ASSIGNMENT § 6.7 | THE ANSWER (OPTIONAL)

Students may switch sides in their assigned client's case for this assignment or they may use the following scenario to create an answer. Affirmative defenses and counterclaims may be included. This assignment may be required or assigned for extra credit by your instructor, but is otherwise optional.

Your attorney tells you she just took a new case. The complaint was filed more than two weeks ago, so the answer is almost due. She wants you to draft an answer and provides you with the basic following information.

The case is Ann Haverhill v. Gene Villipiano. The court case number is 20-1438. Your attorney wants you to admit Paragraphs 1 and 2, deny Paragraphs 3, 5, 6, and 7, and deny Paragraph 4 due to insufficient information. Your affirmative defenses are "Failure to state a claim upon which relief can be granted" and "Assumption of the risk."

Again, this assignment is optional unless your instructor requires it.

§ 6.8

Discovery

Exchanging Relevant Information

The following pages feature interactive study regarding discovery documents. Exercises will be completed in class, and the Assignments will be completed out-of-class, unless otherwise instructed. Try to be brief in completing the fill-in-the-blank questions but use additional paper if necessary. The exercises are primarily designed to encourage the thought process. They will not be graded.

THE DISCOVERY PROCESS

Evidence is needed by each party to a lawsuit to support its side of the case. Both parties attempt to gather the necessary evidence to win at trial. A paralegal is intimately involved in this process. Discovery is the vehicle by which both parties to a suit are entitled to certain facts, documents and other information while preparing for trial. Discovery serves three functions:

- *to clarify issues*
- *to eliminate the element of surprise*
- *to limit the length of trial*

Every attorney knows that lawsuits are won by hard work during the pretrial stage. The best and smartest attorneys use every tool available for the benefit of their clients, and the paralegal is one of the most powerful tools an attorney possesses. Also, when an attorney hears the term "pretrial," he or she

thinks "discovery." Thus, since the paralegal is very involved in discovery, and since most cases are won or lost during the pretrial stage, the paralegal's importance in litigation becomes obvious.

The four most used discovery techniques are:

1. *Interrogatories*
2. *Requests for admissions*
3. *Requests for production and inspection of documents*
4. *Depositions*

THE INTEGRITY OF THE DISCOVERY PROCESS

A judge in Hawaii spoke to a group of paralegal graduates about the proper use of paralegals in a law firm. During his talk, the judge addressed the paralegal's role in the discovery process, passionately making the following points:

Discovery Can Determine the Outcome of a Trial.
Paralegals must understand that the work they do during this stage is not incidental; it is critical to the results of litigation.

The Discovery Process is an Honorable Concept.
The purpose of going to trial is not to win, but to seek justice. For justice to prevail, the relevant facts should be exposed. The discovery process requires parties to disclose all relevant facts, even those facts that damage the party making the disclosure. Some attorneys pride themselves on their ability to avoid or circumvent the discovery process. This is unethical and corrosive to the litigation process.

Do not Compromise Your Ethics for Anyone.
As a paralegal, do not engage in obstructive or evasive techniques. Maintain your ethics and help your attorney maintain his or her ethics. The integrity of the litigation process is at least partially in your hands.

What can a paralegal do?
A paralegal asked to perform a task that seems evasive or deceptive should talk to the attorney about the situation. Maybe there is a reason for the conduct that is not apparent to the paralegal. At some point, the judge pointed out, the paralegal may need to ask the attorney a simple question: *Is this really the purpose of discovery?*

ASSIGNMENT § 6.8 | DISCOVERY DOCUMENTS

Based upon the same facts as the complaint previously prepared, create these discovery documents:

- *Interrogatories* (20 questions)
- *Request for Admissions* (20 statements)
- *Request for Production* (5 requests)

The following pages will instruct you in methods for creating the above documents. For this assignment, staple all the documents together. Keep track of your billable hours and attach your time sheet at the end of the documents.

§ 6.8(A) INTERROGATORIES

Interrogatories, from the word interrogate, are written questions to the other party or general requests for information relevant to the litigation. The other party must respond to interrogatories under penalty of perjury. While Requests for Admissions (discussed later) attempt to paint the opposing party into a legal comer, Interrogatories, instead, paint with a broad brush.

Any time after the suit is filed, either party may set forth Interrogatories to the opposing party. While all discovery must be relevant to the issues being tried, Interrogatories may be general and cover extensive matters, attempting to cast a broad net to obtain as many facts as possible.

> *Discovery Point*
> Discovery is intended to expose all relevant facts that will help the court reach a fair decision. Even if the information is damaging, the responding party must disclose it.

In the past, many jurisdictions required interrogatories and their responses to be filed with the court. Most jurisdictions have eliminated this requirement, although federal rules still generally require filing of the *certificate of mailing* or *receipt of copy*. After the caption and the "comes now" paragraph, many attorneys include specific instructions regarding the responses.

Although not required, these instructions may include such subjects as who responds to the interrogatories, how certain individuals are referred to, what certain terms or phrases mean, and other guidance. These instructions should also state the continuing nature of the interrogatories.

> *Continuing Nature of Discovery*
> Even after initial discovery deadlines have passed and initial discovery responses have been completed, the responding party must inform the requesting party if additional or subsequent information becomes known. For example, if a previously unidentified witness becomes known to the responding party after discovery is complete, that party is responsible for making this information known to the other side.

Remember, interrogatories attempt to find as much information as possible, from generic background information to specific questions about the matter being litigated.

The litigation process is an adversarial process. However, there are polite considerations that should be observed for the benefit of all. One such consideration is to leave enough space between interrogatories for the opposing party to respond. In fact, in some jurisdictions this is required.

Limited Discovery

Many states now have what is referred to as limited discovery. This means either that only specific questions may be posed or that the number of questions is limited.

California, for instance, has replaced traditional discovery documents created in law offices with discovery forms, featuring specific questions for specific legal matters. In some states, discovery forms are supplemented with questions created by the firm, usually requiring court approval.

Many states limit interrogatories to 40 questions per party unless the court grants more. Many courts even count subsections listed as a, b, c, etc., as individual interrogatories. In those jurisdictions, the paralegal should rewrite or create interrogatories without subsections to maximize the number of interrogatories available to the client.

Again, do not reinvent the wheel. If the firm has interrogatories from a previous litigation of a similar nature, or if there are formbooks available to you (in the law library or online), use them.

DISCUSSION POINTS | PART 1

1. At what point are interrogatories usually sent?
2. To whom are interrogatories generally sent? The opposing party, witnesses, or both?
3. Are instructions required?
4. What are the advantages to including instructions?
5. Are interrogatories responded to under oath?

ANSWERS TO INTERROGATORIES

When a law firm receives interrogatories from the opposing party, the paralegal should stamp the "date received" on the document and make note of the response deadline in the appropriate calendar or tickler system. There are three ways to respond to the interrogatories.

1. *The attorney responds.*
   This is the most inefficient means of response and should only be used in cases involving very technical or complex matters. Otherwise, the client pays attorney rates for a service that could have been provided at paralegal rates.

2. *The client responds by himself.*
   This could certainly be appropriate and cost effective. Ultimately, the complexity of the litigation or the client's experience with the litigation process may be the determining factors. If this method of response is chosen, the client must be given a date by which the responses should be returned to the attorney. This date should be well in advance of the actual due date since revisions may be required.

3. *The client responds with help.*
   When the interrogatories are received, the paralegal should notify the clients and make an appointment to consult with them. This is the most intelligent and cost-effective method of responding to discovery. If a paralegal assists the client in responding, the time an attorney must spend reviewing, correcting, and rewriting the interrogatories will be reduced.

When helping a client respond to discovery, always maintain high ethical standards. Should one ever start down the slippery slope of unethical behavior, it is difficult to regain the ethical higher ground. The paralegal should also consider the fact that answers to interrogatories, or any other form of discovery, may be entered into evidence or read at trial. Since the person responding to the interrogatories does so under penalty of perjury, any discrepancy between testimony given at trial and discovery responses could place the client and attorney in jeopardy.

Unfortunately, discovery has been used by many attorneys as a means of intimidation, delay, or obstruction. Some questions are posed simply to upset, embarrass, or scare the opposing party. Other questions may ask for responses or materials of such a quantity that the responding party is overwhelmed.

When this occurs, a litigant's attorney has two choices. The attorney may wish to object to an interrogatory because it is irrelevant, inappropriate, creates a burden on the responding party, or for other reasons. If the amount of material requested is considerable or the information not readily available, the attorney may ask the court for an extension of time to respond. Of course, the attorneys may simply agree between themselves to allow additional time. As a paralegal, you can support your attorney by documenting any agreement reached between attorneys.

DISCUSSION POINTS | PART 2

1. What is the advantage in having a paralegal assist the client in answering interrogatories?

2. What ethically challenging situations could arise for a paralegal who helps a client respond to interrogatories?

3. Which of the following are not under penalty of perjury?

    a. interrogatory responses
    b. affidavits
    c. verified complaints
    d. all the above are runder penalty of perjury

Interrogatory Techniques

First and foremost, when creating any discovery document, use available form books. However, there will be times when no previously existing form quite fits, or the form you find needs substantial alteration. These techniques are designed to give the paralegal a framework for creating discovery documents.

Technique One:

Personal information. Build a profile of the opposing party.

EXAMPLE | INTERROGATORY TECHNIQUE ONE

1. Provide your full name, address, and home, mobile, and work phone numbers.
2. Provide the names of all those involved in responding to these interrogatories.
3. Provide a general statement about your position in this action.

Technique Two:

Financial considerations. Establish the ability of the opposing party to pay damages. Look for assets in three areas: Assets of the party (property, certificates of deposit, etc.); Assets in which the party has an interest (wills, insurance policies, etc.); Assets in which the party has no direct interest, but that may be relevant to litigation (spouse's property, insurance directly covering damages, business liability, etc.)

EXAMPLE | INTERROGATORY TECHNIQUE TWO

1. As to any insurance policy in which you have an interest, provide the following:

    a. name of policy holder
    b. name of insurance company
    c. policy number
    d. your relationship to the policy holder

Technique Three:
Facts pertaining to the case. Ask detailed questions regarding the matter before the court. (Who? What? When? Where? Why? How?)

EXAMPLE | INTERROGATORY TECHNIQUE THREE

1. What was your response when you first saw the plaintiff, your wife's current boyfriend, on the corner?
2. How did the plaintiff react when he saw you?
3. In what manner did the plaintiff approach you?
4. When the plaintiff approached you, how did you react?
5. What occurred when the plaintiff tried to shake your hand?

DISCOVERY POINT | "YES" OR "NO" QUESTIONS

Avoid asking "yes" or "no" questions. If a "yes" or "no" question must be used, use a follow-up question to elicit more details. (i.e. "If yes to the above question, explain those circumstances.") "Yes" or "no" questions are limiting. They do not allow for a response that provides context, and they are uneconomical, using up one of your allotted Interrogatories while gaining little related information. They also allow the person responding to answer "yes" or "no" but to later squirm out of that response by claiming the question did not require specifics. Instead, try rephrasing the question to avoid a simple "yes" or "no" response.

For example, your first attempt to draft a question ends up being, "Were you at the party at the professor's house on the night of June 2 of this year?" That question could be changed to, "What were you doing on the night of June 2 of this year between 6 pm and 3 am the following morning?"

EXERCISE | MODIFYING "YES" OR "NO" QUESTIONS

Modify the following questions so that they do not elicit a simple "yes" or "no" response.

1. Do you know the Plaintiff in this court action?

2. Did you consume any alcohol between 6 and 11 pm on the evening of June 2, 2021?

3. Did you have any conversations with the Plaintiff that evening?

EXAMPLE | INTERROGATORIES

DISTRICT COURT OF CLARK COUNTY
STATE OF CONFUSION

JOHN and SALLY SMITH

Plaintiff,

vs.

JACK DOE

Defendant.

INTERROGATORIES

TO: (OPPOSING PARTY'S NAME)

TO: (OPPOSING COUNSEL)

Under the authority of Rule 33 of the State of Confusion Rules of Civil Procedure, Defendant, by and through his attorneys, request that Plaintiffs answer, in writing and under oath, within thirty days of receipt hereof, the interrogatories hereinafter set forth.

DEFINITIONS

1. "COMPLAINT" shall mean and refer to Plaintiffs' complaint originally filed on 2-25-11 in Department XVII of the Clark County District Court, Case No. 5076.

2. "PROPERTY" shall mean and refer to the real property owned by Defendant.

3. "YOU," "YOUR," "YOURS," and/or "PLAINTIFF" shall mean and refer to both Plaintiffs as well as their agents, attorneys, employees, accountants, family members, investigators, or any other person acting on their behalf.

4. "DOCUMENT" refers to any piece of paper or evidence, including, but not limited to, letters, correspondence, contracts, proposals, subcontracts, invoices, memoranda, notes, drawings, reports, photographs, microfilm, videotapes, and/or computer input documentation.

INTERROGATORIES

INTERROGATORY NO.1:

Describe all items YOU contend constitute defects or deficiencies on the roof at the PROPERTY.

INTERROGATORY NO. 2:

Identify all DOCUMENTS which evidence alleged defects or deficiencies at the PROPERTY.

INTERROGATORY NO. 3:

Please state all facts upon which YOU base any claim for breach of contract.

INTERROGATORY NO. 4:

Please identify all DOCUMENTS upon which YOU rely in claiming that Defendant has breached its contract with respect to the roof at the PROPERTY.

INTERROGATORY NO. 5

State all facts in support of YOUR contention in the COMPLAINT that Defendant owed a duty to YOU.

INTERROGATORY NO. 6:

State all facts in support of YOUR contention in YOUR COMPLAINT that Defendant breached his duty owed to YOU.

INTERROGATORY NO. 7:

Identify with specificity all locations where damages are claimed to have occurred.

INTERROGATORY NO. 8:

Identify all damages claimed to be the result of the alleged wrongful conduct of Defendant.

INTERROGATORY NO. 9:

For each injury identified in response to Interrogatory No. 8, please identify the total cost of the medical services.

INTERROGATORY NO. 10:

Did YOU ever make any written report or complaint to this propounding party regarding alleged injuries?

INTERROGATORY NO. 11:

If YOUR response to the preceding interrogatory was affirmative, please identify with particularity to allow the requesting party to inspect all such documents.

INTERROGATORY NO 12:

Identify each injury or damage YOU attribute to the actions or inactions of Defendant.

DATED this ____ day of ____, 20__.

_____

Attorneys for Defendant,

CERTIFICATE OF MAILING

I hereby certify that on this _____ day of ____ 20__, I placed a true and correct copy of the foregoing INTERROGATORIES in the United States mail, postage prepaid, addressed to counsel on the attached service list:

_____

An employee of [Law Firm Here]