WEAPONIZING DISCOVERY
Outline of Presentation
Darleene Peters, Rachel Reynolds, James (Dart) Meadows, James L. Hollis
FEDERATION OF DEFENSE AND CORPORATE COUNSEL
August, 2, 2024
Toronto, Ontario

- **INTRODUCTION**
  - INTRODUCE PANEL – **(three minutes).**
  - DEFINITION - discovery designed to ensure non-compliance so that party can seek sanctions. **(two minutes**)
    - Not talking about good faith use of discovery process to discover relevant facts. Talking about strategy to pursue overreaching discovery.
    - Discovery solely as a means to seek sanctions or create leverage to force settlement.
  - PLAINTIFFS DO THIS BECAUSE IT WORKS –
    - War Stories -- Rising trend in both state and federal courts. **(five minutes)**
      - Example 1 (Rachel's case)
        - Background facts
        - Results – state bar disciplinary action, bad faith and malpractice claims
      - Example 2 (Georgia trial)
        - Slip and fall case in at a Georgia gas station. Woman fell to the ground, tried to catch herself and broke her pinky finger. Medical expenses = $7,100.
        - Jury awarded $1.8 million in damages.
        - Plaintiff focused on alleged discovery abuse by defendant. Surveillance video was messed up because the wrong time was reported on the form. Had a glitchy video which Plaintiff blamed on "corporate defendant."

- **CASES WHERE SANCTION WARRANTED**

  - *Roadrunner Transp. Services, Inc. v. Tarwater*, 642 Fed. Appx. 759 (9th Cir. 2016) – defendant willfully deleted data from laptops after receiving multiple preservation demands from plaintiff and an order from the court to preserve all data on his electronic devices, thereby depriving plaintiff of its "primary evidence of" defendant's alleged misconduct

  - *Burris v. JP Morgan Chase & Co.*, 566 F. Supp. 3d 995, 1006-08, 1017, 1019 (D. Ariz. 2021) -- plaintiff factory-reset iPhones and laptops, used commercial software programs and an anti-forensics feature to delete ESI from laptops, and purged email account and text messages, which "evince[d] an unusually clear level of intent to deprive Defendants of potentially relevant ESI". Fines and sanctions upheld by Ninth Circuit.

  - *OmniGen Research v. Yongqiang Wang*, 321 F.R.D. 367, 372 (D. Or. 2017) – defendants intentionally made computer unavailable by "donating" it to Goodwill, intentionally deleted thousands of documents from computer one week after receiving plaintiff's preservation notice, intentionally deleted relevant emails, and violated court orders

- **OVERVIEW OF DISCOVERY RULES AND PROCEDURES**

  - Basic Rules (**ten minutes**)

    - Normal process. Serve request, make response, exchange letters, file motions to compel.

    - PRACTICE TIP – for the discovery terrorist, each process is a step towards the sanction hearing.

      - Kill Plaintiff with kindness throughout process. Act like the Judge wants you to act – trying to work it out. Be relentlessly polite.

      - Particularly important when you know Plaintiff does not want to resolve issue.

  - **Standing Orders** – increasingly common. Judges truncate normal process through increasing standing orders. Both an opportunity and a risk.

  - **Statutory Framework**

    - **Fed. R. Civ. P. 37** – Failure to Make Disclosures or to Cooperate in Discovery; Sanctions.

      - Usually requires motion first, then sanctions following order compelling disclosure.

- Court can order fees if lose the motion, or other sanctions if violate the order. Some authority suggests award of fees is mandatory unless defenses in statute are shown.
    - Defense to both an award of fees and to other sanctions is statutory safe harbor of **"Substantial Justification."**
    - **No fees if movant filed motion without good faith conferral.** Fed. R. Civ. P. 37(5)(A)(i) ; *Acosta v. Austin Electric Serv., LLC*, 324 F.R.D 210 (D. Ariz. 2017)).

- **Wide discretion**: Extremely difficult to undo what Court rules. Cases overruling district court findings are rare, although there are examples.
    - *Grider v. Keystone Health Plan Central, Inc.*, 580 F.3d 119 (3rd Cir. 2009) (vacating sanction when court did not analyze whether defendant had substantial justification for failure to comply with order).

➢ **PLAINTIFF'S TACTIC (PANEL DISCUSSION FORMAT)**

- **Request to Produce (unlimited number allowed by Federal Rules)**
    - **Plaintiff Tactic 1**: Unreasonably broad request that you could never fully comply with, combined with efforts to demand assurances of compliance, which are then followed by Motion for Sanctions.
    - **Example 1 (five minutes)**:
        - All documents and communications relating to the design, development, testing and marketing of the driver's front airbag system that has the same design as the Subject Airbag. All test protocols for, all standards for, and all results from the same. All documents related in any way to any root-cause analysis performed on any tested system or component.
        - Overbroad for this vehicle alone, but then interjects additional disputes over what airbag system is the "same design" as the one at issue.
        - Tactics used to combat:

        - This is a "give me everything" request, which is impossible to comply with as written.
        - Defined relevant scope in "general objections" as this model vehicle only, specifying why it mattered (different measurements, vehicle dynamics)
        - Break request into pieces – marketing and testing addressed by other requests, objected to "development" on the basis that only actual design matters. Left us with design, which was easier to deal with.
        - Strategy on post-response disputes was to nicely ask what specifically Plaintiff wanted, assure him we are trying to get it. Plaintiff refused to say what he wanted. Said he wanted everything.
        - At hearing, Plaintiff surprised us with documents he found on trial lawyer list-serv as examples of things we did not produce.
        - Ultimately, Court did not allow him to file a motion to compel because request was undefined and judge found we produced responsive materials in response to other requests.
        - Court said he needed to tell us about the examples before coming to her.

- **Example 2 (five minutes)**:
    - Produce <u>each document</u> which is necessary to <u>identify, access, read, verify and interpret</u> the data in <u>any device</u> in the Subject Vehicle, which <u>records any data</u> of any type including, <u>but not limited to</u> pre-collision, near collision, collision and post-collision data, vehicle performance data, electronic stability control data, driver control data, fault data, diagnostic data, kinematics data, and restraint use and performance data. <u>This applies to any recorded data regardless of the means used to record it</u>.
    - Tactics to combat:
        - Broke in pieces by separating out identify (design docs), access (operation materials), read (same), "verify and interpret" (expert).

- "Any device" – way too broad. Radio records data.
- "any data" – limit to data relevant to crash.
- Were able to use our response offensively. We wanted to remove data device to download. Plaintiff did not but wanted to attack lack of event data recorder.
- Fight ultimately focused on Plaintiff's refusal to allow us to access other potentially relevant data in vehicle Plaintiff owned.
- We ultimately moved to compel a download of control unit. Our motion was denied (it was Plaintiff's car) but we used that denial to challenge other claims by Plaintiff.

- **Example 3 (Dart) (five minutes)**
    - Identify all DOCUMENTS referring or relating to any claims, lawsuits or complaints against you regarding your table saws at any time.
    - Plaintiff's broad definition of "documents" does not limit the scope, especially because Defendant has been in business for forty years.
    - For instance: "(D) "DOCUMENTS" means any writing as defined in section 250 of the California Evidence Code and includes all written or graphic matter, however produced or reproduced, of every kind and description, including without limitation originals, copies where originals are unavailable, drafts, and copies differing in any way from the originals (such as with margin notes), and correspondence, blueprints, drawings, papers, books, accounts, profit and loss statements, letters, emails, texts and/or SMS messages, facsimiles, photographs, objects, microfilm, telegrams, notes or sound recordings of any type regarding personal or business telephone conversations or meetings or conferences, minutes of directors', trustees', agents', shareholders' or committee meetings, memoranda, inter-office communications, reports, studies, written forecasts, projects, analyses, contracts (whether with employees, employers, labor organizations, insurers, administrators, consultants, contractors, subcontractors, customers, suppliers, distributors, retailers or with any other persons), licenses, agreements, contribution reports, provider reports, customer reports, ledgers, books of account, vouchers,

bank checks, invoices, charge slips, expense account reports, hotel charges, receipts, supplier or provider bills, premiums, claims, working papers, drafts, statistical records, cost sheets, abstracts of bids, stenographer's notebooks, calendars, appointment books, diaries, time sheets or logs, job or transaction files, warranty reports, employee dispatch logs, computer print-outs, data compilation, including but not limited to information stored on or accessible through computer or information storage or retrieval systems, or papers similar to any of the foregoing however denominated by you. Any document which contains any comment, notation, addition, insertion or other marking of any kind is to be considered a separate document."

- Request covers a 40 year period, dozens of models and millions of documents.

- **California case (five minutes) -** Plaintiff served **292 Request for Production of documents** and 97 special interrogatories. Following two motions to compel we filed a motion to appoint a discovery referee which the plaintiff initially argued we should pay for but later agreed to divide the cost.

  - "Although the scope of civil discovery is broad, it is not limitless." *Board of Registered Nursing v. Superior Court of Orange County*, 59 Cal. App. 5th 1011, 1039 (2021) (quoting *Calcor Space Facility*, 53 Cal. App. 4th at 216).

  - There must be "a reasonable relationship" between the information sought and the issues involved in the case. *Calcor Space Facility*, 53 Cal. App. 4th at 218-19; *see also Clark v. Hoag Memorial Hospital Presbyterian*, No. G051949, 2017 WL 1180423, *17 (Cal. App. March 30, 2017) (in employment discrimination case, court held interrogatories seeking information about defendant's treatment of other employees that were not limited to employees "similarly situated" to plaintiff "were overbroad", even where plaintiff agreed to limit time period of interrogatories).

- **Montana case** – Plaintiff served Plaintiff's discovery requests have been extensive and overreaching – 74 interrogatories and 357 requests for production of documents. Defendants responded to all the discovery requests fully, including the production of almost 43,000 pages of documents and making several hundred thousands of pages more available for review. Plaintiff still filed a motion for sanctions.

- **Example 4 (Darleene) (five minutes)**

  - Unilateral scheduling of depositions and hearings – this is a common tactic when opposing counsel deems "delayed" responses as a form of ignoring scheduling requests. Often results in unnecessary motion practice to resolve issues that can and should be resolved without court intervention.

- Continuously filing Motions to Compel – this is another common tactic used by opposing counsel when they deem discovery responses inadequate or incomplete. This can backfire when presented to the Court if the discovery is overbroad and/or requests information that does not exist. Similar to the examples above.

- Disruptive deposition behavior – continuous objections, improper objections, pauses to contact the Court to resolve issues that erupts during a deposition, berating witnesses, especially corporate representatives, and reptile line of questions.

➢ **OTHER TACTICS (ten minutes)**

- Use RFAs to seek admissions that responses to ROGS or RFPs are complete. All responsive documents produced etc.…

- Abuse of 30(b)(6) deposition notices.

  - Unreasonable number of topics (71) – then seeking sanctions claiming witness was not properly prepared.

  - Plaintiff refusing to discuss what exhibits they will cover, then claiming witness is not properly prepared.

  - Asking for same documents you have objected to producing previously. Have had lawyers claim waiver if you do not formally object to notice on same basis in RFP.

    - Not proper to ask same question and force you to object again.

    - *McCall v. State Farm Mut. Auto Ins. Co.*, 2017 WL 3174914 at *6 (D. Nev. July 26, 2017) (cannot avoid a parties' objection to an RFP by asking for the same documents via subpoena).

- Abusing Good faith letters

  - Demanding certification that each category of documents produced is complete.

  - Making new requests as an "offer of compromise" – expanding fight, instead of narrowing.

- **GOOD CASES FOR DEFENSE** (**five minutes)**

  - **Force limited time frame:** *See Curran v New York City Transit Authority*, 75 N.Y.S.3d 25, 25-26 (App. Div. 2018) (limiting discovery to five-year period preceding her accident, holding "[t]he production of 15 years' worth of records is burdensome"); *Biorn v. Wright Medical Technology Inc.*, No. CV 15-7102-CAS, 2017 WL 10434388, *3, 5 (C.D. Cal. Jan. 25, 2017) (limiting discovery six years for other injuries, 10-year period for similar designed products); *McKellips v. Kumho Tire Co., Inc*., 305 F.R.D. 655, 679 (D. Kan. 2015) (limiting plaintiff's discovery requests to five-year period beginning one year before date of allegedly defective tire's manufacture); *Schultz v. Daimler Trucks North America, LLC*, No. 2:12-CV-228-SWS, 2014 WL 11516082, *3 (D. Wyo. Nov. 4, 2014) (limiting safer alternative design discovery to five-year period between manufacture of allegedly defective truck and date of plaintiff's accident); *Smith v. Gorilla, Inc*., No. CV-10-17-M, 2010 WL 4286246, *4-5 (D. Mont. Oct. 21, 2010) (ordering defendant to produce information from 10-year period regarding tree stand models substantially similar to allegedly defective tree stand); *Robeck v. Ford Motor Company*, No. 04-4858, 2005 WL 8164548, *2 (D. Minn. Sept. 9, 2005) (limiting discovery to substantially similar truck models from four-year period); *see also Ex parte Weaver*, 781 So. 2d 944, 949 (Ala. 2000) (lawsuits involving any saw manufactured by defendant over 40-year period was oppressive and overly burdensome); *Biorn v. Wright Medical Technology Inc.*, 2017 WL 10434388, *5 (C.D. Cal. 2017) (requests covering a fifty-year period "far exceeds what is proportionate to the needs of these cases.")

  - **Limit to specific product:** Alcala v. Monsanto Company, 2014 WL 1266204, *5 (N.D. Cal. 2014) ("complaints alleging damages related to products he did not use are not relevant."); In re American Optical Corp., 988 S.W.2d 711, 713 (Tex. 1998) (trial court abused discretion in ordering a defendant to produce virtually all documents regarding its products for a fifty-year period, while rejecting requests "not tied to particular products the plaintiffs claim to have used, and are not limited to time periods such use may have occurred.").

- **CONCLUSION**: (**five minutes**)

  - Need to be clear was to what you are giving them, what you are going to look for and what you are not going to give.

  - Rethink "general objections".

    - Many standing orders claiming to prohibit them. Don't use general objection "to the extent .. work product", "to the extent … overbreadth"

- But generally applicable statements but those are useful to define parameters of relevancy, applicable time frames, etc…
    - Definitions of "product", the scope of contractual dispute – what is outside of it.
    - What time period is applicable to dispute. Not going beyond it etc…

- Make Plaintiffs specify what they want and why they want it. Ask if they have an example document.
    - They won't specify because they don't want anything – they want to sanction you.
    - Point to how many times you asked, shifting / changing demands / refusal to talk.
    - Specify burden in finding and collecting – explain if you can. They won't care. Won't work with you. Refusal to engage / negotiate can help.

- BE NICE, EVEN WHEN THE OTHER SIDE IS NOT OR DOES NOT DESERVE IT.