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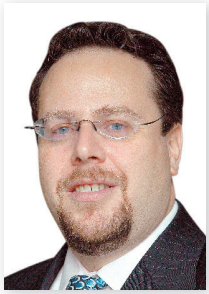
Career Development

Drafting Interrogatories



BY MARK R. SEIDEN

Once a lawsuit has been commenced, the attention of both the plaintiff's and defendant's counsel quickly turns to the formation and execution of a discovery plan. While the primary focus is typically upon deposition practice, it is the rare case in which interrogatories are not utilized.

Surely not as glamorous as deposition practice, interrogatories nonetheless serve an important function in the discovery process. A well-crafted set of interrogatories served early in an action can require the opposing party to serve substantive responses that dramatically alter the balance of discovery, can result in a significant reduction in the time and expense ordinarily associated with discovery and can even impact a party's evaluation of its likelihood of success on the merits.

Indeed, interrogatories can be a particularly valuable tool in an action against a corporation because they force the corporate party to come forward with its collective position as an entity. By comparison, at a deposition an employee-witness may couch her answers to suggest she is not speaking for the company, but only offering her personal view or account of events. Moreover, from an evidentiary perspective responses to interrogatories ordinarily must be sworn to, making them generally admissible at trial. And toward the end of discovery, interrogatories can be an effective tool for forcing the opposing party to disclose its contentions regarding the facts and the law.

These are just some of the reasons interrogatories are an integral component of a discovery plan.

Frequently, the responsibility for developing an initial draft set of interrogatories falls on the junior attorney assigned to the matter. This article provides some general considerations to reflect upon when faced with such an assignment.

Among the first steps to take when given responsibility for drafting interrogatories is to proceed to the law library (or computer database equivalent) to research both procedural and substantive issues. It is of paramount importance to review all applicable procedural rules. While the rules vary from jurisdiction to jurisdiction—and even from judge to judge within a particular jurisdiction—frequently they establish limitations on the permissible scope and number of interrogatories that may be served at various stages of the lawsuit. (See e.g., Federal Rule of Civil Procedure 33(a) and Rule 33.3 of the Local Civil Rules for the Southern District of New York.)

When conducting this research, be mindful that some courts have imposed important limitations on the use of interrogatories through judicial decisions, either in lieu of rulemaking or as a supplement thereto. For that reason, the most efficient way to arrive at a comprehensive statement of the rules may be to review a respected treatise analyzing local discovery practice. Learning these limitations after drafting—or worse yet, after serving—non-compliant interrogatories can result in professional embarrassment.

But beyond merely preventing embarrassment, a working understanding of the rules provides insight regarding the adversary's options and obligations when responding to the interrogatories. Over time you will discover that the requirements for a response impact which questions are actually posed in served interrogatories, and how the questions are best phrased.

Frequently, legal research must be conducted regarding the elements of the causes of actions pleaded by the plaintiff in its complaint, and/or the affirmative defenses pleaded by the defendant in its answer.

This research is necessary where it makes strategic sense to propound interrogatories focused upon the proof that will be required for the opposing party to meet its evidentiary burdens in support of its claims or affirmative defenses.

Depending on the particular circumstances of the action, depositions may provide a better platform for initial discovery regarding claims and defenses, with service of contention interrogatories regarding same to follow at the close of discovery.

Before drafting interrogatories, review the pleadings to confirm the precise factual and legal issues that remain in dispute. Care should be taken to insure that the interrogatories served are strictly limited to disputed issues.

Service of interrogatories inquiring about resolved issues runs the risk of providing an adversary with an opportunity to supplement its earlier pleading and effectively change the status of the formerly "resolved" issue to "disputed." Moreover, in jurisdictions where the number of permissible interrogatories is limited by rule, such as in the federal courts where a party is permitted just 25 interrogatories, propounding interrogatories regarding undisputed issues is simply a waste of a valuable resource.

A junior attorney should always consider whether the information sought is well suited for an interrogatory, or is more apt to illicit a helpful admission if asked for the first time in a deposition.

Remember, interrogatory responses are drafted by attorneys over a period of days or weeks, they are not contemporaneous layperson responses like those provided in a deposition. Importantly, there is no opportunity to ask immediate follow-up questions the way you can in a deposition. For this reason interrogatories may be best suited for fact specific questions that are not subject to lawyer shading, or for disclosure of information that one could not reasonably expect a witness to recite to during a deposition. For example, an interrogatory that asks the party in a breach of contract action to identify the names and addresses of each person who negotiated the contract provides the opposing party with an opportunity to research its files to provide a complete answer.

In addition, the nature of the question is such that the fact that an attorney is providing the written response should not, as a general matter, detract from the value of the response. However, if the same question were posed at a deposition, the witness might not remember everyone involved in the negotiations (and certainly would not have the time or ability to research his response to the question), and most likely would not have the negotiators addresses readily available. Therefore, undertake an analysis as to whether any query drafted is better suited to interrogatories or a deposition; this answer, of course, will vary on a case-by-case basis.

Once actual drafting of the interrogatories begins, careful thought and attention must be devoted to how each query is phrased. The likelihood of receiving meaningful responses is directly tied to the quality of the question posed. Well-crafted interrogatories can result in the disclosure of a great deal of information at a relatively low cost to the client. Narrow, short and focused requests are more likely to garner narrow responses. Conversely, broad questions are likely to be met by objections and possibly expensive motion practice. Posing quality questions requires a focus on details.

In sum, interrogatories are an important part of a litigant's arsenal. A well-thought-out, researched and crisp set of interrogatories enhances the chances of receiving meaningful responses. The challenge is to carefully consider all of the relevant factors in deciding whether to ask a particular question, and if asked, to phrase the question in a manner that will illicit a meaningful response.

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