Prevent Sanctions and Provide Opportunities

Uniform Discovery Responses and Protective Orders

By James C. Ughetta and Scott Toomey

Handled properly, defensive discovery leads to fewer discovery motions and decreased likelihood of sanctions, and possibly, the chance to turn defensive discovery into an offensive thrust in the litigation.

Sanctions constitute the bitter crop that plaintiffs' lawyers hope to reap from the discovery requests that they sow. Uniform discovery responses and consistent protective orders in pattern product liability litigation render that crop benign. A plaintiff's lawyer caught violating a well-drafted protective order may also reap a whirlwind of his or her own.

Clearly, no defense lawyer or in-house counsel wants their clients sanctioned. At the same time, no defense attorney or in-house counsel will voluntarily produce a universe of documents or information just to avoid a discovery fight. Overproducing discovery, of course, may lead to litigation of collateral issues with a resulting increase in defense costs, jury confusion or a lack of focus on the real issues.

Because any document or information provided in discovery may appear in other litigation, overproducing in discovery can have real and adverse consequences. Uniform, coordinated discovery responses and consistent protective orders offer the best way to avoid unpleasant discovery surprises and sanctions. They may also provide an opportunity to turn the tables and to reinforce that a manufacturer takes litigation—and winning—seriously.

The Wish of Every Plaintiff's Lawyer

The holy grail for a plaintiff in discovery is a court's opinion that starts, "Litigation is not a game. It is the time-honored method of seeking the truth, finding the truth, and doing justice. When a corporation and its counsel refuse to produce directly relevant information… they have abandoned these basic principles in favor of their own interests." *Haeger v. Goodyear Tire and Rubber Co.,* 906 F. Supp. 2d 938, 941 (D. Ariz. 2012). An opinion that starts in such a fashion cannot end well for the defendant or its counsel.

Plaintiffs' attorneys undeniably try to win cases by creating discovery issues and securing sanctions. The American Association of Justice (AAJ), formerly known as the Association of Trial Lawyers of America (ATLA), has published materials and conducted seminars teaching its constituents how to win a case or to achieve a good settlement by setting up a defendant for sanctions. As a strategy, convincing one

■ James C. Ughetta is a founding partner of Littleton Joyce Ughetta Park & Kelly, LLP. His national and regional product liability practice is based out of the firm's Purchase, NY office. Scott Toomey serves as the managing partner of the firm's Pennsylvania office in suburban Philadelphia and specializes in the defense of product manufacturers on a national and regional basis. Both have been active in DRI for many years. Daniel J. Kain assisted in the research and preparation of this article.

judge of some alleged discovery wrongdoing can provide an easier path to victory than convincing multiple jurors that a defect exists in a product used by millions with no ill effect.

Pattern product liability cases present particularly fertile ground for efforts to create discovery issues. Similar or identical products often spur similar or identical allegations of defect. Similar fact patterns and allegations can lead to similar discovery requests across the product's litigation portfolio. The issuance of similar sets of discovery satisfies the prerequisite needed to compare the defendant's responses from case to case and exploit inconsistencies.

And no question exists that members of the plaintiffs' bar will communicate with each other to seek out inconsistencies. The 2014 Winter Convention of the AAJ is titled "Strength in Knowledge. Power from Networking. United for Justice." Plaintiffs' lawyers openly volunteer to serve as clearinghouses for information accumulated in pattern products liability lawsuits and to make that information available to other contributing attorneys. *Smith & Fuller, P.A. v. Cooper Tire & Rubber Company*, 685 F.3d 486, 487 (5th Cir. 2012). Since the 1970s, The Attorneys' Information Exchange Group has coordinated for the plaintiffs' bar technical information obtained from defendants in pattern product liability lawsuits. Most plaintiff attorneys will try to use that information at every possible turn and in every possible way.

Ultimately, a plaintiff who can exploit inconsistencies in discovery responses may win the case before it even reaches a trial. Courts that conclude that a defendant failed to cooperate in discovery or obstructed a plaintiff's discovery efforts can enter, and have entered, default judgments. *Ma-lautea v. Suzuki Motor Co., Ltd*, 987 F.2d 1536 (Ga. 1993). Lesser sanctions for perceived discovery violations can still include harmful binding jury instructions or preclusion of a defense or witness. *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 109–110 (2d Cir. 2002); Fed. R. Civ. P. 37(b). Even such less comprehensive remedies can ultimately satisfy a plaintiff if the defendant decides to capitulate rather than incur additional harassment and expense.

Sanctions can hurt in other ways, too. 28 U.S.C. §1927 makes a lawyer personally liable for excess fees and costs incurred by an opponent if the lawyer unreasonably and vexatiously acts to multiply the proceedings in federal court cases. Courts may assess significant monetary sanctions to defendants or force them to disclose the sanctions to other litigants or other courts. *See Haeger,* 906 F. Supp. 2d 938, 941 (D. Ariz. 2012). Even when a court does not impose monetary sanctions, orders detailing discovery infractions are public documents potentially embarrassing to a company.

Just as embarrassing and potentially harmful at trial is the appearance of a document disclosed in one case but not in the case at bar. Plaintiff attorneys in this situation will accuse the corporate defendant of "hiding the ball" to try to show a court and jury that they cannot trust the corporate defendant and should disregard everything it says at trial Of course, defendants have to maintain credibility with judges and juries. Allowing a plaintiff's lawyer to portray a corporate defendant in a poor light undermines the defendant's credibility and hurts the chances of a trial success.

In addition to bearing sanctions or losing credibility or both before a judge and jury, some plaintiffs' lawyers will overburden defendants with discovery demands for the sole purpose of pressuring a defendant or its insurer to settle a case. Plaintiffs' lawyers know that some companies and insurers consider defense costs when evaluating the settlement value of a case. If they can drive up the defense costs, any cost-benefit analysis swings toward settlement.

Frustrating That Wish Through Control, Coordination, and Communication

By definition, responding to discovery in pattern product liability litigation requires a corporate defendant and its counsel to consider the ramifications and consequences of producing documents and information that may appear in other litigation. Steps can, of course, be taken to prevent or mitigate discovery issues. Maintaining consistency in pattern product liability litigation means addressing every set of written discovery materials produced and preparing for each deposition of a company witness while keeping in mind three concepts: (1) control, (2) coordination, and (3) communication.

Control over Defensive Discovery

Clear chains of command and divisions of responsibilities minimize inadvertent errors of omission or commission that invite a discovery motion. Centralizing responsibilities for investigation, document review and drafting discovery responses reduces the chances of inconsistent or uneven efforts that open the door to unwanted surprises.

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At the same time, modern product liability litigation extends to every state, each of which has its own set of rules. Both outside and in-house counsel must know and understand the case issues and local discovery rules. The breadth of discoverable material will vary from state to state, especially in the state courts. Just because a plaintiff's attorney requests documents and information does not automatically mean that a defendant must produce the discovery requested. A manufacturer should provide material and information to which a plaintiff is entitled and no more. Determining where to draw that line requires whoever controls the defensive discovery process to know the rules in the particular venue.

Of course, controlling defensive discovery means more than just understanding the applicable rules of civil procedure. Once a defendant learns that a case has been filed, it should suspend its routine document retention policy and put in place a "litigation hold" to ensure the preservation of relevant documents. *See The Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, 685 F. Supp. 2d 456, 466 (S.D.N.Y. 2010). Failing to do so may constitute sanctionable negligence, or even gross negligence sometimes, when a failure will likely result in the destruction of relevant information. This duty may arise even earlier if a plaintiff places a party on notice that future litigation will

likely begin. *See Cache La Paudre Feeds, LLC v. Land O' Lakes, Inc.*, 244 F.R.D. 614, 621–23 (D. Colo. 2007). Securing the documents and information relevant to a lawsuit represents the first step in controlling the outcome of defensive discovery.

Once a defendant collects relevant and responsive documents, protecting their dissemination becomes the next priority.

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Manufacturers should insist on a protective order before providing any confidential or proprietary information. The protective order should ensure that trade secrets or other confidential research, development or commercial information remain confidential and that a plaintiff either destroys them or preferably returns them to defense counsel when the case concludes. *See, e.g.,* Fed. R. Civ. P. 26(c). Federal Rule 26(c) and similar rules of state courts allow a court to issue a protective order to protect a party from annoyance, embarrassment, oppression or undue burden or expense. Federal Rule 26 provides the federal courts with a typical set of tools to protect a defendant. A court can (1) forbid the discovery or disclosure; (2) specify terms, including time and place, for the discovery or disclosure; (3) forbid inquiry into certain matters or limit the scope of disclosure or discovery of certain matters;(4) require that a deposition be sealed or opened only on court order; and (5) require that a trade secret or other confidential research, development or commercial information not be revealed or be revealed only in a specific way. Manufacturers and distributors should make use of these tools at every opportunity.

Typically, plaintiff attorneys will voluntarily agree to a protective order regarding confidentiality of documents and information. If, however, a dispute arises about certain provisions or what the proposed protective order encompasses, you may need to pursue a protective order by motion, which may not prove an easy task. Some courts disfavor protective orders because American courts lie within the public domain, and protective orders inherently limit the public's access to evidence of record. *See, e.g.*, *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 785–86 (3d Cir. 1994). Jurisdictions, of course, vary in their treatment of motions seeking entry of a protective order. Most plaintiffs' lawyers, however, recognize a manufacturer's legitimate interests and legal right in protecting valuable commercial information and will stipulate to the entry of a protective order.

While many will agree to the entry of a stipulated protective order, some plaintiffs' attorneys nonetheless wish to share confidential and proprietary information with other attorneys suing the same or other manufacturers in other lawsuits. Defense counsel should insist that the protective order prohibit the sharing of information outside the boundaries of the specific case. No reason exists for a plaintiff's attorney in one case to share proprietary and confidential documents and information with other plaintiff's lawyers in other lawsuits. In no way does the sharing of documents advance a plaintiff's case, as long as the discovery responses and document productions in the two cases are consistent. Nonetheless, allowing confidential or proprietary documents to be shared increases exponentially the chances of dissemination outside the boundaries of the case and decreases exponentially a manufacturer's ability to control where the documents go and who sees them.

Protective orders without a provision that prohibits the sharing of information may open the door to collateral issues involving other products or designs. Disseminated information about dissimilar products or different designs opens the door to the introduction of new and collateral issues to a court. A product manufacturer may end up defending products with different designs or characteristics than the product at issue. Of course, this will increase time and expense and can easily distract a judge or jury from the real issues at hand.

Any protective order should also take into consideration any inadvertent disclosure of documents. Defense counsel should include in a protective order a nonwaiver agreement. Without such a provision, a plaintiff may refuse to return the prize inadvertently dropped in his or her lap and an unsympathetic court may find that the disclosure waived any applicable privilege. *See Victor Stanley, Inc. v. Creative Pipe*, 250 F.R.D. 251, 267–68 (D. Md. 2008). Waiver constitutes the most preventable loss of control over the dissemination of important documents.

When a plaintiff's attorney expresses dissatisfaction with a defendant's discovery responses, motion practice can loom—with the resulting potential for a loss of control over the scope of a defendant's responses or production. Most courts require a "good-faith" effort to resolve a discovery dispute before filing a motion. Such an effort should include a "meet and confer" conference to resolve the dispute. Even if a conference ultimately fails, a defendant should document in writing what was agreed to and the principled positions underlying the defendant's side of any unresolved issue. A manufacturer should explicitly describe how the defendant tried to work out any remaining discovery disputes and why the defendant is only taking reasonable and well-founded positions. Documenting the efforts made to accommodate a plaintiff's requests while staying within proper boundaries provides another avenue to control the dialogue and, ultimately, the record that a court may consider if the plaintiff seeks court intervention.

Court intervention in discovery issues may lead to unpredictable results. Most judges do not want to be bothered with discovery disputes, rightfully believing that good attorneys should be able to cooperatively resolve most discovery disputes. When a plaintiff nonetheless seeks to compel further responses or documents, a manufacturer still has an opportunity to control the dialogue, at least partially.

Discovery hearings may, for example, provide an opportunity to educate a court on a plaintiff's overreaching discovery. Plaintiffs in product liability matters in particular often seek information concerning other products, other aspects of the product at issue with nothing to do with the

issues of the specific case and other accidents involving dissimilar products or case issues. A discovery motion can provide an opportunity to educate a court about a product, about the unreasonableness of the actions of plaintiffs' counsel and in general why the defense has a better position in the lawsuit. A discovery motion may allow the defense, then, to gain credibility with a court, obtain a favorable ruling and avoid future discovery disputes with this or other plaintiffs' counsel.

Ultimately, centralizing the responsibility with in-house counsel or national discovery counsel for responding to defensive discovery almost inherently results in more consistent discovery responses. No matter how many similar cases a company faces, fewer speakers inevitably bring the company closer to the goal of speaking with one voice. A company speaking with one voice leaves little room for a plaintiff to find the dissonant discovery response and wave it in front of the wrong judge or the wrong jury.

Coordination of Responses

Crafting bulletproof discovery responses in pattern litigation discovery requires not only vertical coordination between attorney and client, but horizontal coordination among similar cases venued in different states. Courts will often refuse to give the benefit of the doubt to a product manufacturer when presented with evidence that it produced more or different materials in another case. *See Haeger,* 906 F. Supp. 2d 938, 941 (D. Ariz. 2012). Such a discovery can also lead a court to delve deeply into attorney-client communications and the process by which the manufacturer evaluated and answered the discovery. *See id.*

Concentrating the pool of those with responsibility for responding to discovery promotes accurate issue identification and the ability to proactively spot potential areas of trouble. Knowing and understanding a product, its function and development and any relationship to other products within a company enhances the ability to provide what a plaintiff's discovery requires without necessarily providing the universe. Defendants must maintain consistent positions on the central factual and legal themes.

To do so, defendants in pattern product liability litigation, however, must actively compare discovery responses to those submitted in previous cases. Obviously, a company can only compare responses if it retains the earlier ones. To the extent that differences exist, those differences should be flagged and explanations for the disparate treatment readied. Coordination of the responses to discovery in pattern cases necessarily leads to a uniform approach to the core issues and leaves less opportunity for a plaintiff to misconstrue or take out of context a document or discovery response.

Communication Is Key

Although last in the series of suggestions made in this article, active communication between and among the lawyers and clients is by no means the least important. Rather, good communication opens up the avenues to proper control and coordination of discovery in pattern product liability litigation. With different rules for different states, numerous deadlines in cases and plaintiffs' attorneys with varying degrees of aggression, communicating during the preparation of defensive discovery responses becomes crucial.

Although perhaps obvious, merely knowing the rules does not suffice. Clients rightfully want and expect their counsel to keep them advised and up to date on local rules and practices and why specific materials might be discoverable. While many companies devote resources to the discovery process, neither a manufacturer nor its outside counsel can afford misunderstandings that lead to under or overproduction.

Similarly, local counsel cannot overlook the need to advise even the most sophisticated client that late responses or improper objections may have serious consequences in the specific jurisdiction. In some jurisdictions, late responses result in waived objections or the imposition of costs or both. *See, e.g.,* Cal. Code of Civil Procedure §2030.290. Boilerplate or general objections can likewise provoke unnecessary and unwelcome motion practice. *See, e.g.,* Cal. Code of Civil Procedure §2030.300. No amount of care will eliminate all discovery motions. Complete communication can, however, reduce the number and scope of motions, and improve the chances of success when they do occur.

Finally, defense counsel should keep open the lines of communication to the plaintiff's lawyer. Of course, overcoming the unjustified paranoia of some in the plaintiffs' bar may prove difficult. Many plaintiffs' lawyers, however, value their time and understand the diminishing returns of a never-ending fight for the last document. Maintaining a constructive relationship cannot hurt and will likely decrease the chances of motion practice.

Turning the Tables

A plaintiff's lawyer who waves during a trial or deposition a document that a manufacturer has not produced in the case may think twice the next time if a company has properly prepared past and present discovery. The lawyers who can turn the putative smoking gun into a sword can undermine the credibility of the plaintiff's attorney and send a message that their client takes seriously the defense of lawsuits. Others intending to sue the company may get the message as well.

Courts in many jurisdictions have generated a significant body of jurisprudence enforcing protective orders and sanctioning those who disregard prohibitions on the distribution of protected documents. *See, e.g.,* Adam M. Josephs, *The Availability of Discovery Sanctions for Violations of Protective Orders,* 81 Univ. of Chicago L. Rev.— (forthcoming 2013). Such decisions rest on strong policy foundations, including (1) the reliance of a defendant on the protections given by the order when producing sensitive materials; (2) the parties' clear understanding about how important restricting dissemination of the protected materials is to the defendant due to the lengths to which the defendant went to obtain the order; (3) the need to deter future discovery abuse; and (4) a court's need to rely on parties to follow and obey its orders. *See, e.g., Smith & Fuller, P.A. v. Cooper Tire & Rubber Co.,* 685 F. 3d 486 (5th Cir. 2012).

Only well-executed discovery, however, allows a defendant to access any remedies for the wrongful dissemination of its documents and information. More specifically, remedying the improper dissemination of a document or information requires a well drafted protective order and the ability to identify how a plaintiff's lawyer obtained a document or information. In the *Cooper Tire* case, for example, the protected material carried case specific Bates identi-

fications. *Id.* at 487. When the documents surfaced in another case, those identifications rendered tracking the origin of the documents possible. *Id.* Notably, Cooper Tire maintained a national discovery counsel to control and coordinate its responses to pattern litigation discovery. *Id.* at 490–91. While no sanction can erase the dissemination of a protected document, well-handled discovery can lead to some remedy and, to some extent, level the field in discovery matters.

Conclusion

Centralized control over defensive discovery, horizontal and vertical coordination and communication between those responsible for preparing responses lead to an improved ability to manage discovery in pattern products liability litigation and to avoid discovery disputes. They serve an ultimate goal: to produce in discovery only those materials the applicable discovery rules and requests require. Handled properly, defensive discovery leads to fewer discovery motions and decreased likelihood of sanctions, and possibly, the chance to turn defensive discovery into an offensive thrust in the litigation. FD