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August 18, 2011

Defense Nuclear Facilities Safety Board [DNFSB]
625 Indiana Ave NW Suite 700
Washington, DC 20004

Dear Andrew L. Thibadeau,

Subject: DOE Response [to DNFSB Recommendation 2011-1] Disingenuous Due to its Ongoing 8-Year Cover-up of PNNL Contractor Battelle Misconduct via Retaliation & Witness Tampering [Perjury to Suppress Technical Info. (Evidence)] by Office of Science, Office of General Counsel, Site Offices [Pacific Northwest & Oak Ridge] and Inspector General.

The Energy Dept.'s 7/19/11 response to DNFSB Recommendation 2011-1 regarding WTP safety, security, witness tampering, suppressing technical information, retaliation, confidentiality and other matters in the Tamosaitis-v-Bechtel case is tainted and insincere due to DOE's continued churning of taxpayers to specifically fund retaliation, witness tampering, and other violations in its 8-year cover up of Battelle misconduct [False Statements (18 USC §1001), Perjury (18 USC §1621), Suborning Perjury (18 USC §1622), False Declarations (18 USC §1623), False Claims (31 USC §3729) & Security Breach (10 CFR §710 - Accessing Classified Mat.)]. For the benefit of taxpayers, Congress, and those working at DOE sites, this ongoing situation necessitates a factual public comment consisting of sections outlined here and presented below with attachment and embedded Web links to evidence:

1. With its 8-year cover up of contractor misconduct, DOE is willfully funding personal-injury defense lawyer abusive tactics [condemned by courts] and suborning perjury [e.g., falsifying research & ventures] to suppress/hide technical information from federal courts, i.e., evidence implicating Battelle that operates six DOE national labs.

1a. Prior Misconduct to Conceal – *Then*, DOE-funded counsel Miller's firm was fined/sanctioned [record $325K] by WA Supreme Court for discovery abuse, i.e., concealing smoking-gun evidence of dangerous toxicity of a drug that permanently brain damaged a 3-year old girl. His firm was similarly fined by a federal judge for suppressing NHTSA rear-impact driver injury crash test data. *Now*, Battelle's own evidence shows that DOE is funding (i) This attorney to repeat such abuses and (ii) Battelle to suborn perjury [falsify research & hide ventures] to suppress evidence [technical information] implicating Battelle in *again* violating the False Claims Act [defrauding/skimming small business assistance research] and falsifying inventions to patent office. [Attachment 1 has details & press articles.]

1b. DOE 8-Year Suppression – By authorizing such abusive concealment tactics condemned by courts, DOE has confirmed its practice of misappropriating taxpayers by funding litigation fraud/perjury against individuals or small businesses [entrepreneurs] suing contractors due to fraud, negligence, or other misconduct. GAO reports [GAO-04-148R] that most lawsuits against DOE contractors pertain to "radiation and/or toxic exposure, personal injury and wrongful discharge." Thus, DOE's 8-year cover-up [~$1M cost] of Battelle misconduct [Authorized by Chu, Poneman & Koonin] has dangerous implications for those suing for injury, HAZMAT/radiation exposure, wrongful death, fraud or other tortuous/negligent contractor misconduct at any site in DOE's complex. [See evidence site for details.]

1c. 2010 Email re: Witness Tampering – DOE [Chu, Poneman, Podonsky & Friedman] was sent a detailed 4/28/10 email stating that its establishing precedent for such taxpayer-funded practices has adverse health/safety ramifications. A key excerpt is as follows:

"Doesn't Friedman realize he's jeopardizing health/safety at DOE labs by waiving oversight of litigation fraud and allowing Science to retain injury defense lawyers with records of concealing evidence [e.g., radiation dosage, HAZMAT, equipment maintenance/safety records, surveillance logs] or witness tampering if Battelle is sued for exposure, injury or wrongful death due to negligent or other misconduct? [Now knowing that Science suborns such attorney misconduct to conceal, Battelle may relax health/safety procedures to increase lab profits.]"

2. DOE's statement that HSS [Health Safety & Security] will "independently review the safety culture across the entire complex" [¶16] is suspect, i.e., undermined by HSS [Podonsky et al.] ignoring ongoing and prior contractor violations.

2a. 2010 Security Violations [Classified Mat.] – Chu & Podonsky ignored Pulver's 1/13/10 email regarding the 2009 Christmas Day bombing and national security breach by Battelle/DOE. It pertained to granting access to air cargo explosives detection and other classified research by Battelle-PNNL scientist implicated in criminal violations, e.g., perjury, violating False Claims Act [withholding DOE-funded technical assistance research (software) from small business] and falsifying inventions to the patent office. The email stated in part:

"Many compelling reasons necessitate that DOE address the issues detailed in emails below and hold Battelle accountable for criminal misconduct [False Claims (31 USC §3729), False Statements...Perjury (18 USC §1621) and violating 10 CFR §710 (Accessing Classified Mat.)]."

"The 12/25/09 terrorist attack underscores that Science is putting national security at risk by covering up Battelle's misconduct by funding and suborning perjury of top-secret Q-clearance holder Kevin Dorow who's involved with DHS air cargo explosives [detection] and other classified work…Science has long been aware of his access to that material; in an 8/27/08 email [below], Science refused to take any action on this security breach, thus violating 10 CFR§710 [Classified Access]. Its *complicity* to 'protect' its largest contractor is far worse than the systemic failure to "connect the dots" situations of DHS [Detroit (12/25/09)] and SEC [Madoff]."

"DOE's refusal to revoke/suspend Dorow's clearance emboldens Battelle nationally to suborn perjury [or possibly espionage] by top-secret clearance holders when 'needed' to protect/promote its corporate interests (domestic/foreign)."

2b. 2009 Safety/Security Concerns to HSS – Excerpts of Pulver's 11/23/09 email, ignored by Podonsky et al., are as follows:

"Congress has been concerned/outraged that DOE reimburses litigation costs for wrongdoing contractors. [GAO Report d04148r] In this case, DOE Office of Science [PNSO & ORO] has gone a giant step further by funding Battelle and attorney Miller to willfully misrepresent research [RPMP], hide commercial investments and thus invoke litigation fraud/perjury to conceal smoking-gun evidence. [See Doc. #5 citing Miller's prior firm sanctioned for…*withholding toxicity data* on a drug causing brain damage to a 3-year old.] With this ongoing cover-up, DOE has set a precedent that jeopardizes others who may later file lawsuits for injury, illness, cancer, toxic or radiation exposure, hostile work environment, wrongful termination [whistleblower] or other causes of action due to Battelle's negligent or tortuous conduct at PNNL, ORNL and other Office of Science labs."

"Sources show distinct parallels between DOE/Battelle and SEC/Madoff. However, DOE conduct is more egregious because it is …directing Battelle's litigation fraud to obstruct justice [conceal evidence]…churning taxpayers to cover up…Battelle's violations threaten national security [classified access (safeguards)], research & patenting integrity, economic development, entrepreneurs, whistleblowers, and other issues relevant to safely running a national lab." [See details including oversight concerns of Congress.]

2c. 2008 Health/Safety Warnings to HSS – HSS [Podonsky et al.] ignored this 9/29/08 email which stated in relevant part:

" **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… 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 8/24/08 email *(radiation dose alarm levels)*]; thousands of employees at the five national labs run by Battelle could be adversely effected."

As shown by Battelle's continued perjury since, DOE disregarded these and all evidence-based emails. By repeatedly ignoring such substantiated concerns, DOE lacks credibility to assert that HSS will *now* conduct an independent safety review across the complex.

3. Comments on Other Parts of DOE's Response Contradicted by its Ongoing Suppression of Contractor Misconduct.

3a. DOE Response ¶4: "Over the past year, the Department has undertaken a broad range of steps to assure a strong and questioning safety culture at WTP and sites across the DOE complex. We will only be successful if we remain committed to continuous improvement and teamwork. DOE takes all safety concerns--whether from our employees, our contractors, the Board, or third-parties--very seriously."

Comment: Such assertions are contradicted by ongoing conduct cited above, e.g., funding condemned personal-injury defense lawyer tactics to falsify technical information and suppress evidence of misconduct by contractor Battelle. See details in Attachment 1 [Re: DOE Now Repeating Court-Condemned Concealment Tactics Used to Suppress Technical Safety-Related Documents].

3b. DOE Response ¶26: "Based on an investigation by the DOE Office of the General Counsel…found no evidence that DOE or its contractors were aware of and sought to suppress a technical report."

Comment: This statement lacks credibility given General Counsel's complicity in the multi-year perjury by PNNL scientist to suppress technical matter [software] from the court, i.e., concealing evidence that implicates Battelle in (i) Misusing the Technical Assistance Program [withholding DOE-funded software developed for small business & violating False Claims Act] and (ii) Falsifying inventions to patent office. FOIA documents confirm DOE Oak Ridge legal staff condones this litigation fraud [cited in §1 above] that has cost taxpayers ~$1M. And, Office of Science confirmed in Sept. 2010 that General Counsel [GC] has "authorized this litigation fraud/perjury". Given DOE's ongoing cover-up [via contractor perjury] in the Pulver/Battelle case, GC's denial of any suppression in Tamosaitis/Bechtel is to be expected, but obviously lacks credibility, sincerity and plausibility. Contrary to Poneman's claim, GC [e.g., field offices (Chief Counsel)] is not independent from but is quite complicit with DOE contractors.

3c. DOE Response ¶25: "HSS review found…most WTP personnel did not express fear of retaliation."

Comment: While tacitly admitting that *some* personnel feared retaliation, DOE glosses over the issue and thus fails to rebut the Board's concerns re: WTP/Bechtel. Such a flippant response isn't surprising given DOE's 8-year continued retaliation against my small business for reporting fraud, other criminal misconduct, and national security breaches by contractor Battelle. In addition to funding Battelle and its counsel to suborn perjury, conceal evidence, and drive up litigation costs, DOE further retaliated by leaking confidential case material that Pulver sent to a US Attorney regarding legal strategy/analysis/evidence. FOIA-obtained documents from Oak Ridge confirm that an IG Office of Investigations field agent not only divulged this material to Battelle's legal advisors but also provided legal advice (work product) to them. Such complicity reveals that the DOE IG retaliates against complainants and protects contactors at expense of taxpayers, oversight, research & patent integrity, health/security/safety and confidentiality. [Details] And, in May 2009, the site office [PNSO] manager, who issued orders to report fraud, flatly told Pulver that DOE will continue funding the litigation despite evidence of perjury to suppress evidence implicating Battelle; a complaint was then filed but ignored by the IG.

4. 8/18/11: DOE Inspector General Friedman Dismisses/Ignores Pulver's Evidence-Based Allegations Sent to DNFSB

▪ DOE Inspector General, in response to Pulver's 8/7/11 email [re: public comments to the DNFSB], refused to even investigate any of his evidence-backed allegations which include DOE suppressing technical information [evidence], witness tampering [perjury], taxpayers forced to fund personal-injury defense lawyer abuses, ignoring national security threats by its contractors, as well as breach of confidentially and other retaliation by DOE [Science, its site offices (ORO, PNSO…), General Counsel, IG Office of Investigations et al.]. See 8-year chronology of Friedman authorizing perjury, retaliation, security breach & cover up [~$1M] of contractor Battelle misconduct.

▪ Friedman's refusal today further validates the concerns cited above. Moreover, it confirms that (i) DOE [Chu, Poneman, Koonin, General Counsel et al.] is authorized to continue funding & suborning the abusive practices that have been exposed by Tamosaitis, Pulver, Laul, Westbrook. and others over the years, and (ii) Further embolden contractor misconduct at the expense of oversight, fraud prevention, health/safety/security, research integrity, workers' communicating with managers, and strong safety culture.

▪ Friedman clearly implicates himself [revealing his complicity] by his abject refusal to investigate substantiated allegations of staff colluding with accused contractors and General Counsel against those reporting fraud per his DOE Order 221.1. [An appropriately acting IG would diligently pursue and address/rectify such concerns to preserve public trust in his office by whistleblowers, Congress, President et al.] His conduct casts more doubts on the sincerity of DOE responses to DNFSB [re: retaliation, suppression, independent safety review…].

▪ Because the IG authorizes DOE and its contractors, at taxpayer expense, to actually suppress information, conceal evidence, perjure and thus provide false statements to federal or state courts and/or officials, it obviously follows that DOE would lie to or suppress information from the DNFSB or Congress to protect its contractors by concealing safety-related or other misconduct.

At the very least, so long as Friedman remains Inspector General, DOE statements to DNFSB or others regarding contractor-related matters [e.g., retaliation-free safety culture] are clearly suspect and should be independently verified by outside third parties.

5. Closing Summary Points of Concern Regarding DOE Response to 2011-1 or any DNFSB Recommendation

▪ DOE asserting it has strong safety culture and condemns retaliation is soundly discredited by Chu, Poneman and Koonin continuing to be accessories to Battelle's taxpayer-funded perjury, material suppressions, national security breach, research misconduct and false claims, all done to conceal contractor fraud against a small business entrepreneur and the patent office.

▪ DOE's suborning perjury to protect Battelle's commercial interests demonstrates it will similarly suppress technical safety information and engage in witness tampering to protect Bechtel's interests, e.g., not losing a WTP performance bonus. Moreover, DOE's covering up misconduct of contractor Battelle [running 6 national labs] will embolden Bechtel [with General Counsel consent] to repeat such abusive litigation fraud tactics against Tamosaitis to similarly protect its corporate interests.

▪ Instead of holding billion-dollar tax-exempt contractor Battelle accountable for misconduct proven by Battelle and DOE evidence, Secretary Chu and his senior staff [Poneman, Koonin…], with consent of current IG Friedman, are relentlessly churning taxpayers [~$1M] in protracted litigation [perjury-to-conceal by Q-clearance holder accessing classified work] to attempt to financially bury and retaliate against entrepreneur Pulver who dutifully reported fraud to the IG per Order 221.1 in *2003*.

▪ Independent oversight in the $30B DOE is effectively non-existent especially in contractor cases involving high financial stakes.

Mr. Thibadeau, if you or other members of the DNFSB have questions or need more information, please contact me. Thank you.

Sincerely,

Philip C. Pulver
Owner/Entrepreneur, CCOL Inc.
www.NationalLabSafetyRisk.com www.OfficeOfScienceFraud.com
www.PNNLfraud.com www.NationalLabSecurityThreat.com

Attachment1 [w/ links]

Attachment 1

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

Then: WA Supreme Court Imposed Record Sanctions/Fines on Firm for Discovery Abuse [Suppressing toxicity documents].

Now: Miller and Battelle Falsifying Research & Commercial Ventures to Conceal Smoking-Gun Evidence via Perjury.
Funding this 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 via Battelle and Miller's material misrepresentations [perjury] to the court [i.e., DHS Radiation Portal Monitor Project (RPMP) research & Battelle commercial ventures] being used to conceal smoking-gun evidence [e.g., RPMP-funded versions of the MDM (Mobile Data Manager) software] which would *further* implicate Battelle in: **(i)** Misusing/defrauding/skimming DOE small business Technical Assistance Program [TAP] [withholding the DOE-funded software [MDM] from government's intended TAP recipient (Pulver's small business), thereby violating the False Claims Act (31 USC §3729)], **(ii)** Falsifying inventions [18 USC §1001] to the patent office, and **(iii)** Defrauding businesses licensing follow-on versions [BlackBerry…] of MDM software funded by TAP and exclusively licensed to Pulver. Currently being used by Battelle and DOE at great taxpayer expense [~$1M], Bogle tactics to obstruct justice by concealing smoking-gun evidence were condemned by the 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 type of abusive litigation fraud, but at taxpayer expense, to conceal smoking-gun evidence [e.g., DHS versions of MDM software re: Battelle ventures].

(2) DOE is financing and suborning this litigation fraud/abuse/perjury and covering up Battelle's defrauding both a small business and patent office [USPTO] to ensure Battelle 'wins' the upcoming PNNL re-bid [*country's longest un-competed national lab* (48 years)].

(3) DOE Offices of Science, Inspector General and General Counsel will fund & suborn such litigation misconduct when a whistleblower, small business, university, injured staff or others sue contractor Battelle [running 6 national labs (PNNL, ORNL, INL, NREL & BNL) costing billions].

Attracting national media scorn was Bogle's attorney misconduct in two notorious discovery abuse cases involving tactics that DOE Office of Science is now funding in order to conceal evidence of Battelle defrauding DOE's small business assistance program and patent office. In the Fisons case, the WA Supreme Court unanimously sanctioned/fined Bogle & Gates a record $325K for rampant discovery abuse because its lawyers repeatedly withheld smoking-gun toxicity documents on a drug [theophylline] that permanently brain damaged a 3-year old. In the Subaru injury case, a federal judge sanctioned Bogle because it "obfuscated, stonewalled and gave answers that were just plain wrong" to wrongfully withhold rear-impact crash data [National Highway Transportation Safety Admin.].

News articles and the WA Supreme Court's detailed Fisons decision are excerpted below and explicitly illustrate Bogle's discovery abuse tactics to conceal evidence [obstruct justice] and the legal community's outrage over such egregious attorney misconduct. As shown at the evidence sites, Office of Science, by hiring Miller to invoke/repeat Bogle court-condemned concealment tactics has confirmed its practice of misappropriating taxpayer funds for such abusive/fraudulent litigation tactics against individuals or small businesses suing due to fraud, injury or other contractor misconduct. 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 Detailing Many Discovery Abuses [Concealing Evidence] Currently Being Used by Battelle DOE-Funded Counsel to Falsify DHS Research & Conceal Fraud

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

Exhibit 5-4: Link to 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 5-5: Miller-Bateman Law Firm Web Page Confirming Delbert Miller's 30 years with Bogle & Gates where he was Senior Partner in Firm's Litigation Practice Group

Exhibit 5-1 [Citing DOE-Funded Counsel Prior AbusiveTactics Now Used to Conceal Battelle-PNNL 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 [Citing DOE-Funded Counsel Prior Litigation Abuse 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 linked 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

[DOE-Funded Counsel Prior Litigation Abuse Tactics Now Used to Conceal Battelle Fraud]

Web Link to the 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.

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

Note: DOE-funded counsel Delbert Miller, managing partner in Bogle & Gates Litigation Practice Group during Fisons, is invoking the very same discovery abuse tactics to conceal smoking-gun evidence of Battelle violating False Claims Act, defrauding entrepreneur and falsifying inventions to USPTO.

Exhibit 5-4

[DOE-Funded Counsel Prior Litigation Abuse Tactics Now Used to Conceal Battelle Fraud]

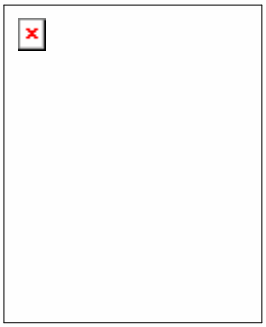
Web Link to Electronic Code of Federal Regulations

Title 48: Federal Acquisition Regulations System
970.5228-1 Insurance – litigation and claims.

http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=515fae029c178b9b7199da0b8084aa70&rgn=div8&view=text&node=48:5.0.3.26.40.31.1.40&idno=48

Excerpt: "[DOE Contractor] shall proceed with such litigation in good faith"

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



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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.