


Civil Procedure Code Using interrogatories effectively to aid cross examination. Ajay J Nandalike Advocate Bangalore

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In the aftermath of COVID-19, courts and arbitrations are beginning to adopt virtual hearings as a means of justice dispensation. There is some debate about conducting cross-examination online. A view that is possible is that cross-examination can be conducted online, however, someone from the other side is physically present in the same room as the witness to avoid tutoring. Another view is to have a physical hearing in respect of cross-examination but restrict the scope of cross-examination by encouraging the use of interrogatories. In this background, this article explores how one can use interrogatories effectively to aid cross-examination. The benefits of an effective use of interrogatories include restricting the scope of cross-examination, creating more effective cross-examination, reducing superfluous questions etc.

Instances where an Interrogatories are beneficial

1.Narrowing the scope of controversy: The opponent may not refer to certain facts in the proof affidavit or be silent in respect of some information. It does not mean that the opponent is denying the information. In this situation, the scope of the dispute can be reduced by asking the opponent to admit certain facts by way of interrogatories. These admissions may not harm the

case of the opponent but may aid another party's narrative or may be required for the sake of completeness. This will reduce the necessity of cross-examination on that issue.

2.Reducing the reliance of documentary evidence in relation to certain aspects: The witness may be relying on some voluminous documents or it may contain detailed technical specifications. In order to avoid the court / Arbitral Tribunal to rely on complete document, one can ask interrogatories seeking the witness to state the relevant procedure or provide technical details or as to which page number of the Exhibit where the details are available. This will ensure that the cross-examination will only be restricted to those page numbers of the Exhibits. It may also so happen that a document produced by the witness may not at all be relevant to the matter. In such a situation, one could seek reasons for reliance on a particular document. This will restrict the scope of cross- examination in relation to that document.

3.Excluding aspects which the witness does not have knowledge of:

If the Legal Manager of the Company files the proof affidavit on behalf of the Company, it is possible that he is deposing entirely on the basis of records. However, there may be several statements in the affidavit which may not be based on records. These need to be carefully gleaned out and the witness can be asked to identify the source of the statement made in the affidavit. If the witness refers to a document, then if the document is not produced or if the document does not depict the said fact, the fact is not proved. If the witness refers to some information obtained from other company personnel and names such a person, then without that person stepping into the witness box, the fact is not proved. The reference to that fact in the proof affidavit of the witness would be hearsay evidence and cannot be accepted. There would be no need to cross-examine the witness on those facts in the affidavit at all.

4.Identifying the source of the information: The witness may be making certain assertions without stating the supporting facts or producing the supporting documents on the basis of which such statements are made. If questions are asked in cross-examination for the first time regarding the

source, the answers may surprise the cross-examiner and one may require more time to prepare to cross-examine further in response to such answers. It may also result in a situation where one is not able to fully cross-examine on that issue because of an unexpected answer. Hence, interrogatories will provide an opportunity to prepare for such surprises.

5. Establishing timelines and dates: It is also possible to utilize the interrogatories to establish a timeline and to organize the information in the affidavit if it has been put in a haphazard manner. If one is required to connect facts stated in the opponent's affidavit in a manner which is suitable for one's case, then it is possible to do so. If the affidavit omits a crucial link, it is possible to bring out that information in the timeline by seeking the opponent to confirm that particular fact. Similarly, one can ask the witness to confirm certain dates and events. If the witness intends to deny the timeline, it will help one focus the cross-examination on that specific aspect in the timeline which is denied. This saves considerable time during cross-examination.

6. Getting more information / better particulars relating to technical or procedural aspects: Answer to Interrogatories may be more complete than cross examination. Unlike depositions, interrogatories may inquire not only into the responding party's present recollection, but also into the collective knowledge available to him or her, including knowledge of his or her agents and attorneys. One may want certain undocumented details or technicalities about some procedure on record. This information requires reference to certain documents which may not be on record or may be just an undocumented business practice of the company, then it is a good idea to ask it in interrogatories.

Witness cannot say that he does not have personal knowledge or that he needs to examine records. For instance, one can ask a question regarding the procedure followed internally for clearing an invoice, which departments are involved, who needs to sign off etc. This information will provide a foundation for cross-examination on whether an invoice was improperly cleared, whether there was waiver etc.

7. Evasive Witness: One of the problems that is faced during cross-examination is the witness may not want to

reveal certain information despite being aware of the same. So, the witness may say that he does not have personal knowledge, he will need to refer to document, he did not understand the question etc., or he may not deliver a complete answer. However, in an interrogatory, he cannot say so. He will have the benefit of looking at all relevant documents, seeking information from other persons in the company, seeking advice from counsel, technical persons etc. Although it is possible to give an evasive answer, if care is taken to identify what relevant facts one wants the witness to state, the witness will have to give a yes or no answer.

8. Pinning down the

opponent's case: It is possible that an opponent will have multiple defences which are taken without prejudice to one another or case may be based on multitude of facts. When the opponent is being cross-examined, it would be possible to give contradictory answers or misconstrue the questions or provide caveats in some manner. In construction arbitrations, interpretations of actions of parties revolve around what constitutes general or best engineering / construction practice. If one is able to pin the opponent's case on any particular issue by eliciting in an interrogatory as to whether they would accept xyz as the best engineering practice and if not, the reasons for the same, one would have a foundation to cross-examination on that issue and elicit appropriate responses. If you are able to rebut the case of the other side with some new information / documents, then interrogatories are an excellent place to pin down the witness. In cross, the witness may want to clarify his statement or say that he misunderstood the question. However, a tightly worded interrogatory requiring an absolute answer will ensure that the opponent is pinned to that position. While cross-examining, one can rebut the case by producing the information / document and create contradictions.

9. Denied document – Before

the trial begins, parties exchange statement of admissions and denials of the documents produced by the other party. Typically, one will deny the receipt of the document or deny the contents of the document. If the receipt of the document is denied, the attempt is to either to verify if the

document is referred in any other document which is admitted by the opponent or proof of receipt is to be furnished. An interrogatory could focus on referencing some event or action that would have been undertaken pursuant to the denied letter so that portions of the letter can be admitted. If the content of the document is denied, it would be beneficial to identify which portions of the letter are admitted and which portions are denied so that the cross-examination is restricted only to that portion. denial of basis of such denial. If you have received the document, did you reply back to the letter and details of the letter so replied back. You could ask under what circumstances did you decide not to reply back to the letter. Document identification interrogatory is useful if you intend to tie a document to a specific event.

10. Getting information not

obtainable from an individual deponent - When conducting discovery against corporations, e.g., in a products liability case, the plaintiff may need to discover information about every other person injured by the same product. Probably no individual employee of the corporation would know the answer, because it would require a search through records. An interrogatory would require the corporation to search its records and conduct a reasonable investigation to gather the information. It's often useful to have a corporate deponent designate the person who's most qualified to testify on specified matters.

11. Breaking down the complex

claim – In construction arbitrations / claims, there may be complex claims which are bunched together. For instance, idle charges may be bunched together for the entire contract period. It would make sense to seek clarity on the break-up of the claims, basis for the claims, what documents are being relied on for what claim. Additionally, it would be possible to ask questions on mitigation steps. The answers given by a witness can be tested in cross-examination under a more thorough questioning. This will enhance the value of the cross-examination.

12. Create contradictions –

One must bear in mind that the interrogatories are drafted with the aid of the opponent's counsel. Hence it is possible that the counsel's thoughts and legal

correctness may gloss over the facts or assume facts which may not be true. If the same question is asked in another context, the answer may be different in the course of cross-examination. This is extremely risky as the witness may stick to the counsel's stand. It is also advisable not to ask about incidents which are based on personal knowledge as the counsel may add relevant details, make it complete. Witnesses have imperfect recollections, details of conversations may actually be different, but a counsel can bring a sense of completeness by covering all loopholes.

Effective use

of interrogatories will not only aid the cross-examination, but also help the Arbitral Tribunal / Civil Courts to focus on the relevant facts and reign in the cross-examination. Interrogatories form part of the evidence of the parties and would have a greater weightage than cross-examination. If strict time periods are imposed on the cross-examination, then meandering around unnecessary questions can be avoided, a lot of the necessary information can be gleaned out in interrogatories. Typically, there is a need to establish certain background facts during cross and this can be achieved in cross-examination. However, it is not being used effectively due to lack of awareness of its benefits. One hopes that this article will aid practitioners to use interrogatories effectively.

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