

“You Want Me To Sign What?!”

What You Need To Know Before Asking Anyone To Sign Answers To Interrogatories

THREE WEEKS AGO, YOUR OPPONENT SERVED written interrogatories on your corporation. Since then, you've been hard at work, overseeing the company's investigation and coordinating with outside counsel on preparation of the answers and objections. Now comes the unpleasant part: alerting the individual that you've selected to sign those answers under oath and waiting for the inevitable

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response: “You want me to sign what?” Before you walk through his door, draft in hand, be sure that he can and should be the person signing on behalf of your client – the corporation.

Rule 33 of the Federal Rules of Civil Procedure permits a party to serve written interrogatories on any other party. Fed. R. Civ. P. 33(a)(1). Where the party to whom the interrogatories are directed is a public or private corporation, interrogatories must be answered under oath “by any officer or agent, who must furnish the information available to the party.” Fed. R. Civ. P. 33(b)(1)(B) and 33(b)(3). That corporate agent need not have personal knowledge of the information sought in order to answer on behalf of the corporation; he may consult with and gather information from other individuals in the corporation. *International Ass’n of Machinists, Dist. 169 v. Amana Refrig., Inc.*, 90 F.R.D. 1, 2 (E.D. Tenn. 1978). By signing under oath, the corporate agent attests to the truth of the answers on behalf of the corporation. *Villareal v. El Chile, Inc.*, 266 F.R.D. 207, 211 (N.D. Ill. 2010). The answers then serve as admissions by the corporation and may be used as evidence against that party at trial. See *Melius v. Nat’l Indian Gaming Comm’n*, No. CIV A 98-2210, 2000 WL 1174994, at *1 (D.D.C. July 21, 2000).

Signing answers to interrogatories under oath on behalf of a corporation is a weighty obligation, and one that is often not fully understood by non-lawyer business personnel until they are confronted by those interrogatory answers at deposition. Below are some tips to consider in deciding which employee should sign and how best to prepare that employee to do so.

Under Every (Reasonable) Rock. . .

As soon as your opponent serves written interrogatories, talk with outside counsel and agree on a clear plan regarding the appropriate scope of and timetable for the corporation's investigation. The corporation does not have to turn over every rock in search of information, but must conduct a reasonable investigation. That requires reasonable inquiry into the factual basis for discovery responses, including information reasonably available to the corporation from employees, agents and others subject to its control. See *Lewton v. Divingnzzo*, No. 8:09CV2, 2010 WL 1630719, at *5 (D. Neb. April 21, 2010). Be ready to educate your signer regarding the corporation's investigation underlying the answers. Your signer is entitled to the certainty that comes from knowing the process the corporation used and the sources it consulted to arrive at the answers.

We Know We Don't Know

Be certain, too, about what the corporation does *not* know. A party must “provide true, explicit, responsive, complete, and candid answers to interrogatories,” and some courts have required that a party, “if unable to supply the requested information, . . . may not simply refuse to answer, but must state under oath that he is unable to provide the information and set forth the efforts he used to obtain the information.” See, e.g., *Hansel v. Shell Oil Corp.*, 169 F.R.D. 303, 305 (E.D. Pa. 1996) (internal citations and quotation marks omitted). Your signer will need clarity about both what the corporation found and what it could not find.

“I'm Busy Doing Business”

Your signer is busy with the business of the corporation, and your interrogatory answers may not be high on his priority list. Nonetheless, the signer must set aside adequate time to review the draft interrogatory answers thoroughly and to discuss the corporation's investigation with you before the signer verifies the accuracy and completeness of those answers under oath. Identify the appropriate signer early in the drafting process, and reserve a spot on his calendar.

Absent a stipulation or order of court, a responding party must serve answers and objections to interrogatories within 30 days after service. Fed. R. Civ. P. 33(b) (2). As a practical matter, counsel often serve unsigned answers to interrogatories with a promise of a forthcoming verification, but courts have admonished counsel and parties for doing so. See, e.g., *Saria v. Massachusetts Mut. Life Ins. Co.*, 228 F.R.D. 536, 539-40 (S.D. W.Va. 2005) (recognizing Rule 33's verification and signature requirement is increasingly ignored, in disregard of rules). Fight the temptation to have your signer execute a verification before you have a final version of the interrogatory responses – such verification is improper. See *McColm v. Foremost Ins. Co.*, No. C 09-04132 SI, 2010 WL 5022924, at *5 (N.D. Cal. Dec. 3, 2010) (finding that verification was improper where it was dated six days before date of answers, because it is impossible to review something before it existed). By reserving adequate lead time for review, the corporation will avoid unnecessary and costly motion practice, and your signer will give stronger testimony at deposition.

Courage Under Fire

Discuss with your outside counsel whether the potential signer is well-suited to explain and support the company's investigation and interrogatory answers at deposition. Opposing counsel may press the signer to describe the scope of the investigation undertaken by the corporation prior to answering, and will be on the lookout for gaps in the investigation and any hesitancy by the signer regarding the accuracy of the answers. See, e.g., *State Farm Mut. Auto. Ins. Co. v. New Horizont, Inc.*, 250 F.R.D. 203, 209 (E.D. Pa. 2008) (excerpting deposition questions posed to a verifying corporate agent). Your signer "must have a basis for signing the responses and for thereby stating on behalf of the corporation that the responses are accurate . . . and may accomplish this through whatever internal process the corporation has chosen." *Shepherd v. American Broadcasting Companies, Inc.*, 62 F.3d 1469, 1482 (D.C. Cir. 1995). You know the potential signer best. Talk with outside counsel about whether he will hold up under questioning and can confidently confirm that he verified the accuracy and completeness of the answers before signing. Consider too whether your potential signer will be a fact witness, and, if not, whether your case strategy is best served by adding an additional deponent to the discovery process.

One Final Warning

Don't wait for the deposition preparation session to find out that your signer's reluctance to answer on behalf of the corporation was an indication of bigger problems. Before approaching your proposed signer, consider whether this litigation raises any potential for self-incrimination by that individual. See *General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973). While corporations have no Fifth Amendment privilege to refuse to answer interrogatories, *United States v. Kordel*, 397 U.S. 1, 7 (1970), "the act of verifying interrogatories on behalf of the companies is testimonial in nature and raises Fifth Amendment concerns." *Central States, Southeast and Southwest Areas Pension Fund v. Carstensen Freight Lines, Inc.*, No. 96 C 6253, 1998 WL 413490, at *4 (N.D. Ill. July 17, 1998). Therefore, a corporation should "select an agent who, without fear of self-incrimination, [can] provide the information requested." *United States v. 3963 Bottles, More or Less, Enerjol Double Strength*, 265 F.2d 332, 336 (7th Cir. 1959). If you serve as counsel for a corporation that has a single employee, shareholder and officer, or so few agents that all face the potential for self-incrimination, refer to *Kordel* and *General Dynamics* for further guidance on the availability of a protective order postponing civil discovery in the event of any criminal investigation or proceedings.

Your Best Ally

Your best ally in this process is an experienced outside counsel who understands your business and your business people, and is well-versed in marrying start-to-finish strategic case development with pre-trial and trial procedure and practice. You can and should expect your outside counsel to work with you in a timely manner to plan the company's investigation, to prepare meaningful interrogatory answers and to obtain a proper and supportable signed verification of those answers.

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