The Riddle of *Fisons*: When is Discovery not Discovery?

(Hint: When it's part of the adversary process.)

by **Randolph I. Gordon**

In September 1993, the Washington State Supreme Court ordered the imposition of sanctions upon the Seattle law firm of Bogle & Gates and its client, Fisons Corporation, for discovery abuse.[1] *The law firm and its client ultimately agreed to pay a fine of $325,000. In May 1995, Bogle & Gates, representing defendant Subaru of America, was again sharply criticized for discovery abuse by U.S. District Court Judge Robert J. Bryan.*[2] *In response to plaintiff's motion for sanctions, defense counsel cited* Fisons *for the principle that: "Fair and reasonable resistance to discovery is not sanctionable."*

Indeed.

Learning *Fisons* the Hard Way: A Law Firm's Trip Down Advocacy's Slippery Slope

The problem of determining what constitutes "fair and reasonable resistance to discovery" (*Fisons*, at 346) is, of course, precisely where the proverbial horse lies moldering. In "scorched earth" litigation such a determination is as tortuous as the investigation of "war crimes" in modern warfare — and for similar reasons. In both contexts:

(1) the judgment of what constitutes fair and reasonable conduct must be made, in the first instance, by the alleged offender;

(2) the facts necessary to justify sanctions are difficult to uncover because, among other reasons, they are often in the exclusive possession of the party who benefits from their concealment;

(3) the misconduct of one party tends to degrade standards for both, blurring distinctions and undercutting the moral standing of the injured party; and

(4) the rewards of misconduct are enormous.

Fisons, regrettably, does little to ease the conflict "between the attorney's duty to represent the client's interest and the attorney's duty as an officer of the court to use, but not abuse the judicial process." *Id.* at 354. This is left to self-regulation, in the first instance, on the theory that:

> [V]igorous advocacy is not contingent on lawyers being free to pursue litigation tactics that *they cannot justify as legitimate*. The lawyer's duty to place his client's interests ahead of all others *presupposes* that the lawyer will live with the rules that govern the system. Unlike the polemicist haranguing the public from the soapbox in the park, the lawyer enjoys the privileges of a professional license that entitles him to enter into the justice system to represent his client, and in doing so, to pursue his profession and earn his living. He is *subject to the correlative obligation to comply with the rules* and *to conduct himself* in a manner consistent with the proper functioning of that system.[3] [Emphasis added].

In other words, the "honor system." One cannot help but marvel at the notion of lawyers being free to pursue any litigation tactic that they can *justify as legitimate*. Lawyers are, after all, in the "justification" business. As H. L. Mencken unflatteringly remarked, and the legal community has yet to disprove: "As for a lawyer, he is simply, under our cash-register civilization, one who teaches scoundrels how to commit their swindles without too much risk."[4] To *presuppose* that lawyers will comply with rules which they regard as being duty-bound to stretch to the breaking point in the name of vigorous advocacy is unsound in theory. Theoretically, one could anticipate that the

balance between full and fair discovery and vigorous representation of a client's interest would be reached at that point providing *as little discovery as can be justified.* Practically, however, the transaction costs associated with compelling discovery, obtaining adequate sanctions, and collecting such awards, virtually assures that such efforts will be even less fruitful.

When is a Brain not a Brain and other Mysteries of Advocacy

We have all seen it. We have, in fact, ourselves heard the siren call of philosophy. For, in the response to standard interrogatories we soon learn that every lawyer is, at heart, a Philosopher-King. Even the novice attorney who has never revealed in early life an inclination towards philosophy finds flowering within him its fully-formed expression. Consider the typical exchange: "Please identify the experts you intend to call at trial?" Response: "Not yet determined."

No one questions the propriety of the inquiry. It is expressly authorized by CR 26. Yet the response is worthless. Is it possible that the counsel for respondent has yet to form an *intention* respecting its trial witnesses? Philosophy beckons. Perhaps the Universe *is* governed by strict determinism and we are free of both will and intention. Intention is a slippery notion and the selection of experts for trial is, after all, a small thing to busy attorneys and may easily escape their notice. (More to the point, how can anyone prove otherwise?) Indeed, we soon learn that the formulation of the requisite intention regarding expert witnesses to be called at trial coincides precisely with the cutoff for disclosing experts mandated in the pretrial schedule. After all, disclosure of experts one second earlier than required may work to the advantage of opposing counsel. It follows that lawyers, demonstrating rare mental discipline, apparently *will* themselves to form no intention until it is congruent with their litigation stratagem. Once more, the "floor" established by the rules, becomes the "ceiling" for performance. Once more, advocacy works to minimize discovery.

But, let us examine *Fisons* more closely to see where the line between advocacy and misconduct lies. A doctor and his insurance company seek damages from a drug company after the parties have settled with a patient injured by a drug (Theophylline) prescribed by the physician and manufactured by the drug company. The doctor and his insurer allege fraud, product liability, and Consumer Protection Act claims. During the course of discovery, the doctor's "simple request" (so characterized by the court, at 346 n. 86) reads as follows:

> INTERROGATORY NO. 2: Can Theophylline cause brain damage in humans?
>
> ANSWER: *See* general objections [set forth in two pages] attached hereto as Exhibit A and incorporated herein by this reference. This interrogatory calls for an expert opinion beyond the scope of Civil Rule 26(b)(4), and is, in any event, premature. Furthermore, this interrogatory appears to call for an opinion based on medical knowledge after January 18, 1986, whereas the relevant time frame is on or before January 18, 1986. In addition, this interrogatory is not reasonably calculated to lead to discovery of admissible evidence under CR 26(b)(1). This interrogatory is also vague, ambiguous and overbroad. **For example, the term "cause" is vague and ambiguous in that it does not specify whether it includes indirect, as opposed to direct, causes.** The term "brain damage" is similarly vague and ambiguous and is overbroad as to time and scope. **For example, it is unclear whether the term "brain" includes the entire central nervous system;** it is further unclear whether the term "brain damage" includes temporary as well as permanent changes. [Bolding added for emphasis.] *Id.* at 346 n. 86.

"To presuppose that lawyers will comply with rules which they regard as being duty-bound to stretch to the breaking point . . . is unsound in theory."

The Washington Supreme Court quoted the above as an example of the drug company demonstrating its "resistance to comply with discovery" and stated: "Although we do not condone this kind of answer, this answer, *alone*, would not warrant sanctions as it does raise some legitimate objections." [Italics in original.] *Id.*

Consider: What does it mean for the Washington Supreme Court to state that the foregoing response is not condoned, but that it does not warrant sanctions? It apparently means that you are "bad" for doing it, but that you will not be punished. Under the "honor system," this works. As a grant of authority to the trial courts to enforce discovery, it fails. (And in the adversary system where being "bad" is simply pushing the "edge of the envelope" of vigorous advocacy, it becomes a badge of honor; a virtue.) Is asserting the ambiguity of "cause" or "brain" in the context of the interrogatory propounded here legitimate advocacy or pettifoggery and obstructionism? If the latter, it must be sanctionable if we are ever to have meaningful discovery.

Suppose the prescient propounder were to have anticipated the objection and met it in advance by saying: "Does the drug cause (and I mean directly *or* indirectly) brain damage — and by brain damage I mean the *entire* central nervous system?" Could not the response be: "Objection. The term 'indirect' is vague and overbroad encompassing without limitation the Universe of indirect effects far beyond any possible legal causation. Further object that 'central nervous system' is vague and ambiguous as it fails to state where the peripheral nervous system begins?" If advocacy can mean that a 'brain' is ambiguous, then virtually every word in the English language soon dissolves into a pool of pedantic circumlocution.

We can scarcely be surprised then at the course of discovery in *Staggs v. Subaru of America* . Asked if their client (Subaru of America) had received information from the National Highway Traffic Safety Administration respecting driver's seats in

the Subaru Justy collapsing backwards from rear-impact forces of 30 miles per hour, Bogle & Gates is reported to have responded: "[the request is] vague, confusing and unintelligible .... Specifically, 30 miles per hour is a velocity, not a force, and due to this confusion of technical terms, no meaningful response can be given."[5]

The lesson of *Fisons* is not reassuring. It appears that in order to be sanctioned you have to be caught red-handed. That is, of course, precisely what happened.

Plaintiffs' counsel requested the production of letters relating to Theophylline toxicity in children. The Court found: "Had the request, as written, been complied with, the first smoking gun letter (exhibit 3) would have been disclosed early in the litigation." *Id.* at 349. It was not. The same attorneys who were unclear over the meaning of the word "brain" responded as follows:

> Such letter, *if any*, regarding Somophyllin Oral Liquid will be produced at a reasonable time and place convenient to Fisons and its counsel of record. *Id.* at 348.

The so-called "smoking gun" letters were not produced. In fact, the Court concluded:

> It appears clear that no conceivable discovery request could have been made by the doctor that would have uncovered the relevant documents, given the above and other responses of the drug company. The objections did not specify that certain documents were not being produced. Instead the general objections were followed by a promise to produce requested documents. These responses did not comply with either the spirit or letter of the discovery rules and thus were signed in violation of the certification requirement [under CR 26(g)]. *Id.* at 352.

What is especially shocking is that:

> Although interrogatories and requests for production should have led to the discovery of the "smoking gun" documents, their existence was not revealed to the doctor until one of them was anonymously delivered to his attorneys. *Id.* at 337.

Following a motion for sanctions heard before the special discovery master, the drug company was ordered to turn over any immediately available documents. "The next day, the second "smoking gun," a 1985 internal memorandum describing theophylline toxicity in children, was delivered along with about 10,000 other documents." *Id.*

What follows establishes, if nothing else, that the defendant and its counsel were not easily embarrassed. Did counsel renounce what the *Fisons* court found to be evasive and misleading non-responses? Did the drug company claim that its inquiry into the records did not uncover the smoking gun documents? No, to both. *Id.* at 347, 352. Rather, the drug company through its counsel took the position that: (1) "[t]he plaintiffs themselves limited the scope of discovery;" (2) the smoking gun documents were "not intended to relate" to the product in question; (3) the drug company "produced all of the documents it agreed to produce or was ordered to produce"; (4) the failure to produce the smoking gun documents resulted from "the plaintiffs' failure to specifically ask for those documents or from their failure to move to compel [their] production"; and (5) that "[d]iscovery is an adversarial process and good lawyering required the responses made in this case." *Id.* at 352-53.

The Court concluded: "If the discovery rules are to be effective, then the drug company's arguments must be rejected." *Id.* at 353.

Why the Adversary Process Fails Us Respecting Discovery

Among those venerable principles underlying the Federal Rules of Civil Procedure, upon which our own Civil Rules were modeled, is this one: "a spirit of cooperation and forthrightness during the discovery process is necessary for the proper functioning of modern trials." *Fisons*, at 242. As then-Court of Appeals Judge Barbara Durham wrote:[6]

> The Supreme Court has noted that the aim of the liberal federal discovery rules is to "make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *United States v. Proctor & Gamble Co.*, [356 U.S. 677, 682 (1958).] The availability of liberal discovery means that civil trials "no longer need be carried on in the dark. The way is now clear ... for the parties to obtain the fullest possible knowledge of the issues and facts before trial." *Hickman v. Taylor*, [329 U.S. 495, 501 (1947).]

This system obviously cannot suc-


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ceed without the full cooperation of the parties.

Historically, the courts have been content to leave the determination of what is reasonable and fair respecting discovery largely in the hands of the attorneys involved: what one side will produce, and what the other side will accept. Judicial intervention has been rare partly because it has been perceived as a matter best left to counsel to work out, and partly because of the difficulty of ascertaining fault, but also because "the issue of imposition of sanctions upon attorneys is a difficult and disagreeable task for a trial judge." *Id.* at 355. As a consequence, the traditional handling of this disagreeable task is akin to a parent separating a fight between siblings with the admonition: "Break it up, you two, or you'll both be punished."

This approach has proven equally ineffective in both courthouses and homes.

All too frequently, the prolonged efforts to gain discovery preliminary to the ultimate motion for sanctions, taken alone, give rise to legal fees and costs to the aggrieved party well in excess of the amount of any sanction (if any is awarded). Such awards, even when adequate, often go unpaid because parties forego collection as incompatible with the compromises required for settlement. Surely, the parties reason, the collection of a discovery sanction should not stand in the way of a settlement. Thus, the interests of the judicial system in deterring discovery abuse go unserved.

Although reluctant to exercise their authority, trial courts have been afforded wide discretion to determine proper sanctions, both in deference to them as judicial actors best positioned to decide the issue, and to eliminate the chilling effect that a review de novo could have on their willingness to impose sanctions. *Fisons*, at 339, citing *Cooper v. Viking Ventures*, 53 Wn. App. 739, 742-43 (1989). However, in one rare case of appellate reversal of a trial court's sanction for inadequacy, the Court of Appeals disapproved a sanction award of $2,500 for being "cheap at twice the price in the context of a $4.5 million wrongful death case." *Gammon, supra*, at 282. "The sanction," we are told, "should insure that the wrongdoer does not profit from the wrong." *Fisons*, at 356.

The rewards of successful concealment of key evidence — and the incentives for abuse — are vast; the risk of sanction remote. Recall, if you will, that it is the party seeking discovery (and inappropriately denied it) who must establish the existence of the document sought. Anonymous donors of smoking gun documents are mournfully few.

> ***"What does it mean for the Washington Supreme Court to state that the . . . response is not condoned, but that it does not warrant sanctions?"***

Cooperation, the highest authorities have made it clear, is essential for the system to function. Yet, the adversary system is founded on the notion that the truth will emerge from a contest of opposing forces. Consider its basic premise: two antagonists confront a body of evidence from which they each extract that which is most favorable to themselves and most unfavorable to their opponents. The very word "antagonist" derives from the Greek words *anti* ("against"), *agonistes* ("competitor"), and, ultimately, from *agonizethai* ("to contend") and *agonia* ("struggle"). The athletes of ancient Greece (from *athlos*, a contest) were closely examined by the officials, and took an oath to observe all the rules. Irregularities were rare, we are told, because "the penalty and dishonor attached to such offenses was discouragingly great."[7]

By contrast, the penalties associated with discovery abuse are mild compared with the potential benefits, are rarely imposed, and are frequently twisted into an accolade by those who perceive it as evidence of vigorous advocacy.

Discovery, as long as it is regarded as adversarial, all too often remains an opportunity for the prolongation of litigation, the imposition of punitive expense on the opponent, and the concealment of evidence to avoid an adjudication on the merits. Counsel often conclude that their duty to represent their client takes precedence over their obligations to cooperate in discovery when called upon to produce documents damaging to their client's case. Applying the principles of advocacy, many attorneys will provide as little discovery as can be justified (and less), thus foisting the burden of compelling discovery upon opposing counsel — and the court. Never-

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theless, the Court in *Fisons* expressly rejected the notion that a party fulfills its discovery obligations by merely producing all documents agreed upon or compelled by court order. There is an affirmative duty to disclose responsive materials.

Where one party is in the exclusive possession of evidence harmful to it, the instincts of contention will promote concealment, not disclosure. While each party may be motivated to extract information from the other through vigorous efforts, we have already observed that the cost of extraction is very high indeed, greatly favoring the party resisting discovery. Moreover, the diminished expectations which arise from widespread discovery abuse, infrequent sanctions, and the high costs of seeking judicial intervention encourage further abuse: "Misconduct, once tolerated, will breed more misconduct and those who might seek relief against abuse will instead resort to it in self-defense."[8]

While the adversary process excels in the courtroom in drawing out competing inferences from a shared body of evidence, it works against the full disclosure and assembly of the relevant evidence essential to litigation. As the United States Supreme Court held: "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation."[9] Proper litigation is difficult if discovery is hobbled by the adversarial instinct, and it becomes impossible in the face of discovery abuse. Put another way, discovery abuse has all the moral integrity of one athlete hiding the car keys of another, so that his competitor cannot get to the stadium in time. *Cooperation* should reign supreme outside of the stadium; competition within.

When Philosopher-Kings Meet Special Masters

We have considered the powerful adversarial reflex which hinders the cooperation essential to full and fair discovery. Even when the adversary process is not contentious, abuse of discovery often is tolerated by tacit agreement, as an alternative to incurring the costs of ineffective judicial review, or in retaliation for perceived misconduct by opposing counsel. A generation of discovery abuse (and the associated lowering of expectations) has gravely impaired the utility of interrogatories, requests for admission and requests for production.

In addition to limited judicial resources, the effectiveness of judicial intervention has been hampered by judicial perceptions: The aversion to the disagreeable task of awarding sanctions, the belief that discovery matters are properly handled between counsel, and the difficulty of ascertaining fault. These factors often prompt a court to place blame on both parties for failing to work things out, further discouraging appeals to the court and prejudicing the court's sympathy for the injured party seeking discovery.

An entire generation of lawyers is badly in need of education regarding appropriate expectations concerning discovery. "The purposes of sanctions orders," we are told, "are to deter, to punish, to compensate and to educate." *Fisons*, at 356. All of these functions are served by a steady, accessible judicial presence, such as a "Special Master for Discovery" (SMD), who can offer immediate and repeated guidance. Some of the United States district court judges, concerned with obstructionist objections during depositions, have found that making themselves avail-

able by telephone on short notice to resolve disputes has a salutary effect. Having an SMD on call, to further the discovery process, to lower the threshold for judicial intervention, and to inject practicality into the process, will provide a re-education badly needed by attorneys who have run wild, fearless of sanctions, forgetful of their duties to the system.

Consider this approach. After a case is filed, at the request of either party, the case shall be designated for service by an SMD. Each party will be required to remit a minimal fee to the SMD fund to help underwrite the service. Telephone hearings will be encouraged — with orders to issue immediately by fax — for a nominal fee per party. If a discovery request, objection, or response is found to be lacking or inappropriate in any way, an order for sanctions (with a fixed minimum assessment), plus the cost of the hearing shall be assessed against the offending party, to be paid within 14 days. The presumption shall be that sanctions shall always be ordered against any party whose response to discovery (or request for discovery) is inappropriate: Either the response (or inquiry) is appropriate, or it is not; either more documents ought to be produced, or not; either an objection is well-founded, or it is not. A de novo review by the Superior Court would, as with the Mandatory Arbitration Rules, award reasonable attorneys' fees and costs allocable to the review to the opposing party if the party seeking review did not improve its position under the SMD's order. Courts should give the SMD, within its modest realm, deference.

The sanctions can be designated, in whole or part, as compensatory or punitive in nature. Compensatory sanctions would be paid to the opposing party for fees and costs incurred, while punitive sanctions would be paid to the SMD fund or other court-related fund. As the Washington Supreme Court stated: "To avoid the appeal of sanctions motions as a profession or profitable specialty of law, we encourage trial courts to consider requiring that monetary sanctions awards be paid to a particular court fund or to court-related funds." *Id.*

Such an SMD would undoubtedly become a profit-center for the courts. If objections are raised that the SMD has a predisposition to assess sanctions to secure funding for his or her position, so be it. We can only hope that the fear of sanctions (just or unjust) will provide just the fillip needed to encourage cooperation. The SMD's ready availability and practical willingness to state when "brain" means "brain," and when an objection is pure hokum, will provide the perfect environment for classical conditioning: frequent, consistent, and moderate correction. Critiquing responses to interrogatories at the cost of the offending party may provide just the appropriate check on the heretofore untrammeled concealment of non-responses beneath objections. An SMD will make short shrift of the pettifoggery of the self-anointed Philosopher-Kings.

Endnotes

[1] *Physicians Insurance Exchange v. Fisons Corporation*, 122 Wn.2d 299, 858 P.2d 1054 (1993).

[2] *Staggs v. Subaru of America, Inc.*, U.S. District Court for the Western District of Washington (at Tacoma), Cause No. C93-5678B.

[3] Schwarzer, *Sanctions Under the New Federal Rule 11 - A Closer Look*, 104 F.R.D. 181, 184 (1985) as quoted in *Fisons, supra*, at 354-55.

[4] Mencken, *Minority Report: H. L. Mencken's Notebooks*, (New York: Alfred A. Knopf, 1956), p. 132.

[5] Fryer, "Dismaying Discovery," *Puget Sound Business Journal* (King Co.), 11/17/95, p. 34 (Quoting Judge Bryan).

[6] *Gammon v. Clark Equip. Co.*, 38 Wn. App. 274, 280; 686 P.2d 1102 (1984); *aff'd*, 104 Wn.2d 613; 707 P.2d 685 (1985).

[7] Durant, *The Story of Civilization, II. The Life of Greece*, (New York: Simon & Schuster, 1966), p. 213

[8] Schwarzer, *supra*, 104 F.R.D. at 205 as cited in *Fisons*, at 355.

[9] *Hickman v. Taylor*, 329 U.S. 495 (1947).

Bellevue attorney ***Randolph I. Gordon*** *is the former president of the East King County Bar Association and currently serves as a trustee of the King County Bar Association.*

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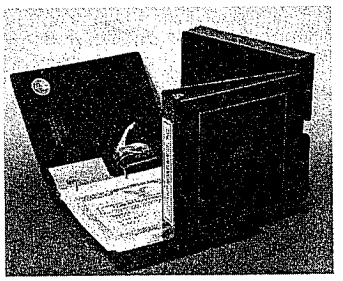

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