



DISCLOSURES IN DISCOVERY: WHAT'S REQUIRED FROM THE PLAINTIFF

By Eugene M. Moen, J.D.

The basic concepts regarding discovery responses seem fairly simple to most plaintiff's attorneys. You only answer what you have to, and you try to avoid giving the defense any information that might be bad for your case. We all engage in that delightful "dance" in responding to discovery: you know what the other side wants to get from you that might be bad for you, but you try to interpret their requests in such a way that you can avoid giving it to them.

The "dance" continues for most of us, but the music has changed with the Washington Supreme Court's decision in Washington State Physicians Insurance Exchange & Association v. Fisons Corporation, 122 Wn.2d 299, 858 P.2d 1054 (1993). In that ruling, which is probably familiar to most of us, the court approved sanctions for the failure of the Fisons Corporation attorneys to provide information about several "smoking gun" documents that had been interpreted by the attorneys as being outside the scope of discovery requests made by the plaintiff. In its opinion, the court did not make new law, but it emphasized that an attorney has a duty to the court and to the legal process to act reasonably and with candor in responding to discovery, and that the duty to one's client must be tempered by reasonableness and good faith. Hypertechnical interpretations of words used in discovery might be an exercise of good advocacy in terms of

duty to your client, but it may expose the attorney to a charge of failing to comply with the spirit and the letter of the discovery rules. Underpinning the court's decision was a rejection of Fisons' argument that good lawyering required that discovery always be an adversarial process.

Unfortunately, in making its decision the court in Fisons provided little in the way of guidance as to the boundaries defining the attorney's joint duties in discovery—duty to the client and duty to the legal process. The court rejected the position that violation of CR 26(g) (a copy of which is included as an appendix to this material) requires proof of intent or bad faith. Instead, it stated an objective standard, and held that subjective belief or good faith does not shield an attorney from the rule. When an attorney signs the discovery responses under CR 26(g), the attorney is certifying not simply that he/she doesn't know of anything that contradicts the responses, but that the attorney has made a "reasonable inquiry" as to the accuracy and truthfulness of the responses, and that the responses are not "misleading."

No longer can an attorney rely solely on what the client tells him/her if the attorney has reason to believe the client may not be fully disclosing information or if the attorney has knowledge of other or contradictory information. A "reasonable inquiry" as to the accuracy and completeness

of the answers must be made by the attorney before signing the discovery responses.

The lack of guidance in the Fisons opinion means that most attorneys - including those of us who represent plaintiffs in personal injury cases - will grapple with these issues repeatedly in conducting discovery, and may or may not meet whatever future standards the court will impose in a specific instance.

- *If a client tells you that he/she does not have a particular document, can you accept that assertion without making further inquiry? How rigorous does the inquiry have to be?*
- *If an opposing counsel asks for a particular document by name, and you suspect he really wants a document that has a different name, can you fail to respond to the request?*
- *If a client tells you that he has never been convicted of a crime involving moral turpitude, but you recall that his mother mentioned that he served time for fraud, must you confront your client with the possible discrepancy and/or talk to the mother to elicit more information? What if the client tells you he does not want you talking to his mother?*
- *If you know of crucial and relevant information or documents, but the opposing counsel is inept in his wording of discovery requests, do you need to assist him/her by pointing out the information or documents?*
- *If a discovery request is vague or ambiguous, should you take advantage of that by responding in a similar fashion?*

Many law review and other articles have appeared since Fisons that point



out the lack of guidance in the court's ruling, but few offer solutions. An exception is an article in *Gonzaga Law Review* ("Harnessing Adversariness in Discovery Responses: a Proposal for Measuring the Duty of Disclose After Physicians Ins. Exch. & Ass'n v. Fisons Corporation, 29 *Gonz. L. Rev.* 499) in which the authors (who are WSTLA luminaries) try to answer the issues presented by Fisons and by the spirit and intent of the discovery rules by offering a three-part "functional test" for objectively weighing the scope of the duty to disclose.

1. A discovery request must be evaluated by the responding party in a light most favorable to the requesting party.
2. In any subsequent proceeding where a party's response is at issue, the responding party may not raise vagueness or ambiguity of the request as a defense unless the response included that objection, specified the basis for the objection, and indicated whether information was withheld on such basis.
3. When ruling on the adequacy of a response, the court evaluates the adequacy of the response by viewing the discovery request in a light most favorable to the requesting party, e.g., whether the requesting party would have reasonably expected the withheld information to be produced.

Like most efforts to provide certainty in a world where uncertainty prevails. The three-pronged test may do little more than raise a new set of issues as each prong is interpreted and applied to a specific fact situation. It also requires a strained effort to put oneself in the other attorney's mind and, in effect, do his/her work for him. To interpret a discovery request in a

light most favorable to the requesting party, must you overlook errors or mistakes made by the opposing counsel in drafting the request? If you think you know what the opposing counsel really wants (or really should want, if he/she were more competent or knowledgeable), but fails to ask for, do you "fill in the gaps" in your responses? Fisons has not changed the basic concepts in discovery: that a party has to ask for specific information or documents, and the opposing party has no obligation to provide the information or documents unless so requested.

As a practical matter, probably all that the Fisons ruling has done is to emphasize that the discovery rules impose a duty on attorneys that qualify or limit their duties to their clients. The adversarial process is tempered by an attorney's duty to the legal system, and it is no longer an excuse that, in responding to discovery requests, an attorney was simply acting in his/her client's interests. There is a greater interest – that of fairness and candor – that must be kept in mind when making discovery responses. Fisons requires us all to adhere to those concepts, or risk having sanctions imposed on us as attorneys.