

# **The End of Discovery Disputes**

by

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**1991**

Experienced litigators know, and those in their novitiate soon find out, that the discovery compulsion process is frustrating, time consuming, and, more often than not, only marginally effective. A typical scenario, under the conventional approach to a recalcitrant opponent, goes something like this:

1. You draft interrogatories and mail them.
2. You receive no response within 30 days or so.
3. You send a letter requesting answers.
4. You receive nothing, other than an assurance that answers will soon be forthcoming or worthless answers.
5. You send a second letter requesting answers, or good answers.
6. You receive no response, other than perhaps another worthless promise or worthless answers.
7. A motion to compel is served, along with a notice of hearing. Implicated by necessity here is that some of your time, or that of someone in your office, will be expended in preparing the appropriate documents and in obtaining a hearing date and time.
8. Your opponent advises you that he or she has a schedule conflict with the hearing date.
9. You obtain a new hearing date to accommodate your opponent's schedule.
10. The hearing takes place, and this implicates several things, such as:
  - a. You have to go to the courthouse. This might mean no more than walking across the street, but it might also mean driving 100 miles.
  - b. You are the complainer before the judge. You may be eminently justified in complaining, but face it, the more frequently you present yourself with such complaints to a judge, the more likely it becomes that the judge will become sick and tired of you. And remember, you are going before a judge who might already be sick and tired of discovery disputes from years of listening to them.
  - c. You have – and it is debatable whether this is more useful than not – put the case into a direct confrontational context well in advance of trial.
11. You, your adversary, and the judge plod through your questions and your adversary's objections to them. You make notes and your adversary does likewise.
12. A few days after the hearing you draft an order, reflecting what you believe the judge ordered. You draft a letter to your opponent to accompany the proposed order.

13. Your opponent writes to tell you that your notes do not agree, so he or she will not sign your proposed order.
14. You go through the entire hearing process a second time to get clarification as to what the judge had ruled. Of course, the judge does not remember how he ruled the first time, and the likelihood that the judge will be irritated is at least enhanced.
15. You draft another order. This one gets entered, but your opponent still offers no answers or lousy answers.
16. You go back to the judge on a motion for sanctions. There is another hearing and another order to draft; the judge has had it with you, your opponent, and your case (which has not progressed an iota in six months), and the process of getting nowhere has usurped a frustrating amount of your time.

Is there a better way? I believe there is. I cannot cite a study on the effectiveness of the tack I will suggest, but I can state empirically that I have not been in a courthouse on a discovery dispute in the five years I have been adhering to it.

Enter the Mountaineer Punishment Set. What, pray tell, is *that*? Well, it is always the same thing, although it takes different forms.

No answers? Forget polite letters requesting them. Forget formal motions to compel. *Send another set*, a Mountaineer Punishment Set. Still no answers to sets one and two? Send a third set, another Mountaineer Punishment Set. Where is your recalcitrant opponent at this point? Probably in a quagmire. He or she must answer all these questions, go to the judge for a protective order, or let everything sit, festering in the file. If the choice is to answer, fine, because this is what you wanted to begin with. If the choice is to go to the judge for protection, well, one need not be skilled in necromancy to envision the rather disadvantageous posture in which your opponent will present him or herself to the court. If the choice is to let things fester, you are indeed lucky. Your opponent will have no joy in life. Each pleasing moment will be spoiled with the nagging memory of that little problem in the file cabinet. It is not unusual at this point to encounter in an adversary what is called Three Monkey Syndrome, the symptoms of

which include a specious sense of euphoria engendered by concluding that neither you nor your case exist, and probably that neither ever did.

The clearest clinical manifestation of the presence of Three Money Syndrome is failure to open mail from your office. If you do not exist, how could one possibly be receiving mail from you? One could not be, of course, so the unopened mail goes into the file to fester with the unanswered interrogatories, or it accumulates on one or more of the repositories of darkness that seem to exist in most offices.

There are simple tests that most can come up with to determine whether your opponent's malaise has progressed to full blown Three Monkey Syndrome with its attendant mail problem. Once you perceive a likelihood that Three Monkey is present in this most virulent and invasive form, it is time to move in for the silent kill. Hit the one who denies your existence with a few eviscerating requests for admissions. Let *them* rot a while; and, instead of a motion to compel, you are probably ready for a motion for summary judgment.

What about evasive or incomplete answers, or, my favorite, answers to questions not asked? The Punishment Set works here, too. There's a certain satisfaction in getting interrogatories answered, verified, and put in the mail; even if one knows that the answers are largely not what the propounder reasonably sought to obtain. You can wipe out this satisfaction and put the onus on the sloppy work that led to it with the Hydra-Headed Monster form of the Punishment Set, in which every bad answer begets four or five new questions. Here is an example.

#### **ORIGINAL QUESTION AND ANSWER**

17. Please provide the name, business address, and corporate capacity of a Dairyland corporate officer, who is qualified to give answers (by way of a deposition) to questions involving Dairyland's claim procedures generally and to compare the procedures followed in this claim with Dairyland's general or usual procedures.

*Answer:* Unknown.

### **HYDRA-HEADED MONSTER RESPONSE**

Please explain the answer of “unknown” given to question 17 of the plaintiff’s first set of interrogatories. Do you mean:

- a. It is unknown whether you have anyone who is qualified to answer such questions?
- b. Unknown whether you have a person who is qualified, because you have made no inquiry to determine if you do or not?
- c. Unknown whether you have a person who is qualified, because, although you made inquiry, you received:
  - (1) No response?
  - (2) Or a response that did not contain sufficient factual information to allow you to answer the question?
- d. Unknown, because no one at Dairyland knows what anyone else at Dairyland knows?
- e. Unknown whether Dairyland has any corporate officers?
- f. Unknown whether Dairyland has any corporate officers capable of giving deposition testimony?
- g. Unknown whether anyone at Dairyland is willing to take an oath?
- h. Unknown for some other reason? If so, what is it?

The key to effective use of Hydra-heads is timing. You have to fire these back within a few days of receiving slack answers. You cannot be laggard, or the psychological impact of getting a new set as a reward for poor work on the first set will be lost. Will your adversary be irritated? Sure, but what remedy is available to assuage such irritation? Go to the judge and explain why one ought not have to answer questions that would never have been asked if good answers had been given in the first instance; while you sit there as *amicus curiae*, having done everything you reasonably could have done to obtain good answers extrajudicially, so as not to waste the court’s valuable time? Imagine that.

It probably does not require the brightest of legal minds to realize that the business of staying out of discovery disputes has a part-two. The flip side. You have to stay clean yourself, or equity will frown upon your quizzically schizophrenic approach. Give good answers and give them promptly. Give more information than has been asked for. If documents are requested, throw in everything you have or can find that is relevant to the case. Try to come up with at least a pound or two of stuff that is readily identifiable as a weekend killer. Give your adversary cause to ponder the adage, "Be careful what you ask for..."

What happens if the suggested approach becomes the weapon of choice for all or most of us? I suspect that the discovery rules will at last work as their framers envisioned they would.