

THE BENCH AS BATTLEGROUND: The Discovery Process Is Broke And Only Judges Can Fix It*

By

James E. Butler, Jr.ⁱ and Patrick A. Dawsonⁱⁱ

Introduction

The discovery wars afflicting products liability cases today result from a deliberate pattern of intentional discovery abuse engaged in by defendants. This defense strategy includes these primary tactics: 1) withholding information, whenever possible ("strategic non-disclosure"); 2) raising as many discovery disputes as possible, hoping the trial judge does not have the time or patience to sort through them all, resulting in orders which "declare a plague on both your houses" or "split the baby" ("trying the court's patience"); and 3) delaying meaningful responses to written discovery while the discovery period inexorably passes away ("dribbling"). The intended results are to stymie plaintiff's investigation, maximize the expense and frustration for plaintiff, and to deny plaintiff efficient use of that information which defendant is ultimately forced to disclose.

Judges are under great pressure to expedite the resolution of cases pending before them. Accordingly, state and federal courts have adopted discovery periods, ranging from four to six months. Judges are also inundated with discovery disputes, most of which require the court to immerse itself in the technical details of private civil disputes, a situation bound to cause irritation and frustration for the court.

These two attributes of discovery--limitations placed upon the time for discovery, and the understandable reluctance of judges to wade through seemingly interminable discovery wrangling, are the twin pillars supporting the defense strategy of discovery abuse in products liability cases. Defendants take advantage of these two attributes to put plaintiff in a dreadful

* ©Copyright 1992 James E. Butler, Jr. and Patrick A. Dawson. All Rights Reserved.

dilemma: If plaintiff challenges defendant's discovery position and awaits the court's ruling, most of the discovery period will be used up before any such ruling is made and the very process of getting a ruling may exhaust the court's patience, so the court either grants no extension or an inadequate extension of discovery, in which event plaintiff will be denied the deposition discovery which plaintiff needs. If plaintiff proceeds with other discovery without obtaining a ruling on the initial discovery disputes, the very nature of a products liability case is such that if and when defendants finally produce discoverable information, many of the depositions plaintiff has by that time already taken will have to be retaken, thus causing further delay and expense.

Denied meaningful responses to initial written discovery and unsure whether defendants will successfully prey on the court's patience and prevent reasonable discovery extension, most of the time plaintiff will either not challenge defendant's discovery abuse, or will go forward with depositions--either of which courses give the defendants the benefit of the discovery abuse they committed.

The net effect is that we are left with a neutered discovery system, in which the plaintiff is, for all practical purposes, denied significant discovery from defendant. The consequences can be devastating in a products liability case, where the most pertinent information is always in the custody of the defendants. That imposing this no-discovery system is the ultimate object of the defendants now-common pattern approach to discovery cannot be doubted.

Unfortunately, instead of streamlining the discovery process, products liability defendants have used these discovery deadlines to evade and resist legitimate discovery attempts. Thus, discovery deadlines actually cause discovery delay. Through use of the pattern approach, defendants are able to string out discovery as the days left for discovery pass inexorably while motions to compel pend before the judge. Defendant's pattern approach to defeating discovery almost always works, for one unfortunate reason: The trial judge becomes

the defendant's unintentional ally. This happens for three reasons: (1) all trial judges are busy, (2) with rare exceptions, trial judges are relatively inexperienced with confronting hard-fought products liability cases, and (3) with even rarer exceptions, busy trial judges want both to be and to appear fair. The defendant's awareness of the three realities has caused the bench to become the battlefield.

The more discovery disputes there are, the more likely an exasperated trial judge is to declare "a plague on both your houses." The more unreasonable the defendant's positions are, the more difficult it is for the trial judge to discover what truth and fairness really require. Indeed, plaintiff resists defendant's discovery abuse at his or her peril, for two reasons: First, the trial judge is inevitably inclined to conclude that the plaintiff, as the recurrent movant with respect to discovery disputes, must be causing the problem. Second, as disputes proliferate and even the most basic matters require judicial intervention, any attempt to obtain legal recourse costs the plaintiff valuable discovery time, which is rapidly passing away. As a result, plaintiff faces a series of dilemmas that pose uniformly undesirable choices. Thus defendant's pattern approach to discovery abuse become a virtual "no-lose" proposition for defendant.

While the resulting injustice in massive numbers of cases and the explosion in litigation and expense are truly terrible results of this pattern approach, those consequences pale by comparison to the ultimate casualty: Honesty in the legal profession. Perverting the letter and spirit of the discovery rules begets the same. The "common denominator" phenomena prevails--you must "fight fire with fire" mustn't you? Plaintiffs know beyond doubt that the trial judges will "split the baby" in resolving discovery disputes, and experience teaches sage counsel there is nothing he can do to change that reality. What to do? The answer is obvious: Be almost as unreasonable as you know defendant will be--ask for more than you need and hope the judge will let you get most of what you need.

The defendant's counsel--always "reputable" lawyers with big establishment

firms--thus lead the profession on a downward spiral. That they lead the way is indisputable: Those firms certainly claim leadership of the profession; and the nonresponses they file to the plaintiff's first written discovery set the tone for the discovery wars that follow. Our professions's pathway to perdition is paved by trial judges' refusal to fulfill their obligation to require honesty and professionalism, and by the grotesque misperception of most practitioners that a lawyer's first duty is to the client. It is not: A lawyer's first obligation is to the court and to the public.ⁱⁱⁱ

Only the trial judge can defeat this "pattern approach to discovery abuse,"^{iv} by quick and decisive rulings on motions to compel and by requiring that the defendant not give the same treatment to the court's words they give to plaintiff's written discovery--restrictively interpreting and selectively obeying court orders. Granting the plaintiff's motions to compel is not enough--the trial judge must stop the downward spiral, first by recognizing the pattern approach ("the beginning of wisdom is to call a thing by its right name") and then by making it clear such conduct will not be tolerated. For example, the court must be prepared to order that full, truthful responses to written discovery be provided before any depositions are taken, extend the discovery deadline as needed, and show a readiness to impose sanctions when the defendant violates the court's order compelling discovery by evasive or partial compliance.^v

Even the trial judge cannot overcome the defendant's pattern approach, however, unless plaintiff's counsel first recognizes and then effectively resists defendant's discovery abuse early in the litigation. It is the object of this article to identify this 'pattern approach' to discovery abuse and suggest methods to defeat it.

The Pattern Approach To Discovery Abuse

To accomplish their goals, most defendants and defense counsel in products liability cases can be expected to follow this pattern:

- 1) Fivolous objections. Upon receipt of the plaintiff's initial written discovery,

defendant will object to virtually everything, on grounds which usually include:

(a) "attorney-client" privilege and "work product" privilege, without identifying the facts or documents to which such privileges supposedly attach and without providing any evidence to support the claim of privilege so the court and plaintiff have no way to evaluate the veracity and validity of the claims of privilege;

(b) the requests are "overbroad," which defendant uses as an excuse to limit the information made available to the plaintiff both "horizontally" (by reference to vehicle or product type and name, for example, arguing that the plaintiff is entitled only to information about the Suzuki "Samurai") and "vertically" (by year model of vehicles, for example, arguing that only information about the 1988 1/2 model "Samurai" is discoverable because the defendant claims some minor modification or differences which the defendant considers pertinent to its interpretation of the plaintiff's defect allegations existed only in that specific model);

(c) relevancy, which objections are expressly predicated upon the defendant's mischaracterization and intentional misinterpretation of plaintiff's contentions about the subject defects (and which objections are made even though all discovery rules declare "relevancy" irrelevant to discovery, so that making the objection is itself abusive litigation); and

(d) definitional, which objections are based upon the defendant's stated inability to understand such ordinary words and terms as "test," "engineer,"^{vi} "propensity to rollover," "risk of personal injury," "substantially similar," or "speak the truth."

2) Answering the wrong question. To the extent defendant does respond, it will first "interpret" the question, and then respond to its own redrafted question. No effort is made to meet the substance of the question head on or to answer the question as it was asked. Such an insidious abuse of discovery is particularly troublesome because it is often the most time consuming and difficult to detect and then articulate to the court. Having answered a question that was not asked, defendant will then argue that it has given "substantially" responsive

answers, when in fact it has given nothing.

3) Feigned attempts to confer. When plaintiff objects to defendant's utter failure to provide any meaningful information, defense counsel will make a great show of sending letters and requesting meetings to 'resolve' the discovery 'disputes.' Thus, defendant both "appears compliant"^{viii} with the discovery rules and defense counsel's obligations as an officer of the court, and puts the plaintiff in a dilemma: If plaintiff's counsel engages in such communications and agrees to any of the suggested limitations or misinterpretations placed upon plaintiff's discovery by defendant, then at any subsequent motion to compel hearing, defense counsel will argue that plaintiff's counsel has admitted that the requested discovery was subject to the objections made because plaintiff's counsel agreed to the limitations or interpretations placed on that discovery by defense counsel. If plaintiff's counsel declines to allow defense counsel to re-draft plaintiff's written discovery, then defense counsel will argue that plaintiff has failed to act in good faith or satisfy the local rules requirement that counsel confer in an attempt to avoid involving the court in discovery disputes.^{viii}

4) Proffering a professional witness. While defense counsel is attempting to engage plaintiff's counsel in prolonged "discussion" about what written discovery defendants will allow, defense counsel will "offer up" a witness, either the defendant's hired expert or a regular employee of the defendant, whom defense counsel will represent can testify authoritatively on behalf of the defendant corporation with respect to the defects alleged by plaintiff. This witness will be one carefully selected by defendant's in-house counsel and by regional counsel for the defendant manufacturer charged with superintending the defense of such cases, a witness whom the defendant can count upon not to reveal any information and not to provide any meaningful elucidation of the facts or issues in the case. If plaintiff's counsel declines to depose such a witness prior to receipt of truthful and forthright written discovery responses providing information necessary to conduct intelligent depositions, then at any subsequent motion to

compel hearing, defense counsel will argue that it is plaintiff's counsel who has obstructed discovery by declining to depose the defendant's "selected" witnesses. If plaintiff's counsel deposes such a witness without first receiving honest and forthright responses to written discovery, then he or she must do so without the information necessary to make the deposition meaningful. Plaintiff's deposition of this defense-selected witness gives defense counsel a 'window to the mind' of plaintiff's counsel, helping them to "prepare" any future witnesses. Moreover, if plaintiff's counsel ever receives information to which plaintiff is entitled by virtue of the written discovery responses, defendant will oppose any re-deposition of the proffered witness or witnesses and will oppose deposition of other witnesses employed by the defendant on grounds the defendant has already cooperated by making its proffered witness or witnesses available.

5) Unilateral discovery. Defendant will attempt to delay the process of judicial consideration of the inevitable motion to compel while insisting that the plaintiff "cooperate" in unilateral discovery, namely, answer defendant's written discovery, disclose plaintiff's experts, and make the plaintiff and plaintiff's experts available for deposition. If plaintiff's counsel is intimidated and agrees to such unbalanced discovery, then defense counsel will have plaintiff's expert or experts in the position of having to testify to opinions without needed information, while the same information is known to and has been available to defense counsel in preparing for the depositions. If the court eventually orders the defendant to provide forthright responses to the plaintiff's written discovery, the defendant will insist upon the opportunity to re-depose plaintiff's experts if review of such information affects their opinions at all, or will use the deposition of such experts at trial to impeach them, despite the fact the testimony was given without full information. If plaintiff's counsel refuses to engage in unilateral discovery, then at any subsequent motion to compel hearing, defense counsel will blame plaintiff's counsel for the delays in and frustration of discovery.

6) Putting the time squeeze on plaintiff. When the applicable discovery period is used up by the defendant's dilatory tactics and the plaintiff seeks an extension, defendant will oppose an extension if plaintiff's experts have been deposed or if plaintiff has not had the opportunity to depose other witnesses for discovery purposes or has not had the opportunity to take discovery and evidentiary depositions of the defendant's employees or other witnesses. Defendant thus maneuvers plaintiff's counsel into an unenviable dilemma: Either plaintiff's counsel takes discovery depositions and evidentiary depositions without having forthright responses to plaintiff's written discovery, or plaintiff's counsel takes the risk the trial judge, whose patience is already sorely tried by seemingly interminable wrangling over discovery disputes, will not extend discovery, thus foreclosing further discovery depositions and possibly foreclosing the taking of evidentiary depositions as well.

7) Nonsharing protective order. Prior to any actual hearing on the motion to compel, but usually after the filing of such a motion, defense counsel will agree to provide certain limited responses to plaintiff's written discovery, as that discovery has been redrafted by limitations and misinterpretation by defense counsel, but only if the plaintiff's counsel will agree to an unnecessarily restrictive or nonsharing protective order. If plaintiff's counsel agrees, the protective order is written to prevent plaintiff from obtaining information from other plaintiffs' counsel with similar cases or from comparing the defendant's discovery responses in the subject case with the defendant's discovery responses in other similar cases to check the veracity and completeness of such responses. If plaintiff's counsel does not agree to the nonsharing protective order, then at any subsequent motion to compel hearing defense counsel will argue the only reason for the discovery impasse is that the plaintiff declines to sign the requested protective order.

8) Last minute token production. Whether or not the protective order gambit works, prior to any motion to compel hearing (and usually fairly close in time to the date for

such hearing) defendant will make available certain limited but useless information in supplemental responses to the plaintiff's written discovery, and then, at the hearing, defense counsel will argue that the defendant has provided substantial information (arguing, for example, "we produced thousands of pages of documents") claiming that the dispute is caused solely because the plaintiff's counsel "greedily" wants more.

9) Narrow and improper focus on admissibility. At the motion to compel hearing, defense counsel will argue that plaintiff's written discovery is unreasonable, because the plaintiff seeks discovery about matters unrelated to the case. For example, if it is alleged that plaintiff or the plaintiff's decedent was wearing a seatbelt, and plaintiff seeks information about seatbelts, the defendant will argue that the victim was not wearing a seatbelt and thus all such information is irrelevant and not discoverable. Thus, defendant necessitates judicial intervention with respect to basic issues such as the distinction between "discoverability" and "admissibility." By requiring such intense judicial intervention, the defendant eventually exhausts the judge's patience, with confidence that the trial court, laboring to be and appear even-handed, will not impose meaningful sanctions.

10) Selective and incomplete production. When plaintiff requests information about other accidents known to defendant, or other claims made or other lawsuits filed, defendant will vigorously resist giving any information whatsoever even though there is an overwhelming body of law which says that information is discoverable.^{ix} When pressed, defendant will agree to give only the names of court cases, without any further information which would allow plaintiff to investigate those other matters. When compelled by the judge to give useful information, defendant will provide just enough information to escape sanctions, but as little as possible, and will delay providing even that information while the time for discovery runs, thus defeating plaintiff's efforts to follow up with respect to that information. Moreover, defendant will "forget" certain accidents, claims, or lawsuits. Those "forgotten" incidents seem

always to include the most useful for purposes of proving the defendant's prior notice of defect. For example, an automotive manufacturer's response to such an interrogatory will always vary from case to case, even though the exact same interrogatory question is asked. At deposition, defendant's employees will deny defendant accumulates such information or has any system for retaining such information, forcing the plaintiff to take a multitude of depositions and employ experts to prove the falsity of that denial, and then to come back to the judge to insist upon forthright responses, all while the period for discovery passes away and the judge's patience dwindles.

11) Restrictively interpreting Court orders. When the trial judge compels discovery, defendant will apply the same "creative" approach to 'understanding' the court's chosen words that it applied to the plaintiff's written discovery. Defendant will thus seek to "appear compliant" without producing the most crucial documents and facts.^x Then when plaintiff files a motion for sanctions, defendant will argue the court's order did not specifically direct production of the concealed facts or documents, so the defendant's noncompliance was purely inadvertent and not evidence of bad faith.

Of course, to fashion an order specific enough to clearly and indisputably require the production of a specific document, as defendant will insist was not done, the court must know what the document is. It must learn those specifics from plaintiff. Here is the catch: If plaintiff can provide such specificity, plaintiff almost certainly does not need discovery from the defendant. If plaintiff cannot provide such specificity, discovery will not do the plaintiff any good. Either way, defendant escapes from its discovery obligations. And, of course, that is the whole object.

If the trial judge elects only to enter another order compelling production, this semantics charade will continue until finally no time is left for discovery, and plaintiff has lost

the opportunity to take needed depositions, or has had to go ahead and take discovery and evidentiary depositions without the necessary background information. Evidentiary depositions taken under these circumstances, long before trial, will seem awkward and out of context when viewed by the jury.

A case currently being litigated by the authors' firm illustrates most of these pattern defense discovery practices.^{xi} That case involves the notorious Suzuki Samurai. Plaintiff has proven in that case that Suzuki first asked General Motors Corporation to market the vehicle in this country. General Motors evaluated what was then a proposed new vehicle, later code-named "Samurai" for sales in the continental United States, and refused to market it, finding it had "perceived rollover tendencies." Suzuki went ahead and marketed the Samurai on its own.^{xii} Despite a recall petition before the National Highway Transportation Safety Administration ("NHTSA") and over 100 lawsuits, Suzuki managed to conceal the evidence of this "GM/Suzuki connection" for nine years--until it was uncovered and proven in our case. To continue the concealment, Suzuki evaded plaintiff's discovery and violated orders compelling discovery, even after the district court had twice threatened default judgment against defendant. Suzuki was willing to risk default judgment to prevent plaintiff from discovering evidence of General Motor's evaluation of the Samurai. Plaintiff managed to obtain evidence of that evaluation from General Motors itself, after considerable litigation and expense, but Suzuki steadfastly refused to provide any discovery from its own files and employees about GM's negative testing and evaluation of the Samurai. The district court entered default judgment against Suzuki.

Combatting Defendant's Pattern Approach

These are all highly technical matters. Quite naturally, overexposure to such tactics by a trial judge or any other normal person is enough to make their eyes glaze over. The defendant realizes that fact, and uses it to its advantage.

The object of plaintiff's written discovery is to find out, as a preliminary matter,

what information is available from defendant about the allegedly defective product, about defendant's awareness of the defects, about the availability of reasonably available and economically feasible alternative designs, and about defendant's decision to use a design which maims and kills, rather than some other design. None of these goals can be accomplished unless plaintiffs' lawyers adopt a uniform and aggressive approach to combatting defendants' pattern approach to discovery abuse. Specifically, they should do the following:

1) Plan in advance. Plaintiff's counsel knows what is coming when he or she files the complaint and initial written discovery. Go ahead and prepare a draft motion to compel.

2) React swiftly. Establish a discovery review policy. For example, require that the responsible lawyer carefully review defendant's discovery responses within five business days of its receipt. The lawyer should review each response in the context of the defendant's pattern approach to discovery abuse. The uniformity of the defendants' bad faith and evasiveness will be readily apparent.

3) Inform the defendant of the inadequacies of its responses. Upon completion of the discovery review, send a discovery conference letter pursuant to the applicable local rules of court or to show plaintiff's good faith.^{xiii} The letter should clearly state the inadequacies of the defendant's discovery responses and specifically state that it is being sent in a good faith effort to resolve the discovery disputes. Depending on the inadequacies of the responses and the frivolity of the objections, plaintiff may wish to discuss each interrogatory or request or, if the inadequacies apply generally to each specific interrogatory or request, may discuss the inadequacies by category. If any of defendant's responses or objections truly have merit, then use the letter to narrow plaintiff's requests or withdraw those which are overburdensome.^{xiv} The letter should impose a specific response deadline on the defendant.^{xv}

4) File a motion to compel. As soon as the response deadline passes, file plaintiff's motion to compel. At the motion to compel hearing, provide the judge with a

summary of the relief plaintiff is seeking in the motion. Consider providing the judge with a proposed order describing in detail what information defendant is compelled to produce. This assists the judge in entering a specific and comprehensive order so it becomes more difficult for defendant to later claim it did not understand the order or that the order did not encompass certain disputed responses and information.

5) Seek a discovery extension. Contemporaneous with the motion to compel, plaintiff should file a motion for extension of discovery, asking the court to extend discovery by the exact amount of time wasted because of the defendant's inadequate discovery responses and frivolous objections, namely the time which passes between defendant's initial inadequate responses and defendant's responses pursuant to a court order compelling discovery.

6) Halt unilateral discovery. Make it clear to defendant that plaintiff will not tolerate unilateral discovery. It is especially unfair for defendant to conduct discovery necessary to its defense of its case while simultaneously denying plaintiff the right to any meaningful discovery. Thus, plaintiff should refuse to respond to any written discovery until defendant has filed satisfactory responses to plaintiff's discovery. No depositions should be taken until this initial discovery is fairly concluded. Defendant's notices of deposition should be met with an appropriate motion for protective order. Consider discovery a two-stage process: Stage one is defendant's response to plaintiff's initial written discovery seeking background information. Until that stage is satisfactorily completed, nothing else should be done.

7) Fight nonsharing protective orders.^{xvi} The request for a nonsharing protective order usually appears in defendant's initial discovery responses. It does not surface then because defendant really wishes to produce any information, but because defendant is attempting improperly to divest itself of the burden of showing good cause for such an order and to shift the burden of proof to plaintiff. To expedite the discovery process, plaintiff may wish to propose a sharing protective order. Such an order fully protects the defendant's competitive interests, if

any, in the alleged confidential information, yet allows plaintiff to share with other plaintiffs' lawyers handling similar cases.^{xvii} Since products liability defendants rarely agree to sharing protective orders, plaintiff must resist the nonsharing protective order in the motion to compel.

8) Remind the defense lawyer that he or she is not the judge: Privileges are specific. Defense counsel may not unilaterally decide what is or is not privileged; defense counsel have not been deputized by the judge to make that decision. A claim of "privilege" is waived when made generally, without reference to any specific fact or document, because the making of such a claim of "privilege" informs the judge of nothing, and gives the judge nothing to decide--it creates no issue for a decision for the judge.^{xviii} Any objection based upon any claim of "privilege" should be denied unless that claim is made with respect to some specific fact or document. At a minimum, plaintiff and the court should insist on a privilege log, which should include the name of the document, the date of creation, the author and recipients, and a description of the nature of the documents.^{xix}

9) Call defendant's discovery strategy by its right name. Plaintiff should point out in no uncertain terms that the defendant's responses are intentionally deceitful. They delay discovery and, consequently, delay trial preparation and cause plaintiff and the court unnecessary trouble and expense. Defendant is usually no stranger to lawsuits alleging the defect plaintiff's allege in the case. More likely than not, defendant has already investigated the same allegation of prior defect in other cases and with respect to other injuries and deaths. If possible, provide the judge with evidence from other lawyers or courts that this is indeed the case. Show that similar or identical requests for documents and for responses to interrogatories have already been made and that defendant already provided this information in other cases. If the production was the result of a motion to compel, attach the other court's order. Point out that defendant has required this plaintiff to file a motion to compel with respect to the very same evidence other courts had already ordered be disclosed.

10) Find evidence of the defendant's pattern of bad faith and discovery abuse.

Develop evidence of the defendant's bad faith attempts to evade and resist discovery in other cases. It is unconscionable for defendant to object to providing legitimate discovery information which the defendant has provided or has been compelled to provide in the past in another case. The trial judge should be fully advised with respect to defendant's discovery conduct in other similar cases alleging the same or similar defects, so that the judge can assess both the merit of the defendant's objections and claims of "privilege" and can also make an appropriate ruling with respect to sanctions because of the defendant's inherently deceitful objections and claims of "privilege." To accomplish this end, plaintiff's initial written discovery should include interrogatories and requests for production of documents directing that defendant provide full information about all compulsion or sanction orders entered in any case involving allegations similar in any way to plaintiff's allegations. When defendant objects and refuses to produce documents in one case which the defendant has produced or been compelled to produce in another case, that must be grounds for sanctions.^{xx}

11) Share information with other plaintiffs' lawyers. If you are able to prevent the entry of any protective order or are able to obtain a sharing protective order, be sure to share information obtained in discovery with other plaintiffs' lawyers and plaintiffs' nonprofit information clearinghouses. Products liability defendants routinely produce different information and documents to different plaintiffs who have asked identical questions, even though one law firm usually serves as a national litigation coordinator and clearinghouse for each type of case. The different responses and documents are convincing evidence of the defendant's bad faith approach to discovery. Thus, sharing of discovery should provide a system of checks and balances insuring honesty from the defendant. It will not, however, unless the trial court defeats defendant's pattern approach to discovery abuse, because defendant will still stick to the pattern and "dribble" out different facts and documents to different lawyers, and the

discovery period will pass away before defendant can effectively be caught. Sharing information should allow you to obtain the sanctions such conduct demands, however.

12) File a motion for sanctions. Review all discovery material produced in response to the court's order or orders compelling production. If the material does not meet the letter and obvious spirit of the court's order, then file a motion for sanctions.^{xxi} Always require that all discovery hearings be transcribed and obtain a transcript, so defendant can be held to the judge's oral rulings, even if not memorialized in the final written order. A judge can impose sanctions for violations of its oral orders as well as its written orders.^{xxii} If the discovery abuse is egregious enough or the pattern of abuse is pervasive, then ask the judge to dismiss defendant's answer and enter a default judgment.

The "Trojan Horse" Response To Possible Sanctions

An increasingly common tactic used by defendants, often when sanctions seem imminent, is to dump boxes of unidentified documents off at the offices of plaintiff's counsel. Typically, no explanation is made, no index is provided, and no supplemental response to plaintiff's written discovery is filed. Without anything to evidence what is or is not produced by this method, plaintiff's counsel "accepts" such unconventional "production" at his or her peril. It is imperative that a record always be made when production of documents is made and of what specific documents are produced. Otherwise, "confusion" may result about whether defendant has reasonably complied with plaintiff's written discovery. It is not at all unusual for defendants to claim to have produced documents which plaintiff never received --often after plaintiff seeks sanctions upon discovering the existence of particular documents from other plaintiffs. This too is part and parcel of the "pattern approach" to discovery abuse.

Seeking Sanctions For Discovery Abuse

Federal courts have broad statutory power under Rules 11, 26(g) and 37 of the Federal Rules of Civil Procedure and its inherent powers to strike a miscreant defendant's answer

and enter a default judgment. Under each of these rules, additional lesser sanctions may be imposed, including monetary sanctions, issue and evidence preclusion, censure, and injunctive relief. Some state courts do not yet have a Rule 26(g), but may nevertheless sanction the defendant under rules corresponding to Rules 11 and 37. Discovery sanctions are to punish and deter the abuser, and to deter other similar situated persons or entities from engaging in similar discovery abuse.^{xxiii}

The motion for sanctions should stress that any sanction less than a complete default judgment would have little or no realistic effect in the abuser, but would instead vindicate the defendants' abusive litigation strategies. Mere monetary sanctions, however large, will not deter a large manufacturer and others like it from engaging in and benefiting from such conduct in the future, particularly when truthful discovery responses might subject the defendant to a greater penalty imposed by the jury. Always keep in mind that the fact defendant corporations routinely balance risks against benefits, and in many products cases, the risk of default judgment, even if realized, clearly justifies the benefit of preventing plaintiff from discovering the truth.

Propriety of sanctions under Rule 26(g). Federal courts are vested with statutory power under Rule 26 of the Federal Rules of Civil Procedure to enter a default judgment or other sanctions against a defendant for its abusive discovery practices.^{xxiv} Indeed, Rule 26(g) mandates sanctions for abusive discovery practices and was enacted specifically to curb discovery abuse by encouraging the aggressive imposition of sanctions.^{xxv} The purpose of Rule 26(g), therefore, is predominately deterrent. Accordingly, the court is authorized to enter default judgments if the misconduct or abusive litigation practice is severe enough.^{xxvi}

When defendant and its lawyers sign and verify known false or abusive discovery responses, they trigger Rule 26(g). The defendant obviously has no legal "right" to withhold the information requested, especially in light of the liberal scope of discovery under Rule 26.^{xxvii} There is similarly no valid excuse for violating a court's previous discovery order. No defendant

can claim that it had a factual reason to lie in its discovery responses or abuse the discovery process. It is axiomatic that a defendant's false or misleading discovery responses are intentionally burdensome and purposefully interposed for an improper purpose.

Propriety of sanctions under Rule 11. If defense counsel prepares and signs pleadings that facilitate the defendant's abusive discovery practices, then sanctions under Rule 11 might be appropriate. The standards that apply to Rule 26(g) also apply to Rule 11, and the propriety of sanctions is similarly available to deter errant defendants.^{xxviii} Look for Rule 11 violations in defendant's responses to the plaintiff's motions to compel or for sanctions.

Propriety of sanctions under Rule 37. Rule 37 authorizes the court to impose sanctions for any failure to obey an order.^{xxix} Default judgment is one of those sanctions.^{xxx} Striking of pleadings and default judgments and other sanctions are properly imposed to punish those who intentionally violate court orders.^{xxxi} In this context, intent does not require malice, although it is clearly present in the pattern approach to discovery abuse, but rather is meant to exclude mere inadvertence.^{xxxii} Moreover, "[w]hen a party demonstrates a flagrant disregard for the court and the discovery process, . . . [default judgment] is not an abuse of discretion."^{xxxiii}

The United States Supreme Court has stated that the primary purpose of Rule 37 sanctions is to deter future abuse of discovery.^{xxxiv} "The Court in National Hockey League admonished the Court of Appeals not to exhibit "'leniency' even in the face of 'outright dismissal as a sanction for failure to comply with a discovery order' because Rule 37 sanctions were designed 'not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.'" ^{xxxv} "Rule 37 sanctions are imposed not only to prevent unfair prejudice to the litigants but also to ensure the integrity of the discovery process."^{xxxvi}

Propriety of sanctions under the court's inherent powers. The judge is vested with inherent powers to enter a default judgment or other sanctions to sanction discovery abuse and

violations of court orders.^{xxxvii} "[I]nherent powers of federal courts are those which 'are necessary to the exercise of all others.'^{xxxviii} The judge "must be able 'to protect the administration of justice by levying sanctions in response to abusive litigation practices.'^{xxxix} Because of the "great deterrent value" to be derived from the imposition of sanctions for abusive discovery practices; judges are empowered to enter a default judgment or other lesser sanctions against the defendant for lying in its discovery responses, flagrantly disregarding the court's discovery orders, or abusing the discovery process.^{xl} Moreover, there is "no requirement that other [lesser] sanctions be first considered or tried."^{xli}

Propriety of sanctions under 28 U.S.C. § 1297. In addition to the numerous other bases for sanctions, the plaintiff may ask that sanctions be imposed on defendant's attorneys under 28 U.S.C. § 1297. That statute authorizes the imposition of costs, expenses, and attorney's fees on any attorney "who. . . multiplies the proceedings in any case unreasonably and vexatiously. . . ."^{xlii}

Conclusion

To fight a defendant's discovery abuse and to develop the plaintiff's products liability case, plaintiff's counsel must have the patience of Job. But he or she need not, indeed must not, tolerate lying and other forms of deliberate abuse. We owe the Court, the legal system, our profession, and the people the solemn duty not to treat discovery as a 'game' or 'sport' and not to tolerate those who do.

The advent of modern discovery and civil practice rules was supposed to advance the legal profession beyond the 'bad old days' of dishonest and distasteful 'trial by ambush.' It has not worked in products liability litigation. 'Trial by ambush' has been replaced by systemic, calculated deceit and obfuscation. In virtually every case, defendants and defense counsel deliberately use discovery deadlines and limited judicial patience as tools to defeat lawful discovery.

One reason the discovery system does not work is because many lawyers defendants do not accept its fundamental, if unstated, premise that a lawyer's first duty is to the court as an officer of the court.^{xliii} Voluntary discovery without massive judicial intervention simply will not work if lawyers are allowed to feign confusion about their obligations as officers of the court. Discovery under modern rules will not work even with massive judicial intervention so long as judges tolerate counsel who conceal for their clients.

But merely requiring that lawyers "do right" is not enough. Judges must realize that in today's "lowest common denominator" world, defendants who seek to evade justice will always locate lawyers willing to do their bidding, if judges will accept and thus allow such misconduct. The true source of the problem is the defendants themselves. Defendants' decision to abuse the discovery process is usually wise. Sanctions of any kind are rare, and sanctions other than monetary penalties are rarer still. The "risk" of monetary sanctions is offset by the "benefits" potentially resulting from concealment of evidence. In many circumstances, defendants will willingly risk even default judgment, if that risk is preferable to disclosing evidence which might cause a large punitive damages award or provoke governmental regulatory action.

When sanctions are sought, defendants typically have their lawyers attempt to take the blame, secure in the awareness that the lawyer on the bench is disinclined to sanction the lawyer at the bar. Defendants willingly pay the cost of any sanctions that are imposed against their retainers, and pay those retainers for taking that risk to protect the client.

By directing sanctions against the defendants themselves, judges strike at the source of the discovery difficulty. More importantly, by severely sanctioning the defendants themselves, judges empower defense lawyers to decline to engage in misconduct, as counsel can and will warn the defendants that paying another to perpetrate its concealment schemes will not insulate the defendants from severe sanctions.

Judges hold the key to making discovery work in products liability cases. By recognizing the pattern approach to discovery abuse and imposing severe sanctions against the party itself for pursuing that strategy, judges serve notice that such misconduct will not be tolerated, and that the risk attending such misconduct is greater than any possible benefit can be.^{xliv}

ENDNOTES

- i. James E. Butler, Jr. is the senior partner in the firm of Butler, Wooten, Fryhofer, Daughtery & Sullivan, with offices in Atlanta and Columbus, Georgia.
- ii. Patrick A. Dawson is a former associate in the firm of Butler, Wooten, Fryhofer, Daughtery & Sullivan.
- iii. See Pesaplastic, C.A. v. Cincinnati Milacron Co., 799 F.2d 1510, 1522-23 (11th Cir. 1986).
- iv. Courts are now beginning to recognize expressly or implicitly the "pattern" approach to discovery abuse. See, e.g., C.T. Bedwell & Sons, Inc. v. International Fidelity Ins. Co., 843 F.2d 683, 694 (3d Cir. 1988) (agreeing with the district court's finding that the sanctioned party's "pattern of abuse" weighed in favor of sanctions, the Third Circuit noted that the record on appeal demonstrated a significant pattern of delay, including failure to comply with fully with document requests after court deadlines, failure to answer interrogatories, and by refusing to engage in certain discovery, thereby necessitating motions to compel); Morgan v. Massachusetts General Hosp., 901 F.2d 186, 195 (1st Cir. 1990) (First Circuit agreed with the district court's finding that the "case reflect[ed] a persistent pattern of disregarding or disobeying the requirements of the Federal Rules of Civil Procedure, the Local rules of the . . . District Court and explicit court orders."); Profile Gear Corp. v. Foundry Allied Indus., 937 F.2d 351 (7th Cir 1991) (default judgment entered as sanction for numerous discovery violations, including late production of documents after "repeated prodding," two sets of documents went missing under questionable circumstances, and respondent gave evasive and dishonest answers to discovery and to questions by the court).
- v. Congress has recognized the exploding problems of cost and delay in civil litigation by urging federal judges to become involved in the discovery process early and decisively. Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 102, 104 Stat. 5089 (codifying 28 U.S.C. § 471-482 (1990)).
- vi. This really happens. See, e.g., Malautea v. Suzuki Motor Corp., Civil Action File No. CV-490-322 (S.D. Ga), 1991 U.S. Dist. LEXIS 19901.
- vii. In Regional Refuse Systems, Inc. v. Inland Reclamation Co., 842 F.2d 150 (6th Cir. 1988), the Sixth Circuit looked with disfavor upon the sanctioned party's feigned attempts to appear compliant. In Regional Refuse, the plaintiff's behavior during his deposition revealed that he consistently made a colorable effort to seem to be acting in good faith while in fact consistently refusing to supply relevant and unprivileged information. The Sixth Circuit observed that "misconduct is not any less misconduct because it is executed with a veneer of good intentions." Id. at 156.
- viii. See, e.g., Unif. State Ct. R. § 6.4(B) (Ga. 1992).
- ix. Many of the cases stand for the proposition that evidence of "other similar incidents" is

admissible if substantially similar to the incident which forms the basis of the lawsuit. The "substantially similar" requirement is greatly relaxed when the incidents are intended to show proof of notice rather than proof of defect. In any event, all such information is discoverable whether admissible at trial or not.

x. "I don't know what you mean by 'glory,'" Alice said. Humpty Dumpty smiled contemptuously. "Of course you don't know--till I tell you. I mean 'there's a nice knockdown argument for you."

"But 'glory' doesn't mean 'a nice knockdown argument,' Alice objected.

"When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean--neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master--that's all."

Lewis Carroll, Through The Looking-Glass 102-03 (Children's Classics 1990) (cited in Malautea v. Suzuki Motor Corp., Civil Action No. CV-490-322 (S.D. Ga.), 1991 U.S. Dist. LEXIS 19901 (Order of December 30, 1991, at 8)).

xi. Malautea v. Suzuki Motor Corp., Civil Action File No. CV-490-322 (S.D. Ga), 1991 U.S. Dist. LEXIS 19901.

xii. See, e.g., Unif. Sup. Ct. R. 6.4(B) and Local Rule 225-4(a) (N.D. Ga. 1992).

xiii. In other words, resist doing (and do not do) what our "experience and common sense" mandates you must do: Overreach, so when the judge 'splits the baby,' you are left with enough discovery to get useful information. If that sounds like conflicting advice, it is, because defendants' perversion of the discovery rules and trial courts' tolerance of those perversions puts plaintiff in a Catch-22 situation: To 'play the game' at all, you will neither deserve nor get the judicial remedies which defendants' discovery abuse should provoke, and will you be participating in the continued downward spiral of discovery ethics.

xv. Consider sending defendant and defense counsel an "abusive litigation" letter if that remedy is available to you under state law. Georgia's abusive litigation statute is an excellent model. When used, it has proven effective in causing withdrawal of frivolous defenses. See O.C.G.A. § 51-7-80 et. seq.

xvi. For a superb exposition on how to fight restrictive or nonsharing protective orders, see

Hare, Gilbert & ReMine, Confidentiality Orders (Wiley 1988). See also Hare & Gilbert, Resisting Confidentiality Orders, Trial (October 1990); Freeman & Jenner, Just Say No: Resisting Protective Orders, Trial (March 1990).

xvii. See Garcia v. Peeples, 734 S.W.2d 343 (Tex. 1987); Moseley v. General Motors Corp., Civil Action File No. 90-V-6276, State Court of Fulton County, Georgia 1991); Malautea v. Suzuki Motor Corp., Civil Action File No. CV-490-322 (S.D. Ga. 1991) (sharing order entered in collateral action to obtain documents from General Motors Corporation in Eastern District of Michigan) (Friedman, J.).

xviii. An assertion of "privileges" must be supported by evidence. In re Shopping Carts Antitrust Litigation, 95 F.R.D. 299, 305 (S.D.N.Y. 1982); United States v. Goodman, Dunberg & Hochman, P.A., 660 F. Supp. 929 (S.D. Fla. 1987); McFadden v. Norton Co., 118 F.R.D. 625, 628 (D. Neb. 1988); Delco Wire & cable, Inc. v. Weinberger, 109 F.R.D. 680 (E.D. Pa. 1986). "The mere claim of privilege does not justify a refusal to identify properly the information and documents requested." Moses v. State Farm Mut. Auto Ins. Co., 104 F.R.D. 55, 58 (N.D. Ga. 1984). Moreover, representations by counsel are obviously not evidence. United States v. Goodman, Dunberg & Hochman, P.A., 660 F. Supp. 929 (S.D. 1987). When a "privilege" is asserted but no evidence is provided, the privilege is deemed waived. Eureka Financial Corp. v. Hartford Acc. & Indem. Co., 136 F.R.D. 179, 182 (E.D. Cal. 1991); see also Peat, Marwick, Mitchell & Co. v. West, 748 F.2d 540, 541-42 (10th Cir. 1984) (holding that a blanket, nonspecific attorney-client objection was insufficient and effected a waiver of the privilege); Kansas-Nebraska Natural Gas Co. v. Marathon Oil Co., 109 F.R.D. 12, 23-24 (D. Neb. 1983) (same). As the court in Eureka Financial Corp. noted, "[w]hether a responding party states a general objection to an entire discovery document on the basis of privilege or generally asserts a privilege objection with an individual discovery response, the resulting 'blanket objection' is decidedly improper. This fact should no longer be 'news' to a responding party." 136 F.R.D. at 182.

xix. See International Paper Co. v. Fiberboard Corp., 63 F.R.D. 88 (D. Del. 1974). For the typical manufacturer's kneejerk response, see Varner & Bayman, Putting the Cart before the Horse: Providing a Privilege Index under Proposed Federal Rule of Civil Procedure 26(b)(5), National Institute on Emerging Issues in Automotive Product Liability Litigation, ABA (March 21-22, 1991).

xx. Since a court may require a party to produce documents that are under a sealing order in another case, 8 Wright & Miller Federal Practice and Procedure § 2210, at 624-25 n.67, it is axiomatic that refusal to do so is grounds for sanctions.

xxi. For two excellent treatises on sanctions and discovery abuse, see Joseph, Sanctions: The Federal Law Of Litigation Abuse (The Michie Company 1989) and Dombroff, Unfair Tactics (Wiley, 2d ed. 1988). See also Sanctions: Rule 11 And Other Powers (Litigation Section, ABA, 3d ed. 1988).

xxii. See Professional Seminar Consultants, Inc. v. Sino American Technology Exch. Council, Inc., 727 F.2d 1570, 1474 (9th Cir. 1984) (violation of oral orders sanctionable); Henry v. Sneiders, 490 F.2d 315, 318 (9th Cir.), cert denied, 419 U.S. 832 (1974) (default judgment upheld when the defendant violated oral order to produce documents).

xxiii. National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976) (per curiam)

xxiv. See Fed. R. Civ. P. 26(g).

xxv. Id.; see Joseph, Federal Law of Litigation Abuse § 40(A), at 467-68 (1989); Advisory Comm. Notes To Rule 26(g).

xxvi. Fed. R. Civ. P. 26(g) (authorizing "appropriate sanctions"); Apex Oil Co. v. Belcher Co., 855 F.2d 1009 (2d Cir. 1988) (court entered default judgment). In addition to simply failing to sign a paper or pleading, there are four ways in which a discovery response can run afoul of Rule 26(g): (1) by failing to have adequate legal support, (2) by failing to have adequate factual support, (3) by having an improper purpose, and (4) by being unreasonably burdensome.

xxvii. Courts have held that the concept of relevancy is to be broadly construed as it relates to the discovery process: Relevancy and Rule 26 cannot be equated with admissibility at trial, Holliman v. Redman Development Corp., 61 F.R.D. 488, 490 (D. S.C. 1973), Carrier Manufacturing Co. v. Rex Chainbelt, Inc., 281 F. Supp. 717, 718 (E.D. Wis. 1968), or with the very narrow issue presented by the facts. Brunswick Corp. v. Chrysler Corp., 291 F. Supp. 118, 120 (E.D. Wis. 1968); Transmirra Products Corp. v. Montsano Chemical Co., 26 F.R.D. 572, 574 (S.D.N.Y. 1960). Rather, the test of relevancy is the subject matter of the action. Devex Corp. v. General Motors Corp., 275 F. Supp. 310, 313 (D. Del. 1967); Luey v. Sterling Dry, Inc., 140 F. Supp. 632, 634-35 (W.D. Mich. 1965); Novak v. Good Will Grange No. 127, Patrons of Husbandry, Inc., 28 F.R.D. 394, 395 (D. Conn. 1961). McClain v. Mack Trucks, Inc., 85 F.R.D. 53, 61 (E.D. Pa. 1979). See also Flora v. Hamilton, 81 F.R.D. 576, 578 (M.D.N.C. 1978) ("[i]t is clear that what is relevant in discovery is different from what is relevant at trial, and that the concept at the discovery stage is much broader."). As Justice Powell, speaking for a unanimous Court, once noted: The key phrase in this definition--'relevant to the subject matter involved in the pending action'--has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case Consistently with the notice-pleading system established by the Rules, discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues ... Nor is discovery limited to the merits of a case, for a variety of fact-oriented issues may arise during litigation that are not related to the merits.

Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978) (citations omitted) (emphasis added).

- xxviii. See Fed. R. Civ. P. 11 (allowing imposition of sanctions against the "represented party").
- xxix. See Advisory Committee Notes To Rule 37.
- xxx. Fed. R. Civ. P. 37(b)(2)(C).
- xxxi. Jaffe v. Grant, 793 F.2d 1182 (11th Cir. 1986), cert. denied, 107 S. Ct. 1566 (1987); Carlucci v. Piper Aircraft Corp., 775 F.2d 1440, 1453 (11th Cir. 1985) (sanctions appropriate to deter and penalize).
- xxxii. See 4A Moore's Federal Practice § 37.03 [2.-5] (2d ed. 1987).
- xxxiii. Telectron, Inc. v. Overhead Door Corp., 116 F.R.D. 107, 131 (S.D. Fla. 1987) (quoting Aztec Steel Co. v. Florida Steel Corp., 691 F.2d 480, 481 (11th Cir. 1982)); accord Buchanan v. Bowman, 820 F.2d 359, 361 (11th Cir. 1987); Emerick v. Fenick Indus., Inc., 539 F.2d 1379 (5th Cir. 1976).
- xxxiv. See, e.g., National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639 (1976) (per curiam).
- xxxv. Carlucci, 775 F.2d at 1447.
- xxxvi. Aztec Steel Co., 691 F.2d at 482 (emphasis added).
- xxxvii. Donaldson v. Clark, 819 F.2d 1551, 1551 n. 6 (11th Cir. 1987); Carlucci v. Piper Aircraft Corp., 775 F.2d 1440, 1447 (11th Cir. 1985).
- xxxviii. Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980) (quoting United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812)).
- xxxix. Brockton Savings Bank v. Peat, Marwick, Mitchell & Co., 771 F.2d 5, 11 (1st Cir. 1985) (quoting Penthouse Int'l, Ltd. v. Playboy Enterprises, Inc., 663 F.2d 371, 386 (2d Cir. 1981)).
- xl. Brockton Savings Bank, 771 F.2d at 12.
- xli. Id. (citing Damiani v. Rhode Island Hosp., 704 F.2d 12, 15 (1st Cir. 1983)); Hal Commodity Cycles Management Co. v. Kirsh, 825 F.2d 1136 (7th Cir. 1987) (court not required to "fire a warning shot" before entering default judgment under Rule 60).
- xlii. 28 U.S.C. § 1927.
- xliii. See Carter & Worrel, "Corporate Ethics In Discovery," 21 The Brief 44 (ABA Trial and Insurance Practice Section, Winter 1991) (arguing that [a] lawyer's role as an officer of the court requires full and fair compliance with discovery. His or her professional obligation to the client

mandates a zealous defense. These obligations can clash head-on when damaging, incriminating, or highly sensitive and confidential documents are called for by a fair reading of the discovery request.). But see Pesaplastic, C.A. v. Cincinnati Milacron Co., 799 F.2d 1510, 1522-23 (11th Cir. 1986) ("attorneys of the Law Firm lost light of the fact that, as members of the bar, and officers of the court, our primary responsibility is not to the client, but to the legal system."). There is no clash between a lawyer's obligation to the court and his obligations to his client. The former obligation clearly rules and, if the attorney fulfills it, then he also fulfills his obligations to his client. Any deviation from an attorney's duty to the court constitutes professional and ethical misconduct and, in the discovery context, constitutes flagrant and sanctionable discovery abuse. Under the scenario Mr. Carter and Ms. Worrel describe, the corporation has absolutely no choice but to produce the requested documents.

It is "false conflicts" such as Mr. Carter and Ms. Worrel describe, and thus foster, that tempt corporate and defense counsel to avoid their obligations under the discovery rules. It is this kind of attitude which has prevented the rules from living up to their mandate to bring about the just, speedy, and inexpensive resolution of every action. As one court has noted: [L]itigation is not a game of hare and hounds where rules are easily bent, where truth is skirted by lies and evasions and cheap victory is sought at the expense of fairness and candor. Even if the cynics are incorrect in saying that such practices are endemic to the system, it is necessary to say . . . that they will not be tolerated.

People v. Haas, 781 P.2d 80, 85 (Colo. 1989) (attorney suspended from practice of law for "planned course of conduct to cover up and be unresponsive in the civil discovery process").

xliv. Defense discovery deceit is sometimes so bad it causes defense victories which are later set aside when the deceit in itself is discovered. See Rozier v. Ford Motor Co., 573 F.2d 1332 (5th Cir. 1978).