STATE BAR LITIGATION SECTION REPORT

THE ADVOCATE

DISCOVERY DISPUTES

VOLUME 101
WINTER
2022

STATE BAR LITIGATION SECTION REPORT
THE ADVOCATE

EDITORS

Editor in Chief
Professor Lonny Hoffman
University of Houston Law Center
lhoffman@uh.edu

Editor Emeritus
J. Patrick Hazel*
University of Texas School of Law
*Deceased

Graphic Designer
Janie Alderman
janiealderman52@gmail.com

EDITORIAL BOARD

Sofia Adrogué, PC
Diamond McCarthy LLP

Hon. Patricia O. Alvarez
Fourth Court of Appeals

W. Stephen Benesh
Bracewell, LLP

Bill Boyce
Alexander Dubose Jefferson

John K. Broussard, Jr.
LyondellBasell

Hon. Jeff Brown
United States District Court
Southern District of Texas

Hon. Karin Crump
250th Judicial District Court

Professor Edward C. Dawson
University of Texas School of Law

Hon. April Ferris
First Court of Appeals

Jason P. Fulton
Diamond McCarthy, LLP

Soraya Yanar Hanshew
The Hanshew Law Firm, PLLC

Erica Harris
Susman Godfrey

Claire Abernathy Henry
Ward, Smith & Hill, PLLC

Allyson N. Ho
Gibson, Dunn & Crutcher LLP

Lisa Hobbs
Kuhn Hobbs PLLC

Roger Wade Hughes
Adams & Graham, LLP

Greg Love
Love Law Firm PC

Hon. Jessica Mangrum
200th District Court, Travis County

William R. Peterson
Morgan, Lewis & Bockius LLP

Alex Roberts
Beck Redden LLP

Hon. Karen Gren Scholer
United States District Court
Northern District of Texas

Ken Slavin
Kemp Smith LLP

Michelle Stratton
Smyser Kaplan & Veselka, LLP

Kennon Wooten
Scott, Douglass & McConnico, LLP

Stephen Yelenosky
Yelenosky Mediation & Arbitration

Hon. Evan Young
Supreme Court of Texas

Associate Editors,
***ex officio* members**
of editorial board

Hon. Cory L. Carlyle
Fifth Court of Appeals

Eric Chen
Carter Arnett

Allison Cook
Reese Marketos LLP

Matthew Hoffman
Vinson & Elkins LLP

Brian P. Lauten
Brian Lauten, PC

Charisma Nguepdo
Law Clerk, Hon. Al Bennett
U.S. District Court, S.D. Texas

Britton Taubenfeld
Vinson & Elkins LLP

Eugene Temchenko
Vinson & Elkins LLP

Kristen Vander-Plas LaFreniere
Vander-Plas LaFreniere, PLLC

2022-2023 LITIGATION
SECTION OFFICERS

J. Paul Manning, Chair
Field, Manning, Stone,
Hawthorne & Aycock, PC

Geoff Gannaway, Chair-Elect
Beck Redden LLP

Rebecca Simmons, Vice-Chair
Rebecca Simmons, PLLC

Raymond L. Thomas, Treasurer
Ray Thomas, PC

Jason Paul Fulton, Secretary
Diamond McCarthy LLP

Cade W. Browning
Immediate Past Chair
Browning Law Firm

CHAIR EMERITUS MEMBERS

Jennifer Haltom Doan
Haltom & Doan

James “Wes” Christian
Christian Levine Law Group LLC

Hon. Xavier Rodriguez
United States District Court
Western District of Texas

VOLUME 101
WINTER
2022

COUNCIL MEMBERS

TERMS EXPIRE IN 2023
Raymond Baeza
El Paso, Texas

Chip Brooker
Dallas, TX

Andrew L. Kerr
San Antonio, TX

Andy Payne
Dallas, TX

TERMS EXPIRE IN 2024
Slater Chalfant Elza
Amarillo, TX

Robert Ford
Houston, TX

Sofia A. Ramon
Edinburg, TX

Christine Lynne Stetson
Beaumont, TX

Morgan Gaskin Thomas
Houston, TX

TERMS EXPIRE IN 2025
Curt Fenly
Lufkin, TX

Hon. Sue Karita
El Paso, TX

Chari Kelley
Austin, TX

Karen Prescella
Ft. Worth, TX

Amy Pruger
Austin, TX

LIAISONS/ADVISORS
Carlos Eduardo Cardenas
Board Advisor
El Paso, TX

G. David Smith
Alternate Board Advisor
Rockwall, TX

Kirk Cooper
TYLA Liaison
El Paso, TX

Hon. Jeffrey S. Boyd
Supreme Court Liaison
Austin, TX

Tracy Nuckols
State Bar of Texas Liaison
Austin, TX

STATE BAR LITIGATION SECTION REPORT
THE ADVOCATE

Table of Contents

WINTER 2022 VOLUME 101

Editor's Comments by Lonny Hoffman 3

Chair's Report by J. Paul Manning 4

Sustaining Members of the Litigation Section of the State Bar of Texas 5

SYMPOSIUM: DISCOVERY DISPUTES

Supreme Court Advisory Proposals For Reform on Discovery and Case Management
by Chief Justice Tracy Christopher 8

Avoiding Obstructionist Discovery Practices: How to Respond Properly to Production Requests and Eliminate Improper Boilerplate and Other Common Improper Objections
by Robert K. Wise & Kennon L. Wooten 12

Demystifying the Crime-Fraud Exception
by Jeffrey Andrews & Matthew Zorn.. 16

Dealing With Bad Behavior in Discovery
by Robert H. Ford. 20

Confronting Bad Depositions
by Fidel Rodriguez, Jr.. 24

State of the Art Expert Discovery Practices
by Quentin Brogdon 27

Texas Rule of Civil Procedure 202: Uses, Abuses, and Other Considerations
by Kate Gaither 30

Table of Contents, Continued Next Page

TABLE OF CONTENTS, CONTINUED

A VIEW FROM THE BENCH: CURBING DISCOVERY SHENANIGANS THROUGH REQUIRED INITIAL DISCLOSURES
by Judge Tonya Parker & Judge Lora J. Livingston 33

MY RESPONSES TO THESE DISCOVERY REQUESTS WERE REASONABLE, RIGHT? NAVIGATING FED. R. CIV. P. 26(g)(1)
by Xavier Rodriguez 36

ETHICAL ISSUES IN E-DISCOVERY
by Kirby B. Drake 40

DISCOVERY ABUSE IN MDLS AND OTHER SPECIAL PROCEEDINGS
by Russell Lewis & Liz Malpass 44

ADDITIONAL CONTRIBUTIONS

EVIDENCE & PROCEDURE UPDATES
by Luther H. Soules III & Robinson C. Ramsey 48

DISCOVERY ABUSE IN MDLs AND OTHER SPECIAL PROCEEDINGS

BY RUSSELL LEWIS & LIZ MALPASS

MOST ATTORNEYS INVOLVED IN CIVIL LITIGATION are all too familiar with discovery abuses and the disruptions they cause in proceedings. In special proceedings involving a multitude of parties—including federal or state multidistrict litigation proceedings ("MDLs"), mass actions, and matters consolidated for discovery—those discovery abuses are often amplified, as a single plaintiff's or defendant's manipulations can substantially delay if not derail a complex proceeding involving hundreds or thousands of claimants. Though these special proceedings are designed to make large-scale litigation both efficient and manageable (and they often do), the magnitude of special proceedings lends itself to various discovery abuses.

This article examines discovery abuses through the lens of those special proceedings, focusing primarily on MDLs, which have boomed in recent years (from 1% of all pending cases in 1991 to 37% in 2019), and how courts and parties have addressed those abuses. *See* Nora Freeman Engstrom, *The Lessons of* Lone Pine, 129 YALE L. J. 2 (2019). This article also includes practical advice for preventing discovery manipulations in those settings.

Establishing the Ground Rules: The Importance of Case Management Orders

As Frank Herbert wrote in *Dune*, "A beginning is the time for taking the most delicate care that the balances are correct." That wisdom holds true for MDLs and consolidated proceedings where it is easy, at the beginning, to be caught up in the flurry of transfers, tag-alongs, and consolidations. At the outset of litigation, after a party has filed a motion for transfer to an MDL pretrial court and requested a stay of all trial court proceedings, the parties should try to reach an agreement on preliminary matters, especially as to preservation of evidence, to alleviate any concerns before the propriety of consolidation and pretrial assignment has been determined. Then, after initial case filings and transfers have calmed, the parties should prioritize organizing themselves into lead and liaison counsel and working with the court to enter a case management order ("CMO").

Without a CMO in place, discovery abuses can quickly proliferate. From the defendants' perspective, this usually translates into over-eager plaintiffs lodging discovery requests in the trial court even after the MDL panel has stayed those proceedings, or otherwise unilaterally serving discovery requests directly in the MDL or transferee court. Before a CMO has been entered, defendants are usually forced to respond to, or, at their risk, ignore these volleys, which inevitably leads to the exchange of discovery motions that the court must adjudicate. On the other hand, plaintiffs may fear that defendants are failing to preserve evidence or ignoring early disclosure obligations. These early abuses, easily perpetuated by either side, can entangle the parties in early, costly, and avoidable discovery disputes. To prevent these situations, the parties should prioritize scheduling a time to convene with the court to discuss the entry of a CMO.

CMOs, negotiated by the parties and approved by the court, offer a roadmap for the parties to proceed with discovery and, equally importantly, provide the court with a clear basis to curb abuses. A CMO in a specialized, consolidated proceeding should generally include:

- A procedure for additional transfers to the MDL, including tag-along transfers;
- A schedule for proceeding, including deadlines for amended complaints and various stages of discovery; and
- Clearly articulated discovery parameters, including limitations for written requests and deposition notices that may be served by liaison counsel on parties and nonparties.

The parties should also try to reach a clear understanding with the MDL court about how discovery disputes will be resolved. Many courts are willing to depart from traditional briefing processes to help simplify discovery issues, and disputes may be resolved by streamlined letter briefing or a quick call or video conference with the court.

CMOs also typically discuss Plaintiff Fact Sheets ("PFS"), an indispensable tool for organizing a case of hundreds or thousands of plaintiffs.

Plaintiff Fact Sheets: Useful but Often Incomplete or Tardy

PFS are standardized short forms negotiated by the parties and approved by the court. They are often used in mass actions to help the court and the parties manage the claims of a vast number of plaintiffs. PFS typically include simple interrogatories that allow defendants to receive notice of the basic facts of each plaintiff's claim. In personal injury cases, PFS usually also include requests for the plaintiff to attach signed medical authorizations and supporting documentation, such as relevant medical records and prescription receipts. In many ways, PFS are intended to balance the equities in discovery; while plaintiffs usually begin intensive fact discovery of the defendants at the outset of special proceedings, PFS allow the defendants to obtain basic information about the plaintiffs' claims.

As useful as PFS undoubtedly are, parties' delinquency in returning or completing PFS can generate substantial problems in large proceedings. Courts have addressed this issue in varying ways, with mixed results.

As useful as PFS undoubtedly are, parties' delinquency in returning or completing PFS can generate substantial problems in large proceedings.

One particular MDL illustrates two very different approaches a single court took at various stages in the proceeding. The MDL, *In re Taxotere (Docetaxel) Prods. Liab. Litig.*, MDL No. 2740, centralized numerous actions involving claims alleging that the defendants knew that a drug caused permanent hair loss and failed to warn plaintiffs of that side effect.

In the first instance regarding PFS, the court took what appeared to be a lenient approach to a plaintiff's seemingly bad-faith evasion of discovery. *See* 2018 WL 4002624 (E.D. La. Aug. 22, 2018). Approximately one year after filing suit, the plaintiff sought advice from a physician on how to regrow her hair and possibly received treatment from the physician. *Id.* at *3. Plaintiff did not include the physician on her PFS but later inadvertently produced emails exchanged with the physician. *Id.* She also directed her employer to resist any discovery from defendants. *Id.* The court issued a sanction against the plaintiff for not producing the data, but, ultimately, the sanction itself amounted to only an order to produce the documents she had withheld (or directed her physician to withhold), additional time for defendants to take her deposition about that information, and an order that she pay the costs that defendants incurred as a result of plaintiff's failure to comply with her discovery obligations. *Id.* at *4. The court advised that it would "allow this sanction to serve as a warning . . . to any other plaintiff who might be considering adopting evasive tactics" and advised that if it learned that "any other plaintiff ha[d] intentionally withheld relevant information that should have been produced . . . [it would] impose severe sanctions, which may include dismissal with prejudice." *Id.*

Later in the same MDL, each plaintiff was also required to sign a declaration attesting that the information provided in the PFS was true and correct. *See* 837 F. App'x 267, 271 (5th Cir. 2020). If a plaintiff failed to provide the documents within the allotted time, defendants could file a notice of deficiency, which would then trigger a thirty-day cure period. *Id.* If a plaintiff failed to cure within 30 days, the defendants could serve a notice of non-compliance on plaintiffs' liaison counsel, triggering a second thirty-day period for compliance. *Id.* At that point, if a plaintiff still had not complied with the court's orders, defendants could add the plaintiff's name and case number to a call docket and show cause hearing. *Id.* The court warned that any plaintiff who failed to appear at the call docket and establish good cause for any remaining deficiencies could have her case dismissed with prejudice or be subject to other relief. *Id.* The Fifth Circuit reviewed the appeals of four separate plaintiffs whose cases were dismissed for deficiencies—one plaintiff appealed her dismissal and the other three plaintiffs filed appeals of the district court's denial of their motions for reconsideration after they had been dismissed. The Fifth Circuit affirmed the district court's decisions in all four cases, citing the plaintiffs' continual noncompliance with the court's orders and the court's repeated deadline extensions that the plaintiffs still failed to meet. *Id.* at 276–78.

Attempting to harmonize these two scenarios provides ample room for conjecture, as the court delivered a harsher result to the plaintiffs with the delinquent PFS certifications than the plaintiff who evaded and suppressed discovery. However, other cases have reached analogous results on delinquent PFS and PFS certifications, especially where the court has repeatedly reminded plaintiffs of the PFS deadline and extended it in their favor. *See, e.g.*, *In re Deepwater Horizon*, 988 F.3d 192 (5th Cir. 2021) (affirming dismissal of plaintiffs who ignored responsibility to "provide more particularized information regarding their claims to help the court and the parties to better understand the nature and scope of the injuries, damages, and causation alleged").

Looking past initial PFS obligations, deficient PFS and PFS certifications can pose problems at later stages—even as the

parties are nearing settlement. For example, in *In re Abilify (Aripipirazole) Products Liability Litigation*, No. 3:16-md-2734 (N.D. Fla. Feb. 25, 2019), hundreds of plaintiffs brought individual suits claiming that Abilify, an antipsychotic drug, had dangerous compulsive behavior side effects. There, the court approved PFS in various stages of the litigation, until the parties reached the settlement stage in 2019. The court entered a certification order requiring potentially eligible plaintiffs to certify that they had made good-faith efforts to obtain and produce records sufficient to show that they were entitled to settlement relief. Eventually, after nearly 150 of the almost 650 plaintiffs failed to provide the required certifications—and after the court extended the deadline for plaintiffs to provide those certifications—the court dismissed those claims with prejudice. *In re Abilify*, No. 3:16-md-2734 (Sept. 24, 2019), ECF 1170 at 4.

These dismissals, though a harsh result, are often the only way to push litigation forward when plaintiffs refuse to comply with, or even respond to, requests from the court. As a practical matter, defendants should not rely on the court to keep the schedule moving. Defendants can, and should, send push letters to plaintiffs about their PFS deficiencies. These letters are not simply useful nudges to plaintiffs; they document defendants' efforts to advance discovery and will aid the court should it need to decide whether or not to dismiss plaintiffs with deficient or delinquent PFS.

Defendants' Obligations

In consolidated proceedings with multiple defendants, courts have also deployed Defendant Fact Sheets that require some minimum level of production in response to each category of claim against each defendant. More often than not, however, defendants' discovery obligations consist of responding to a unified set of master discovery requests and participating in common liability discovery that benefits all plaintiffs.

And though delinquent or incomplete PFS can hinder and obstruct an MDL, a defendant's failure to comply with discovery obligations can also pose a significant threat, particularly in the preservation context, as the defendant's failure to comply with crucial preservation and discovery obligations can affect the rights of thousands of claimants. In *In re Pradaxa (Dabigatran Etexilate) Prod. Liab. Litig.*, No. 312MD02385DRHSCW, 2013 WL 6486921, at *4 (S.D. Ill. Dec. 9, 2013), a MDL involving failure-to-warn claims associated with a prescription blood-thinning drug, a court found that defendants had acted in bad faith by failing to preserve and produce documents to the plaintiffs. The court ordered that the defendants pay a substantial fine, plus the plaintiff's costs associated with the discovery motion—totaling nearly $1 million (approximately $500.00 per case). *In re Pradaxa (Dabigatran Etexilate) Prod. Liab. Litig.*, No. 312MD02385DRHSCW, 2014 WL 984911, at *2 (S.D. Ill. Mar. 13, 2014). The defendants were also ordered to audit their records to determine whether they were in possession of additional materials they had not produced and ordered to produce those documents to the parties.

Unilateral Discovery and Other Discovery Manipulations

Once the court has determined a path to proceed with discovery in a consolidated proceeding, parties may still try to maneuver around the court's orders and the parties' agreed-to parameters.

For example, in *In re Merscorp Inc.*, 2008 WL 347682 (S.D. Tex. 2008), a liaison committee of plaintiffs had, after extensive negotiation with the defendant, agreed upon the rules for the defendant's corporate representative deposition. After that deposition had occurred, one plaintiff sought to re-depose and seek additional documents from the corporate representative, despite having designated another lawyer to ask questions on his behalf in the first deposition. The court extended the class certification discovery deadline to allow the plaintiff's liaison counsel to file a motion to compel any class certification documents that the plaintiff believed the defendant-company should have provided, and for the individual plaintiff to file additional document requests if the motion to compel did not encompass the documents that the plaintiff sought. The court's leniency led to an unfruitful result: the plaintiff, without consulting with liaison counsel, sent out improper, wide-ranging discovery that included requests aimed at the merits of the case. The court eventually struck the plaintiff's individual discovery requests, but not before the case was delayed because of the plaintiff's "unilateral discovery strategy on behalf of a single [MDL] Plaintiff." *Id.* at *3.

Courts have dealt with these abuses in various ways, but, in some situations, the parties must themselves combat these issues. For example, parties may wield discovery tools, such as third-party subpoenas and state court deposition notices, to get around organized discovery intended to target similar information in the consolidated proceeding. For instance, if the consolidated proceeding is pending in federal court, other claimants who have yet to join that proceeding may file requests for pre-suit depositions in state court—in Texas, Rule 202 petitions—seeking to elicit testimony or investigate potential claims against those same defendants. While these Rule 202 petitions are often thinly veiled attempts to circumvent the special proceeding's ordered discovery, defendants

may have no practical choice but to fight the Rule 202 petitions in state court, all while juggling their other obligations in the special proceeding.

The same is true of subpoenas issued in courts outside of the MDL. Even if the subpoena would have been more properly issued through the MDL itself, motions to quash the subpoena must be made in the court issuing the subpoena rather than in the underlying MDL. *See In re Clients and Former Clients of Baron & Budd, P.C.*, 478 F.3d 670 (5th Cir. 2007) ("[T]he proper court in which to file a motion to quash or modify the subpoena is the issuing court, not the court in which the action is pending.").

Conclusion

Though discovery abuses can make the constantly moving parts of a consolidated proceeding or MDL all the more cumbersome, attorneys who can impose sound structure to their proceedings—through CMOs, appointment of lead and liaison counsel, and frequent communication with opposing parties and the court—are more likely to achieve effective results.

Russell Lewis and Liz Malpass are attorneys practicing at Baker Botts L.L.P. in Houston. ★