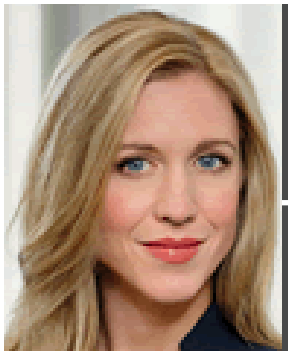

PANEL DISCUSSION: CHALLENGES IN MANAGING LITIGATION IN MULTIPLE JURISDICTIONS

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An Ongoing Mission: Consistency, For Consistency's—and the Client's—Sake in National Litigation
Haley A. Cox and Amaobi J. Enyinnia

It goes without saying that lawyers are trained to strike whenever the opposition makes inconsistent statements in pleading, papers, depositions, or on the witness stand. The chance of inconsistent responses or statements only increases when a client is involved in litigation nationwide, especially where that litigation tends to concern similar or repeatedly occurring types of issues. Inconsistency may occur not only as the result of differing answers to the same or similar discovery requests in or between cases, but also as the result of discrepancies between discovery responses and deposition testimony in cases across the country.

While danger underlies any lawsuit for a client, the danger of inconsistent discovery responses, or witness testimony, to the same or similar questions in multiple jurisdictions or venues is sometimes understated. In more benign cases, inconsistencies between types of testimony, such as a deposition testimony and a given interrogatory response, may be overlooked. But, in some instances, those discrepancies or contradictions may be used by opposing counsel to curry not only judicial favor, but penalize the other side via sanctions, whether monetary or in the form of the imposition of adverse jury instructions. Additionally, these inconsistencies, and the judicial opinions that lay them bare, may raise ethical concerns and lead to bad publicity for the client, and in some cases, their counsel too.

Inconsistency Has Derailed Past Missions

A recent opinion issued in AKH Co., Inc. v. Universal Underwriters Ins. Co., No. 13-2003-JAR-KGG, 2019 WL 1261986 (D. Kan. Mar. 19, 2019) highlights the minefield and dangers created by inconsistency in discovery responses and in witness testimony. In this case, for years, the counterclaim defendant maintained in both its discovery responses and in its deposition testimony that certain financial documents covering relevant years, such as check registers and deposit lists, did not exist. The counterclaimant sought these documents in attempts to determine the counterclaim defendant's net worth and find evidence supporting its fraudulent transfer claims. However, several years into the litigation, the counterclaim defendant produced documents that in fact referred to the existence of those financial documents that the counterclaim defendant had denied existed. After being confronted with the references to the existence of the financial documents, the counterclaim defendant produced them. But, at that point, discovery had closed, and because the counterclaimant was unable to further pursue new questions that arose from those documents, it pursued sanctions under Rule 37 of the Federal Rules of Civil Procedure.

In its order, the trial court found that the counterclaim defendant had indeed led the counterclaimant on a "goose chase" for those documents over three years. The court shot down each of the counterclaim defendant's attempts to argue the counterclaimant never specifically requested those documents, noting how the counterclaimants had sought the information informally over three years and how the counterclaim defendant had repeatedly insisted that they did not exist. The court

sanctioned the counterclaim defendant by granting the counterclaimant several adverse inference instructions, including an inference that the documents produced would be favorable to the counterclaimant's position. The court also awarded the counterclaimant its reasonable attorneys' fees spent on its sanctions motion, along with the expert's fees spent in attempting to decipher the desired information from thousands of other financial documents previously produced, as the counterclaim defendant had insisted the counterclaimant would have to do.

But that is not all. In addition to withholding financial documents, the trial court also found the counterclaim defendant surreptitiously withheld information about a domain name that constituted a valuable asset. Specifically, during his Rule 30(b)(6) deposition, one of the counterclaim defendant's corporate representatives testified that the counterclaim defendant no longer owned a valuable domain name and had transferred it to another company. This was consistent with the counterclaim defendant's interrogatory responses that it was not a financially viable company and could not cover a judgment that may be entered against it.

Years later, the counterclaim defendant amended its interrogatory responses and admitted it was in possession of the domain name the entire time, which was estimated to be worth millions and sufficient to satisfy the potential judgment. Once again, the counterclaim defendant had not supplemented its inconsistent discovery responses or corrected its inconsistent deposition testimony from years ago. As a result, the court found that the counterclaim defendant's claims of an honest mistake were not credible, and the court sanctioned the counterclaim defendant by green-lighting evidence of the counterclaim defendant's net worth at trial. As a result of this transgression, and the transgression regarding the late-produced financial information discussed earlier, the court granted the counterclaimant numerous adverse inference instructions about the counterclaim defendant's behavior, including an instruction that the jury could infer that the counterclaim defendant sought to conceal assets in order to avoid a judgment for the purposes of determining punitive damages.

Such blatant deception is not the benchmark for sanctions; simple discovery inconsistencies may also lead to sanctions. In other cases, courts have sanctioned trial counsel for failing to produce the latest version of a document and failing to make sure that the information produced was actually accurate. For example, in Hightower v. Heritage Academy of Tulsa, Inc. No. 07-CV-602-GKF-FHM, 2008 WL 4858269, (N.D. Okla. Nov. 10, 2008), counsel for the defendant failed to produce the correct copies of their client's bylaws until after depositions of their client's representative in the case revealed that counsel had overlooked a set of more recent bylaws. While counsel immediately produced the bylaws identified in the deposition, the trial court there found that counsel failed to take appropriate steps to verify that the information originally produced was accurate. The court penalized the defendant by awarding the plaintiff reasonable expenses and attorneys' fees incurred with the plaintiff's motion for sanctions and granted the plaintiff the opportunity to conduct an additional deposition of another corporate representative regarding the bylaws, with all reasonable expenses and attorneys' fees for the deposition to be paid by the defendant.

On a different, but related note, national counsel must avoid the blind use of cookie-cutter discovery responses. In recent years, national counsel in Georgia were chastised and punished on two separate occasions by the Georgia appellate courts for failing to serve full and complete discovery responses. Specifically, in Ford Motor Co. v. Young, 745 S.E.2d 299 (Ga. Ct. App. 2013), trial counsel did not disclose the existence of their client's excess insurance carriers until the proverbial last minute before trial began, after the jury was selected. Rather than disclose the existence of the excess carriers, the discovery responses simply stated the client was able to cover any reasonable judgment. When confronted with the same questions from the trial court seeking confirmation regarding the client's excess carriers, they provided the same answer. The client's national discovery strategy was to resist disclosing insurance information.

Yet, such information was particularly important in Georgia because it was statutorily required to be disclosed in order to qualify jurors. As a result, the national counsel's admission pro hac vice was revoked. The failure to disclose excess insurance carriers until the last minute also affected the defendant in more than just the Young case. Plaintiffs in a prior case against the same defendant in Georgia used that information to challenge a defense verdict rendered nearly two years before the Young case. They filed a motion for a new trial for failing to disclose the insurance information in response to that plaintiff's discovery requests seeking that same information. Fully aware of the Young case, the Georgia Supreme Court overturned the defense verdict and ordered a new trial. Ford Motor Co. v. Conley, 757 S.E.2d 20 (Ga. 2014).

The Ethical Obligation to Provide Consistent and Complete Discovery Responses

In addition to litigation-related incentives to keep discovery responses and witness testimony consistent, ethical rules come into play when discovery responses

are seen as inconsistent, contradictory, or misleading. In particular, Rule 3.3 of the Model Rules of Professional Conduct—and similar rules in virtually all jurisdictions—calls for candor towards the tribunal. State and federal courts consider incomplete, and likely inconsistent responses to discovery requests, to violate that rule. At least one court has stated that "[n]owhere is an attorney's representation of the facts more important than in discovery. For the discovery process to function, the Court and counsel must be able to rely on the accuracy of discovery responses." Thompson v. Haynes, 36 F. Supp. 2d 936, 940 (N.D. Okla. 1999). Indeed, in the Young case, counsel were found to have violated Georgia's Rule 3.3 of Professional Conduct for failing to disclose the client's insurance carriers until the eve of trial, which formed the basis for the trial court's decision to revoke the pro hac vice admissions. Young, 745 S.E.2d at 351.

Further, the above cases reaffirm the potential impact of the doctrine of imputed knowledge. To briefly explain, by all accounts, a lawyer is an agent of their client. The implication of this relationship is tremendous. By the laws of agency, clients are bound by what their counsel know or have reason to know, minus some exceptions related to criminal liability. Restatement (Third) of Law Governing Lawyers § 5 cmt. d, §28(1) (2000). This tenet particularly comes into play in discovery, as it is well-established that "[a] party clearly cannot refuse to answer interrogatories on the ground that the information sought is solely within the knowledge of his attorney." Hickman v. Taylor, 329 U.S. 495, 504 (1947). Courts have recognized that attorneys cannot refuse to educate client witnesses regarding relevant facts, even if they were first learned by counsel, and have punished parties where their counsel failed to disclose relevant knowledge and potential witnesses that the party or their counsel should have been aware of due to previous engagements in discovery. See Guzman v. Bridgepoint Educ., Inc., 305 F.R.D. 594 (S.D. Cal. 2015).

Even an inadvertent failure to disclose information that counsel, but not necessarily the client, is aware of can trigger not only ethical inquiries, but also call into question whether a party is in violation of Rules 26(e) and 26(g) of the Federal Rules of Civil Procedure for failing to conduct a reasonable inquiry. Violations of Rule 26, of course, may lead to Rule 37 sanctions. See Oklahoma v. Tyson Foods, Inc., 262 F.R.D. 617 (N.D. Okla. 2009). Relatedly, counsel cannot—and should not—attempt to shield themselves from the implications of knowing certain facts by avoiding inquiry, as a client can be charged with information that their counsel has reason to know. Restatement (Third) Of Agency § 5.03 (2006); Restatement (Third) of Law Governing Lawyers §28(1). In some situations, counsel's reckless or intentional failure to know material information could give rise to a cause of action against counsel by the client for breach of fiduciary duty. George M. Cohen, "The State of Lawyer Knowledge Under the Model Rules of Professional Conduct," American University Business L. Rev. 115, 140 (2018).

Tips to Use in Practice

National litigation presents many perils, but national counsel have a number of methods and tools at their disposal to combat inconsistency and its potential dangers:

Communicate. There must be a commitment to open lines of communication with the client. This includes a consistent and deliberate practice of getting the client materials with sufficient time to review them so they may point out any issues or items needing further discussion. Cookie-cutter responses should be avoided. Rather, an open discussion about the collection of documents and the specific response to given discovery request should take place. Importantly, for both ethical reasons and consistency reasons, counsel should simply keep their client updated on the development of a case, which gives the client a chance to also speak up and alert counsel to potential issues they may foresee. When the client and national counsel work together and have an open line of communication, the pitfalls of inconsistency can be avoided.

Develop Standard Procedures. National counsel must be intimately familiar with the internal systems and procedures the client has in place to vet discovery responses, including the process for searching, identifying and gathering responsive documents. Most clients have developed systems to ensure consistent and complete discovery responses. If not, processes should be put in place to avoid inconsistent positions. In that same vein, national counsel should have team members in place who, through their experience, are familiar with the client's business, documents, and discovery practices. It is of course imperative that in any established procedure, counsel provide the client sufficient time to review and vet the proposed discovery responses.

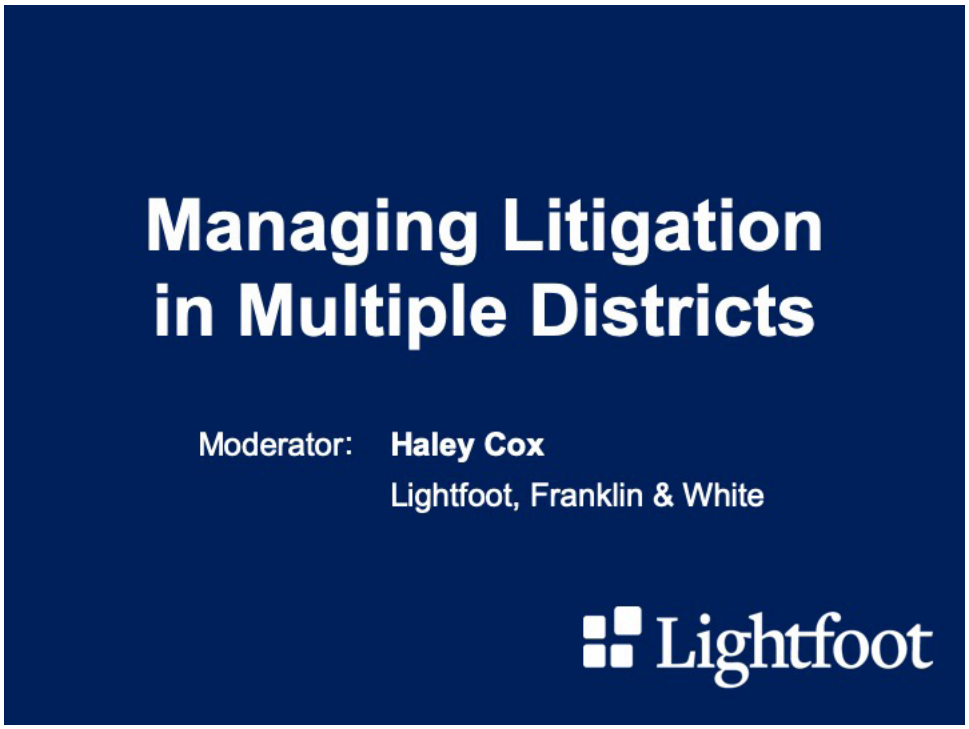
Develop Subject-Matter Expertise. National counsel should not only be subject-matter experts on the topics at issue in a given lawsuit, but also have an understanding of their client's business as a whole. Those efforts help streamline identifying information, witnesses and potential responsive documents. The more you can know about your client's business, the

more you can assist them in developing litigation strategies, including managing nationwide discovery requests. National counsel should also coordinate with other national counsel for their client about reoccurring issues to address them in a coordinated fashion.

Prepare, Prepare and Prepare. National counsel should plan to spend substantial time preparing corporate representatives. If national counsel knows the client's business, the client's available documents and information, past deposition testimony and the scope of documents produced in the underlying lawsuit, they are better equipped to assist in ensuring that a corporate representative does not inadvertently contradict past positions the client has taken. National counsel can be invaluable in streamlining witness preparation.

Utilize and Review History. For consistency's sake, especially with respect to witness preparation, national counsel should endeavor to review prior transcripts of the witness, or other corporate representatives, in similar cases. For certain discovery requests, reviewing how the client has responded to similar requests in the past can be useful to determine the potential scope of information available. Of course, knowing the history does not always result in complete and accurate discovery responses. It is national counsel's role to look at the past with a critical eye to ensure that the client (or counsel) has not become complacent in their response to specific discovery requests because that has simply been the way it has been done in the past.

Ultimately, national counsel's mission of representation, which they have chosen to accept, involves many responsibilities and many challenges. Avoiding inconsistency with discovery and witness testimony is one responsibility and challenge that should never be minimized.



Panelists

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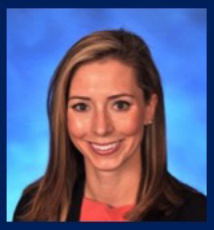


Sarah McAfee
General Motors

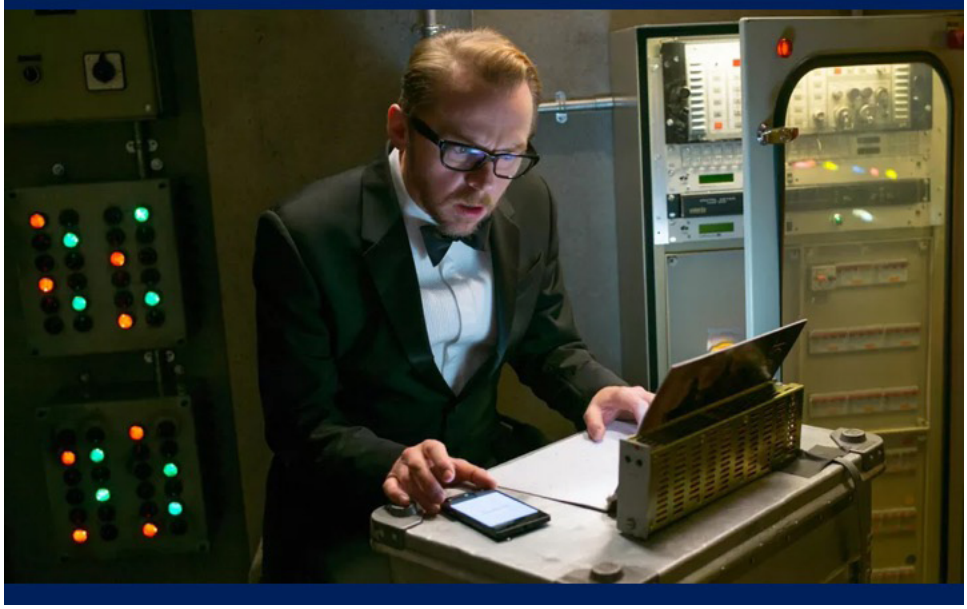
A Need for Consistency in Discovery

Internal Approaches For Consistency

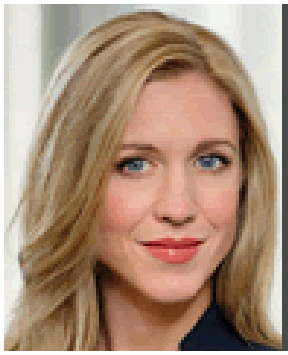
Making Outside Counsel Subject Matter Experts

Balancing National Counsel with Local Counsel

How to Use Experts




What Can We Do to Help You?



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Haley tries cases and leads defense teams in a wide range of high-stakes cases, including claims of product defect, medical malpractice and serious personal injuries. She is admitted to the Alabama and Texas bars, and she has litigated in more than a dozen states.

Haley understands what it takes to win: the truth, hard work and delivering the client's story so it resonates with judges and juries. She also understands that winning is different to every client and in every case. A win may be a fair and swift resolution, or it may mean fighting all the way to a verdict. Either way, opponents know that Haley – like every Lightfoot lawyer – is prepared to take the case as far as it needs to go.

For more than 10 years, Haley has been instrumental in recruiting the next generation of Lightfoot lawyers to serve the firm's clients. She is committed to carrying out Lightfoot's mission of hiring only the most talented, driven and diverse lawyers, and then training them the right way.

Benchmark Litigation recognized Haley as a 2018 "Local Litigation Star." Since 2014, she has been named annually by Mid-South Super Lawyers as a "Rising Star" and, in 2018, was named a "Rising Star of Law" by the Birmingham Business Journal. She has also been selected for the Alabama State Bar's Leadership Forum.

Outside of work, Haley's true loves are her family, Alabama football, running and good wine.

Practice Areas

- Automotive
- Commercial Transportation
- Product Liability
- Medical Malpractice
- Catastrophic Injury
- Consumer Fraud & Bad Faith
- Professional Liability

Awards/Recognitions

- Alabama State Bar Leadership Forum (Class 11)
- Alabama Super Lawyers, "Rising Star" —Civil Litigation: Defense (2014-15)
- Benchmark Litigation, "Future Star" — Consumer Litigation, Medical Malpractice, Product Liability, Professional Liability, Top 10 Boutiques (2018-19)
- Birmingham Business Journal, "Rising Star of Law" (2018)
- Mid-South Super Lawyers, "Rising Star" (2016-18)

Education

- Samford University, Cumberland School of Law (J.D., magna cum laude, 2006)
- University of Alabama (B.S., summa cum laude, 2003)