

American University Washington College of Law

Digital Commons @ American University Washington College of Law

Articles in Law Reviews & Other Academic Journals

Scholarship & Research

Spring 2024

The Art of Discovery: Part 2

David Spratt

American University Washington College of Law, dspratt@wcl.american.edu

Follow this and additional works at: https://digitalcommons.wcl.american.edu/facsch_lawrev



Part of the [Legal Education Commons](#), [Legal Profession Commons](#), and the [Legal Writing and Research Commons](#)

Recommended Citation

David Spratt, *The Art of Discovery: Part 2*, VBA Journal 12 (2024).

Available at: https://digitalcommons.wcl.american.edu/facsch_lawrev/2262

This Article is brought to you for free and open access by the Scholarship & Research at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Articles in Law Reviews & Other Academic Journals by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.



BY DAVID H. SPRATT
PROFESSOR, AMERICAN UNIVERSITY

The Art of Discovery: Part 2

My 17-year-old son attended his senior year homecoming dance last night, replacing his usual sweatpants, hoodie, baseball hat, and Crocs with a suit, shirt, dress shoes, and tie that matched his girlfriend's fingernails. Freshly shaved, showered, and coiffed, he cleaned himself up "real nice." This is more than I can say about the toiletries and clothes left on his bathroom floor. We're talking about a makeover, not a miracle.

Do your discovery requests need a similar makeover? In my last column, I offered tips for preparing your client to effectively answer discovery. In a future column, I will discuss best practices for revising a client's answers and drafting objections. For now, let's focus on issuing discovery requests to another party. How long has it been since you "cleaned up" your discovery requests?

Most lawyers rely on form discovery. There are plenty of resources, online and in print. Bender's Forms of Discovery has volumes of sample discovery questions for over 200 different legal topics. Some local bar associations and courts offer "model" discovery requests. Many law firms and organizations have discovery form banks related to their specific practice areas.

Form discovery is undeniably useful, particularly for seeing the types of questions or documents that are usually asked in a certain type of case. Unfortunately, many form interrogatories and document requests are outdated and do not follow effective writing strategies of clarity and precision. Many of the sample discovery requests are full of legalese, which often results in ambiguity. Grab your comb and razor, as we work together to "clean up" your discovery requests.

TAILOR THE DISCOVERY REQUESTS TO YOUR CLIENT'S CASE

Rule 4:1(b)(1) of the Rules of the Supreme Court of Virginia states that a party "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . ."

In short, make sure the discovery requests you draft are relevant to the issues in your client's case. This advice seems obvious, but when

I was in practice, it was sometimes ignored. If child support and custody are not at issue in your case because the parties do not have minor children, then do not include interrogatories or document requests that mention child support or custody.

First, it is sloppy drafting that shows inattention to detail. Irrelevant discovery requests are a calling card that diminishes credibility with its recipient. When I saw custody interrogatories in a case with no children, I knew upfront that opposing counsel was not taking the case as seriously as they should have been.

Second, irrelevant interrogatories can prejudice a client's case. Rule 4:8(g) limits the number of interrogatories that may be served upon another party "at any one time or cumulatively" to "thirty written interrogatories, including all parts and sub-parts without leave of court for good cause shown." This might seem like a lot of questions, but some cases are quite complex. Focused discovery can both help narrow the issues and prepare for settlement or litigation. When attorneys cut and paste an irrelevant interrogatory into discovery requests, they are throwing away a chance to best serve the interests of the client.

Despite this limit, what constitutes one interrogatory is open to debate and varies among jurisdictions (and even judges on the same court). For example, when I practiced family law in Fairfax County Circuit Court many moons ago, this question appeared as a "model" interrogatory, which meant that the court deemed it acceptable as one interrogatory, despite the subparts:

If you are unemployed, or have been at your present employment less than two years, provide the following for each of your previous places of employment during the last two years:

- a) Employer's name and address;
- b) Position or title;
- c) Dates of service;
- d) Salary history for last two years in job;
- e) Work schedule;
- f) The nature, value and date of all overtime, bonuses, commissions or other compensation in the last two years in the job;
- g) Describe all fringe benefits, such as insurance coverage (life, health, dental, etc.), automobile use, vacation and sick leave; and
- h) Reason for termination of employment.

How long has it been since you "cleaned up" your discovery requests?

The consensus seems to be that an interrogatory can ask both a general question and several follow-up questions and still count as one interrogatory if the subparts are logically and factually related to the initial question.

Above all, when drafting interrogatories, leave some room to ask additional questions later. A good, but not fixed, rule of thumb is to ask no more than 27 initial interrogatories, which leaves three to play with in the future.

KNOW WHAT YOU ARE ASKING IN EACH QUESTION AND WHY

Never ask an interrogatory simply because the interrogatory is included on a form; you need to know why you are asking a question and whether the question should be asked in the first place. Do not waste the limited and valuable resource an interrogatory can provide.

Before drafting interrogatories or any type of written discovery, research the procedural rules controlling discovery practice in your

jurisdiction and the substantive law, so you know what information is needed to prove or defend your client's case. For example, if you are drafting discovery in an equitable distribution case, review the equitable distribution statute. Tailor the interrogatories to seek information and facts relevant to the factors a court must consider in making an equitable distribution award.

Well-drafted interrogatories seek information needed for case development, help parties and their counsel see (and address) the strengths and weaknesses of their case, and help discover the opposing party's factual and legal basis for each cause of action and defense.

Focused interrogatories asking for basic factual data are typically the most effective; try to target the "gaps" in the other party's case or to pin down the other side on an issue or on specific facts that can be used against the other party at trial.

Interrogatories are good at gathering facts. Focus your questions on "who," "what," "when," "where," and "how." Asking "why" in an interrogatory does not usually result in a specific enough answer to be useful at trial.

It's the end of the column, and we have only seen the tip of the iceberg. We haven't even touched on drafting document requests. I'm off to "discover" the current state of my son's bathroom. Your task: starting to "clean up" your interrogatories. See you soon, as we continue exploring the "Art of Discovery." ■

Please send any suggestions that you have "discovered" along the way to dspratt@wcl.american.edu.

David H. Spratt

is a professor of legal rhetoric at The American University, Washington College of Law, where he teaches legal writing, contracts, and family law litigation and practice and is the associate director of the Legal Rhetoric Program. Spratt received a B.A. degree in government and psychology from The College of William and Mary and graduated summa cum laude from The American University, Washington College of Law. In 2001, he was a founding partner of Schwartz & Spratt, PLC, a family law firm in Fairfax, Virginia. Previously, he worked as an associate at the Law Office of Betty A. Thompson, Ltd. Spratt is the chair of the Virginia State Bar Section on the Education of Lawyers and was formerly the civil reporter of decisions for the Court of Appeals of Virginia. In February 2023, he published a textbook, "Contracts: A Modern Coursebook," with co-author Ben Templin.