 218 (SD Ohio 2000).

96 See *Tome v United States*, 513 US 150, 156–59 (1995) (interpreting FRE 801(d)(1)(B)). See also *Krupski v Costa Crociere SpA*, 130 S Ct 2485, 2494–95 (2010) (using Advisory Committee Notes to interpret FRCP 15(c)).

97 See, for example, *Bank One Chicago, NA v Midwest Bank & Trust Co*, 516 US 264, 279–83 (1996) (Scalia concurring in part and concurring in the judgment) ("The law *is* what the law *says*, and we should content ourselves with reading it rather than psychoanalyzing those who enacted it.").

98 *Tome*, 513 US at 167–68 (Scalia concurring in part and concurring in the judgment) (noting that although he himself had previously used Advisory Committee Notes as evidence of the drafters' purpose, Justice Scalia now believes they are merely "persuasive scholarly commentaries" that "bear no special authoritativeness as the work of the draftsmen"). See also *Krupski*, 130 S Ct at 2498–99 (Scalia concurring in part and concurring in the judgment) ("The Advisory Committee's insights into the proper interpretation of a Rule's text are useful to the same extent as any scholarly commentary. But the Committee's *intentions* have no effect on the Rule's meaning.").

99 See Part III (arguing that using a broad interpretation of the text, as some courts have, leads to absurd results).

100 FRCP 37(b), Advisory Committee Notes to the 1970 Amendment (discussing the effect of the amendment on the scope of Rule 37(b)(2)).

101 FRCP 26, Advisory Committee Notes to the 1970 Amendment (noting rearrangements made to the Rules, for the purpose of "establish[ing] Rule 26 as a rule governing discovery in general").

issue. Courts have attempted, with varying degrees of success, to interpret the Rule 37 Notes.[102] But, astonishingly, no court has yet even mentioned the Advisory Committee Notes of Rule 26 ("Rule 26 Notes"), although they are perhaps the most important evidence of how Rule 37(b) interacts with Rule 26(c).

1. Limitations of the Rule 37 Notes.

The Rule 37 Notes provide additional examples of what is sanctionable under Rule 37(b). Unlike the text of Rule 37, the Notes *do* contain a reference to Rule 26(c), which has ultimately led to much confusion in the courts. The Rule 37 Notes state in relevant part:

> The scope of Rule 37(b)(2) is broadened by extending it to include any order "to provide or permit discovery," including orders issued under Rules 37(a) and 35. Various rules authorize orders for discovery—for example, Rule 35(b)(1), Rule 26(c) as revised, Rule 37(d). Rule 37(b)(2) should provide comprehensively for enforcement of all these orders.[103]

It could be argued—and the *Westinghouse Electric* and *Poliquin* courts have found—that this answers the question of whether protective orders are included.[104] These courts saw Rule 26(c) mentioned in the Rule 37 Notes and took that to mean protective orders can be enforced by sanctions under Rule 37(b). This, however, skims over the text of the Rule 37 Notes. The Notes do not say that all orders under Rule 26(c) are covered, but only "orders *for discovery*."[105] Recall that Rule 26(c) grants authority for two distinct types of orders: protective orders issued under Rule 26(c)(1) and discovery orders issued under Rule 26(c)(2) in response to denied motions for protective orders.[106]

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[102] See, for example, *Lipscher*, 266 F3d at 1322–23 (finding that the Rule 37 Notes support the inclusion of Rule 26(c)(2) discovery orders, and not Rule 26(c)(1) protective orders, within Rule 37(b)'s purview); *Westinghouse Electric*, 992 F2d at 935 (assuming that the mention of Rule 26(c) "orders for discovery" in the Rule 37 Notes refers to protective orders).

[103] FRCP 37(b), Advisory Committee Notes to the 1970 Amendment (citations omitted).

[104] See *Westinghouse Electric*, 992 F2d at 935 (assuming in dicta that Rule 26(c) protective orders are included); *Poliquin*, 154 FRD at 31 ("Discovery orders that can be enforced through Rule 37(b) include protective orders issued under Federal Rule of Civil Procedure 26(c).").

[105] FRCP 37(b), Advisory Committee Notes to the 1970 Amendment (emphasis added).

[106] See FRCP 26(c)(1)–(2) (allowing for protective orders, and, where those are "wholly or partly denied," discovery orders).

It is unclear which of the two types of orders the Rule 37 Notes are referring to, since that depends on which are considered "orders for discovery." Ultimately, therefore, the vagueness of the Rule 37 Notes does little to shed light on Rule 37. The Rule 26(c)(2) responsive discovery orders are surely discovery orders, but are Rule 26(c)(1) protective orders "orders for discovery"? If the answer to this question were clear at this point, then it would be unnecessary to look past Rule 37(b)'s text to the Notes in the first place. Thus, contrary to *Westinghouse Electric* and *Poliquin*, the Rule 37 Notes do no more to resolve the issue than Rule 37(b)'s text does.

2. Revelations from the Rule 26 Notes.

The Rule 26 Notes, on the other hand, provide vital information regarding the classification of the two types of orders and their interplay with Rule 37(b) sanctions.[107] This makes it

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[107] It is worth noting that, as a general principle, using the Advisory Committee Notes of one rule as evidence of the meaning of a different rule is not without controversy. In *Libretti v United States*, 516 US 29 (1995), the Supreme Court was tasked with, among other issues, determining whether, under the Federal Rules of *Criminal* Procedure, the asset forfeiture provision of a plea agreement was an element of a postconviction sentence or a separate substantive offense. See id at 36–41 (indicating that also at issue were "the requisites for waiver of the right to a jury determination of forfeitability under Rule 31(e)"). In trying to argue that the forfeiture provision fell within the scope of the protections given to plea agreements under Rule 11(f), the defendant pointed to language in the Advisory Committee Notes of Rule 31. See id at 40–41. The Court rejected this argument:

> Libretti seeks to use the Note appended to Rule 31 to elucidate the meaning of an entirely distinct Rule. We cannot agree that the Advisory Committee's Notes on the 1972 amendment to Rule 31(e) shed any particular light on the meaning of the language of Rule 11(f), which was added by amendment to Rule 11 in 1966.

Id at 41.

Many distinctions can be drawn between the defendant's use of Advisory Committee Notes in *Libretti* and this Comment's use of the Rule 26 Notes as evidence as to the intent of Rule 37(b). Taken altogether, these distinctions suggest that the Rule 26 Notes are still very relevant. While the Advisory Committee Note evidence in *Libretti* "r[an] counter to the weighty authority" the Court also discussed, the Rule 26 Notes add additional information without contradicting any other evidence. *Libretti*, 516 US at 41. Additionally, Libretti's Notes contained only a general principle—and may very well have been completely unrelated to Rule 11(f). See id at 41. The Rule 26 Notes, by contrast, specifically mention Rule 37(b).

Lastly, this all assumes that the Rule 26 Notes are being used to determine the meaning of Rule 37(b). But what if the Rule 26 Notes are simply clarifying aspects of Rule 26(c)? Indeed, while identifying the scope of Rule 37(b) sanctions is the larger target of this Comment, to do so requires defining parts of Rule 26(c)—that is, figuring out which of Rule 26(c)'s two orders are "orders for discovery." Framed like this, it seems perfectly acceptable to use the Rule 26 Notes as evidence, notwithstanding *Libretti*. In fact,

all the more surprising that, in contrast to courts' wide use of the Rule 37 Notes, the Rule 26 Notes have been simply ignored. The Rule 26 Notes state in relevant part:

> [S]ubdivision [(c)] contains new matter relating to sanctions. When a motion for a protective order is made and the court is disposed to deny it, the court may go a step further and issue an order to provide or permit discovery. This will bring the sanctions of Rule 37(b) directly into play.[108]

The significance of the Rule 26 Notes in answering this Comment's question cannot be overstated.

The Rule 26 Notes strongly suggest that an interpretation of Rule 37(b) as including *all* protective orders is incorrect. The 1970 amendment of the Federal Rules moved authorization for protective orders from Rule 30(b) and (d) to Rule 26(c); it *also* added the authority to issue responsive discovery orders, codified in Rule 26(c)(2). Prior to the 1970 amendment, there logically existed three distinct possibilities: all protective orders were sanctionable under Rule 37(b), no protective orders were sanctionable under the Rule, or some protective orders were sanctionable under the Rule.

The way the Rule 26 Notes discuss Rule 37(b) sanctions effectively eliminates this first possibility, that all protective orders were previously sanctionable. The Rule 26 Notes describe the application of Rule 37(b) sanctions to Rule 26(c) as "*new* matter relating to sanctions."[109] If Rule 37(b) applied to all pre-1970 protective orders (found in Rule 30), then a mere shift of protective orders from Rule 30 to Rule 26 should not change the relationship between Rule 37 sanctions and protective orders; thus it would not make sense to describe the involvement of Rule 37(b) as "new." Additionally, the Notes suggest that the issuance of a discovery order in response to a denied protective order is what "bring[s] the sanctions of Rule 37(b) directly into play."[110] Rule 37(b) sanctions must not have been definitively in play when protective orders existed without the responsive discovery order before 1970. These two facts together nullify the claim that all protective orders were previously sanctionable. If

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the Supreme Court in *Libretti* expressly marked as acceptable the Court's previous use of a rule's Advisory Committee Notes to evidence the "*meaning of that Rule*." See id at 41, citing *Tome*, 513 US at 160–63.

108 FRCP 26(c), Advisory Committee Notes to the 1970 Amendment.

109 Id (emphasis added).

110 Id.

Rule 37(b) had previously applied to all protective orders, then this amendment would not have changed how the orders under Rule 26(c) are enforced. Nor would it have warranted discussion in the Advisory Committee Notes. The new Rule 26(c)(2) discovery order must be introducing the possibility of sanctions in at least some cases where sanctions were not previously available.

The Rule 26 Notes also help shed light on the mention of Rule 26(c) in the Rule 37 Notes, which several courts have relied on in finding that Rule 26(c) protective orders are Rule 37(b)–sanctionable. The Rule 26 Notes' "provide or permit" language describing Rule 26(c)(2) *discovery* orders matches the language in Rule 37(b) and the Rule 37 Notes covering what types of orders are sanctionable.[111] These revisions suggest that it is Rule 26(c)(2) discovery orders—as opposed to Rule 26(c)(1) protective orders—that the Rule 37 Notes use as an example of a sanctionable order "to provide or permit discovery."[112]

This does not mean the *Lipscher* court was necessarily correct in exempting all protective orders from 37(b) sanctions, however. To reiterate, the Rule 26 Notes suggest that the addition of the Rule 26(c)(2) responsive discovery order is what *required* the involvement of Rule 37(b) sanctions, whether or not they mattered at all previously. The Notes also show that the Rule 37 Notes refer to Rule 26(c)(2) discovery orders as an example, but do not discuss Rule 26(c)(1) protective orders. While this evidence severely weakens the case that all protective orders are enforceable through discovery sanctions, it does not preclude the possibility that some protective orders are included in the scope of Rule 37(b). The lists of examples provided by Rule 37(b) and its Notes, after all, are not exhaustive.[113] This concept, unlike that put forth by *Lipscher*, leaves the door open to include some protective orders under the purview of Rule 37(b). Part III.C proposes how to determine which protective orders qualify.

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[111] See FRCP 26(c), Advisory Committee Notes to the 1970 Amendment; FRCP 37(b), Advisory Committee Notes to the 1970 Amendment.

[112] FRCP 37(b), Advisory Committee Notes to the 1970 Amendment.

[113] There is little question that the drafters did not intend the Rule 37(b) list to be exhaustive. Interpreting the lists as exhaustive would lead to an extremely narrow construction of Rule 37(b). Moreover, since the Rule 37 Notes provide additional examples of sanctionable orders beyond those listed in the Rule itself, the list from Rule 37(b) cannot be exhaustive.

C. When Protective Orders Are Also Discovery Orders

If one accepts that Rule 26(c)(2) *discovery* orders are the only Rule 26(c) orders that are assuredly sanctionable under Rule 37(b), but that some protective orders may also be enforced by sanctions, the question then becomes *which* protective orders also qualify? Returning to the text of Rule 37(b), the answer is clear: the protective orders that are "order[s] to provide or permit discovery."[114]

Since this descriptor applies to discovery orders like those authorized by Rule 26(c)(2)[115] and Rule 37(a),[116] these orders can be used as guidelines for assessing which Rule 26(c)(1) protective orders are also enforceable through sanctions. A look at Rule 37(a), the discovery order rule, suggests certain attributes that are typical of discovery orders. The most important factor—and most useful for judging protective orders—is the fact that discovery orders are issued to compel the *disclosing* party to provide materials or cooperate in discovery.[117] This is in contrast to most types of protective orders, which *protect* the disclosing party and place limitations on what the receiving party can access in discovery.[118] This distinction is the key to measuring the

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[114] FRCP 37(b)(2)(A).

[115] See Part III.B (interpreting the Rule 26 Notes to find that the Rule 37 Notes refer to Rule 26(c)(2) responsive protective orders as having their violations sanctionable under Rule 37(b)).

[116] The text of Rule 37(b) and the Rule 37 Notes specifically mention traditional Rule 37(a) discovery orders as sanctionable under Rule 37(b). See FRCP 37(b)(2)(A) ("If a party or a party's officer, director, or managing agent . . . fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders."); FRCP 37(b), Advisory Committee Notes to the 1970 Amendment ("The scope of Rule 37(b)(2) is broadened by extending it to include any order 'to provide or permit discovery,' including orders issued under Rules 37(a) and 35.").

[117] See FRCP 37(a)(3)(A)–(B) (describing available motions for discovery orders against disclosing parties, such as those compelling the release of materials and responses to other discovery requests).

[118] See FRCP 26(c)(1)(A)–(H). Recall the eight different ways a protective order can direct a party:

> (A) forbidding the disclosure or discovery;
> (B) specifying terms, including time and place, for the disclosure or discovery;
> (C) prescribing a discovery method other than the one selected by the party seeking discovery;
> (D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;
> (E) designating the persons who may be present while the discovery is conducted;
> (F) requiring that a deposition be sealed and opened only on court order;

extent to which Rule 37(b) sanctions apply to Rule 26(c)(1) protective orders.

Thus, identifying Rule 26(c)(1) protective orders enforceable by sanctions necessitates looking at a given order's substance, rather than its form. A Rule 26(c)(1) "protective order" that, in substance, operates exactly like a discovery order should be treated as one for the purposes of Rule 37(b) sanctions. Given that discovery orders are "order[s] to provide or permit discovery"[119] under Rule 37(b), this principle entails treating protective orders that are substantively designed to "provide or permit discovery" as sanctionable.

There is precedent for this sort of analogy. When interpreting other provisions of the Federal Rules, courts have recognized that the substance of an action, rather than its form or label, determines the rule under which it should be analyzed. In *Obriecht v Raemisch*,[120] the Seventh Circuit issued the most recent decision in a line of cases considering whether a given motion for reconsideration should be analyzed under Rule 59(e)[121] or Rule 60(b).[122] After the district court granted summary judgment for the defendants, the plaintiff filed two motions for reconsideration due to alleged errors of law, and both were denied. He had labeled them as Rule 60(b) motions, so the court used this Rule in deciding whether to overturn the judgment.[123] On appeal, the Seventh Circuit affirmed the grant of summary judgment but determined that the motions for reconsideration had been analyzed using the wrong standard.[124] The court found that the proper characterization of a motion for reconsideration "depends on the *substance* of the motion, not on the timing or label affixed to it."[125] Since legal error is typically covered by a motion for reconsideration under Rule 59(e) rather than Rule 60(b), the

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(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and
(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

119 FRCP 37(b)(2)(A).

120 517 F3d 489 (7th Cir 2008).

121 See FRCP 59(e) (allowing "[a] motion to alter or amend a judgment").

122 See FRCP 60(b) (offering the reasons for which a court can relieve a party from final judgment, including mistake, new evidence, and fraud).

123 *Obriecht*, 517 F3d at 492 (describing the motions and the supporting materials that Obriecht submitted).

124 See id at 493–94 ("[E]ven construing his motion as a motion under Rule 59(e), Mr. Obriecht cannot prevail.").

125 Id at 493, citing *Borrero v City of Chicago*, 456 F3d 698, 701–02 (7th Cir 2006).

court held that the plaintiff's motions should be construed as such and held them to that Rule's legal standard.

The same emphasis on substance over form is applicable here. Protective orders that compel the disclosing party rather than protect it are essentially, in substance, discovery orders. Though not facing a protective order like this, the *Lipscher* court's analysis overlooked the possibility of Rule 37(b) applying to this subset of protective orders. Of the types of protective orders enumerated by Rule 26(c)(1),[126] the most common of these quasi-discovery orders would be orders "specifying terms, including time and place, for the disclosure or discovery"[127] or orders "prescribing a discovery method other than the one selected by the party seeking discovery."[128] These closely resemble normal discovery orders. They grant the disclosing party minimal protection, and in prescribing a discovery method, they function like a traditional discovery order—albeit one that orders production in a manner different than what the receiving party originally sought.

For example, imagine a plaintiff seeking a deposition of a defendant-corporation's CEO. A court might grant the defendant's motion for a protective order under Rule 26(c)(1), specifying that, rather than being deposed, the CEO will instead be required to answer interrogatories. At this point, the order to answer interrogatories is basically a normal discovery order directing production by the defendant, even though it is styled as a protective order. If the CEO then refuses to answer the interrogatories, thus violating the "protective order," the violation would be sanctionable under Rule 37(b).

This model also satisfies the concerns Judge Ryan articulates in his *Coleman* dissent.[129] Recall that one of his justifications for the wholesale exclusion of protective orders was their "amorphous" nature and the more abstract harm that results from their violation, which makes them unlike discovery orders. He argued that this makes protective orders unfit for the test associated with Rule 37(b), requiring proportionality between a

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[126] See FRCP 26(c)(1)(A)–(H). See also text accompanying notes 12–14; note 118 and accompanying text (enumerating the types of protective orders authorized by Rule 26(c)(1)).

[127] FRCP 26(c)(1)(B).

[128] FRCP 26(c)(1)(C).

[129] See *Coleman*, 23 F3d at 1099 (Ryan dissenting) (arguing that Rule 37(b) does not apply to protective orders).

sanction and the specific prejudice suffered from an order violation.[130] Protective orders that substantively function like discovery orders, however, do not suffer from this problem. These are not the typical protective orders that *protect* the disclosing party, which are often concerned with concepts like "embarrassment" or "oppression."[131] Rather, these protective orders are *commanding* a party actually to provide information. Thus, this reading of Rule 37(b) and application of *Obriecht* fits within Judge Ryan's understanding of what should be sanctionable.

In sum, a court examining the text of Rule 37 and the pair of Advisory Committee Notes should find that Rule 37(b) discovery sanctions are not available for the majority of Rule 26(c) protective orders. There are, however, certain narrow categories of protective orders that should be enforceable through Rule 37(b): those that mimic normal discovery orders. The narrowness of this category leaves a large gap in rule-based sanctioning authority to enforce protective orders.

D. Alternatives for Courts to Enforce Protective Orders

If, as this Comment proposes, Rule 37(b) provides inadequate authority for courts to sanction parties for violations of all but a narrow subset of Rule 26(c) protective orders, then how are courts supposed to enforce traditional protective orders? Another source of authority, the courts' inherent power to sanction, can temporarily fill in the gap. This change in sanctioning authority should lead to similar results in most individual cases, though it is an open question whether some marginal cases may be treated differently under the two regimes. However, such a change is only a stopgap. Rule-based sanction authority is ultimately preferable to the inherent powers for numerous reasons.

The inherent judicial sanctioning power, like Rule 37, gives courts a range of potential responses when facing a violation of a court order.[132] The Supreme Court has limited the availability of

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[130] Id (discussing the "prejudice" analysis). See also text accompanying note 52 (detailing why protective orders do not fit neatly within the Rule 37(b) sanctioning framework).

[131] See *Coleman*, 23 F3d at 1099 (Ryan dissenting) (identifying, in addition to these "amorphous concerns," as the usual object of protective orders "broader considerations of public policy").

[132] Compare Daniel J. Meador, *Inherent Judicial Authority in the Conduct of Civil Litigation*, 73 Tex L Rev 1805, 1815–16 (1995) (describing the inherent authority to sanction as allowing contempt, fines, fee shifting, dismissal, and default judgment, as well as "[l]esser sanctions . . . includ[ing] warnings, formal reprimands, placement of the

the more severe inherent power sanctions—like shifting attorney's fees—in certain cases, such as when the violation was not willful or in bad faith.[133] This would seem to differentiate inherent authority from Rule 37(b), which on its face has no state-of-mind restrictions on its sanctions. Rule 37(b), however, has been given similar limiting treatment by courts in a number of cases,[134] leaving it open whether certain violations are sanctionable under Rule 37(b) though not sanctionable under the inherent powers. Ultimately, however, it would be worthwhile to amend the Federal Rules of Civil Procedure to specifically grant courts rule-based authority to deal properly with all protective order violations, so as not to have to rely on unwritten judicial authority.

1. Using the court's inherent power to sanction.

A court order must be enforceable by a court; otherwise, the order is idle words on a page, a mere suggestion that litigants may freely disregard. Accordingly, regardless of whether there is rule-based authority to enforce a particular order, courts can generally do so anyway. This is where the inherent power to sanction comes into play.

A court's inherent authority, or inherent power, is "the authority of a trial court . . . to control and direct the conduct of civil litigation without any express authorization in a constitution, statute, or written rule of court."[135] This includes not only the ability to dismiss a claim or issue a default judgment in response to an order violation, but also to fine parties, shift fees and costs, and hold parties in contempt.[136] In addition, the court can impose less severe sanctions, like issuing warnings or admonitions, decreasing a case's priority on the docket, forcing

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case at the bottom of the calendar list, temporary suspension of counsel, . . . dismissal of the suit unless new counsel is secured, and preclusion of claims or defenses"), with FRCP 37(b)(2)(A)(i)–(vii) (authorizing sanctions including making negative inferences, striking pleadings, dismissing a case, issuing default judgment against a defendant, and holding the violating party in contempt).

[133] See notes 139–63 and accompanying text (discussing *Alyeska Pipeline Service Co v Wilderness Society*, 421 US 240 (1975); *Roadway Express, Inc v Piper*, 447 US 752 (1980); and *Chambers v NASCO, Inc*, 501 US 32 (1991)).

[134] See Part III.D.2 (discussing the limitations courts have imposed on certain Rule 37(b) sanctions based on a characterization of the violator's conduct).

[135] Meador, 73 Tex L Rev at 1805 (cited in note 132). See also *Degen v United States*, 517 US 820, 827 (1996); *Link v Wabash Railroad Co*, 370 US 626, 630–31 (1962).

[136] Meador, 73 Tex L Rev at 1815 (cited in note 132) (noting that "[l]itigation-ending sanctions . . . although generally acknowledged to be within a court's inherent power [ ] are considered the most drastic type of sanctions"). See also *Degen*, 517 US at 827–28.

parties to change their counsel, and precluding specific claims and defenses.[137]

While the concept of inherent powers has existed for centuries,[138] the Supreme Court has further developed and clarified the law on the inherent power to sanction in a relatively recent line of cases. While courts have naturally been able to sanction for bad-faith or willful violations—blatant disrespect and disregard of a court's authority—the power with regard to good-faith violations is more nuanced. The Court briefly discussed the sanctioning power in a discussion of shifting attorney's fees in *Alyeska Pipeline Services Co v Wilderness Society*.[139] In dicta specifying exceptions to the American Rule, under which each of the parties pays for its own legal fees, the Court stated that courts have the "inherent power" to award attorney's fees for the "willful disobedience of a court order" or "when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons."[140] This has since been established as the settled rule.[141]

Subsequently, in *Roadway Express, Inc v Piper*,[142] the Court reviewed sanctions imposed against the plaintiff's counsel for stalling the court's proceedings, failing to respond to interrogatories, and violating the court's orders.[143] On appeal from the appellate court's reversal of the attorney's fees sanctions, the Supreme Court touched on the question of "what sanctions may be imposed on lawyers who unreasonably extend court proceedings."[144] After holding that Rule 37 could justify sanctions, it further held that the inherent power to sanction could be used if

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137 Meador, 73 Tex L Rev at 1816 (cited in note 132) (observing that the more severe litigation-ending sanctions should only be used when these lesser sanctions are "deemed [in]adequate under the circumstances"). See *Degen*, 517 US at 828 (seeking an alternative sanction in a criminal flight case on the ground that "disentitlement is too blunt an instrument").

138 See, for example, *United States v Hudson and Goodwin*, 11 US (7 Cranch) 32, 33–34 (1812) ("Certain implied powers must necessarily result to our Courts of justice from the nature of their institution.").

139 421 US 240 (1975).

140 Id at 258–59 (quotation marks and citations omitted).

141 See *Hutto v Finney*, 437 US 678, 689 & n 14 (1978) (collecting cases) (noting that it is a "settled rule that a losing litigant's bad faith may justify an allowance of fees to the prevailing party"), citing *Alyeska*, 421 US at 258–59.

142 447 US 752 (1980).

143 Id at 755–57 (noting that the lower court "found justification for its ruling in the confluence of several statutes").

144 Id at 757.

there was a finding of bad faith.[145] Stating that "[t]here are ample grounds for recognizing [ ] that in narrowly defined circumstances federal courts have inherent power to assess attorney's fees against counsel,"[146] the *Roadway Express* Court confirmed what it had stated in dicta in *Alyeska Pipeline*: that inherent-power sanctions could be issued in cases of bad-faith or willful violations of orders.[147]

The Supreme Court later clarified the scope of a court's inherent power to sanction—and defined its relationship with rule-based sanctioning authority—in *Chambers v NASCO, Inc.*[148] In litigation following the failed sale of a television station, the defendant Chambers and his counsel took numerous steps to obstruct the proceedings and resist the jurisdiction of the court.[149] In determining whether to issue sanctions, the district court found that the misbehaviors of Chambers and his lawyer were covered neither by Rule 11,[150] which only reaches papers that are filed, nor by 28 USC § 1927,[151] which only allows the sanctioning of *attorneys* but not the parties themselves.[152] The court instead used its inherent powers to make them pay nearly $1 million in attorney's fees and expenses.[153] These sanctions were upheld at the appellate level, and the Supreme Court granted certiorari to determine the legality of assessing attorney's-fees sanctions

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145 See id at 763–67 (remanding for determination of recovery under Rule 37 and for consideration of whether the violations were "tantamount to bad faith").

146 *Roadway Express*, 447 US at 765.

147 See id at 766 (reasoning that the expenses could be assessed against litigants and their counsel alike).

148 501 US 32 (1991) (noting that the rules and statutes, "taken alone or together, are not substitutes for the inherent power").

149 Id at 35–41 (noting that the defendant continued obstructionist tactics despite warnings from the court).

150 FRCP 11(c) ("If, after notice and a reasonable opportunity to respond, the court determines that [Rule 11's requirement that filed papers be certified] has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation.").

151 28 USC § 1927:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

152 *Chambers*, 501 US at 41 (explaining the district court's reasoning).

153 Id at 40 (noting that the district court opinion provided an "extensive opinion recounting what it deemed to have been sanctionable conduct").

under the authority of inherent powers when a party's bad-faith conduct falls outside the defined rules authorizing sanctions.[154]

The *Chambers* Court "discern[ed] no basis for holding that the sanctioning scheme of the statute and the rules displaces the inherent power to impose sanctions for [ ] bad-faith conduct."[155] The inherent power could operate concurrently because it is "both broader and narrower than other means of imposing sanctions."[156] On one hand, it fills in the gaps when these other rules are limited to certain parties and behaviors; on the other hand, sanctions like fee shifting, in violation of the American Rule, are limited "to cases in which a litigant has engaged in bad-faith conduct or willful disobedience of a court's orders," whereas many Federal Rules are not limited in this way.[157] It is with these properties that the inherent power to sanction operates alongside Rule 37(b)'s sanctioning authority—it covers some areas that the Rule does not, but part of the authority may be limited in cases of good-faith or nonwillful violations.

The interpretation of these Supreme Court decisions has not been clear-cut, and there has been much subsequent confusion over the extent of inherent powers when facing these particular good-faith or nonwillful violations.[158] If a violation is in bad faith, no level of sanctions is off the table. Whether a particular sanction is available for good-faith or nonwillful violations, however, depends on the severity of that sanction. Minimal sanctions, like a small fine or admonition, likely do not require a bad-faith or willful violation.[159] On the other hand, as discussed above, attorney's-fee shifting and dismissal do require the violator to have had a culpable state of mind.[160]

The medium sanction, contempt, is where courts have wavered. One Ninth Circuit panel, for example, found that the Supreme Court was not referring to situations of contempt, so that

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[154] See id at 42 (noting that the Court granted certiorari "[b]ecause of the importance of these issues"). See also *NASCO, Inc v Calcasieu Television and Radio, Inc*, 894 F2d 696, 702–03 (5th Cir 1990).

[155] *Chambers*, 501 US at 46.

[156] Id.

[157] Id at 46–47.

[158] See *United States v Seltzer*, 227 F3d 36, 41 (2d Cir 2000) (collecting cases).

[159] See id at 41–42 (noting that a $350 fine for an attorney who violated an order without bad faith by returning late from lunch for the reading of a verdict was not problematic, but reversing the decision because the record was insufficient).

[160] See *Chambers*, 501 US at 46–47 (comparing the limitation on courts' ability to use inherent powers to assess attorney's fees with the use of other mechanisms, like FRCP 11).

if a good-faith violating party were held in contempt, the court could shift fees as a sanction in violation of the American Rule.[161] On the other hand, another Ninth Circuit panel held that although "contempt need not be willful, and there is no good faith exception to the requirement of obedience to a court order . . . a person *should not* be held in contempt if his action appears to be based on a good-faith and reasonable interpretation of the court's order."[162] A full analysis of the relationship between good faith and contempt sanctions is beyond the scope of this Comment. It is sufficient to note that bad-faith and willful protective order violations would be fully sanctionable under the inherent powers, while some types of severe sanctions might be unavailable in cases of good-faith and nonwillful violations.

2. Similar restrictions on Rule 37(b) sanctioning.

That the inherent powers are restricted in this way may arouse fears that sole reliance on them for enforcing protective orders might be limiting, as compared to using Rule 37(b). Part of this is mitigated by the fact that some courts already opt to use inherent sanctions like contempt orders for enforcement, rather than Rule 37(b).[163] Further, courts have also limited Rule 37(b) in many of the same ways as the inherent powers, which raises the possibility that the respective reaches of the two authorities might actually be coterminous.

While the discretion of district courts to issue Rule 37(b) sanctions is generally broad, it is "not limitless,"[164] despite a lack of restrictions listed in the text of the Rule. Like inherent power sanctions, "although Rule 37(b) applies to all failures to comply, whether wilful or not, the presence or lack of good faith in the

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161 *Perry v O'Donnell*, 759 F2d 702, 704–06 (9th Cir 1985) (describing the purpose of civil contempt as being "remedial").

162 *In re Dual-Deck Video Cassette Recorder Antitrust Litigation*, 10 F3d 693, 695 (9th Cir 1993) (emphasis added) (citations, quotation marks, and brackets omitted). See also *Food Lion, Inc v United Food and Commercial Workers International Union, AFL–CIO–CLC*, 103 F3d 1007, 1017–18 (DC Cir 1997) ("Although a party's good faith may be a factor in determining whether substantial compliance occurred, and may be considered in mitigation of damages, good faith alone is not sufficient to excuse contempt.").

163 See, for example, *Grove Fresh Distributors, Inc v John Labatt Ltd*, 888 F Supp 1427, 1447 (ND Ill 1995) (holding a party in civil and criminal contempt for willfully violating a protective order).

164 *Bon Air Hotel, Inc v Time, Inc*, 376 F2d 118, 119–22 (5th Cir 1967) (finding that a district court erred by imposing overly harsh sanctions when it dismissed plaintiff's complaint because the plaintiff was unable to produce a witness for deposition).

parties is relevant to . . . the severity of the sanctions."[165] Application of this concept is similarly complicated and differs among circuits. It is nearly universal that the severest of sanctions under Rule 37(b), like dismissal of a case, are limited to bad-faith or willful violations of orders.[166] Numerous courts have also been unwilling to shift attorney's fees and costs under Rule 37(b) when facing good-faith or nonwillful discovery order violations.[167] At least one circuit, on the other hand, has held that "only in a case where the court imposes the most severe sanction—default or dismissal—is a finding of willfulness or bad faith failure to comply necessary."[168] Thus, since the overlap of Rule 37(b) and inherent powers is unclear, it is likewise uncertain whether a shift to reliance on inherent authority would restrict the sanctioning ability of courts.

3. A preference for rule-based sanctions.

Notwithstanding this question mark, even if the inherent authority to sanction can justify enforcement of protective orders without the need for Rule 37(b), it is preferable to expressly allow sanctions for all protective order violations in a rule. There are numerous reasons why codifying the authority would best serve courts and litigants alike. First, judges could be confident

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[165] Id at 122, citing *Societe Internationale pour Participations Industrielles et Commerciales, SA v Rogers*, 357 US 197, 207 (1958).

[166] See, for example, *Toma v City of Weatherford*, 846 F2d 58, 61–62 (10th Cir 1988) (holding that a dismissal sanction was an abuse of discretion when the order violator's actions were not deemed to be willful); *Fjelstad v American Honda Motor Co, Inc*, 762 F2d 1334, 1337 (9th Cir 1985), quoting *Sigliano v Mendoza*, 642 F2d 309, 310 (9th Cir 1981) ("Where the drastic sanctions of dismissal or default are imposed, however, the range of discretion is narrowed and the losing party's non-compliance must be due to willfulness, fault, or bad faith."); *Savola v Webster*, 644 F2d 743, 746 (8th Cir 1981) (discussing how, in the past, the court has found "'willfulness' as an element required to uphold dismissal of a suit"). Note that these cases refer to dismissal as a sanction. Courts can, of course, dismiss a plaintiff's suit for failure to prosecute, regardless of an express finding of bad faith. See *M & H Cosmetics, Inc v Alfin Fragrances, Inc*, 102 FRD 265, 267 (EDNY 1984) (dismissing a case after the plaintiff "made no move to press this action over the course of seventeen months").

[167] See, for example, *Vollert v Summa Corp*, 389 F Supp 1348, 1352 (D Hawaii 1975) (holding that awarding costs is unjustified without a finding of bad faith); *M & H Cosmetics*, 102 FRD at 267 (finding that, even if dismissal was warranted for failure to prosecute, attorney's fees should not be shifted under Rule 37(b) since the plaintiff's incomplete answering of interrogatories was due to a lack of case preparation and not willfulness or bad faith).

[168] *BankAtlantic v Blythe Eastman Paine Webber, Inc*, 12 F3d 1045, 1049 (11th Cir 1994) (upholding sanctions without evidence of bad faith because only the most severe sanctions require bad faith).

in their selection of a singular source of authority to enforce protective orders, decreasing the administrative costs of having to choose and lowering the chance that the sanctions get overturned on appeal. Next, litigants could better know what to expect should they violate a protective order.[169] If the potential for sanctions is meant to serve as a deterrent for violations, then knowledge of what exactly these sanctions could entail would best deter would-be violators.[170]

Additionally, enumerating the sanctions could increase faith in the judicial system and give the court's actions more legitimacy.[171] The inherent powers have been referred to as a "shadowy concept,"[172] one which operates in the background of the judicial system. Consider Professor Maurice Rosenberg's prescient description of the perils of relying on inherent powers to fill in the gaps of Rule 37 in his 1958 article:

> There is no justification for the courts' practice of bypassing rule 37, and the practice can only cause trouble. So important a mechanism as discovery should rest upon a coherent and integrated foundation of enforcing power. Areas not reached by rule 37 should be covered, not by piecemeal decision, but by systematic overhaul of the rule.[173]

Related to this idea, from a rulemaking perspective, express sanctioning authority would give both courts and legislators more power to tailor the law specifically to protective order violations. The inherent powers are broad and cover many actions of a court; they are far broader than any authority Rule 37(b) provides. If a court's ability to sanction for protective order

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169 See Timothy Meyer, *Codifying Custom*, 160 U Pa L Rev 995, 1003–04 (2012) (discussing the role of codification in clearly "delineating" the boundaries of a "legal obligation" in the context of international law).

170 See Sandra L. DeGraw and Bruce W. Burton, *Lawyer Discipline and "Disclosure Advertising": Towards a New Ethos*, 72 NC L Rev 351, 373 n 108 (1994) ("Deterrence of sanctionable behavior depends not only on clear guidelines for attorney behavior, but also on dissemination of information. On this score, the educational effects of Rule 11 are palpable."), quoting Thomas E. Willging, *The Rule 11 Sanctioning Process* 12 (Federal Judicial Center 1988).

171 Barbara C. Salken, *To Codify or Not to Codify—That Is the Question: A Study of New York's Efforts to Enact an Evidence Code*, 58 Brooklyn L Rev 641, 645 (1992) (describing the "perception" in the era before codification "that the law was inaccessible and uncertain"), citing Jeremy Bentham, *Theory of Legislation* 92–95 (Oceana 1975) (Richard Hildreth, trans).

172 Maurice Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 Colum L Rev 480, 485 (1958).

173 Id at 486.

violations falls within this large umbrella, then changes to the umbrella may also have unintended consequences on the ability of courts to sanction for protective order violations. On the other hand, if a legislative body or courts want to change the way that protective orders are enforced, they can make rulings or changes to the specific rule in question.[174]

A change to the Federal Rules of Civil Procedure could take numerous forms, but the simplest is likely the most preferable. The text of Rule 37(b) could be amended to expressly include Rule 26(c)(1) protective orders. Rather than declaring that protective orders fall within the category of "order[s] to provide or permit discovery,"[175] which this Comment argues they fundamentally do not,[176] the Rule should be changed to authorize sanctions for violations of these protective orders *in addition* to "order[s] to provide or permit discovery." The new Rule 37(b)(2)(A), as amended, could read:

> (A) *For Not Obeying a Discovery Order or Protective Order*. If a party or a party's officer, director, or managing agent—or a witness designated under Rule 30(b)(6) or 31(a)(4)—fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), or a protective order under Rule 26(c)(1), the court where the action is pending may issue further just orders.

CONCLUSION

Courts have analyzed the applicability of discovery sanctions to violations of protective orders in a number of ways. This Comment argues that, because the Rule 26 Advisory Committee Notes have not been given their due consideration, no court has

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174 See Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 Yale J Intl L 435, 509 (2000) (explaining the argument that codification means "[f]uture legislative reforms would be undertaken more easily and more effectively"). If Congress were to pass legislation altering the enforcement of protective orders, the same questions may arise about inherent powers filling in the gaps. However, the new legislation could theoretically supersede the inherent power to sanction if that were Congress's stated intent. See *Chambers*, 501 US at 47, quoting *Weinberger v Romero-Barcelo*, 456 US 305, 313 (1982) (stating that "the exercise of the inherent power of lower federal courts can be limited by statute and rule," but that the Court "'do[es] not lightly assume that Congress has intended to depart from established principles' such as the scope of a court's inherent power").

175 FRCP 37(b)(2)(A).

176 See Part III.A (analyzing the text of Rule 37(b) to argue Rule 26(c)(1) protective orders are not "order[s] to provide or permit discovery" under Rule 37(b)).

yet gotten the answer completely correct. Eschewing the extremes the courts have proposed to date, this Comment proposes taking a middle path, arguing that protective orders are neither categorically excluded from nor categorically included in the Rule 37(b) sanctioning scheme. Instead, though traditional protective orders should be read as outside the scope of Rule 37(b), the violations of certain protective orders—those that functionally mimic discovery orders—should be sanctionable under Rule 37(b).

Such a reading would necessitate a temporary shift in the authority used to enforce traditional protective orders. For the time being, the inherent power to sanction could fill in the gap left by a narrower Rule 37(b), though the inherent powers may be more limited in some circumstances. While the full range of sanctioning options under the inherent authority has been restricted by the Supreme Court in certain situations, Rule 37(b) faces similar restrictions. Regardless of how adequate a substitute the inherent powers may be, there are numerous reasons why codified sanctioning is preferable to relying on these unwritten rules. These include an increase in legitimacy, a greater deterrent effect for potential violations, and more control over the nature of protective order–violation sanctions going forward. Thus, while transitioning to a temporary reliance on inherent authority is the proper course of action, it is only a stopgap; it would be ideal to amend Rule 37(b) expressly to include Rule 26(c)(1) protective orders, so as not to have to rely on the court's inherent authority.