

**THE BOUNDARIES OF ZEALOUS ADVOCACY:
PROPERLY REPRESENTING CONSUMERS AGAINST
CORPORATIONS AND THEIR OBSTRUCTIONIST DISCOVERY TACTICS**

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The inherent conflict between the lawyer's obligations to the court and to the client lies at the root of many, if not most, of the ethical dilemmas confronting trial practitioners and causes many, if not most, of the egregious "discovery" misdeeds committed in cases. This "conflict" should be easily resolved. Nothing seems clearer than the proposition that a lawyer's first duty should be to the courts, as creations of the people. And, lest we forget, the lawyer owes his license to the people.

Not until this conflict is resolved can we hope to have real "professionalism" in the practice of law, or is there real hope to overcome the abuses which plague our system of justice. Yet, there is little likelihood of such a resolution, for the conflict ably serves the interests of corporations. Since the era of rapacious capitalism right after the War Between the States a societal view has prevailed that 'the business of America is big business', and that even "government [is] to be the tool of business interests." The Robber Barons. That view still prevails. It has allowed the creation of a class of lawyers for big business who have become mercenaries for hire to the highest bidder, instead of officers of the court.¹

¹ See Malautea v. Suzuki Motor Co., Ltd., 987 F.2d 1536, 1543-47 (11th Cir. 1993). See Williams v. General Motors Corp., No. 92-16-ALB (M.D. Ga. March 18, 1993). In Williams, the defendant product makers sought sanctions against the plaintiff's counsel for the plaintiff's counsel's cancellation of depositions. Plaintiff's counsel cancelled the depositions after he was summoned in the dead of night because his father was gravely ill. Plaintiff's counsel rushed to his father's bedside. Defense counsel, apparently at the behest of their clients, moved for sanctions against the plaintiff's lawyer for this conduct. In refusing to sanction the

Unfortunately, the nascent plaintiffs' bar in years long past shares in the blame. For years, that part of the bar struggled mightily to avoid accountability for bringing groundless claims and exaggerating clients' causes. Indeed, the ethical rules of Georgia and elsewhere, which trial lawyers supported, focus almost exclusively upon the lawyer's duties of zealous advocacy and confidentiality² and largely foresake our primary duties as officers of the courts.

This system now in place provides the framework under which the corporate "discovery" abusers practice their obstruction. As defenders of this system rationalize:

"An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all the means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others."

2 Trials of Queen Caroline 8 (J. Nightingale ed. 1820-21). Even more crudely stated:

"If the law is wrong in allowing the defendant to kill a thousand people, it should be changed. Until then, the lawyer must presume it is right (or more correctly, that it is not wrong)."

Tommy Prud'homme, The Need for Responsibility within the Adversary System, 26 Gonz. L. Rev. 443 (1990/91).

plaintiff's lawyer and sanctioning the defense, the court stated that, "[i]t appears that the only reason these sanctions are sought is because the Defendants, General Motors Corp. and Delco Remy, requested that their counsel do so." The court went on to say that, "here, [instead of concern,] the [defense reaction] was one of greed -- who will pay me for my lost time?"

² "The transformation of the lawyer-as-quasi-autonomous-advisor, who could be a public actor as well as a private counsel, into the lawyer-as-hired-gun is typified above all as by the introduction of a formal ethical duty to maintain client confidences -- a duty that was wholly absent from the primary pre-Civil War treatises on legal ethics." Luban, The Noblesse Oblige Tradition in the Practice of Law, 41 Vand. L. Rev. 717, 719 (1988).

Today, most codified ethical rules attempt only to constrain the lawyer from doing that which is illegal. "The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law." Model Code of Professional Responsibility EC 7-19 (1980). Corporate counsel often view their violations of the discovery rules as within the bounds of the law because the conduct is not a crime, and civil remedies exist to aggrieved parties. The economic rewards of obstruction have produced the feeling that almost anything can be litigated in good conscience. Galanter, Mega-Law and Mega-Lawvering in the Contemporary United States, The Sociology of the Professions, Lawyers, Doctors and Others 152, 153 (R. Dingwell & P. Lewis eds. 1983).

The classic expostulation of this view was expressed by Samuel Johnson, in response to the question of how a lawyer can sponsor an unjust cause:

"Sir, you do not know [a cause] to be good or bad till the judge determines it. . . . An argument which does not convince yourself may convince the judge to whom you urge it: and if it does convince him, why then, sir, you are wrong and he is right.

2 Boswell, The Life of Johnson 47 (Hill ed. 1887).

Often, corporate lawyers look at discovery abuse as part of the game, but it is not a game. The discovery rules are the law. Court orders are the law. Intentional violations are thus unethical.

Not surprisingly, this atmosphere has caused many corporate lawyers to employ a virtual cost-benefit analysis in determining whether or not to act ethically. If the cost to the client of acting ethically exceeds the cost of acting unethically, then many corporate attorneys will act unethically.

In the product liability case, typically, the defendant will have a wealth of incriminating documents and facts within its possession.

The mass producer realizes if a given product is defective that hundreds or thousands of potential suits exist. If the defect is dangerous enough, potentially affects enough people, the manufacturer's knowledge of the defect and failure to remedy or warn blatant enough, and an alternative, safer design practical enough, the costs of turning over incriminating documents is often seen by the manufacturer as prohibitive. Giving documents to one plaintiff's attorney often guarantees that others will get their hands on them in other cases. A manufacturer will often hide, destroy, or otherwise fail to produce incriminating evidence, even after the fraud is ferreted out by opposing counsel and the court. Faced with that threat, defendants are often willing to sacrifice one case to the ultimate sanction of default. For a loss in one case can be borne more easily than a loss in all cases, especially if the loss stems from default instead of from disclosing the truths which will haunt the defendant in case after case. Such defendants deliberately subvert the letter and spirit of discovery rules to hide incriminating evidence. The product maker is involved in a larger war, and, to them, a particular case is but a battle in that war.³

Plaintiffs' lawyers should not, and are not required to, abdicate their duty to the courts and to the public. We are and should be, first and foremost, officers of the courts. We owe that to the courts, to the public, and to the profession. Lawyers should not be allowed to do that which is immoral, even though the conduct is technically not a crime. It is not "right that a man should, with a wig on his head, and

³See Noone v. Oldsmobile Div. of General Motors Corp., No. 85-68704 (Dist. Ct. Harris Co., Tex. Nov. 21, 1988) (default judgment imposed for willful, bad faith discovery abuse); Shepard v. General Motors Corp., 42 F.R.D. 425 (D. N.H. 1967) (default judgment appropriate sanction for GM's willful discovery abuse).

a band round his neck, do for a guinea what, without these appendages, he would think it wicked and infamous to do for an Empire." Macauley, Lord Bacon, 2 Critical & Historical Essays 121, 152 (F. Montague ed. 1903).

Undertaking to change the ethical (or, more appropriately, unethical) legal system within the confines of a particular case is impractical. For now, we must educate courts to the systematic and premeditated abuse. We must refuse to give unilateral discovery; we cannot let the defense make their case until we can simultaneously make ours. For to make ours, we must wrangle for months while the discovery period runs on. We must share information to ensure that each "battle" is a short, efficient rout. For if we come to each other's aid in each battle, we can ultimately win the war.

The strategy is simple. Many corporate defendants employ a barrage of time-tested tactics to obstruct discovery and defeat or delay justice. They succeed all too often. Officers of the courts must educate ourselves as to whom the violators are, what tactics they use, and then we must educate each court, from the outset of each case, as to what is about to happen and what should be done about it. Then, as the defendant's scheme unfolds, reveal it to the court to counter the defendant's recurrent pleas of "good faith," "honest mistake," and "misunderstanding." As the violations mount, as counsel has warned the court from the beginning, the court will see the truth. In cases of infamous proven abusers, ask for the ultimate sanction from the very first abuse, pointing out how lesser sanctions have never worked, how the defendant employed these tactics in other cases, incurred lesser sanctions, and is yet again abusing the law. Insist, rightly, that nothing short of default will do.

The remainder of this paper provides a number of examples of the

systematic discovery abuse tactics used by product makers to obstruct discovery, using one defendant as a primary example. This list, with its descriptions and examples is, by no means, comprehensive, as product makers are always developing new ways to obstruct and delay reckoning. Hopefully, we can use these examples to educate courts and show courts the true intent behind the obstruction.

The focus is on abuses in products cases, but the same phenomena appear in medical malpractice cases and other cases. Indeed, the abuses in medical malpractice cases are often the most outrageous.⁴

1. THE OPEN-ENDED RESPONSE

Product makers often respond to plaintiffs' initial written discovery by asserting that they have found no documents, but they are searching and will supplement when, and if, responsive documents are found.⁵ The defendant hopes to leave its response "open" forever so that it can produce documents at any time during the litigation. This response denies plaintiffs closure. If a defendant is always free to produce more documents it has been unable to "find," then plaintiffs can never prove, with documents obtained from other sources, that it intentionally failed to produce incriminating documents. This particular evasion helps defendants avoid getting caught: confronted with proof that a particular document has not been produced, the defendant's lawyers will assert that "we just have located it and will

⁴Our firm has seldom had a medical case in which the medical records have not been changed and the defendant then tried to hide the change, usually unsuccessfully.

⁵ See, e.g., Coleman v. General Motors Corp., No. 88-53419-02 (Cir. Ct. Dade Co., Fla. April 12, 1993); Cooper v. General Motors Corp., No. 25459 (Cir. Ct. Marquette Co., Mich. Feb. 9, 1993 hearing on motion for sanctions); Stump v. General Motors Corp., No. 91-C-09 (Dist. Ct. Republic Co., Kan. Aug. 17, 1992); Noone v. Oldsmobile Div. of General Motors Corp., No. 85-68704 (Dist. Ct. Harris Co., Tex. Nov. 21, 1988).

produce it."⁶

2. MERITLESS OBJECTIONS THAT THE DEFENDANT CANNOT UNDERSTAND DISCOVERY REQUESTS

Corporate defendants often will not even say that they "will produce." They often chime "cookie-cutter" objections charging "vagueness" and overbreadth, falsely claiming not to understand what was requested or what the court ordered.⁷ In the cited cases, for example, the defendant objected to the following terms, among others, as vague: it's own name, "product", and "defect". In another case, the defendant pled an inability to comprehend the meaning of words such as "risk of personal injury" and "engineer".⁸ When plaintiff asks for the same information in different ways, to overcome that anticipated dodge, or sends requests with modified language to overcome the objections, defendants then complain about the multitude of requests bombarding them.

3. BASELESS ATTORNEY/CLIENT AND WORK PRODUCT OBJECTIONS

⁶One of defendants' primary imperatives, to protect their intent to subvert the process, is to find out what the plaintiff already has. If defendant knows what the plaintiff has, then defendant knows what the plaintiff does not have, and what it can safely hide without risk of detection.

⁷ See, e.g., Coleman v. General Motors Corp., No. 88-53419-02 (Cir. Ct. Dade Co., Fla. April 2, 1993) (vacated pursuant to stipulation) (GM's claims of "ignorance" held "inappropriate or calculated solely to delay discovery"); Klitsch v. General Motors Corp., 1990 WL 192037 (E.D. Pa. 1990) (objections that requests "vague and ambiguous"); Noone v. Oldsmobile Div. of General Motors Corp., No. 85-68704, at 4 (Dist. Ct. Harris Co., Tex. Nov. 21, 1988) ("[GM's own] witnesses, including one of its in-house counsel, . . . could offer no explanation for either [GM's] refusal to answer interrogatories or for the conduct of [GM] in alleging [it] did not know what was requested. . . ."); Kennedy v. General Motors Corp., 1985 WL 4664 (Ohio App. 1985) (objections because discovery requests allegedly "vague and uncertain or ambiguous," "not defined . . . and unclear," "burdensome," that the inquiry would lead to "irrelevant" material, and that the request is "overly broad").

⁸Malautea v. Suzuki, 148 F.R.D. 362, 365 (S.D. Ga. 1991)

Another common tactic is the across-the-board, blanket attorney/client and work product objections, made without submitting the allegedly privileged documents and the objections to the court for a judicial determination of the merits of the objection.⁹ Of course, the law is clear. Blanket, unsupported, and untimely privilege objections are waived.

Of all the tactics employed by defendants to evade discovery obligations, this is the most pernicious. Courts are, rightly, very reluctant to infringe on true attorney-client privilege or require production of genuine work product materials. The 'court' was a lawyer first.

Any judge is also reluctant to spend his or her limited time attending to the minutiae of whether particular documents may be legitimately withheld from discovery. The courts, and the system, depend on the fidelity of counsel to the court, for aren't the lawyers 'officers of the court'? Of course, regrettably few lawyers consider

⁹ See, e.g., Stump v. General Motors Corp., No. 91-C-09 (Dist. Ct. Republic Co., Kan. Nov. 16, 1993 hearing on motion for sanctions) ("There's no particular need to chronicle all of the things that General Motors has done historically . . . , but there was initially the across-the-board claim of attorney/client privilege, and across-the-board claim of work product privilege, . . . attempting to tell the court what the scope of discovery should be."); Stump v. General Motors Corp., No. 91-C-09 (Dist. Ct. Republic Co., Kan. April 21, 1992 hearing on motion for protective order) ("I think that General Motors was out of time. . . . [T]here was a motion for protective order, but it was not filed until over two months later, long after [GM] knew that this matter was going to be brought on for hearing on a motion to compel. . . . General Motors in effect was trying to shift the burden to plaintiff to say, well, when we get a protective order worked out, then we're going to release this to you. [GM], if it had concerns about confidentiality, had an obligation to timely file its motion, so . . . [GM's] motion for protective order is denied."); Klitsch v. General Motors Corp., 1990 WL 192037 (E.D. Pa. 1990); Sellon v. Smith, 112 F.R.D. 9 (D. Del. 1986) ("GM has never provided an identification of the document as required by opinions of this court going back at least as far as [1974]."); Carlson v. General Motors Corp., 289 N.E.2d 439 (Ill. App. 1972).

themselves governed by their obligations to the court when those obligations conflict with perceived obligations to the client, so the 'system' on which the court depends to avoid it having to intercede in such matters totally fails. Moreover, in products cases, the decision what documents to withhold based on privilege or work product objections is almost never made by any officer of the court at all--it is made not by the lawyers who appear before the court, but by other counsel for the defendant, usually in-house counsel.

The law seems quite clear and logical: the decision whether documents or answers to interrogatories may be withheld based on a privilege objection is to be made by the court not by the defendant. As the court cannot make that decision absent the document or answer, those must be provided to the court. Defendants never do so, unless forced to by plaintiff and the court. Of course, that means after a motion and hearing, and the loss of virtually all the discovery time usually afforded by the federal and Georgia rules.¹⁰

The law also requires proof of the basis for the privilege or work product objection. That is almost never provided. The law specifies that such a failure is a waiver. Few courts are willing to so hold.

If a court has the temerity to actually force the defendant to let the court decide the merits of defendant's objections, defendant is ready with a tactic to discourage such temerity: it inundates the court with documents, identifying hundreds of documents withheld based

¹⁰Discovery is filed with the complaint. Objections are the response 45 days later. A motion to compel production of the withheld facts and documents to the court for decision is filed. The response comes 30 days later. In most courts, a hearing must be held, and the decision on the motion comes sometime thereafter. Then the facts and documents are produced to the court, and it must review them and decide the objections. Virtually all the available discovery time is then gone, and the withheld facts and documents have been unavailable to plaintiff for use in preparing his or her case or for use in discovery depositions.

on privilege or work product, and challenging the court to wade through them all.¹¹

4. INSISTENCE, BEFORE PRODUCTION, ON UNNECESSARY PROTECTIVE ORDER

Oftentimes, defendants insist upon extracting burdensome protective orders calculated only to delay plaintiffs' receipt of the requested materials, to shift the burden to plaintiffs to get a protective order acceptable to the defendant worked out before production will take place, and to prevent plaintiffs from sharing documents with other plaintiffs' lawyers.¹²

5. FAILURE TO PROVIDE DISCOVERY UNTIL PLAINTIFFS MOVE TO COMPEL OR FOR SANCTIONS

(a) Production with a gun to their head

Notwithstanding the statutory mandate that a party provide discovery within the time provided by the discovery rules, corporate defendants habitually fail to produce the documents they said they

¹¹In one case, the defendant produced to the court some 1400 documents it claimed were privileged, eight months after it first made that objection. No proof to sustain the claim was submitted. The court nevertheless undertook to review each of the 1400 documents. It found only 203 of the privilege objections had any merit. The defendant moved for reconsideration, but only as to 14 documents, thus acknowledging the validity of the court's findings as to almost 1200 documents defense counsel had solemnly represented were protected by attorney-client privilege! Failing in that gambit, the defendant then 'mandamus' the state court trial judge, in a superior court action. Failing in that, defendant appealed the superior court's refusal to 'reverse' the state court's decision.

¹² See, e.g., Coleman v. General Motors Corp., No. 88-53419-02, at 2 (Cir. Ct. Dade Co., Fla. April 12, 1993) (GM extracted agreement that "material produced pursuant to any requests for production and/or interrogatories would be subject to a protective order. . . ."); Stump v. General Motors Corp., No. 91-C-09 (Dist. Ct. Republic Co., Kan. April 21, 1992 hearing on motion for protective order); McGuire v. General Motors Corp., No. 719-169 (Cir. Ct. Milwaukee Co., Wisc. April 17, 1989) ("Even with [the lesser burden of showing 'tempered good cause'], GM failed to meet the requisite showing necessary to maintain the Protective Order."). See also Russell v. General Motors Corp., 3 Cal. App.4th 894, 4 Cal. Rptr.2d 750 (1992) (monetary sanction award against GM non-appealable).

would produce until the plaintiff moves to compel production or for sanctions.¹³ Courts habitually condone that misconduct by inaction.

(b) The Dribble method of production

Sometimes, defendants produce some responsive (or non-responsive) documents here and there along the way to feign good faith.¹⁴ Of

¹³ See, e.g., Cooper v. General Motors Corp., No. 25459, at 26-27 (Cir. Ct. Marquette Co., Mich. Feb. 9, 1993 hearing on motion for sanctions) ("[N]o response . . . at all from General Motors [to plaintiffs' discovery requests] until we had this motion for sanctions. . . ."); General Motors Corp. v. Aetna Cas. & Surety Co., 573 N.E.2d 885 (Ind. 1991) ("It was not until . . . the date set for argument on [plaintiff's] motion for summary judgment [based on facts established by GM's failure to respond to plaintiff's requests for admissions], that GM first sought withdrawal of its admissions."); Noone v. Oldsmobile Div. of General Motors Corp., No. 85-68704, at 4, 8-10 (Dist. Ct. Harris Co., Tex. Nov. 21, 1988) ("The court asked . . . in-house counsel to show one timely filed [GM] response, and none was given to this court." GM's first serious attempt to produce a "realistic part of the requested discovery materials commenced . . . after General Motors had received notice of the . . . sanction motions for hearing. . . . General Motors could have produced these documents, films and records prior to [when it did]; no satisfactory explanation was presented to the court for the failure to respond in good faith prior to the . . . flurry of activity prompted by the pendency of the sanction hearing. . . . The court finds no evidence of the production of any internal documents responsive to the many requests by the plaintiff for such materials. . . . [T]he delay in producing requested discovery materials was deliberate; . . . the partial responses belatedly made were not adequate responses required . . . under the Texas Rules of Civil Procedure. . . . [S]uch unacceptable conduct is the sole product of . . . General Motors itself, who . . . has apparently assumed the direct responsibility of responding and controlling discovery responses, which is normally the role of the local trial attorney. . . . The uncontroverted fact . . . is that General Motors chose not to petition . . . for additional time to search for and produce requested discovery materials if it had any need to do so. Such failure to seek additional time can only be interpreted . . . to mean that General Motors' failure to produce was a deliberate decision. . . ."). See also Wilson v. General Motors Corp., No. 85-CI-01868 (Dist. Ct. Bexar Co., Tex. Sept. 25, 1985); Kennedy v. General Motors Corp., 1985 WL 4664, at 5 (Ohio App. 1985) (GM, though it provided responses, totally ignored certain requests).

¹⁴ Noone v. General Motors Corp., No. 85-68704, at 10 (Dist. Ct. Harris Co., Tex. Nov. 21, 1988) ("[D]uring the hearings . . . General Motors . . . carried into court . . . five boxes. . . . [T]hese boxes of records were then piece meal delivered to the plaintiff on different days prior to the next hearing on sanctions. . . . No GM witnesses "had [any] recollection or any documentation

course, the object of that tactic is to harass plaintiffs' counsel, by obstructing their attempt to review the entirety of the available information and (a) make sense of it, and (b) try to ascertain if documents have been withheld. That tactic also forecloses the ability of plaintiff to conduct a coherent plan of discovery depositions or take definitive videotape depositions for use at trial, because plaintiffs' counsel never has the whole history until trial is imminent, if then. In one case, the defendant pursued this tactic to the logical end, refusing to even disclose its trial exhibits to plaintiff despite repeated orders to do so. The result was a sanctions order preventing that defendant from using any exhibits at trial.¹⁵

(c) The hide-and-seek approach

A favorite defense tactic is to go to any extreme to make sure there is no way plaintiff can ever prove that a particular document has not been produced by defendant. "Dribbling" helps in that regard, because it is so confusing. Defendants also violently resist having to provide indexes to documents which are produced, identifying them by title and bates numbers, even though defendants compile and maintain those exhibits for their internal use (so they can keep track of 'who has what'). Then, when plaintiff discovers the perfidy and argues to the court that defendant has concealed a document, defense counsel simply claims to have produced in one of the boxes delivered on a certain date. Absent indexes, and proof what was and was not produced,

to reflect when local counsel received these records. . . . [There was no] explanation why the [documents] were not delivered to plaintiff upon receipt by local counsel or on the day they were physically present in the courtroom.").

Equally often, defendants inundate the plaintiff with thousands of meaningless documents, then plead the 'quantity' defense to plaintiff's charge of withholding documents.

¹⁵Bishop v. General Motors, U.S. D. Ct., E.D. Okla. (Burrage, J., Sept. 8, 1995).

the court is confronted with a 'swearing match' between lawyers. Such events seldom produce definitive court action.

6. BLATANT VIOLATION OF COURT ORDERS COMPELLING DISCOVERY

The extent to which defendants arrogate unto themselves the power to decide what will or what will not be produced is astounding. More astounding is how often plaintiffs let them get away with it. Oftentimes, courts will not.¹⁶ To some defendants, matters not that a court of law has ordered production of specific documents.¹⁷

¹⁶ Coleman v. General Motors Corp., No. 88-53419-02 (Cir. Ct. Dade Co., Fla. April 12, 1993) ("In spite of the [court's] order no further information or documents were forthcoming from GM in response to the above court orders, or requests for production, or interrogatories. . . . GM's blatant and "contumacious" violations of multiple court orders "were neither isolated nor justified."); Stump v. General Motors Corp., No. 91-C-09 (Dist. Ct. Republic Co., Kan. Aug. 17, 1992) ("[I]t is disturbing that GM's staff determines what plaintiffs need and provide that material rather than what the court ordered."); Noone v. Oldsmobile Div. of General Motors Corp., No. 85-68704 (Dist. Ct. Harris Co., Tex. Nov. 21, 1988) ("It is apparent from the totality of the record that General Motors unilaterally decided what it would produce or not produce regardless of the requirements of the Texas Rules of Civil Procedure. . . . During cross-examination of the witness for General Motors who was responsible for searching for and producing documents, films, and records requested by the plaintiff, the witness acknowledged he had not been asked to search for a number of the requested documents and discovery items, and that he only searched for what he was told to locate and produce. . . .").

¹⁷ See, e.g., Coleman v. General Motors Corp., No. 88-53419-02 (Cir. Ct. Dade Co., Fla. April 2, 1993) (vacated pursuant to stipulation) ("GM has violated the court orders. . . and further has indifferently or intentionally withheld information from plaintiff in a blatant and contumacious abuse in violation of the Florida Rules of Civil Procedure and good faith conduct of discovery as required by the code of professional responsibility. . . ."); Cooper v. General Motors Corp., No. 25459, at 31 (Cir. Ct. Marquette Co., Mich. Feb. 9, 1993 hearing on motion for sanctions) (discussing GM's violation of January 15, 1993 discovery order, the judge stated that "I'm sure that if we went back through the actual order of August of 1992, we could trace a similar history of the failure of GM to provide appropriate discovery pursuant to that order, even if we needed to."); Stump v. General Motors Corp., No. 91-C-09 (Dist. Ct. Republic Co., Kan. May 27, 1993) ("From the time General Motors was made a defendant in this case it has repeatedly willfully refused to provide or permit discovery and . . . has repeatedly and without justification disobeyed the discovery orders of the court. . . ."); Stump v. General Motors Corp., No. 91-C-09

7. SUBTLE VIOLATIONS OF COURT ORDERS AND THE RULES OF DISCOVERY --
DEFENSE "INTERPRETATION"

Corporate defendants often "interpret" court orders compelling discovery and plaintiffs' discovery requests, without telling anyone about this "interpretation," in a way so as not to produce what plaintiffs were after all along.¹⁸

(Dist. Ct. Republic Co., Kan. Aug. 17, 1992) (The court "instructed GM [on May 12, 1992] to comply with ordered discovery as soon as practicable, but in any event . . . by June 12, 1992. Plaintiffs have been forced to file a second motion to compel discovery."); McGuire v. General Motors Corp., No. 719-169 (Cir. Ct. Milwaukee Co., Wisc. Oct. 30, 1991) ("The court's . . . order directed GM to produce materials requested by the plaintiffs. . . . GM, instead of using all avenues available to locate these materials, limited [its] search in such a manner as to not find all the materials requested under the court's order. . . . GM conducted its search in a manner which made non-production of some requested items inevitable."); Sellon v. Smith, 112 F.R.D. 9, 11, 15 (D. Del. 1986); Shepard v. General Motors Corp., 42 F.R.D. 425, 426-27 (D. N.H. 1967) ("General Motors Corporation has displayed a willful disregard for the rights of the plaintiffs, for the Federal Rules of Civil Procedure, and for the orders of this court.").

¹⁸ See, e.g., Coleman v. General Motors Corp., No. 88-53419, at 3-4 (Cir. Ct. Dade Co., Fla. June 11, 1993 hearing) (Court stated in response to GM's response to request for production limiting search to "the societal harm related to light trucks" that "I doubt seriously in the history of humanity that you can find that quote anywhere in the world. . . . By putting it in quotes, [GM is] saying if one word is different, then it wasn't exactly that way, then it wasn't there. That is absurd.") (emphasis supplied); Sellon v. Smith, 112 F.R.D. 9, 13-14 (D. Del. 1986) ("It is sophistic for GM to assert that the tests [not produced] do not fall within plaintiffs' document request because [the documents] relate to overall product improvement as opposed to the improvement of a particular product. . . . The scope of plaintiffs' document request . . . is manifestly broad, and it was unreasonable for GM to construe it so narrowly. The court is convinced that any modifying language is likely to be interpreted by GM in such a manner so as to result in further disagreement. . . ."); Stump v. General Motors Corp., No. 91-C-09, at 3 (Dist. Ct. Republic Co., Kan. Aug. 17, 1992) ("[I]t is disturbing that GM's staff determines what plaintiffs need and provide that material rather than what the court [actually] ordered."); McGuire v. General Motors, No. 719-169 (Cir. Ct. Milwaukee Co., Wisc. Oct. 30, 1991) ("The court's discovery order directed GM to produce materials requested by the plaintiffs. . . .GM, instead of using all avenues available to locate these materials, limited [its] search in such a manner as to not find all the materials requested under the court's order. . . . GM conducted its search in a manner which made non-production . . . inevitable."); Noone v. General Motors Corp., No. 85-68704, at

8. THE HUMAN SHIELD

Defendants bent on subverting discovery to prevent disclosure of damaging truths are dependent on their lawyers to protect them from the consequences. This explains the parade of defense counsel one often sees in hotly contested cases. Often counsel from outside the jurisdiction are brought in to 'lead' the effort. Local counsel are picked from among those most politically powerful in the jurisdiction or considered most credible with the court. When the fur begins to fly, local counsel is pushed to the front. When the court's patience runs out, the outside counsel is often replaced, and the 'oil on troubled waters' man brought in to promise fidelity in the future. The strategy is to convince the court that the problems stem from 'personality' difficulties, and failing that, to convince the court

7 (Dist. Ct. Harris Co., Tex. Nov. 21, 1988) ("A second unacceptable response that is repeated in General Motors pleading responses is to ignore the specific question, then refer to the limited production already delivered to the plaintiff and then assert that this constituted compliance. The court finds this response unacceptable. . . . It is apparent from the totality of the record that General Motors unilaterally decided what it would produce or not produce regardless of the requirements of the Texas Rules of Civil Procedure. . . . During cross-examination of the witness for General Motors who was responsible for searching for and producing documents, films, and records requested by the plaintiff, the witness acknowledged he had not been asked to search for a number of the requested documents and discovery items, and that he only searched for what he was told to locate and produce."); Kennedy v. General Motors Corp., 1985 WL 4664 (Ohio App. 1985) ("A frequent technique employed [by GM] consisted of objection, usually on the ground of vagueness and ambiguity, then declaring non-waiver of objection, General Motors proceeded to provide some semblance of a purported answer -- oft times of questionable value or relevancy." (emphasis supplied); Sellers v. General Motors Corp., 40 Fed. R. Serv.2d 590 (E.D. Pa. 1984) (defense counsel at fault for "adhering to an extremely rigorous interpretation of plaintiff's discovery requests."); Balian v. General Motors Corp., 121 N.J. Super. 118, 296 A.2d 317 (1972) ("Such interpretation [construing expert's motion pictures refuting plaintiffs' theory as not a 'report,' such as to be required to be produced under the court's order] appears extremely narrow. . . . GM's "interpretation" of the court's order "avoid[s] the spirit if not the strict letter of the court's order. . . .").

that the problem results simply from errant defense lawyers, and not from the defendant's own plan to abuse. These ploys often work. Most courts are troubled by the damage which appropriate sanctions might cause lawyers, for whatever reason.

CONCLUSION

The obligation of the plaintiffs' lawyer is to serve as a tribune of the people, by fulfilling his/her duty as an officer of the court. Fulfillment of that duty requires honesty and forthrightness with the court.¹⁹ Only by so doing can a stark contrast be demonstrated between the conduct of plaintiffs' counsel and the conduct of the corporate adversary. Absent that clear contrast, the court is unlikely to credit plaintiffs' charges of sanctionable abuses.

Educating the courts requires understanding the subject matter. Understanding the subject matter of discovery abuse requires becoming familiar with the fact that the abuses are systematic, represent a pattern, and are deliberate, carefully crafted techniques to subvert the discovery rules, created and taught by defense 'research' organizations.

Nothing so imperils a plan to do wrong than public disclosure of that plan in advance. The practitioner can, through study and reflection, anticipate with precision what defendants will do, and by informing the court, prospectively forestall some of the abuses and set the stage for the defendant to perpetrate the rest only at great peril.

¹⁹Some 15 years ago The Verdict published a 'list' of 'ten ways to build a successful law practice which Sherrod Taylor and I had prepared. Rule number one was to the effect that one should always be honest with the court. The stated explanation was that it was the right thing to do. Given the temptations which confront lawyers, we also added that it was the smart thing to do, as failure to do so would be found out, and credibility with the court would be forever lost. Much has changed in 15 years. Regrettably, not many courts impart any credibility to lawyers anymore.

Much is available to help defeat defendants' pattern discovery abuse. The reporters are replete with examples of abuses condemned by courts.

But, first and foremost, defeating the abuses depends on the plaintiffs' lawyer, who must heed the admonitions of Eleventh Circuit Judge Peter T. Fay:

. . . too many attorneys have forgotten the exhortations of these century-old canons. Too many attorneys . . . have allowed the objectives of their client to override their ancient duties as officers of the court. In short, they have sold out to the client.

We must return to the original principle that, as officers of the court, attorneys are servants of the law rather than servants of the highest bidder. We must rediscover the old values of our profession. The integrity of our justice system depends on it.

Malautea v. Suzuki Motor Co., Ltd., 987 F.2d 1536, 1543-47 (11th Cir. 1993).