INTERROGATORY PRACTICE UNDER THE FEDERAL RULES OF CIVIL PROCEDURE: WHAT IS THE BASIS FOR THE SPECULATIVE AND ARGUMENTATIVE OBJECTIONS?

Corey LaBrutto and Jason Kanterman**#*

We have all seen them: the poorly drafted interrogatory question purporting to require the adverse party to disclose every bit of information in its possession, and the subsequent responses reciting a litany of pre-drafted objections before answering the question posed. Most of those objections stem directly from provisions in the Federal Rules of Civil Procedure ("FRCP"). Two common objections however—that the interrogatory propounded is either argumentative or calls for speculation—do not find explicit support in any specific Federal Rule. This article will explore the history and foundation of those two objections and make recommendations as to their usage.

For purposes of comparison, the following is a non-exhaustive list of the most common interrogatory objections and the Federal Rule of Civil Procedure from which they emanate, coupled with a citation to a case applying the rule:[1]

* Corey is a 2017 graduate of Rutgers Law School and a former Managing Editor of the *Rutgers University Law Review*. Corey will begin a clerkship with the Superior Court of New Jersey, Appellate Division in August 2017.

** Jason is a 2016 graduate of Rutgers Law School and is currently serving as a law clerk in the Superior Court of New Jersey, Appellate Division. The views expressed in this Commentary are solely those of the author and are not made on behalf of either the New Jersey Supreme Court or the court system. The author is available for contact by email at Jason.Kanterman@gmail.com.

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1. FED. R. CIV. P. 33(a)(2) states that the scope of an interrogatory "may relate to any matter that may be inquired into under Rule 26(b)," therefore the scope of FED. R. CIV. P. 33 is guided by FED. R. CIV. P. 26.

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- Interrogatories exceed the number permitted by statute[2]
    - FRCP 33(a)(1);
    - *Walker v. Lakewood Condominium Owners Association*, 186 F.R.D. 584 (C.D. Cal. 1999).

- Interrogatories are irrelevant or seek irrelevant information[3]
    - FRCP 26(b)(1)
    - *Thomas v. Cate*, 715 F. Supp. 2d 1012, 1031 (E.D. Cal. 2010).

- Interrogatories seek privileged information[4]
    - FRCP 26(b)(1)
    - *Munzer v. Swedish American Line*, 35 F. Supp. 493 (D.N.Y. 1940).

2. FED. R. CIV. P. 33(a)(1) ("Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts."); Walker v. Lakewood Condo. Owners Ass'n, 186 F.R.D. 584, 586 (C.D. Cal. 1999) ("Rule 33(a) and Local Rule 8.2.1, by their express terms, make it doubly clear that every interrogatory which is served, including any discrete subparts, shall be counted against the numerical limit.").

3. FED. R. CIV. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged *matter that is relevant to any party's claim or defense and proportional to the needs of the case*, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.") (emphasis added); Thomas v. Cate, 715 F. Supp. 2d 1012, 1031 (E.D. Cal. 2010) ("[D]iscovery should ordinarily be allowed under the concept of relevancy unless it is clear that the information sought can have no possible bearing upon the subject matter of the action." (citing La Chemise Lacoste v. Alligator Company, Inc., 60 F.R.D. 164, 170–71 (D. Del. 1973))).

4. FED. R. CIV. P. 26(b)(1) ("Parties may obtain discovery *regarding any nonprivileged matter* that is relevant to any party's claim or defense. . . .") (emphasis added); Munzer v. Swedish Am. Line, 35 F. Supp. 493, 497 (D.N.Y. 1940) ("It has been generally recognized that 'privilege' as an objection applies to interrogatories under Rule 33, just as it may be the basis of an objection to questions on the examination of a party whose deposition is being taken under Rule 26.")

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- Interrogatories seek facts or opinion of non-witness experts[5]
  - FRCP 26(b)(4)(D)
  - *Acuff-Rose Publications, Inc. v. Silver Star Publishing Co.*, No. 4636, 1967 U.S. Dist. LEXIS 7981 (M.D. Tenn. Aug. 2, 1967).

- Interrogatories on issues of pure law[6]
  - FRCP 33(b)
  - *Abbott v. United States,* 177 F.R.D. 92 (N.D.N.Y. 1997)

- Interrogatories are overly-broad or overly-general[7]
  - FRCP 26(b)(1)
  - *United States v. Renault, Inc.*, 27 F.R.D. 23 (S.D.N.Y. 1960).

- Interrogatories are vague or ambiguous[8]
  - FRCP 26(b)(1)
  - *Wing v. Challenge Machinery Co.*, 23 F.R.D. 669 (S.D. Ill. 1959).

5. FED. R. CIV. P. 26(b)(4)(D) ("Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial."); Acuff-Rose Publ'ns., Inc. v. Silver Star Publ'g Co., No. 4636, 1967 U.S. Dist. LEXIS 7981 at *2 (M.D. Tenn. Aug. 2, 1967) ("[T]he court is of the opinion that the better rule is that discovery of reports prepared by an adverse party's expert should not ordinarily be permitted in the absence of a showing that factual information, which is necessary for the moving party's trial preparation, cannot be obtained by the moving party's independent investigation or research.").

6. FED. R. CIV. P. 33, Notes of Advisory Committee on 1970 amendments, Note to Subdivision B ("[I]nterrogatories may not extend to issues of 'pure law,' i.e., legal issues unrelated to the facts of the case."); Abbott v. United States, 177 F.R.D. 92, 93 (N.D.N.Y. 1997) ("[A]s with requests for admissions, 'interrogatories may not extend to issues of "pure law," i.e., legal issues unrelated to the facts of the case.'" (internal citations omitted)).

7. FED. R. CIV. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering . . . *whether the burden or expense of the proposed discovery outweighs its likely benefit*.") (emphasis added); United States v. Renault, Inc., 27 F.R.D. 23 (S.D.N.Y. 1960) (holding that interrogatories which ask for all evidence that would be presented in trial were overly broad and therefore unduly burdensome).

8. FED. R. CIV. P. 26(b)(1); Wing v. Challenge Mach. Co., 23 F.R.D. 669, 673 (S.D. Ill. 1959) (upholding objections to interrogatory requests that were "so ambiguous and so wanting in specificity that the same are burdensome and oppressive").

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- Interrogatories are burdensome or oppressive[9]
  - FRCP 26(b)(1)
  - *Newell v. Phillips Petroleum Co.*, 144 F.2d 338 (10th Cir. 1944).

- Interrogatories are cumulative[10]
  - FRCP 26(b)(2)(C)(i)
  - *Erone Corp. v. Skouras Theatres Corp.*, 22 F.R.D. 494 (S.D.N.Y. 1958).

- Interrogatories breach Fifth Amendment Protections[11]
  - U.S. CONST. amend. V
  - *United States v. Kordel*, 397 US 1 (U.S. 1970).

- Interrogatories seek compilations of data, outside research, or information outside the knowledge of the party[12]
  - FRCP 26(b)(1)
  - *United States v. 216 Bottles*, 36 F.R.D. 695 (E.D.N.Y. 1965)

9. FED. R. CIV. P. 26(b)(1); Newell v. Phillips Petroleum Co., 144 F.2d 338 (10th Cir. 1944) (upholding a determination that unreasonably burdensome interrogatories should not be answered under the FRCP).

10. FED. R. CIV. P. 26(b)(2)(C)(i) ("[T]he court must limit the frequency or extent of discovery otherwise allowed by these rules . . . if . . . the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;"); Erone Corp. v. Skouras Theatres Corp., 22 F.R.D. 494, 501 (S.D.N.Y. 1958) ("[W]here defendants have already furnished the information to plaintiffs it would be unreasonable to require them to undertake to do it again.").

11. U.S. CONST. amend. V ("No person shall be . . . compelled in any criminal case to be a witness against himself"); United States v. Kordel, 397 US 1, 7 (U.S. 1970) (holding that interrogatory responses given by an individual, on behalf of a corporation, could be used against him in criminal proceedings, in part because "[w]ithout question he could have invoked his Fifth Amendment privilege against compulsory self-incrimination").

12. FED. R. CIV. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering . . . *whether the burden or expense of the proposed discovery outweighs its likely benefit*."); United States v. 216 Bottles, 36 F.R.D. 695, 702 (E.D.N.Y. 1965) ("Compilation of data and information by claimant from its own records is not improper, particularly where the interrogated party must make such compilation for its own preparation for trial. On the other hand, it is unreasonable to require the claimant to search for facts and to compile outside data and citations to literature not within its possession or known to it, as the case may be." (citing Baim & Blank, Inc. v. Philco Distribs., Inc., 25 F.R.D. 86 (E.D.N.Y.1957); Aktiebolaget Vargos v. Clark, 8 F.R.D. 635 (D.D.C. 1949))).

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A thorough review of federal case law and the Federal Rules of Civil Procedure fail to yield a concrete etiology for the argumentative and speculative objections. Notwithstanding, Moore's Federal Practice, a widely respected and often-cited source for federal litigation principles, provides that if properly supported by specific factual circumstances, an objection may be premised on the grounds that interrogatories are either "[a]rgumentative or speculative."[13] In support for this proposition, Moore's cites to *In re Erie Lackawanna Railway Co.*,[14] and *Rhodes v. Houston*,[15] for the general proposition that a "party need not answer interrogatory calling for speculation."[16] In *Rhodes*, the district court mentioned that argumentative interrogatories were outside the bounds of decent practice, and may be properly objected to, if the facts in the record so deem:

> The plaintiff's requests are also factually unobjective and argumentative in their tenor, and largely seek not facts but the acknowledgment of Mr. Rhodes' interpretation of what he contends to be the legal significance of facts, themselves in dispute. . . . And they abound in argumentative matter, an inescapable conclusion. That, virtually in their entirety, they call for irrelevant information is unquestionably true. . . . Each of the judges has examined in detail all of the several "Demands" and "Interrogatories". And they consider that, in the manner of their verbal presentation, with the exception of a very few merely formal, and preliminary, questions or requests, they are so argumentatively and controversially formulated as to require their individual quashing and suppression, and the absolution of the defendants, and each of them, from any and all obligation to answer them, or any of them. Though tardily, the law's objective, "*ut litium sit finis*," should be administered. Accordingly, the plaintiff's "Demands" and "Interrogatories" above identified are being quashed and suppressed severally and entirely in these three cases, and the defendants, and each of them, are being freed of any obligation to respond to them, or any of them, in these cases. . . . The ruling disclosed in this paragraph is expressly limited to [these] cases . . . . To the

13. 7 *Moore's Federal Practice* § 33.173 (Matthew Bender 3d Ed.).
14. 496 F.2d 1189, 1190 (6th Cir. 1974).
15. 258 F. Supp. 546 (D. Neb. 1966).
16. Moore's Federal Practice, *supra* note 13 at § 33.173 n.21 (citing *In re Erie Lackawanna Ry. Co.*, 496 F.2d at 1190).

> extent that Mr. Rhodes has tendered the same or like "Demands" and "Interrogatories" in any other case or cases pending in this court[,] ruling will be made concerning them in each such case or cases, with due regard to the context in which they are there tendered.[17]

The court in *Rhodes* does not cite to any rule or authority supporting this conclusion.

A detailed review of the Federal Rules of Civil Procedure in both its present and archived forms indicates that FRCP 26 may provide the basis for the objection. The operative language for the argumentative objection is found in FRCP 26(b). For our purposes, a review of the pre- and post-2015 amendments is all that is necessary, but it should be noted that previous versions of the rule exist. The most recent version of FRCP 26(b)(1) defines the scope of discovery:

> *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that *is relevant to any party's claim or defense and proportional to the needs of the case*, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. *Information within this scope of discovery need not be admissible in evidence to be discoverable.*[18]

The most immediate previous version provided for a slightly different standard:

> *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is *relevant to any party's claim or defense*—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order

17. *Rhodes*, 258 F. Supp. at 583–84.
18. FED. R. CIV. P. 26(b)(1) (eff. Dec. 1, 2015) (emphasis added).

> discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial *if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.* All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).[19]

The change in the language is subtle, but significant. Prior to 2015, the discovery sought needed to be both relevant and *reasonably calculated* to lead to the discovery of *admissible* evidence. After 2015, the discovery sought needs to be "relevant . . . and proportional to the needs of the case[.]" The operative limiting language now requires that evidence be "proportional to the needs of the case," rather than "reasonably calculated to lead to admissible evidence," because "reasonably calculated" was frequently being interpreted in an overly broad and problematic manner.[20] While these rules have been interpreted as providing differing standards, both rules allow objections to interrogatories that are either argumentative in nature or speculative because neither are "reasonably calculated to lead to the discovery of admissible evidence" nor "relevant to any party's claim or defense *and* proportional to the needs of the case[.]"[21]

Therefore, in both versions of FRCP 26(b), relevancy acts as a limit on what may be sought. Black's Law Dictionary defines the term *relevant* as "[l]ogically connected and tending to prove or disprove a matter in issue; having appreciable probative value — that is, rationally tending to persuade people of the probability or possibility of some alleged fact."[22] Argumentative interrogatories are—implicitly or explicitly—making an affirmative statement, not seeking information. Logically then, they are not aimed at discovering relevant or admissible evidence, as affirmative statements are not investigatory in nature. A similar analysis applies to interrogatories that are speculative: they are not "[l]ogically connected and tending to prove or disprove a *matter in issue*" nor persuasive as to some alleged fact.

19. FED. R. CIV. P. 26(b)(1) (eff. Dec. 1, 2006) (emphasis added). This rule, updated in 2006, remained in effect until the 2015 amendments.

20. FED. R. CIV. P. 26 advisory committee notes to the 2015 amendment ("The 'reasonably calculated' phrase has continued to create problems, however, and is removed by these amendments.").

21. *See* Cameron v. Sarraf, 2000 U.S. Dist. LEXIS 22930, at *16, 2000 WL 33677584, at *5 (E.D. Va. Mar. 17, 2000) ("None of plaintiff's allegations in his complaint or responses, or in his requested interrogatories, challenge these basic facts. Moreover, plaintiff's requested interrogatories are argumentative, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence.").

22. *Relevant*, BLACK'S LAW DICTIONARY (10th ed. 2014).

Ultimately, both the argumentative and speculative objections appear to be more narrow derivatives of the relevancy objection. Practically, however, these objections—lodged without further explanation—are likely to draw the ire of the judiciary. The recent amendments to the Federal Rules of Civil Procedure are largely aimed at cleaning-up the practice of pre-trial litigation.[23] Specifically, FRCP 34 requires objecting parties to, "*state with specificity the grounds for objecting to the request, including the reasons*."[24] For propounded questions that cannot possibly be aimed at the discovery of relevant or admissible evidence, a specifically worded relevance objection will always be available to combat truly argumentative or speculative questions that could harm the answering party. Because the argumentative and speculative objections appear to be more narrow explanations of why something lacks relevancy, best practices would require that objecting parties object to argumentative and speculative questions with specificity in order to comply with FRCP 34.

We suggest that objections to argumentative interrogatories should point out that: (1.) the interrogatories are irrelevant or seek irrelevant information, under FRCP 26; because (2.) the question makes an affirmative statement instead of seeking information relevant and proportional to the case; and therefore (3.) the responding party has not provided a substantive response, permitted inspection, or divulged responsive information as the propounded integratory has not identified any relevant information to be had. For speculative interrogatories, we similarly suggest the objection should state that the propounded question is: (1.) irrelevant, under FRCP 26; because (2.) it is not logically connected to or tending to prove or disprove a matter in issue, because, on its face, speculation on a matter in issue does nothing to prove or disprove it; and therefore (3.) the responding party has not provided a substantive response, permitted inspection, or divulged responsive information as the propounded interrogatory has not identified any relevant information to be had. For both, in the spirit of the amended rules, we may also suggest adding a courtesy line to show the court and

23. FED. R. CIV. P. 26 advisory committee notes to the 2015 amendment. ("The present amendment again reflects the need for continuing and close judicial involvement in the cases that do not yield readily to the ideal of effective party management. It is expected that discovery will be effectively managed by the parties in many cases. But there will be important occasions for judicial management, both when the parties are legitimately unable to resolve important differences and when the parties fall short of effective, cooperative management on their own.").

24. FED. R. CIV. P. 34(b)(2)(B) (emphasis added).

your adversary that you are not being obstreperous, indicating that should counsel amend the interrogatory to specifically identify the relevant evidence sought in a non-argumentative or speculative manner, your client would be in a better position to enter more fully responsive answers.

In conclusion, the argumentative and speculative objections—derivatives of the more general relevance objection—should be set forth with specificity, identifying the problematic language and explaining why compliance with the request is not possible.