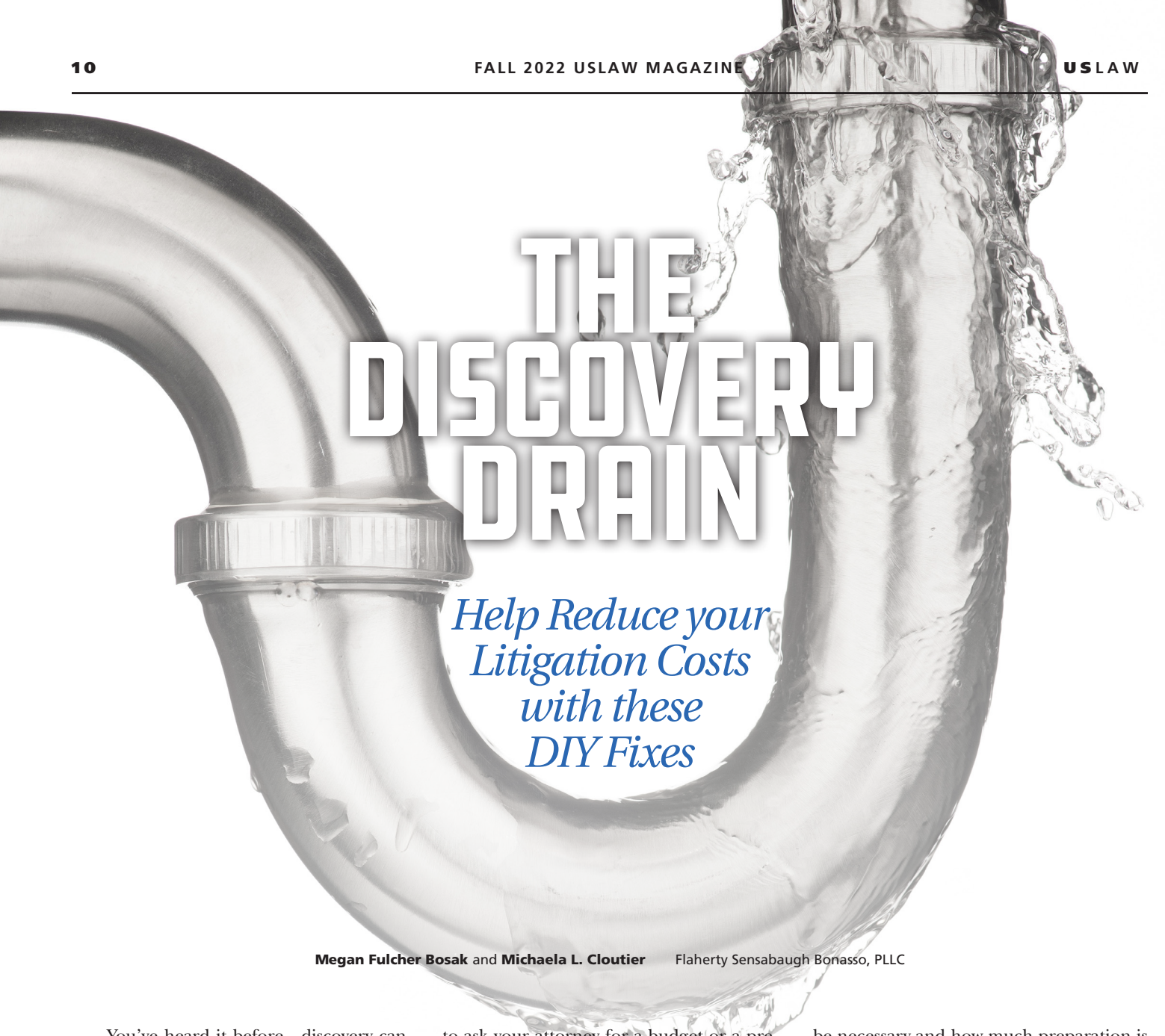

THE DISCOVERY DRAIN

Help Reduce your Litigation Costs with these DIY Fixes

Megan Fulcher Bosak and **Michaela L. Cloutier** Flaherty Sensabaugh Bonasso, PLLC

You've heard it before—discovery can be expensive and burdensome. Given that written discovery is one of the most significant expenses in litigation,[1] it makes sense that discovery costs are a frequent complaint. Today's litigants are especially eager to reduce litigation costs in light of sky-high inflation across the board. But discovery expenses don't have to be such a drain on your litigation budget. Proactively participating in your defense can help you get specialized, cost-effective legal representation and a better outcome. While every case is different, some simple ways to get more involved are applicable in most types of litigation and can help you stop the discovery drain.

PIPE UP! ASK QUESTIONS, INCLUDING "HOW MUCH IS THIS GOING TO COST?"

It is in the best interest of the attorney-client partnership if the client is educated about the litigation process and able to assist in their defense, so don't be afraid to ask your attorney for a budget or a prediction of likely litigation costs. At most firms, there are a variety of billing arrangements available. Attorneys can often tailor their legal services to meet varying needs and budgets—but only if you inform them of your litigation needs. Your attorney won't be offended if you ask—they're used to providing budgets and/or litigation plans to their clients at the outset of litigation, and it's beneficial to them if they can understand your financial constraints as well. It can help them determine which aspects of the case they should focus on and inform a strategic decision regarding how quickly you should attempt to resolve the matter.

Also, be sure to ask your attorney what will be needed from you throughout the litigation, especially during the discovery process. For example, your attorney could give you an estimate of when to expect written discovery requests and a prediction regarding whether corporate depositions will be necessary and how much preparation is likely to be required.

And, pipe up! Don't be afraid to ask your attorney if there are any other ways you can help to keep costs down.

HELP IDENTIFY THE SOURCE OF THE LEAK

One specific way to help minimize costs is to do some preemptive investigation and document collection at the very outset of litigation when recollections are the freshest. While the information your attorney requests might vary depending on the type of case, the venue, and other considerations, there is a good bit of information that attorneys consistently need for common motions, defenses, and discovery requests:

- The story: what happened from your perspective (especially the date of any relevant events, as this might form the basis for statute of limitations or statute of repose de-

fenses);
- The name of any individuals with knowledge of the incident at the heart of the litigation;
- Any documents that relate to the incident at the heart of the litigation (especially any documents that you know the opposing party is aware of);
- Information about the incorporation or founding of your company/organization;
- The location of your organization's current headquarters;
- The location of any other facilities owned by your organization at which a significant number of employees work and the number of employees at each.

You know your organization better than your attorney does. While it might seem counterintuitive, being over-inclusive with the information you provide can reduce costs. An attorney who places your interests first will hold off on reviewing a document until they know it's necessary to do so, especially if you provide some context for the documents you send. Sending your attorney all the relevant information you have, especially the above-listed information, can help you avoid significant charges for time spent interviewing witnesses or tracking down information about your company's history from other sources.

Litigation attorneys also start thinking about a "theme" for a case as soon as they receive notice of the suit. This information helps your attorney develop their theme quickly, as they can see the full picture—including potential defenses—early on. If your attorney has the information they need, they can strategize when and how to conduct negotiations and proceed with defenses quickly, helping the litigation to resolve more efficiently.

KEEP THE INFORMATION FLOWING

It is imperative to send your attorney any information that you think might harm your defense. You should be ready to say right away whether there is anything "out there" that might negatively affect your case.

Sometimes clients think that their defense will benefit from hiding alarming facts from their attorney, hoping that those facts never get out, but this is not a reliable strategy. Bad information almost always comes out. You should have faith in your legal counsel's ability to advise you, regardless of the factual situation. However, to properly advise you, your attorney needs to know *all* the relevant facts from the outset, so they have time to formulate an effective defense or to better evaluate how much a case is worth. Otherwise, your attorney may plan a defense around good facts and later be forced to spend time formulating an entirely new defense. This will harm the consistency of your overall case, cost you money in legal fees, and even cause you to miss settlement opportunities.

In short, your attorney needs to know the holes in your defense, so they can help you figure out how to patch them and avoid wasting time and money on untenable legal positions.

DON'T FORGET PREEMPTIVE MAINTENANCE!

Discovery disputes can blow your discovery budget and prolong the discovery process, but investing a bit of time on preemptive maintenance early on can ensure you don't face a big blowout later in the litigation.

Boilerplate objections are a major cause of discovery disputes. Admittedly, boilerplate objections are sometimes the result of attorney laziness or obstructionist tactics. However, they are often the result of an attorney simply lacking the information required to respond to discovery requests substantively, necessitating evasive and incomplete responses and objections. Such boilerplate responses rarely satisfy the opposing party, frequently causing a dispute. Additional communications and/or pleadings associated with such a dispute can quickly add up, further raising discovery-related litigation costs. Necessary supplemental discovery responses will result in more attorney and/or paralegal time billed. Boilerplate discovery responses also irritate the courts and can lead to sanctions.[2] If all likely relevant information is produced to your attorney early in the litigation, your attorney will already have most of the information they need when they receive discovery requests, and these expenses can be avoided or minimized.

Other discovery disputes that can quickly cause discovery costs to skyrocket often arise from the propounding of multiple sets of discovery requests and the noticing of unnecessary corporate representative depositions. Though technically disallowed by the Rules of Civil Procedure,[3] attorneys will often use the propounding of multiple burdensome discovery requests as a strategy to force the other party to settle. But the expense associated with responding to multiple sets of discovery requests can be minimized if your attorney has the information necessary to respond without having to communicate with you extensively or eliminated when your attorney has the required information to submit complete—rather than evasive—responses initially. The noticing and taking of corporate depositions is also often used as a tactic to force a settlement, but these expenses can be avoided by providing the information that opposing counsel requests during the first round of written discovery. (If all relevant information has already been produced, there won't be anything for the opposing party to seek.) Both disputes can be avoided through good attorney-client communication and planning, saving you from dispute-related expenses.

Sometimes discovery expenses feel like a slow leak, and other times—especially when disputes arise—they come in the form of one big, costly repair. But being forthright with your attorney, and giving them access to necessary documents, can save you money, especially by helping to avoid discovery disputes.

Megan Fulcher Bosak is a member in Flaherty's Charleston office. She focuses her practice on mass litigation, medical malpractice, and long-term care with proven results. Megan may be reached at mbosak@flahertylegal.com.

Michaela L. Cloutier is an associate in our Charleston office, where she is a member of our complex tort and product liability practice group. Michaela may be reached at mcloutier@flahertylegal.com.

1 *See* Lawyers for Civil Justice et al., Statement, Litigation Cost Survey of Major Companies, 2010 Conf. Civ. Litig., DUKE L. SCH., https://www.uscourts.gov/sites/default/files/litigation_cost_survey_of_major_companies_0.pdf at 2 (2010) ("discovery costs comprise at least one-fourth of total outside legal fees"). *See also* Institute for the Advancement of the American Legal System, Electronic Discovery: A View from the Front Lines, at 3–4, 25 (2008) (e-discovery costs alone amount to approximately $3.5 million for a typical mid-size lawsuit).

2 *See* Fischer v. Forrest, No. 1:14-cv-01307-PAE-AJP (S.D.N.Y Feb. 28, 2017) (order instructing parties to comply with Rule 34's requirement to state objections with specificity), https://uploads-ssl.webflow.com/60f0542421b57fec161904f4/610ab7884091b7b2bcd3992e_Fischer-v-Forrest-Judge-Peck.pdf and Liguria Foods, Inc. v. Griffith Lab'ys, Inc., 320 F.R.D. 168, 171 (N.D. Iowa 2017) (warning about imposition of sanctions due to obstructionist discovery responses). *See also* Wesley Corp. v. Zoom T.V. Prod., LLC, No. 17-10021, 2018 WL 372700, at *1 (E.D. Mich. Jan. 11, 2018) (imposing sanctions).

3 *See* Fed. R. Civ. P. 26(g)(1)(B)(ii).