

Conducting strategic discovery

By Carolyn O. Boucek and
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Congratulations – you filed a lawsuit! Think that was the hard part? Think again. Now comes the real labor – proving it. Cases are often won and lost in discovery, but conducting effective discovery is a balancing act.

Tips for Drafting Effective Discovery

Drafting strategic discovery starts with knowing the rules. Even seasoned litigators should always double-check the limits of permissible discovery at the outset of a case to avoid getting tripped up on technicalities.

For instance, litigants can be limited to a certain number of interrogatories by rule or by court order. See e.g., *Fed. R. Civ. P. 33(a)(1)* (setting a 25-interrogatory limit). The federal 25-interrogatory limit includes discrete subparts. *Id.* The trouble is courts have ruled that not all subparts are “discrete” subparts which each count toward the 25-interrogatory limit. See e.g., *Straight Arrow Pods, Inc. v. The Mane Choice Hair Sol., LLC*, 2021 U.S. Dist. LEXIS 192703, at 6 (E.D. Pa. Oct. 6, 2021). Several federal courts have adopted the “related question” test such that “a subpart is discrete and regarded as a separate interrogatory when it is logically or factually independent of the question posed by the basic interrogatory.” *Kates v. Packer*, Civil Action No. 3:13-cv-01525, 2017 U.S. Dist. LEXIS 113516,



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at 8 (M.D. Pa. July 21, 2017) (citation omitted); e.g., *Straight Arrow Prods.*, 2021 U.S. Dist. LEXIS 192703 at 12. But, given that the Third Circuit lacks binding authority regarding counting discrete subparts, it can be no surprise that “much ink has been spilled” regarding the matter. See e.g., *Fouad v. Milton Hershey Sch. and Tr.*, Civ. A. No. 19-253, 2020 U.S. Dist. LEXIS 105774, at 4 (M.D. Pa. June 17, 2020).

Unlike interrogatories, there are generally no numerical limits to requests for production of documents. See *Fed. R. Civ. P. 34*. Litigators can maximize probative requests by reserving interrogatories for questions that cannot be easily addressed by requests for production or other discovery mechanisms. Phrasing discovery can help determine if information is available only through



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interrogatories. E.g., an interrogatory seeking the identities of a meeting’s attendees would be wasteful if counsel could simply request the meeting minutes. But the same request would be appropriate if counsel already requested meeting minutes, no documents identifying the attendees exist, and that issue is critical to the case.

Requests for admission are another substitute for interrogatories that seek a binary answer. However, admission requests that invite qualifications also invite evasive answers. It can be helpful to ask whether the recipient of a request for admission could possibly answer with anything besides an unqualified “yes” or “no.” Subject to few exceptions, if the answer is yes, the requestor should consider redrafting tighter admission requests.

Addressing Deficient Responses and Answers

Even with perfectly tailored requests, it is unlikely that opposing counsel will turn over all relevant information and documents in the initial response. A handful of incomplete responses are to be expected, but unreasonably evasive or non-responsive responses must be addressed.

You must weigh the costs associated with seeking compliance with the request you have already made versus the likelihood of curing the defect by serving a follow-up request. The greater the deficiencies, the more likely you will need to take action to seek compliance with the requests you made.

Once you decide to seek compliance, you should consult the local rules of the jurisdiction and the presiding judge’s chamber rules with respect to discovery disputes. Most courts will require parties to engage in some level of good faith discussion prior to seeking court intervention. See *Coleman v. Nat’l R.R. Passenger Corp.*, No. 94-4526, 1995 U.S. Dist. LEXIS 4415, at 3 (E.D. Pa. Apr. 5, 1995) (denying motion to compel because movant’s attorney did not follow the local rules to engage in efforts to resolve the dispute before seeking court action). Accordingly, your next step will likely be sending a carefully crafted deficiency letter to opposing counsel that clearly identifies the requests to which counsel has provided insufficient responses and the

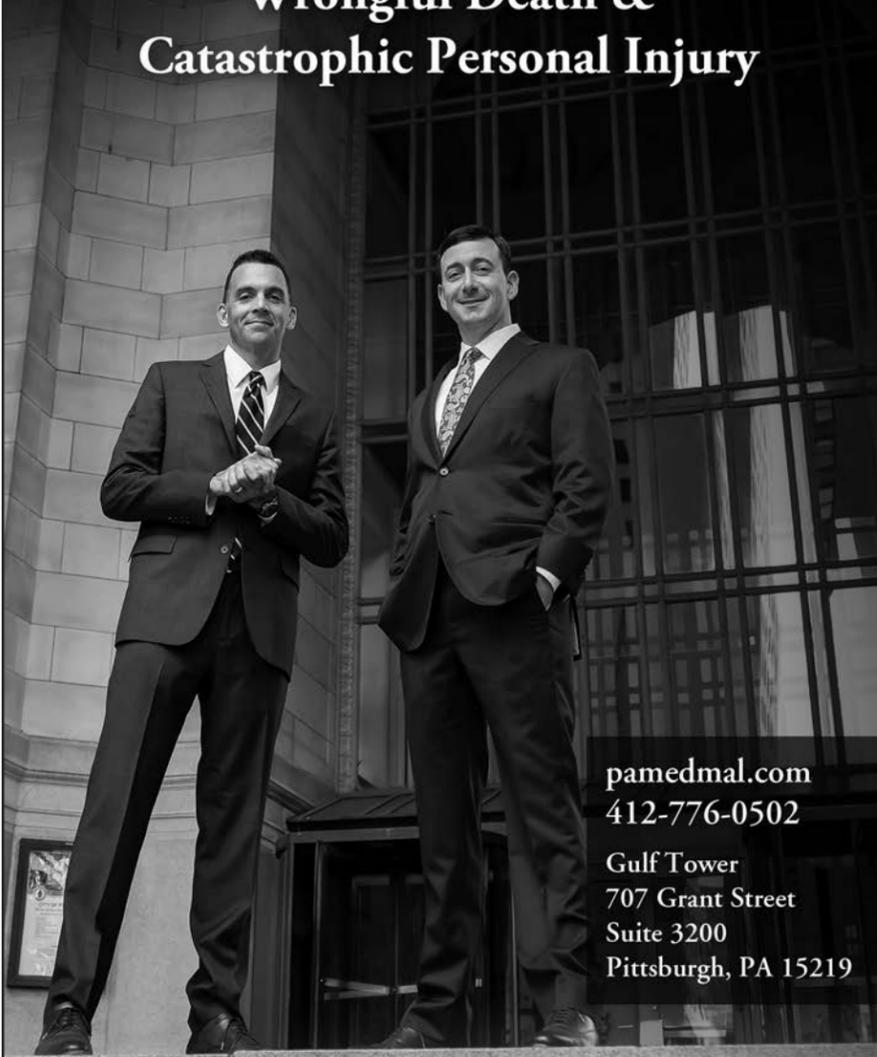
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“All Rise (a glass)” happy hour will be on November 22 and will provide Section members a relaxed atmosphere to hear from members of the court on recent developments, as well as meet and mingle with fellow Section members. These happy hours will continue in 2023 and we are looking for additional firms to open their offices and revel in the return to in-person events.

The Section continues to work with the Court of Common Pleas to offer less-experienced litigators the opportunity to represent *pro se* individuals at trial to gain courtroom experience with its Trial Practice Program. In addition to these new programs, the extremely popular “Lunch with the Judges” at the Duquesne Club will continue, albeit now in April. The annual CLE and Holiday Party is scheduled for December 13 at the Rivers Club. We will continue to publish the opinions from the Civil Division and are working with the Court to publish civil jury verdicts.

So, for the nearly 800 members of the Section, I want to thank you for your membership. If you are not a member, but interested, I would suggest you strongly consider “checking the box” to join the Section to maximize your membership in the ACBA. I do not think there is any doubt that we’re better together. I also want to encourage everyone to take advantage of the opportunities to get back together. If you would like to find out more about our upcoming events and endeavors, or become more involved in the Section, feel free to contact me. I would invite you to attend – in-person or remotely – Civil Litigation Section Council meetings, which are the

fourth Monday of each month. I look forward to seeing you. ■

Joe Froetschel is a founding member of the newly formed personal injury law firm, Phillips Froetschel LLC. Joe is an adjunct professor at the University of Pittsburgh School of Law, where he teaches Advanced Pennsylvania Torts. He is also Chair of the 2023 Bench-Bar Conference Committee and an active member of the Local Rules Committee, and an ambassador for the ALLY Initiative. Joe is a member of the Academy of Trial Lawyers of Allegheny County and Board member of the Pennsylvania Association for Justice and Western Pennsylvania Trial Lawyers Association.

PRESIDENT’S MESSAGE
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legal department can get involved with a pro bono project please contact Director of the Pro Bono Center Barbara Griffin at bgriffin@acba.org.

Our Young Lawyers Division also has a dedicated Public Service Subcommittee that has worked on many community service projects over the years, some which have gained national recognition. The YLD’s Public Service Committee, co-chaired by Aleksandra Kocelko and Rebeca Miller, welcomes the involvement and support of all attorneys on its projects. “The YLD Public Service Committee is one of the beating hearts of our organization. We are impassioned by the legal help we can provide our communities. We believe that diverse participation promotes fresh perspectives, so please feel free to contact us,” said Miller. Look for more information in the *Sidebar* on these projects, including the YLD’s upcoming annual Children’s Gift Drive and Holiday Party and how you can help.

Please also be on the lookout for information regarding the ACBF’s annual Attorneys Against Hunger campaign, which has raised over \$2.2 million over the last 27 years. A donation in any amount goes directly to one of 17 local anti-hunger agencies. Donations can be made at www.acbf.org/donate.

The ACBA’s committees, divisions and sections have all been called upon this year to think of ways to give back to our communities. I encourage you, our members, to have an active voice in those discussions. Leading and/or collaborating on a service project is not only personally rewarding, but it stands to impact the lives of others less fortunate in a powerful way. Our Community Service and Public Service Committees are here to help and welcome the opportunity to collaborate and work with volunteers.

While you may not have given much thought to the history of Thanksgiving since grade school, it should serve as a reminder that we get to enjoy our turkey and stuffing because laws were put into place recognizing the need to have a day of reflection and thanks with prayer for one another and our country. Lincoln’s ask of the American people in 1863 rings true today. Let us reflect and pray to heal the wounds of our nation and restore it to the full enjoyment of peace, harmony, tranquility and Union. Let us all be thankful that we are lawyers and have the ability to impact those we serve. I wish you and your family a blessed Thanksgiving. ■

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reasons why such responses are insufficient. Deficiency letters thrive

on specificity – identify each request and corresponding response at issue, explain why (and under what authority) the response is insufficient or inappropriate, and request that the specific deficiencies be cured by a particular date.

While discovery, and litigation in general, is inherently adversarial, keep the deficiency letter professional and free from unnecessary editorialization. Litigators should craft each correspondence during discovery as if the correspondence will be read and scrutinized by the court. In fact, if the dispute is not resolved between the parties, the court will likely receive and review all correspondence from the attorneys regarding the dispute. The negative effect from the court reading your discourteous correspondence might outweigh any possible benefits from sending it. See, e.g. *Guy Chem. Co. v. Romaco AG*, No. 3:06-96, 2007 U.S. Dist. LEXIS 31832 (W.D. Pa. May 1, 2007). On the flipside, you may experience positive consequences for keeping your responses professional in contrast to your opponent’s.

If opposing counsel is not responsive to your deficiency letter, follow the court’s rules and the judge’s practices and procedures regarding filing a motion to compel compliance with your discovery requests.

Finally, litigators must remember the age-old lesson to “pick your battles” while moving through discovery. Litigators who fight every battle will be hard-pressed to receive leeway from their opposing counsel in the future. ■

Boucek and Cottington are labor and employment litigators with Eckert Seamans Cherin & Mellott, LLC.

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