THE EFFECTIVE USE OF WRITTEN INTERROGATORIES

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I. INTRODUCTION

Written interrogatories may be used effectively in almost every lawsuit. They may be used to particularize and elaborate notice pleadings and to refine and narrow the eventual issues for trial. They may also be used to facilitate subsequent discovery by establishing the identity of those persons whose depositions should be taken and the identity of those documents which should be the subject of a motion to produce or inspect.

Interrogatories can also serve very specific functions, such as establishing the extent of a defendant's contacts with a forum for jurisdictional purposes, obtaining information to be used in drafting an amended pleading, verifying known facts, identifying expert witnesses, establishing the dates for a potential statute of limitations defense or obtaining an itemized breakdown of claimed special damages.

In complex litigation interrogatories are often the only practical and efficient means of obtaining certain information. For example, although depositions are relatively effective for obtaining spontaneous answers, the information is restricted to the knowledge of the deposed individual. Answers to interrogatories, on the other hand, represent the collective knowledge of the opponent and his attorneys and agents.[1] Moreover, the answering party is required to conduct a reasonable investigation[2] if this is necessary in order to formulate an adequate response to the questions.

The fact that interrogatories are directed to the collective knowledge of a party and his attorneys and agents is particularly important with respect to lawsuits involving corporations. Interrogatories may be used to obtain a "corporate" response

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1. *See* text accompanying note 16 *infra*.

2. *See* text accompanying notes 13-16 *infra*.

to questions which no single individual could fully answer. Unfortunately, this simple proposition can be confirmed by many attorneys who have conducted successive depositions of corporate agents only to receive repeated answers of "I don't know."

Interrogatories are often preferable to depositions for identifying such things as witnesses, documents, the dates and substance of transactions and conversations,[3] since a deponent may easily forget or overlook relevant information when answering such questions. Written interrogatories are also the ideal discovery device where the information sought can be obtained only by reference to several documents or where the information is of such a complex and technical nature that it cannot be communicated verbally in an organized and comprehensible manner. In addition, the answers to written interrogatories can frequently induce intelligent settlement discussions by establishing the contentions of the parties and exposing the strengths and weaknesses of their respective cases. Indeed, in some cases the mere service of interrogatories can result in a settlement.

Despite decided advantages, however, written interrogatories possess inherent limitations. For example, interrogatories requesting a description of how an incident occurred, the details of a particular conversation, or the recollections of an eye witness are often unwise, since the answers will undoubtedly be the calculated response of an attorney, rather than the spontaneous recollections of a deponent. Consequently, interrogatories directed to such matters should not be propounded prior to conducting the necessary depositions. Another potential disadvantage is the fact that answering a comprehensive set of interrogatories forces an opponent to prepare his case. Investigation which might have been deferred for weeks or months will be conducted. Opposing counsel will be forced to analyze and reanalyze his case, and, as a result, ideas will be born and oversights avoided. He will meet with his clients and discuss the various aspects of the litigation. And, in all probability, this increased attorney-client contact and discussion will improve that party's eventual performance as a witness at trial.

Another practical limitation on the use of interrogatories is the fact that they can only be directed to a party to the law-

3. *See* text accompanying notes 39-50 *infra*.
4. *See* text accompanying notes 51-65 *infra*.

suit.[5] Although this may not be particularly restrictive in most cases, in certain situations it most definitely is. For example, the employer of the plaintiff in a products liability case arising out of an industrial injury is never a party, due to the exclusivity of the worker's compensation remedy.[6] Often, however, the defense of such a case is based upon the alleged negligence of the employer.[7] Since interrogatories are not available, the defendant must resort to depositions and other more expensive discovery devices.

Without doubt, however, the greatest limitation upon the effective use of written interrogatories is the ability of attorneys to avoid providing any information which they feel will be damaging to the interests of their clients. This limitation is manifested in varying forms: objections based upon allegations of privilege, work product, undue burden and irrelevancy; objections that the interrogatories are vague, ambiguous and incapable of being answered; unresponsive (and ridiculously self-serving) answers; and so forth. The result is motions, briefs, arguments, and, inevitably, delay and expense.

It is often stated that written interrogatories are an inexpensive discovery device. This is a misleading statement. Interrogatories, in order to be effective, must be drafted with care and precision. Similarly, answering interrogatories requires investigation, deliberation, and good draftsmanship. Motions, briefs, and arguments are often required. All this requires time. And, in this context at least, time is money.

Despite these inherent limitations, the insightful and prudent attorney can successfully use written interrogatories. Care must be taken in drafting so that objections based upon improper wording either will not be made or will not be sustained. In addition, an understanding of the appropriate role and function of interrogatories and the applicable law results in questions which, even if initially objected to, will have to be an-

5. WIS. STAT. § 804.08 (1973); FED. R. CIV. P. 33. Prior to 1970 the Federal Rules provided that interrogatories could only be served upon adverse parties. This adversity requirement was removed by the 1970 amendments.

6. *See* WIS. STAT. § 102.03(2) (1973).

7. The Wisconsin Supreme Court has held that, when the evidence calls for it, a question relating to the negligence of the employer should be included in the special verdict, despite the fact that the employer is not a party due to the exclusivity of the worker's compensation remedy. Connar v. West Shore Equipment, Inc., 68 Wis. 2d 42, 43, 227 N.W.2d 660 (1975).

swered. Accordingly, interrogatories should be carefully drafted for specific purposes and the proponent must be prepared to go to court to get the answers.

II. DRAFTING CONSIDERATIONS

Good legal draftmanship leaves little doubt as to the precise nature and scope of interrogatories or a party's duties in answering them. Questions must be clear, concise and precise, since even the slightest ambiguity invites either an objection that an interrogatory is hopelessly vague and incapable of being answered, or an answer which, although arguably responsive, is essentially meaningless. As one judge has recognized, "Ask me a foolish question, and I'll give you a foolish answer."[8] Thus, attention to detail is essential to the effective use of interrogatories.

Although many courts have been relatively lenient on interrogators faced with objections that interrogatories are so imprecise, confusing and ambiguous that they cannot be responded to,[9] the prudent attorney should bear in mind that "[i]deally an interrogatory should be a single direct question phrased in a fashion that will inform the other party what is requested of him."[10] Shotgun requests and boilerplate terminology not tailored to the particular case, although initially saving time and expense, inevitably result in either objections or hopelessly qualified answers, as well as a seemingly endless string of motions, briefs and arguments.

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8. Pressley v. Boehlke, 33 F.R.D. 316, 317 (W.D. N.C. 1963). The interrogatory which prompted the judge's remark read, "In what way could you have avoided the collision?" Indeed, the number and variety of foolish answers to such a question is limited only by the collective imagination of the bar.

9. In Pressley v. Boehlke, 33 F.R.D. 316 (W.D. N.C. 1963), the court approved of an interrogatory asking "What prompted you to drive the front of your car into the left rear of the 1956 Chevrolet on the occasion in question?" The court stated: "That it is somewhat vague and general is not itself justification for refusal to answer, for in no event can requiring the defendant to answer the question be burdensome. The most sound objection to the question would seem to be that it is argumentative; but, for present purposes at least, the defendant certainly gets the last word in the argument. If the assumption is false that something 'prompted' defendant, he need only answer, 'Nothing'." 33 F.R.D. at 317.

See also 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2168 at 516 (1970) [hereinafter WRIGHT & MILLER], where it is stated: "Only rarely it is held that an interrogatory is so unclear that the other party cannot reasonably be required to answer it."

10. 8 WRIGHT & MILLER § 2168 at 515.

The principle that individual interrogatories should be simple and direct does not, however, prevent the inquiries from being comprehensive and thorough. Indeed, the well-advised party will serve interrogatories which relate to all the areas from which he might obtain information which is helpful to his case. These interrogatories, in order to be effective, must be drafted with precision. If this is done, the attorney or party who makes frivolous or ill-conceived objections or provides misleading or incomplete answers will undoubtedly be assessed costs in the event of a motion to compel answers.[11]

A. Introductory Language

Section 804.08 of the Wisconsin Statutes and Federal Rule 33 do not specify any particular form for interrogatories. Consequently, parties are free to utilize whatever drafting techniques they deem appropriate, as long as the end result is direct questions "phrased in a fashion that will inform the other party what is requested of him."[12]

1. Setting Forth the Duties of the Answering Party

It is advisable to preface a set of interrogatories with an introductory section which sets forth the duties of the answering party. Such a practice serves several functions: (1) it informs the attorney for the answering party of statutory duties of which he may or may not be aware; (2) it lays a foundation for a subsequent showing that a failure to make discovery was willful and deliberate, thus increasing the probability of an award of costs or the imposition of available sanctions; and (3) perhaps most importantly, it impresses upon the opposing party the knowledge, skill and determination of his adversary.

Initially, the duty to conduct a reasonable investigation should be set forth.[13] Interrogatories differ from depositions in that the answering party may not rely solely upon personal knowledge.[14] For example, a party cannot, in lieu of answering, allege that he does not have personal knowledge of the matter,

11. *See* WIS. STAT. § 804.12(1)(c) (1973), and text accompanying note 00, *infra.*

12. 8 WRIGHT & MILLER, § 2168 at 515.

13. *See* 4A J. MOORE, MOORE'S FEDERAL PRACTICE 33.20 (2d ed. 1976) [hereinafter MOORE'S FEDERAL PRACTICE].

14. For example, in Olmert v. Nelson, 60 F.R.D. 369, 370 (D.D.C. 1973), the court stated that individuals, as well as corporate parties, must when answering interrogatories provide information which is under their control or to which they have access.

if he could obtain the information by a reasonable inquiry.[15] And it has been repeatedly held that a party is required to disclose information known by or in the possession of his attorney, despite the fact the party himself may be personally ignorant about the matter.[16]

In view of the duty of the answering party to make reasonable inquiries, the following introductory language is recommended:

> In answering these Interrogatories the plaintiff must furnish all requested information, not subject to a valid objection, that is known by, possessed by, or available to him or any of his attorneys, consultants, representatives or other agents.

Obviously, in the case of the corporate party, one would use slightly different wording.

A second duty which should be set forth involves the necessity of answering to the fullest extent possible, despite the fact that it may be impossible to provide all of the requested information.[17] A commonly utilized dilatory tactic is to answer an interrogatory with a simple statement to the effect that it is impossible to provide all of the requested information, despite the fact that the party is in a position to provide some of the information. Clearly, such an objection cannot support a total refusal to answer.[18] Therefore, in anticipation of such a tactic,

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15. 4A MOORE'S FEDERAL PRACTICE ¶ 33.20; *e.g.*, the court in Breeland v. Bethlehem Steel Co., 179 F. Supp. 464, 467 (S.D. N.Y. 1959), stated that: "The mere statement of lack of knowledge by plaintiffs, of the facts sought by the defendant's interrogatories, without any recital of what attempt, if any, has been made to acquire the knowledge, is clearly insufficient."

16. *E.g.*, the court in Maryland v. Baltimore & Ohio R.R., 7 F.R.D. 666, 667 (E.D. Pa. 1947), stated: "The plaintiff, having authorized her attorney to bring this suit, to appear for her and to prepare for and conduct the litigation, was bound to disclose facts relating to the accident in his possession even though at the time she answered the interrogatories the information may not have been transmitted to her." *See also* Hickman v. Taylor, 329 U.S. 495, 504 (1947). ("A party clearly cannot refuse to answer interrogatories on the ground that the information sought is solely within the knowledge of his attorney.")

17. Bar Harbour Theatre Corp. v. Paramount Film Distrib. Corp., 5 Fed. R. Serv. 2d 613 (E.D. N.Y. Sept. 18, 1961); *see also* Riley v. United Air Lines, Inc., 32 F.R.D. 230 (S.D. N.Y. 1962); Magelson v. Cement Masons Local 518, 32 F.R.D. 464 (D. Mo. 1963).

18. The court in Bar Harbour Theatre Corp. v. Paramount Film Distrib. Corp., 5 Fed. R. Serv. 2d 613 (E.D. N.Y. Sept. 18, 1961), stated: "[I]f [a party] claims to have less than full information at the time his answers are due he should answer by giving the available information and by stating that the answer reflects the limited information that he then has." 5 Fed. R. Serv. at 613-14.

and to increase the probability of either obtaining some information or of being awarded costs or sanctions, the following introductory is recommended:

> If the plaintiff is unable to answer fully any of these interrogatories, he must answer them to the fullest extent possible, specifying the reason(s) for his inability to answer the remainder, and stating whatever information, knowledge, or belief he has concerning the unanswerable portion. An evasive or incomplete answer is deemed to be a failure to answer under section 804.12 of the Wisconsin Statutes, and may render the plaintiff or his attorney or both liable for the expenses of a motion pursuant to that statute.

Another tactic which is commonly employed by attorneys for answering parties is to raise an objection to the scope of an interrogatory in lieu of providing any information whatsoever. This situation generally arises where counsel for the interrogating party has drafted overly broad questions and his adversary has utilized the admittedly valid objection as an excuse for a total failure to answer. For example, an objection that an interrogatory requests information which is not reasonably calculated to lead to the discovery of admissible evidence might be made even though the vast majority of the requested information is both relevant and admissible. Similarly, many attorneys respond to various interrogatories with simple statements such as "call for the revelation of work product," despite the fact that only a portion of the requested information is privileged work product. The following language is designed to combat such tactics:

> Each lettered subpart of a numbered interrogatory is to be considered a separate interrogatory for the purpose of objection. The plaintiff must object separately to each subpart, and if he objects to less than all of the subparts of a numbered interrogatory, then he must answer the remaining subparts. In addition, if the plaintiff objects to an interrogatory or a subpart thereof as calling for information which is beyond the scope of discovery (e.g., "not reasonably calculated to lead to the discovery of admissible evidence," "work product," "unduly burdensome," etc.) he must, nevertheless, answer the interrogatory or subpart thereof to the extent that it is not objectionable.

Finally, it is recommended that the introduction set forth the statutory duties with respect to supplementation of responses:

> The plaintiff must supplement his responses to these interrogatories when so requested by the defendant prior to trial. In addition, without being requested to do so by the defendant, the plaintiff must seasonably supplement the answers to all interrogatories requesting the identification of persons having knowledge of discoverable matters and the identification of persons expected to be called as expert witnesses at trial. Without being requested to do so by the defendant, the plaintiff must also amend any answer when it is discovered to have been incorrect when made or when it is discovered to be no longer true and circumstances are such that a failure to supplement is in substance a knowing concealment.

Although these duties are set forth in section 804.01(5) of the Wisconsin Statutes and in corresponding Federal Rule 26(e), their inclusion in the introduction to the interrogatories alerts opposing counsel to the fact that his adversary is aware of the statutory duties and is willing to pursue his rights thereunder.

2. Definitions

The use of definitions of important terms in the introduction to interrogatories is permissible.[19] If well drafted, they can significantly increase the overall utility and effectiveness of interrogatories. However, if they are poorly written and unreasonably expand the scope of the information which is being requested, they may render many of the interrogatories, or the entire set, unduly burdensome.[20]

Definitions can generally be used for three somewhat overlapping functions. One is to clarify the exact nature of the information which is to be provided in the answers. A second function is to clarify and elaborate potentially vague and confusing terms and phrases. The third is to avoid unnecessary repetition and thereby insure a basic economy in drafting.

A primary example of a definition which sets forth the exact nature of the information which is to be provided is the following:

> "Identify" (or "state the identity of") with respect to a document means set forth the following information, if known:

19. Diversified Prods. Corp. v. Sports Center Co., 42 F.R.D. 3 (D. Md. 1967).
20. *Id.*

(1) a general description thereof (e.g., letter, memorandum, report, etc.);
(2) a brief summary of its contents;
(3) the name and address of the custodian of the original;
(4) the name and address of the person(s), if any, who drafted, prepared, compiled or signed it; and,
(5) any other descriptive information necessary in order to adequately describe it in a subpoena duces tecum, or in a motion or request for production thereof.

Such a definition can be helpful in a variety of cases. There are definite limitations, however. In a complex lawsuit involving a large mass of documents the request to set forth the "names and addresses of person(s) if any, who drafted, prepared, compiled or signed" might be unduly burdensome. In addition, if the definition is used in conjunction with broad and general interrogatories, the end result might be totally unreasonable. For example, consider the impact of this definition when used in conjunction with the following interrogatory: "Identify all documents which pertain, relate, refer or are otherwise relevant to the plaintiff's allegation that the product X was unreasonably dangerous at the time it left the possession and control of the defendant." Among other things such an interrogatory, when coupled with the definitions, requires the plaintiff to set forth the name and address of the clerk of courts (as the custodian of the original), since the court file would undoubtedly contain several documents which "pertain, relate, refer or are otherwise relevant to" the allegations of the complaint.

On the other hand, if one bears in mind the inherent limitations and the ultimate effect of definitions such as the one presented above, they can be used effectively. Thus, depending upon the facts of the particular case, one might want to similarly define "identify" (or "state the identity of") with respect to persons and with respect to oral communications. Moreover, if one defines "person" so as to include all legal entities, as well as individuals, then he can separately define "identify" with respect to "individuals" and with respect to "persons, other than individuals."

The function of clarifying potentially vague and confusing terms is an important one which can be illustrated by numerous examples. One of the most commonly encountered objections is that an interrogatory is unclear and incapable of re-

sponse. Precisely drafted definitions can often eliminate or at least reduce the number of valid objections on that ground. For example, in a products liability lawsuit interrogatories frequently inquire about various aspects of the allegedly defective product. Some of these interrogatories inquire about the particular product which caused the injury, while others inquire about the class of product to which the individual product belongs. If two simple definitions making this distinction are included in the introduction, then counsel is relieved of the burden of repeatedly making the distinction in the individual interrogatories.

Other examples of definitions which clarify vague and confusing terms abound, and a few will be included here for illustrative purposes:

> "Document" — refers to any paper, book, record, letter, memorandum, contract, agreement, invoice, receipt, cancelled check, drawing, sketch, or other similar materials which contain any verbal, graphic or pictorial information.
>
> "Oral communication" — refers to any oral expression, exchange or transmission of thoughts, messages, information, or the like, at any time or place, and under any circumstances whatsoever.
>
> "Person" — refers to any individual person (whether living or deceased), partnership, firm, corporation, association, joint venture, or other entity.
>
> "You" or "your" — refers to the party to whom these interrogatories are addressed, but the use of such terms shall not be construed so as to limit the information provided to that which is within the personal knowledge of such party.

Occasionally, when the answering party is an individual, there will be a need for separate interrogatories addressed to him in different capacities. For example, the party may be interrogated in his individual capacity or in a collective sense (*i.e.*, including his attorneys, agents, etc.). Such distinctions can effectively be made with definitions such as the following:

> "Plaintiff" — refers to the plaintiff, John Doe, and all of his attorneys, consultants, representatives, and other agents.
>
> "Plaintiff, individually" — refers to the plaintiff, John Doe, as an individual and not to any of his attorneys, consultants, representatives, or other agents.

As stated above, it is generally not advisable to inquire into the specifics of oral communications in interrogatories, since

this merely allows the opposing attorney to write a script for the eventual testimony at trial. However, in particular cases it may be advisable to so inquire. Interrogatories, because they provide an opportunity for reflection and probing of one's memory, can be an effective device for obtaining an accurate recollection of a particular oral communication or statement. This is particularly true where it is probable that the answering party will be as truthful as possible in answering an interrogatory. For example, since interrogatories may be directed to any party to a lawsuit,[21] the defendant might want to propound an interrogatory upon a co-defendant concerning an issue with respect to which they are united in interest. In such a case, the defendant might wish to propound an interrogatory requesting that the co-defendant "quote or paraphrase" a particular oral communication.[22] The following definition would be helpful where there is such an interrogatory:

> "Quote or paraphrase" — when used herein, requires that the defendant, John Doe, solely on the basis of his personal recollection, state the exact wording of the oral statements which he is to "quote or paraphrase." If this is not possible then he should so indicate and provide instead a paraphrasing of the oral statement which connotes the substance of what was said, as accurately as possible. In addition, if the defendant definitely recalls that particular words were used, he should include these words in his answer, indicating that he definitely recalls that those words were used.

The sample definitions provided above are by no means exhaustive and incapable of being improved upon. However, when used with foresight and restraint, definitions such as these may be used to set forth the nature of the information sought, to clarify and elaborate vague and potentially confusing terms, and to avoid unnecessary repetition.

B. Drafting Particular Interrogatories

1. General Principles

Despite the fact that the permissible scope of interrogatories, as set forth in the Wisconsin Statutes[23] and the Federal

21. WIS. STAT. § 804.08(1) (1973); FED. R. CIV. P. 33.

22. An interrogatory requesting that a party state his best recollection of a relevant oral conversation is proper. Byers Theaters, Inc. v. Murphy, 1 F.R.D. 286 (W.D. Va. 1940); Tudor v. Leslie, 1 F.R.D. 448 (D. Mass. 1940).

23. WIS. STAT. § 804.01(2) (1973).

Rules,[24] is quite broad, the attorney who phrases his interrogatories in statutory language is certain to be faced with objections. For example, an interrogatory requesting the "identity of all persons having knowledge of discoverable matter" should and would be objected to by most attorneys, especially in complex lawsuits. The statutes merely define those areas into which interrogatories may inquire; they do not provide model language which should be used in particular interrogatories.

Although there are few cases which hold that interrogatories need not be answered because they are too broad and general,[25] a review of these decisions provides a lesson in the proper drafting of interrogatories. For example, in one case a party objected to an interrogatory requesting it to "state in detail the information you or any of your representatives have or are aware of relating to the accident. . . ."[26] The court sustained the objection, reasoning that the interrogatory was "entirely too broad to permit an effective response."[27] Similarly, in *Romero v. California State Labor Commissioner*,[28] the court rejected an interrogatory calling for the identity "of all persons having knowledge of relevant facts," calling it a "shotgun" as "broad as space."

Another common source of overbreadth in the drafting of interrogatories is the failure to restrict the request to a reasonable (and relevant) time period. For example, in *Auer v. Hershey Creamery Co.*,[29] the court held that an interrogatory was too broad because it had failed to limit the request to a specific time period. And in *Transmirra Products Corp. v. Monsanto Chemical Co.*,[30] the defendant was not required to answer an interrogatory requesting that it state the substance of conversations between its attorney and certain individuals, where the conversations were not limited with respect to time or subject matter.

The decision in *Jones v. Goldstein*[31] illustrates the distinc-

24. FED. R. CIV. P. 26(b).

25. *E.g.*, in Lunn v. United Aircraft Corp., 25 F.R.D. 186 (D. Del. 1960), the answering party made and the court sustained an objection to an interrogatory which requested the identification of "persons having knowledge of relevant facts."

26. Mort v. A/S D/S Svendborg, 41 F.R.D. 225, 226 (E.D. Pa. 1966).

27. *Id.* at 227.

28. 276 Cal. App. 2d 787, 81 Cal. Rptr. 281 (1969).

29. 1 F.R.D. 14, 15 (D. N.J. 1939).

30. 26 F.R.D. 572 (S.D. N.Y. 1960).

31. 41 F.R.D. 271 (D. Md. 1966).

tion between proper and overly broad interrogatories. One interrogatory in that case requested "a concise statement of the facts as to how you contend that the occurrence took place . . . ."[32] The court sustained an objection to it because contention interrogatories must be directed at ascertaining the opponent's "position on specific points."[33] A second interrogatory in *Jones* asked whether the answering party was making a particular contention, and, if so, to "give a concise statement of the facts upon which you rely."[34] The court ordered that this interrogatory be answered.

The problem of overbreadth is one which can be easily avoided by care and deliberation at the drafting stage. For example, suppose that a defendant wants to have those documents which support a particular contention or allegation identified. How should an interrogatory be phrased so as to accomplish this purpose? Many attorneys, in the interest of being thorough and complete, tend to use interrogatories such as the following:

> INTERROGATORY 1. Identify all documents which pertain, relate, refer or are otherwise relevant to the plaintiff's allegation that the defendant's product was unreasonably dangerous at the time that it left the defendant's possession and control.

The problem with such a request is that, not only does it seek the identification of those documents which support or tend to support the allegation, but it also potentially requests the identification of scores of other documents, including the answer to the complaint. Even if the interrogatory is not met with objection, the interrogator might well be provided with an exhaustive (and exhausting) list of documents. Hours of investigation, and perhaps additional interrogatories, would then be required to ascertain which of the documents in the list (if any) contain information which supports the "unreasonably dangerous" allegation. Such problems can be avoided, of course, by narrowing the scope of the request.

> INTERROGATORY 1. [Alternate form.] Identify all documents which contain information which tends to sub-

32. *Id.* at 273.

33. *Id., citing* Buining v. The Transporter, 171 F. Supp. 127, 135 (D. Md. 1959) (Interrogatory No. 28).

34. *Id.*

> stantiate the plaintiff's allegation that the defendant's product was unreasonably dangerous at the time it left the defendant's possession and control.

Admittedly, this interrogatory does not require the identification of documents containing exculpatory information, but the identification of such documents can always be requested in a separate interrogatory.

In addition to overbreadth, a common mistake in the drafting of interrogatories is the use of vague and indefinite terminology. To some degree this problem can be dealt with through the use of an introductory set of definitions.[35] In addition, care must be taken in drafting the individual interrogatories. Particular words must be analyzed for their apparent and potential meanings. In technical cases, experts should be consulted.

In one case a district court rejected an interrogatory because of its general reference to "early American furniture."[36] The court felt that this term was so indefinite and lacking in precision that the interrogatory could not be intelligently answered. In another case, the court rejected as too vague an interrogatory which inquired whether a particular coffee extract was stored at a certain temperature without any substantial adverse flavor effects.[37] On the other hand, in *Luey v. Sterling Drug, Inc.*[38] the court overruled objections to interrogatories which referred to "efficacy," "dangerous" side effect, and "harmful" side effect, when it was learned that those terms have a clear meaning in the drug industry.

2. Identifying Documents, Oral Communications and Persons Having Knowledge of Discoverable Matter

Interrogatories which request the identification of documents,[39] oral communications[40] and persons having knowledge

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35. *See* text accompanying note 19 *et seq. supra.*

36. Heritage Furniture, Inc. v. American Heritage, Inc., 28 F.R.D. 319 (D. Conn. 1961).

37. Struthers Scientific & Int'l Corp. v. General Foods Corp., 45 F.R.D. 375 (S.D. Tex. 1968).

38. 240 F. Supp. 632 (S.D. Mich. 1965).

39. "If a document is itself not discoverable, courts have refused to allow interrogatories that call for such complete information about the document as to be equivalent to furnishing the document itself (footnote omitted). This rule seems perfectly proper, but it should not be applied to defeat the right of a party

of discoverable matter[41] are clearly proper. Section 804.01(2)(a) of the Wisconsin Statutes and Federal Rule 26(b)(1) provide, in pertinent part:

> IN GENERAL. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . 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. . . .

Despite repeated holdings to the contrary,[42] many attorneys pose work product objections to interrogatories which merely request the identification of persons. In addition, many parties plead ignorance to such requests despite the fact that the information is available to their attorneys.[43] Clearly, however, the names of witnesses to the events out of which the action arises,[44] the name of an individual who inspected a product after an injury,[45] and the names of persons who were interviewed by and gave statements to an opponent's agent[46] may be sought by interrogatories.

With respect to the identification of documents, care must be taken to keep the request within permissible bounds. If an interrogatory merely inquires about the existence, nature and location of a relevant non-privileged document, then it must be answered, as long as it does not seek information protected by

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to inquire about the existence and nature of a document . . . ."
8 WRIGHT & MILLER § 2166 at 496. This distinction is logical since interrogatories which merely request the identification of documents do not require, for example, the divulgence of work product, but merely set the stage for an eventual determination (generally on a motion to produce or inspect) of whether the contents of the documents are privileged or protected.

40. *See, e.g.*, Cornaglia v. Ricciardi, 63 F.R.D. 416, 420 (E.D. Pa. 1974).

41. 4 MOORE'S FEDERAL PRACTICE ¶ 26.57.

42. *Id.* at 26-200 n. 2.

43. "Nor may the interrogated party or deponent plead personal ignorance of the names on the ground that they are known only to his attorney." 4 MOORE'S FEDERAL PRACTICE ¶ 26.57[2] at 26-200 to 201.

44. *See, e.g.*, Butler v. United States, 226 F. Supp. 341 (W.D. Mo. 1964); Pacific Intermountain Express Co. v. Union Pac. R.R., 10 F.R.D. 61 (W.D. Mo. 1950); Walsh v. Pullman Co., 9 F.R.D. 107 (D. Mass. 1949).

45. Baker v. Yellow Cab Co., 12 F.R.D. 84 (W.D. Mo. 1951).

46. McNelley v. Perry, 18 F.R.D. 360 (E.D. Tenn. 1955). However, the answering party need only identify those interviewed individuals who possess knowledge of relevant facts. St. Paul Fire & Marine Ins. Co. v. King, 45 F.R.D. 521 (W.D. Okla. 1968).

section 804.01(2)(c) and (d) or Federal Rule 26(b)(3) and (4).[47] However, an interrogatory which requests a detailed description of the contents of documents is the equivalent of a motion to produce and need not be answered.[48]

In a particular case a party might be justified in responding to a request for the identification of various documents by specifying the records from which the information may be derived.[49] However, such a response is only justified where "the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the parties served."[50]

3. Opinion and Contention Interrogatories

Prior to 1970 the federal courts were hopelessly split as to whether or not interrogatories calling for opinions, contentions and conclusions were necessarily improper.[51] Some courts reasoned that, since the discovery process is designed to uncover and reveal facts, interrogatories which requested opinions involving the application of law to fact improperly invaded the province of the jury.[52] On the other hand, many decisions pointed out that, due to the advent of notice pleading, interrogatories could serve the legitimate function of clarifying and refining the ultimate issues for trial.[53]

The 1970 amendments to Federal Rule 33(b) terminated the controversy by the adoption of the following sentence:

> 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 . . . .

These amendments are also incorporated in Wisconsin Stat-

47. For a discussion of the limits of discovery of trial preparation documents, *see* Graczyk, *The New Wisconsin Rules of Civil Procedure: Chapter 804*, 59 MARQ. L. REV. 463, 471-72 (1976).

48. *Id.*

49. WIS. STAT. § 804.08(3) (1973); FED. R. CIV. P. 33(c).

50. *Id.*

51. *See* 4A MOORE'S FEDERAL PRACTICE ¶ 33.17.

52. Ryan v. Lehigh Valley R.R., 5 F.R.D. 399 (S.D. N.Y. 1946).

53. Luey v. Sterling Drug, Inc., 240 F. Supp. 632 (W.D. Mich. 1965); United States v. Renault, Inc., 27 F.R.D. 23 (S.D. N.Y. 1960); Territory of Alaska v. The Arctic Maid, 135 F. Supp. 164 (D. Alaska 1955).

utes section 804.08. This provision, if used properly, can be very helpful in delineating the areas of controversy in a lawsuit.[54]

As stated previously, careful draftsmanship is essential to the effective use of interrogatories. This is particularly true with respect to "contention" interrogatories. For example, in a simple automobile collision case a party might propound an interrogatory which directs his adversary to "state in detail how the collision occurred." Indeed, such an interrogatory was expressly approved of in *Coyne v. Monongahela Connecting Railroad*.[55] However, the utility of such a broad and general request is minimal, since any answer would undoubtedly be permeated with self-serving phraseology. A better tactic, at least in the simple case, is to confine the interrogatories to specific points of issue. Moreover, in many situations it is preferable to phrase the question such that the answering party must respond with a "yes" or a "no."[56] This enables the interrogator to restrict the use of self-serving language.

While contention interrogatories can be used effectively in a wide array of lawsuits, they are of primary importance in complex litigation. For example, the defendant in a products liability case is initially presented with little more than an allegation that a particular product was unreasonably dangerous. Interrogatories can be used to expand and elaborate such an allegation. For example: "Describe in detail each construction defect in the product which you contend rendered it unreasonably dangerous."

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54. Indeed, this function was recognized by the Advisory Committee in the Note accompanying the 1970 amendments to the Federal Rules:

> Rule 33 is amended to provide that an interrogatory is not objectionable merely because it calls for an opinion or contention that relates to fact or the application of law to fact. Efforts to draw sharp lines between facts and opinions having invariably been unsuccessful, and the clear trend of the cases is to permit "factual" opinions. As to requests for opinions or contentions that call for the application of law to fact, they can be most useful in narrowing and sharpening the issues, which is a major purpose of discovery.

48 F.R.D. 457, 524 (1970).

55. 24 F.R.D. 357 (W.D. Pa. 1959).

56. Although an interrogatory drafted to elicit a "yes" or "no" response is similar in form to a request for admission, the response to such an interrogatory does not have the same legal effect. When an admission is made, the matter admitted is conclusively established at trial. WIS. STAT. § 804.11(2) (1973). Although an answer to an interrogatory may be used for impeachment purposes at trial, it generally does not legally bind the parties. Graczyk, *The New Wisconsin Rules of Civil Procedure: Chapter 804*, 59 MARQ. L. REV. 463, 508 (1976).

If such an interrogatory is propounded, the term "construction defect" should be defined so as to include all aspects and conditions of the design, construction, materials, and components of the product which caused the injury. Such a definition clarifies the nature of the question being asked and reduces the probability of an objection that the interrogatory is incapable of being answered because the term "construction defect" is hopelessly vague.

Another approach which can be utilized, depending upon the nature of the particular product and injury, is to draft two separate interrogatories which inquire about defects. One interrogatory would inquire about the product in a collective sense, and would include defects in the prototype. Obviously, this would principally involve defects in the design criteria. A second interrogatory could be directed to the individual product; this would principally involve defects in materials and construction.

Once the plaintiff has specified the alleged defects, he may be required to substantiate his contentions:

> INTERROGATORY 2. With respect to each construction defect alleged in the answer to the preceding interrogatory state the following:
> (a) the facts which form the basis for the plaintiff's contention that the alleged construction defect rendered the product unreasonably dangerous;
> (b) the identity of each person having personal or expert knowledge of the facts contained in the answer to subpart (a) of this interrogatory;
> (c) the identity of each document (including, but not limited to any books, periodicals, reports, studies or technical manuals) which contains information which tends to substantiate the facts alleged in the answer to subpart (a) of this interrogatory; and
> (d) how the alleged construction defect caused or contributed to the plaintiff's injuries in this case.

If the responses to these questions would require the disclosure of trial preparation materials or expert opinion protected by Wisconsin Statutes sections 804.01(2)(c) and (d) and Federal Rule 26(b)(3) and (4), the response should so state.

While contention interrogatories can be used to inform defendants of the nature of plaintiffs' claim, they can also be used by plaintiffs. For example, if a retained expert in a products liability lawsuit informs his client that a particular safety fea-

ture was both feasible and prevalent in the industry, the following interrogatories would be in order:

> INTERROGATORY 1. Does the defendant contend that the incorporation of "X" safety feature into "Y" was not feasible (for economic or any other reasons)?
>
> INTERROGATORY 2. If the answer to the preceding interrogatory is yes, state the following:
>
> (a) all reasons why it was not feasible;
>
> (b) the identity of each person having personal or expert knowledge of each reason why it was not feasible; and
>
> (c) the identity of each document which contains information, statements, or opinions which tends to substantiate the defendant's contention that the incorporation of "X" safety feature into "Y" product was not feasible (including but not limited to any books, periodicals, reports, studies or technical manuals).[57]

Obviously, *X's* safety features should be defined in the introduction. Moreover, the definition should be based upon information obtained from the retained expert.

Another technique which can be used with success in many cases is to propound a simple interrogatory directed to a particular contention, and to follow it with a second interrogatory which requests the facts upon which the contention is based.[58] For example:

> INTERROGATORY 1. Does the plaintiff contend that the defendant has waived its right to rely upon the forfeiture provision of the contract?
>
> INTERROGATORY 2. If the answer to the preceding interrogatory is yes, state in detail each fact and opinion upon which this contention is based.

Several decisions have ordered answers to interrogatories which request that a party specify the facts upon which a claim, allegation or contention is based.[59] For example, in

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57. The respondent of course is entitled to withhold only matter which is protected by WIS. STAT. §§ 804.01(2)(c) and (d) (1973).

58. "An interrogatory which inquires into the facts upon which certain vague and general allegations of a complaint are founded . . . is not objectionable on the ground that it calls for a legal conclusion." Sargent-Welch Scientific Co. v. Ventron Corp., 59 F.R.D. 500 (N.D. Ill. 1973); *see also* Harlem River Const. Co. v. Associated Gas of Harlem, Inc., 64 F.R.D. 459 (S.D. N.Y. 1974); Jones v. Goldstein, 41 F.R.D. 271, 273 (D. Md. 1966).

59. *See* cases cited in note 53 *supra*.

Pember v. Superior Court,[60] the California Supreme Court pointed out that an interrogatory which requests a statement of all facts which support a particular allegation must be answered, while an identical question asked at an oral deposition need not be. The distinction is based, quite logically, upon the inherent differences between these two discovery devices.[61] A deponent cannot be expected to answer such a question without considerable consultation with his attorney, as well as a comprehensive review of the file and other sources of information. Written interrogatories, on the other hand, provide considerable opportunities for consultation and reflection, and drafting and redrafting.

Despite tremendous potential, there are definite limitations upon the use of opinion or contention interrogatories. Federal Rule 33(b) and section 804.08 of the Wisconsin Statutes provide that an interrogatory "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 . . . ." The clear implication of the emphasized language is that there are circumstances in which opinion or contention interrogatories are objectionable. Moreover, since the rules do not specify the limitations, the courts are vested with considerable discretion.[62]

An effective test for determining the validity of interrogatories directed at the contentions of an opponent has been developed. This test was first discussed in decisions preceding the 1970 amendments to the Federal Rules; however, it remains equally persuasive today.

> The applicable test, I think, should not be left to finespun distinctions between "knowledge" and belief based upon information from other sources. Rather, it is the practical test which has been well stated by Professor Moore when he poses the question, "Would an answer serve any substantial purpose" . . . . The answer is "yes." The answers might be ex-

60. 68 Cal. 2d 601, 427 P.2d 167 (1967).

61. "[A]sking a party, during a deposition for his contentions and conclusions of law as related to fact will usually be useless. In the vast majority of situations the deposed party would be unable to relate the facts to relevant legal conclusions. Since a party's attorney cannot be deposed, interrogatories are the only way to get the information . . . ." Comment, *Civil Procedure — Opinion Interrogatories After the 1970 Amendment to Federal Rule 33(b)*, N.C. L. REV. 695, 699 (1975).

62. 8 WRIGHT & MILLER § 2176.

> pected to help the plaintiff to know what proofs are required: it might save him much labor and expense in producing proofs for which there would be no actual need. In other words, the interrogatory, if answered, might refine the actual issue of fact.[63]

The "substantial purpose" test has been cited with approval in several decisions, both prior and subsequent to the 1970 amendments.[64] Moreover, it is consistent with the opinion of the Federal Rules Advisory Committee that opinion or contention interrogatories "can be most useful in narrowing and sharpening the issues, which is a major purpose of discovery."[65]

C. *Answering Interrogatories*

All that has been said with respect to the care which should be taken in drafting interrogatories is equally applicable to answering them. However, a few principles and techniques unique to answering interrogatories will be discussed.

1. Answering Vague or Overbroad Interrogatories

Parties and their counsel are often faced with improperly worded interrogatories. Sometimes the questions are "so garbled as to be undecipherable or so vague and misleading as to be beyond the bounds of relevancy."[66] If this is so, the court would sustain an objection pointing out the obvious inadequacies.[67] Often, however, the answering party is aware of the substance of the request, despite the fact that the interrogator has failed to adequately express it. In this situation, it is often advisable to qualify the question prior to answering it.[68] For example:

> INTERROGATORY 1. State whether or not the defendant has ever received any complaints about product X.

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63. Taylor v. Sound Steamship Lines, Inc., 100 F. Supp. 388 (D. Conn. 1951).

64. Carrier Mfg. Co. v. Rex Chainbelt, Inc., 281 F. Supp. 717 (E.D. Wis. 1968); Stonebrook Tenants Ass'n v. Alpert, 29 F.R.D. 165 (D. Conn. 1961); American Oil Co. v. Pennsylvania Petrol. Prods. Co., 23 F.R.D. 680 (D. R.I. 1959). *See also* the cases cited at note 3 *supra*.

65. 48 F.R.D. 457, 524 (1970).

66. Tsangarakis v. Panama Steamship Co., 41 F.R.D. 219, 220 (E.D. Pa. 1966).

67. *Id.*

68. "If a party to whom the interrogatory is addressed thinks that there is uncertainty in the meaning of the interrogatory he may qualify his answer if need be." 8 WRIGHT & MILLER § 2168 at 515-16.

> ANSWER TO INTERROGATORY 1. Assuming that the term "product X" refers to the class of products to which the individual product belongs, which the plaintiff alleges caused his injuries . . . [then answer the interrogatory as so construed].

A similar tactic can be utilized with respect to interrogatories which, as phrased, are either overly broad or unduly burdensome. For example, if an interrogatory requests the identification of all documents which pertain, relate, refer or are otherwise relevant to a particular contention, then the following answer might be posed:

> ANSWER TO INTERROGATORY 1. This interrogatory, as phrased, requests the identification of literally hundreds of documents, including defendant's answer to the complaint. To fully answer it would require much time and expense and would constitute an undue burden upon the defendant. However, the defendant is willing to identify at this time those documents which it presently relies upon in support of the above described contention. The defendant has not completed its investigation, discovery and trial preparation in this case, and, consequently, the following information is being provided without prejudice to the right of the defendant to produce as evidence at trial any subsequently discovered or subsequently drafted documents. [Then identify the documents which are presently relied upon.]

Obviously, whether or not a partial answer and partial objection such as this would be advisable depends upon the facts of the case. Under Wisconsin Statutes section 804.12(1)(b) an incomplete answer to an interrogatory is tantamount to a failure to answer at all, thus making the answering party liable to be sanctioned under section 804.12. In many instances, however, a partial answer might induce the interrogator to settle for the information which is provided. Or, in the event that there is a motion to compel a further answer, the court might decide that a good faith effort to answer had been made and that the interrogator is not entitled to more. In addition, even if there is an eventual order compelling a further answer, an assessment of costs would be less probable.

2. Answering Contention Interrogatories

Two principles should be borne in mind when one is answering contention interrogatories. The first is that, under ordinary

circumstances, the answers to such interrogatories cannot limit the proof at trial. The Advisory Committee Note to Federal Rule 33(b) states:

> The principal question raised with respect to the cases permitting such interrogatories is whether they reintroduce undesirable aspects of the prior pleading practice, whereby parties were chained to misconceived contentions or theories, and ultimate determination on the merits was frustrated. See James, *The Revival of Bills of Particulars under the Federal Rules*, 71 Harv.L.Rev. 1473 (1958). But there are few if any instances in the recorded cases demonstrating that such frustration has occurred. The general rule governing the use of answers to interrogatories is that under ordinary circumstances they do not limit proof. See, *e.g., McElry v. United Air Lines, Inc.*, 21 F.R.D. 100 (W.D. Mo. 1967); *Pressley v. Boehlke*, 33 F.R.D. 316, 317 (W.D.N.C.1963). Although in exceptional circumstances reliances on an answer may cause such prejudice that the Court will hold the answering party bound to his answer, *e.g., Zielinkski v. Philadelphia Piers, Inc.* 139 F.Supp. 408 (E.D.Pa.1956), the interrogating party will ordinarily not be entitled to rely on the unchanging character of the answers he receives and cannot base prejudice on such reliance.[69]

In *Zielinski*, the case cited by the Advisory Committee as illustrative of the type of situation where a party may be bound, the answers to interrogatories had failed to disclose the fact that the plaintiff had sued the wrong corporation, despite the fact that this was known to both corporations and their common insurer. When the defendant raised this defect after the statute of limitations had run as to the proper party defendant, the court held that the answers to the interrogatories were conclusive and binding.[70]

The second principle of which a party answering contention interrogatories should be aware is the statutory provision that "the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time."[71]

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69. 48 F.R.D. 487, 524 (1970).

70. Zielinski v. Philadelphia Piers, Inc., 139 F. Supp. 408 (E.D. Pa. 1956).

71. FED. R. CIV. P. 33(b); WIS. STAT. § 804.08(2)(b) (1973).

III. Sanctions for Failure to Answer Interrogatories

Section 804.12 of the Wisconsin Statutes sets forth the sanctions which may be imposed upon a party for failing to answer interrogatories. This statute is based upon Federal Rule 37, as amended in 1970, and, as a result, federal decisions are persuasive authority and illustrative of the principles involved.

Prior to 1970, the Federal Rules were structured such that any objection by a party answering interrogatories automatically resulted in a judicial hearing with respect to the validity of the objection. The 1970 amendments, however, changed this practice by providing for a hearing only when the interrogating party has made a motion for an order compelling answers. This places the burden on the interrogating party, where it more properly belongs, since the interrogating party is generally in the best position to determine whether an order compelling answers is necessary and advisable. In addition, the elimination of the automatic hearing provision allows parties to resolve their differences out of court.

A. The Motion Compelling Answers — Award of Expenses

An order compelling discovery may be sought whenever a party fails to fully answer an interrogatory. Section 804.12(1) provides in part:

> (a) *Motion.* If a . . . party fails to answer an interrogatory submitted under s. 804.08 . . . the discovering party may move for an order compelling an answer . . . . If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to s. 804.01(3).

Basically, this initial motion practice is designed to deal with three recurring factual situations: (1) where there has been a complete failure to answer a set of interrogatories or particular interrogatories; (2) where objections have been made to particular interrogatories; and (3) where the answers to particular interrogatories are evasive or incomplete.

Control over this initial motion practice is maintained by awarding expenses, including attorney's fees, to the successful party. If the movant prevails, he "shall" be awarded his reasonable expenses incurred in obtaining the order unless the opposition to the motion was "substantially justified." Conversely, if the opponent is victorious, he is to be awarded his expenses unless the making of the motion was substantially justified.

Finally, if the motion is granted in part and denied in part, the court is empowered to "apportion the reasonable expenses."

Since most parties will provide answers when ordered to do so by the court, the award of expenses provision is the most frequently utilized sanction set forth in section 814.12. Moreover, the mandatory requirement that expenses be awarded to the victorious party, unless the position taken by his adversary was substantially justified, is designed to reduce the frequency and probability of frivolous objections.[72]

B. The Two-Step Motion Process

With the exception of section 804.12(4), which will be discussed below, the key to imposing substantive sanctions is the existence and violation of an order compelling answers. Consequently, in order to invoke such sanctions a propounder of interrogatories must make at least two motions. The first motion, pursuant to section 804.12(1), is for an order compelling answers to interrogatories. Assuming that such an order is issued and that it is violated, the party must then bring a second motion, pursuant to section 804.12(2), for the imposition of sanctions.

It is clear from the language of the statute that the court is vested with considerable discretion in ruling upon the latter motion. The rule reads in part: "[T]he court in which the action is pending may make such orders in regard to the failure

72. The Federal Rules Advisory Committee Note states:

> On many occasions, to be sure, the dispute over discovery between the parties is genuine, though ultimately resolved one way or the other by the court. In such case, the losing party is substantially justified in carrying the matter to court. But the rules should deter the above implicit in carrying or forcing a discovery dispute to court when no genuine dispute exists. And the potential or actual imposition of expenses is virtually the sole formal sanction in the rules to deter a party from pressing to a court hearing frivolous requests for or objections to discovery.
>
> The proposed change provides in effect that expenses should ordinarily be awarded unless a court finds that the losing party acted justifiably in carrying his point to court. At the same time, a necessary flexibility is maintained, since the court retains the power to find that other circumstances make an award of expenses unjust — as where the prevailing party also acted unjustifiably. The amendment does not significantly narrow the discretion of the court, but rather presses the court to address itself to abusive practices. The present provision that expenses may be imposed upon either the party or his attorney or both is unchanged. But it is not contemplated that expenses will be imposed upon the attorney merely because the party is indigent.

48 F.R.D. 487, 540 (1970).

Since the range of available sanctions varies from an award of expenses to a default judgment or dismissal of a complaint, courts are free to fashion relief in particular cases such that it fairly and adequately compensates the movant. For example, in *Ward v. Hester*,[76] the plaintiff alleged in an amended complaint that an individual defendant was acting as an agent for a corporate defendant at the time of the motor vehicle accident. The corporate defendant denied that there was an agency relationship but refused to comply with valid discovery requests pertaining to the alleged agency relationship. The court ordered the corporate defendant to provide the information and, when it refused to do so, held that the issues of agency and scope of employment were deemed to be established for the purposes of the lawsuit.

Similarly, in *Iaconelli v. Anchor Lines, Ltd.*[77] the court refused to allow a defendant to submit evidence in support of a particular contention where it had failed to answer, for a period of nineteen months, an interrogatory requesting the identification of witnesses possessing knowledge pertaining to the contention, despite the existence of two court orders compelling the identification. Normally, precluding the uncooperative party from calling the unidentified individual as a witness in support of his case would be a sufficient remedy for such a failure. However, in *Iaconelli* the nineteen-month delay in identifying the individuals severely hampered the interrogator's ability to defend, since the individuals, when they were identified, were no longer within the United States.

The plaintiff in *Life Music, Inc. v. Broadcast Music, Inc.*[78] was ordered to provide responsive answers to a variety of interrogatories which dealt with several issues. Subsequently, the order was violated and the court imposed a variety of sanctions. Of particular interest is the manner in which the court fashioned the relief to the facts of the case. For certain of the violations the court held that issues would be deemed established, while for others the plaintiff was merely precluded from introducing certain matters into evidence. Moreover, the distinctions which the court made when it imposed the varying sanctions were logically based upon the nature of the informa-

76. 36 Ohio St. 2d 38, 303 N.E.2d 861 (1973).
77. 51 F.R.D. 144 (E.D. Pa. 1970).
78. 41 F.R.D. 16 (S.D. N.Y. 1966).

tion which the plaintiff had refused to provide, and the resultant prejudicial effect upon the interests of the defendant.

The decision in *Life Music* demonstrates the care which courts should take in fashioning relief to meet the circumstances of the case. For example, if a party possessing the burden of proof with respect to a particular factual issue refuses to responsively answer interrogatories concerning it, then a court might be justified in ordering that the facts shall be taken to be established in accordance with the contentions of the interrogator. On the other hand, if the party resisting discovery does not have the burden of proof with respect to the issue, then the preclusion of evidence might be a more appropriate sanction.

Due to the wide variety of situations which can arise with respect to the failure of a party to answer interrogatories, it is logical that the rules vest a considerable amount of discretion in the trial court. However, when this discretion is coupled with the fact that discovery orders are generally interlocutory and nonappealable, the result is often quite unfortunate. One tactic which has been utilized by parties to side-step the nonappealability of a discovery order is to be cited for contempt. For example, in *Hanley v. James McHugh Construction Co.*[79] the district court cited the defendant for contempt due to his failure to comply with a discovery order. The defendant then appealed to the Seventh Circuit Court of Appeals which held that the judgment of contempt was final, and, as a result, appealable. More significantly, the appellate court concluded that it had the power to review the validity of the underlying discovery order in conjunction with the contempt citation. Ultimately, the court held that the discovery order was erroneous and reversed the judgment of the contempt.

Despite its success in *Hanley* and other decisions,[80] the tactic of being cited for contempt in order to obtain pretrial appellate review of a discovery order seems, at best, illadvised. For one thing, there is the possibility that some sanction which is not appealable will be imposed. More importantly, however, is the fact that the United States Supreme Court has expressly stated that "[v]iolations of an order are punishable as criminal contempt even though the order is set aside on appeal."[81]

79. 419 F.2d 955 (7th Cir. 1969).

80. *See, e.g.*, Southern Ry. v. Lanham, 408 F.2d 348 (5th Cir. 1969).

81. United States v. UMW, 330 U.S. 258, 294 (1947).

C. *Sanctions Where There Has Been No Order Compelling Answers to Interrogatories*

As stated above, one way to invoke the sanctions outlined in section 804.12(2) of the Wisconsin Statutes is a two-step motion process, that is, by filing a motion for an order compelling answers, and, then — if the opponent persists in his refusal to make discovery — by filing a second requesting the imposition of sanctions. A second means of invoking the statutory sanctions is outlined in section 804.12(4) and the corresponding provisions of the Federal Rules.[82] Insofar as it pertains to interrogatories that statute provides:

> If a party or an officer, director, or managing agent of a party . . . fails . . . to serve answers or objections to interrogatories submitted under s. 804.08, after proper service of the interrogatories, or . . . seasonably to supplement or amend a response when obligated to do so under s. 804.01(5), the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others, it may take any action authorized under sub. (2)(a) 1, 2 and 3.

One of the primary shortcomings of this statutory subsection is that the reference to the failure to answer apparently does not include evasive or incomplete answers. Subsection 804.12(1)(b) provides that "[f]or purposes of this subsection an evasive or incomplete answer is to be treated as a failure to answer." Unfortunately, and due perhaps to oversight, subsection (4) of section 804.12 contains no language to similar effect. As a result, it is simply not clear whether sanctions may be imposed pursuant to subsection (4) if there have been evasive or incomplete answers to interrogatories.

The importance of this apparent oversight is manifested by a simple and all too common example. Suppose that a defendant propounds an interrogatory which requests the identification of all persons who witnessed a particular event. Although he is aware of three such persons, the plaintiff responds by identifying only two individuals. At trial, the plaintiff attempts to call as an eye witness the third, previously unidentified, individual. Are any sanctions available under section 804.12 of the statutes?

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82. FED. R. CIV. P. 37.

Initially, it should be pointed out that no sanctions may be imposed pursuant to section 804.12(2), since that section requires the existence of a prior order compelling answers to the interrogatories.[83] Since the defendant first became aware at trial of the evasive and misleading nature of the plaintiff's response to his interrogatory, no such order exists. Moreover, it is not clear whether relief is available pursuant to section 804.12(4) of the statutes. Can the failure to provide a complete answer to the interrogatory be deemed a failure to "serve answers or objection to interrogatories"? The question can only be answered effectively by a decision of the Wisconsin Supreme Court.

The statutory provision with respect to the duty to supplement responses also fails to cover the hypothetical example presented above. Section 804.01(5) states in its introduction:

> (5) SUPPLEMENTATION OF RESPONSES. A party who has responded to a request for discovery with *a response that was complete when made* is under no duty to supplement his response to include information thereafter acquired, except as follows . . . .

Obviously this statute does not govern the situation where knowingly false answers to interrogatories have been served. Fortunately, there are several decisions which have concluded that courts possess inherent common law power to impose sanctions.[84] For example, in *Taggart v. Vermont Transportation Co.*,[85] there had been an interrogatory requesting the identification of the eye witnesses to a particular incident. The answer to this interrogatory did not refer to one Reynolds but, nevertheless, the answering party attempted to call him as a witness at trial. The court concluded that the party's actions were tantamount to a refusal to answer for purposes of Rule 37 and refused to allow the witness to testify. The decisions are not uniform, however, and other courts, faced with the same

83. The plain wording of WIS. STAT. § 804.12(2) (1973) requires the existence of a prior order compelling answers. Without such an order § 804.12(2) is simply not applicable. *See, e.g.*, Wembly, Inc. v. Diplomat Tie Co., 216 F. Supp. 565 (D. Md. 1963), in which the court interpreted FED. R. CIV. P. 37(b)(2).

84. "Even though Rule 37 is not applicable in the case before us, there is no doubt that apart from that rule a district court has discretionary power to conduct a fair and orderly trial." Halverson v. Campbell Soup Co., 374 F.2d 810, 812 (7th Cir. 1967).

85. 32 F.R.D. 587 (E.D. Pa. 1963).

situation as the court in *Taggart*, have allowed the witness to testify.[86]

The inherent common law power of the courts to impose sanctions has been recognized in various decisions. For example, in *Stevens v. Consolidated Mutual Insurance Co.*,[87] the defendant, in response to an interrogatory, denied that there were in existence any blueprints, diagrams or drawing of the scene of the accident. Based upon this denial the court refused to permit the defendant's expert witness to give testimony based upon blueprints of the accident scene. Similarly, in *Frankel v. Stake*,[88] the plaintiff, in an answer to an interrogatory, denied having in his possession any statments of any witnesses to an accident. Subsequently, when the plaintiff attempted to cross examine a witness at trial on the basis of one such statement, the court foreclosed him, pointing out that any "prejudice is outweighed by our elimination of the element of ambush from this case."[89]

It is often difficult to ascertain in advance of trial whether answers to interrogatories are complete. This is particularly true with respect to interrogatories calling for the identification of documents, oral communications and persons. Consequently, it is a good practice to include in trial briefs the section which summarizes those decisions which recognize the inherent common law power of the court to impose sanctions.

D. Constitutional Limitations upon the Imposition of Sanctions

The United States Supreme Court has held that the granting of a default judgment due to noncompliance with discovery orders may, in certain situations, constitute a denial of due process.[90] The controlling principle is set forth in *Societe Internationale v. Rogers*.[91] In that case, the trial court dismissed the plaintiff's complaint due to noncompliance with an order to produce certain documents under Federal Rule 34. The dis-

86. Wray M. Scott Co. v. Daigle, 309 F.2d 105 (8th Cir. 1962); Wroblewski v. Exchange Ins. Ass'n, 273 F.2d 158 (7th Cir. 1959); 8 Wright & Miller § 2050 at 327 n. 6.

87. 352 F.2d 41 (1st Cir. 1965).

88. 33 F.R.D. 1 (E.D. Pa. 1963).

89. *Id.* at 2.

90. *See* Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1909); Hovey v. Elliott, 167 U.S. 409 (1897); 8 WRIGHT & MILLER § 2283.

91. 357 U.S. 197 (1958).

missal was granted despite the fact that the plaintiff had made diligent and good faith attempts to comply with the order and that Swiss law prevented disclosure of the papers in question. In reversing the dismissal the Supreme Court stated:

> In view of the findings in this case, the position in which the petitioner stands in this litigation, and the serious constitutional questions we have noted, we think that Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner.[92]

The precise constitutional limitations upon Federal Rule 37 and section 804.12 of the Wisconsin Statutes are not easy to define. Clearly, a court cannot impose the extreme sanction of dismissal unless there is some element of willfulness. Just as clearly, however, a court can impose lesser sanctions based upon the mere negligent failure to comply.

> [T]he Rogers Court laid particular emphasis upon the level of contumacy as a determinant of the harshness of the sanction. It stated unequivocally that no willfulness is necessary to bring Rule 37(b) into play. But it added that willfulness is a necessary ingredient in a decision to dismiss the case for failure to produce. The most that can be said about the decision is that Rule 37(b) is designed to empower the court to compel production of evidence by the imposition of reasonable sanctions, but that the court should not go beyond the necessities of the situation to foreclose the merits of controversies as punishment for general misbehavior.[93]

IV. CONCLUSION

Despite inherent limitations, written interrogatories, if properly conceived and drafted, can be an effective discovery device. This article has attempted to demonstrate the purposes for which interrogatories may be used and the principles which must be borne in mind so that the interrogator can effectively accomplish these purposes.

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92. *Id.* at 212.

93. 4A MOORE'S FEDERAL PRACTICE ¶ 37.03[2.-1] at 37-56.