

Sleazy In Seattle

by Stuart Taylor, Jr

Discovery is the bread and butter of most big-firm litigators. But the most important and ethically sensitive decisions the make-choosing when and how to avoid disclosing damning evidence to adversaries-are almost always veiled in secrecy. Now an anonymous whistle-blower in a case near Seattle has helped give as a revealing glimpse into how litigators reconcile their duties to be zealous advocates with their duties not to be whores. It's not a pretty picture and it involves one of Seattle's largest and most prestigious firms.

The covered-up corporate document that the whistle-blower leaked in March 1990 led to an agreement this January by Seattle's 200-lawyer Bogle & Gates and its client Fisons Corp. to pay \$325000 in sactions 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 textbox example of the need for discovery reforms even more far-reaching than those that were adopted last year by the federal judiciary-reforms that are still under attack in Congress. (On which more below.)

What prompted the settlement was a unanimous Washington Supreme Court decision last September 16, and the prospect of an evidentiary hearing on remand that would have made Bogle's conduct look even worse than it looks in the court's sternly worded opinion.

The seven justices held that Bogle & Gates and its client, a British-owned pharmaceutical company with U.S. headquarters near Rochester, 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 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." These statements were accompanied by artfully worded discovery responses that Bogle later claimed (in a rationale rejected by the court) should have put its adversaries on notice that relevant documents would be produced only if found in a particular Fisons product file

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It's also remarkable that the Washington State Bar Association is not, it confirms, even investigating the conduct of Guy Michelson and Kevin Baumgardner, the two Bogle partners who stand accused by opposing counsel of having made representations (under oath, in one case) to their representation (under oath in one case) to their adversaries and the superior court that were "deliberately or recklessly false and intended to deceive." The court record bears out the accusations.

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Geoffrey Hazard Jr., perhaps the nation's most prominent legal ethics expert [see "Hazardous Duty Pays," page 60], and leading Washington State litigators including ten fellows of the prestigious American College of Trial Lawyers, of whom two are also past presidents of the Washington State Bar Association.

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You be the judge of whether Bogle's conduct was honest, whether such practices are the norm, and-if they are- whether they ought to be.

Bogle and Fisons were initially exonerated of discovery abuse by the special master overseeing discovery in the case and by two successive superior court judges, including Judge Stuart French of Snohomish County Superior Court (north of Seattle), who presided over the 1990 trial of the underlying tort case. Judge French rejected a motion for sanctions and signed an opinion (drafted by lawyers for Bogle and Fisons) finding that all of the discovery responses had been "reasonable and proper," and that "the conduct of Fisons and its counsel...was consistent with the customary and accepted litigation practices in the bar of this community and this state"

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process, and believe that lawyers are untrust worthy," as Saltzburg argued in one legal brief.

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But Bogle's experts may have been right, I fear, insofar as they suggested that many and perhaps even most litigators engage under cover of darkness in the kind of conduct that is fortuitously brought to light in this case. If so, then the discovery process has been clogged by a culture of evasion and deceit that accounts for much of its grotesque wastefulness, and the adversary system has been perverted from an engine of truth into a license for lawyerly lies.

Asked for Bogle's comment on the case, Richard Wallis, the managing partner, says: "It is our view that the Supreme Court's decision is a 'course correction' for the entire legal profession...Bogle & Gates-like other firms in this state-will now pursue discovery on behalf of our clients in a manner consistent with this ruling. It is our position that Bogle & Gates was, in this case, operating in good faith within the standards of practice followed by attorneys in this state at the time these discovery responses were made."

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Bogle and Fisons blame Joel Cunningham of Seattle's Williams, Kastner & Gibbs (who brought the pediatrician's cross-claim against Fisons) and the injured child's lawyers (including Paul Lu-vera, the top plaintiffs lawyer in the state) for the decisions by Bogle and Fisons not to hand over the smoking gun documents.

Cunningham "had only himself to blame," William Helsell of Seattle's Helsell, Fetterman, Martin, Todd & Hokanson, who represented Bogle & Gates and Fisons in the sanctions proceeding, told the state supreme court. Helsell, a much-admired leader of the Seattle bar and Bogle's litigation experts claimed that Cunningham and the injured child's lawyers failed to ask the right questions or to press their adversaries hard enough for responsive answers.

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THE UNDERLYING FACTS

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 Fison's 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 damages was (the litigation established) that the theophylline in her blood soared to toxic levels as a result of her viral infection.

Jennifer's parent filed a products liability suit against Fisons along with a malpractice suit against Dr. James Klicpera, the Everett, Washington, Pediatrician who had prescribed the drug. He and his insurer cross-claimed against Fisons, alleging that the company had known, and had failed to warn

him, that theophylline posed a serious risk of nervous system damage when used to treat children with viral infections. Fisons defended on the grounds that (among other things) it had disclosed all known risks, and that Dr. Klicpera had caused Jennifer's injuries by negligently failing to monitor her theophylline levels and prescribing an overdose.

In October 1986 Cunningham, Dr. Klicpera's counsel, served Fisons with four brief requests for production of documents, including this: "Produce genuine copies of any letters sent by your company to physicians concerning theophylline toxicity in children."

SMOKING GUN NO. 1

This fit one of the smoking gun documents like a glove: a June 1981 letter sent by Fisons's manager of marketing and medical communications, Cedric Grigg, to a select group of 2,000 physicians around the country (not including Dr. Klicpera).

Addressed "Dear Doctor," and entitled "Re: Theophylline and Viral Infections," the letter warned that it "can be a capricious drug," Grigg stressed a published study showing "life-threatening theophylline toxicity when pediatric asthmatics on previously well tolerated doses of heophylline contract viral infections." The letter, which was approved by high-level Fisons executives, promoted another Fisons product for treatment of asthma, called Intal, as safer than competing drugs based on theophylline.

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But in fact, Fisons and Bogle-which says it first learned in March 1987 about the 1981 Grigg smoking gun letter-decided not to produce it, then or ever. And later, they argued that they had acted properly because they had had no obligation to produce it. (See if you can guess the Fisons-Bogle rationale; then look under the "Rationales for Concealment" subhead below to see if you were right.)

Cunningham, the pediatrician's lawyer, says (as did Jennifer Pollock's lawyers) that Fisons and Bogle misled him into believing that there were no documents responsive to his request.

"I expected that I would get an honest answer to an honest question," he recalls. But he did not get the 1981 Grigg letter until March 15, 1990-some 40 months after his request, and three years after Bogle got the letter-when the anonymous whistle-blower sent it to Cunningham via U.S. mail. By that time, Bogle and Fisons had parried many more discovery requests, and Dr. Klicpera had settled the brain-damaged child's malpractice suit for what amounted (after various contingencies) to a \$500,000 payment by his insurer.

The leak of the 1981 Grigg letter prompted the court-appointed special master in charge of discovery in the case, Peter Byrnes, to demand on March 28, 1990, that Bogle and Fisons stop playing games and hand over-the next day-any other theophylline-related documents of which they had copies at hand. (Byrnes, a former Bogle & Gates partner, was chosen with Cunningham's assent.)

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Byrnes said that Fisons's "nonresponse" to Cunningham's request was "troubling," but that "the plaintiff was not without fault" in failing to clarify the response. He denied a motion for discovery sanctions against Bogle and Fisons.

But, the special master said to the Bogle lawyers in a telephone conference, "my hunch is that you have already pulled them out... and they've already been assembled somewhere."

His hunch was right. Bogle lawyers had copies of the two smoking guns and other theophylline-related documents in Seattle.

SMOKING GUN NO. 2

A second document, produced at the same time, was a July 1985 memo from the same Cedric Grigg to a Fisons vice-president, which obliterated whatever remained of Fisons's failure-to-warn defense.

The memo began: "An alarming trend seems to be surfacing in the medical literature and as a manufacturer of theophylline

products we need to be aware of it...[There has been] a dramatic increase in reports of serious toxicity to theophylline in 1985 medical journals."

The memo went on to state that many doctors who prescribe theophylline prod- promotional letters as " 'Dear Doctor' letters" in internal communications.

"DUCKING AND DODGING"

Bogle's 14 experts convinced Judge French of the legitimacy of the Bogle-Fisons rationales. And, during the January 1991 oral argument in the trial court on the discovery abuse issue, William Helsell, counsel for Fisons and Bogle, made a virtue of such concealment by asserting that it was required by principles of legal ethics:

"All experienced trial lawyers do some ducking and dodging in connection with discovery. And why do they do that? We do it because we have a duty to our client...within the bounds of honesty, to not give the opposition one piece of paper that they don't clearly and specifically ask for." Of course, in this case Bogle's adversaries *did* clearly and specifically ask for the 1981 smoking gun document, and arguably the 1985 document as well-or at least their requests would be read that way by anyone whose comprehension of English had not been warped by years of exposure to the bizarre hermeneutics of discovery practice.

You can judge from the excerpts in the box below whether Bogle lawyers engaged only in permissible "ducking and dodging"-or whether their statements were, in Saltzburg's words, "deliberately or recklessly false and intended to deceive."

THE SUPREME COURT RULES

The Washington Supreme Court would have no part of Bogle's

arguments on the discovery issues, however. In its September 16 decision, the court upheld the \$1.1 million award to Dr. Klicpera for injury to reputation as well as the fee award, though reversing the pain and suffering award. More significantly, it also reversed, as an abuse of discretion, Judge French's refusal to award sanctions under the state's civil rule regarding discovery abuse, which the supreme court was construing for the first time.

"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." Nor had any party ever suggested that that was what Fisons meant when it undertook to produce only responsive documents "regarding Somophyllin Oral Liquid," the court held.

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 discover 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."

Chief Justice James Andersen's opinion also stressed that "a spirit of cooperation and forthrightness during the discover process is necessary for the proper functioning of modern trials." He said that "conduct is to be measured against the spiructs "may not be aware of this alarming increase in adverse reactions such as seizures, permanent brain damage, and deaths," and that the standard dosage level endorsed by (among others) Fisons was "a significant 'mistake.'" Grigg concluded: "This 'epidemic' of theophylline toxicity [would justify a] corporate decision to cease promotional activities with our theophylline line of products."

This memo, and a number of other documents containing dire warnings by Grigg about theophylline, would (as the state supreme court held) have come to light much earlier if Bogle and Fisons had responded candidly to any one of several discovery requests made by the plaintiffs.

Ultimately, Fisons bought its way out of the lawsuit by the injured child and her family for a whopping \$6.9 million in April 1990, less than a month after it had to cough up the smoking gun documents. This amount set a local record. It also constituted an admission by Fisons and Bogle of the devastating impact that the previously withheld documents would have had at trial.

But Dr. Klicpera, furious at the cover-up of such vital evidence, pressed on with his cross-claim, seeking sanctions

for discovery abuse and asserting that he would not have agreed to his own settlement with the injured child's family had he known of the smoking gun documents.

In July 1990, after a monthlong trial, a jury decided for the doctor on most of his failure-to-warn claims. The jury displayed its disgust with Fisons and Bogle by awarding Dr. Klicpera-whose evidence of actual damages was pretty thin, and whom the jury found to be 3.3 percent contributorily negligent-a generous \$3.3 million. This included \$1.1 million for injury to his professional reputation and \$2.1 million for pain and suffering. (Punitive damages are not recoverable in the state.)

Judge French compounded the blow by hitting Fisons with a \$450,000 attorneys' fees award to Dr. Klicpera, although he rejected the doctor's discovery abuse motion. It was this case that landed before the state supreme court and prompted its decision against Bogle and its client.

RATIONALES FOR CONCEALMENT

In defending against these claims, Fisons and Bogle & Gates insisted that their nondisclosure of the smoking gun documents had been proper.

Their rationale as to the June 1981 smoking gun letter-which was indisputably covered by Cunningham's October 1986 request for production-was that Fisons's inclusion of the limiting phrase "regarding Somophyllin Oral Liquid" in its November 1986 response had *implicitly* served notice on Cunningham that Fisons objected to producing documents responsive to his request, no matter how relevant, unless they were kept in its "Somophyllin Oral Liquid files."

Fisons and Bogle also seemed to interpret "regarding Somophyllin Oral Liquid" as excluding any documents (wherever filed) regarding the drug's primary ingredient

unless the brand name was cited. All copies of the two smoking guns were (Fisons has claimed, without contradiction so far) in the files for one of its other drugs, Intal, and those documents did not mention Somophyllin Oral Liquid by name.

Bogle and Fisons also claimed that they had served notice to the same effect on all parties by making a general objection from the outset of discovery to "all discovery requests regarding Fisons products other than Somophyllin Oral Liquid," and they asserted that Jennifer Pollock's counsel had similarly limited the scope of discovery in their requests by defining "the product" as Somophyllin Oral Liquid.

Bogle managing partner Richard Wallis stresses in written responses to questions for this story: "This limitation on the scope of discovery was first enunciated by our attorneys [in November 1986] *before* they learned of the existence of any of the Intal [smoking gun] documents...When we learned [in 1987] of the existence of the various Intal documents, the issue then became whether we were under an affirmative obligation to take the initiative and expand the existing product scope of discovery to include the Intal files. ...We concluded in good faith that we did not have such an affirmative obligation under the discovery rules, and in view of our obligation to represent our client."

But the devious thing about Bogle's conduct was not its November 1986 insertion of the phrase "regarding Somophyllin Oral Liquid" into its response to a request for production; it was Bogle's unilateral and secret-and strained-*interpretation* of that phrase as a license to withhold documents highly relevant to the safety of Somophyllin Oral Liquid if they happened to be found in files other than those designated by Fisons as "Somophyllin Oral Liquid files." With this surreptitious, self-serving semantic gambit, Bogle and its client withheld the crucial documents while leading their adversaries to believe no such documents were withheld.

Another document request, from the injured child's lawyers, seeking "any warning letters including 'Dear Doctor' letters or warning correspondence to the medical professions regarding the use of the drug Somophyllin Oral Liquid" also seems clearly to cover the June 1981 smoking gun letter, the supreme court stressed. In fact, Bogle later assured opposing counsel and the court that it had produced any relevant "Dear Doctor" letters."

To explain away this particular whopper, after the leak of the June 1981 letter, Bogle supplemented its twisted interpretation of "regarding Somophyllin Oral Liquid" with another, even more astonishing contention: It argued that the June 1981 letter-which begins "Dear Doctor" and warns of "life-threatening theophylline toxicity"-was not a "Dear Doctor" letter! How so? Because, Bogle has contended, this is a "term of art referring to a warning letter mailed *at the FDA's request* to all physicians in the United States." Therefore, Bogle suggests, its assurances that any relevant "Dear Doctor" letters had been disclosed, and that there were no such letters, were true.

On its face this is an excessively narrow and legalistic gloss on the phrase. Moreover, Fisons's officials had in fact referred to the 1981 Grigg letter and similar it and purpose of the rules, not against the standard of practice of the local bar... Misconduct, once tolerated, will breed more misconduct, and those who might seek relief against abuse will instead resort to it in self-defense."

The supreme court remanded the case to Judge French to determine the amount of sanctions and who should pay, with instructions to assess an amount "severe enough to deter these attorneys and others from participating in this kind of conduct in the future."

On remand, Bogle strenuously opposed demands by Dr. Klicpera's counsel for a public evidentiary hearing at which

Bogle partner Guy Michelson, other Bogle lawyers, and Fisons officials could be cross-examined about their conduct and about such questions as when various people at Fisons and Bogle had learned of the smoking gun documents and how much Bogle had been paid. Bogle sought to preempt the need for any such hearing by filing an affidavit in which Michelson said he had advised Fisons not to disclose the 1981 and 1985 smoking gun documents, of which he admitted-for the first time-he had known since (respectively) March and November 1987.

BOOLE AND FISONS SETTLE

Finally, in late January, Bogle and Fisons bought their way out of a public hearing by agreeing to pay \$325,000 in discovery abuse sanctions to Dr. Klicpera's insurer, and to state publicly that Bogle admitted that it had violated the rules, 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." Managing partner Wallis says the firm "immediately" circulated copies of the decision "to all of our attorneys who litigate in any forum," and followed up with mandatory training sessions where four partners discussed the legal and practical implications for discovery. The firm still suggests to reporters and others, however, as it has all along, that the supreme court had changed the discovery rules on it in the middle of the game. The state bar gives a similar rationale for its decision to do nothing about the case.

So Fisons has already paid out more than \$10 million-\$6.9 million to the Pollocks, \$1.5 million to Dr. Klicpera, its share of the \$325,000 in discovery abuse sanctions to his insurance company, and fees rumored to exceed \$2 million to Bogle & Gates and Helsell-for its handling of a lawsuit that Fisons could have settled for \$1.5 million (according to lawyers close to the case), had it conducted a responsible defense from the start.

Hardball litigation-for which Bogle & Gates is known in the Seattle legal community-doesn't always pay. But often it does. As the doctor's lawyer, Saltzburg, says of Fisons and Bogle & Gates: "They almost got away with it." And they would have if not for the anonymous whistle-blower who mailed the first Grigg memo to Cunningham.

And even though they didn't get away with it this time, the sanctions award apparently forced Bogle to disgorge only a small fraction of its fees from Fisons. Michelson and Baumgardner are still in good standing at the firm.

A LEGAL CULTURE OF DECEIT

It would be easy to dismiss this sad story as simply one episode of rogue lawyering by a single big law firm and its client. But it's more than that, judging by the parade of leading lights that stepped up to defend Bogle. In the view of Bogle's 14 distinguished litigation experts (and of Judge French), the kind of ducking and dodging that took place in this case is a routine aspect of the discovery process, and is permitted and (some say) even required by the rules of professional ethics.

Examples:

- Roy Mocerri of Seattle's Reed Mc-Clure, a leader in the state bar association, swore: "Most of the bar of this state would be subject to sanctions at one time or another" if Fisons and Bogle were sanctionable for their "nonresponsive answer" to Cunningham's request for theophylline documents.

- David Boerner, a legal ethics professor at the University of Puget Sound Law School, wrote: "The 'practitioners' see discovery as a part of, not an exception to, the adversary system...Tendentious, narrow, and literal positions with regard to discovery are, in my opinion, both typical and expected in the civil discovery process."

- Jerry McNaul, head of the litigation department at Seattle's

Culp, Guterson & Grader, who often represents plaintiffs, said that Fisons's responses to discovery requests were "typical of those that I routinely find defendants making in major litigation."

•Yale's Geoffrey Hazard said that on the basis of his limited review of the case "it would be unreasonable to expect Fisons to review non-Somophyllin Oral Liquid files in responding to [Cunningham's] request [for theophylline documents]," and that "I do not find evidence of discovery abuse or unethical conduct by Fisons or its counsel." Hazard added: "An award of sanctions is reserved for clear abuses of the discovery process where reasonable minds cannot differ on the issue. In responding to discovery requests, the rules do not require the responding party to be generous or to volunteer information that may be helpful to the other side."

CONDONING INJUSTICE

"What surprised me about the case," says Dr. Klicpera's lawyer, Joel Cunningham "is that they were able to get highly respected lawyers to sign declarations saying the conduct was all right....I saw people whom I highly respect say, 'Hey we do this all the time.' I doubted myself; little bit through this. I thought, 'Well maybe I'm naive. Maybe I've been unfair to these guys.' But I would come back to thinking, 'This just can't be the way of practice law, and if it is, it's just totally wrong, and it's the reason we spend our lives in court arguing over discovery.'"

The conduct that these experts can do after describing it in highly euphemistic terms-is not just a lawyers' game. It causes real injustice, by denying essential evidence to wronged parties like the Pollocks and Dr. Klicpera. The discovery process, and indeed the legal process fail in their most basic functions when they fail to unearth such highly relevant documents, and thus allow the truth to be concealed, denied, and perverted.

"Both as a lawyer and a law teacher I had a special interest in this case," Stephen Saltzburg recalls. "As a law teacher, I was almost sick to my stomach every time I thought about the possibility that law schools would have to add to their skills training programs courses in how to mislead judges and other lawyers and how to make misleading statements rather than true ones...."

"I could not imagine having to criticize a student doing an exercise for being can did, honest, and forthcoming, and to demonstrate how to be misleading, false, and deceptive. Were I to lose, I feared I would be required to do just such a demonstration, at least if my students were going to be able to fight for their clients the way other lawyers fought for theirs."

It is no answer-or, at least, no defense of the system-to say, with Bogle and its experts, that the process failed here only because the lawyers for Dr. Klicpera and the Pollocks did not do their jobs.

Assume, for the sake of argument, the validity of Bogle's claim that Joel Cunningham, Paul Luvera, and their colleagues should have framed their discovery requests more artfully, or should have sensed that Fisons was hiding something behind its sly ambiguities. (In fact, most of their key discovery requests were simple, precise, lucid, and narrowly tailored.) So what? Why should we tolerate a discovery system that works well only when the lawyers invoking it display uncommon brilliance in framing just the right questions, uncommon cynicism about their adversaries' candor, and an uncommon willingness to go to court to remove any possible ambiguity in an adversary's response?

"Their contention, as far as I can gather, is that I was naive or lazy," says Joel Cunningham, "and if that's true, I claim the right to be naive, if that means you expect people to tell the truth."

In fact, Fisons-Bogle counsel William Helsell described Cunningham as "a rising star in our profession" in his January 1991 argument. Helsell also called the plaintiffs attorneys "as good lawyers as we have in western Washington."

So, by Helsell's account, this was a case in which both sides had first-rate lawyers; in which massive discovery proceeded over more than three years; and in which the corporate defendant nonetheless would have managed to keep the smoking gun documents hidden forever but for the random act of a whistle-blower. How could that be? Helsell's explanation, and that of Bogle's other experts, is that some of the best lawyers in the state somehow "didn't do their homework."

Something is very wrong when even first-rate lawyers cannot contrive discovery requests exquisite enough to prompt their adversaries to cough up highly relevant documents that the defense lawyers have in hand. This is the central lesson of the Fisons case, regardless of whether you blame the system's failure on unethical (but apparently commonplace) conduct by one side or on insufficient vigilance by the other side.

There is also something egregiously wasteful about a system in which lawyers seeking discovery must assume, if they want to protect their clients, that their adversaries will resort to evasion, obfuscation, cleverly concocted ambiguities, and other trickery to avoid disclosing damaging documents. For if that is the assumption, those seeking discovery must do what Bogle's experts say Joel Cunningham should have done: take deposition after deposition, serve interrogatory after interrogatory, and file motion after motion, in a costly war of attrition to smoke out evidence that should be obtainable through a few straightforward questions to opposing counsel. Finally, it is perverse for the legal system to create such strong incentives to come up with rationalizations for hiding evidence.

FIXING THE SYSTEM

The root cause of discovery abuse, and of the waste that it entails, is the persistence of raw adversary principles and instincts in the context of a discovery system in which lawyers are supposed to exchange all relevant, nonprivileged information in "a spirit of cooperation and forthrightness," in the words of Chief Justice Andersen. And the solution is to reform the discovery process by making crystal clear the obligations of litigants and counsel to hand over the most relevant information to their opponent: without playing endless games over whether just the right question has been asked.

A modest step down this road has now been taken by the federal judiciary, with the adoption (effective last December 1) of discovery reforms including a requirement (at the option of the various U. S district courts) that parties identify or produce clearly relevant documents (and certain other information) to one another at the outset of a case.

Yet these new federal discovery rules have inspired such a remarkable storm of opposition, from such a broad array of litigators—the plaintiffs trial bar, the corporate defense bar, and a raft of other groups—that Congress almost vetoed them before they took effect, and might still, conceivably, repeal them.

What explains the breadth of this opposition? Self-interest, for one thing: The waste associated with discovery as we know it is measured in billable hours, and any reform that cuts down on such waste will cost law firms a pile of money.

Money aside, many lawyers sincerely believe that the mandatory disclosure rule would put them at cross-purposes with their clients—for example, by forcing them to volunteer damaging evidence even if it is relevant only under theories of liability that might never have occurred to opposing counsel.

They also fear that turn-it-all-over obligation would deter lawyers from asking probing questions of their clients for fear of finding skeleton in closets that they would then be obliged to throw open to their adversaries.

Perhaps so. But what would be so bad about that? Why *shouldn't* we put lawyers at cross-purposes with clients who are seeking to conceal relevant evidence? Note that here we're talking about corporate clients seeking to avoid civil liability, not about individual criminal defendants squirming in the grip of the state. The rules should be designed to achieve higher purposes than ensuring the wealth and comfort of lawyers by helping them facilitate fraud.

And why shouldn't we require litigants to bring relevant evidence to light regardless of which side it helps? Sure, this might reduce the advantages that skilled, diligent lawyers have over sloppy, lazy lawyers. But litigation rules should be aimed at awarding victory to the party with the best case, not the one with the best lawyer.

The glory of the adversary system has been its power to illuminate the truth by harnessing the skills of zealous advocates for opposing parties to *dig out* relevant facts and to clarify which inferences judges and juries can reasonably derive from a full factual record. The shame of the adversary system has been its degeneration into a pretext for lawyers to hide facts, so as to pervert the truth. It's time for those who care about the system to make it clear that the duty of zealous advocacy neither requires nor permits lawyers to be cover-up artists.