

# **Having Fun with Discovery**

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## 1. Fun with interrogatories

a. The Mountaineer punishment set.<sup>1</sup>

b. The hydra-headed monster response to bad answers to good questions.<sup>2</sup>

c. Consider abandoning the typical lawyer-to-lawyer answers to interrogatories. The questions are from the defendant to the plaintiff, so there's no reason why you can't have the plaintiff talk to the defendant in answering as if they were sitting across the table from one-and-other. Here's an example from a pending Ohio car wreck case.

**INTERROGATORY:** *Please describe each and every pain in each and every part of your body you claim to have felt immediately after the accident in question.*

**ANSWER:** First of all, this was no accident. You came across the median like a bat-from-Hell-or-worse and smashed into me and knocked my car up on one side and into the guard rail. Accidents just happen. This happened because you don't know how to drive or at least didn't that day. I'm lucky to be alive to answer your questions, so don't talk to me about accidents.

As for pain, let me tell you about pain. I had blood everywhere, and everywhere it was coming from hurt. My face and head and neck felt like you'd taken a 50-pound salmon by the tail and slapped me upside the head with it. Then there was my collapsed lung. It felt like you'd taken a javelin to me. And my back? It couldn't have hurt more if you'd swung an axe blade into it. Overall I felt like I'd taken a direct hit from an anti-tank rocket.

Here's an example from a recently-settled West Virginia car-truck collision in which the interrogatories were from the trucking company whose driver hit the plaintiff.

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<sup>1,2</sup> See the attached article, "The End of Discovery Disputes."

**INTERROGATORY:** *Please describe in detail the precise sequence of events which led to the November 18, 1993, collision.*

**ANSWER:** Your driver stopped his tractor-trailer in front of me, so I stopped, and the city garbage truck behind me stopped. Then things started. Your driver, who must be blind, starts backing up the tractor-trailer. I'm honking and honking, but your guy doesn't hear any better than he sees. So he backs into me, but he doesn't feel any better than he sees or hears, so he isn't phased by hitting me, and he keeps on coming and pushed me back into the city garbage truck. There I am, being folded in like an accordion between the front of the garbage truck and the butt end of your tractor-trailer. When you guy stopped squashing me, my car is about 2/3 the size it had been, but at least I think the worst is over.

But I'm wrong.

Your can't-see-can't-hear-can't-feel fool of a driver pulls forward a ways, then he puts it in reverse, and here he comes at me again. I'm honking and now the garbage truck – and I'm attached to it at this point – is honking, too. It doesn't matter though. Your man rams me again, and by the time he's had his way with me this time, my car is 1/2 the size it started out.

Next your clueless driver pulls away like nothing had happened. I don't figure honking will do any good keeping him from leaving, and I'm pinned in and can't do squat. Lucky for me a guy coming the other way waves him down. So he walks back and looks through my broken windshield and asks if I'm okay. I ask him if he took his driver training at the Stevie Wonder Institute for the Sensory Impaired. And he looks at me like I'm the one who has a problem, which at that point I did, because I was all busted up, but I'll explain that in my answer to your next question.

d. Objections to interrogatories can be fun, too.<sup>3</sup>

## 2. Fun with depositions

a. If you're bored, say so. This is an extract from a deposition in *Altvater v. Sadauskas*, a West Virginia airplane crash case settled a couple of years back. The deposition was being taken by the defendant lawyer (DL) of an important non-party witness.

**Mr. Hill:** I'm bored.

**Mr. DL:** What?

**Mr. Hill:** I'm bored.

**Mr. DL:** Do you have an objection?

**Mr. Hill:** No, just a comment.

**Mr. DL:** If you have an objection, make it so we can move on.

**Mr. Hill:** I don't have an objection, but the way you're going at this we'll never get out of here. It's 5:30, and I've been putting up with this since 10:00 this morning. First you ask a question, then you write down the answer, then you repeat the answer and ask if you got it right. It takes you three shots to get what all the rest of us get in one, and I'm bored and having a hard time staying awake.

**Mr. DL:** Is that an objection?

**Mr. Hill:** Are you deaf? Is that the problem?

**Mr. DL:** If you don't have an objection, you have no right to interfere with my questioning.

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<sup>3</sup> See the attached objections from *Kamarados v. Rafaini*.

**Mr. Hill:** I think everyone has the inherent right to comment on curious human behavior which adversely affects others.

**Mr. DL:** So you think I'm a curiosity?

**Mr. Hill:** Your words, not mine.

**Mr. DL:** I didn't come here to be insulted.

**Mr. Hill:** You could have fooled me. It looks like you've been setting yourself up for it all day.

**Mr. DL:** Is that all?

**Mr. Hill:** I'm still bored.

**b.** Make up the rules when you need to. In a Pennsylvania tractor-trailer bad maintenance injury case, *McLaughlin v. Transamerica Leasing*, I made this one up in a lawyer's office in Philadelphia, where a non-party was to be questioned in a deposition set by agreement.

**DL:** If you don't mind, I'll ask questions first.

**Mr. Hill:** I mind. I want to go first.

**DL:** It's my office, and I'll decide who goes first.

**Mr. Hill:** The rule is I get to go first.

**DL:** What rule?

**Mr. Hill:** Biggest-man-in-the-room rule. It says the biggest guy goes first unless there's someone who thinks he can stop him. And I don't see anyone here who can stop me, so I'm going first.

c. Coach your client by scolding. Your client, Clyde, is babbling on in his deposition, volunteering information, and you want it stopped. Look over at Clyde and tell him,

**Lawyer:** Clyde, do you remember our talk before this deposition?

**Clyde:** nods head affirmatively.

**Lawyer:** Do you remember I told you to listen to the question and answer the question asked and not to ramble on?

**Clyde:** nods head hesitantly.

**Lawyer:** Well, you're not doing what I told you. You're not answering Mr. Hay's questions. You're just talking about whatever you want. You're wasting his time. He doesn't want to hear you talk about this and that and whatever. He wants answers. So start giving him answers and no more, okay?

**Clyde:** okay.

If the opposing lawyer objects, simply say you were trying to save him or her time.

### **3. Having fun with letters**

See the attached March 10, 1993, letter from *Cunningham v. Bauer et al.*, a West Virginia product liability-Mandolitis case.

# **The End of Discovery Disputes**

by

**Barry Hill**

**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.

**In the  
Circuit Court of Hancock County  
West Virginia**

<b>Lillian Kamarados</b> , individually and as the	)	
mother and next friend of Georgette	)	
Kamarados, <b>Georgette Kamarados</b> and	)	
<b>Stanley Kamarados</b> ,	)	
	)	
<i>Plaintiffs</i> ,	)	
	)	
<i>vs.</i>	)	<b>Civil Action No. 91-C-258 SP</b>
	)	
<b>Pete Rafaiani</b> ,	)	
	)	
<i>Defendant</i> .	)	

**Objections to the defendant’s interrogatories  
and request for production**

**A. Objections to interrogatories**

**1. General objections**

There are three plaintiffs in this case. The interrogatories are directed “to plaintiffs.” Presumably this indicates that a separate set of answers is expected from each plaintiff. However, Plaintiff Stanley Kamarados has asserted only loss of consortium claims, and none of the interrogatories, can reasonably be construed as being directed toward him. Thus, when answers to these interrogatories are given, there will be two sets, one from Plaintiff Georgette Kamarados and one from Plaintiff Lillian Kamarados. No answers will be provided by Plaintiff Stanley Kamarados, unless interrogatories are identified as ones the defendant wishes Plaintiff Stanley Kamarados to answer.

## B. Specific objections

### INTERROGATORY

### OBJECTION

- No. 7                    This question does not appear to be likely to lead to relevant information in light of rejection of the seat belt defense in *Wright v. Hanley*, 387 S.E.2d 801 (W.Va. 1989).
- No. 8                    The objection is the same as to No. 7.
- No. 15                   A request to identify trial witnesses, other than experts retained for litigation purposes, is beyond the permissible scope of interrogatories. *Truck Drivers & Helpers v. Grosshans & Peterson*, 209 F.Supp. 161 (D.C. Kans. 1962), *Uinta Oil Co. v. Continental Oil Co.*, 226 F.Supp. 495 (D.C. Utah 1964), *Wirtz v. Howard*, 4 F.R. Serv.2d 543 (D.C. Ky. 1961).
- No. 33                   With respect to Plaintiff Lillian Kamarados, the only plaintiff making a wage loss claim, and thus the only plaintiff toward whom this question can reasonably have been directed, there is nothing in her tax returns that is relevant to her wage loss claim (or earning capacity claim) that is not available through her W-2 forms. There is no objection to providing W-2 information, but tax returns are a different matter, because, among other things, tax returns would provide income information as to Stanley Kamarados, to which the defendant has no entitlement. Where documents other than income tax returns reveal the information sought from tax returns, the returns themselves need not be produced. *Eastern Auto Distributors, Inc. v. Peugeot Motors of America*, 96 F.R.D. 147 (E.D. Va. 1982).
- No. 39                   The plaintiffs will answer 39(a) and will provide the expert witness information requirements of R.C.P. 26(b)(4)(A)(i). Interrogatories 39(b) through (j) exceed the scope of R.C.P. 26(b)(4)(A)(i) and will not be answered. See *King v. Kayak Mfg. Corp.* 287 S.E.2d 511, 523 (W.Va. 1989).
- No. 50                   No claim for property damage has been made. Thus no useful purpose is served by inquiring into property damage. Other expenses have previously been itemized.
- No. 53                   The scope of this question is unreasonably broad, practically unlimited. To attempt to answer it as asked, one would need to include buildings, sidewalks, traffic lights, clouds, shrubs, grass, power poles and lines, and who knows what else.

- No. 54                   It is unreasonable to ask a person to give a narrative description “in *complete* chronological detail, stating *everything*” that happened in a collision. Omnibus questions such as this are in effect, whether or not be intent, trick questions. No matter how thorough an answer is given, something will invariably not be thought of and hence not mentioned. Then, in questioning at a deposition or trial, the propounder of such a question will invariably think of something not mentioned, and will start with “Why didn’t you include that in your answer to interrogatory no. 54?” The question could easily be modified to be a reasonable one.
- No. 75                   This is a new one to the undersigned. One can perhaps assume that the intent here is to find out whether Plaintiff Georgenne Kamarados, Plaintiff Lillian Kamarados, or both have, or do not have, difficulty travelling as results of their injuries. If so, this is a reasonable inquiry in substance, but the question calls for obscure details that implicate the objection made to NO. 54. If one of the plaintiffs flew somewhere, a precise answer to the question asked would require an airline passenger manifest. Then, too, no one can reasonably be expected to keep a log of trips over fifty miles for two years in anticipation of perhaps being asked such a question as this some day. The undersigned believes that, at a minimum, a predicate question, asking if either plaintiff is claiming a restriction on ability to travel ought precede this type of question. Finally, the undersigned believes the defendant, irrespective of all other considerations, must make some showing of potential relevance before either Plaintiff Lillian Kamarados or Georgenne Kamarados must disclose the names of those with whom they have traveled, where they went, and why they went over the past two years. By filing a lawsuit, a plaintiff opens up reasonable inquiries into the plaintiff’s activities, as they relate to the injuries claimed, but this does not mean that every minute detail of a plaintiff’s personal life is available for inspection.
- No. 80                   This is a lawsuit, not an employment application. It is unacceptable in the opinion of the undersigned to expect a plaintiff to be able to guess at the mental impressions of others. Frankly, it sounds like a question one would hear on The Newlywed Game. If the question were to name any non-medical people believed to have a reasonable appreciation of a plaintiff’s before-and-after medical condition, there would be no objection to it.
- No. 94                   Whether the car is still owned is a question that will be answered, although it seems to be a meaningless inquiry. If the car has been sold, its sale price cannot conceivably have relevance to a case in which no property damage claim has been made.
- No. 100                  There is no property damage claim being made; thus the question has no apparent relevance. Moreover, the defendant’s insurance carrier

paid the property damage claim and has all the information being requested.

No. 101 No. The question is off the wall in context.

No. 103 All facts upon which Plaintiffs Lillian Kamarados and Georgette Kamarados will rely in proving damages have been set forth in answers to previous interrogatories, so they need not be restated here. As to calculations, none have been or will be done other than to add up economic losses; unless, as the case progresses, it appears that use of an economist would be feasible. As to witnesses expected to testify in support of damages: 1) experts and their opinions have been provided in response to previous interrogatories, and 2) a request to identify lay trial witnesses or to provide summaries of expected lay trial witnesses exceeds the permissible scope of interrogatories. *Writz v. A.C. Steel Products, Inc.*, 312 F.2d 14 (4<sup>th</sup> Cir. 1962), *Jackson v. Kroblin Refrigerated Xpress, Inc.*, 49 F.R.D. 134 (D.C. W.Va. 1970), *Truck Drivers & Helpers, supra, Uinta Oil Co., supra.*

## **B. Objections to request for production**

### **1. General objection**

For the reasons stated in the general objection to interrogatories, responses to the request for production will be forth coming from Plaintiff Georgette Kamarados and Plaintiff Lillian Kamarados, but not Plaintiff Stanley Kamarados.

### **2. Specific objections**

#### **REQUEST**

#### **OBJECTION**

No. 1 & No. 2 Copies of health care provider records that have been obtained by plaintiffs' counsel in response to requests by plaintiffs' counsel for all records in the possession of each health care provider implicated in treatment of injuries received in the collision in question will be provided. Records for unrelated matters will not be provided voluntarily, unless specific records are identified, and there is at least a plausible reason given for inquiring into them in the context of the injuries that are the subject of this lawsuit.

No. 3 For the reasons stated in the objection to Interrogatory No. 3, W-2's will be produced but not tax returns.

No. 4

- a) Medical bills for treatment of injuries received in the subject collision will be provided. Bills for unrelated medical treatment will not be produced voluntarily.
- b) These will be provided in the response to request No. 2.
- c) These will be provided in the response to request No. 1.
- h) "...other photographs" of *what*? There is no limit to what might be covered by this request.
- j) There is no property damage claim nor rental car expense claim being made. Thus the request appears to be for irrelevant documents.
- k) The scope of discovery permitted by Rule 26 does not extend requiring a party to list or produce copies of documents the party intends to introduce into evidence at trial. *V.D. Anderson Co. v. Helenda Cotton Oil Co.*, 117 F.Supp. 932 (D.C. Ark. 1953), *Uinta Oil Co.*, *supra*, *Atkiebolaget Vargos v. Clark*, 8 F.R.D. 635 (D.C. D.C. 1949).
- m) All subparts are objectionable, because they inquire exclusively into collateral sources, evidence of which is neither admissible nor reasonably calculated to lead to relevant evidence. Nonetheless, the plaintiffs will provide the medical payments information requested in subpart (iv), because of the existence of a subrogation claim for medical payments made. It appears that subpart (ix) is a duplicate request for medical payments information.