----- Original Message -----
From: Philip Pulver
To: Andrewt@dnfsb.gov
Sent: Wednesday, July 20, 2011 3:29 PM
Subject: Comments to DNFSB Report Safety Culture at the Waste Treatment and Immobilization Plant

Defense Nuclear Facilities Safety Board,

This email consists of **Part 1 [Feedback on Report Excerpts]** and **Part 2 [Other Relevant Points]**.

Attached is a document pertaining to DOE's ongoing funding of an attorney whose firm was condemned by the WA Supreme Court for suppressing toxicity evidence on a drug that brain damaged a three-year old girl. In my case, DOE is now repeating such tactics to suppress evidence in order to conceal contractor Battelle civil and criminal misconduct.

Feel free to forward these comments as you deem appropriate.

If you have any questions, please let me know. Thank you.

Sincerely

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Comments to the DNFSB Report [Safety Culture at the Waste Treatment and Immobilization Plant]

Part 1: DNFSB Report Excerpts

Report Pg3: "The Board's investigation found significant failures by both DOE and contractor management to implement their roles as advocates for a strong safety culture…Finding One: A Chilled Atmosphere Adverse to Safety Exists"

Comment: My ongoing case lends credence to the Board's findings. DOE is funding personal-injury lawyer litigation tactics to Hide Contractor Misconduct – Office of Science is paying outside counsel [Miller] to engage in discovery abuse by defrauding the court into blocking smoking-gun evidence implicating Battelle in violating False Claims Act [misusing small business technical assistance http://pnnlfraud.com/misuse.htm] and falsifying inventions to patent office [18 USC §1001]. His litigation team was unanimously condemned [fined-sanctioned] by WA State Supreme Court and federal judge for discovery abuse, i.e., concealing drug toxicity evidence [http://pnnlfraud.com/toxicity.htm] on chemical that brain damaged 3-year old girl and hiding NHTSA crash injury data. DOE's continued funding such tactics to suppress evidence rebuts Chu and Poneman's claim of strong health/safety/security culture at DOE sites; see also attached PDF re: suppression of toxicity and crash data.

Report Pg4: "There is a firm belief among WTP project personnel that persisting in a dissenting argument can lead, as in the case of Dr. Tamosaitis, to the employee being reassigned to other duties. As of the writing of this finding, Dr. Tamosaitis sits in a basement cubicle in Richland with no meaningful work. His isolated physical placement by contractor management and the lack of meaningful work is seen by many as a constant reminder of what management will do to an employee who raises issues that might impact budget or schedule."

Comment: The fact that Poneman and Chu allow this ongoing treatment of Tamosaitis [Basement Cube] by their billon-dollar Hanford contractor [and sub] undercuts the thesis of their letters to the Board, i.e., DOE has a strong safety culture, encourages open discussion, and condemns retaliation toward those raising issues impacting contractors. Such DOE complicity is quite typical, e.g., my case and the Laul case [http://pnnlfraud.com/Laul.htm] where DOJ found Battelle defrauded DOE and Hanford cleanup was impacted.

Report Pg4: **"**The investigative record shows that the DOE Office of River Protection Employee Concerns program is not effective. One safety expert explicitly testified that employees would not and did not use the program, and believed that individuals running the program would "bury issues" brought to them.
Report Pg5: "Although the HSS report stated that most WTP personnel did not share these opinions, the Board notes that personnel interviewed by HSS were escorted to their interviews by management. The Board's record shows that involving management with the interviews clearly can inhibit the willingness of employees to express concerns. In its own way, DOE's decision to allow management to be involved in the HSS investigation raises concerns about safety culture."

Comment: DOE ignores this conflict of interest which consistently results in a sham investigation comprised of cover-up, material suppressions, excluding personnel and even outright perjury in ensuing litigation that costs taxpayers millions in legal fees. The current IG [Friedman] encourages such investigations that suppress/bury contractor wrongdoing, intimidate/pressure subjects to be a team player and omit/exclude individuals that are not 'helpful'.

Report Pg5: "Finding Two: DOE and Contractor Management Suppress Technical Dissent
Report Pg6: "...The testimony of several witnesses confirms that the expert witness was verbally admonished by the highest level of DOE line management at DOE's debriefing meeting following this session of the hearing. Although testimony varies on the exact details of the verbal interchange, it is clear that strong hostility was expressed toward the expert witness whose testimony strayed from DOE management's policy while that individual was attempting to adhere to accepted professional standards. Testimony by a senior DOE official confirmed the validity of the expert witness' concerns. In addition, the expert witness testified that they felt pressure to change their testimony, but refused to do so."

Comment: Such strong hostility and witness tampering [to change testimony] has been occurring in my 8-year case for which DOE has soaked taxpayers ~ $1M to fund litigation fraud [discovery abuse] and suborned perjury by Q-clearance scientist to suppress evidence of defrauding small business, falsifying inventions to patent office, and breaching national security [re: classified information]; see details at http://nationallabsecuritythreat.com.

Part 2: Other Relevant Points

▪ Dr. Winokur's decision to withhold the investigation record from DOE was very prudent as such a release would have subjected "non-team playing" interviewees to exposure by DOE to contractor management resulting in admonishment and retaliation. In my case, FOIA documents confirm that the DOE-IG divulged confidential information back to the contractor's [Battelle] legal team, e.g., detailed confidential emails that I sent to US Attorney regarding Battelle's criminal misconduct. Given such breach of confidentiality [helpful to contractor] is condoned by the Inspector General himself, it plausibly follows that such misconduct and de-facto retaliation is pervasive among all DOE officials involved in oversight and investigations of its contractors.

▪ Receiving extensive emails [http://pnnlfraud.com/Emails-DOE.htm], DOE's Koonin, Poneman & Chu have been quite aware of the ongoing litigation fraud/perjury and witness tampering since 2009; Friedman IG himself has known and asked for such evidence since 2006. Despite preponderance of evidence of Battelle's fraud and national security breaches, DOE response is continuing to fund perjury [e.g., research falsification & concealing ventures] to suppress evidence of contractor wrongdoing. Given its multi-year tactics to "protect" interests of contractor Battelle, DOE-and-contractor retaliatory conduct and chilled safety culture cited in your report is thus no surprise.

▪ In a 2/25/11 letter to DNFSB, Poneman stated "As you are aware, the Department of Energy is reviewing its safety and security directives to assure these requirements provide effective and efficient protection for workers, national security assets, the public…". This assertion, however, is contradicted by DOE [Chu, Podonsky et al.] ignoring my 1/13/10 email [sent 3 weeks after 2009 Christmas Day bomber http://pnnlfraud.com/011310-Chu.htm] regarding Battelle-PNNL's breaching national security pertaining to classified information [10 CFR 710], e.g., air cargo explosives. Again, placing contractor corporate interests above national security lends credence to your report that DOE similarly puts contractor management interests ahead of an open, intellectually honest safety culture; recall, Tamosaitis concerns endangered a multi-million dollar bonus to Bechtel.

▪ For more information on how my case shows a pattern of DOE/IG/contractor hostility against those reporting security, safety, fraud and other contractor misconduct, visit extensive evidence sites at either http://officeofsciencefraud.com, http://pnnlfraud.com, http://nationallabfraud.com, http://aircargothreat.com, http://patentfraud.org or http://researchfraud.com.

▪ I raised the safety issue in a 2008 email to DOE Office of Science regarding oversight of the national labs and adverse implications of DOE Office of Chief(General) Counsel suborning perjury [witness tampering] to suppress evidence of Battelle's fraud. An excerpt relevant to your report three years later is as follows:

> **"Staff health/safety/security at Office of Science labs is at greater risk going forward.**
> DOE's authorizing Battelle to violate 48 CFR 970.5228-1 [Litigation in "good faith"] via "personal injury defense" tactics to withhold smoking-gun evidence is relevant to staff at DOE labs which entail HAZMAT, radiation, machinery, high-temperature apparatus, and other work hazards. These abusive/fraudulent litigation tactics put at risk staff that may later file lawsuits for wrongful injury, illness, cancer, death, termination or other causes of action due to Battelle's negligent or tortuous conduct. [GAO confirms most DOE contractor lawsuits pertain to radiation, toxic exposure, personal injury, and/or wrongful discharge. See 8/24 email. Your decision eliminates/mitigates Battelle's legal & financial risk of violating staff health/safety/security procedures, ignoring DEAR, and thwarting whistleblower protections. It will likely incent them to relax such procedures to increase profit [See Westbrook ORNL case in 8/24 email below.]; thousands of employees at the five national labs run by Battelle could be adversely effected." [http://pnnlfraud.com/092908LetterToDOE-UnderSecretaryOrbach.htm]

Online version at http://www.NationalLabSafetyRisk.com/Docs.htm

DOE-Funded Counsel Miller Prior Firm Misconduct: *Concealing Safety Evidence* – Condemned by Courts

Then: WA Supreme Court imposed record sanctions/fines on firm for discovery abuse [hiding drug toxicity documents].

Now: Miller and Battelle Falsifying Research & Commercial ventures to conceal smoking-gun evidence via perjury.

Funding the perjury for 5 years, Dept. of Energy [Science] charged taxpayers ~$1M to cover up Battelle fraud.

Overview

DOE-funded Attorney Delbert Miller was the partner managing the litigation practice at now defunct Bogle & Gates law firm which engaged in fraud [discovery abuse] to conceal smoking-gun evidence [drug toxicity warnings, crash injury data…]. Tactics used by the firm's attorneys to wrongfully withhold evidence are cited below because they are now being repeated by Battelle and Miller's ongoing material misrepresentations [perjury] to the court [DHS Radiation Portal Monitor Project (RPMP) & Battelle's commercial ventures] being used to block smoking-gun evidence [e.g., RPMP-funded versions of the MDM (Mobile Data Manager) software] which would also implicate Battelle in: **(i)** Misusing/defrauding Energy Dept.'s small business **T**echnical **A**ssistance **P**rogram [withholding DOE-funded research from the government's intended TAP recipient [Pulver small business], thereby violating the False Claims Act (31 USC §3729),] **(ii)** Falsifying inventions (18 USC §1001) to the patent office, and **(iii)** Defrauding those licensing follow-on versions [BlackBerry…] of MDM software funded by TAP *and* exclusively licensed to Pulver. Now being deployed by Battelle and DOE at great expense to taxpayers [~1$M], Bogle tactics to fraudulently conceal smoking-gun evidence were condemned by WA Supreme Court and federal judge [both imposed sanctions for litigation fraud (discovery abuse)] and gained national notoriety.

Media & court sources excerpted below and Battelle/DOE documents/testimony at all evidence sites confirm the following:

(1) DOE-funded counsel Miller and Battelle top-secret Q clearance holder scientist Dorow are now using the same abusive litigation fraud at taxpayer expense to conceal smoking-gun evidence [e.g., DHS versions of MDM software & Battelle ventures].

(2) DOE is financing & suborning this litigation fraud/abuse/perjury and covering up Battelle defrauding a small business and patent office [USPTO] to ensure Battelle wins upcoming 2012 PNNL re-bid [longest un-competed national lab (47 years)].

(3) DOE Offices of Science, Inspector General and General Counsel will fund and suborn such litigation misconduct when any whistleblower, small business, university et al. sues Battelle [running 6 national labs (PNNL, ORNL, INL, NREL & BNL) costing billions].

Exhibits cite articles on attorney misconduct from two notorious discovery abuse cases involving tactics that DOE Office of Science is funding to conceal evidence of Battelle defrauding federal small business and patent office [USPTO]. In the Fisons case, the WA Supreme Court unanimously sanctioned Bogle & Gates a record $325K for rampant discovery abuse because its lawyers withheld smoking-gun documents on a drug [theophylline] that permanently brain damaged a 3-year old girl. In the Subaru injury case two years later, a federal judge sanctioned Bogle because they "obfuscated, stonewalled, and gave answers that were just plain wrong" to wrongfully withhold rear-impact crash test data from the National Highway Transportation Safety Administration.

News articles and the WA Supreme Court's detailed Fisons decision are cited below and explicitly show Bogle's discovery abuse tactics to conceal evidence [obstruct justice] and the legal community's outrage over such egregious attorney misconduct. As cited throughout the evidence sites, Office of Science, by hiring Miller to invoke/repeat Bogle concealment tactics condemned by courts, has confirmed its practice of misappropriating taxpayer funds for such abusive/fraudulent litigation tactics against individuals or small businesses suing due to be defrauded or other misconduct by Battelle. DOE's ongoing cover-up of Battelle fraud, funded by Sec. Chu, Poneman & Koonin, has dangerous implications for those suing for injury, HAZMAT/radiation exposure, wrongful death, fraud or other tortuous/negligent misconduct throughout the entire DOE complex. Excerpts of an article cited below are as follows:

Clout of State's Big Law Firms Wards Off Misconduct Cases

"In one of the sharpest penalties ever levied against a law firm, the Washington State Supreme Court fined the Seattle firm Bogle & Gates and its client, the drug company Fisons, $325,000 in 1993. The Supreme Court found that Bogle & Gates and Fisons withheld documents that conclusively showed that Fisons knew one of its products was dangerous if used in conjunction with other drugs.

Two years later, Bogle & Gates was sanctioned by a federal court judge for a similar violation. Representing Subaru of America, Bogle & Gates was asked to provide warranty and personal-injury claims relating to the seatback design of the Subaru Justy. The company responded that it had no records that would answer those questions. Later depositions revealed that the information did, in fact, exist. Bogle & Gates had to pay the other side's legal fees and the case was later settled."

Index to Attached Exhibits Below

Exhibit 5-1: Articles Excerpts re: Bogle & Gates Discovery Abuses and Court Sanction [$325K] for Misconduct

Exhibit 5-2: Excerpts of WA Supreme Court Decision Illustrating Discovery Abuses [Concealing Evidence] Currently Used by Battelle DOE-Funded Counsel to Misrepresent DHS-RPMP and Conceal Fraud

Exhibit 5-3: Complete WA State Supreme Court Decision: Imposition of Sanctions/Fines for Discovery Abuse

Exhibit 5-4: Miller-Bateman Homepage Excerpt Confirming Delbert Miller's Thirty years with Bogle & Gates where he was Senior Partner in the Firm's Litigation Practice Group

Exhibit 5-5: *Electronic Code of Federal Regulations 48 CFR 970.5228-1* Insurance—Litigation and claims. Excerpt: "[DOE Contractor] shall proceed with such litigation in good faith"

Exhibit 5-1 [Re: DOE-Funded Counsel Prior Tactics Now Used to Conceal Battelle Fraud]

Articles: Bogle & Gates Discovery Abuses → Court Sanctions/Fines [Fisons & Subaru Injury Cases]

http://findarticles.com/p/articles/mi_m1295/is_n4_v61/ai_19254733 [¶9]

No Contest: Corporate Lawyers and the Perversion of Justice in America. The Progressive, April, 1997 by Morton Mintz

"No Contest's most devastating section focuses on the obstruction of justice by corporate executives and their attorneys who withhold, alter, or destroy documents. Consider Jennifer Pollock of Everett, Washington. In 1986, when Jennifer was two, she suffered seizures that caused irreversible brain damage after taking an asthma medication, Somophyllin Oral Liquid…In 1990, an anonymous source sent the Pollocks' lawyer a "Dear Doctor" letter from Fisons conveying a **stark warning** about the drug's key ingredient, theophylline: A study had confirmed **report that children with asthma were vulnerable to "life-threatening theophylline toxicity** -- the very same toxicity suffered by Jennifer. Fisons had prepared the letter in 1981 -- more than four years before Jennifer was stricken -- but sent it to only a limited group of "influential" physicians...(Fisons also omitted mention in product's package insert of the risk of disabling or fatal harm.)

The company failed to produce the letter even after the Pollocks and [Dr.] Klicpera filed a discovery motion in 1986, which sought "any letters sent by your company to physicians concerning theophylline toxicity in children."…Bogle & Gates **admitted it had reviewed the smoking guns by 1987 and advised Fisons not to produce them**"

http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=900005514051

THE MORAL COMPASS: Calculated Malfeasance, The ongoing abuse of discovery requires stronger, surer sanctions
Richard Zitrin & Carol Langford, Law News Network

"May 7, 1999 *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...**law firm advised Fisons not to produce either that letter or a 1985 memo documenting theophylline's danger**…

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 2 years after *Fisons*, 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."

http://community.seattletimes.nwsource.com/archive/?date=19980503&slug=2748582

Clout Of State's Big Law Firms Wards Off Misconduct Cases. By Alex Fryer, Seattle Times Business Reporter

"In one of the sharpest penalties ever levied against a law firm, the Washington State Supreme Court fined the Seattle firm Bogle & Gates and its client, the drug company Fisons, $325,000 in 1993. The Supreme Court found that **Bogle & Gates and Fisons withheld documents that conclusively showed that Fisons knew one of its products was dangerous** if used in conjunction with other drugs.

Two years later, Bogle & Gates was sanctioned by a federal court judge for a similar violation. Representing Subaru of America, Bogle & Gates was asked to provide warranty and **personal-injury claims** relating to the seatback design of the Subaru Justy. The company responded that it had no records that would answer those questions. Later depositions revealed that the information did, in fact, exist. Bogle & Gates had to pay the other side's legal fees, and the case was later settled."

http://co-mdm.com/seattlepi-9309190036.asp.pdf

LEGAL CONDUCT DECRIED COURT RULES LAW FIRM, CLIENT FAILED TO SUPPLY EVIDENCE

"In a landmark ruling on attorney ethics, the Washington state Supreme Court has denounced the conduct of a major Seattle law firm and a New York drug company for **failing to produce "smoking gun" documents** in a lawsuit involving a 3-year-old girl left brain-damaged by a controversial asthma medication."

http://doug4justice.org/Lawyers/Sleazy.htm
***Sleazy In Seattle,* by Stuart Taylor, Jr.** American Lawyer Newspapers Group, Inc.

"The covered-up corporate document that the whistleblower leaked in March 1990 led to an agreement this January by Seattle's 200-lawyer Bogle & Gates and its client Fisons Corp. to pay $325,000 in sanctions for discovery abuse, one of the largest such awards ever. By misleading its adversaries to avoid producing damning documents in its client's files, Bogle provided a textbook example of the need for discovery reforms…

The seven justices [unanimously] held that Bogle & Gates and its client, a British-owned pharmaceutical company with U.S. headquarters near Rochester[NY], had used "misleading" discovery responses to **hide two "smoking gun documents" from lawyers for a 3-year-old girl who suffered permanent brain damage** as a result of taking a Fisons asthma drug in 1986, as well as from lawyers for the girl's pediatrician, who had filed a cross-claim against Fisons.

Since the decision, Bogle has been forced to admit for the first time that it had the smoking gun documents since 1987 and had advised Fisons to withhold them -- while at the same time, in the supreme court's words, making statements to opposing counsel "that all relevant documents had been produced."…

In January 1986, 3-year-old Jennifer Pollock, a child with multiple health problems, suffered seizures and permanent brain damage as a result of being treated with Fisons' Somophyllin Oral Liquid for her severe lung disease (including asthma) at a time when she also had a viral infection. The product's main active ingredient is a generic drug called theophylline. **The cause of Jennifer's brain damage was (the litigation established) that the theophylline in her blood soared to toxic levels as a result of her viral infection.**

The Supreme Court Rules

The Washington Supreme Court would have no part of Bogle's arguments on the discovery issues, however…"The drug company avoided production of these theophylline-related materials, and avoided identifying the manager of medical communications [Cedric Grigg] as a person with information about the dangers of theophylline, by giving evasive or misleading responses to interrogatories and requests for production," the court held.

It refused to accept the if-it-isn't-in-the-right-file-under-the-right-name-we-won't produce-it ploy, noting that none of the parties had ever specified that the discovery would be limited to documents in the "Somophyllin Oral Liquid files," or that documents concerning theophylline risks would be withheld if they were filed elsewhere or did not contain the words "Somophyllin Oral Liquid."…

The court also cut through the twisted argument that the Grigg documents regarding the dangers of theophylline-based drugs were not documents "regarding Somophyllin Oral Liquid" because they were not in that product's file, saying that "a document that warned of the serious dangers of the primary ingredient of Somophyllin Oral Liquid is a document regarding Somophyllin Oral Liquid." After all, the court pointed out, Fisons marketed this and its three other Somophyllin products as brand-name embodiments of theophylline.

It added that, **in light of the elaborate series of pretexts offered by Fisons and Bogle for their acts of concealment, "it appears clear that no conceivable discovery request could have been made by the doctor that would have uncovered the relevant documents.** 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 the letter of the discovery rules.'"

http://www.citizen.org/congress/article_redirect.cfm?ID=918
Discovery Abuse: How Defendants in Products Liability Lawsuits Hide & Destroy Evidence **David Halperin, Congress Watch**

"In 1990, the Pollocks' attorneys received an envelope in the mail from an anonymous source. Inside was a Fisons document, a 1981 "Dear Doctor" letter sent by Cedric F. Grigg, Fisons' Manager of Marketing and Medical Communications…The letter **proved that Fisons knew its medication had a potential lethal defect** that could disable or kill children and yet continued to market the drug anyway without warning most doctors of the danger…The court found that Fisons had carried out a **prolonged shell game**, replete with "misleading" answers that were "contrary to the purposes of discovery and...most damaging to the litigation process." The Court added, "Having read the record herein, we cannot perceive of any request that could have been made to this drug company that would have produced the smoking gun documents."

http://community.seattletimes.nwsource.com/archive/?date=19940130&slug=1892566
Fines Say It's Not OK To Withhold Evidence

"One of Seattle's biggest law firms and a national pharmaceutical company will pay $325,000 as a penalty for **withholding evidence** in a lawsuit involving a 3-year-old Everett girl left brain-damaged by one of the company's drugs...

The penalty is apparently the largest sanction ever imposed for attorney misconduct in Washington state...it was only when documents were leaked to Klicpera's attorneys that they learned how much Fisons knew about potential problems with the drug.

The documents showed **Fisons knew the key ingredient could cause seizures or even death** in some circumstances. The company has stopped selling it…state Supreme Court said lawyers must turn over all relevant information to the opposing side, even if it is damaging to their clients. **Bogle & Gates admitted in the agreement that their lawyers advised Fisons to withhold documents.**"

http://www.thefreelibrary.com/Landmark+court+sanction+may+herald+new+era+in+pre-trial+discovery.-a015213415
Landmark court sanction may herald new era in pre-trial discovery.

"During discovery, the plaintiffs sent several sets of interrogatories requesting information on Somophyllin and theophylline. Bogle & Gates **criticized every request as vague, overbroad, or irrelevant.** Then an anonymous party sent the plaintiffs a copy of a "smoking gun" -- a warning letter Fisons had sent to a few influential pediatricians…With this letter the plaintiffs were also able to pry loose a July 10, 1985, company memo referring to an **"epidemic of theophylline toxicity**."'

Exhibit 5-2 [Re: DOE-Funded Counsel Prior Tactics Now Used to Conceal Battelle Fraud]

Excerpts of WA Supreme Court Decision

Showing Similar Discovery Abuses by Battelle DOE-Funded Counsel

WASHINGTON STATE PHYSICIANS INSURANCE EXCHANGE & ASSOCIATION, d/b/a Physicians Insurance, and James A. Klicpera, M.D., Respondents,

v.

FISONS CORPORATION, Appellant.

[Complete court decision is attached in Exhibit 5-3.]

"We are also asked to rule that the trial court erred in denying sanctions against the drug company for certain abuses in the discovery process.

The physician's action began as part of a malpractice and product liability suit brought on behalf of a child who was the physician's patient. On January 18, 1986, 2-year-old Jennifer Pollock suffered seizures which resulted in severe and permanent brain damage. It was determined that the seizures were caused by an excessive amount of theophylline in her system. The Pollocks sued Dr. James Klicpera (Jennifer's pediatrician), who had prescribed the drug, as well as Fisons Corporation (the drug manufacturer and hereafter drug company) which produced Somophyllin Oral Liquid, the theophylline-based medication prescribed for Jennifer….

The doctor and his insurer, Washington State Physicians Insurance and Exchange Association (hereinafter referred to collectively as "the doctor"), asked the trial court to sanction the drug company and its lawyers for discovery abuse. This request was based on the fact that at least two documents crucial to the doctor's defense as well as to the injured child's case were not discovered until March of 1990--more than 1 year after the doctor had settled with the child, nearly 4 years after the complaint was filed and approximately 1 month before the scheduled trial date. The two documents, dubbed the "smoking guns" by the doctor, show that the drug company knew about, and in fact had warned selected physicians about, the dangers of theophylline toxicity in children with viral infections at least as early as June 1981, 4 years before Jennifer Pollock was injured.

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...

Although other documents were relevant to the case, the two smoking gun documents were the most important. The first, a letter, dated June 30, 1981, discussed an article that contained a study confirming reports "of life threatening theophylline toxicity when pediatric asthmatics ... contract viral infections." The second, an interoffice memorandum, dated July 10, 1985, talks of an "epidemic" of theophylline toxicity and of "a dramatic increase in reports of serious toxicity to theophylline."

Both documents contradicted the position taken by the drug company in the litigation, namely, that it did not know that theophylline based medications were potentially dangerous when given to children with viral infections…

The drug company avoided production of these theophylline-related materials, and avoided identifying the manager of medical communications as a person with information about the dangers of theophylline, by giving evasive or misleading responses to interrogatories and requests for production…

Somophyllin and its primary ingredient, theophylline, were not distinguished in discussions between the attorneys or in drug company literature…and marketing brochures refer to the names Somophyllin and theophylline interchangeably.

The drug company's responses to discovery requests contained the following general objection:

> *Requests Regarding Fisons Products Other Than Somophyllin Oral Liquid.*
> "Fisons objects to all discovery requests regarding Fisons products other than Somophyllin Oral Liquid as overly broad, unduly burdensome, harassing, and not reasonably calculated to lead to the discovery of admissible evidence."…

[Example of Bogle & Gates Discovery Response is below]

> *"Request for Production No. 4:* Please produce copies of any and all seminar materials, regardless of their source, in Fisons' possession on or before January 16,1986 regarding asthma…allergy.
> *Response:* Fisons objects to this discovery request as overbroad, burdensome, and not reasonably calculated to lead to the discovery of admissible evidence…Fisons has no documents regarding theophylline and otherwise responsive to this discovery request."

These requests, and others of a similar tenor, should have led to the production of the smoking gun documents...

The drug company's responses and answers to discovery requests are misleading...

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...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...

If the discovery rules are to be effective, then the drug company's arguments must be rejected…

Second, the drug company argues that the smoking gun documents and other documents relating to theophylline were not documents *regarding* Somophyllin Oral Liquid because they were intended to market another product. No matter what its initial purpose, and regardless of where it had been filed, under the facts of this case, a document that warned of the serious dangers of the primary ingredient of Somophyllin Oral Liquid **is** a document *regarding* Somophyllin Oral Liquid…

If the drug company did not agree with the scope of production or did not want to respond, then it was required to move for a protective order. In this case, the documents requested were relevant. The drug company did not have the option of determining what it would produce or answer, once discovery requests were made.

Fourth, the drug company further attempts to justify its failure to produce the smoking guns by saying that the requests were not specific enough. Having read the record herein, we cannot perceive of *any* request that could have been made to this drug company that would have produced the smoking gun documents…

Fifth, the drug company's attorneys claim they were just doing their job, that is, they were vigorously representing their client. The conflict here is 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. Vigorous advocacy is not contingent on lawyers being free to pursue litigation tactics that they cannot justify as legitimate...

Sanctions are warranted in this case...

Misconduct, once tolerated, will breed more misconduct and those who might seek relief against abuse will instead resort to it in self-defense."

Exhibit 5-3 [Re: DOE-Funded Counsel Prior Tactics Now Used to Conceal Battelle Fraud]

Complete WA Supreme Court Decision

[Condemning Discovery Abuse Tactics Now Funded by DOE Office of Science]

WASHINGTON STATE PHYSICIANS INSURANCE EXCHANGE & ASSOCIATION, d/b/a Physicians Insurance, and James A. Klicpera, M.D., Respondents,

v.

FISONS CORPORATION, Appellant.

[Complete court decision attached as Exhibit 5-3.]

Note: Certain text is highlighted to show commonality with discovery abuses now being being invoked by Battelle and DOE-funded outside counsel Delbert Miller who was managing partner in Bogle & Gates Litigation Practice at the time of Fisons.

This landmark WA Supreme Court ruling is downloadable from Cornell Law School:

http://ww3.lawschool.cornell.edu/faculty-pages/wendel/Law%20Governing%20Lawyers_files/fisons.pdf

858 P.2d 1054

Supreme Court of Washington.

WASHINGTON STATE PHYSICIANS INSURANCE EXCHANGE & ASSOCIATION, d/b/a Physicians Insurance, and James A. Klicpera, M.D., Respondents,
v.
FISONS CORPORATION, Appellant.

Sept. 16, 1993.

**1058 Bogle & Gates, Ronald E. McKinstry, Ronald T. Schaps, Guy P. Michelson, Kevin C. Baumgardner, Karen McGaffey, William Helsell, Seattle, for appellant.

Williams, Kastner & Gibbs, Mary H. Spillane, Margaret A. Sundberg, Carney, Badley, Smith & Spellman, P.S., James E. Lobsenz, Stephen A. Saltzburg, Seattle, for respondents.

Laurie Kohli, Constance Gould, Russell C. Love, Seattle, for amicus curiae on behalf of Washington Defense Trial Lawyers.

Halleck H. Hodgins, Bryan P. Harnetiaux, Mary Ellen Gaffney-Brown, Gary N. Bloom, Spokane, for amicus curiae for respondent on behalf of Washington State Trial Lawyers Ass'n.

ANDERSEN, Chief Justice.

FACTS OF CASE

We are asked in this case to decide whether a physician has a cause of action against a drug company for personal and professional injuries which he suffered when his patient had an adverse reaction to a drug he had prescribed. The physician claimed the drug company failed to warn him of the risks associated with the drug. If such action is legally cognizable, we are then asked to determine whether damages awarded by the jury were excessive and whether attorneys' fees were properly awarded by the trial court. We are also asked to rule that the trial court erred in denying sanctions against the drug company for certain abuses in the discovery process.

The physician's action began as part of a malpractice and product liability suit brought on behalf of a child who was the physician's patient. On January 18, 1986, 2-year-old Jennifer Pollock suffered seizures which resulted in severe and permanent brain damage. It was determined that the seizures were caused by an excessive amount of theophylline in her system. The Pollocks sued Dr. James Klicpera (Jennifer's pediatrician), who had prescribed the drug, as well as Fisons Corporation (the drug manufacturer and hereafter drug company) which produced Somophyllin Oral Liquid, the theophylline-based medication prescribed for Jennifer.

Dr. Klicpera cross-claimed against the drug company both for contribution and for damages and attorneys' fees under the Consumer Protection Act as well as for damages for emotional distress.

In January 1989, after nearly 3 years of discovery, Dr. Klicpera, his partner and the Everett Clinic settled with the Pollocks. The settlement agreement essentially provided that the doctors' insurer, Washington State Physicians Insurance Exchange and Association (WSPIE), would loan $500,000 to the Pollocks which would be contributed in the event of a settlement between the Pollocks and the drug company. The Pollocks were guaranteed a minimum total recovery of $1 million, and in the event of trial Dr. Klicpera agreed to remain as a party and to pay a maximum of $1 million. The settlement between the Pollocks and Dr. Klicpera was determined by the trial court to be reasonable pursuant to RCW 4.22.060.

More than 1 year after this settlement, an attorney for the Pollocks provided Dr. Klicpera's attorney a copy of a letter received from an anonymous source. The letter, dated June 30, 1981, indicated that the drug company was aware in 1981 of "life-threatening theophylline **toxicity"**in children who received the drug while suffering from viral infections. The letter was sent from the drug company to only a small number of what the company considered influential physicians. The letter stated that physicians needed to understand that theophylline can be a "capricious drug".

The Pollocks and Dr. Klicpera contended that their discovery requests should have produced the June 1981 letter and they moved for sanctions against the drug company. The request for sanctions was initially heard by a special discovery master, who denied sanctions, but who required the ****1059** drug company to deliver all documents requested which related to theophylline. Documents that the drug company and its counsel had immediately available were to be produced by the day following the hearing before the special master. The remainder of the documents were to be produced within 2 weeks. The trial court subsequently denied Dr. Klicpera's request to reverse the discovery master's denial of sanctions and at the close of trial denied a renewed motion for sanctions.

The day after the hearing on sanctions, the drug company delivered approximately 10,000 documents to Dr. Klicpera's and Pollocks' attorneys. Among the documents provided was a July 10, 1985 memorandum from Cedric Grigg, director of medical communications for the drug company, to Bruce Simpson, vice president of sales and marketing for the company.

This 1985 memorandum referred to a dramatic increase in reports of serious toxicity to theophylline in early 1985 and also referred to the current recommended dosage as a significant "mistake" or "poor clinical judgment". The memo alluded to the "sinister aspect" that the physician who was the "pope" of theophylline dosage recommendation was a consultant to the pharmaceutical company that was the leading manufacturer of the drug and that this consultant was "heavily into [that company's] stocks". The memo also noted that the toxicity reports were not reported in the journal read by those who most often prescribed the drug and concluded that

those physicians may not be aware of the "alarming increase in adverse reactions such as seizures, permanent brain damage and death". The memo concluded that the "epidemic of theophylline toxicity provides strong justification for our corporate decision to cease promotional activities with our theophylline line of products." The record at trial showed that the drug company continued to promote and sell theophylline after the date of this memo.

On April 27, 1990, shortly after the 1985 memo was revealed, the drug company settled with the Pollocks for $6.9 million. The trial court determined that settlement to be reasonable, dismissed the Pollocks' claims, extinguished Dr. Klicpera's contribution/indemnity claims against Fisons pursuant to RCW 4.22.060 and reserved determination of what claims remained for trial. The trial court then ordered the lawsuit recaptioned, essentially as Dr. James Klicpera, plaintiff v. Fisons Corporation, defendant.

* * *

ISSUE NINE.

CONCLUSION. The trial court applied an erroneous legal standard when ruling on the motion for sanctions for discovery abuse and erred when it refused to sanction the drug company and/or its attorneys for violation of CR 26(g).

The doctor and his insurer, Washington State Physicians Insurance and Exchange Association (hereinafter referred to collectively as "the doctor"), asked the trial court to sanction the drug company and its lawyers for discovery abuse. This request was based on the fact that at least two documents crucial to the doctor's defense as well as to the injured child's case were not discovered until March of 1990--more than 1 year after the doctor had settled with the child, nearly 4 years after the complaint was filed and approximately 1 month before the scheduled trial date. The two documents, dubbed the "smoking guns" by the doctor, show that the drug company knew about, and in fact had warned selected physicians about, the dangers of theophylline toxicity in children with viral infections at least as early as June 1981, 4 years before Jennifer Pollock was injured.

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.

A motion for sanctions based on discovery abuse was heard first by a special discovery master on March 28, 1990, before the child's case was settled. The special master ruled that he could not find "on the basis of this record that there was an *intentional* withholding of this document." (Italics ours.) Clerk's Papers, at 9693. The special master then turned to what he determined was the more relevant issue, additional and full discovery of other theophylline-related documents in the drug company's possession. The special master ordered the drug company's attorneys to turn over any immediately available documents concerning theophylline

to attorneys for the child and the doctor by noon the next day and to review the remainder of the drug company's files and produce other relevant documents at the end of 2 weeks. 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.

Although other documents were relevant to the case, the two smoking gun **1075 documents were the most important The first, a letter, dated June 30, 1981, discussed an article that contained a study confirming reports "of life threatening theophylline toxicity when pediatric asthmatics ... contract viral infections." The second, an interoffice memorandum, dated July 10, 1985, talks of an "epidemic" of theophylline toxicity and of "a dramatic increase in reports of serious toxicity to theophylline."

Both documents contradicted the position taken by the drug company in the litigation, namely, that it did not know that theophylline based medications were potentially dangerous when given to children with viral infections.

After the 1985 memorandum was discovered and still prior to trial, the special master's denial of the sanctions motion was appealed and affirmed, without specific findings, by a judge of the Superior Court (Judge Knight), who essentially deferred to the special master.

The motion for sanctions was renewed and heard by another judge of the Superior Court, the trial judge (Judge French), at the close of trial. The trial court declined to impose sanctions, deferring to the earlier decisions of the special master and Judge Knight. The doctor then appealed the denial of his sanctions motion directly to this court.

* * *

Concern about discovery abuse has led to widespread recognition that there is a need for more aggressive judicial control and supervision. Sanctions to deter discovery abuse would be more effective if they were diligently applied "not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." ... *Thus the premise of Rule 26(g) is that imposing sanctions on attorneys who fail to meet the rule's standards will significantly reduce abuse by imposing disadvantages therefor.* (Citations omitted. Italics ours.) *Amendments to the Federal Rules of Civil Procedure,* Advisory Committee Note, 97 F.R.D. 166, 216-19 (1983).

* * *

It is with these purposes in mind, that we now articulate the standard to be applied by trial courts which are asked to impose sanctions for discovery abuse.

**1078 On its face, Rule 26(g) requires an attorney signing a discovery response to certify that the attorney has read the response and that after a reasonable inquiry believes it is (1)

consistent with the discovery rules and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; (2) not interposed for any improper purpose such as to harass or cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had, the amount in controversy, and the importance of the issues at stake in the litigation.

Whether an attorney has made a reasonable inquiry is to be judged by an objective standard. Subjective belief or good faith alone no longer shields an attorney from sanctions under the rules.

In determining whether an attorney has complied with the rule, the court should consider all of the surrounding circumstances, the importance of the evidence to its proponent, and the ability of the opposing party to formulate a response or to comply with the request.

The responses must be consistent with the letter, spirit and purpose of the rules. To be consistent with CR 33, an interrogatory must be "answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer." CR 33(a) (part). A response to a request for production "shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified." CR 34(b) (part).

In applying the rules to the facts of the present case, the trial court should have asked whether the attorneys' certifications to the responses to the interrogatories and requests for production were made after reasonable inquiry *and* (1) were consistent with the rules, (2) were not interposed for any improper purpose and (3) were not unreasonable or unduly burdensome or expensive. The trial court did not have the benefit of our decision to guide it and it did not apply this standard in this case.

Instead, the trial court considered the opinions of attorneys and others as to whether sanctions should be imposed. This was error. Legal opinions on the ultimate *legal* issue before the court are not properly considered under the guise of expert testimony. It is the responsibility of the court deciding a sanction motion to interpret and apply the law.

The trial court then denied sanctions, in part because: (1) The evidence did not support a finding that the drug company *intentionally* misfiled documents to avoid discovery; (2) neither the doctor nor the child had formally moved for a definition of "product" and neither had moved to compel production of documents or answers before requesting sanctions; (3) the conduct of the drug company and its counsel was consistent with the customary and accepted litigation practices of the bar of Snohomish County and of this state; and (4) the doctor failed to meet his burden of proving that the "evidence of discovery abuse is so ****1079** clear that reasonable minds could not differ on the appropriateness of sanctions."

The trial court erred in concluding as it did. As stated above, intent need not be shown before sanctions are mandated. A motion to compel compliance with the rules is not a prerequisite to a sanctions motion. Conduct is to be measured against the spirit and purpose of the rules, not against the standard of practice of the local bar. Furthermore, the burden placed on the doctor by the trial court in this regard was greater than that mandated under the rule.

Additionally, we agree with the doctor's claim that many of the findings of fact entered by the trial court are, instead, erroneous conclusions of law or are not supported by the evidence. For example, the trial court implicitly found in finding of fact 7, and then again in finding of fact 14b, that the "product scope" had been defined by the plaintiffs early in the litigation. The record does not support this finding. In finding of fact 14c the trial court stated that the doctor had been put on notice by the drug company's discovery responses that production of documents "would be limited to responsive documents from Somophyllin Oral Liquid *files*". (Italics ours.) There is no evidence in the record to support this finding and while findings of fact which are supported by substantial evidence will not be disturbed on appeal, unsupported findings cannot stand.

A remand for a determination as to whether sanctions are warranted would be appropriate but is not necessary. Where, as here, the trial judge has applied the wrong legal standard to evidence consisting entirely of written documents and argument of counsel, an appellate court mayindependently review the evidence to determine whether a violation of the certification rule occurred. If a violation is found, as it is here, then sanctions are mandated, but in fairness to the attorneys and parties, a remand is required for a hearing on the appropriate sanctions required and against whom they should be imposed.

We now measure the conduct of the drug company and its attorneys against the standard set forth in the rule.

The drug company was persistent in its resistance to discovery requests.[1] Fair and

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[1] For example, the drug company's response to the following interrogatory propounded by the doctor demonstrates the resistance to comply with discovery. Although we do not condone this kind of answer, this answer, *alone,* would not warrant sanctions as it does raise some legitimate objections. The doctor's simple request, and the answer thereto, are 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 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

reasoned resistance to discovery is not sanctionable. Rather it is the misleading **1080 nature of the drug company's responses that is contrary to the purposes of discovery and which is most damaging to the fairness of the litigation process.

The specific instances alleged to be sanctionable in this case involve misleading or "non" responses to a number of requests which the doctor claims should have produced the smoking gun documents themselves or a way to discover the information they contained. The two smoking gun documents reportedly were contained in files which related to Intal, a cromolyn sodium product, which was manufactured by Fisons and which competed with Somophyllin. The manager of medical communications had a thorough collection of articles, materials and other documents relating to the dangers of theophylline and used the information from those materials to market Intal, as an alternative to Somophyllin Oral Liquid. The drug company avoided production of these theophylline-related materials, and avoided identifying the manager of medical communications as a person with information about the dangers of theophylline, by giving evasive or misleading responses to interrogatories and requests for production.

The following is but a sampling of the discovery between the parties.

The first discovery documents directed to the drug company were prepared by the child's attorney and were dated September 26, 1986. The interrogatories contained a short definition section stating in part:

> The term "the product" as used hereinafter in these interrogatories shall mean the product which is claimed to have caused injury or damage to JENNIFER MARIE POLLOCK as alleged in pleadings filed on her behalf, namely, to wit: "Somophyllin" oral liquid.

These first interrogatories requested information about "the product" which is manufactured by the drug company, Fisons, as well as about theophylline, a drug entity which is the primary ingredient of the drug company's product Somophyllin Oral Liquid. The interrogatory regarding theophylline was answered by the drug company, as were the interrogatories about "the product".

Somophyllin and its primary ingredient, theophylline, were not distinguished in discussions between the attorneys or in drug company literature. The printed package insert for Somophyllin Oral Liquid and marketing brochures refer to the names Somophyllin and theophylline interchangeably. One marketing brochure states:

Theophylline
Theophylline
Theophylline

---

the term "brain damage" includes temporary as well as permanent changes.

Theophylline
Theophylline
Theophylline
Theophylline
Theophylline
Theophylline
The *one* name to remember ...
Somophyllin

The drug company's responses to discovery requests contained the following general objection:

> *Requests Regarding Fisons Products Other Than Somophyllin Oral Liquid.* Fisons objects to all discovery requests regarding Fisons products other than Somophyllin Oral Liquid as overly broad, unduly burdensome, harassing, and not reasonably calculated to lead to the discovery of admissible evidence.

Theophylline is not a Fisons "product". Furthermore, because theophylline is the primary ingredient in Somophyllin Oral Liquid, any document focusing on theophylline would, necessarily, be one *regarding* Somophyllin Oral Liquid.

In November 1986 the doctor served his first requests for production on the drug company. Four requests were made. Three asked for documents concerning Somophyllin. Request 3 stated:

> 3. Produce genuine copies of any letters sent by your company to physicians concerning theophylline toxicity in children.

The drug company's response was:

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

Had the request, as written, been complied with, the first smoking gun letter (exhibit 3) would have been disclosed early in the litigation. That June 30, 1981 letter concerned theophylline toxicity in children; it was sent by the drug company to physicians.

The child's first requests for production, and the responses thereto, included the following:

> *REQUEST FOR PRODUCTION NO. 12:* All documents pertaining to any warning letters including "Dear Doctor letters" or warning correspondence to the medical professions regarding the use of the drug Somophyllin Oral Liquid.

RESPONSE: Fisons objects to this request as overbroad in time and scope for the reasons identified in response to request number 2, hereby incorporated by reference. *Without waiver of these objections and subject to these limitations, Fisons will produce documents responsive to this request* at plaintiffs' expense at a mutually agreeable time at Fisons' headquarters.

REQUEST FOR PRODUCTION NO. 13: All documents of any clinical investigators who at any time stated or recommended to the defendant that the use of the drug Somophyllin Oral Liquid might prove dangerous.

RESPONSE: Fisons objects to this request as overbroad in time and scope for the reasons identified in response to request number 2 hereby incorporated by reference. Fisons further objects to this request as calling for materials not within Fisons' possession, custody or control. Fisons further objects to this request to the extent it calls for expert disclosures beyond the scope of CR 26(b)(4) or which maybe protected by the work-product and/or attorney- client privilege. *Without waiver of these objections and subject to these limitations, Fisons will produce documents responsive to this interrogatory* at plaintiffs' expense at a mutually agreeable time at Fisons' headquarters.

(Italics ours.)

The doctor further requested:

Request for Production No. 4: Please produce copies of any and all seminar materials, regardless of their source, in Fisons' possession on or before January 16, 1986 regarding asthma, bronchopulmonary dysplasia, theophylline and/or allergy.

Response: Fisons objects to this discovery request as overbroad, burdensome, and not reasonably calculated to lead to the discovery of admissible evidence *to the extent it seeks seminar materials regarding subjects other than theophylline.* Without waiving these objections, Fisons answers as follows:

Fisons has no documents regarding theophylline and otherwise responsive to this discovery request.

(Some italics ours.)

These requests, and others of a similar tenor, should have led to the production of the smoking gun documents.

When the child or the doctor attempted to see information from the files of other products, the drug company objected. For example:

Request for Production No. 1: All documents contained in all files from the regulating department, marketing department, drug surveillance department, pharmaceutical development department, product manager department and the medical departments regarding all cromolyn [Intal] products of Fisons Corporation. ****1082** Regarding this request for production all documents should include from inception of file to the present.

Answer: Defendant Fisons objects to this discovery request as not reasonably calculated to lead to the discovery of admissible evidence, as overbroad in time, and as incredibly burdensome and harassing. This discovery request encompasses approximately *eighty-five* percent of *all* documents in the subject files and departments--millions of pages of documents. *Neither cromolyn (which should be referred to as cromolyn sodium), nor any cromolyn product, nor the properties or efficacy of cromolyn is at issue in this litigation.* Furthermore, Fisons objects to this discovery request as calling for the production of extremely sensitive trade secret and proprietary material.

(Some italics ours.)

To requests asking for correspondence, memoranda, articles and other documents "concerning", "regarding" or "covering" Somophyllin Oral Liquid, the drug company generally objected to the requests and then stated

Without waiver of these objects and subject to these limitations, Fisons will produce documents responsive to this request at plaintiffs' expense at a mutually agreeable time at Fisons' headquarters.

In support of the drug company's motion for a protective order, the drug company's in-house counsel and its Seattle lawyer filed similar affidavits. Seattle counsel's affidavit declares:

Plaintiffs allege that Fisons failed to provide adequate warnings of possible dangers associated with the use of Somophyllin Oral Liquid, a theophylline- based prescription medication distributed by Fisons.... [Plaintiffs'] discovery requests are extremely broad in scope. Many of these discovery requests are not reasonably related to plaintiffs' failure-to-warn allegations against Fisons.

Following receipt of plaintiffs' First Request for Production, I traveled to Fisons in Bedford, Massachusetts in order to ascertain firsthand the scope and extent of documents responsive to plaintiffs' request for production. At that time I confirmed that to produce all of the documents responsive to plaintiffs' catch-all requests would be extremely burdensome and oppressive to Fisons. Between one and two million pages of documents, most of which have no colorable relevance to the issues in this action, would have to be located, assembled, and made

> available for review or copying. The time, expense, and intrusion upon the day-to-day business activities of Fisons would be immense.
>
> While at Fisons I identified those documents reasonably related to the claims asserted by plaintiffs in this litigation and arranged to have them copied and forwarded to Seattle for production to plaintiffs.

The affidavit goes on to say that the drug company had "agreed to make available those documents reasonably related to plaintiffs' allegations against Fisons."

In its memorandum to the court in support of the motion for a protective order, the attorney for the drug company outlined the documents contained in the regulatory file on Somophyllin Oral Liquid. That file purportedly contained complete information regarding the drug including: Summaries of adverse reactions associated with the use of the medication that had been reported to Fisons; all promotional or advertising material disseminated by Fisons *with regard to the medication;* the complete product file for Somophyllin Oral Liquid, which contained records of communications with the Food and Drug Administration, internal memoranda, and miscellaneous medical literature regarding theophylline. The memorandum goes on to tell the court

> In short, Fisons' Regulatory File for Somophyllin Oral Liquid contains all or nearly all documents in Fisons' possession ****1083** that are reasonably related to plaintiffs' failure-to-warn allegations.

A footnote to this comment states "Fisons has also agreed to make available to plaintiffs an index of periodicals maintained in Fisons' internal library as well as certain other documents."

The drug company's responses and answers to discovery requests are misleading. The answers state that all information *regarding* Somophyllin Oral Liquid which had been requested would be provided. They further imply that all documents which are relevant to the plaintiffs' claims were being produced. They do not specifically object to the production of documents that discuss the dangers of theophylline, but which are not within the Somophyllin Oral Liquid files. They state that there is no relevant information within the cromolyn sodium product files.

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.

The drug company does not claim that its inquiry into the records did not uncover the smoking gun documents. Instead, the drug company attempts to justify its responses by arguing

as follows: (1) The plaintiffs themselves limited the scope of discovery to documents contained in Somophyllin Oral Liquid *files*. (2) The smoking gun documents were not intended to relate to Somophyllin Oral Liquid, but rather were intended to promote another product of the drug company. (3) The drug company produced all of the documents it agreed to produce or was ordered to produce. (4) The drug company's 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 production of those documents. (5) Discovery is an adversarial process and good lawyering required the responses made in this case.

If the discovery rules are to be effective, then the drug company's arguments must be rejected.

First, neither the child nor the doctor limited the scope of discovery in this case. Attorneys for the child, the doctor and the drug company repeatedly referred to both theophylline and Somophyllin Oral Liquid. There was no clear indication from the drug company that it was limiting all discovery *regarding* Somophyllin Oral Liquid to material from that product's file. Nor was there any indication from the drug company that it had information about theophylline, which is not a Fisons' "product", or information *regarding* Somophyllin Oral Liquid that it was not producing because the information was in another product's file. The doctor was justified in relying on the statements made by the drug company's attorneys that all relevant documents had been produced and he cannot be determined to have impliedly, albeit unknowingly, acquiesced in limiting the scope of discoverable information.

Second, the drug company argues that the smoking gun documents and other documents relating to theophylline were not documents *regarding* Somophyllin Oral Liquid because they were intended to market another product. No matter what its initial purpose, and regardless of where it had been filed, under the facts of this case, a document that warned of the serious dangers of the primary ingredient of Somophyllin Oral Liquid is a document *regarding* Somophyllin Oral Liquid.

Third, the discovery rules do not require the drug company to produce only what it agreed to produce or what it was ordered to produce. The rules are clear that a party must *fully* answer all interrogatories and all requests for production, unless a ****1084** specific and clear objection is made. If the drug company did not agree with the scope of production or did not want to respond, then it was required to move for a protective order. In this case, the documents requested were relevant. The drug company did not have the option of determining what it would produce or answer, once discovery requests were made.

Fourth, the drug company further attempts to justify its failure to produce the smoking guns by saying that the requests were not specific enough. Having read the record herein, we cannot perceive of *any* request that could have been made to this drug company that would have produced the smoking gun documents. Unless the doctor had been somehow specifically able to request the June 30, 1981, "dear doctor" letter, it is unlikely that the letter would have been

discovered. Indeed the drug company claims the letter was not an official "dear doctor" letter and therefore was not required to be produced.

Fifth, the drug company's attorneys claim they were just doing their job, that is, they were vigorously representing their client. The conflict here is 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.

> [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 his soapbox in the park, the lawyer enjoys the privilege of a professional license that entitles him to entry 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.

Schwarzer, *Sanctions Under the New Federal Rule 11--A Closer Look,* 104 F.R.D. 181, 184 (1985).

Like CR 11, CR 26(g) makes the imposition of sanctions mandatory, if a violation of the rule is found. Sanctions are warranted in this case. What the sanctions should be and against whom they should be imposed is a question that cannot be fairly answered without further factual inquiry, and that is the trial court's function. While we recognize that the issue of imposition of sanctions upon attorneys is a difficult and disagreeable task for a trial judge, it is a necessary one if our system is to remain accessible and responsible.

> Misconduct, once tolerated, will breed more misconduct and those who might seek relief against abuse will instead resort to it in self-defense.

Schwarzer, 104 F.R.D. at 205.

In making its determination, the trial court should use its discretion to fashion "appropriate" sanctions. The rule provides that sanctions may be imposed upon the signing attorney, the party on whose behalf the response is made, or both.

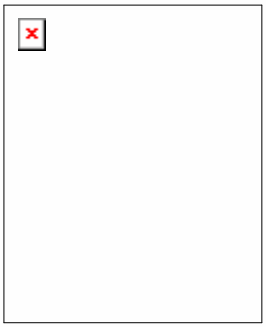
In determining what sanctions are appropriate, the trial court is given wide latitude. However certain principles guide the trial court's consideration of ****1085** sanctions. First, the least severe sanction that will be adequate to serve the purpose of the particular sanction should be imposed. The sanction must not be so minimal, however, that it undermines the purpose of discovery. The sanction should insure that the wrongdoer does not profit from the wrong. The wrongdoer's lack of intent to violate the rules and the other party's failure to mitigate may be

considered by the trial court in fashioning sanctions.

The purposes of sanctions orders are to deter, to punish, to compensate and to educate. Where compensation to litigants is appropriate, then sanctions should include a compensation award. However, we caution that the sanctions rules are not "fee shifting" rules. Furthermore, requests for sanctions should not turn into satellite litigation or become a "cottage industry" for lawyers. 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. In the present case, sanctions need to be severe enough to deter these attorneys and others from participating in this kind of conduct in the future.

The trial court's denial of sanctions is reversed and the case is remanded for a determination of appropriate sanctions.

Exhibit 5-4 [Miller Prior Web Site] ***Source:*** http://web.archive.org/web/20010503053216/w w millerbateman.com/miller html



Delbert D. Miller

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Position

Mr. Miller is a Partner with Miller Bateman LLP. Mr. Miller formerly practiced for over 30 years with Bogle & Gates P.L.L.C. where he was Senior Partner in the Litigation Practice Group.

Exhibit 5-5 **[Re: DOE-Funded Counsel Prior Tactics Now Used to Conceal Battelle Fraud]**

Electronic Code of Federal Regulations
Title 48: Federal Acquisition Regulations System

970.5228-1 Insurance—litigation and claims. ["in good faith"]

http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&tpl=/ecfrbrowse/Title48/48cfr970_main_02.tpl

Electronic Code of Federal Regulations
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Title 48: Federal Acquisition Regulations System

PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS
Subpart 970.52—Solicitation Provisions and Contract Clauses for Management and Operating Contracts

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970.5228-1 Insurance—litigation and claims.

As prescribed in 970.2803–2, insert the following clause:

Insurance—Litigation and Claims (AUG 2009)

(a) The Contractor may, with the prior written authorization of the Contracting Officer, and shall, upon the request of the Government, initiate litigation against third parties, including proceedings before administrative agencies, in connection with this contract. The Contractor shall proceed with such litigation in good faith and as directed from time to time by the Contracting Officer.

(b) The Contractor shall give the Contracting Officer immediate notice in writing of any legal proceeding, including any proceeding before an administrative agency, filed against the Contractor arising out of the performance of this contract. Except as otherwise directed by the Contracting Officer, in writing, the Contractor shall furnish immediately to the Contracting Officer copies of all pertinent papers received by the Contractor with respect to such action. The Contractor, with the prior written authorization of the Contracting Officer, shall proceed with such litigation in good faith and as directed from time to time by the Contracting Officer.

(c)(1) Except as provided in paragraph (c)(2) of this clause, the Contractor shall procure and maintain such bonds and insurance as required by law or approved in writing by the Contracting Officer.

(2) The Contractor may, with the approval of the Contracting Officer, maintain a self-insurance program; provided that, with respect to workers' compensation, the Contractor is qualified pursuant to statutory authority.

(3) All bonds and insurance required by this clause shall be in a form and amount and for those periods as the Contracting Officer may require or approve and with sureties and insurers approved by the Contracting Officer.

(d) The Contractor agrees to submit for the contracting officer's approval, to the extent and in the manner required by the Contracting Officer, any other bonds and insurance that are maintained by the Contractor in connection with the performance of this contract and for which the Contractor seeks reimbursement. If an insurance cost (whether a premium for commercial insurance or related to self-insurance) includes a portion covering costs made unallowable elsewhere in the contract, and the share of the cost for coverage for the unallowable cost is determinable, the portion of the cost that is otherwise an allowable cost under this contract is reimbursable to the extent determined by the Contracting Officer.

(e) Except as provided in subparagraphs (g) and (h) of this clause, or specifically disallowed elsewhere in this contract, the Contractor shall be reimbursed—

(1) For that portion of the reasonable cost of bonds and insurance allocable to this contract required in accordance with contract terms or approved under this clause; and

(2) For liabilities (and reasonable expenses incidental to such liabilities, including litigation costs) to third persons not compensated by insurance or otherwise without regard to and as an exception to the clause of this contract entitled, “Obligation of Funds.”

(f) The Government's liability under paragraph (e) of this clause is subject to the availability of appropriated funds. Nothing in this contract shall be construed as implying that the Congress will, at a later date, appropriate funds sufficient to meet deficiencies.

(g) Notwithstanding any other provision of this contract, the Contractor shall not be reimbursed for liabilities (and expenses incidental to such liabilities, including litigation costs, counsel fees, judgment and settlements)—

(1) Which are otherwise unallowable by law or the provisions of this contract; or

(2) For which the Contractor has failed to insure or to maintain insurance as required by law, this contract, or by the written direction of the Contracting Officer.

(h) In addition to the cost reimbursement limitations contained in 48 CFR part 31, as supplemented by 48 CFR 970.31, and notwithstanding any other provision of this contract, the Contractor's liabilities to third persons, including employees but excluding costs incidental to worker's compensation actions, (and any expenses incidental to such liabilities, including litigation costs, counsel fees, judgments and settlements) shall not be reimbursed if such liabilities were caused by Contractor managerial personnel's—

(1) Willful misconduct;

(2) Lack of good faith; or

(3) Failure to exercise prudent business judgment, which means failure to act in the same manner as a prudent person in the conduct of competitive business; or, in the case of a non-profit educational institution, failure to act in the manner that a prudent person would under the circumstances prevailing at the time the decision to incur the cost is made.

(i) The burden of proof shall be upon the Contractor to establish that costs covered by paragraph (h) of this clause are allowable and reasonable if, after an initial review of the facts, the Contracting Officer challenges a specific cost or informs the Contractor that there is reason to believe that the cost results from willful misconduct, lack of good faith, or failure to exercise prudent business judgment by contractor managerial personnel.

(j)(1) All litigation costs, including counsel fees, judgments and settlements shall be differentiated and accounted for by the Contractor so as to be separately identifiable. If the Contracting Officer provisionally disallows such costs, then the Contractor may not use funds advanced by DOE under the contract to finance the litigation.

(2) Punitive damages are not allowable unless the act or failure to act which gave rise to the liability resulted from compliance with specific terms and conditions of the contract or written instructions from the Contracting Officer.

(3) The portion of the cost of insurance obtained by the Contractor that is allocable to coverage of liabilities referred to in paragraph (g)(1) of this clause is not allowable.

(4) The term “contractor's managerial personnel” is defined in clause paragraph (j) of 48 CFR

970.5245–1.

(k) The Contractor may at its own expense and not as an allowable cost procure for its own protection insurance to compensate the Contractor for any unallowable or non-reimbursable costs incurred in connection with contract performance.

(l) If any suit or action is filed or any claim is made against the Contractor, the cost and expense of which may be reimbursable to the Contractor under this contract, and the risk of which is then uninsured or is insured for less than the amount claimed, the Contractor shall—

(1) Immediately notify the Contracting Officer and promptly furnish copies of all pertinent papers received;

(2) Authorize Department representatives to collaborate with: in-house or DOE-approved outside counsel in settling or defending the claim; or counsel for the insurance carrier in settling or defending the claim if the amount of the liability claimed exceeds the amount of coverage, unless precluded by the terms of the insurance contract; and

(3) Authorize Department representatives to settle the claim or to defend or represent the Contractor in and/or to take charge of any litigation, if required by the Department, if the liability is not insured or covered by bond. In any action against more than one Department Contractor, the Department may require the Contractor to be represented by common counsel. Counsel for the Contractor may, at the Contractor's own expense, be associated with the Department representatives in any such claim or litigation.

(End of clause)

[65 FR 81009, Dec. 22, 2000, as amended at 66 FR 4627, Jan. 18, 2001; 67 FR 14873, Mar. 28, 2002; 74 FR 36375, 36378, 36380, July 22, 2009]

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