"Giving Defendants a Choice: Obey the Rules or Pay the Price"

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Our law firm has spent years fighting "discovery wars", trying to extract admissible evidence from defendants. It has been a frustrating experience, but one that has taught us some lessons which we find useful.

Frustration eventually inspires reflection. Reflection inspires understanding. That's been the course of our experience in trying to extract evidence from defendants.

We understand now that although our nexus with the defendant is the defense lawyer, the defense lawyer may not be the cause of the problems.

We understand, now, that *professionals* doing defense work are not obligated to prove our case for us. They are obligated to follow the rules and court orders, but unless we know how to seek information -- how to craft requests for production of documents and interrogatories that clearly require the information be provided, the defense lawyers aren't obligated to give us what we want to get. The vast majority of defense lawyers do, we think (and hope) fulfill their obligations to the courts and obey both the rules and court orders.

Many do not, under pressure from unscrupulous clients. Many, instead, deliberately calculate how to evade the rules, obstruct discovery, and hide evidence. We understand why. They are paid to do so. We understand why so many are willing to do so much to undermine justice. If they don't, someone else stands ready and willing to do the defendants' bidding and take the client.

Many more participate in efforts to change the rules to facilitate the misconduct for which their corporate employers are so willing to pay.

We understand why defendants are so willing to violate rules, disobey court orders, hide evidence, and avoid justice. On the most superficial level, it is because no one wants to be the author of their own misfortune: a defendant possessed of the 'smoking gun' document which can destroy its defense and cost it a lot of money will do most anything to avoid producing the document. On a more fundamental level, it is

because many defendants -- perhaps most -- simply do not believe in justice at all, particularly when it may damage the defendant in some way.[1]

We understand now that a primary source of that evil is the failure of the Bar, and of the courts, to require that all lawyers, as licensees of the people should be made to serve the people and the system of justice. Malautea v. Suzuki Motor Co., LTD, 987 F2d 1536, 1546-47 (1993).

An alternative exists when a defendant and its counsel steadfastly refuse to do what the rules and court orders require them to do: sanctions. Rule 37 provides the remedy.

The solution to the problem stems from reflection upon these basic premises. The solution is this: Don't get frustrated; don't get angry; don't get pious. Instead, give the recalcitrant defendant the choice: *Obey the rules or pay the price.*

Understand yourself, and help the courts to also understand, that there are times and there are situations where a defendant will not -- perhaps, in its own 'mind', cannot -- obey the rules and the court orders and affirmatively prefers the ultimate sanction to compliance with court orders by producing devastating evidence to its adversary.

This is merely logical. An automaker, for example, has more than your case to litigate: it may be litigating hundreds of products liability cases. Oftentimes, dozens of them may involve the same defect, or the same issue, and the automaker may rationally expect dozens, or hundreds, more such cases to arise in the future. Confronted with the requirement, imposed first by the rules and by your carefully crafted discovery and then by court orders on motion to compel, to produce the 'smoking gun' document in your one case, the defendant realizes that to do so may expose it, ultimately, to that same document in many other cases. The 'cost' to defendant of default in your one case is *minor* compared to the 'cost' to defendant of exposure in many other cases. Even when there aren't 'many other cases', the cost of exposure in the press and the public relations damage is often considered far greater than the cost of default in your one case.

Examples are legion. The one most publicized for the American people has been the Ford Explorer/Firestone tire debacle. Ford Motor Company knew before it sold the first Explorer that that vehicle was going to have a deadly rollover problem. Ford knew rollover; its Bronco II was one of the worst. Firestone knew before it sold the first of those shredding tires that people were going to die as a result. For years each defended

[1] After enough years and enough cases and fights, most of what one experiences in this endeavor begins to lose its power to shock. One thing does not: the extent to which many *businesses*, particularly large corporate entities, *simply do not believe in the justice system.* It is, to them, an impediment, something to be manipulated. They do not believe in tolerating its interference in their activities; they believe, instead, in "reforming" it so that it ceases to be a threat. Even that becomes understandable, however: the problem with the justice system, in the view of most corporate executives, is that it is the 'great leveler'. Any citizen can come to a public courtroom "equal" to the mightiest corporation. Few concepts are more obnoxious to the corporate type.

cases, settled cases, obtained "protective orders", conned plaintiffs' lawyers into returning documents, and 'kept the lid on.'

Understand also, and help the courts to understand, that the discovery rules and court orders are not absolute: a party retains the *right* not to obey. That's a decision a defendant may choose to make, for whatever reason. But the decision carries a severe penalty, and the penalty ought to replicate the possible cost to the plaintiff.[2]

This approach -- giving defendants the choice they seem to crave and manifestly deserve -- obey the rules or pay the price -- applies not just to products cases, but to medical cases, environmental cases, business torts, to the whole panoply of plaintiffs cases where damaging evidence reposes in the files of the defendants to which plaintiff is entitled.

The approach works. This firm has obtained sanctions orders in a number of cases. Some orders granted default, others granted issue preclusion. What is *not* useful and therefore not acceptable is fines or fees or expenses. That is not a fair trade. When a defendant deprives plaintiff of evidence to which plaintiff is entitled *because* the evidence will insure or render more likely a victory for plaintiff, then any sanction which does not cause the same result is no real sanction at all. It is instead a victory for the disobedient defendant.

What is required to confront defendant with the dilemma it deserves -- obey or pay? Obviously it takes *hard work.* It is not easy. Defense counsel, particularly those who handle major cases, are usually very experienced and consequently adept -- true artful dodgers. They've done this before, probably -- the same defect or issue, same evidence, same discovery, same dodges.

What follows are some very general suggestions:

1. Formulate your discovery strategy before you file suit. Confer with other lawyers. Compose your interrogatories and requests for production carefully.

2. Do not accept bogus 'blanket' privilege or work product objections. The law requires specific objections, and proof of the validity of each such objection, and the submission to the court and to opposing counsel of a privilege log. The law requires that the privilege log contain sufficient information so that the opposing party may reasonably contest the claim.[3]

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[2] The actual cost to the plaintiff is impossible to calculate: when a defendant elects to disobey court orders and to hide evidence, one can never know what value that evidence might have had to the plaintiff. The courts should assume that it would have had immense value. That's logical; if it was of little use, defendant wouldn't hide it.

[3] See attached "Motion for an Order Outlining the Proper Procedure for Making Privilege Objections" and proposed "Order", attached hereto.

3. Realize that any and all particularly damaging documents will be concealed behind a claim of privilege or work product *and that* such claims will almost all lack any merit whatsoever. *Fight the privilege war.* Properly fought, you cannot lose.[4] Within the body of documents defendants conceal based on privilege will be some that are either not privileged in the first instance, or as to which the privilege cannot be proved or has been waived, or which are subject to the crime/fraud exception. Evaluate all three avenues to getting such documents. Be on the lookout for documents defendant is ordered to produce which defendant cannot produce, because the damage in all cases or to public relations exceeds the cost of suffering default in your one case.

4. Do not tolerate evasive responses. Insist on the required "meet and confer", but insist that it be recorded by a court reporter so the agreements will be clear for the parties and the court. Agree, where appropriate or necessary, to limit the language of your discovery or modify it, but insist on direct responses to the questions or requests as propounded, not as "interpreted" (re-written) by defense counsel.[5]

5. Do not tolerate deliberate delay. Routinely, defendants respond to requests for production with the "will produce" (at some indefinite date in the future) dodge. *The documents are due on the same day responses are due unless the deadline is extended.* Be reasonable about agreeing to extensions (which are often really needed by defendant), but do not allow defendant to "grant" its own "motion" for an extension, which is precisely the result of this 'will produce' dodge.

6. Keep one thing clear, to yourself, and make it clear to defendant: Defense counsel don't wear robes. They are not entitled to make rulings. Only the court may do that. Insist on it.

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[4] In the Six Flags case, for example, virtually every important defense document upon which plaintiffs' case was based was first concealed by a privilege or work product claim. Most of those claims were totally bogus. Few were valid. Enclosed is one of the trial court orders regarding privilege issues. In GM litigation, key documents are regularly sent to lawyers in an attempt to fabricate the basis for at least making a future privilege and/or claim. GM counsel are not deceived: they know such claim will lack any basis. But they also know that few lawyers will fight the battle, and that fewer still will take the time to properly present the issue to a judge. (Many have said that judges are loath to review privilege claims. Our experience is, for the most part, to the contrary. Few judges have experienced privilege objections properly contested.)

[5] *See.* Malautea v. Suzuki Motor Co., LTD, 987 F2d 1536 (1993).

7. Do not allow "dumping" of documents. Do not allow defendant to confuse the record about what has or has not been produced. This is routine. Shockingly, most plaintiffs' lawyers allow it. It can, and often does, make it impossible to later prove that defendant has failed to produce particular documents.[6] Our firm has a strict policy. It will not accept delivery of any production of documents in any case unless we receive prior notice *plus* (a) an index of what's in the boxes, using Bates numbers which also appear on each page produced, *and* (b) a supplemental response using request numbers and listing, for each request, the bates numbers of documents which are being produced and the date of production.

8. Review the documents. But who? Granted, lead counsel may not always have time to do so. But very experienced litigation personnel -- lawyer or paralegal -- must do so. Prior to beginning such reviews, brainstorm what should be looked for. Then, *review the documents again.*[7]

9. *Attention to detail.* That is the key. Insist that defendant do what is required of defendant, and pay exquisite attention.[8]

10. Fight any requests for unreasonable protective or confidentiality orders. The rules allow a protective order only in certain circumstances. *Defendants always demand protective orders to which they are clearly not entitled.* Never agree to a broad, unreasonable demand. If the defendant will not agree to a reasonable protective order, the defendant will have to move for a protective order. The burden of proof is on defendant. It usually cannot meet the burden except as to a very few documents. At a minimum, request that the Court enter, as to the documents subject to protection, a "sharing" protective order, so you can share documents with other lawyers with other cases against the same defendant. This is *crucial.* You cannot discover the entire universe of information relevant to a defect or an issue without the

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[6] Imagine this scenario: you accept, without notice, index, or supplemental response, 80 boxes of documents. You go through them all. You later discover ten crucial documents which (a) were not in the 80 boxes, and (b) refer to yet other documents which are not in the 80 boxes. How are you going to prove, on motion to compel or motion for sanctions, that category (a) and (b) documents are *not in* the 80 boxes? Think the trial judge is going to go through all 80 boxes to verify your representation they are not there when defendant says they are? You lose.

[7] I learned a long time ago, in medical cases, that there's no substitute for repetition. Just as good students study for an exam by going over their notes time and time again, so should litigators go through documents over and over. What you totally missed the first or second time will scream out to you the third time, because of something else you have seen elsewhere in the documents. *This never fails to happen.*

[8] Attached is an Order from Bampoe v. GM demonstrating the value of paying close attention and tolerating no violations of court orders, no matter how subtle or how well masked by defendant.

assistance of other plaintiffs' counsel, and they won't have the information to share with you unless they have successfully fought against the defendant's demand for a protective order. There is a huge body of law *requiring* sharing protective orders. Defendants know this. Most auto manufacturers will simply agree to a sharing protective order when dealing with plaintiffs' lawyers experienced in such issues. If they will not, our experience has shown that trial courts almost always require a sharing order.

11. Educate the judge. From the very beginning, tell him or her what to expect. The defendants' pattern of discovery abuse is always the same. Prepare the court for the discovery motions and privilege war that will be required. Explain not just what defendant is doing but *why* defendant is doing it. Help the court understand that defendant may have no choice, in its own judgment, but to disobey the rules and court orders, because the cost of obedience exceeds the cost of disobedience, even if disobedience brings the ultimate sanction of default.

12. First and foremost, from the very beginning, teach the court that "discovery deadlines beget discovery abuse". Every incidence of evasion and obfuscation and delay is rewarded by a strict discovery schedule: defendant keeps one eye on the clock and plays the 'four corners' defense, knowing that there can never be enough time to go through all the mandatory meet & confer and motions procedure necessary to get evidence from a determinedly obstructive defendant and still get the evidence in time to use for trial.

13. Be cordial, but firm. Resist the temptation to engage in 'correspondence wars'. For years I gave in to temptation: it was such fun! I have come to believe, however, that 'shorter is better', and that judges aren't going to read long letters attached to briefs as exhibits, anyway, and if they see them at all, they are likely to "declare a plague on both your houses", which is one of defendants' objects!

14. Be thorough. There's no substitute for that. In many cases, and in all automotive products cases, if you are thorough, you will target documents, facts, or witnesses which prove your case but which defendant, unfortunately, will not be willing to give up.[9]

[9] Attached is an Order granting default against DaimlerChrysler, which ably demonstrates thoroughness.