

# LITIGATORS CORNER: Using Interrogatories Saves Time and Money



BY JOSEPH N. HOSTENY,  
OF NIRO, SCAVONE,  
HALLER & NIRO

*Regular IP Today columnist Joseph N. Hosteny is an intellectual property litigation attorney*

*with the Chicago law firm of Niro, Scavone, Haller & Niro. A Registered Professional Engineer and former Assistant US Attorney, his articles have also appeared in Corporate Counsel Magazine, The Docket (American Corporate Counsel Association), American Medical News, Inventors' Digest, Litigation Magazine and Assembly Engineering Magazine. Listed in Who's Who, Mr. Hosteny was recently named to the Board of Editors of Patent Strategy & Management (a monthly publication of American Lawyer Media), for which he will also be writing periodic guest columns. In addition, an article quoting him appeared in the November, 1999 issue of Entrepreneur Magazine. Mr. Hosteny can be reached at (312) 236-0733, or by e-mail at [jhosteny@hosteny.com](mailto:jhosteny@hosteny.com), or by visiting his web site at <http://www.hosteny.com>.*

Contingent fee cases have taught me how to be really, really cheap. Discovery can't be done on the lines of the conventional billable case, where the prevailing practice of many lawyers is to buy the Mercedes-Benz, and then throw in a couple of BMWs just to be on the safe side. If you do that in a contingent fee case, you are doomed. In contingent fee cases, discovery has to be better focused, because it must be less expensive and protracted. You cannot depose everyone in the Western Hemisphere, which seems to be the fashion in some of the cases — or perhaps it's better to call them melees — I have seen.

I used to think interrogatories stank as a means of discovery, because of the pettifogg-ing, obfuscating non-responses employed by most lawyers. But, in truth, you can't lose if you use this tool for effective discov-

ery. Interrogatories under Rule 33 of the Federal Rules of Civil Procedure are one of the best discovery techniques, particularly in contingent fee cases. Other aspects of the Federal Rules have been changed in recent years, and these changes facilitate the use of interrogatories.

Under the present version of Rule 33, you may employ up to twenty-five interrogatories. And you can issue these interrogatories as soon as you have complied with Rule 26(d), the "priority of discovery" provision, which requires that the parties confer under Rule 26(f). In this conference, you should ask for more interrogatories and, of course, you should agree to more for the other side, as well. The other side can only say "no," and that forms a predicate for asking the Court for an increase in the number of interrogatories. If your opponent is uncooperative, this makes the lack of cooperation evident at an early stage. Remember that the rules now limit you to ten depositions, each of which will cost several thousand dollars. Tell the Court your client's resources are limited, and that you need to employ inexpensive discovery techniques. If you are operating on a contingency fee basis, say so, since this will convey to the judge your client's lack of funds. Rule 33 says that the court "shall" grant leave to serve additional interrogatories when doing so is consistent with the principles of Rule 26(b)(2). That rule, in turn, specifically mentions a "party's resources" as a factor in altering limits on discovery.

There are several justifications — besides reducing costs — for increasing the number of interrogatories. First, the patent laws provide a variety of defenses. Under Section 102, the defenses include public use, sale, anticipation, abandonment, derivation, etc. Under Section 112, the defenses include best mode, enablement, and written description. Most judges will agree that patent cases can be sticky and complicated. Besides the number of possible defenses, the patent may have a number of asserted claims, too. The 1993 notes of the Advisory Committee recognize

that "[i]n many cases it will be appropriate for the court to permit a larger number of interrogatories . . . ."

Ask interrogatories right away, as soon as the 26(f) meeting is over, and as soon as the defendant has answered. Seek the other side's factual basis for all the defenses it has advanced. Almost every accused infringer throws a statute book at you in its answer to your complaint: the patent is invalid because it is obvious, invalid because it is anticipated, invalid because it doesn't comply with Section 112, unenforceable, and not infringed, limited by prosecution history estoppel, etc. You have the right to get at the other party's facts during — not after — fact discovery, because the idea of discovery as a "shell game" is extinct. *Epstein v. MCA, Inc.*, 54 F.3d 1422, 1423 (9th Cir. 1995) (Federal Rules of Civil Procedure promote search for truth); *Christman v. Brauwin Realty Advisors, Inc.*, 185 F.R.D. 251, 255 (N.D. Ill. 1999) (Discovery is a search for truth); *In re Puerto Rico Air Disaster Litigation*, 1971 U.S. Dist. LEXIS 13792, \*1-\*2 (D.P.R. April 12, 1991) ("To deny discovery upon the facts of the instant case would be to pay tribute to the sporting theory of justice, which hopefully has long been discarded."); and *Griffith v. University Hospital LLC*, 1999 U.S. Dist. LEXIS 13824, \*5 (N.D. Ill. August 24, 1999) ("Discovery under Fed.R.Civ.P. 26, however, is viewed broadly because the goal of discovery is to further the parties' understanding of the case and to search for the truth.").

Rule 33 authorizes a court to time or delay interrogatories for contentions, but contentions are mixtures of facts and law, not just facts. Even then, this does not allow a party to completely avoid disclosing its contentions while discovery is underway. *In re Convergent*, 108 F.R.D. 328, 338-39 (N.D. Cal. 1985) allowed contention interrogatories because they would clarify issues in the case. *Cable Computer Tech. v. Lockhead Sanders, Inc.*, 175 F.R.D. 646, 652 (C.D. Cal. 1997) allowed them because the answering party could supplement its responses, if necessary.

I mentioned earlier that you can't lose by using interrogatories. Why? Because the other side will do one of two things: (1) give responsive answers, or (2) do something really stupid: start painting itself into a corner by giving the usual non-answers. I have seen parties use several excuses to avoid

answering: (1) that it is too early for contentions to be disclosed, (2) that all the facts aren't known, (3) that the attorney-client privilege justifies withholding information, etc., etc., etc. You can recognize these excuses easily: the party responding in bad faith won't tell you a thing. Here is one example of smoke-blowing from one of our cases:

Defendant objects to this interrogatory as vague, overly broad, unduly burdensome, compound, and seeking a narrative. Defendant objects to this interrogatory as a contention interrogatory the answer to which is premature at this stage of the proceeding. This interrogatory seeks information which is protected from disclosure by the work product doctrine. This action involves multiple patents with multiple alleged infringed claims. Its tremendous complexity and depth renders this vague, overly broad, generic interrogatory virtually impossible to answer. This interrogatory suffers from such ambiguity and overbreadth as to make it virtually unintelligible. For example, plaintiff does not even purport to identify or explain the following: (1) which allegations this interrogatory addresses; (2) what "state the facts" refers to or how defendant can segregate some facts from others or identify all facts which may relate to such unidentified allegations; (3) what the meaning and scope of "an identification of any elements present in the accused product or method" is. Furthermore, putting such defects aside, contention interrogatories of this type are simply improper in an action such as this, much less until discovery has been completed.

In light of the extraordinary vagueness and improper scope and nature of this interrogatory in relation to this complex patent infringement action, defendant objects to this interrogatory in its entirety.

What hogwash. Boilerplate objections should be a thing of the past. As of 1993, Rule 33(b)(4) requires specificity or the objection is waived. A number of cases enforce the principle. *Carfagno v. Jackson National Life Ins. Co.*, 2001 U.S. Dist. LEXIS 1768, at \*12-3 (W.D. Mich. 2001) ("The court strongly condemns the



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practice of asserting boilerplate objections to every request."); *St. Paul Reinsurance Co. v. Commercial Financial Corp.*, 198 F.R.D. 508, 514 (N.D. Iowa 2000) (granting sanctions for the use of unsubstantiated boilerplate objections); *Walker v. Lakewood Condominium Owners Association*, 186 F.R.D. 584, 587 (C.D. Cal. 1999) (boilerplate objections impermissible); *Miller v. Pancucci*, 141 F.R.D. 292, 302 (C.D. Cal. 1992) (boilerplate objections are improper); *Swift v. First USA Bank*, 1991 U.S. Dist. LEXIS 19474, \*18-19 (N.D. Ill. December 15, 1999) (boilerplate objections impermissible; specific statement of grounds and legal basis required); *Lekkas v. Mitsubishi Motors Corp.*, 2000 U.S. Dist. LEXIS 12016, \*9 (N.D. Ill. August 17, 2000) (generic non-specific boilerplate objections are inconsistent with the letter and spirit of the Federal Rules of Civil Procedure); *In Re Aircrash Near Roselawn, Indiana on October 31, 1994*, 172 F.R.D. 295, 306-07 (N.D. Ill. 1997) (boilerplate objections impermissible; objections to document requests must clearly specify the objection and how the objection relates to the documents being demanded); and *United States of America v. Baird-Neece Packing Corp.*, 1999 U.S. App. LEXIS 11736, \*5-6 (9th Cir. June 4, 1999) (suggesting that vague objections regarding irrelevancy and burden are impermissible).

But why is the vague interrogatory response useful for you? Because, unless the answering party gives better information during discovery, it will be stuck with this nonsense. You are entitled to rely on the response. See, for example, *ELCA Enterprises, Inc. v. Sisco Equipment Rental & Sales, Inc.*, 53 F.3d 186, 190 (8th Cir. 1995) ("Parties are 'entitled to accept answers to previous interrogatories as true, and to refrain from seeking additional

discovery directed to the same issue.>"). Second, the answering party is under an automatic obligation to supplement an answer whenever Rule 26(e) comes into play. That rule says a discovery response must be supplemented when two conditions occur: (1) the response is "in some material respect incomplete or incorrect," and (2) the "additional or corrective information has not been made known to the other parties during the discovery process." If the interrogatory response is not supplemented, then the answering party will be limited to the information it has given.

Of course, the usual dodge is to manipulate Rule 26, and include all the real ammunition in the expert's report. Such reports aren't provided in most cases until after fact discovery is complete. But if that disclosure occurs after fact discovery is over, then you have the argument that you were precluded from deposing the expert's sources of information, and prevented from taking discovery to deal with the facts revealed only in an expert's report. That gives you a basis to exclude the expert and his or her report. See, for example, *National Football League Properties, Inc. v. Prostyle, Inc.*, 16 F.Supp. 2d 1012, (E.D. Wisc. 1998) or *THK America, Inc. v. MSK, Ltd.*, 917 F.Supp. 563, 568 (N.D. Ill. 1996), which excluded tardy contentions.

In conclusion, use interrogatories, and use them early. Request supplementation periodically. If your opponent follows the law, you will get useful information. If your opponent does not follow the law, you will confine him to the non-responses he has given, and create a basis to exclude his experts. Either way, you improve your chances of winning. And you can do all this very cheaply — with nothing but some paper and a fax machine. 