Jurists Attack Abuses of Right to Pry Into Opponent's Secrets

By Daniel B. Moskowitz

"Discovery" is the process by which lawyers on each side of a civil suit get details about their opponents, invoking the authority of the court to force open confidential records and secret files. The concept is that a trial can run efficiently only if each side knows the key facts ahead of time. But in fact, discovery is often a club intended not to gather relevant information but to beat the other side into submission.

As a 1980 American Bar Foundation report on discovery practices in Chicago put it: "Several lawyers reported using discovery to try to 'move' cases toward settlement. For some attorneys this meant little more than trying to pick a propitious moment to serve a major discovery request, hoping that an opponent would rather settle than respond. For others it meant asking for information about which they knew opposing parties were particularly sensitive."

But increasingly, legal scholars and jurists are getting concerned about such discovery abuses and are reminding judges that they have an obligation to see to it that the data sought is really a vital part of the case. The most recent reminder came from the full U.S. Court of Appeals in Chicago, in a ruling that tossed out a $10,000 fine levied on the American Academy of Orthopaedic Surgeons for disobeying a judge's discovery order. The opinion in *Marrese v. AAOS* was handed down Jan. 3.

The penalty for criminal contempt should not have been imposed because the underlying discovery order was invalid, six of the nine judges agreed. And it was invalid not because the documents were not important to the plaintiffs—they were—but because the trial judge did not go far enough in protecting the privacy of those discussed in the documents, Judge Richard Posner explained.

"We may not ignore as judges what we know as lawyers—that discovery of sensitive documents is sometimes sought not to gather evidence that will help the party seeking discovery to prevail on the merits of his case but to coerce his opponent to settle regardless of the merits rather than to have to produce the documents," Posner wrote.

The ruling came in an attack on the academy by two surgeons who had been denied membership in what they claimed was a plot to protect older members from new competition. And the documents in question were all the backup materials about every application denied during the 1970s. The academy refused because its leaders feared that if members' candid assessments of the character and qualifications of applicants became public, they would be less candid in the future.

The appellate court majority ranked those worries as very serious, affecting not just private rights but the public interest in preserving the First Amendment guarantee that each of us can form associations with whomever we choose.

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What the judge should have done, Posner said, was to have all of the names and other identifying material blacked out before the records were made available to the disgruntled doctors. Then specific names would be made available as the plaintiffs' lawyers showed a need to know them. Another alternative: The judge himself could have read the files involving the two plaintiffs in the case, and, if he found in them no evidence of wrongdoing, could have ended the matter without anyone else seeing any of the documents.

In other cases, courts ruled that:

• **The Commerce Department has to be more open when it decides to take another look at an order imposing countervailing duties on certain imports.** When Commerce slaps on this extra tax—to make up for unfair benefits overseas producers get from their home governments—its usual order says that it will review the matter in 12 months. But that is not enough notice, the Court of International Trade has decided. The court told the department that it has to publish a warning in the Federal Register before beginning the re-examination.

(Hide-Away Creations v. U.S., Dec. 21)

• **Effort counts.** The 1970 law outlining federal land acquisition policies says that the government must help any business displaced by a project being built with Washington money to find a new location.

A laundry used that requirement to get a federal judge to halt construction on a Transportation Department project until a new site for the establishment was found. But the U.S. Court of Appeals in Richmond said that the injunction should never have been issued. Officials had tried to find a location, and that's all the law requires, the higher court ruled; there's no guarantee that the search will be successful.

(American Dry Cleaners v. U.S. DOT, Nov. 30)

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