Attorney Information Exchange Group ("AIEG"):

What It Is, What It Does, and How to Mitigate Its Effect

Lana A. Olson

Nikaa B. Jordan

Lightfoot, Franklin & White, LLC

400 20th Street North
Birmingham, AL 35203
(205) 581-0700
lolson@lightfootlaw.com
njordan@lightfootlaw.com

Lana A. Olson is a partner with the litigation-only boutique firm, Lightfoot, Franklin & White, LLC in Birmingham, Alabama. The first case that she ever handled as a lawyer nearly 17 years ago was toxic tort case that multiplied into hundreds of cases in multiple states and which lasted for eight years. Her practice today has expanded into general civil defense litigation, with an emphasis on environmental and toxic torts, product liability, class actions, drug and medical device litigation, employment litigation, and business disputes. She was the chair of the 2014 DRI Toxic Torts and Environmental Law Seminar and is an active member of the DRI Toxic Torts and Environmental Law Committee. She is currently the chair of the DRI Women in the Law Committee.

Nikaa B. Jordan's practice is devoted to brief writing at all phases of litigation. The focus of her trial-level work is the exclusion of expert testimony and complex dispositive motions. Ms. Jordan has written briefs in support of excluding a host of expert witnesses, including physicians, toxicologists, economists, and alternative design theorists. Her case-dispositive practice raises a host of issues under state and federal law for a broad spectrum of clients. Her work in this regard has ranged from cases alleging simple claims of fraud to class actions based on antitrust law.

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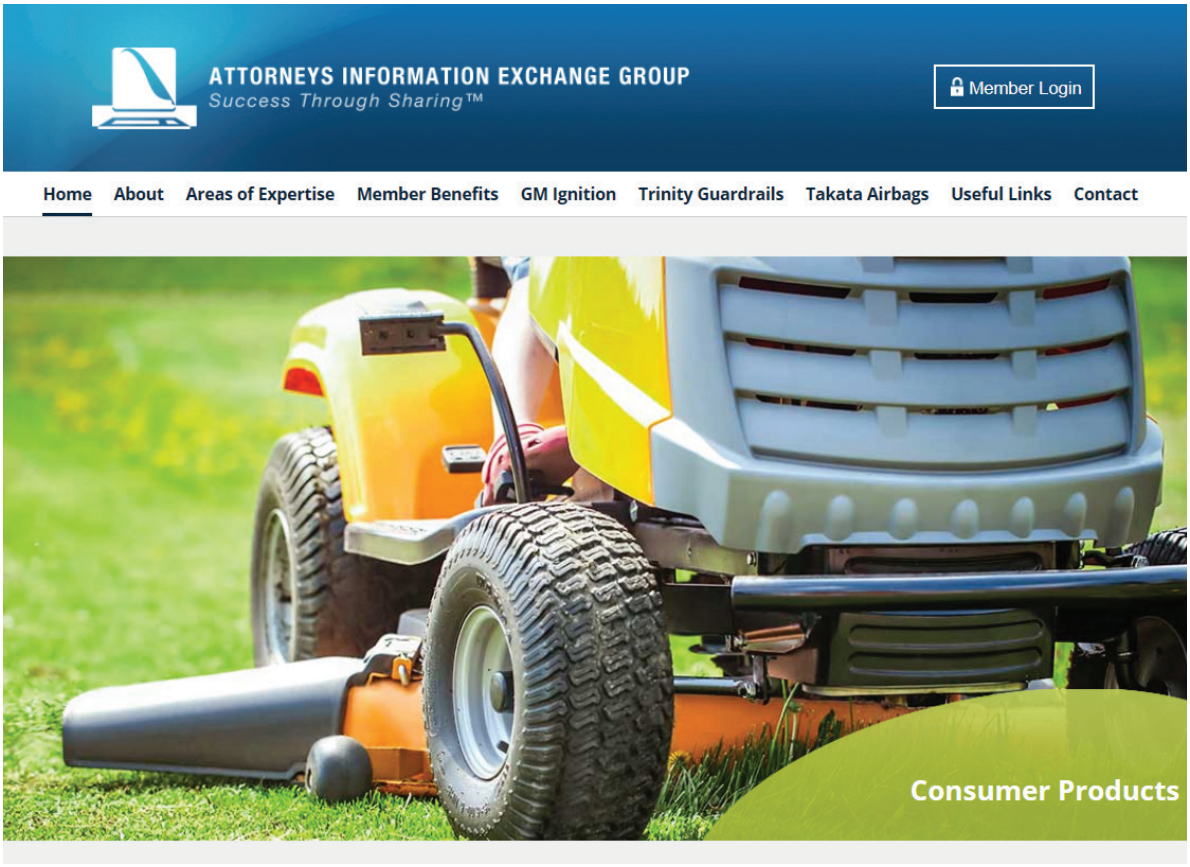

I. What Is AIEG?

AIEG stands for Attorney Information Exchange Group. It is a nationwide litigation support group founded in Birmingham, Alabama. for the sole purpose of allowing plaintiffs' attorneys to share information about similar cases among themselves. Widely known as the most significant group of its type, it was founded in in the mid-1970s by Francis H. Hare, Jr., a noted national plaintiffs' attorney from Birmingham.

AIEG's bylaws recite that it was founded for the following purposes: (i) to assist its member attorneys handling similar cases to properly prepare and fairly resolve product defect cases; (ii) to reduce the time and expense required to properly prepare and fairly resolve product defect cases; (iii) to offset the inherent advantages favoring defendants in defective product litigation; and (iv) to overcome the obstacles that unjustly impede the victims of defective products in the exercise of their right to seek legal redress.

AIEG quickly become actively involved in mass litigation in federal and state courts across the country—either as counsel for mass tort plaintiffs, as an amicus advocating pro-plaintiff causes, or as a third-party repository of technical information germane to mass torts. AIEG has in excess of 600 members and has been involved in a number of watershed mass tort cases, including the Ford Pinto litigation, the GM side saddle fuel tank litigation, the Toyota sudden acceleration litigation, the Ford Firestone tire litigation, and varying species of the tobacco litigation.

II. How Does It Work?

AIEG administers a number of discrete litigation support groups; each deals with a different alleged product defect design in a particular product that is the subject matter of individual product liability cases pending in state and federal courts around the country. AIEG allows its plaintiff attorney members to place materials obtained from defendants through discovery into a data bank at AIEG. When an AIEG member submits a description of his case to AIEG, the AIEG prepares a list of documents in the database that may be on topic. The AIEG member then selects which documents he wants. AIEG members do not sell material; it is paid for in kind.

AIEG's membership is limited to ATLA members. Its website has only a place for entry of a user I.D. and password with no descriptive information whatsoever. AIEG Members are required to agree not to divulge AIEG documents to non-AIEG members. If a court orders an AIEG member to produce an AIEG document, that attorney's membership in AIEG is automatically terminated.

III. Where Does It Fit Among the Plaintiffs' Bar?

AIEG represents itself as a necessary resource to plaintiffs' counsel in mass tort litigation involving allegations of product defect. It points to cooperation among the defense bar and contends to the plaintiffs' bar that the failure to take advantage of its corroborative sharing mechanism constitutes legal malpractice. AIEG considers the type of sharing it does as its "civil responsibility to the judicial system" and its member attorneys have noted that it is their "custom and practice." AIEG member attorneys often, as a matter of custom and routine, will not agree to a stipulated protective order prohibiting sharing.

IV. What Are the Typical Types of Materials That AIEG Members Can Access?

Among the materials commonly shared among AIEG members: expert reports, trial testimony, deposition testimony, corporate representative deposition testimony, "hot docs," technical product design information, and internal corporate documents produced during discovery.

AIEG members also have access to legal memoranda and attorney work product prepared by fellow AIEG members containing legal analyses, opinions, mental impressions, and conclusions. "Providing Member Attorneys" are to aid AIEG members in their case preparation activities and facilitate the desire of AIEG members handling similar cases to participate in "a cooperative effort to achieve the common interest of properly preparing and fairly resolving individual cases."

V. Why Should You Worry About AIEG?

AIEG poses a multi-layered threat to a corporate defendant sued in any jurisdiction in the nation. First, the mere proliferation of sensitive corporate documents among plaintiffs' attorneys not only increases the likelihood of suit in the first place, but also increases the likelihood that a corporate representative or defense expert will be ambushed at deposition with "hot docs" or other incendiary materials obtained from the AIEG exchange.

In addition, AIEG frequently appears as an amicus to oppose a corporate defendant's efforts to prevent or inhibit dissemination of documents and information obtained by plaintiffs during pretrial discovery. And AIEG has appeared as an amicus to support other plaintiff-friendly causes, such as the survival of com-

mon law tort claims amidst a highly regulatory federal framework and an overly lax application of Rule 702 of the Federal Rules of Evidence.

Although AIEG's by-laws state that it will not share material in violation of a protective order, it has been known to do so on a number of occasions. *See Smith & Fuller, P.A. v. Cooper Tire & Rubber Co.,* 685 F.3d 486, 487 (5th Cir. 2012), *McDonald v. Cooper Tire & Rubber Co.*, 2005 W.L. 3372855, at *1 (M.D. Fla. Dec. 12, 2005).

VI. What Can You Do to Protect Your Client from AIEG?

A. Negotiate a Strong Protective Order

First, do your part to prevent AIEG from obtaining sensitive information in the first place by negotiating for a strongly worded protective order and acting vigorously at all times to ensure that it is adhered to.

1. Hallmarks of a Strong Protective Order

What are the characteristics of a strong protective order? A strong protective order allows certain materials to be designated as confidential, sensitive, or proprietary. It limits the universe of people who can access those documents and the uses to which they may be put. As broad a definition of protected information as possible should be urged; this definition should span beyond trade secrets and proprietary information and reach any type of information that a court could conclude lies within a zone of privacy. For example:

> **Protected Material**: all information, regardless of the manner in which it is generated or maintained (including without limitation any deposition or other testimony, transcripts, or tangible things), that is protected under state or federal law as confidential business information, trade secrets, or as being within the zone of privacy of an individual or entity.

And because courts will be more inclined to enforce protective orders that are specifically bargained for, include a recital that makes plain the intended purpose of the protective order. In other words, make an express statement that the protective order is being stipulated to for the specific purpose of protecting confidential information from disclosure to unauthorized individuals or groups. For example:

> **Basic Principles**. All protected material shall be used solely for this case or any related appellate proceeding, and not for any other purpose whatsoever, including without limitation any other litigation, contemplated litigation, any business or competitive purpose or function, or any communication or dissemination to the public, the media, or any information exchange groups in any form. Protected Material shall not be distributed, disclosed or made available to anyone except as expressly provided in this Order.

After defining what type of content should be subject to a protective order, the universe of people who can access that type of content should be sharply circumscribed. For example: disclosure should be limited to "authorized persons, solely in the performance of their duties in connection with the trial preparation of this case." Such "authorized persons" should further be defined as counsel of record for the parties to the case at hand who have consented to and signed the protective order, their support staff, and outside experts they have retained. A provision allowing for access outside the definition of authorized person upon agreement of counsel should be included and each authorized person should agree to subject himself or herself to the jurisdiction of the court entering the protective order.

Authorized persons should be expressly defined to exclude AIEG and like groups. For example:

> **Authorized persons** shall not include any organization or entity that regularly maintains or disseminates documents or information regarding documents, including abstracts or summaries, or any other records as a service to its members, subscribers, or others, or the representative of such an organization or entity.

It is critically important to ensure very specific compliance with all the terms of the protective order to avoid an argument that its protections were somehow waived. In addition, a safeguard for inadvertent disclosure should be included and whatever steps are outlined there followed in such an event.

2. Courts Are More Likely to Enforce a Negotiated Protective Order and to Impose Sanctions for Its Violation

There is general unanimity that a negotiated protective order can only be changed upon the moving party's showing of "good cause." *See, e.g., Jochims v. Isuzu Motors, Ltd.*, 145 F.R.D. 499 (S.D. Ia. 1992) (citing cases). The rationale is that a party which in good faith negotiates a stipulated protective order and then proceeds to produce documents pursuant to that protective order is entitled to "the benefit of its bargain; namely, to rely upon the terms of the stipulated protective order." *See, e.g., Omega Homes, Inc. v. Citicorp Acceptance Co.*, 656 F. Supp. 393, 403 (W.D. Va. 1987).

In addition, efforts toward securing a strongly worded protective order and to vigilantly police its enforcement weigh toward imposing sanctions for its violation. *See, e.g., Rodriguez Trenado v. Cooper Tire & Rubber Co.*, 2011 WL 79525 (Jan. 6, 2011) (sanctioning attorney who provided documents to AIEG in contravention of protective order).

B. If Negotiating for an Order Fails, Advocate for an Order That Prevents Information Sharing

If you cannot negotiate a strong protective order that prohibits sharing and protects confidentiality, advocate for the entry of a protective order having that same effect.

If plaintiff's counsel refuses to negotiate a protective order that protects confidentiality and prevents sharing, it can be an uphill battle to persuade a court to include a non-sharing provision in a protective order. In fact, the sharing mechanism that AIEG promotes and that AIEG members facilitate has been lauded by some courts as an aid to efficient mass tort litigation. Federal courts in particular have been very open to the sharing practice that AIEG promotes. *See, e.g., Wilk v. American Medical Ass'n,* 635 F.2d 1295, 1299 (7th Cir. 1980). Soon after AIEG came on the scene in the Ford Pinto litigation, one court adjudicating those claims observed:

> If, as asserted, a single design defect is the cause of hundreds of injuries, then the evidentiary facts to prove it must be identical, or nearly so, in all the cases. Each plaintiff should not have to undertake to discover anew the basic evidence that other plaintiffs have uncovered. To so require would be tantamount to holding that each litigant who wishes to ride a taxi to court must undertake the expense of inventing the wheel. Efficient administration of justice requires that courts encourage, not hamstring, information exchanges such as that here involved.

See Ward v. Ford Motor Co., 93 F.R.D. 579 (D. Colo. 1982).

Not only courts, but commentators, have praised AIEG's sharing model. AIEG attorneys often cite these materials in negotiating for sharing provisions. Members of the firm founded by the founder of AIEG have been known to tout that they have been litigating product liability cases for nearly 40 years, and cannot

recall ever losing a court ruling on the issue of plaintiffs' information sharing. They reference trial journals, *see* George E. McLaughlin and William J. Hansen, *Mining Discovery In Other Cases*, 43 Trial 32, 34 (Nov. 2007) ("Many defendants in product liability cases use obstructive tactics—such as seeking wide-ranging protective orders—to restrict information-sharing among plaintiff counsel in related cases. Their aim is to make each plaintiff lawyer reinvent the wheel in every case. But with few exceptions, courts have embraced information-sharing among counsel in related cases, to avoid duplication of discovery; ensure full, fair, and consistent disclosure by defendants; improve efficiency and consistency; and keep costs down."), as well as litigation texts and treatises. *See* Roxanne Barton Conlin & Gregory S. Cuisimano, *Litigating Tort Cases* §14.44. ("Sharing information among plaintiffs' counsel furthers the objectives of the Rules of Civil Procedure—namely, just resolution of cases by 'eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice. In sharp contrast, the effect of restrictive confidentiality orders conflicts with each of these objectives. The authorities are virtually unanimous in recognizing the value in information sharing.").

Likewise, AIEG and groups like it have been praised for having "a sunlight as a disinfectant" effect. *See Wilk v. American Medical Ass'n,* 635 F.2d 1295 (7th Cir. 1980). (In fact, AIEG invokes state sunshine in litigation laws to argue against confidentiality protections.). In a related vein, there is a presumption that, absent a good reason, pre-trial discovery is to be conducted in public. *See* Federal Rule of Civil Procedure 26(c) ("good cause" required for the issuance of a protective order). *See also Public Citizen v. Liggett Group, Inc.,* 858 F.2d 533, 557 (1st Cir. 1988).

There is authority supporting the contrary view, *i.e.*, that there is no right to access the discovery materials in a related case. *See, e.g., Rhinehart v. Seattle Times Co.*, 654 P.2d 673, 679 (1982) (holding protective order was not subject to a First Amendment challenge and stating that "the effective administration of justice does not require dissemination beyond that which is needed for litigation of the case. It was the needs of litigation and only those needs for which the courts adopted [Rule 26]…"), *aff'd,* 467 U.S. 20, 33 (1984). *See also In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 255 (11th Cir. 1987) ("[A]ppellants' common law right of access does not extend to information collected through discovery which is not a matter of public record.").

There are, however, several good bases on which to oppose the entry of a protective order that contains a sharing provision. As an initial matter, consider whether the case or claims even give rise to some basis for sharing. Unless there are other lawsuits regarding the same product and making the same allegations, there really should be no reason to share the information with anyone. A plaintiff's attorney who urges for a sharing provision in a unique litigation setting is more than likely trying to build the arsenal of information that AIEG and groups like it have against corporate defendants. And the case law recognizes that the efficiency and cost savings benefits of shared discovery are entirely speculative when there is no specific plaintiff involved in a lawsuit that would benefit. *See, e.g., Memendez v. Wal-Mart Stores,* 2012 WL 90140 (N.D. Ind. Jan. 11, 2012) (plaintiff could not identify collateral lawsuits for purported sharing benefit), *Gil v. Ford Motor Co.*, 2007 WL 2580792 (N.D. W. Va. Sep. 4, 2007) (court rejecting hypothetical benefit and issuing protective order against disclosure of confidential information).

In addition, there is support for the argument that a sharing provision should not be used to do an end run around discovery rules in collateral litigation. For example, permitting sharing when the information would not be discoverable in collateral litigation has been frowned upon. *See Gil, supra*, at *5. *See also AT&T Corp. v. Sprint Corp.*, 407 F.3d 560 (2d Cir. 2005) (denying modification of protective order because it was sought to circumvent the close of discovery in collateral litigation), 8A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, §2044.1 (3d ed. 2013) (sharing of discovery should be denied where it would subvert the discovery limitations in the collateral litigation).

Also argue the relative prejudice to the parties if sharing is allowed. In *Massachusetts v. Mylan Labs, Inc.*, 246 F.R.D. 87 (D. Mass. 2007), a sharing provision was disallowed because the plaintiff in that case would get the documents at issue, just be prevented from sharing them with parties not before the court. A corporate defendant, by contrast, can be see its commercial interests substantially harmed if confidential or sensitive information is made widely available. Moreover, it has taken steps and expended sums to shield that information from public view for years. *See Williams v. Taser Int'l, Inc.*, 2006 WL 1835437 at *1 (N.D. Ga. 2006) (noting the risk to defendant by release of confidential information and difficulty enforcing protective order when documents were shared outweighed the plaintiff's interests in sharing that information).

Another strategy is to argue to the court that a sharing provision will create a "side show" whereby the parties will just come running back to court to hash out what can and cannot be shared. Explain to the court that a sharing provision will unduly burden it with controversies that are completely collateral to the case at hand. Moreover, those controversies could continue to arise long after the case before the court is concluded. In particular, warn the court of the everlasting risk that parties in collateral litigation will come before it to intervene to have the protective order modified. *See, e.g., United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) ("[W]here an appropriate modification of a protective order can place private litigants in a position they would otherwise reach only after repetition of another's discovery, such modification can be denied only where it would tangibly prejudice substantial rights of the party opposing modification.").

VII. Can You Prevent Your Witnesses from Being Ambushed by the Type of Material That AIEG Supplies to the Plaintiffs' Bar?

You can take steps to avoid having a witness being ambushed by materials gathered from AIEG or a similar database. The first step is attempting to determine what materials the plaintiff may have gotten from AIEG or a similar entity. Targeted interrogatories aimed at identifying materials drawn from the AIEG database can be effective. For example:

> Please identify the following information for each and every document obtained by Plaintiff or Plaintiff's counsel from the Attorney's Information Exchange Group ("AIEG") that is relevant to this case:

a. A description of the document;
b. The source of the original document;
c. The date upon which the document was originally obtained;
d. The date upon which the document was added to the AIEG database;
e. When the document was retrieved by Plaintiff from the AIEG database; and
f. Any identifying bates labels on the document.

And in order to cast as broad a net as possible, it is helpful to inquire beyond the AIEG database:

> Please identify each and every database or website to which Plaintiff or Plaintiff's counsel has access to which contains documents responsive to these requests, any of Defendants' previous requests, or any of Plaintiff's requests directed to Defendant.

Note, however, that AIEG is generally treated just like any other agent assisting counsel in preparing a case. For this reason, materials selected from AIEG by a plaintiff's attorney have been held subject to the work product doctrine, as they could give away his strategy in preparing the case for trial. *See McDaniel v. Freightliner Corp.*, 2000 WL 303293 (S.D. N.Y. 2000).

VIII. What Can You Do if Your Corporate Representative Is Confronted with an AIEG-Provided Document in a Deposition?

Assume that you are putting your corporate representative up for deposition and she is confronted with a facially-inflammatory corporate document. What should you do? First: stay as calm as possible. Deposition is not trial, which is where the admissibility of the document will be determined.

At deposition, it is important to build your arsenal for arguing that the document should be excluded from evidence. Depending on your facts and your rep's personal knowledge, establish whether the document can even be authenticated. Has your witness seen it before? Have personal knowledge of its contents? Did it pre-date or post-date his or her time at the corporation?

Can your witness provide testimony to make it difficult for the document to circumvent the hearsay rule? For example, if the author of the document (if even known) was not authorized to speak on behalf of the corporation, then establish as much. And if the author is unknown, establish that much as well.

Do the matters or incidents in the document even have any bearing on the issues in your case? If different products, product models/designs, or manufacturing timeframes are at issue, then testimony to that effect will go a long way toward a motion *in limine* to exclude the document as irrelevant and to opposing your opponent's argument that "other similar incidents" exception for Rule 404(b) is satisfied.

The most important thing that you can do is to build a record to support your arguments for excluding the document. Depending on your relationship with opposing counsel, you may request that the deposition be adjourned until your witness can familiarize himself with the document. But, if the witness truly has no personal knowledge regarding the documents or the matters it deals with, you are probably better off building a record demonstrating he or she was ambushed and that the document should be excluded.