Discovery

Interrogatories
The building blocks of your client's case

by Thomas J. Curcio

As I have previously written, interrogatories are one of several tools in an attorney's discovery toolbox. ("Discovery in the Products Liability Case," VTLA *Journal*, Fall, 1994) Along with other discovery procedures, such as Requests for Production, Subpoenas Duces Tecum, Depositions, and Requests for Production, Interrogatories are a tool used to build your client's case and deconstruct your opponent's case. Interrogatories, paired with a request for production, lay the foundation upon which you build your case and test the opposition's case.

Preliminary considerations

Before you draft your first set of interrogatories, there are some preliminary steps to take to make them effective in accomplishing your goals. (Note that I said *first set*. My practice is to hold back several for a second set to explore matters that are raised by the opposition's responsive pleadings or arise later in discovery. More about this below.) First, take the time to think seriously about the elements of your case, what you need to prove to prevail, and what defenses may be raised. This process begins at the initial client meeting, where you hear the client's story, what you need to know to prove your case, and what defenses you are likely to confront and must overcome. A thorough interview with the client is necessary, which includes asking the client to bring to the initial meeting a copy of all relevant documents.

For example, in an auto case, we instruct a potential client to bring the police report; the names and contact information of any witnesses; any photographs of the scene, the vehicles, and their injuries; copies of all related medical records and bills; and the declarations page to their insurance policy. In a product liability case, we request a potential client bring all available documents relating to the sale and purchase of the product, including warranty information and the owner's manual.

As you listen to the potential client tell his or her story, make note of things that you need to explore in discovery, such as whether the defendant in an auto case was given a ticket, was intoxicated, reported a medical emergency, or claimed that his light was green. In many cases, a visit to the scene is particularly helpful. For example, in a premises liability case, a visit to the scene could raise issues to explore, such as lighting, maintenance, repair, or improper alterations. In a premises case we handled several years ago, our client was struck by a highway sign that blew off its stand in high wind. When we inspected the scene, we saw several other highway signs with bent and damaged edges indicating that they too had become dislodged from their stands, as well as several stands that were sandbagged, also evidence that they had blown over in windy conditions. In another premises case, an inspection of the scene revealed that when exiting the restaurant, the exit door swung outward beyond the step at the top of the exit steps, that the ceiling light that our client had a photo of was still not working, and that the only light in the exit area was that provided by a cigarette machine.

The same concept can apply in a product liability case. In a recent case involving a stair lift, inspecting the product at the site of the injury revealed the design defect and then set the stage for the interrogatories we drafted concerning previous incidents and complaints and subsequent designs.

Conduct a thorough pre-suit investigation such as speaking to the police officer in an auto case, attending the traffic hearing, checking the court file regarding whether the defendant was cited for the subject collision and the disposition of that ticket. In premises cases, determine as best you can the correct legal name of the owner or occupier of the property. This may require a trip to the land records office to review the deed or to the local business license office to determine who holds the business license. In a product liability case, determine whether there have been other claims or cases involving the subject product, and if so, contact the lawyers involved in those cases. Review the sales documents, owner's manuals, product labels, and warranty information to determine the necessary parties. The internet is a great source of information concerning corporate entities, and the State Corporation Commission should always be checked for corporate existence, history, and proper name. To best know the elements of your case and the elements of any defenses you are likely to encounter, read the jury instructions and the case annotations or statutory bases of the instructions. Recognize and remember at the outset of investigating your case that the instruc-

tions are what, at the end of the trial, the judge will tell the jury you must prove to win. You should think of these elements as boxes to be checked when you put together and ultimately present your case. Similarly, the elements of the defenses likely to be raised guide you through knowing what must be developed to determine if a valid defense exists and what is needed to overcome that defense.

The second preliminary step in drafting effective interrogatories is a working knowledge of the scope of permissible discovery as set forth in Rule 4:1of the Rules of Supreme Court of Virginia. Subsection (b)(1) of Rule 4:1 provides, in pertinent part, as follows:

> (b) *Scope of Discovery*. — Unless otherwise limited by order of the court in accordance with these Rules, the scope of discovery is as follows:
>
> (1) *In General*. — Parties may obtain discovery regarding **any matter**, **not privileged**, which is **relevant** to the **subject matter involved in the pending action**, whether it relates to the claim or defense of the party seeking discovery or to the **claim or defense of any other party**, including **the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter**. It is **not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence**. (Emphasis added)

I highlighted the operative language of the rule to emphasize that the attorney crafting the interrogatories needs to know what is properly discoverable under the Rule. In its broadest sense, proper discovery extends to "any matter" which is "relevant" to the "subject matter involved" in the action. Relevant evidence is defined in the newly codified Rules of Evidence as "…evidence having any tendency to make the existence of any fact in issue more or less probable than it would be without the evidence." Rule 2:401 Rules of Supreme Court of Virginia.

Rule 4:1(b)(1) specifically allows for the discovery of information relating to the claims and defenses of the parties. It expressly allows for the discovery of information about tangible things, such as documents, including their existence, location, and custody, as well the discovery of the identity and location of persons having knowledge of discoverable matter. The scope of discovery is expressly wider than the scope of admissible evidence at trial as the matter sought only needs to appear reasonably calculated to lead to the discovery of admissible evidence. Rule 4:8, which specifically allows for and controls the use of interrogatories, states that "Interrogatories may relate to any matters which can be inquired into under Rule 4:1(b)…" *See* Rule 4:8(e).

Additionally, that same subsection provides, in pertinent part, that "…An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact…". *See* Rule 4:8(e).

Be mindful of how the trial courts are ruling on certain discovery matters, such as the discoverability of statements taken by an insurance company pre-suit, the discoverability of when the plaintiff retained counsel, or of social media information. *Virginia Lawyer's Weekly* and VTLA listserves are great sources for court rulings.

The scope of discovery is expressly limited to exclude privileged information, which leads directly into the third thing necessary to draft effective interrogatories, which is a working knowledge of evidence law. Privileges are set out at Rules 2:501 through 2:507 the Rules of Supreme Court of Virginia and contain the following privileges: attorney-client, clergy-communicant, marital, doctor-patient, mental health practitioner-patient, and interpreters. The attorney must also be familiar with the case law regarding attorney work product and information "prepared in anticipation of litigation" as both are protected from discovery. Additionally, the lawyer drafting the interrogatories needs to know Rule 4:8(g) limits the number of interrogatories that can be served to 30, including parts and subparts. (The number can be increased for good cause shown.) My practice is to serve less than 30 interrogatories in my first set as I want to be able to explore any defenses raised or factual denial with a second set.

After you have thought about your case, what you need to prove, and what you need to know or learn to prove your case, are familiar with the scope of permissible discovery, and know the rules of evidence, especially that of privilege, you are ready to begin drafting your first set of interrogatories. In doing so, your goal is to obtain the information you need without drawing an objection. One final point needs to be made: do not wait until just before the statute of limitations to file suit as doing so precludes you from correcting a misnomer or adding a necessary party, information that you will develop with your first set of interrogatories. As such, get into the practice of filing suit and serving your initial discovery at least 90 days before the statute runs.

My practice is to serve the first set of interrogatories with the Complaint. (Note that in drafting the Complaint, I make the factual allegations in each paragraph simple and concise, typically including

one fact per paragraph. As such, the Answer will be much more helpful as I will know which facts are admitted and which facts are denied. A denial can be explored in a second set of interrogatories. Such drafting proved valuable in a recent case in which I was unsure as to which of two related, but distinct, corporate entities employed the negligent tour bus driver. In one paragraph, I alleged he was employed and acting within the scope of company A. In the next paragraph, I alleged he was employed and working within the scope of company B. The defendant admitted one and denied the other, enabling me to dismiss as to the non-employer and focus my energies on the correct party. With the above goal in mind, I'll discuss various interrogatories served in various personal injury cases I have handled and why.

As my goal is to obtain the information needed to prevail without having to waste time on writing letters to opposing counsel regarding objections and preparing and arguing motions to compel, I draft each interrogatory to seek properly discoverable information. As part of that goal, I contain a reasonable and limited set of instructions and definitions as a preamble to the interrogatories. Those instructions and definitions are as follows:

Instructions

a. These interrogatories are continuing in character, so as to require you to file supplementary answers if you obtain further or different information before trial.

b. Where knowledge or information in possession of a party is requested, such request includes knowledge of the party's agents, representatives and, unless privileged, his attorneys.

c. Unless otherwise indicated, these interrogatories refer to the time, place and circumstances of the occurrence mentioned or complained of in the pleadings.

d. If you cannot answer after conducting a reasonable investigation, you should so state and answer to the extent you can, stating what information you do have, what information you cannot provide and stating what efforts you made to obtain the unknown information.

Definitions

e. The pronoun "you" refers to the party to whom these interrogatories are addressed and the persons mentioned in paragraph b.

f. The noun "person" refers to natural persons, and all business entities including corporations, partnerships, and limited partnerships.

g. "Identity" or "state the identity" means: 1. With reference to a person, to state the full name, home address, business address, and telephone numbers, if known. 2. With reference to a document, to state: the title and subject material of the document, the type of document (e.g., letter, memorandum, etc.), the date of the document, and a description of the contents of the document.

h. The term "subject collision" means the collision giving rise to this lawsuit.

Matters to discover with interrogatories

As the first tool used in your discovery tool box, there is key information that must be developed through the first set of interrogatories. This includes basic information about the opposing party, such as, in the individual case, his/her name, address, date of birth, and social security number. This information will confirm that you have correctly named the defendant, and provides information needed to conduct criminal and financial background checks on the opposing party if such becomes necessary, or to subpoena medical records if a medical emergency defense is raised. In a case involving a corporate entity, it is especially important to ask its correct legal name to avoid a misnomer. I routinely ask for the names of persons providing information used to answer the interrogatories as these are individuals whose knowledge I may want to explore in deposition. Information concerning potential witnesses to the event or having knowledge of it should also be developed through the first set of interrogatories. This includes their contact information as well as whether a statement was obtained from them, and if so, when it was taken and by whom. In a personal injury case, I specifically ask whether the defendant gave a statement, and if so, when. (I generally do not ask that statements be produced at this point as it may be protected under Rule 4:1(b)(3) as material prepared in anticipation of litigation. Rather, I fashion the interrogatory to obtain information to assess whether a privilege properly applies.) The existence and location of documents, such as police reports, photographs of the scene and automobiles in an auto case should be determined. Photographs of the scene or the vehicles involved are becoming more commonplace in this age of smart phones. Such photos, along with diagrams or drawings of the scene, final location of the vehicles, and traffic signals, are also critical pieces of information in understanding and proving what happened. The interrogatory seeking this information should always have a corresponding request in the first request for production of documents served at the same time as the first set of interrogatories.

In a premises case, the existence of scene photographs, incident reports, surveillance videos, and prior injuries or complaints should be determined.

In a product liability case, ask about prior notices of injury, claims, lawsuits, and recall notices and the existence of related documents.

Other basic information to obtain with the first set of interrogatories is the existence of possible other liable parties. In the individual auto collision case, this would include asking whether the defendant was working at the time of the crash, and if

so, to identify their employer. In the premises case, determine whether a management company or, if appropriate, a cleaning company, were involved. In a product liability case, ask questions designed to determine all sellers in the chain of distribution. As part of determining whether you have named all necessary parties, ask the defendant whether she blames a third party or the plaintiff for the collision, and if so, to describe how such third-party contributed to the happening of the incident. If a third party is identified, he or she can be brought into the case, assuming there is time remaining on the statute of limitations.

A purpose of the discovery rules is to enable competent counsel to obtain the information necessary to assess the strengths and weaknesses of their client's case and that of their opponent, with the underlying belief that such will promote settlement. With that purpose in mind, Rule 4 (b)(2) specially allows for the discovery of information relating to insurance. That Rule provides in pertinent part, as follows:

> (2) *Insurance Agreements*. — A party may obtain discovery of the existence and contents of any insurance agreement under which **any** person (which includes any individual, corporation, partnership or other association) **carrying on an insurance business may be liable to satisfy part or all of a judgment** which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. (Emphasis added)

The underlined language shows the broad scope of the Rule. It extends to "any" policy which "may be liable" to satisfy a "part" or "all of a judgment." Determining as early as possible the sources and amount of insurance that is available to compensate your injured client is of critical importance. Knowing such information sooner rather than later determines whether the case is a limits case, whether an assets check on the defendant needs to be conducted, and whether the case should then be settled rather than proceeding with expensive and time-consuming litigation. As such, the existence and amount of all possible sources of coverage must be discovered. Fortunately, Va. Code §8.01-417 now enables the discovery of the defendant's coverage pre-suit if the medicals bills exceed $12,400 and copies of the bills and records are provided to the liability carrier along with the accident crash report. The insurance information obtained pursuant to Code §8.01-417 is only the beginning of your search for all sources of coverage and you should fashion interrogatories to ferret out all other possible sources. This includes determining whether the driver is the owner of the vehicle, and if not, discovering policy information on both the driver and the owner. While the FR-300 Accident Crash Report usually contains the name and address of the owner, if different from the driver, it is best to have this information answered under oath. Another important area of inquiry is whether the defendant has some sources of coverage provided by relatives within his or her household. An interrogatory asking the defendant to state the address at which he was living at the time of the collision, to identify all persons living at that address with him at the time of the collision, and to state each person's relationship to him obtains this information.

Rule 4:1(b)(4)(A) expressly allows for the discovery of experts, their opinions, and the basis of those opinions through interrogatories. That rule, provides in pertinent part, as follows:

- (4) *Trial Preparation: Experts; Costs – Special Provisions for Eminent Domain Proceedings*. — Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this Rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:
  - (A)
    - (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(Subsection (ii) of that Rule expressly allows for the deposition of such experts).

It is important to note that the rule is expressly limited to testifying experts, and that discovery concerning consulting experts is permitted only in limited circumstances. *See* Rule 4:1(b)(4)(A). It is also important to note what is in fact discoverable regarding experts. In drafting my interrogatory, I keep it within the express scope of the rule. My standard expert interrogatory is as follows:

Identify each person whom you expect to call as an expert witness in the trial of this case and for each such person, state the following:

(a) The subject matter on which the expert is expected to testify;
(b) The substance of facts and opinions to which the expert is expected to testify; and
(c) A summary of the grounds for each opinion.

My practice is to include this interrogatory in my first set of interrogatories even though the defendant has not yet selected experts as a party is under a duty to supplement the identity of experts pursuant to Rule 4:1(e)(1). That way I know that I have asked the question and don't have to worry about it.

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I routinely serve a second set of interrogatories, primarily to explore any defenses raised in the Answer. In personal injury cases, these typically include the defenses of contributory negligence, assumption of risk, and the liability of third persons. (Note that Rule 4:8(e) allows for the serving of multiple sets of interrogatories provided the overall limit of 30 is not exceeded.) To explore such defenses when raised, I serve an interrogatory asking the defendant to identify all facts of which they are aware which supports the asserted defense, i.e. contributory negligence, and to identity all persons having knowledge of all such facts. Typically, the response is that discovery is ongoing and testifying experts are not known at this time. By the time of the defendant's deposition, when I inquireof the defenses, more often than not defense counsel abandons them.

Objections and Motions to Compel

As my goal is not to waste time arguing motions to compel, when drafting interrogatories and corresponding requests for production of documents, I stay within the scope of permissible discovery as defined in Rule 4:1. As such, if I'm met with an objection, I am able to show my opponent that the requested discovery is proper. Similarly, before objecting to interrogatories served by the opposing party, I review the Rules to determine whether the requested information is within the scope of permissible discovery. If not, I will respond with a brief, but specific objection, such as "the requested discovery is beyond the proper scope of discovery as stated in Rule 4:1(b)(1) as it calls for irrelevant information and doesn't appear reasonably calculated to lead to the discovery of admissible evidence." Similarly, if the requested information is protected by a privilege, such as attorney work product, I will clearly state that. (Rule 4:8(d) requires that the attorney sign objections and the answering party sign the answers.) Doing this enables my opponent to see and assess the basis of the objection, and hopefully leads to fruitful discussions in resolving the issues. Additionally, if the matter does go to a motion to compel, the Court will quickly see and understand the basis of the objection. Note that if a privilege is claimed, Rule 4:1(b)(6) requires that the privilege be expressly stated and that the items or materials claimed protected be described in such a manner as to allow the seeking party to assess the claim while not also disclosing privileged information.

Motions to Compel answers to interrogatories, including incomplete or evasive answers, are governed by Rule 4:12. That Rule requires that the movant certify that he or she "…has in good faith conferred or attempted to confer…" with "…other affected parties…" in an effort to resolve the dispute without court involvement. *See* Rule 4:12(a)(2). Note also that Rule 4:8(c)(2) requires counsel to provide the Court with copies of the subject interrogatories and responses. On another practical note, the party prevailing on the Motion to Compel should draft the Order and obtain the opposing party's signature as soon as possible, preferably before leaving the courthouse, to avoid any confusion over the Court's ruling.

Use of interrogatories at trial

Rule 4:8(e) provides that answers to interrogatories are admissible at trial subject to the rules of evidence. That Rule further provides that such interrogatories and answers must be offered in evidence to become part of the record. Rule 4:8(e) similarly provides for the use of interrogatory answers for summary judgment sought pursuant to Rule 3:20. My experience in using interrogatories at trial is limited to declaratory actions on insurance policy issues. In those instances, I treated the interrogatories and answers I intended to introduce into evidence as I do Requests for Admissions I routinely introduce at trial. That is, I prepared and marked as an exhibit the interrogatories and related answers, listed them on the exhibit list identified as "Certain Interrogatories and Answers Thereto," and provided copies to my opponent. At trial, I introduced and moved the exhibit into evidence.

As introducing requests for admission into evidence at trial is an easy and quick way to prove elements or facts necessary for you to prevail, interrogatory answers can be used for such purposes. For example, the relationship between owner and management agent in a premises case can be proved by introducing an interrogatory answer containing that information. Similarly, the employee-employer relationship and that the employee was acting within the scope of employment at the time of the collision can quickly and easily be proved by introducing interrogatories and answers directed to that information.

Conclusion

If you have not recently read Part Four of the Rules of Supreme Court of Virginia, especially for purposes of this article, Rules 4:1, 4:8, and 4:12, I suggest you do so. As a practicing attorney, you will have a greater appreciation and understanding of the Rules. Additionally, if you think more about your case and what you need to prove, and draft interrogatories within the scope of discovery, the information you obtain in response will better help you and your client to prevail. Finally, when preparing for trial, think about what interrogatories and answers will help you to prove your case and use them as trial exhibits.