

What of Mine Is Yours?

By: John D. Rowell & Mary M. Bennett

The defense counsel submits requests for production seeking all documents in possession of the plaintiff or his agents and attorneys generated by the defendant or a past or present employee of the defendant. Those who work in the area of products liability will eventually see this request or something very similar. It also pops up in bad faith cases with some regularity.

You should consider this request a red flag. In my experience, and in the experience of most lawyers practicing in the products liability area, this discovery device is primarily employed in an effort to find out if a defendant may safely deny the existence of some crucial or devastating internal document. It is used to determine what internal documents of the manufacturer have been compiled by other lawyers handling cases involving the same defect. For example, data banks such as the ATLA Exchange, the AIEG Work Product Data Banking System, or deposition data banks (and their corresponding exhibits) maintained by CAOLA and CAOC. Maintaining the integrity of these sources is crucial!

Without an effective deterrent, manufacturers cannot and will not resist the powerful motive to withhold the production of critical discovery materials in a products liability case. The evidence supporting this conclusion is simply overwhelming. (Hare, Gilbert and Ollanik, *Full Disclosure: Combatting Stonewalling And Other Discovery Abuses* (ATLA Press 1994), Chapters Four through Ten..) The evil of such conduct is greatly compounded by the fact that by its very nature it *cannot be readily detected!* If the defendant withholds the production of a vital internal document which it alone possesses, in the absence of some mechanism for verifying the accuracy of the defendant's response, the defendant's abuse of the discovery process will go undetected. The likelihood of a reasonably accurate response is dependent upon the existence of some possibility that the defendant's withholding may be detected. The ATLA, AIEG, CAOC and CAOLA data banks and less organized information sharing among plaintiffs with similar cases is the pivotal key to deterrent. Verification of the accuracy of the defendant's response to discovery requests is an integral consequence of the exchange of information by and between plaintiffs counsel.

The "what of mine is yours" type of request is used by manufacturers in conjunction with requests for protective and non-disclosure orders which preclude sharing with other attorneys so that the manufacturer can keep track of what documents they must concede exist. Thus, these practices allow defendants to stonewall and deny the existence of crucial material. (Hare, Gilbert and Ollanik, *Full Disclosure: Combatting Stonewalling And Other Discovery Abuses* (ATLA Press 1994), at 114-115 and 166-167.)

Manufacturers began using the "what of mine is yours" tactic in the 1980s after a decade of getting caught withholding critical documents and after having failed in their initial attempts to prevent plaintiff's information sharing. Viewed in the context of the overall development of stonewalling tactics in

products liability cases, and the obvious lack of need for its own internal documents, it is clear that the defendant's real purpose in seeking to compel the plaintiff to identify the corporate manufacturer's own records is to facilitate the suppression of previously undisclosed and relevant material. An equally important goal, from the manufacturer's perspective, is to secure the work product not only of the plaintiff's lawyer, but, where counsel have formed or participated in a litigation support group, the work product of every other member of the group who has assisted in the cooperative effort to prepare other similar cases.

Grounds For Objection

You should object to these types of requests on the grounds that (1) the manufacturer's internal documents are equally available to the manufacturer, (2) the request is overbroad, seeking relevant and irrelevant documents as well as information as to counsel's thoughts and selection process, i.e. work product. Of course, from the standpoint of the manufacturer, compelling such disclosure would also have the beneficial effect of discouraging other plaintiffs lawyers from participating in such groups.

Authority For Objections

The Courts in California do not seem to have directly addressed this issue. However, there is California authority supporting this objection. The remainder of this article will discuss the authorities in this area, both Federal and State.

Internal Documents Are *Inter Alia* Equally Available

C.C.P. section 203 l(m) requires a party moving for production to "set forth specific facts showing good cause justifying the discovery sought by the inspection demand". This requirement was previously set forth in earlier versions of the Civil Discovery Act. In 1967, the California Supreme Court addressed the issue of "good cause" for a document production in *Associated Brewers Dist. v. Superior Court* (1967) 65 Cal,2d 583, at 588. In this case a beer distributor was seeking to establish a parol side agreement with a brewer that its distributorship would not be cancelled without cause and notice. It filed a motion under former Code of Civil Procedure section 2031 for production of the brewer's inter-office memoranda relating to the termination that had occurred, as well as for inspection of the correspondence between the two parties. The trial court denied the motion because it felt that "good cause" had not been shown. The Supreme Court set forth some general guidelines to look to when ruling on "good cause" and pointed out that the determination necessarily depends on facts and issues of the particular case." *Associated Brewers Dist. v. Superior Court, supra* at 587.

However, the Court's application of the rule to the facts is very significant for our purposes. While

holding that the trial court had erred in denying the motion to compel production, the Supreme Court limited the required production as follows:

"Schlitz contends that certain of the documents [requested] are correspondence between Schlitz and Associated, not Schlitz' reports or interoffice memoranda, and that Associated has the original correspondence. **These items cannot be obtained without a further showing by Associated that it does not have them or does not have access to them.**" (Emphasis added.) (*Id.*)

Associated Brewers has been cited as authority for the proposition that a party need not produce documents already in the possession of his adversary. (Hogan, *Discovery In Civil Cases*, 3rd Ed. (1981), §6.11, p. 405.) As a party's internal documents are presumably in its possession, "good cause" does not exist for their production.

The primary objective of the civil justice system is to insure that the outcome of the dispute resolution process is just. In its landmark decision in *Hickman v. Taylor* (1947) 329 U.S. 495, 507, the United States Supreme Court pointed out that in order to insure the outcome is just, the parties must have access to all the facts concerning the issues in dispute:

"Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation".

In view of the fact that the manufacturer already possesses copies of its own internal documents, there is no question that the information sought by this request is available to the defendant "from some other source that is more convenient, less burdensome, (and) less expensive." The quoted language is from Rule 26(b)(1)(i). This ground of objection was deemed by the authors of the Federal Rules to be so important to the efficient operation of the discovery rules that it was expressly included in Rule 26 by a special amendment in 1983. (*See* notes of the advisory committee, 1983 amendment to FED. R. Civ. P. 26(b).) In the event that the court finds that the requested information is obtainable from some other more convenient or less burdensome source, the court's obligation to limit discovery is *mandatory*; i.e., the extent of use of discovery "shall be limited by the court." (FED. R. Civ. P. 26(b)(1)(i).) The manufacturer's own documents are obviously conveniently available to it.

The defendant typically argues that its request merely seeks information that is admittedly relevant and that the request is therefore well within the scope of discovery. This argument is specious. No one disputes that the actual contents of individual documents is relevant. Specific documents from the manufacturer's Internal Documents admittedly contain critical evidence. That is simply not the issue. That is not the discovery objective of a "what of mine is yours" request. Such a request does not seek the disclosure of information contained in a specific document. It seeks the identity of all Internal Documents

known to plaintiffs counsel. The court must be made to understand that the intended objective of a such a request is to prevent further, additional and full disclosure of the defendant's Internal Documents and the critical information they contain. By granting a motion to compel production, the court is literally assisting the defendant in suppression of vital information.

Counsel's Selection And Obtention of Documents From Other Cases Should Be Protected

Plaintiff counsel's understanding of the meaning and strategic significance of the manufacturer's key Internal Documents is easily the most precious asset counsel possesses in a defective design case.

The overwhelming majority of out-of-State courts that have considered the question have held that an attorney selection process is entitled to opinion work product protection. (*Amax Coal Co. v. Adams*, 597 N.E.2d 350, 355 (Ind. App. 1992); *Berkey Photo, Inc. v. Eastman Kodak Company*, 74 F.R.D. 613, 616 (S.D.N.Y. 1977); *In re: Grand Jury Subpoena Dated Nov. 8, 1979*, 622 F.2d 933, 936 (6th Cir. 1980); *James Julian, Inc. v. Raytheon Company*, 93 F.R.D. 138, 144 (D. Del. 1982); *Jaroslavicz v. Engelhard Corp.*, 115 F.R.D. 515, 517 (D. N. J. 1987); *Laxalt v. McClatchy*, 116 F.R.D. 438, 444 (D. Nev. 1987); *In re: LTV Securities Litigation*, 89 F.R.D. 595, 605, 612 (N.D. Tex. 1981); *Matter of Grand Jury Subpoenas*, 959 F.2d 1158, 1166 (2d Cir. 1992); *In re: Minebea Co., Ltd.*, 143 F.R.D. 494, 499 (S.D.N.Y. 1992); *National Union Fire Insurance Company v. Valdez*, 863 S.W.2d 458, 461 (Tex. 1993); *Omaha Public Power District v. Foster Wheeler Corp.*, 109 F.R.D. 615, 616 (D. Neb. 1986); *Schacher v. American Academy of Ophthalmology*, 106 F.R.D. 187, 191 (N.D. 111. 1985); *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1328-29 (8th Cir. 1986); *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 402 (8th Cir. 1987); *Smith v. Florida Power & Light Company*, 632 So.2d 696 (Fla. App. 1994); *Snowden By & Through Victor v. Connaught Laboratories*, 137 F.R.D. 325, 332 (D. Kan. 1991); *Sporck v. Peil*, 759 F.2d 312, 315-17 (3d Cir. 1985), *cert. denied*, 474 U.S. 903 (1985); *United States v. McDade*, 827 F.Supp. 1153 (E.D. Pa. 1993).)

Although there, again, does not appear to any authority from the California State Courts directly on point, some of the leading authorities on California discovery agree with this conclusion, citing many of the above cases. (2 Hogan & Weber, *California Civil Discovery*, § 13.16, p.234.)

The defendant frequently seeks and obtains work product protection for the fruits of the attorney selection process *for its own lawyers*. Indeed, the great majority of cases on this point are examples of the *defendant* urging its entitlement to work product protection. For example, in the ATV Litigation, Honda consistently asserts that its Defense Counsel Index System (DCIS) is entitled to opinion work product protection. See, e.g. *Dailey v. Honda Motor Co.*, CA NO. NA 91-109-C, S.D. Ind., New Albany Div. (April 8, 1994).

Sporck v. Peil, 759 F.2d 312, 315-17 (3d Cir. 1985), *cert. denied*, 474 U.S. 903 (1985) is a good example. In holding that the selection process of defense counsel in grouping certain documents together

out of the thousands produced in litigation is work product entitled to protection under Federal Rule of Civil Procedure 26(b)(3), the Third Circuit stated:

"Opinion work product includes such items as an attorney's legal strategy, his intended lines of proof, his evaluation of the strengths and weaknesses of his case, and the inferences he draws from interviews of witnesses. *See, e.g., In re Grand Jury Investigation*, 599 F.2d 1224 (3d Cir. 1979); *see also Special Project, The Work Product Doctrine*, 68 Cornell L.Rev. 760, 818-19 (1983) (*cases cited therein*). Such material is accorded an almost absolute protection from discovery because any slight factual content that such items may have is generally outweighed by the adversary system's interest in maintaining the privacy of an attorney's thought processes and in ensuring that each side relies on its own wit in preparing their respective cases. *See, e.g., Upjohn Co. v. United States*, 449 U.S. 383, 401, 101 S.Ct. 677, 688, 66 L.Ed.2d 584 (1981); *In re Grand Jury Investigation*, 599 F.2d 1224, 1231 (3d Cir. 1979).

We believe that the selection and compilation of documents by counsel in this case in preparation for pretrial discovery falls within the highly protected category of opinion work product. As the court succinctly stated in *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138, 144 (D. Del. 1982):

In selecting and ordering a few documents out of thousands counsel could not help but reveal important aspects of his understanding of the case.

Indeed, in such a case as this, involving extensive document discovery, the process of selection and distillation is often more critical than pure legal research. There can be no doubt that at least in the first instance the binders were entitled to protection as work product.

See also Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613, 616 (S.D.N.Y. 1977) (notebooks representing "counsel's ordering of facts," referring to the prospective proofs, organizing, aligning, and marshalling empirical data with the view to combative employment that is the hallmark of the adversary enterprise" categorized as work product). Further, in selecting the documents that he thought relevant to Sporck's deposition, defense counsel engaged in proper and necessary preparation of his client's case. As the Supreme Court noted in *Hickman v. Taylor*:

Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and protect their client's interest."

A few courts have held that materials subject to the attorney selection process are entitled to protection as ordinary work product. These cases are factually distinguishable. In each of these cases the court essentially found that the ordinary work product doctrine was sufficient under the facts of the case to provide adequate protection to the selected materials. (*In re: Antitrust Grand Jury Investigation*, 500 F.Supp. 68, 71 (E.D. Va. 1980); *Hense v. G.D. Searle & Co.*, 452 N.W.2d 441,445 (Iowa 1990); *In re: Minebea Co., Ltd.*, 143 F.R.D. 494, 499 (S.D.N.Y. 1992); *Ranft v. Lyons*, 163 Wis.2d 254, 471 N.W.2d 254, 262 (Wis. App. 1991); *San Juan DuPont Plaza Hotel Fire Litigation*, 859 F.2d 1007, 1016-1019 (1st Cir. 1988); *Smith v. BIC Corporation*, 121 F.R.D. 235, 244-45 (E.D. Pa. 1988), *reversed on*

other grounds, but affirmed on this ground, 869 F.2d 194, 201-202 (3d Cir. 1989); *United States v. Horn*, 811 F.Supp. 739, 747 (D.N.H. 1992).)

Materials Created By and Shared Among Other Attorneys Handling Similar Cases

Numerous courts have held that each of the attorneys working together in a cooperative effort to protect common interests are entitled to assert the work product protection. (*Abrams v. General Insurance Co.*, 508 So.2d 437,442 (Fla. App. 1987); *American Standard, Inc. v. Bendix Corp.*, 71 F.R.D. 443, 446-47 (W.D. Mo. 1976); *Bowne of New York City, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 480 (S.D.N.Y. 1993); *Burlington Industries v. Exxon Corp.*, 65 F.R.D. 26, 43-45 (D. Md. 1974); *Castle v. Sangamo Weston, Inc.*, 744 F.2d 1464, 1466 (11th Cir. 1984); *In re: Crazy Eddie Securities Litigation*, 131 F.R.D. 374, 379 (E.D.N.Y. 1990); *Duplan Corp. v. Deering Miliken, Inc.*, 397 F.Supp. 1146, 1172-75 (D. S. C. 1975, *aff'd*, 487 F.2d 459 (4th Cir.), *cert denied*, 415 U.S. 978 (1974); *GAF Corp. v. Eastman Kodak Co.*, 85 F.R.D. 46, 51-52 (S.D.N.Y. 1979); *Gottlieb v. Wiles*, 143 F.R.D. 241, 250-51 (D. Colo. 1992); *In re: Grand Jury Proceedings*, 604 F.2d 798, 803 (3d Cir. 1989); *Hunydee v. United States*, 355 F.2d 183, 184-85 (9th Cir. 1965); *In re: Kaiser Steel Corp.*, 84 B.R. 202, 205 (Bkrcty. D. Colo. 1988); *Niagara Mohawk Power Corp. v. Stone & Webster Engineering Corp.* 125 F.R.D. 578, 586, 588 (N.D.N.Y. 1989); *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 525 (D. Conn. 1976); *In re: Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982); *Stanley Works v. Haeger Potteries, Inc.*, 35 F.R.D. 551, 554-55 (N.D. Ill. 1964); *Stix Products, Inc. v. United Merchants & Mfrs., Inc.*, 47 F.R.D. 334, 338-39 (S.D.N.Y. 1969); *In re: Texaco, Inc.*, 84 B.R. 889, 892 (Brtcy. S.D.N.Y. 1988); *Transmirra Products Corp. v. Monsanto Chemical Co.*, 26 F.R.D. 572, 578-80 (S.D.N.Y. 1960); *United States v. American Tel. & Tel. Company*, 624 F.2d 1285, 1296-1300 (D. C. Cir. 1980); *United States v. Gulf Oil Corp.*, 760 F.2d 292, 296 (Emer. Ct. App. 1985); *Vilastor-Kent Theatre Corp. v. Brandt*, 19 F.R.D. 522, 525 (S.D.N.Y. 1956); *Western Fuels Ass'n. v. Burlington Northern R. Co.*, 102 F.R.D. 201, 203 (D. Wyo. 1984).)

Thus, document databanks, such as the ATLA Exchange and the AIEG Work Product Data Banking System, or deposition data banks (and their corresponding exhibits) maintained to CAOLA and CAOC are protected.



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