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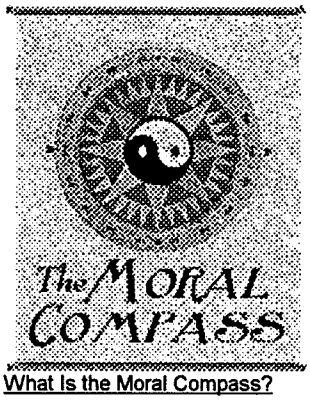

What Is the Moral Compass?

THE MORAL COMPASS: Calculated Malfeasance

The ongoing abuse of discovery requires stronger, surer sanctions

By Richard Zitrin & Carol Langford

Anyone who thinks discovery abuse is on the wane hasn't been reading the papers.

Last Monday's lead story in *The National Law Journal* detailed an $18 million sanction against Wal-Mart Stores for withholding discovery. Beaumont, Texas judge James Mehaffy found that Wal-Mart had made discovery abuse "a corporate policy." He topped off his fine by imposing an extra $50,000 against Wal-Mart's lawyers, Houston's Magenheim, Bateman, Robinson, Wrotenbury & Helfland. The Beaumont case was just one of four actions that resulted in discovery sanctions against Wal-Mart in Texas alone, according to the NLJ. In three of the four, the discount superstore was represented by Magenheim, Bateman.

The hefty sanctions award came in a case brought by Donna Meissner, who was kidnapped from a Wal-Mart parking lot. Central to Meissner's case was a 1993 Wal-Mart survey that showed customers were far more likely to be the victims of crimes outside than inside the store, and that exterior security patrols appeared to effectively limit crime. Meissner's lawyers claimed that Wal-Mart and its attorneys were doing all in their power to avoid revealing the study's details. According to the NLJ, name partner Alan Magenheim claimed that Wal-Mart's 1993 review was a survey, not a study, and thus didn't fall within the plaintiff's request. The judge was not amused. But Magenheim is hardly unique in his use of such semantic legerdemain.

Washington State Physicians Ins. Exch. & Ass'n v. Fisons

Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 858 P.2d 1054 (Wash. 1993) exposes the disturbing behavior of Seattle's Bogle & Gates, one of the Pacific Northwest's largest firms. Starting in 1986, Bogle represented the drug company Fisons in a case filed by the parents of a three-year-old girl named Jennifer, who was permanently brain damaged from a dose of theophylline, the active ingredient in Fisons' Somophyllin Oral Liquid. The parents also sued the girl's pediatrician for prescribing the drug. Theophylline can be toxic when given to children like Jennifer who are also suffering from a viral infection. Although Fisons knew of this problem, the pediatrician didn't, because the company had never warned him. The doctor filed a counter-claim against Fisons, saying he never would have prescribed the drug had he been told.

During discovery, Jennifer's lawyers requested all documents pertaining to any warning letters -- including 'Dear Doctor' letters or warning correspondence to the medical profession regarding the use of Somophyllin Oral Liquid. Bogle & Gates knew of a 1981 letter addressed "Dear Doctor" on the subject of "Theophylline and Viral Infections" that had been sent to 2,000 physicians, but not to Jennifer's doctor. But the law firm advised Fisons not to produce either that letter or a 1985 memo documenting theophylline's danger.

The case went on for four years, with the doctor, unable to prove his defense, eventually settling with Jennifer's parents. Then, in March 1990, the pediatrician's lawyer received in the mail an extraordinary document from an anonymous source -- a copy of the 1981 "Dear Doctor" letter. A month later, Fisons paid Jennifer's parents $6.9 million. The pediatrician, having kept his cross-complaint against Fisons alive, and furious about the deceit, went on the offensive against both the drug company and its lawyers for damaging his reputation and withholding vital documents.

Incredibly, rather than conceding they had made an error of judgment, Bogle & Gates' lawyers defended its decision. They argued that Bogle had interpreted the request for all "Dear Doctor" letters as being limited to the term of art -- referring to a warning letter mailed at the FDA's request to all physicians -- and not merely to any letter addressed "Dear Doctor." The patent absurdity of this position -- what Stuart Taylor later called a surreptitious, self-serving semantic gambit -- would be laughable had it not been taken so seriously by so many.

At trial, the pediatrician won a million dollar verdict against Fisons and another $450,000 in attorneys' fees. But the court refused to order Bogle & Gates to pay discovery sanctions, the judge making the extraordinary finding that Bogle's conduct was consistent with the customary and accepted litigation practices in the bar of the community and state. Perhaps he was swayed when Bogle produced the sworn declarations of 14 experts, including Professor Geoffrey Hazard and two past presidents of the Washington State Bar, all of whom said Bogle had acted appropriately. Three of Bogle's experts even argued that the principle of zealous advocacy required that the law firm not provide the documents.

On appeal, the Washington Supreme Court unanimously reversed the trial court on the discovery issue. "It appears clear," wrote Chief Justice James Anderson, "that no conceivable discovery request could have been made by the doctor that would have uncovered the relevant documents." The higher court then remanded the case to the trial court with instructions to punish Bogle with an amount severe enough to deter these attorneys and others from engaging in such conduct again.

Bogle agreed to pay $325,000, made a public admission of its mistake, and said it had taken steps to ensure that all attorneys at Bogle & Gates understand that the rules must be complied with in letter and spirit. But apparently Bogle's lawyers hadn't taken their lesson to heart. Less than two years after the *Fisons* opinion, their litigators were in trouble again.

This time Bogle & Gates represented Subaru of America on charges that the driver's seatbacks in Subaru's Justy could collapse backwards when hit from the rear, potentially causing grave injury. In the view of federal Judge Robert Bryan, Bogle obfuscated, stonewalled, and gave answers that were just plain wrong.

In one request, plaintiffs had asked for National Highway Traffic Safety Administration records that showed the collapse of driver's seats from a rear-impact force of 30 miles per hour. Bogle's response was that the request was "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." Judge Bryan called this "lawyer hokum," and forced Bogle to pay the other side's attorneys' fees.

Bogle & Gates and Wal-Mart and its lawyers are hardly

alone. Just this January, Du Pont and its law firm, Atlanta's giant Alston & Bird, agreed to pay a total of $11.25 million to settle charges of withholding studies of the effect of Du Pont's Benlate on the soil of farmers whose crops had been ruined. The stakes were high for both the chemical company and the law firm: Both faced possible criminal charges. Du Pont paid a total of $11 million while Alston & Bird got off with a mere $250,000 fine. They were lucky. In his original order, trial judge J. Robert Elliott had sanctioned Du Pont and its law firm a total of $115 million, a penalty eventually overturned by a federal appeals court.

Why would Alston & Bird risk such disapprobation? Why did Bogle & Gates engage in a repeat performance? The answer, unfortunately, is that discovery is such a high stakes game -- and such a vital profit center for some law firms -- that monetary sanctions, even in the hundreds of thousands of dollars, are too often seen as simply the cost of doing business. Both Alston & Bird and Bogle may have suffered from a temporarily sullied reputation, but the ultimate effect on their pocketbooks was relatively minimal -- undoubtedly a small fraction of the fees they had charged. Bogle's *mea culpas* aside, the two lawyers primarily responsible for the *Fisons* discovery remained with the firm in good standing. The younger one was even promoted to partner.

Monetary sanctions alone are simply insufficient to deter discovery abuse. But judges have the power to stem the tide by the more liberal use of issue sanctions. These sanctions range from determining specific issues adversely to the offending side, to making an adverse finding on liability, to striking a party's answer, as a Nebraska judge did in a 1997 case. They work because they have a direct effect on the outcome of a case. Most judges are reluctant to use such extreme remedies. But unless members of the bench are willing to do more than complain, and start acting on what they see, the deterrent to future abuses simply won't be enough. If we want discovery abuses stopped, it will require greater consequences than money.

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