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Fighting Discovery Abuse in Litigation

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Forensic accountants can serve a number of important roles in a legal dispute. In these roles, forensic accountants often provide 1) discovery assistance (e.g., knowing what specific information to request and identifying the appropriate individuals to depose or interview); 2) development of a detailed, straightforward analysis and report that communicates appropriate findings and conclusions; and 3) the delivery of effective testimony whether it be in deposition, arbitration, trial or other dispute resolution forums. Since discovery accounts for the majority of the cost of civil litigation (as much as 90 percent in complex cases),[1] the role that forensic accountants play in the discovery process is particularly significant.

Discovery is the formal process that litigants use to obtain information from opposing parties (Sinclair, 2008; Crumbley et.al., 2013). The discovery process, in theory, enables the parties to know before trial begins what evidence may be presented. This process minimizes surprises, lowers the transaction costs of dispute resolution, increases the percentage of settled cases, improves the accuracy of trials and filters out frivolous disputes (Kim and Ryu, 2002).

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[1] Memorandum from Paul Niemeyer, Chair, Advisory Comm. on Civil Rules to Hon. Anthony J. Scirica, Chair, Comm. on Rules of Practice and Procedure (May 11, 1999), 192 F.R.D. 340, 357 (2000).

How the course of discovery proceeds, in practice, is a decision made by the parties to the lawsuit.[2]

Over the years, discovery has been transformed from a tool to gather facts into a tactical weapon. For many attorneys, discovery evolved into the ultimate adversarial proceeding referred to by the legal community as "discovery abuse" (Flegal, 1982). The practice of discovery abuse manifests itself in two major ways: 1) excessive or improper use of discovery devices to harass, cause delay, or wear down an adversary by increased costs (Easterbrook, 1989; Epstein, 2007); and 2) "stonewalling" or opposing otherwise proper discovery requests for the purpose of frustrating the other party (Hare *et al*., 1995). As a result, abusive tactics increase the costs of litigation, contribute to the general dissatisfaction with the justice system, engender the criticism that judicial resources are misused and encourage unjust settlements (Flegal, 1982; Rennie, 2011).

Abusive tactics are fostered by the justice system itself. First, attorneys know that lawyers are given multiple opportunities to comply with discovery requests before judicial enforcement of discovery obligations is imposed by the court (Lee and Willging, 2010; Mehr, 2012). Second, the generally accepted law firm economic model provides an incentive to increase the costs of discovery as lawyers may use it as a way to increase the number of hours they bill to clients (Lee and Willging, 2010; Mehr, 2012). Since our legal system simply cannot remove discovery from the process, forensic accountants, lawyers, and judges must use tools at their disposal to enforce compliance with the rules, consistent with the spirit of discovery.

[2] See Fed. R. Civ. P. 26(f) (describing the mandatory conference opposing parties must have to decide the time table of discovery as well as the general issues that will be pursued).

The purpose of this article is to show how litigation support tools can be combined with standard discovery techniques to obtain critical evidence from an opposing party bent on discovery abuse. An enhanced understanding of these issues will place forensic accountants in a better position to assist attorneys in litigation. Moreover, the use of various litigation support tools will improve attorneys' chances of securing valuable evidence that they otherwise would not obtain.

We first discuss discovery devices and various methods that have been used to abuse the discovery process. We then offer a collaborative or team approach and provide tactics to fight discovery abuse.

What is Discovery?

The process of discovery begins with an initial meeting of the parties to the lawsuit (hereinafter referred to as "parties") during which they are required to make or arrange for mandatory disclosures and develop a proposed discovery plan. The timing for discovery should be established. The judge uses the plan to implement the timeline so that discovery is completed by the agreed-upon date.[3] After the initial meeting, mandatory initial disclosures occur and must be made "based upon the information then reasonably available …."[4] A litigant is not excused from making disclosures "because it has not yet fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures."[5]

[3] Fed. R. Civ. P. 26(f).
[4] Fed. R. Civ. P. 26(a)(1)(E).
[5] Fed. R. Civ. P. 26(a)(1)(E).

The Federal Rules of Civil Procedure allow a litigant to pursue information from the other party by, for example, depositions, interrogatories, document production requests, requests for physical or mental examination, and requests for admission. Litigants must even provide their opponents with information that may not be admissible at trial if the information could reasonably lead to the discovery of admissible evidence.[6]

Depositions require the opposing party or third-party witness to be placed under oath before trial and answer questions posed by attorneys from both sides of the case. Anyone who may have knowledge or expertise pertinent to the case may be deposed, including expert witnesses such as forensic accountants. The Federal Rules of Civil Procedure allow each party up to ten depositions. No limit exists on the number of questions that may be asked, but there is a time limit of seven hours (per day). The three main reasons to take depositions are: 1) to lock witnesses into their testimony; 2) to become aware of information possessed by the other side; and 3) to ascertain how a witness will appear and conduct himself or herself before a judge or jury.

Interrogatories are a set of written questions directed to the other party to the lawsuit. The other party must submit written answers. Interrogatories may only be directed to a party in the case. Questions can either be broad ("What happened on April 19, 2013?") or very specific ("Is it your stance that the defendant did not prepare his own tax return?") Each party is permitted to serve 25 interrogatories upon another party but must secure leave of court, i.e.,

[6] Some information is protected from discovery. Reasons why information may be undiscoverable include some legal privilege (e.g., attorney-client privilege)(Fed. R. Civ. P. 26(b)(1)), the work product rule (trial preparation materials)(Fed. R. Civ. P. 26(b)(3)), non-testifying experts (Fed. R. Civ. P. 26(b)(4)(D)), and court-imposed limits for good cause (Fed. R. Civ. P. 26(b)(2) and 26(c)).

permission by the court, or consent of the other party to serve a larger number.[7] Sometimes responses to interrogatories are verified by inclusion in an affidavit.

The Federal Rules of Civil Procedure provide that when interrogatories seek disclosure of information in corporate records, the party upon whom the request is served can designate the records that contain the answers. Objections to questions in interrogatories can be raised, and a party need not answer until a court determines their validity.

A request for the production of documents is a request made to a party in a lawsuit to turn over copies of any evidence in the form of paper documents, electronically stored information (ESI), or other items. A request for the production of documents usually contains separately-numbered requests. The request specifies a certain class or type of document, but often is broadly worded to cover as many documents as possible. Examples include copies of bank statements, insurance policies, or other financial or business documents related to the case. A request "must describe with reasonable particularity each item … to be inspected."[8] The request also must "specify a reasonable time, place, and manner for the inspection."[9] Requests for the production of documents are governed by Federal Rule of Civil Procedure 34.

A request for admissions is a list of questions, each of which is stated as a declaration which the responding party must admit, deny, or state the reason he or she cannot admit or deny. Instead of responding to each question, a responding party also may object to the request for admission itself. Requests are limited to facts, the application of law to facts, opinions about either the facts or the application of law to the facts, and the genuineness of any described

[7] Fed. R. Civ. P. 33.
[8] Fed. R. Civ. P. 34(b)(1)(A).
[9] Fed. R. Civ. P. 34(b)(1)(B).

documents.[10] No limit exists on the number of requests for admission except for limits contained in local court rules.

Discovery Abuse

One persistent criticism of the Federal Rules of Civil Procedure is that discovery provisions do not quell the abusive discovery practices of litigants. Discovery abuse or predatory discovery[11] can take various forms. The first is excessive discovery such as the use by the requesting party of an avalanche of interrogatories, deposition notices, and document requests. The responding party may try to bury opponents with thousands of pages of documents.[12] These practices are to harass, cause delay, or wear down the adversary by forcing it to incur costs (Rennie, 2011). The second category is stonewalling or opposing proper discovery requests to frustrate the other party. A significant number of litigants refuse to comply with discovery requests or court orders or only partially comply with discovery requests or court orders.[13] A third type of predatory discovery is obnoxious behavior by attorneys. We discuss the various categories of discovery abuse in the context of interrogatories, depositions, and document requests.

[10] Fed. R. Civ. P. 36(a)(1).
[11] This term originates from *Marrese v. Amer. Academy of Orthopedic Surgeons*, 726 F. 2d 1150, 1162 (7th Cir. 1984). Predatory discovery is "sought not to gather evidence that will help the party seeking discovery to prevail on the merits of his case but to coerce his opposition to settle regardless of the merits ….".
[12] Defendants can exploit the broad relevance standard under Federal Rule of Civil Procedure 26(b) by inundating plaintiffs with information. This exploitation is particularly likely to be acute in situations in which plaintiffs need discovery the most because they do not know enough about the defendant's internal workings or documents to draft narrower requests. Many plaintiffs may simply buckle under the sheer volume of information and the costs of sifting through it (Glover, 2012).
[13] Some of the more egregious federal cases in which a party failed to comply with a court order compelling discovery include: *Wanderer v. Johnston*, 910 F. 2d 652 (9th Cir. 1990) (defendants refused to produce documents even though nine court orders had been issued to do so-the Ninth Circuit Court of Appeals affirmed entry of a default judgment of $25 million in plaintiffs' favor) and *John B. Hull, Inc. v. Waterbury Petroleum Prod.*, 845 F. 2d 1172, 1177 (2d Cir. 1988) (upholding sanction of dismissal of third-party plaintiff's complaint and award of attorney's fees and costs where the third party disregarded court orders).

Interrogatories

Interrogatories represent a comparatively inexpensive and efficient means of obtaining information. Interrogatory practice requires litigants to conduct research and investigate specific matters; as such, interrogatories can yield more thorough and relevant information. Despite these advantages, predatory discovery through interrogatories may undermine proper litigation practice.

Interrogatories are the most abused discovery device. Attorneys ask questions drawn from a stock reserve and those questions return only objections, vague answers, and little information (Luria and Clubby, 2005). The problem with interrogatories is that lawyers believe, and the system reinforces, that the exchange and answer of interrogatories is a game (Luria and Clubby, 2005).

Some attorneys have exploited judicial conflict concerning Rule 33(a) which states that "any party may serve upon any other party written interrogatories, not exceeding 25 in number …." Some courts and legal commentators have interpreted Rule 33(a) to apply to each and every party of a civil action.[14] Hence, if A, B, and C filed a civil action against D and E, then A, B, and C can each serve D and E with 25 interrogatories (for a total of 150 interrogatories) (Yoo, 2008). The same arrangement would apply to any interrogatories filed by D and E upon A, B, and C (Yoo, 2008). Also, this broad interpretation enables parties on the same side of a dispute to file interrogatories upon one another (Yoo, 2008). Rule 33(a) defines "party" as *any* named actor in a civil action. According to Yoo (2008), the broad interpretation accorded to the word "any" has led to gross inefficiencies and has encouraged abuse.

[14] St. Paul Fire and Marine Insurance Co. v. Birch, Stewart, Kolasch & Birch, LLP, 217 F.R.D. 288 (D. Mass. 2003); James Moore. *7 Moore's Federal Practice §33.30[1].* Mathew Bender, 3rd ed., 1997 and Supp. 2004.

An alternate interpretation of Rule 33(a) is that the word "party" may refer to an entire side of a dispute collectively rather than to the individual actors that are members of each side.[15] In the example above, plaintiffs A, B, and C would be able collectively to file no more than 25 interrogatories upon D and E and vice-versa (Yoo, 2008).

The choice of interpretation of Rule 33(a) has implications for predatory discovery. The broad construction permits parties to file larger numbers of interrogatories and often more than is required for adequate discovery. This practice is particularly true for "big ticket cases where the stakes motivate parties to litigate by hook or crook" (Yoo, 2008). Interrogatory abuse also can affect smaller cases where well-heeled parties can protract discovery beyond the means of less wealthy parties (Yoo, 2008).

A second technique employed by litigants is the outright refusal to answer interrogatories (or take excessive time to answer). This conduct can buy a defendant a substantial amount of time and wear down the plaintiff as the latter seeks court sanctions. In *National Hockey League v. Metropolitan Hockey Club, Inc.,*[16] the plaintiffs failed to answer various interrogatories submitted by the defendants, continually flouting the trial court's discovery orders and timelines. The federal district court dismissed the case with prejudice (i.e., with finality). On appeal, the U.S. Supreme Court upheld the dismissal. An example in which the plaintiffs' case was

[15] Zito v. Leasecomm Corp., 233 F.R.D. 395, 399 (S.D.N.Y. 2006) (a civil RICO case brought by more than 200 individual plaintiffs as the result of an alleged fraudulent e-commerce leasing scheme); Charles Wright, Arthur Miller and Richard Marcus. *8A Federal Practice and Procedure §2168.1,* West 2d ed. 1994 and Supp. 2007.
[16] 427 U.S. 639 (1976).

dismissed for taking too long to answer interrogatories is *Govas and Yiannias v. Chalmers and Electronic, Missiles & Communications, Inc.*[17]

A third abuse occurs when counsel chooses to craft uninformative or inadequate responses to obscure important information. In other cases, a lawyer will intentionally fail to respond properly, objecting as often as possible. Appendix A contains a list of improper and proper objections. Some objections may be based on attorney-client privilege or the work product rule. Moreover, the attorney may not identify the facts, events, or documents to which the privilege attaches and does not provide evidence to support the privilege claim.

A fourth abuse is that the responding party makes no effort to answer the interrogatory questions as asked. A responding party answers a question that was not asked and then claims it has provided a responsive answer. This abusive technique is quite time-consuming and determining whether the response provided was meant to be evasive can be difficult for counsel. The court also may have a hard time in determining whether a response is evasive, especially cases that are industry specific or involve some type of product or service liability.

A fifth abuse centers on the fact that some consider interrogatories well-suited for discovering information about technical or statistical data (Rennie, 2011). Technical and statistical interrogatories require opposing counsel to ask the client to prepare the answer, as it is probable that the lawyer will not possess the necessary information (Luria and Clubby, 2005). A responding party may evade the interrogatory by using Rule 33(d), which allows it to avoid answering when the answer may be derived from reviewing business records. The requesting

[17] 965 F. 2d 298 (7th Cir. 1992). In that case, the plaintiffs, Govas and Yiannias, filed a suit alleging federal securities law fraud, common law fraud, and RICO violations. After the plaintiffs refused to answer interrogatories for almost two years, defendants moved to have the case dismissed. The federal district court and appellate court upheld dismissal.

party would then have to make a motion to compel a response to the interrogatory.[18] If the burden of summarizing the records is the same for both parties, the requesting party will lose the motion.

Depositions

Depositions are an effective discovery device that is used to collect information that has not been screened by the opposing attorney. Witness deposition testimony can highlight weaknesses in an opponent's case, establish a basis to impeach a witness' trial testimony, preserve a witness' knowledge in the event of unavailability at trial, and permit evaluation of a deponent as a witness. Depositions have, however, been used as a predatory discovery practice.

One type of discovery abuse is vulgar and abusive language and physical threats. In *Saldana v. Kmart Corp.,*[19] the plaintiff's attorney, Lee Rohn, used the word "f*ck" numerous times, including during depositions. In one deposition, Rohn told opposing counsel, "I will put my remarks on the record as I'm entitled. I do not need to be lectured by you sir. Don't f*ck with me." Sanctions were imposed by the district court, but they were overturned by a federal appellate court. In *Carroll v. The Jaques Admiralty Law Firm,*[20] the Fifth Circuit upheld sanctions against attorney Jaques for profane language and threats made to opposing counsel during a videotaped deposition. Sanctions also may be imposed against a lawyer who does not act to prevent a deponent from using abusive language. In *GMAC Bank v. HTFC Corp.,*[21] a

[18] In *Derson Group, Ltd. v. Right Management Consultants, Inc.,* 119 F.R.D. 396 (N.D. Ill. 1988), plaintiff Derson Group did not answer two sets of interrogatories but instead made reference to 33,000 documents previously produced in reliance on Rule 33(d). Since Derson Group delayed and provided no clue as to where to find requested information, a federal district court granted a motion to compel answers to interrogatories.
[19] 84 F. Supp. 2d 629 (D.V.I. 1999), *rev'd. in part,* 260 F. 3d 228 (3rd Cir. 2001).
[20] 110 F. 3d 290 (5th Cir. 1997).
[21] 248 F.R.D. 182 (E.D. Pa. 1993).

breach of contract case, the owner of HTFC said the word "f*ck" and variants thereof approximately 73 times during a two-day deposition.

Physical threats are sometimes employed to intimidate a deponent and opposing counsel. In *Office of Disciplinary Counsel v. Levin,*[22] an attorney was suspended indefinitely from the practice of law for making physical threats during a deposition. Counsel threatened to take a questioner's mustache off his face, give the questioner the beating of his life, and slap him across the face and break his head.

A second category of predatory deposition abuse involves instructions not to answer and/or improper objections. Rule 30(c)(2) states that one "may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion" to terminate or limit. In *Morales v. Zondo, Inc.,*[23] a gender discrimination case, counsel for employer Zondo instructed the defendant not to answer several questions during a deposition. Sanctions were imposed against defendant's counsel for this and other misconduct. One federal court has ruled that instructions not to answer and which do not conform to the Federal Rules of Civil Procedure, are "presumptively improper."[24] A difficult lawyer also may repeatedly make objections during a deposition. Appendix A outlines proper and improper objections during a deposition. Objections should be limited to the form of a question or the deponent's nonresponsiveness. Objections to competency, relevancy, or materiality are not waived and are preserved for trial (Alford *et al*., 2010). An objection to an

[22] 517 N.E. 2d 892 (Ohio 1998).
[23] 204 F.R.D. 50 (S.D.N.Y. 2001).
[24] Boyd v. Univ. Md. Med. Sys., 173 F.R.D. 143 (D. Md. 1997).

error or irregularity at a deposition is waived if it relates to the form of a question or answer or other matter that might have been corrected at the time.[25]

A third type of predatory practice in depositions involves witness coaching, interrupting a witness, or private consultations. A technique followed by some attorneys is to make an extended speaking objection that suggests an answer to a pending question (a form of witness coaching). Rule 30 (c)(2) states that an objection "must be stated concisely in a nonargumentative and nonsuggestive manner." In *VanPilsum v. Iowa State University,*[26] plaintiff Joyce VanPilsum sued Iowa State for alleged age discrimination. Her counsel, attorney Barrett, repeatedly restated the opposing attorney's objections (making them thinly veiled instructions to the witness), objected to the form of opposing counsel's questions, and engaged in *ad hominem* attacks. In a transcript of 4025 lines, only 70 percent contained questions by opposing counsel and the deponent. The deposition style of attorney Barrett has become known as "Rambo litigation." Attorney Barrett was sanctioned and another deposition in front of a discovery master was scheduled.

Another Rambo tactic is to hold private conferences with the client-deponent during the deposition. In *Hall v. Clifton Precision,*[27] plaintiff's counsel conferred privately with the deponent on two occasions over the objection of opposing counsel. The federal district court held that not only are private conferences barred but so are coffee breaks and recesses to discuss answers to deposition questions.

[25] Fed. Rule Civ. P. 32(d)(3)(B).
[26] 152 F.R.D. 179 (S.D. Iowa 1993).
[27] 150 F.R.D. 525 (E.D. Pa. 1993).

Although somewhat rare, one last category of deposition discovery abuse is physical violence. In *Brewer v. Town of W. Hartford,*[28] lawyer James Brewer deposed Officer Jack Casey of the West Hartford police concerning the suicide of a police officer. Brewer asked various questions that the opposing lawyer would not allow Casey to answer. In response, Brewer physically attacked Casey and his attorney. Brewer was disbarred and convicted of a misdemeanor.

Requests for Document Production and Inspections

In litigation, forensic accountants and the attorneys for whom they work depend to a large extent on documents and other data obtained from opposing counsel through the document production and/or inspection process. Unfortunately, one of the most contentious battlegrounds involves document or data production in response to requests under Rule 34.

One common discovery abuse is the use of overbroad document production requests in an attempt to cast a wide net to launch a litigation "fishing expedition." In *Regan-Touhy v. Walgreen Co.,*[29] Ms. Touhy sued Walgreen Co. alleging intentional infliction of emotional distress, breach of duty of confidentiality, invasion of privacy, and disclosure of confidential medical information. Document production requests included a request for log files or other documents capable of identifying which employees had access to her pharmacy account information, a request for all manuals concerning any computer system or program housing data about Ms. Touhy, a request for an employee's personnel file, a request for all e-mails from one employee's e-mail account and a request for all documents that relate in any way to Ms. Touhy.

[28] U.S. Dist. LEXIS 72734 (D. Conn. Sept. 28, 2007).
[29] 526 F. 3d 641 (10th Cir. 2008). The specific allegations of the plaintiff are that a former Walgreen's pharmacy technician, Kim Whitlock, disclosed the contents of Ms. Touhy's medical records (i.e., a case of genital herpes) to the plaintiff's ex-husband and others.

The Tenth Circuit Court of Appeals upheld a district court order that these requests were overly broad. A litigant has a duty to state discovery requests with "reasonable particularity."[30] A request for document production should be sufficiently definite to "apprise a person of ordinary intelligence what documents are required and to enable the court … to ascertain whether the requested documents have been produced."[31]

A second abuse involving document production requests is evasive or incomplete responses. These leave the requesting party unable to determine whether the responding party has agreed to produce all of the requested documents, when production will be made, how it will be made, and once made, whether it is complete (Girard and Espinosa, 2010). One evasive response is to indicate that initial document production may be supplemented if additional documents are found. This position may sound reasonable but in practice it is employed to deliberately withhold relevant records (Halperin, 1997). Another type of evasive response is to provide only a subset of the documents requested and to indicate a limitation to the response to the request by, for example, saying that there are no documents that exist with respect to the matter the request addresses when, in fact, there are documents that are related to the matter (Halperin, 1997).

The Federal Rules contain an express prohibition against evasive responses and provide mechanisms to shift fees for the cost of enforcing compliance. These rules are seldom enforced and, as a result, evasive discovery responses have become a routine tactic (Girard and Espinosa, 2010). Some of the reasons given for lack of enforcement of discovery sanctions include: 1) a distaste for becoming involved in discovery disputes that litigants should be able to resolve themselves; 2) a belief that litigants should seek sanctions against an adversary only when they

[30] Fed. Rule Civ. P. 34(b)(1)(A).
[31] Charles Wright, Arthur Miller and Richard Marcus. *8A Federal Practice and Procedure* §2211.

have been without fault in complying with discovery; and 3) a belief that the imposition of a sanction embarrasses or humiliates the attorney or party and should thus be resorted to only in extreme situations (Moss, 2009; Vairo, 1998). Other potential contributing factors include a lack of judicial resources, including time, and the lack of a uniform approach by the federal circuits in imposing sanctions (Girard and Espinosa, 2010; Golinsky, 1996).

A third abusive practice is the use of boilerplate objections to document requests. Parties routinely object to virtually every request on the same grounds, including broad relevancy objections, objections that requests are unduly burdensome, harassing or assuming facts not in evidence, privacy objections, and attorney-client and work product objections (Girard and Espinosa, 2010). A document production request may be met with a dozen or more objections, regardless of whether the responding party agrees to produce documents.[32] The requesting party cannot ascertain whether any documents are actually being withheld on the basis of any of the objections.

A fourth predatory practice is for the party who has been requested to produce documents to seek a protective order. The reasons sometimes offered in a request for protective order are that the information sought would reveal a trade secret and/or the request is oppressive, harassing and unduly burdensome. Protective orders that are granted assist defendants by delaying the release of various documents, keeping harmful information away from the opposing side, and requiring requesting attorneys to spend time negotiating complex provisions (Halperin, 1997).

A fifth abusive technique is a document dump. A responding party provides thousands and thousands of pages of poorly organized documents to the requesting party. Sometimes the

[32] In *Cason-Merenda v. Detroit Med. Ctr.,* 2008 U.S. Dist. LEXIS 94028 (E.D. Mich. Nov. 12, 2008), various defendants lodged numerous "general objections" to a specific document request. The court overruled the objections and ordered production of the requested documents.

responding party will bury relevant documents within huge stacks of irrelevant documents the other party never requested. Another technique is to fail to produce document indices that help the requesting party review the documents even though such indices exist (Halperin, 1997).

Tactics to Fight Predatory Discovery

Numerous tactics can be used to respond to predatory discovery practices. These responses include adopting a collaborative or team approach (i.e., working very closely with counsel), making a good record, insisting on a privilege log, seeking protective orders and the appointment of a special master, and seeking sanctions.

Adoption of a collaborative or team approach yields three major benefits to the discovery abuse victim. One benefit is that these tactics may help counsel obtain the evidence needed to win the case. A second benefit is that evidence of discovery abuse may be used as evidence of bad faith in cases involving punitive damages. Moreover, a litigant who obtains a ruling that the opposing party deliberately withheld documents may present that discovery misconduct ruling to the court as further evidence of bad faith (in seeking punitive damages). A third benefit is obtained by building a case of discovery abuse using a theory of a "discovery fraud scheme." If the opposing party is perpetrating a discovery "fraud" scheme, then evidence of the entire scheme must be exposed to use it against the other party at trial.

Using a Collaborative or Team Approach

The great Chinese warrior Sun Tzu said, "Know thy self, know thy enemy. Victorious warriors win first and then go to war, while defeated warriors go to war first and then seek to win." In that spirit, seizing the initiative by using a collaborative or teamapproach is the single most important step that can be taken by the attorney and forensic accountant. First, the forensic

accountant should meet with counsel, establish discovery objectives, and obtain all documents and other evidence already in the possession of the client. Some evidence, not in document form, may be gleaned through interviews of various persons. The forensic accountant skilled in interviewing and interrogation should prove invaluable to counsel. Completion of these first three steps permits the litigation team to decide how much and what type of additional evidence is needed to satisfy the discovery objectives. Also, the litigation team is now in a more informed position to prepare a work program. An initial step in the work program should entail collecting data on opposing counsel.

The forensic accountant, possibly with the guidance of counsel, should collect as much information as possible on the litigation work habits, style, and practices of opposing counsel. The cost of these services most likely would be paid by the client but could be charged at a lower rate than traditional litigation support services. Such knowledge can assist in speculating about the kind of discovery abuse, if any, to expect from the opposing side. The extent of this knowledge can range from the superficial to the in-depth. One means of compiling data is for the forensic accountant to observe opposing counsel performing direct and cross-examinations, lodging objections, and engaging in opening and closing arguments at trial to develop an understanding of his or her litigation techniques and practices. Another means of gaining knowledge is to talk with lawyers who have litigated against opposing counsel. A third means is to review trial court files for several cases handled by opposing counsel. Such an examination may reveal the types of motions opposing counsel favors. A litigation file review should also provide insights into opposing counsel's approach to discovery practice. Moreover, such a file review should focus on cases in which the opposing attorney has been sanctioned for

misconduct. Showing that opposing counsel has been previously sanctioned for the same type of misconduct that occurs in the current case is a powerful tool in combating discovery abuse.

If possible, answer such questions as what types of objections, if any, did counsel raise to various interrogatories? Did counsel file any motions for a protective order? Did counsel do a document dump or engage in other abusive discovery practices? Did counsel ever refuse to comply with a court order? These are just a few of the many questions that could be answered by investigating the opposing attorney.

Before commencing the discovery process, it may also be advisable to collect as much information as possible about the opposing litigant—individual, business (partnership or corporation), non-profit, government agency or other entity (e.g., trust). When a business is the opposing litigant, the litigation team should gain an understanding of the following areas:

1. the nature of the entity's business, industry, competition, market share, and major suppliers and customers;

2. the entity's capital and/or financing structure (including bank accounts maintained and how and for what purpose they are used, information about investment accounts, etc.) if the data is available without legal process;

3. the entity's organizational structure including parent, subsidiaries (domestic and foreign), joint ventures, etc.;

4. the entity's regulatory environment (publicly available documents such as Form 10-K can be excellent sources of information);

5. the flow of funds through the business;

6. nature of the decision-making process at the executive level;

7. production methods (if relevant);

8. purchasing methods, e.g., contract, bidding (if relevant);

9. employee compensation methods, e.g., salary, hourly, commission, etc. (if relevant);

10. accounting information system and internal controls and accounting records maintained;

a. the forensic accountant's understanding will focus on these and other questions:

- How is the type of transaction initiated and authorized? What processing steps are involved? Who performs these procedures?
- What records and documents are involved? How are documents filed and stored? How are they completed? If they are completed electronically, who are the individuals with access?

11. the identity of related parties, if any; and

12. the types and amounts of insurance coverage in the event that the subject litigation may involve the potential payment of damages (if liability is established).

A forensic accountant should identify the personnel who have influence over whether and how to respond to discovery requests and what type of discovery requests may be forthcoming. Knowledge of key personnel might help the forensic accountant identify potential witnesses and/or deponents.

Financial statement analysis should be undertaken to determine the financial condition of the opposing litigant—business entity or otherwise. Financial statement analysis would reveal whether the litigation opponent is in financial distress. The presence of financial distress may affect the pressures or motives of a litigant during the discovery process.

Adoption of a collaborative or team approach also entails using precise discovery requests. Use of an industry expert or forensic accountant is vital in preparing precise discovery requests, particularly when seeking financial documentation or data. Precise discovery requests reduce the legitimacy of the objection that the request is "unduly broad" and force the opposing side to offer precise or specific objections if the objections are to withstand judicial scrutiny. Moreover, precise discovery requests may have a higher likelihood of surviving a motion for a protective order from the opposing side than would requests that are not as precise.

A collaborative or team approach also entails quick responses to any delays, omissions, incomplete responses, etc. Some discovery abusers try to run the clock out (by waiting until the last minute to respond to interrogatories or requests for production) to force the other party to conduct depositions without adequate background information. Responding quickly is not often a simple matter. Attorneys may have heavy case loads and it may take considerable time to analyze responses to interrogatories and requests for production.

The litigation team may think of and treat discovery abuse as a fraud scheme. Discovery abuse, such as withholding documents, may, under certain circumstances, especially in combination with other misconduct, constitute "fraud on the court."[33] Arguably, a litigant and/or litigator who withholds documents during pretrial discovery may engage in other abusive

[33] A "fraud on the court" occurs where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense. Since corrupt intent knows no stylistic boundaries, fraud on the court can take many forms. *Aoude v. Mobil Oil Corporation,* 892 F. 2d 1115 (1st Cir. 1989); *Alexander v. Robertson,* 882 F. 2d 421 (9th Cir. 1989).Examples of withholding documents during pretrial discovery being part of a fraud on the court include: *Skywark v. Isaacson et al.,* 2000 U.S. Dist. LEXIS 1171 (S.D.N.Y. Feb. 8, 2000) (plaintiff's conduct included lies under oath, delays and through concealment by deliberate extraction of requested medical records evidence of malingering and a possible bribery attempt to inflate the value of a claim); *Penthouse Int'l. Ltd. v. Playboy,* 663 F. 2d 371 (2nd Cir. 1981) (plaintiff refused to produce certain records in violation of a court order and where false testimony, material misrepresentations by counsel and foot-dragging were used to prevent defendant from getting at relevant records).

conduct. Moreover, discovery abuse may be deemed "bad faith" by a court under certain circumstances.

Document or evidence withholding during discovery may take these forms:

1. Sanitized document or data production -- involves removal of data or facts detrimental to the party's case. This scheme leaves the perpetrator vulnerable to having to explain the absence of documents. Policy and procedure manuals may require inclusion of various types of documents not found in a file.

2. Intentionally incomplete production -- entails leaving out or omitting any record of key facts, meetings, emails, or phone calls between important players in the case[34]

3. Unbalanced production -- involves creating documents and/or data that favor the responding party's side of the case (e.g., denial of insurance coverage).

A common sense reaction to suspected withholding during discovery is a careful inspection of documents that are produced. First, the investigator can look for references to withheld documents. Many documents, e-mails, and other data cross-reference each other, permitting the accountant to construct an audit trail of documents. The use of diagrams and flowcharts illustrates the flow of documents and relations between them. Although the relationship between some documents is subtle, an experienced forensic accountant can often make the connection to a missing document.

Another part of deflecting discovery abuse is fashioning a framework from the outset in which predatory misconduct is discouraged and barriers to it are erected. An attorney should

[34] An example of an incomplete file and how its exposure can be used against the offending party is:
> Was a meeting held? Probably. Somebody picked up the phone, set a meeting, and nobody put their notes in the file. It was "of the record" so they could speak freely without fear of later cross-examination. The opposing attorney could have a field day with an intentionally incomplete file (Williams, 2001)

work with a forensic accountant and obtain the trial court's assistance in imposing restrictions on discovery. Since trial judges dislike monitoring discovery, a special master or discovery referee may be enlisted by the court (Shugrue, 1997). Such a master can hold regularly scheduled hearings to address ongoing discovery disputes as they occur. In addition, a litigant can request that the losers of motions involving discovery abuse pay costs and fees.

Making a Good Record

A second tactic in combating abusive discovery involves making a good record. Attorneys and forensic accountants should meticulously monitor deadlines and ask for extensions only when necessary. An attorney and forensic accountant should keep a spreadsheet of all discovery requests, motions, and the status of each request and motion. This tactic also requires the documentation of abuse by creating correspondence describing the other side's failure to follow the rules (Jenner, 2002). The pursuit of a "meet and confer" process establishes a litigant's reasonableness in the face of discovery abuse. This approach provides a court a middle ground to resolve a dispute (Shugrue, 1997).

Providing a Privilege Log

A third tactic is to insist that the opponent provide a "privilege log." This lists the documents the opposing litigant refuses to produce on the basis of a legally recognized privilege or work product doctrine under Rule 26(b)(5). The log must describe the nature of the documents or items not produced without revealing privileged or protected information but permitting other parties to ascertain whether the claim is legitimate.[35] Also, counsel may request an in-camera review of documents withheld due to a privilege claim. One abuse maneuver is to

[35] Leach v. Quality Health Servs., 162 F.R.D. 499 (E.D. Pa. 1995); In re Unisys Corp. Retiree Med. Benefits ERISA Litig., 1994 WL 6883 (E.D. Pa. Jan. 6, 1994).

insulate employees and attorneys from discovery by claiming that the shielded work is in anticipation of litigation (work product rule).

Protective Orders

A fourth step is to seek a protective order from the trial court. Given the abusive conduct that may occur in depositions (and especially if investigative work reveals that opposing counsel is a "Rambo litigator") obtaining a protective order that sets limits on the lengths of depositions and establishes payment obligations and other conditions for violations (Jenner, 2002) might be prudent. Some jurisdictions have local rules that place time limits (beyond those contained in the Federal Rules) on various forms of discovery. One common abusive maneuver is to ignore interrogatories, document production requests and requests for admission to force the other side to proceed to deposition without proper preparation. A protective order can overcome or shield against these predatory practices. Another favorite abuse maneuver is a document dump on the eve of a hearing on a motion to compel production. Keeping in mind that Rule 34(b)(2)(E) states that a responding party "must organize and label them to correspond to the categories in the request," and Rule 33(c) indicates that a "responding party has the duty to specify" the records from which answers to interrogatories may be derived, a protective order obtained beforehand may provide additional protections against such abuses.

Seeking Sanctions

The most potent tactic is to seek sanctions for predatory discovery. Federal courts have ample authority to impose sanctions under Federal Rule of Civil Procedure 37, including the following:

1. directing that matters embraced in a court order be taken as established for purposes of the lawsuit;

2. prohibiting the discovery abuser from supporting or opposing designated claims or defenses on introducing certain evidence;
3. striking pleadings in whole or in part;
4. staying further proceedings until a court order is obeyed;
5. dismissing the action in whole or in part;
6. rendering a default judgment against the abusing party;
7. treating as contempt of court the failure to obey a court order except the failure to submit to a physical or mental examination; and/or
8. ordering expenses to be paid by the misbehaving party.

Despite the existence of the authority to impose sanctions, many federal courts do not enforce the civil discovery rules in this way (Girard and Espinosa, 2010; Mehr, 2012). Moreover, many attorneys do not seek to enforce compliance with discovery rules and orders through sanctions (Girard and Espinosa, 2010). According to one recent study, discovery sanctions were sought in only about 3 percent of cases and of those filed, only 26 percent are granted in whole or in part (Institute for the Advancement of the American Legal System, 2009). Hence, it is essential to combine forensic accounting strategy and techniques with anti-abuse tactics to improve the discovery process in forensic accounting litigation.

Conclusion

Legal disputes offer opportunities for parties to an action to abuse provisions of the law, especially in the area of discovery. Forensic accountants are particularly qualified to work with attorneys to help reduce the harmful effects of attempts to abuse the discovery process. The best defense is to be aware of the techniques that abusers use to frustrate the system and to take proactive steps to lower the likelihood that such abuses, when attempted, are thwarted. These steps include approaching the legal action with a predetermined plan: gathering information about the practices of opposing counsel, collecting information about the opposing party, enlisting the aid of a special master or discovery referee, examining documents with skepticism, and documenting discovery abuse when encountered. In addition, the forensic accountant can assess the relevance of documents already in the possession of the client, determine the identity of documents needed as evidence, and examine documents received. The attorney can increase the chances that the discovery process works as the law intends by insisting that the opposing counsel provide a privilege log, seeking protective orders, and sanctions should discovery abuse occur. Taking these steps will increase the odds of resolving actions in a manner that is fair and impartial.

Appendix A

Improper Objections	**Proper Objections**
If you recall	Leading question
Do not guess	Ambiguous
The witness does not understand the question	Compound question
I do not understand the question	Argumentative
The item speaks for itself	Form of the question
Calls for a legal conclusion	
Calls for a narrative	
Asked and answered	
Assumes facts not in evidence	

Sources: Alford *et al.*(2010); *In re* Stratosphere Corp. Sec. Litig., 182 F.R.D. 614 (D. Nev. 1998).

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