

THE END OF INTERROGATORIES: WHY TWOMBLY AND IQBAL SHOULD FINALLY STOP RULE 33 ABUSE

by
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Interrogatories are good for only one thing: abuse. Interrogatories are formal, written questions that parties are supposed to use to obtain discoverable information under Rule 33 of the Federal Rules of Civil Procedure. But they rarely provide any useful information. Other discovery devices and motion practice are more effective at narrowing issues for trial and uncovering the true facts of a case. Interrogatories are inherently burdensome and frequently unreasonable, often demanding that a party disclose key aspects of its trial strategy, which a party itself may not know until the eve of trial. Likewise, interrogatory responses are evasive and rife with incoherent legalese. Nonetheless, many consider interrogatories a necessary tool to discover the detail underlying a plaintiff's complaint under the federal "notice pleading" system. The Supreme Court's recent decisions in Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal, however, heightened the federal pleading standard, raising the bar for plaintiffs to survive a pre-discovery motion to dismiss. Now, plaintiffs must include enough factual detail in their complaints to render their claims "plausible." There is no longer any need for a discovery tool to obtain that same information. Thus, interrogatories function solely as a tactical weapon to force an opposing party to incur costs, delay litigation, and avoid a just disposition on the merits.

In this Article, I propose a series of reforms that will eliminate Rule 33 from the Federal Rules of Civil Procedure, putting an end to the abusive tactics that come with it. To the extent that other procedures have not completely overtaken the legitimate functions of interrogatory practice, they can be expanded to do so. My proposal will not only help to curb

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discovery abuse, but also alleviate the increasing burdens on plaintiffs, who are already required to prepare numerous complex submissions before getting to trial.

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I. INTRODUCTION

Inefficient discovery drives up litigation costs and causes delays, denying justice to average citizens who cannot afford to engage in protracted and expensive litigation.¹ Interrogatories² have traditionally sat at the top of the list of the most “abused” discovery devices.³ They are expensive and produce little or no useful information.⁴ Yet, caught in the discovery “war of attrition,”⁵ practitioners continue to use them because they know the other side will do so as well.⁶

Federal Rule of Civil Procedure 33 currently permits any party to serve any other party with interrogatories concerning any discoverable matter.⁷ The responding party must then provide a written response to each question under oath within a given time period.⁸ Commentators have generally separated interrogatories into two categories: “identification interrogatories” and “contention interrogatories.”⁹ Identification interrogatories generally require the responding party to provide simple factual information, such as the identity of potential witnesses or the location of relevant documents.¹⁰ Contention interrogatories—the more controversial type—seek information about a party’s allegations or contentions.¹¹ Most commonly, they require parties to provide the facts and theories underlying the allegations in their pleadings.¹²

¹ See *infra* notes 130–31 and accompanying text.

² Interrogatories are sets of formal, written questions that a party may serve on other parties. See, e.g., Claudia Wilken & Robert M. Bloom, *Interrogatories to Parties*, in 7 MOORE’S FEDERAL PRACTICE § 33.02[1] (3d ed. 2010).

³ See SECTION OF LITIGATION, AMERICAN BAR ASSOCIATION, SECOND REPORT OF THE SPECIAL COMMITTEE FOR THE STUDY OF DISCOVERY ABUSE, 92 F.R.D. 137, 146, 175 (1980) [hereinafter “SECOND REPORT”] (“Many of the abusive practices we have considered are associated with the interrogatory process. . . . No single rule was perceived by the Bar at large . . . as engendering more discovery abuse than Rule 33 on interrogatories.”); Amy Luria & John E. Clabby, *An Expense Out of Control: Rule 33 Interrogatories After the Advent of Initial Disclosures and Two Proposals for Change*, 9 CHAP. L. REV. 29, 30 (2005) (“Interrogatories are the most abused discovery vehicle, and what is more problematic is that their cost generates little value.”); Weyman I. Lundquist, *In Search of Discovery Reform*, 66 A.B.A. J. 1071, 1072 (1980) (“Not surprisingly, interrogatories lead the list as the discovery mechanism most frequently abused.”).

⁴ See *infra* notes 483, 506 and accompanying text.

⁵ Frank H. Easterbrook, *Discovery As Abuse*, 69 B.U. L. REV. 635, 635 (1989).

⁶ Luria & Clabby, *supra* note 3, at 30 (“The norms of practice encourage a lawyer to file interrogatories, even though the answers to those interrogatories would not help that lawyer’s client.”).

⁷ FED. R. CIV. P. 33(a).

⁸ FED. R. CIV. P. 33(b)(2)–(3).

⁹ See *infra* Part III.B.

¹⁰ See *infra* notes 325–27 and accompanying text.

¹¹ See *infra* note 332 and accompanying text.

¹² See *infra* notes 332–35 and accompanying text.

The legitimate purposes of interrogatories have dwindled as pretrial procedures have evolved over the past 70 years. As many commentators have observed, most of the functions of identification interrogatories have been taken over by Rule 26's mandatory disclosure provisions.¹³ The primary difference is that now, instead of waiting for the other side to, for example, request a list of potential witnesses, a party must automatically provide that list at the outset of the lawsuit.¹⁴ To the extent that Rule 26(a) has not totally usurped the role of identification interrogatories, it—along with Rule 34—can be modestly broadened to do so. Identification interrogatories, therefore, do not provide any reasons to preserve Rule 33.

The flaws with contention interrogatories have also become increasingly evident as pretrial procedures have evolved. They are farcically addressed to the parties in a question and answer format when, realistically, they must be answered by counsel in an additional pretrial round of “shadow briefing” disproportionately burdening plaintiffs.¹⁵ Because the responses are written by counsel, they typically consist of self-serving diatribes that rarely provide any useful information.¹⁶ They are poorly suited for aiding the summary judgment process, which has evolved considerably since the 1980s.¹⁷ They are not an ideal means of obtaining admissions and narrowing the issues for trial because they are not binding.¹⁸ They are a bad alternative to depositions for eliciting factual narratives because of their rigidity.¹⁹ They are also not a legitimate means of seeking an adversary's work product.²⁰

However, until recently, contention interrogatories were arguably still an essential part of American civil procedure.²¹ Courts and commentators alike argued that since the pleading standard traditionally has been low, a defendant needed the ability to serve contention interrogatories in order to unearth the bases of a plaintiff's claim, which may have only been roughly sketched out in a “notice pleading”-era complaint.²²

The Supreme Court's recent decisions in *Bell Atlantic Corp. v. Twombly*²³ and *Ashcroft v. Iqbal*,²⁴ however, appear to have put an end to

¹³ See *infra* note 348.

¹⁴ See FED. R. CIV. P. 26(a)(1)(A)(i).

¹⁵ See *infra* notes 545, 548–50, 562–66 and accompanying text.

¹⁶ See *infra* notes 513–15 and accompanying text.

¹⁷ See *infra* notes 553–55 and accompanying text.

¹⁸ See *infra* notes 556–58 and accompanying text.

¹⁹ See *infra* notes 559–61 and accompanying text.

²⁰ See *infra* notes 567–73 and accompanying text.

²¹ See, e.g., Iain D. Johnston & Robert G. Johnston, *Contention Interrogatories in Federal Court*, 148 F.R.D. 441, 449–50 (1993).

²² See *infra* note 337.

²³ 550 U.S. 544 (2007).

²⁴ 129 S. Ct. 1937 (2009).

notice pleading. These landmark decisions have, in essence, heightened the general pleading standard under Rule 8 in order to stop frivolous cases before they reach the point that a party with a meritless claim can potentially extract a settlement from an adversary based on the threat of proceeding with an expensive discovery process.²⁵ As a result, they have effectively usurped the last remaining legitimate purpose of interrogatories. Now that the notice pleading regime no longer exists, and a plaintiff must state factual matters in the complaint just to survive the pleading stage,²⁶ this final rationale for contention interrogatories has evaporated with it. Contention interrogatories are now good for only one thing: abuse.²⁷ Accordingly, the Advisory Committee on Civil Rules should eliminate Rule 33. Indeed, even if the Advisory Committee rejects the reforms to Rules 26 and 34 that I propose here in favor of preserving identification interrogatories, it should still eliminate contention interrogatories.

I am not the first to advocate interrogatory reform. Professor Fleming James raised concerns about contention interrogatories in the 1950s which were subsequently rejected by the Advisory Committee.²⁸ More recently, Amy Luria and John E. Clabby suggested eliminating Rule 33 interrogatories.²⁹ However, Luria and Clabby specifically advocated *preserving* contention interrogatories.³⁰ Other commentators have been less ambitious, merely discussing revisions to the numerical limits on the amount of interrogatories a party may serve in a litigation.³¹ Significantly, all of this commentary predated (or failed to consider) the impact of the *Twombly* and *Iqbal* decisions.

This Article is divided into six parts. Part II sets out the context of interrogatories in modern litigation, describing the evolution of pretrial civil practice, focusing on the pleading stage, discovery, and summary judgment. Part III discusses interrogatories specifically, including the evolution of Rule 33, the two types of interrogatories, the functions they serve in modern litigation, compares them to other discovery devices, and describes criticism and reform proposals to date. Part IV then analyzes interrogatories in modern litigation, assessing their drawbacks and benefits. Part V describes my reform proposal to eliminate interrogatories and expand several other discovery rules. Part VI concludes the Article.

²⁵ See *infra* notes 233–36, 272–73 and accompanying text.

²⁶ See *infra* Part II.G.

²⁷ See *infra* note 580.

²⁸ See *infra* notes 315–16, 470–79 and accompanying text.

²⁹ See Luria & Clabby, *supra* note 3, at 43–46.

³⁰ *Id.* at 45–46.

³¹ See David S. Yoo, Comment, *Rule 33(a)'s Interrogatory Limitation: By Party or by Side?*, 75 U. CHI. L. REV. 911, 935 (2008).

II. THE EVOLUTION OF PRETRIAL CIVIL PRACTICE

Rule 33 does not exist in a vacuum. It is one part of the Federal Rules of Civil Procedure's intricate pretrial framework. Individual discovery devices, like interrogatories, are best understood within the larger context of pretrial civil practice.³² This Part traces the evolution of modern pretrial civil practice, from the development of pretrial procedure in the period prior to the adoption of the Federal Rules of Civil Procedure up through the Supreme Court's recent decisions in *Twombly* and *Iqbal*. It focuses on the relationship between the three key aspects of pretrial practice: the pleading stage, discovery, and summary judgment.

A. The Pre-1938 Period

At common law, pretrial practice focused on the pleadings.³³ Pleadings had to fit within one of several recognized causes of action.³⁴ The parties would often progress through multiple rounds of pleading in a "hyper-technical" process that promoted form over substance.³⁵ Meritorious claims were often dismissed due to the failure to comply with the technicalities.³⁶ Pretrial practice was thus dominated by a "battle of wits" between counsel rather than an assessment of the lawsuit's merit.³⁷

In response to these problems, some states sought to reform their pleading rules. The New York Code of 1848, developed by David Dudley Field (and sometimes known as the "Field Code"³⁸), was particularly influential.³⁹ Under the Field Code, and similar codes adopted in other states, the plaintiffs had to plead facts establishing the cause of action.⁴⁰ The Federal Equity Rules adopted a similar standard in 1912, requiring plaintiffs to plead the "ultimate facts" that they relied upon, although not the underlying "evidence."⁴¹ These reforms thus sought to eliminate the

³² Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 745 (1998).

³³ Edward Cavanagh, *Pleading Rules in Antitrust Cases: A Return to Fact Pleading?*, 21 REV. LITIG. 1, 3 (2002) (citations omitted).

³⁴ *Id.* at 3–4.

³⁵ *Id.* at 3.

³⁶ *See id.* at 4.

³⁷ *Hickman v. Taylor*, 329 U.S. 495, 516 (1947) (Jackson, J., concurring).

³⁸ *See, e.g.*, 5C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1374 (3d ed. 2004).

³⁹ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 574 (2007) (Stevens, J., dissenting); Cavanagh, *supra* note 33, at 4–5.

⁴⁰ Cavanagh, *supra* note 33, at 4–5 (citations omitted); Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15, 23 (2010) (citations omitted).

⁴¹ *Twombly*, 550 U.S. at 574 (Stevens, J., dissenting) (quoting FED. EQUITY R. 25). Prior to passage of the Rules Enabling Act in 1934, federal procedure was supposed

technical pitfalls of common law pleading, but still had their own problems.⁴² Indeed, some lawyers and judges may have “sabotaged” the code-pleading reforms by continuing certain aspects of common law pleading practice.⁴³ During this period, Roscoe Pound, the future dean of Harvard Law School, delivered an influential address identifying pleading practice as a key source of public disillusionment with the justice system.⁴⁴

Given the emphasis on pleading in this era, other pretrial procedures were less significant. Discovery, while not unheard of, was not common.⁴⁵ Multiple rounds of pleading and corrective motions were the standard means of eliciting facts and narrowing the issues for trial.⁴⁶ Although some state codes did expand discovery,⁴⁷ discovery was “very limited”⁴⁸ and “cumbersome” where available.⁴⁹ The net result was that “little information was exchanged between the opposing parties outside of the pleadings.”⁵⁰

Summary judgment also existed, but was not widespread.⁵¹ The procedure had developed in England in the mid-1800s as a means for creditors to obtain a quick judgment against delinquent debtors.⁵² Some American states adopted similar forms of the procedure; however, many state courts regarded it as a “drastic remedy to be used only sparingly.”⁵³

to conform to state procedural rules except in equity and admiralty matters. See Subrin, *supra* note 32, at 693.

⁴² Paul W. Greene, *Reassessment of the Lawyers' Discovery Responsibilities: The Early Disclosure Provisions of the Proposed Amendments to Rule 26, Federal Rules of Civil Procedure*, 53 ALA. LAW. 278, 279 (1992).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Hickman v. Taylor*, 329 U.S. 495, 515 (1947) (Jackson, J., concurring) (noting that discovery had forerunners in English Chancery practice, and perhaps even European law).

⁴⁶ WRIGHT & MILLER, *supra* note 38, § 1375; Subrin, *supra* note 32, at 696 (noting that Field “believed that precise and verified pleadings should be used to eliminate legal and factual issues and to focus the controversy”).

⁴⁷ See, e.g., *Hickman*, 329 U.S. at 515 (Jackson, J., concurring).

⁴⁸ FRANCIS H. HARE, JR., JAMES L. GILBERT & STUART A. OLLANIK, *FULL DISCLOSURE: COMBATING STONEWALLING AND OTHER DISCOVERY ABUSES* 56 (2d prtg. 1995).

⁴⁹ *Hickman*, 329 U.S. at 500–01; see also Yoo, *supra* note 31, at 922 (noting that discovery was “irregular” before the promulgation of the Federal Rules, as, in smaller communities, jurors frequently “had direct knowledge of the parties and facts” (citing Subrin, *supra* note 32, at 695)). Indeed, the Field Code did not contain any provisions authorizing the use of interrogatories. See Subrin, *supra* note 32, at 696.

⁵⁰ Angela R. Lang, Note, *Mandatory Disclosure Can Improve the Discovery System*, 70 IND. L.J. 657, 661 (1995).

⁵¹ Jeffrey W. Stempel, *Summary Judgment*, in 11 MOORE'S FEDERAL PRACTICE § 56App.100[2], at 56App.-17 (3d ed. 2010).

⁵² *Id.* at 56App.-21 to -22.

⁵³ *Id.* at 56App.-22 (citation omitted).

B. The Federal Rules of Civil Procedure

The Federal Rules of Civil Procedure became effective in 1938, four years after Congress passed the Rules Enabling Act.⁵⁴ The goal of the Rules was to achieve just dispositions of cases on the merits rather than resorting to a lawyers' "battle of wits."⁵⁵ The drafters of the Rules thus sought to shift the focus of pretrial litigation away from the pleadings, expand discovery as the primary means of developing evidence for trial, and broaden the use of the summary judgment procedure to dispose of unmeritorious claims before trial.⁵⁶ Discovery and pretrial motion practice would now perform functions previously handled by the pleadings.⁵⁷ Thus, "[t]he Federal Rules ushered in a new era of open access for plaintiffs by casting aside complicated fact-pleading regimes in favor of simplified pleading and broad discovery."⁵⁸

The language of the pleading rules is largely unchanged from 1938.⁵⁹ Under Rule 8, all a plaintiff has to submit is "a short and plain statement of the claim showing that the pleader is entitled to relief."⁶⁰ The only exception is for claims of "fraud or mistake" which must be alleged "with particularity."⁶¹ Notably, in a stark break with prior practice which promoted form over substance, Rule 8 also explicitly provides that the pleadings should "be so construed as to do substantial justice."⁶² The main function of the pleadings thus became providing the defendant with notice of the claims.⁶³ The defendant can still attack the legal basis for the claim at the outset of the lawsuit by moving to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6).⁶⁴ However, factual attacks on the complaint have to be decided after discovery.⁶⁵ As a vestige from the prior pleading practice, however, the Rules also originally provided that a party could seek a bill of particulars

⁵⁴ See, e.g., Greene, *supra* note 42, at 279.

⁵⁵ HARE, GILBERT & OLLANIK, *supra* note 48, at 3; Cavanagh, *supra* note 33, at 3 ("In the view of the drafters, the Federal Rules should assure that litigants with meritorious claims have their day in court." (citations omitted)). Cf. *Hickman v. Taylor*, 329 U.S. 495, 516 (1947) (Jackson, J., concurring).

⁵⁶ Wilken & Bloom, *supra* note 2, § 33.03.

⁵⁷ HARE, GILBERT & OLLANIK, *supra* note 48, at 3–4.

⁵⁸ A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 2 (2009) (citations omitted). See also Cavanagh, *supra* note 33, at 5 (suggesting that the Rules were an obvious advance over earlier procedures).

⁵⁹ See FED. R. CIV. P. 8, 9 & 12 advisory committee's notes.

⁶⁰ FED. R. CIV. P. 8.

⁶¹ FED. R. CIV. P. 9(b).

⁶² FED. R. CIV. P. 8.

⁶³ HARE, GILBERT & OLLANIK, *supra* note 48, at 4; Cavanagh, *supra* note 33, at 5.

⁶⁴ FED. R. CIV. P. 12(b)(6).

⁶⁵ Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL'Y 61, 62–63 (2007).

or a more definite statement in order to amplify a complaint so as to allow the party to respond to the pleading “or to prepare for trial.”⁶⁶

While the importance of the pleadings was diminished, discovery was vastly expanded. Indeed, some have suggested that the discovery rules are the “most important provisions” of the Rules.⁶⁷ Thus, parties were afforded a number of discovery devices, including depositions, document requests, interrogatories, requests for admission, and physical and mental examinations.⁶⁸ The Rules broadly permitted discovery on “any matter” that was “relevant to the subject matter involved in the pending action.”⁶⁹

Summary judgment was also codified in Rule 56.⁷⁰ The rule provided that any party could move for summary judgment on a claim or part of a claim and that the motion should be granted if the pleadings and discovery showed that “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”⁷¹ Unlike its predecessors in English law and state law, Rule 56 was not restricted to any type of action and was available to both plaintiffs and defendants.⁷² The measure was, therefore, somewhat controversial.⁷³

C. *Early Practice Under the Rules*

Early practice under the Rules was characterized by the clarification and expansion of the existing procedures. This period saw the scope of discovery expand while pleadings were relegated to a “notice” function, as envisioned by the drafters of the Rules. Notably, however, summary judgment remained under-utilized.

⁶⁶ WRIGHT & MILLER, *supra* note 38, § 1374.

⁶⁷ HARE, GILBERT & OLLANIK, *supra* note 48, at 4; *see also* Lundquist, *supra* note 3, at 1071 (“When the new Federal Rules of Civil Procedure became effective in 1938, pretrial discovery was heralded as a major step toward the ‘just, speedy, and inexpensive’ disposition of civil cases.”).

⁶⁸ *See* FED. R. CIV. P. 26, 30, 31 & 33–36 advisory committee’s notes. Depositions were originally governed by Rule 26, but those provisions were later moved to Rules 30 through 32. *See* FED. R. CIV. P. 26 advisory committee’s (discussing the revisions in the 1970 Amendment).

⁶⁹ Patrick E. Higginbotham, *Duty to Disclose: General Provisions Governing Discovery*, in 6 JAMES W. MOORE, MOORE’S FEDERAL PRACTICE § 26App.01[1], at 26App.-1 (3d ed. 2010); *see also* Wilken & Bloom, *supra* note 2, § 33App.02[1], at 33App.-1, -2 (noting that the language of Rule 33 as amended in 1946 refers to the scope of deposition discovery in Rule 26); FED. R. CIV. P. 26 advisory committee’s note (noting that under some prior practices, a party could only seek discovery of facts supporting that party’s case).

⁷⁰ *See* FED. R. CIV. P. 56.

⁷¹ Stempel, *supra* note 51, § 56App.01[1], at 56App.-1 (text of original Rule 56(c)).

⁷² Thomas, *supra* note 40, at 18; Stempel, *supra* note 51, § 56App.100[1], at 56App.-14.1.

⁷³ Stempel, *supra* note 51, § 56App.100[1], at 56App.-16.

Accepted principles of the American legal system began to take shape.⁷⁴ Early experience with the Rules proved positive.⁷⁵ Discovery was thought to expedite just resolutions of cases⁷⁶ and was generally not used to harass or delay.⁷⁷ As late as the 1960s, many thought that fundamental changes to the discovery rules were unnecessary.⁷⁸

The Supreme Court helped to solidify these principles. *Hickman v. Taylor*⁷⁹ is notable not only because it established the modern work product doctrine, but also because it gave the Court an opportunity to consider the newly developed discovery rules.⁸⁰ The Court noted that the discovery procedures were “one of the most significant innovations” of the Rules.⁸¹ It acknowledged that prior to the Rules, “the pre-trial functions of notice-giving, issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings.”⁸² The Rules, however, confined the pleadings to “notice-giving” while devoting other functions to the discovery process.⁸³ The discovery devices serve two main purposes: (1) “to narrow and clarify the basic issues between the parties”;

⁷⁴ See, e.g., HARE, GILBERT & OLLANIK, *supra* note 48, at 5 (stating that discovery “has four distinct but interrelated purposes”: [1] “to narrow and clarify the issues; [2] to identify potentially relevant information and the persons who might possess such information, and to ascertain how and from whom it may be procured in order to assist the parties in preparing for trial; [3] to eliminate unfair surprise; and [4] to promote the expeditious, just, and final resolution of disputes in accordance with the substantive rights of the parties”); see also 8B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, *FEDERAL PRACTICE AND PROCEDURE* § 2162 (2010) (discussing the purposes of interrogatories).

⁷⁵ Order Amending the Federal Rules of Civil Procedure, 446 U.S. 997, 999 (1980) (Powell, J., dissenting) (“When the Federal Rules first appeared in 1938, the discovery provisions properly were viewed as a constructive improvement.”); HARE, GILBERT & OLLANIK, *supra* note 48, at 56–57 (noting that the discovery provisions were generally praised by commentators after the Rules were adopted); William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 704 (1989) (“For the first thirty years the Federal Rules appear to have worked to the satisfaction of the bar and the bench.”).

⁷⁶ Lundquist, *supra* note 3, at 1071 (“When the new Federal Rules of Civil Procedure became effective in 1938, pretrial discovery was heralded as a major step toward the ‘just, speedy, and inexpensive’ disposition of civil cases.”).

⁷⁷ See Schwarzer, *supra* note 75, at 704 (citing a survey of lawyers from 1968); Note, *Discovery: Boon or Burden?*, 36 MINN. L. REV. 364, 373, 376 (1952) (concluding that discovery did not delay litigation and was rarely used for harassment or otherwise abused in Minnesota federal courts).

⁷⁸ Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 748 (1998) (citing Advisory Committee’s Explanatory Statement Concerning Amendments of the Discovery Rules, 48 F.R.D. 487, 489 (1970)).

⁷⁹ 329 U.S. 495 (1947).

⁸⁰ See Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1298 (1978) (referring to *Hickman* as the “seminal opinion about the scope of discovery”).

⁸¹ *Hickman*, 329 U.S. at 500.

⁸² *Id.*

⁸³ *Id.* at 501.

and (2) to uncover the facts so that the parties have “the fullest possible knowledge of the issues and facts before trial.”⁸⁴ Thus, the discovery rules “are to be accorded a broad and liberal treatment.”⁸⁵ Parties are entitled to “inquir[e] into the facts underlying” their adversaries’ cases.⁸⁶ “Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.”⁸⁷ The discovery rules simply require the parties to disclose those facts before trial, “thus reducing the possibility of surprise.”⁸⁸

A few years later, the Court reinforced the minimal role that the pleadings played under the Rules when it decided *Conley v. Gibson*.⁸⁹ In *Conley*, the Court recognized the “accepted rule” that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”⁹⁰ Thus, a complaint could be sufficient even if it “failed to set forth specific facts to support its general allegations.”⁹¹ All Rule 8 required was a “short and plain statement of the claim” sufficient to “give the defendant fair notice” of the plaintiff’s claim and its grounds.⁹² Indeed, this “simplified ‘notice pleading’ [wa]s made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules” which were designed to reveal the bases of claims and defenses more precisely while also narrowing the “disputed facts and issues.”⁹³ The Court emphasized that the purpose of the pleading standard was to “do substantial justice,” and avoid resorting to “game[s] of skill” in pleading practice.⁹⁴

This era of notice pleading and expansive discovery continued and reached its apex in 1970.⁹⁵ By then, the Advisory Committee had already clarified that inadmissible evidence could nonetheless be discoverable,

⁸⁴ *Id.*

⁸⁵ *Id.* at 507.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ 355 U.S. 41 (1957).

⁹⁰ *Id.* at 45–46 (citation omitted).

⁹¹ *Id.* at 47.

⁹² *Id.* (citing FED. R. CIV. P. 8(a)(2)).

⁹³ *Id.* at 47–48 (citation omitted).

⁹⁴ *Id.* at 48 (citation omitted).

⁹⁵ HARE, GILBERT & OLLANIK, *supra* note 48, at 49 (noting that liberal discovery reached its “zenith” in 1970 (quoting Greene, *supra* note 42, at 279)); WRIGHT, MILLER & MARCUS, *supra* note 74, § 2169 (“The 1970 amendments represented something of a high-water mark for broad and unrestrained discovery; since then rule amendments have generally aimed to constrain discovery” (citing Marcus, *supra* note 78, at 747)); Lang, *supra* note 50, at 662 (noting that the discovery rules appeared to work well up until the 1970s, when they “became the target of mounting criticism”); Yoo, *supra* note 31, at 923 (explaining that before the 1970s, the trend was to liberalize discovery and promote “attorney control over discovery with minimal judicial involvement”).

and eliminated the requirement that a party seek leave of court before noticing a deposition.⁹⁶ In the 1970 Amendments, the Advisory Committee further: (a) eliminated the “good cause” requirement for document requests;⁹⁷ (b) added Rule 30(b)(6) to provide a procedure for parties to depose unnamed organizational representatives;⁹⁸ (c) expanded the matters susceptible to requests for admission under Rule 36;⁹⁹ and (d) added an explicit procedure for a party seeking discovery to move to compel a response under Rule 37.¹⁰⁰ As discussed in more detail below, the Advisory Committee also explicitly condoned the use of contention interrogatories.¹⁰¹

Two other developments in this era are also worthy of note. The first was the unanticipated explosion of requests for bills of particulars.¹⁰² Under the original version of Rule 12(e), a party could request a bill of particulars not only to enable it to respond to the complaint, but also “to prepare for trial.”¹⁰³ This prompted many attorneys, accustomed to the old pleading-centered practice, to use Rule 12(e) as a tool for extracting the facts underlying the allegations in the complaint.¹⁰⁴ Most courts rejected these attempts, finding that Rule 12(e) could only be used to gather additional detail where it was needed in order to respond to the complaint, and thus, appearing to read the language “to prepare for trial” out of the rule.¹⁰⁵ A minority, however, permitted the practice to go forward, finding the fact that the defendant could uncover those details in discovery irrelevant.¹⁰⁶ Given that the plaintiff generally did not have any more information than it had pleaded, it would frequently have to undertake discovery in order to respond to the bill.¹⁰⁷ In light of the superior discovery procedures, the bill of particulars had become nothing better than a nuisance suited only for creating “expense, delay, harassment, and drain on litigant and judicial time and energy.”¹⁰⁸ Accordingly, Rule 12(e) was amended in 1946 to abolish the bill of

⁹⁶ FED. R. CIV. P. 26 advisory committee’s note (discussing the 1946 Amendment); *see also* Subrin, *supra* note 32, at 734–39 (discussing the importance of early amendments to the Federal Rules).

⁹⁷ FED. R. CIV. P. 34 advisory committee’s note (discussing the 1970 Amendment).

⁹⁸ FED. R. CIV. P. 30 advisory committee’s note (discussing the 1970 Amendment).

⁹⁹ FED. R. CIV. P. 36 advisory committee’s note (discussing the 1970 Amendment).

¹⁰⁰ FED. R. CIV. P. 37 advisory committee’s note (discussing the 1970 Amendment).

¹⁰¹ *See infra* notes 303–16 and accompanying text.

¹⁰² WRIGHT & MILLER, *supra* note 38, § 1375.

¹⁰³ *See id.* § 1374.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* § 1375 (citation omitted).

¹⁰⁸ *Id.*

particulars and only permit a motion for a more definite statement where necessary for a party to prepare a responsive pleading.¹⁰⁹

The second other noteworthy development was the lower courts' reluctance to grant summary judgment.¹¹⁰ In 1963, the Advisory Committee revised Rule 56 to explicitly provide that a party opposing summary judgment "may not rest upon the mere allegations or denials of [its] pleading."¹¹¹ To the contrary, the opposing party had to "set forth specific facts showing that there is a genuine issue for trial" through affidavits or discovery.¹¹² The language was changed "to overcome a line of cases" that held that summary judgment should be denied where the opposing party rests on "well-pleaded" allegations, even without establishing a genuine issue for trial.¹¹³ The Advisory Committee also added a provision specifically authorizing courts to defer a response to a summary judgment motion so that discovery could be conducted.¹¹⁴

D. *The Rise of Discovery Abuse*

The era of good feelings did not last forever. By the 1970s, a new concern began dominating the civil procedure dialogue: "discovery abuse."¹¹⁵ Some contended that discovery was no longer just a

¹⁰⁹ See FED. R. CIV. P. 12(e) advisory committee's note (discussing the 1946 Amendment).

¹¹⁰ FED. R. CIV. P. 56 advisory committee's note (discussing the 1963 Amendment).

¹¹¹ *Id.*; see also KEVIN M. CLERMONT, FEDERAL RULES OF CIVIL PROCEDURE 441 (2009) (noting the changes in the 1963 Amendment).

¹¹² FED. R. CIV. P. 56 advisory committee's note (discussing the 1963 Amendment).

¹¹³ *Id.* (noting that "[t]he very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial"); Stempel, *supra* note 51, § 56App.100[3], at 56App.23 (noting that the purpose of the 1963 amendments was to require the nonmovant to do more than rely on its pleadings).

¹¹⁴ FED. R. CIV. P. 56(f) advisory committee's note (discussing the 1963 Amendment). This provision was moved to subdivision (d) as of December 1, 2010. See FED. R. CIV. P. R. 56(d) advisory committee's note (discussing the 2010 Amendment).

¹¹⁵ See SECOND REPORT, *supra* note 3, at 139 ("Discovery was envisioned as a useful mechanism to achieve the 'just, speedy, and inexpensive determination of every action.' There is mounting evidence that the delay and expense too frequently encountered in the discovery process are thwarting attainment of this fundamental goal."); Andrew W. Bogue, *Discovery: A Judge's Perspective*, 33 S.D. L. REV. 199, 199 (1988) ("Probably more time and space has been consumed in articles about [discovery abuse] than in any other topic about our modern day court procedures."); Frank F. Flegal, *Discovery Abuse: Causes, Effects, and Reform*, 3 REV. LITIG. 1, 1 (1982) (indicating that discovery abuse was recognized as a problem in the 1970s after increasing complaints about it in the preceding 20 years); C. Lynn Oliver, Note, *Economical Litigation: Kentucky's Answer to High Costs and Delay in Civil Litigation*, 71 KY. L.J. 647, 647 (1983) (noting that "many people do fear that rising costs of civil litigation and delay resulting from protracted discovery processes and overcrowded

“professional tool for the discovery of facts,” but had now become a “tactical weapon.”¹¹⁶ Discovery thus arguably became “a new playing field for competitive maneuvering”¹¹⁷ that had evolved into “the ultimate adversary proceeding.”¹¹⁸

Although the term “discovery abuse” is, itself, arguably vague,¹¹⁹ commentators have suggested that discovery abuse manifests itself in two primary ways.¹²⁰ First, “overuse”—in other words, excessive or improper use of discovery devices to harass, cause delay, or wear down the adversary by forcing it to incur costs.¹²¹ This behavior is difficult to uncover even in retrospect: A request that leads to a “dry hole” is necessarily reasonable at the time it was made because the requesting party could not have known that no useful information existed.¹²² Indeed, many requests may be appealing to attorneys not only because they may turn up useful information, but also because they will impose costs on their adversaries.¹²³ Second, “stonewalling”—or opposing otherwise proper discovery requests for the purpose of frustrating the other party.¹²⁴

dockets are turning the American court system into an impractical alternative for dispute resolution”); HARE, GILBERT & OLLANIK, *supra* note 48, at 48–49 (“Many rule reformers in the 1970s and 1980s . . . emphasized the . . . concern that devoting too much time and effort to the disclosure process was inefficient and costly. They argued that discovery practice was being used tactically by the discovering party to increase costs and delay or to obtain information for commercial purposes rather than to serve the overriding goal of ‘the just, speedy, and inexpensive determination of every action.’” (citation omitted)); Lundquist, *supra* note 3, at 1071 (noting that by the mid-1970s, discovery had become “unfocused, unthoughtful, often massive, and always expensive”); Yoo, *supra* note 31, at 923–24 (noting that the trend toward liberal discovery shifted during the 1970s due to “widespread discovery abuse,” which lead to increased use of sanctions, “number restrictions on discovery devices, . . . and increased judicial control over discovery practices”). Of course, discovery abuse likely did exist to some degree before the 1970s. *See* Subrin, *supra* note 32, at 702–08 (noting concerns about discovery abuse prior to the adoption of the Federal Rules of Civil Procedure). However, before the 1970s, it was not perceived to be a widespread problem.

¹¹⁶ Lundquist, *supra* note 3, at 1071.

¹¹⁷ HARE, GILBERT & OLLANIK, *supra* note 48, at 50.

¹¹⁸ Flegal, *supra* note 115, at 33 (quoting Ronald Olson).

¹¹⁹ EMERY G. LEE III & THOMAS E. WILLGING, FEDERAL JUDICIAL CENTER, ATTORNEY SATISFACTION WITH THE FEDERAL RULES OF CIVIL PROCEDURE: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 8 (March 2010), http://www.fjc.gov/library/fjc_catalog.nsf/autoframepage!openform&url=/library/fjc_catalog.nsf/Publication!openform&parentunid=18B74A7470C55F22852576D9007AA2 (“There are many possible meanings of discovery abuse.” (citation omitted)).

¹²⁰ *See* HARE, GILBERT & OLLANIK, *supra* note 48, at xxxi; Flegal, *supra* note 115, at 14 (quoting John F. Grady, J.).

¹²¹ *See* Easterbrook, *supra* note 5, at 641 (discussing the incentives that prompt discovery overuse); Epstein, *supra* note 65, at 71.

¹²² Easterbrook, *supra* note 5, at 638–39.

¹²³ *Id.* at 641.

¹²⁴ *See* HARE, GILBERT & OLLANIK, *supra* note 48, at xxxi.

Stonewalling may include making improper objections or reading requests narrowly to omit crucial information.¹²⁵

The system arguably fosters discovery abuse by creating numerous incentives for attorneys to engage in these tactics. The threat of malpractice, the traditional ethical duty of “zealous” advocacy, and the “broadest relevance test in the world,” encourage the general sense that “more is better.”¹²⁶ At the same time, attorneys know that judges are reluctant to award sanctions before giving them “multiple bites at the apple.”¹²⁷ Indeed, some commentators have suggested that interjecting broad discovery tools into an inherently adversarial context would inevitably lead to abuse,¹²⁸ although it is unclear why these tendencies did not reveal themselves earlier.¹²⁹

Abusive tactics increase the costs of litigation and delay the resolution of cases.¹³⁰ Abuse thus contributes to the general dissatisfaction with the judicial system, diminishing the legal system in the eyes of the average citizen, taxing judicial resources, undermining professional morale, and encouraging unjust settlements.¹³¹ Although most seem to agree that discovery abuse takes place in some cases, the debate over how widespread the problem is remains unresolved.¹³²

¹²⁵ Cf. SECOND REPORT, *supra* note 3, at 147 (noting that responding parties frequently seek to evade proper interrogatories).

¹²⁶ See Easterbrook, *supra* note 5, at 641 (noting that lawyers are incented to “engage in extensive discovery” because they do not necessarily know what they are looking for, or when they will have “enough.”); Flegal, *supra* note 115, at 15, 20 (quoting Peter Gruenberger). See also Brazil, *supra* note 80, at 1303–04, 1311–15 (discussing the incentives for lawyers in discovery practice).

¹²⁷ Flegal, *supra* note 115, at 17 (quoting Peter Gruenberger, Address to the Judicial Conference of the United States (1982)).

¹²⁸ See Brazil, *supra* note 80, at 1303–04; Subrin, *supra* note 32, at 706–07.

¹²⁹ Then-Professor Wayne Brazil, debunking survey data, suggested that the evidence of discovery abuse did exist earlier. Brazil, *supra* note 80, at 1305–11. He also suggested that increasing fears of being sued for malpractice may have contributed to aggressive discovery practice. *Id.* at 1307. Others attribute the change to a more general “increasing competitiveness and aggressiveness of the bar.” Schwarzer, *supra* note 75, at 705.

¹³⁰ Order Amending the Federal Rules of Civil Procedure, 446 U.S. 997, 1000 (1980) (Powell, J., dissenting) (indicating that widespread discovery abuse “denies justice to many actual or prospective litigants” who may be forced to “settle unjust claims and relinquish just claims simply because they cannot afford to litigate” (citation omitted)); Flegal, *supra* note 115, at 33–36 (identifying the victims of discovery abuse as the average American, the impoverished, the justice system, and the legal profession); Lundquist, *supra* note 3, at 1073 (noting that there is no disagreement “about the [negative] effect of discovery upon the average citizen’s ability to afford legal remedies” and suggesting that much of the criticism of the justice system is attributable to “needlessly expansive and expensive discovery” (citation omitted)); Oliver, *supra* note 115, at 651–52 (“[R]educing court costs and delay presumably improve the quality of justice.”).

¹³¹ See SECOND REPORT, *supra* note 3, at 152; Flegal, *supra* note 115, at 33–36.

¹³² See LEE & WILLGING, *supra* note 119, at 8 (indicating disagreement among various groups of practitioners surveyed as to whether “[d]iscovery is abused in

Rising concerns about discovery abuse spurred a number of reactions beginning in the mid-1970s.¹³³ In 1976, a conference held by the American Bar Association (known as the “Pound Conference” in honor of Dean Pound) commissioned a “committee to study the problem of discovery abuse and to make appropriate recommendations.”¹³⁴ The Special Committee for the Study of Discovery Abuse (as it was known) recommended a number of reforms, including scaling back the scope of discovery to the claims and defenses (rather than the “subject matter”) in the case, instituting an optional discovery conference, imposing a thirty interrogatory limit,¹³⁵ adding a certification requirement to discovery requests and responses, and expanding discovery sanctions.¹³⁶

After some contentious debate,¹³⁷ the Advisory Committee adopted many of these suggestions in what became the 1980 and 1983 Amendments. The 1980 Amendments included the Special Committee’s

almost every case”); *compare, e.g., Order*, 446 U.S. at 999 (Powell, J., dissenting) (“Delay and excessive expense now characterize a large percentage of all civil litigation. The problems arise in significant part, as every judge and litigator knows, from abuse of the discovery procedures available under the Rules.” (citation omitted)), HARE, GILBERT & OLLANIK, *supra* note 48, at 47 (acknowledging that discovery abuse is a problem), and Greene, *supra* note 42, at 281 (discussing survey data showing that most judges identified discovery abuse as the cause of excessive litigation costs and delay), and Lang, *supra* note 50, at 666 (stating that “virtually everyone within the legal community agrees that a [discovery abuse] problem does exist.” (citation omitted)), *with, e.g.,* EMERY G. LEE III & THOMAS E. WILLGING, FEDERAL JUDICIAL CENTER, FEDERAL JUDICIAL CENTER NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 70–71 (Oct. 2009), [http://www.fjc.gov/public/pdf.nsf/lookup/FJC_Civil_Report_Sept_2009.pdf/\\$file/FJC_Civil_Report_Sept_2009.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/FJC_Civil_Report_Sept_2009.pdf/$file/FJC_Civil_Report_Sept_2009.pdf) (indicating that most practitioners surveyed disagreed with the suggestion that “discovery is abused in almost every case in federal court”), and Seymour Moskowitz, *Rediscovering Discovery: State Procedural Rules and the Level Playing Field*, 54 RUTGERS L. REV. 595, 609–10, 642 (2002) (“[E]mpirical data from studies of federal and state cases do not confirm the ‘discovery abuse’ hypothesis.”). Professor Moskowitz relies on studies that show that little discovery takes place in many cases. *Id.* However, the fact that there is no discovery in some cases does not mean that there is no discovery abuse in cases that do utilize discovery. *Cf. Easterbrook, supra* note 5, at 637 (“Data showing that most cases settle without substantial discovery are not reassuring; the terms of settlement are affected the most when the parties threaten discovery (explicitly or implicitly) but never use it.”); *infra* note 137; Flegal, *supra* note 115, at 6–7 (noting that studies that came out in the late 1970s and early 1980s suggested that the Advisory Committee’s initial determination that discovery abuse was not widespread was incorrect).

¹³³ *Cf. HARE, GILBERT & OLLANIK, supra* note 48, at 58–59 (noting that concern over discovery abuse spurred the reform efforts that lead to the 1980 and 1983 amendments).

¹³⁴ SECOND REPORT, *supra* note 3, at 137, 151.

¹³⁵ *Id.* at 149, 157–59, 173.

¹³⁶ *Id.* at 138–48.

¹³⁷ *See* FED. R. CIV. P. 26 advisory committee’s note (discussing the 1980 and 1983 Amendments); *Order*, 446 U.S. at 999–1000 (1980) (Powell, J., dissenting); SECOND REPORT, *supra* note 3, at 137–38; Flegal, *supra* note 115, at 41–42 (quoting Steven Umin).

proposal for an optional discovery conference and several minor changes to other Rules.¹³⁸ The 1983 Amendments added language allowing the court to limit discovery in certain situations and adding a certification requirement for discovery papers.¹³⁹ The Advisory Committee declined to impose a limit on interrogatories or scale back the scope of discovery,¹⁴⁰ but did observe that the new language in Rule 26 would allow courts to “restrict the number of depositions, interrogatories, or the scope of a production request” in “an appropriate case.”¹⁴¹ It also strengthened the judicial case management provisions in Rule 16.¹⁴²

Significantly, the Advisory Committee also revised Rule 11. Although Rule 11 does not directly deal with discovery, it has become “integrally connected” with discovery’s role in civil procedure.¹⁴³ The new language required attorneys to conduct a “reasonable inquiry” and certify that any “pleading, motion, or other paper . . . is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose”¹⁴⁴ If any such paper was signed in contravention of the Rule, the court was now required to sanction the attorney, the party, or both.¹⁴⁵ The requirement was intended to reduce frivolous claims and defenses by requiring “some prefiling inquiry into both the facts and the law.”¹⁴⁶ This revision was criticized by some as a “shift toward limiting access to the courthouse by litigants lacking sufficient evidence of liability at the time the suit is filed” and a “regress[ion] toward the days of pleadings practice and field codes in which a party’s case had to be made without the benefit of discovery.”¹⁴⁷

¹³⁸ FED. R. CIV. P. 26, 33–34 & 37 advisory committee’s note (discussing the 1980 Amendment).

¹³⁹ FED. R. CIV. P. 26 advisory committee’s note (discussing the 1983 Amendment).

¹⁴⁰ Many thought that changing the language controlling the scope of discovery would not make any difference and only cause confusion. *See* Marcus, *supra* note 78, at 757–58.

¹⁴¹ FED. R. CIV. P. 26 advisory committee’s note (discussing the 1983 Amendment). The Committee also noted, however, that “district judges have been reluctant to limit the use of the discovery devices.” *Id.*

¹⁴² *See* FED. R. CIV. P. 16 advisory committee’s note (discussing the 1983 Amendment). This amendment eventually stole the thunder of the optional discovery conference provisions adopted in 1980. *See* Marcus, *supra* note 78, at 773.

¹⁴³ HARE, GILBERT & OLLANIK, *supra* note 48, at 54.

¹⁴⁴ Jerold S. Solovy & Laura A. Kaster, *Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions*, in 2 MOORE’S FEDERAL PRACTICE § 11App.02[1], at 11App.-1 to -2 (3d ed. 2010) (emphasis omitted).

¹⁴⁵ *Id.*

¹⁴⁶ FED. R. CIV. P. 11 advisory committee’s note (discussing the 1983 Amendment).

¹⁴⁷ HARE, GILBERT & OLLANIK, *supra* note 48, at 54.

Notably, the federal system was not alone in attempting to address discovery abuse. Some state courts considered more radical reforms.¹⁴⁸ Notably, two California state courts participated in an experiment where discovery was severely restricted in certain types of cases.¹⁴⁹ Interrogatories were eliminated and depositions were only available in limited circumstances.¹⁵⁰ Although the changes did reduce costs and delay, attorneys were generally dissatisfied with the restrictions on discovery, claiming that they made it more difficult to assess settlement and reduced the quality of trials.¹⁵¹

E. The Supreme Court's 1986 Summary Judgment "Trilogy"

While the Advisory Committee grappled with discovery abuse, summary judgment remained underutilized. Federal courts had been reluctant to accept the procedure. Despite the fact that Rule 56 had been on the books since 1938¹⁵² and was clarified in 1963,¹⁵³ there remained a general sense that summary judgment was "extremely difficult to obtain."¹⁵⁴

The trend began to change in the early 1980s when the lower courts began granting summary judgment more frequently.¹⁵⁵ But the real change occurred in 1986, when the Supreme Court decided a "trilogy" of cases clarifying the procedure.¹⁵⁶ At that point, the Rule required the moving party to first demonstrate "that there is no genuine issue as to any material fact and that [it was] entitled to judgment as a matter of law."¹⁵⁷ The non-moving party then was required to make a showing setting forth "specific facts" through affidavits or discovery demonstrating that there was "a genuine issue for trial."¹⁵⁸ The non-moving party was explicitly prohibited from relying on "mere allegations or denials of [its] pleading."¹⁵⁹

¹⁴⁸ See Oliver, *supra* note 115, at 657–63 (discussing proposals in Kentucky).

¹⁴⁹ Steven Weller, John C. Ruhnka & John A. Martin, *What Happened When Interrogatories Were Eliminated?*, 21 JUDGES' J., no. 3, 1982 at 8, 8–9.

¹⁵⁰ *Id.* at 10.

¹⁵¹ *Id.* at 9, 13, 15, 44.

¹⁵² See *supra* notes 70–71 and accompanying text.

¹⁵³ See *supra* notes 111–14 and accompanying text.

¹⁵⁴ Stempel, *supra* note 51, § 56App.100[3], at 56App.-24.

¹⁵⁵ *Id.* (citations omitted).

¹⁵⁶ *Id.* § 56.03[1], at 56-22 to -23. (explaining that the "trilogy" of summary judgment cases in 1986 "substantially increased the availability of summary judgment and encouraged greater use of the motion by trial courts" and citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)).

¹⁵⁷ See CLERMONT, *supra* note 111, at 441 (showing that the quoted language was not changed in the 1963 amendment).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

The first “trilogy” case was *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*¹⁶⁰ The Court explained that if the moving party’s showing demonstrates that the non-moving party’s claim is “implausible,” the non-moving party must “come forward with more persuasive evidence to support [its] claim than would otherwise be necessary.”¹⁶¹

Next, in *Anderson v. Liberty Lobby, Inc.*,¹⁶² the Court sought to explain the predicate for summary judgment: that there be “no *genuine* issue of *material* fact.”¹⁶³ Materiality depends on “which facts are critical and which facts are irrelevant” under the substantive law governing a claim.¹⁶⁴ Genuineness turns on whether there is enough evidence for a reasonable jury to “return a verdict for the nonmoving party.”¹⁶⁵ The summary judgment standard thus “mirrors the standard for a directed verdict” (now known as “judgment as a matter of law”) under Rule 50(a).¹⁶⁶ The only difference between the two motions is essentially timing—one occurs before trial and one occurs at trial.¹⁶⁷ However, the “essence” of either inquiry is the same: “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.”¹⁶⁸ The Court thus rejected a series of decisions that had suggested that a mere “scintilla of evidence” was sufficient to overcome summary judgment.¹⁶⁹

In the final episode of the “trilogy,” *Celotex Corp. v. Catrett*,¹⁷⁰ the Court held that Rule 56 requires courts to grant summary judgment “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.”¹⁷¹ In other words, the moving party may discharge its burden “by ‘showing’ . . . that there is an absence of evidence to support the nonmoving party’s case.”¹⁷² The nonmoving party must then respond by setting out “specific facts showing that there is a genuine issue for trial.”¹⁷³ Appearing to address past reluctance of lower courts to grant summary judgment, the Court further explained that:

¹⁶⁰ 475 U.S. 574 (1986).

¹⁶¹ *Id.* at 587.

¹⁶² 477 U.S. 242 (1986).

¹⁶³ *Id.* at 247–49.

¹⁶⁴ *Id.* at 248.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 250.

¹⁶⁷ *Id.* at 251–52.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 252.

¹⁷⁰ 477 U.S. 317 (1986).

¹⁷¹ *Id.* at 322.

¹⁷² *Id.* at 325.

¹⁷³ *Id.* at 324.

Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole Before the shift to “notice pleading” accomplished by the Federal Rules, motions to dismiss a complaint or to strike a defense were the principal tools by which factually insufficient claims or defenses could be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources. But with the advent of “notice pleading,” the motion to dismiss seldom fulfills this function any more, and its place has been taken by the motion for summary judgment.¹⁷⁴

District courts got the message. In light of these decisions, far from being a disfavored and rarely used procedure, summary judgment became “viewed as a fulcrum for adjudicating the heavy caseload facing federal courts.”¹⁷⁵

Many courts and judges have now formalized the summary judgment process with local and court rules.¹⁷⁶ They now require a party moving for summary judgment to provide a separate document setting forth the material facts that the moving party contends are not in dispute in separately numbered paragraphs.¹⁷⁷ The moving party must cite affidavits or other materials provided in support of the motion for each fact.¹⁷⁸ These submissions are frequently given titles such as “Statement of Material Facts Not in Dispute.”¹⁷⁹ The non-moving party then responds to each numbered paragraph, indicating whether it agrees or disagrees that the fact is not in dispute.¹⁸⁰ Where it disagrees, the non-moving party must also cite affidavits or other materials showing why the fact is disputed.¹⁸¹ This process allows the court to cleanly assess whether there are “genuine issues of material fact” and compare the factual support for the parties’ arguments. Indeed, the Advisory Committee recently formalized this process. As of December 1, 2010, revised Rule 56 requires parties asserting that a fact is or is not genuinely disputed to support their assertions by referring to materials in the record.¹⁸²

¹⁷⁴ *Id.* at 327 (citations omitted).

¹⁷⁵ Stempel, *supra* note 51, § 56.03[1], at 56-24; *see also* Moskowitz, *supra* note 132, at 638 (noting that the use of summary judgment appears to have increased since the 1970s).

¹⁷⁶ *See, e.g.*, D.N.J. L.Civ.R. 56.1 (updated as of Oct. 14, 2010); N.D. Ill. LR56.1 (updated as of Feb. 4, 2010).

¹⁷⁷ *See* D.N.J. L.Civ.R. 56.1(a).

¹⁷⁸ *See id.*

¹⁷⁹ *See id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* Under the District of New Jersey procedure, the non-moving party may also provide a supplemental statement of disputed facts. *Id.*

¹⁸² *See* FED. R. CIV. P. 56(c)(1); *see also* FED. R. CIV. P. 56 advisory committee’s note (explaining that subdivision (c) “establishes a common procedure for several aspects of summary-judgment motions synthesized from similar elements developed in the cases or found in many local rules”). A party need not do so where it is contending

Still, although summary judgment now disposes of unmeritorious claims before trial, summary judgment motions are “routinely defeated” when made prior to discovery and “do nothing to curb” discovery abuse “prior to the time that [they are] granted.”¹⁸³

F. *The 1993 and Subsequent Amendments*

Despite the significance of some of the changes, particularly the revision to Rule 11, some still thought that the 1980 and 1983 Amendments did not adequately address discovery abuse.¹⁸⁴ By the early 1990s, Congress had become interested in the problem¹⁸⁵ and some were even calling for the end of notice pleading.¹⁸⁶ The Advisory Committee was ready to administer stronger medicine.¹⁸⁷

In the 1993 Amendments, Congress enacted a system of mandatory disclosure accompanied by limiting the number of interrogatories and depositions.¹⁸⁸ These reforms were based on successful local rules.¹⁸⁹ Rule 26(a) was revised to require parties to disclose information about potential witnesses, documents, damage computations, insurance, expert witnesses, and trial evidence.¹⁹⁰ The first four categories of information have to be provided at the outset of discovery.¹⁹¹ The Advisory Committee

that the material relied on by the other party does not establish the fact or that the other party cannot establish a fact on which it bears the burden of production. FED. R. CIV. P. 56(c)(1)(B).

¹⁸³ Epstein, *supra* note 65, at 70–71.

¹⁸⁴ Greene, *supra* note 42, at 281; Lang, *supra* note 50, at 665; *see also* Marcus, *supra* note 78, at 773–75 (suggesting that the effects of the 1980 and 1983 Amendments were modest).

¹⁸⁵ Edward D. Cavanagh, *The Civil Justice Reform Act of 1990 and the 1993 Amendments to the Federal Rules of Civil Procedure: Can Systemic Ills Afflicting the Federal Courts be Remedied by Local Rules?*, 67 ST. JOHN'S L. REV. 721, 723–24 (1993) (discussing the evolution of the Civil Justice Reform Act).

¹⁸⁶ Easterbrook, *supra* note 5, at 644–45.

¹⁸⁷ Lang, *supra* note 50, at 657 (referring to the mandatory disclosure amendments as “revolution[ary]” and “radical” (citation omitted)). The Advisory Committee did, however, initially back off its push for mandatory disclosure before deciding to move forward. *See* Marcus, *supra* note 78, at 766–67.

¹⁸⁸ *See* FED. R. CIV. P. 26(a) advisory committee's note (discussing the 1993 Amendment); FED. R. CIV. P. 30 advisory committee's note (discussing the 1993 Amendment); FED. R. CIV. P. 31 advisory committee's note (discussing the 1993 Amendment); FED. R. CIV. P. 33 advisory committee's note (discussing the 1993 Amendment); HARE, GILBERT & OLLANIK, *supra* note 48, at 60.

¹⁸⁹ *See* FED. R. CIV. P. 26(a) advisory committee's note (discussing the 1993 Amendment); FED. R. CIV. P. 33 advisory committee's note (discussing the 1993 Amendments); *see also* Cavanagh, *supra* note 185, at 733. Notably, mandatory disclosure proposals dated back to the original draft of the Federal Rules of Civil Procedure. Marcus, *supra* note 78, at 765 (citing Subrin, *supra* note 32, at 718–19).

¹⁹⁰ FED. R. CIV. P. 26(a) advisory committee's note (discussing the 1993 Amendment).

¹⁹¹ *Id.* Some types of cases, which generally do not involve extensive discovery, are exempted from the initial disclosure requirements. *See* FED. R. CIV. P. 26(a)(1)(B).

likened these requirements to “court-ordered interrogatories.”¹⁹² Expert information, along with trial witness and exhibit lists, does not have to be provided until closer to trial.¹⁹³ The Advisory Committee also expanded Rule 26(f)’s discovery conference procedure to apply presumptively to all cases.¹⁹⁴

The purpose of mandatory disclosures was “to accelerate the exchange of basic information” and eliminate excess “paper work,” thereby achieving a “savings in time and expense.”¹⁹⁵ The provisions were not intended to preclude parties “from using traditional discovery methods to obtain further information” about the covered subjects.¹⁹⁶ At the time, the disclosure provisions were extremely controversial and were nearly blocked by Congress.¹⁹⁷

Notably, Rule 26(a) provided that the parties had to disclose information about potential witnesses and documents that were “relevant to disputed facts alleged with particularity in the pleadings.”¹⁹⁸ An earlier draft of this provision would have required the parties to disclose information about persons “likely to have information that bears significantly on any claim or defense.”¹⁹⁹ The change was made to account for the “[b]road, vague, and conclusory allegations sometimes tolerated in notice pleading.”²⁰⁰

The Advisory Committee also revised Rules 30 and 31 to limit the number of depositions to ten per side.²⁰¹ It also finally acted on proposals to limit interrogatories, amending Rule 33 to provide a 25 interrogatory limit per party, “including all discrete subparts.”²⁰² Thus, according to the Advisory Committee, parties cannot “evade th[e] presumptive limitation through the device of joining as ‘subparts’ questions that seek information about discrete separate subjects.”²⁰³ The Advisory Committee attributed its change of heart on limits to “[t]he information explosion of

¹⁹² FED. R. CIV. P. 26(a) advisory committee’s note (discussing the 1993 Amendment).

¹⁹³ FED. R. CIV. P. 26(f) advisory committee’s note (discussing the 1993 Amendment).

¹⁹⁴ FED. R. CIV. P. 26(a) advisory committee’s note (discussing the 1993 Amendment).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *See* Marcus, *supra* note 78, at 766–68.

¹⁹⁸ MOORE, *supra* note 69, § 26App.09[1], at 26App.-41 (including the text of Rule 26(a)(1) as amended in 1993).

¹⁹⁹ HARE, GILBERT & OLLANIK, *supra* note 48, at 62.

²⁰⁰ *Id.* (quoting FED. R. CIV. P. 26(a) advisory committee’s note).

²⁰¹ FED. R. CIV. P. 30 advisory committee’s note (discussing the 1993 Amendment); FED. R. CIV. P. 31 advisory committee’s note (discussing the 1993 Amendment).

²⁰² CLERMONT, *supra* note 111, at 381 (showing the changes to Rule 33 from the 1993 Amendments).

²⁰³ FED. R. CIV. P. 33 advisory committee’s note (discussing the 1993 Amendment).

recent decades” which had “greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression.”²⁰⁴ The Federal Rules of Civil Procedure provide that a court may grant a party permission to exceed either the deposition or interrogatory limits in appropriate circumstances.²⁰⁵

Still, in what was becoming a familiar refrain, some felt that the 1993 Amendments did not accomplish their main goal: curbing discovery abuse.²⁰⁶ The Advisory Committee went back to work, acknowledging that “[c]oncerns about costs and delay of discovery have persisted”²⁰⁷ In what became the 2000 Amendments, the Advisory Committee acted on earlier proposals to narrow the scope of discovery.²⁰⁸ Parties are now permitted to seek discovery regarding matters “relevant to the claim or defense of any party” rather than “the subject matter involved in the pending action.”²⁰⁹

The Advisory Committee also correspondingly revised the potential witness and document disclosure provisions to cover only information that “the disclosing party may use to support its claims or defenses, unless solely for impeachment.”²¹⁰ This change is notable in two respects. First, it only covers information that the disclosing party “may use,” as opposed to discoverable information in general, which may be either helpful or unhelpful to the disclosing party. This was intended to mirror the exclusion provision in Rule 37 so that if a party fails to disclose the information, it may not be able to use it.²¹¹ Second, the revised language excludes information that may be used “solely for impeachment.”²¹² These changes appear to have been intended to mitigate the non-

²⁰⁴ FED. R. CIV. P. 26 advisory committee’s note (discussing the 1993 Amendment).

²⁰⁵ See FED. R. CIV. P. 30, 31, 33.

²⁰⁶ W. Bradley Wendel, *Regulation of Lawyers Without the Code, the Rules, or the Restatement: Or, What Do Honor and Shame Have To Do with Civil Discovery Practice?*, 71 *FORDHAM L. REV.* 1567, 1573 (2003); see also HARE, GILBERT & OLLANIK, *supra* note 48, at 69 (suggesting that the 1993 Amendments would not help curb stonewalling and overuse because those inclined to engage in these activities will just adapt their practices, and advocating “substantive changes to the incentives affecting discovery practice” (i.e., sanctions)); Marcus, *supra* note 78, at 784 (suggesting that “unhappiness about discovery” endured even after the 1993 Amendments).

²⁰⁷ FED. R. CIV. P. 26 advisory committee’s note (discussing the 2000 Amendment).

²⁰⁸ See *SECOND REPORT*, *supra* note 3, at 140–42, 157–58.

²⁰⁹ CLERMONT, *supra* note 111, at 340 (showing the 2000 Amendment).

²¹⁰ *Id.* at 338.

²¹¹ FED. R. CIV. P. 26 advisory committee’s note (discussing the 2000 Amendment).

²¹² *Id.*

adversarial aspects of mandatory disclosure, which some thought were harming the attorney-client relationship.²¹³

In 2006, the Advisory Committee sought to address additional problems arising out of the expanding use of electronic materials.²¹⁴ Rule 26 was revised to provide that a responding party need not provide electronic materials that are “not reasonably accessible because of undue burden or cost.”²¹⁵ Even after all of the Advisory Committee’s efforts, however, some still contended that the discovery abuse problem had not been solved.²¹⁶

G. Twombly, Iqbal, and the End of Notice Pleading

The Federal Rules of Civil Procedure had drastically simplified pleading practice.²¹⁷ In *Conley v. Gibson*,²¹⁸ the Supreme Court reinforced the language of the Federal Rules of Civil Procedure by holding that dismissal of a complaint was inappropriate “unless it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief.”²¹⁹ By 2007, the Federal Rules of Civil Procedure’s notice pleading regime enshrined by *Conley* had governed for 50 years. Indeed, the “basic provisions” of the Federal Rules had “remained essentially unchanged since 1938” despite “constant revision[s]” to the details.²²⁰ But after nearly 30 years of modest revisions, concerns about discovery abuse remained, leading the Supreme Court to make a fundamental reappraisal of those “basic provisions.”²²¹ The court

²¹³ See NEW YORK CITY BAR: COMMITTEE ON STATE COURTS OF SUPERIOR JURISDICTION, REPORT ON PROPOSED NEW YORK COURT RULE REGARDING INTERROGATORIES (Oct. 29, 2004), <http://nycbar.org/Publications/reports/index.php?type=subject> (suggesting that the 2000 Amendments were intended to alleviate the burden on attorneys to produce adverse information, which some feared was jeopardizing the attorney-client relationship); HARE, GILBERT & OLLANIK, *supra* note 48, at 66 (suggesting that the 1993 Amendments were “unrealistic” to the extent that they were intended to minimize adversarial conduct in discovery).

²¹⁴ FED. R. CIV. P. 26 advisory committee’s note (discussing the 2006 Amendment).

²¹⁵ FED. R. CIV. P. 26(b)(2)(B).

²¹⁶ See Thomas Y. Allman, *Conducting E-Discovery After the Amendments: The Second Wave*, 10 SEDONA CONF. J. 215, 227 (2009) (suggesting that the 2006 Amendments were not sufficient to address rising discovery costs); see also LEE & WILLGING, *supra* note 119, at 9 (indicating that most groups of practitioners surveyed disagreed with the suggestion that the post-1970s amendments had “significantly reduced discovery abuse”).

²¹⁷ See *supra* Part II.A–B.

²¹⁸ 355 U.S. 41 (1957); see *supra* notes 89–94.

²¹⁹ *Conley*, 355 U.S. at 45–46 (emphasis added).

²²⁰ Epstein, *supra* note 65, at 83.

²²¹ Cf. *infra* note 450; Epstein, *supra* note 65, at 65–66 (arguing that the notice pleading system “performs erratically in the context of modern complex litigation”).

confronted the issue in *Bell Atlantic Corp. v. Twombly*²²² and *Ashcroft v. Iqbal*.²²³

Twombly involved a putative class of local telephone and high speed internet subscribers who had brought claims against the regional telephone carriers that had previously made up the AT&T monopoly.²²⁴ The plaintiffs alleged that the carriers violated section 1 of the Sherman Act by engaging in “parallel conduct” to inhibit the growth of competitor carriers in their regions and that they had agreed not to compete in each others’ regions.²²⁵ The district court granted the defendants’ motion to dismiss under Rule 12(b)(6), but the appellate court reversed, invoking *Conley*’s “no set of facts” language.²²⁶

The Supreme Court first explained that parallel conduct, alone, is not sufficient to establish an antitrust violation under section 1 of the Sherman Act.²²⁷ The Court then noted that the pleading rules merely require “‘a short and plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’”²²⁸ However, the Court also explained that a complaint must contain “[f]actual allegations . . . [that are] enough to raise a right to relief above the speculative level.”²²⁹ In order to do so, the plaintiff must allege “enough factual matter . . . to suggest” a “plausible” theory of liability.²³⁰ Thus, in *Twombly*, the plaintiffs had to do more than merely allege facts that would be consistent with a conspiracy; they had to allege facts suggesting that the carriers actually made an anti-competitive agreement.²³¹ The plaintiffs had accordingly failed to “nudge[] their claims across the line from conceivable to plausible.”²³²

Significantly, the Court invoked commentary discussing discovery abuse and rising discovery costs.²³³ It noted that the courts had had only “modest” success in “checking discovery abuse” through case management practices.²³⁴ The Court appeared particularly concerned that “the threat of discovery expense will push cost-conscious defendants to settle even anemic cases” prior to discovery.²³⁵ It reasoned that a basic

²²² 550 U.S. 544 (2007).

²²³ 129 S. Ct. 1937 (2009).

²²⁴ *Twombly*, 550 U.S. at 549–50.

²²⁵ *Id.* at 550.

²²⁶ *Id.* at 553.

²²⁷ *Id.* at 553–54.

²²⁸ *Id.* at 555 (quoting FED. R. CIV. P. 8(a)(2) and *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

²²⁹ *Id.* (citation omitted).

²³⁰ *Id.* at 556.

²³¹ *Id.* at 556–57.

²³² *Id.* at 570.

²³³ *Id.* at 558–59.

²³⁴ *Id.* at 559 (citing Easterbrook, *supra* note 5, at 638).

²³⁵ *Id.*

deficiency in pleading “should be exposed” at the earliest possible point—i.e., the pleading stage.²³⁶

The Court recognized that the plaintiffs had relied heavily on the expansive “no set of facts” language in *Conley*.²³⁷ It suggested that the *Conley* language, if taken literally, was always inconsistent with the “accepted pleading standard” and was merely “gloss” on an opinion discussing allegations “which the Court quite reasonably understood as amply stating a claim for relief.”²³⁸ The Court thus proceeded to “retire[]” *Conley*’s “no set of facts” language.²³⁹ It then found that both of the plaintiffs’ theories of liability were insufficient to survive the defendants’ motion to dismiss.²⁴⁰ It explicitly claimed that it was *not* applying a “‘heightened’ pleading standard” in reaching its conclusions.²⁴¹

Justice Stevens, joined by Justice Ginsburg, dissented.²⁴² Contrary to the majority’s claim that it was not changing the pleading standard, Justice Stevens claimed that the Court had imposed a “new pleading rule” outside of Congress’ rulemaking process, which he contended was plainly a “‘heightened’ pleading standard.”²⁴³ After describing the evolution of notice pleading, Justice Stevens went on to note that *Conley* had been cited with approval numerous times by the Court and that a majority of states had adopted pleading standards similar to *Conley*.²⁴⁴ He contended that the Rule 8 standard was never intended to “require, or even invite, the pleading of facts,” and that it was left to the discovery and summary judgment to “dispose of unmeritorious claims.”²⁴⁵ In essence, Justice Stevens claimed, the majority was transforming the motion to dismiss into a motion for summary judgment.²⁴⁶

Although the language of the opinion indicated that the *Twombly* analysis was generally applicable to all cases under Rule 8, after *Twombly*, some suggested that the “plausibility” standard was limited to the antitrust context.²⁴⁷ To the extent that *Twombly* left any doubt, however, that doubt “disappeared” when the Court issued its decision in *Iqbal*.²⁴⁸ In

²³⁶ See *id.* at 558 (citation omitted).

²³⁷ *Id.* at 561 (quoting *Conley v. Gibson*, 355 U.S. 41, 45 (1957)).

²³⁸ *Id.* at 562–63.

²³⁹ *Id.*

²⁴⁰ *Id.* at 564–69.

²⁴¹ *Id.* at 569 n.14 (citations omitted).

²⁴² *Id.* at 570 (Stevens, J., dissenting).

²⁴³ *Id.* at 586–88 (citations omitted).

²⁴⁴ *Id.* at 577–78.

²⁴⁵ *Id.* at 579, 585 (citations omitted).

²⁴⁶ See *id.* at 586 (“Everything today’s majority says would . . . make perfect sense if it were ruling on a Rule 56 motion for summary judgment and the evidence included nothing more than what the court has described.”).

²⁴⁷ See *Angell v. Ber Care, Inc. (In re Caremerica, Inc.)*, 409 B.R. 737, 746 (Bankr. E.D.N.C. 2009).

²⁴⁸ *Id.*

Ashcroft v. Iqbal,²⁴⁹ the respondent was a Pakistani Muslim who had been arrested and detained by federal officials after the September 11th terrorist attacks.²⁵⁰ He was held in maximum security conditions before pleading guilty to fraud and conspiracy charges.²⁵¹ The respondent subsequently filed *Bivens* claims against former Attorney General John Ashcroft and former FBI Director Robert Mueller (the petitioners on the appeal), among other federal officials.²⁵² The respondent alleged that he had been confined in “harsh conditions . . . as a matter of policy, solely on account of his religion, race, and/or national origin.”²⁵³ He further alleged that Ashcroft was the “principal architect” of the policy and that Mueller was “instrumental” in adopting it and carrying it out.²⁵⁴

After concluding that it had jurisdiction, the Court noted that in order for the respondent to prevail on his *Bivens* claim, he could not rely on respondeat superior liability.²⁵⁵ Rather, the respondent had to allege that the petitioners implemented the detention policies “through [their] own individual actions” and “for the purpose of discriminating on account of race, religion, or national origin.”²⁵⁶ The Court then sought to clarify the applicable pleading standard.²⁵⁷ It explained that, under *Twombly*, the “complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”²⁵⁸ This, the Court explained, was “not akin to a ‘probability requirement.’”²⁵⁹ However, a complaint must plead facts that are more than “merely consistent with” liability in order to cross “the line between possibility and plausibility of ‘entitlement to relief.’”²⁶⁰

The Court then explained that the *Twombly* analysis turned on “[t]wo working principles.”²⁶¹ First, a court need not accept “[t]hreadbare” legal conclusions.²⁶² Second, the complaint must satisfy the “plausibility” standard.²⁶³ The Court went on to acknowledge that evaluating plausibility is a “context-specific task.”²⁶⁴ Thus, in *Twombly*, the Court first found that it need not accept the plaintiffs’ conclusory assertion that an

²⁴⁹ 129 S. Ct. 1937 (2009).

²⁵⁰ *Id.* at 1942.

²⁵¹ *Id.* at 1943.

²⁵² *Id.* (citing *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)).

²⁵³ *Id.* at 1944 (citations omitted).

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 1948.

²⁵⁶ *Id.* at 1948–49.

²⁵⁷ *Id.* at 1949.

²⁵⁸ *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

²⁵⁹ *Id.* (quoting *Twombly*, 550 U.S. at 556).

²⁶⁰ *Id.* (quoting *Twombly*, 550 U.S. at 557).

²⁶¹ *Id.*

²⁶² *Id.* (citing *Twombly*, 550 U.S. at 555).

²⁶³ *Id.* (citing *Twombly*, 550 U.S. at 556).

²⁶⁴ *Id.* at 1950.

unlawful agreement existed, then went on to evaluate (and reject) the “well-pleaded fact of parallel conduct” under the plausibility standard.²⁶⁵

The Court proceeded to evaluate the respondent’s claims, finding that he, similar to the plaintiffs in *Twombly*, had failed to “nudge[] [his] claims . . . across the line from conceivable to plausible.”²⁶⁶ First, the respondent’s “formulaic” allegations that the petitioners designed and implemented the alleged discriminatory policy were “conclusory and not entitled to be assumed true.”²⁶⁷ The Court then found that the allegations failed under the plausibility analysis because, although the respondent’s allegations were “consistent” with a discriminatory policy, they did not “plausibly establish” that purpose in light of “more likely explanations.”²⁶⁸ Those alternate explanations being that the petitioners sought to keep terrorist suspects in a secure location, and this produced “a disparate, incidental impact on Arab Muslims.”²⁶⁹

The Court also considered, and rejected, three arguments offered by the respondent.²⁷⁰ First, it found that *Twombly* was not “limited” to antitrust cases, thus preserving the trans-substantive nature of Rule 8.²⁷¹ Second, it found that possible efforts to “cabin” or contain discovery in anticipation of a summary judgment motion were irrelevant to whether the complaint could survive a motion to dismiss.²⁷² In making this finding, it cited the passage in *Twombly* noting that Courts had limited success in containing discovery abuse.²⁷³ Third, the Court found that Rule 9’s reference to “general[]” pleading for an individual’s state of mind, which is juxtaposed with a heightened standard for allegations of fraud or mistake, did not alter its analysis of the Rule 8 standard.²⁷⁴

Justice Souter, author of the majority opinion in *Twombly*, dissented.²⁷⁵ He was joined by Justices Stevens, Ginsburg, and Breyer.²⁷⁶ Justice Souter first disputed the majority’s characterization of *Bivens* liability, arguing that the respondent could succeed on a theory of supervisory liability, even if he could not prevail under a respondeat superior theory specifically.²⁷⁷ Justice Souter then contended that the majority had misapplied *Twombly*, stating that “*Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual

²⁶⁵ *Id.* (citing *Twombly*, 550 U.S. at 570).

²⁶⁶ *Id.* at 1951 (quoting *Twombly*, 550 U.S. at 570).

²⁶⁷ *Id.* (quoting *Twombly*, 550 U.S. at 554–55).

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 1952.

²⁷¹ *Id.* at 1953.

²⁷² *Id.* (citation omitted).

²⁷³ *Id.* at 1953 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007)).

²⁷⁴ *Id.* at 1954 (citing FED. R. CIV. P. 9(b)).

²⁷⁵ *Id.* (Souter, J., dissenting).

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 1955–58.

allegations are probably true.”²⁷⁸ He indicated that he did not believe that the majority disagreed with his “understanding of ‘plausibility’ under *Twombly*.”²⁷⁹ To the contrary, he disputed the first aspect of the majority’s analysis—the part where the Court determined that some of the respondent’s allegations were conclusory, and therefore, could be disregarded.²⁸⁰ Contrary to the majority, Justice Souter would have found that the respondent’s allegations that the petitioners created and condoned the discriminatory policies were not conclusory in light of several “subsidiary allegations.”²⁸¹ Thus, considering the allegations taken together, Justice Souter would have found that the complaint satisfied the Rule 8 standard.²⁸²

Unsurprisingly, scholars have extensively analyzed, discussed, and debated the *Twombly* and *Iqbal* decisions.²⁸³ Some have persuasively argued that *Conley* was treated as “authoritative” and “followed uniformly” before *Twombly*, contrary to the majority’s assertions.²⁸⁴ Many have suggested that the decisions will strongly disadvantage plaintiffs,²⁸⁵ particularly in certain types of cases where plaintiffs must rely on information from defendants’ files to prove their claims.²⁸⁶ Somewhat surprisingly, however, commentators have largely ignored the potential impact of these decisions on discovery procedures.²⁸⁷

For their part, many courts have accepted the reality of the “new” “heightened” pleading standard.²⁸⁸ Initial data indicates a slight increase

²⁷⁸ *Id.* at 1959.

²⁷⁹ *Id.* at 1960.

²⁸⁰ *Id.* at 1960–61.

²⁸¹ *Id.* at 1961.

²⁸² *Id.* at 1955.

²⁸³ Thomas, *supra* note 40, at 16 n.2 (collecting articles).

²⁸⁴ Epstein, *supra* note 65, at 64.

²⁸⁵ See, e.g., Cassidy M. Flake, Casenote, *Ashcroft in a Defendant’s Wonderland: Redefined Pleading Standards in Ashcroft v. Iqbal*, 61 MERCER L. REV. 977, 992 (2009) (arguing that it is an “understatement” to suggest that “the effects of *Iqbal* will unfairly disadvantage plaintiffs in a ‘dramatic departure from settled procedural law’” (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 573 (2007) (Stevens, J., dissenting))).

²⁸⁶ Spencer, *supra* note 58, at 28–29 (suggesting that the plausibility standard may have a disproportionate impact on employment discrimination, civil rights, and antitrust claims); Thomas, *supra* note 40, at 32 (suggesting that “[e]mployment discrimination may be one of the areas most affected by” the decisions); cf. Minna J. Kotkin, *Discovery in the Real World*, 46 FLA. L. REV. 115, 121 (1994) (noting that individual plaintiffs in employment discrimination actions generally have few relevant documents and need information from the defendant’s files to prove their claims).

²⁸⁷ Cf. Z.W. Julius Chen, Note, *Following the Leader: Twombly, Pleading Standards, and Procedural Uniformity*, 108 COLUM. L. REV. 1431, 1453–62 (2008) (suggesting that states must consider the impact of pleading standards within the context of other pretrial procedures when deciding whether to adopt the *Twombly* standard).

²⁸⁸ See, e.g., *Angell v. Ber Care, Inc. (In re Caremerica, Inc.)*, 409 B.R. 737, 745 (Bankr. E.D.N.C. 2009) (referring to the “new” and “heightened” pleading standard set forth in *Twombly* and *Iqbal*).

in the percentage of motions to dismiss granted by the courts since *Iqbal*.²⁸⁹

H. Summary

The Federal Rules of Civil Procedure were adopted with the goal of promoting substance over form and justice over brinksmanship. Accordingly, they set out a system with a low initial threshold for filing a lawsuit, testing only the legal basis of the claim, and then allowing the parties to proceed with broad discovery to uncover the true facts. Unmeritorious claims could then be disposed of prior to trial with summary judgment.

This system appeared to work well up until the 1970s. By then, however, many became concerned that unrestrained discovery had begun to consume the entire litigation process and derail the justice system into an endless abyss of tangential disputes. The Advisory Committee eventually accepted radical solutions like mandatory disclosure and discovery limits. But still, some commentators insisted that the problem had not been solved. Widespread electronic data creation and storage only threw fuel on a fire that had been burning for over 30 years.²⁹⁰ The Supreme Court apparently decided that a more fundamental change was needed. It cast notice pleading aside for an exacting evaluation of cases at the pleading stage, analyzing not only the legal basis for claims, but also the facts.

Procedural rules are important because they “allocate power between litigants and thus affect substantive results.”²⁹¹ Since the advent of the Federal Rules in 1938, the Supreme Court, the Advisory Committee, and commentators have struggled to achieve the proper balance between several competing values.²⁹² The difficulty lies in the fact

²⁸⁹ STATISTICS DIVISION, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, MOTIONS TO DISMISS (July 28, 2010), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Motions_to_Dismiss_081210.pdf (indicating that the number of motions to dismiss granted as a percentage of total cases filed increased from approximately 12% before *Twombly* to 14% after *Iqbal*); Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 555–56 (2010) (finding that 46% of motions to dismiss sampled were granted before *Twombly*, compared with 48% after *Twombly*, and 56% after *Iqbal*). These statistics would not indicate, however, whether any potential plaintiffs declined to bring claims that they would have brought prior to the *Twombly* and *Iqbal* decisions.

²⁹⁰ Cf. Paul V. Niemeyer, *Here We Go Again: Are the Federal Discovery Rules Really in Need of Amendment?*, 39 B.C. L. REV. 517, 518–19 (1998) (noting that broad discovery policies created serious problems in light of the “geometrically increased number of records and amount of data now maintained”).

²⁹¹ Moskowitz, *supra* note 132, at 597.

²⁹² See HARE, GILBERT & OLLANIK, *supra* note 48, at 47–55 (“Nearly every commentator on discovery abuse has looked to the litigation climate established by the Federal Rules of Civil Procedure to identify potential solutions.” Further noting that the Federal Rules of Civil Procedure attempt to balance conflicting values including: the “utility of discovery: full disclosure vs. cost savings”; the “concern with

that changing the rules to address one problem may necessarily create another.²⁹³ As this evolution demonstrates, cutting back access to information to protect against abuse while still promoting just resolution of disputes is no easy task.²⁹⁴

III. INTERROGATORIES

The discovery rules provide parties with a number of tools to uncover the facts of a case. All discovery devices are intended to function as part of an integrated process “to enable a party to prepare its case for trial in a manner that advances the overriding purpose of the federal rules as a whole: to ‘promote the just, speedy, and inexpensive determination of the action.’”²⁹⁵ In this sense, they all serve the same purpose²⁹⁶ and are complementary.²⁹⁷ Interrogatories are one part of this process. Indeed, in theory, the ability to send a party a written question and have it respond under oath would seem like a vital tool to help achieve the goals of the Federal Rules of Civil Procedure.²⁹⁸ The reality, however, is more problematic.²⁹⁹

This Part focuses on interrogatories under Rule 33 in detail. It examines the two types of interrogatories and their functions in modern litigation, and compares them with other discovery tools. This Part concludes with a discussion of the prior criticisms of interrogatories and proposals for reform.

discovery overuse vs. concern with evasion”; the “counsel as [an] advocate vs. [the] counsel as [an] officer of the court”; “judicial intervention vs. judicial laissez-faire”; “pre-filing proof of liability vs. proof obtained by discovery”; and “who pays: discovering party vs. disclosing party.”).

²⁹³ *Id.* at 47–48 (“Adjusting the rules in a manner that adversely impacts only undesirable conduct is not an easy task. Rules intended to promote one worthy objective frequently adversely affect another.”).

²⁹⁴ *Id.* at 47 (“The difficult task facing rule reformers is to change the climate so as to eradicate pernicious species of discovery conduct and encourage conduct positively directed toward seeking truth and justice.”).

²⁹⁵ *Id.* at 5 (quoting 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, *FEDERAL PRACTICE AND PROCEDURE* § 2001 (2010)); WRIGHT, MILLER & MARCUS, *supra* note 74, § 2163 (suggesting that all discovery rules have the same function, but “provide varying procedures to accomplish that result”).

²⁹⁶ Wilken & Bloom, *supra* note 2, § 33.03 (“Interrogatories serve the same purpose as other forms of discovery,” namely “to further the rational and balanced search for truth, and to secure the just, speedy, and inexpensive determination of every action.”).

²⁹⁷ *Id.* § 33.04[1].

²⁹⁸ See United States Army Legal Services Agency, *Interrogatories—to Answer or not to Answer, That is the Question: a Practical Guide to Federal Rule of Civil Procedure 33*, ARMY LAW., Aug. 1997, at 38, 38 (“In theory, there could not be a simpler, more efficient, and less expensive discovery method than sending written questions to the opposing party and having him send back the sworn written answers. In practice, however, interrogatories often are frustrating, costly, and ineffective for both parties.”).

²⁹⁹ See *id.*

A. The Evolution of Rule 33

The evolution of interrogatory discovery follows the same arc as discovery in general: a gradual expansion of the device until the 1970s, followed by retraction. Interrogatories, like most discovery devices, predate the Federal Rules. Indeed, the original version of Rule 33 was based on Federal Equity Rule 58.³⁰⁰ The original rule simply provided that “[a]ny party may serve upon any adverse party written interrogatories.”³⁰¹ The responding party was then to answer each interrogatory “separately and fully in writing under oath” and sign the response.³⁰²

The 1970 amendments contained the first significant changes to Rule 33. Two changes are particularly noteworthy. The first explicitly condoned contention interrogatories, while the second codified the “business records” option.

Equity Rule 58 had only permitted parties to seek information about “facts and documents” with interrogatories.³⁰³ The original version of Rule 33 did not specify its scope, but in 1946 it was amended to refer to Rule 26(b)’s broad language,³⁰⁴ permitting discovery into any non-privileged matter “relevant to subject matter involved in the pending action.”³⁰⁵ Based on the old Equity Rule’s limited scope, however, some courts had read a similar restriction into Rule 33.³⁰⁶ Others disagreed, finding that the liberal pleading rules weighed in favor of permitting contention interrogatories.³⁰⁷ In the 1970 amendments, the Advisory Committee sought to overrule the line of authority limiting the scope of interrogatories, adding the following provision to Rule 33:

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed, or at a pre-trial conference, or other later time.³⁰⁸

The Advisory Committee noted that “[e]fforts to draw sharp lines between facts and opinions have invariably been unsuccessful, and the

³⁰⁰ FED. R. CIV. P. 33 advisory committee’s note (discussing the 1937 adoption of Rule 33); *see also* WRIGHT, MILLER & MARCUS, *supra* note 74, § 2161.

³⁰¹ *See* Wilken & Bloom, *supra* note 2, § 33App.01[1].

³⁰² *Id.*

³⁰³ WRIGHT, MILLER & MARCUS, *supra* note 74, § 2167.

³⁰⁴ FED. R. CIV. P. 33 advisory committee’s note (discussing the 1946 Amendment).

³⁰⁵ *Id.*; *see supra* note 69.

³⁰⁶ WRIGHT, MILLER & MARCUS, *supra* note 74, § 2167.

³⁰⁷ *Id.* § 2167 n.9 (citing *Hartsfield v. Gulf Oil Corp.*, 29 F.R.D. 163, 164–65 (E.D. Pa. 1962)).

³⁰⁸ *See* Wilken & Bloom, *supra* note 2, § 33App.03[2], at 33App.-6.

clear trend of the cases is to permit ‘factual’ opinions.”³⁰⁹ It further indicated that it was explicitly extending the device to “requests for opinions or contentions that call for the application of law to fact” because they “can be most useful in narrowing and sharpening the issues, which is a major purpose of discovery.”³¹⁰ In the notes to Rule 26, the Advisory Committee further explained that this change might require “a party and his attorney . . . to disclose, to some extent, mental impressions, opinions, or conclusions” but noted that any documents containing that information would be protected from discovery by the work product doctrine as codified in Rule 26(b)(3).³¹¹ The Advisory Committee further revised the language to Rule 33 in 2007, deleting the phrase “not necessarily” because it “seemed to imply” that an interrogatory could be objectionable “merely” because it did seek information about a contention.³¹²

The Advisory Committee drew the line, however, at interrogatories seeking contentions about “issues of ‘pure law,’ *i.e.*, legal issues unrelated to the facts of the case.”³¹³ It further noted that discovery may be needed to answer “mixed questions of law and fact,” and therefore allowed courts to defer responses to contention interrogatories until the end of the discovery period.³¹⁴

Notably, the Advisory Committee acknowledged Professor James’s concern that permitting contention interrogatories would “reintroduce undesirable aspects of the prior pleading practice, whereby parties were chained to misconceived contentions or theories, and ultimate determination on the merits was frustrated.”³¹⁵ However, it doubted this would become a problem since interrogatories are not binding on the responding party, who may generally withdraw or amend them, absent prejudice.³¹⁶

The second major revision in the 1970 amendments explicitly permitted a party to respond to an interrogatory by producing business

³⁰⁹ FED. R. CIV. P. 33 advisory committee’s note (discussing the 1970 Amendment).

³¹⁰ *Id.*

³¹¹ FED. R. CIV. P. 26(b)(3) advisory committee’s note (discussing the 1970 Amendment).

³¹² FED. R. CIV. P. 33 advisory committee’s note (discussing the 2007 Amendment and noting that this implication was ignored in practice as “[o]pinion and contention interrogatories are used routinely”).

³¹³ *Id.* (discussing the 1970 Amendment).

³¹⁴ *Id.*

³¹⁵ *Id.* (citing Fleming James, Jr., *The Revival of Bills of Particulars Under the Federal Rules*, 71 HARV. L. REV. 1473 (1958)); see also WRIGHT, MILLER & MARCUS, *supra* note 74, § 2163 (noting that Professor James’ argument that allowing discovery of a party’s contentions may “undesirabl[y]” revive the discredited bill of particulars device “was rejected” with the adoption of the 1970 amendments).

³¹⁶ FED. R. CIV. P. 33 advisory committee’s note (discussing the 1970 Amendment).

records.³¹⁷ Prior to that time, some courts had prohibited this practice.³¹⁸ The Rule only permits the responding party to invoke this option, however, where “the burden of deriving or ascertaining the answer is substantially the same for” both parties.³¹⁹ The Advisory Committee contended that this provision would shift the burden of potentially expensive research to the requesting party “without undermining the liberal scope of interrogatory discovery.”³²⁰

The Advisory Committee made the next set of significant revisions to Rule 33 in 1993. As previously discussed, these amendments imposed a 25 interrogatory limit (including subparts) on each party.³²¹ The Advisory Committee indicated that it was imposing the limit because interrogatories “can be costly and may be used as a means of harassment.”³²² It claimed, however, that the limit would “not . . . prevent needed discovery, but [rather] provide judicial scrutiny before parties make potentially excessive use of this discovery device.”³²³

B. Identification and Contention Interrogatories

Under the current version of Rule 33, interrogatories can be generally classified into two groups: identification interrogatories and contention interrogatories.³²⁴ Identification interrogatories seek factual information, including many of the subjects that have since been covered by the mandatory disclosure provisions.³²⁵ Primarily, they seek lists of factual information, such as potential witnesses.³²⁶ They may also include requests for summaries of statistical or technical data.³²⁷ Identification

³¹⁷ See Wilken & Bloom, *supra* note 2, § 33App.03[1], at 33App.-6.

³¹⁸ See WRIGHT, MILLER & MARCUS, *supra* note 74, § 2178.

³¹⁹ Wilken & Bloom, *supra* note 2, § 33App.03[1], at 33App.-11.

³²⁰ FED. R. CIV. P. 33 advisory committee’s note (discussing the 1970 Amendment) (citation omitted).

³²¹ See Wilken & Bloom, *supra* note 2, § 33App.05[1], at 33App.-11. Notably, the original rule limited the parties to “one set” of interrogatories. *Id.* § 33App.01[1], at 33App.-1. The Advisory Committee deleted this limitation in the 1946 Amendment. *Id.*

³²² FED. R. CIV. P. 33 advisory committee’s note (discussing the 1993 Amendment).

³²³ *Id.*

³²⁴ See Johnston & Johnston, *supra* note 21, at 442; see also Fischer & Porter Co. v. Tolson, 143 F.R.D. 93, 95 (E.D. Pa. 1992).

³²⁵ See *infra* note 348.

³²⁶ See Johnston & Johnston, *supra* note 21, at 442.

³²⁷ Notably, Luria and Clabby, relying on Kenneth R. Berman, classify interrogatories seeking technical and statistical data and interrogatories seeking knowledgeable persons as separate categories. See Luria & Clabby, *supra* note 3, at 34 (citing Kenneth R. Berman, *Q: Is This Any Way to Write an Interrogatory? A: You Bet It Is*, in THE LITIGATION MANUAL: PRETRIAL 154, 155 (John G. Koeltl & John Kiernan eds., 3d ed. 1999)). These commentators, however, were not attempting to categorize all types of interrogatories in general; rather, they were identifying particular subcategories that they deemed to be effective. See *id.*

interrogatories are generally not controversial,³²⁸ unless they impose a significant burden on the party compiling the response.³²⁹ In those instances, a responding party may invoke the business records option.³³⁰

In contrast, contention interrogatories are more controversial.³³¹ They seek to explore what a party is contending (whether in its pleading or otherwise) and the bases for those contentions.³³² They may seek factual contentions (such as a narrative description of a party's version of events)³³³ or they may require the responding party to apply the law to factual contentions.³³⁴ A typical set of contention interrogatories may simply track the allegations in the complaint and ask the plaintiff to identify the bases for each contention.³³⁵ Thus, a contention interrogatory in a products liability case might read:

³²⁸ See, e.g., Bogue, *supra* note 115, at 203.

³²⁹ Flegal, *supra* note 115, at 21–22; cf. Johnston & Johnston, *supra* note 21, at 441.

³³⁰ See FED. R. CIV. P. 33(d).

³³¹ Johnston & Johnston, *supra* note 21, at 444; Kristen Scott Beerly, Note, *An Attorney's Thoughts Remain Inviolable: The Missouri Supreme Court Protects Intangible Work Product*, 62 MO. L. REV. 449, 469 (1997).

³³² See, e.g., Wilken & Bloom, *supra* note 2, § 33.02[2][b], at 33–10 (“Contention interrogatories may, among other things, ask a party to (1) state what it contends or whether it is making a certain contention, (2) explain the facts underlying its contention, (3) assert a position or explain that position with regard to how the law applies to the facts, or (4) articulate the legal or theoretical reason for a contention.”); Johnston & Johnston, *supra* note 21, at 442 (identifying four types of contention interrogatories, based on Judge Brazil’s analysis in *In re Convergent Technologies Securities Litigation*, 108 F.R.D. 328, 332 (N.D. Cal. 1985): “first, a question which asks another party what it contends; second, a question which asks another party whether it makes a specified contention; third, a question asking a party to state all the facts or evidence upon which it bases a contention; and fourth, a question which asks the party to take a position and then to explain that position with respect to how the law applies to the facts or asks a party to articulate the legal basis or theory behind a specified contention”); see also 7A WEST’S FED. FORMS, ADMIRALTY § 11803 (2010); Gianfranco A. Pietrafesa, *Contention Interrogatories*, N.J. LAW., Dec. 2001, at 9, 10.

³³³ See, e.g., *Brassell v. Turner*, No. 3:05CV476LS, 2006 WL 1806465, at *2 (S.D. Miss. June 29, 2006) (discussing interrogatories that call for a “narrative response” and noting that they are only improper where they are overbroad or burdensome, even if they could also be sought through a deposition). Others have categorized “substantive interrogatories,” such as those “requesting a description of events or discussions at a meeting,” as a separate category. See Bogue, *supra* note 115, at 203. Here, these types of “substantive” interrogatories are classified as contention interrogatories seeking factual information.

³³⁴ See FED. R. CIV. P. 33(c).

³³⁵ See *In re Convergent Techs. Sec. Litig.*, 108 F.R.D. at 337, 346 (referring to these as “classic” examples of contention interrogatories and suggesting that this practice is “a serious form of discovery abuse”); *County of Suffolk v. Lilco*, No. 87 CV 0646 (JBW), 1988 WL 69759, at *1 (E.D.N.Y. June 13, 1988) (discussing interrogatories that “for the most part track . . . allegations in the complaint . . . and request all facts, all documents and the identify of all individuals with knowledge of the facts which support the allegations”).

State the bases for your contention in the Complaint that the product in question was “unreasonably dangerous” due to “lack of, or improper, warnings or instructions,” including, but not limited to:

- (a) any and all warnings or instructions that accompanied the product or were communicated to you;
- (b) the source of any and all warnings or instructions;
- (c) each and every warning or instruction that was not communicated that rendered the product unreasonably dangerous; and
- (d) any and all other facts that you contend rendered the warnings or instructions or method of communication unreasonably dangerous.³³⁶

Thus, contention interrogatories are supposed to fill in the gaps of the notice pleading system.³³⁷

In jurisdictions that do not use the notice pleading standard, however, there is less of a need for contention interrogatories. *State ex rel. Papin Builders, Inc. v. Litz*,³³⁸ illustrates this point. In *Litz*, the court found

³³⁶ See JAMES WM. MOORE, 4 MOORE’S MANUAL: FEDERAL PRACTICE FORMS 15B-607 (Matthew Bender & Co., Inc. 2009) (proposing a form interrogatory similar to the text for a products liability case involving an unreasonably dangerous product).

³³⁷ See, e.g., WRIGHT, MILLER & MARCUS, *supra* note 74, § 2163 (noting that interrogatories may be used to develop further information where the “pleadings are quite general”); Alex Wilson Albright, *New Discovery Rules: The Supreme Court Advisory Committee’s Proposal*, 15 REV. LITIG. 275, 284–85 (1996) (“The contention interrogatory . . . began as a tool to require parties with notice pleadings to plead more particularly.”); Beerly, *supra* note 331, at 469 (“[T]he rationale for allowing contention interrogatories is rooted in the federal notice pleading system.”); Johnston & Johnston, *supra* note 21, at 449–50 (“The function of the complaint under the federal rules is to notify the defendant of the plaintiff’s claim rather than detail the evidence which if true would show that the plaintiff should prevail. The complaint needs to indicate the nature of the plaintiff’s claim with only enough specificity to allow the parties to determine the preclusive effect of a judgment disposing of the claim. Thus, when a true notice pleading is filed, contention interrogatories allow a party to discover the theory behind the claim.”); see also *Johnson v. Kraft Foods N. Am., Inc.*, 236 F.R.D. 535, 544–45 (D. Kan. 2006) (finding that “[b]ecause of the simplicity of notice pleading . . . [the defendants were] ‘entitled to know the factual basis of plaintiff’s allegations’” and the plaintiff accordingly had to provide answers to the defendants’ contention interrogatories (citation omitted)); *Anaya v. CBS Broad. Inc.*, No. CIV 06-0476 JBKBM, 2007 WL 2219458, at *6 (D.N.M. May 16, 2007) (quoting *Johnson*, 236 F.R.D. at 544–45).

³³⁸ 734 S.W.2d 853 (Mo. Ct. App. 1987). The decision in *Litz* was later overruled by the same appellate court that decided it in *State ex rel. Krigbaum v. Lemon*, 854 S.W.2d 72, 75 (Mo. Ct. App. 1993) (rejecting *Litz* and finding that contention interrogatories should be answered because they aid the purposes of discovery). However, *Lemon* was then, itself, overruled by the Missouri Supreme Court in *State ex rel. Atchison, Topeka & Santa Fe Railway Co. v. O’Malley*, 898 S.W.2d 550, 552–53 (Mo. 1995). Contrary to *Lemon*, the *O’Malley* court found that a party properly objected to interrogatories seeking intangible work product and that Missouri’s equivalent of Rule 26(b)(3) only codified “half of the work product doctrine,” and did not “alter or

that several contention interrogatories were not authorized under Missouri's discovery rules, which closely resembled the Federal Rules.³³⁹ The court noted that unlike the federal "notice pleading" system, Missouri used a "fact pleading" system where "the pleadings must . . . contain [the] facts" and serve a role beyond simply placing the defendant on notice of the claim.³⁴⁰ Thus:

In the federal system the pleadings are committed to a lesser role; emphasis is placed on discovery to define and sharpen the issues. In Missouri, however, while discovery is broad, the same emphasis is not placed on the discovery process to sharpen and define the issues as in the federal system.³⁴¹

After noting that the Missouri rule on interrogatories was modeled on the Federal Rule, the court proceeded to distinguish federal cases permitting contention interrogatories.³⁴² "These federal decisions are based upon the basic philosophy of the federal rules that the pleadings only serve the function of giving general notice of a claim and that the proper method of ascertaining and sharpening the issues is by means of discovery."³⁴³ The court went on to note that even under the federal system, contention interrogatories "are not unlimited."³⁴⁴ The court then determined that the Missouri rule had to be "construed in a manner consistent with the Missouri philosophy dealing with the relative importance of pleadings and discovery."³⁴⁵ The court subsequently found that two interrogatories were objectionable and that the court below had abused its discretion in overruling the responding party's objections.³⁴⁶

C. Modern Functions

Proponents of interrogatories have suggested that they serve a number of functions in modern litigation. They have claimed that parties can effectively use interrogatories to obtain: (1) information that leads to other discovery; (2) "objective" factual information; (3) summaries of technical or statistical data; (4) information that has to be gathered from an entire organization; (5) information about a party's contentions; (6) admissions; (7) information that forms the basis for a summary

abrogate the protections of intangible work product, which exist independently of" that rule. *Id.* at 553. As one commentator has noted, the *O'Malley* decision supports the continuing viability of the *Litz* court's reasoning. Beerly, *supra* note 331, at 469.

³³⁹ 734 S.W.2d at 855, 858.

³⁴⁰ *Id.* at 858 (citation omitted).

³⁴¹ *Id.*

³⁴² *Id.* at 860.

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ *Id.* at 861.

³⁴⁶ *Id.* The court also found that a third interrogatory was proper where it sought information that should have been included in the responding party's pleading. *Id.* at 862.

judgment motion; and (8) their adversary's work product. Depending on the situation, a party may use either identification or contention interrogatories for these various purposes, although one type may be better suited for a particular purpose. For example, discovering information about a party's contentions is the basic function of a contention interrogatory, just as seeking information about potential witnesses is the classic example of an identification interrogatory. This section summarizes these potential functions.

1. *Leading to Other Discovery*

One of the most common uses of interrogatories is to obtain information that will lead to other discovery.³⁴⁷ Many of the topics (such as obtaining information about potential witnesses, who may then be deposed) are now encompassed by the mandatory disclosure provisions.³⁴⁸ However, interrogatories can be used to obtain more information about those subjects than Rule 26(a) requires.³⁴⁹ Notably, Rule 26(a)(1) presently only requires a party to disclose information about potential witnesses and documents that the disclosing party "may use to support its claims or defenses, unless the use would be solely for impeachment."³⁵⁰ Thus, a party can use an interrogatory to obtain information about other potential witnesses—i.e., those with damaging

³⁴⁷ See, e.g., WRIGHT, MILLER & MARCUS, *supra* note 74, § 2163 (suggesting that interrogatories are useful for "obtain[ing] information needed in order to make use of the other discovery procedures"); ROGER S. HAYDOCK ET AL., FUNDAMENTALS OF PRETRIAL LITIGATION § 7.1.4 (7th ed. 2008) (noting that interrogatories can be used early in discovery to help a party determine how to proceed, including who to depose, what areas to inquire about, and how to approach document discovery).

³⁴⁸ See, e.g., ROGER S. HAYDOCK & DAVID F. HERR, DISCOVERY PRACTICE § 21.01 (5th ed. Supp. 2010) (acknowledging that "[t]he current federal disclosure rules and similar state rules eliminate or reduce the need for some interrogatories."); HAYDOCK ET AL., *supra* note 347, § 7.2.1 (acknowledging that disclosure procedures, as in Rule 26(a), require the parties to disclose information that could otherwise be obtained through interrogatories); WRIGHT, MILLER & MARCUS, *supra* note 74, § 2163 (suggesting that interrogatories may be used to obtain further information through which to take depositions of witnesses and aid document discovery but conceding that "initial disclosure and Rule 26(f) conferences may be equally effective"); Berman, *supra* note 327, at 154 (recognizing that the Rule 26(a) disclosure rules have superseded interrogatories as "the main search engine for discovering information about insurance, expert opinions, and damages"); Luria & Clabby, *supra* note 3, at 43 ("Much of the benefit that Rule 33 interrogatories traditionally brought to litigation is now provided through other means."); Oliver, *supra* note 115, at 660 (suggesting mandatory disclosure provisions can "eliminate the need for lengthy interrogatories"); Wilken & Bloom, *supra* note 2, § 33.03 ("Much of the information that was previously sought by interrogatories must now be disclosed by the parties at the outset of litigation without a formal discovery request under the mandatory disclosure provisions of Rule 26(a)."); see also HARE, GILBERT & OLLANIK, *supra* note 48, at 61 (noting that "[t]he automatic disclosure requirements found in amended rule 26 have been likened to interrogatories of the court" (citing FED. R. CIV. P. 26(a)(1) advisory committee's note)).

³⁴⁹ Wilken & Bloom, *supra* note 2, § 33.41[6], at 33-49.

³⁵⁰ FED. R. CIV. P. 26(a)(1)(A)–(B).

information about the disclosing party's case that the disclosing party is unlikely to use affirmatively.³⁵¹

2. *Objective Factual Information*

Interrogatories can also be used to obtain other factual information which may be useful in and of itself, rather than for the purpose of developing other discovery.³⁵² Proponents of this interrogatory use have suggested that it works best when limited to "simple"³⁵³ or "objective"³⁵⁴ facts. This category could potentially include measurements or information about an entity's incorporation or legal status.³⁵⁵ Some have suggested that this type of interrogatory may be useful in eliminating unnecessary depositions.³⁵⁶

3. *Technical or Statistical Data*

Arguably part of the last category,³⁵⁷ some have argued that interrogatories are particularly well-suited for discovering information about technical or statistical data.³⁵⁸ Supposedly, the attorney preparing the responses will be less capable of answering questions about technical issues or statistics and will accordingly have to rely on "a technical person" working with or for the client in order to answer the interrogatories.³⁵⁹ Since the interrogatory will be answered directly by the person with knowledge, rather than the adverse party's attorney, the answer is more likely to be useful.³⁶⁰

4. *Gather Information from an Entire Organization*

An organization responding to an interrogatory must answer using all information available to it.³⁶¹ Thus, while a particular witness may only be able to answer questions based on information available to that individual, an organization responding to interrogatories has an affirmative duty to research and gather all information available to the

³⁵¹ See HAYDOCK ET AL., *supra* note 347, § 7.2.1 (suggesting that interrogatories may be used to obtain more information than is subject to the disclosure requirements, since they are limited to information that the disclosing party "may use to support its claims or defenses") (quoting FED. R. CIV. P. 26(1)(A)); *cf.* Berman, *supra* note 327, at 162–63 (suggesting that sending an interrogatory inquiring about "knowledgeable person[s]" was still useful under the previous formulation of Rule 26 because that Rule was limited to facts "alleged with particularity").

³⁵² See, e.g., Wilken & Bloom, *supra* note 2, § 33.03, at 33-13.

³⁵³ WRIGHT, MILLER & MARCUS, *supra* note 74, § 2163.

³⁵⁴ HAYDOCK ET AL., *supra* note 347, § 7.2.3.

³⁵⁵ See *id.*

³⁵⁶ *Cf.* Wilken & Bloom, *supra* note 2, § 33.03, at 33-13.

³⁵⁷ HAYDOCK ET AL., *supra* note 347, § 7.2.3.

³⁵⁸ See *id.*; Berman, *supra* note 327, at 160–61.

³⁵⁹ *Id.* at 161.

³⁶⁰ See *id.* at 160–61.

³⁶¹ See FED. R. CIV. P. 33(b)(1)(B).

entire organization when responding.³⁶² This is true despite the fact that an individual will have to sign the interrogatories on behalf of the organization.³⁶³

5. *Information About Contentions*

As discussed in Part III.B, interrogatories are often used to obtain information about an adverse party's contentions. This is particularly true under the notice pleading framework,³⁶⁴ leaving some to suggest that they are the preferred method of obtaining information about a party's pleading.³⁶⁵ Some have suggested that interrogatories are ideal for seeking information about positions that a party has taken in its pleading and certified under Rule 11 because a party cannot evade questioning about its own assertions.³⁶⁶ Contention interrogatories may also go beyond the allegations in the pleadings—a party may more generally ask another party what it is contending or whether it is making a particular contention.³⁶⁷ As noted above, contention interrogatories may not be used to obtain information about issues of “pure law,”³⁶⁸ however, distinctions between permissible questions of mixed law and fact and impermissible issues of “pure law” can be “uncertain.”³⁶⁹

6. *Admissions*

Many commentators also promote interrogatories as a useful means of obtaining admissions.³⁷⁰ Interrogatory answers may be admissible at trial as admissions or for impeachment purposes.³⁷¹ However, a party may amend them at any time³⁷² and they are generally understood not to limit a party's proof at trial, absent severe prejudice.³⁷³

³⁶² See, e.g., HAYDOCK ET AL., *supra* note 347, § 7.1.1; HAYDOCK & HERR, *supra* note 348, § 21.01[A]; Wilken & Bloom, *supra* note 2, § 33.104[3] (noting that an organization must draw on its “collected knowledge” when answering interrogatories).

³⁶³ See, e.g., Wilken & Bloom, *supra* note 2, § 33.104[3], at 33-80 to -81.

³⁶⁴ See *supra* note 337.

³⁶⁵ See HAYDOCK ET AL., *supra* note 347, § 7.1.1 (stating that interrogatories are “the intended method to particularize the factual and legal bases for pleadings”).

³⁶⁶ See Luria & Clabby, *supra* note 3, at 35.

³⁶⁷ See *supra* note 332.

³⁶⁸ See FED. R. CIV. P. 33 advisory committee's note (discussing the 1970 Amendment).

³⁶⁹ Wilken & Bloom, *supra* note 2, § 33.79, at 33-68 to -69.

³⁷⁰ See WRIGHT, MILLER & MARCUS, *supra* note 74, § 2163; HAYDOCK ET AL., *supra* note 347, § 7.2.4; Wilken & Bloom, *supra* note 2, § 33.03, at 33-13.

³⁷¹ See, e.g., Wilken & Bloom, *supra* note 2, § 33.160, at 33-95; HAYDOCK & HERR, *supra* note 348, § 21.03[D].

³⁷² See FED. R. CIV. P. 26(e)(1)(A) (providing that a party must supplement its discovery responses where it learns that information in the response is “incomplete or incorrect”).

³⁷³ See FED. R. CIV. P. 33 advisory committee's note (discussing the 1970 Amendment); Johnston & Johnston, *supra* note 21, at 452 (acknowledging that

7. *Bases for Summary Judgment*

Commentators have also suggested that interrogatories are an effective means of uncovering bases for summary judgment motions.³⁷⁴ Theoretically, an interrogatory response could expose a key flaw in the responding party's theory of the case. For example, a response indicating how a party intends to establish one of the required elements of its claim might demonstrate that its theory is implausible.³⁷⁵ The requesting party could then move for summary judgment on that basis, relying on the interrogatory response. This may then, in turn, aid the larger purpose of expediting the final resolution of the case.³⁷⁶

8. *Work Product*

Several commentators have also suggested that interrogatories are a useful means of obtaining adversaries' work product.³⁷⁷ This view appears to rely on the language in the Advisory Committee's notes to Rule 26, which suggests that a party may have to disclose "mental impressions, opinions, or conclusions" in response to an interrogatory.³⁷⁸

D. *Comparison with Other Discovery Devices*

Although all discovery devices serve the same purposes,³⁷⁹ some discovery devices are better suited to discovering certain types of information than others. Indeed, many attorneys prefer mandatory disclosures, document requests, and depositions to interrogatories.³⁸⁰ This section discusses the other discovery devices available to parties under the Federal Rules of Civil Procedure³⁸¹ and compares them with interrogatories.

contention interrogatory responses "are not generally binding"); Wilken & Bloom, *supra* note 2, § 33.160, at 33-95.

³⁷⁴ Johnston & Johnston, *supra* note 21, at 444; Wilken & Bloom, *supra* note 2, § 33.03, at 33-14; *see also* Jayne H. Lee, Inc. v. Flagstaff Indus. Corp., 173 F.R.D. 651, 652 (D. Md. 1997).

³⁷⁵ *Cf. supra* note 161.

³⁷⁶ *See* Wilken & Bloom, *supra* note 2, § 33.03.

³⁷⁷ *See id.* § 33.62[2], at 33-56 (suggesting that opinion work product may be discovered through contention interrogatories); Johnston & Johnston, *supra* note 21, at 451 (taking the position that contention interrogatories are not objectionable based on the work product doctrine because "Rule 26(b)(3) only protects documents and tangible things from discovery").

³⁷⁸ *See* Johnston & Johnston, *supra* note 21, at 451 (quoting FED. R. CIV. P. 26 advisory committee's note).

³⁷⁹ *See supra* notes 295-97 and accompanying text.

³⁸⁰ *See* HAYDOCK & HERR, *supra* note 348, § 21.01 (acknowledging that "[t]he current federal disclosure rules and similar state rules eliminate or reduce the need for some interrogatories" and that "many lawyers" prefer depositions and document requests to interrogatories).

³⁸¹ In addition to the discovery devices discussed in this section, the Federal Rules of Civil Procedure also provide that the court may order a physical or mental examination of a party or person under a party's custody or legal control. FED. R. CIV.

1. *Mandatory Disclosures*

As previously noted, the mandatory disclosure provisions in Rule 26(a) require parties to disclose information about potential witnesses, documents, damages, insurance, expert witnesses, and trial witness and exhibit lists.³⁸² Prior to the advent of mandatory disclosures, much of this information was obtained through interrogatories.³⁸³ However, interrogatories and other discovery devices can still be used to obtain additional information about these subjects.³⁸⁴ Indeed, given that the potential witness and document disclosure provisions are limited to those that the disclosing party “may use” to support its case,³⁸⁵ any competent attorney will serve discovery requests seeking broader information—i.e., the type that will aid his or her client’s case and undermine the adversary’s case.³⁸⁶ Thus, under the current Federal Rules of Civil Procedure, some discovery is necessary to obtain additional information about the mandatory disclosure subjects. Attorneys may use interrogatories to obtain that information, but as discussed below, they may also use other procedures to do so.³⁸⁷

2. *Document Discovery*

Rule 34 permits parties to request another party to produce documents, electronically stored information, or other tangible things for inspection and copying.³⁸⁸ After receiving a Rule 34 request, a responding party must respond to each item or category of materials requested by stating its objections (if any) and stating whether it will provide the requested materials.³⁸⁹ The responding party must then give the requesting party access to the documents or materials that are within responding party’s “possession, custody or control.”³⁹⁰ In practice, many parties will simply exchange copies of requested documents.³⁹¹ Parties are

P. 35. This provision is not applicable in most cases, and accordingly, is rarely a realistic alternative to serving interrogatories.

³⁸² FED. R. CIV. P. 26(a).

³⁸³ See *supra* note 348.

³⁸⁴ See HAYDOCK ET AL., *supra* note 347, § 7.2.1 (suggesting that interrogatories may be used to obtain more information than is subject to the disclosure requirements, since they are limited to information that the disclosing party “may use to support its claims or defenses”) (quoting FED. R. CIV. P. 26(a)(1)(A)).

³⁸⁵ FED. R. CIV. P. 26(a)(1)(A)–(B).

³⁸⁶ See *supra* note 384.

³⁸⁷ Cf. HAYDOCK & HERR, *supra* note 348, § 21.02[A] (listing purported “categories of information that interrogatories do disclose in a most efficient, effective, and economical way,” including several areas covered by Rule 26(a)(1)).

³⁸⁸ FED. R. CIV. P. 34(a). The Rule also permits a party to seek entry onto land controlled by the adverse party for inspection or other purposes. *Id.* Needless to say, the request must be relevant to the claims or defenses in the case. See *id.* (noting that a request must be “within the scope of Rule 26(b)”).

³⁸⁹ FED. R. CIV. P. 34(b)(2)(B).

³⁹⁰ FED. R. CIV. P. 34(a)(1).

³⁹¹ See, e.g., Paul Dieseth, *The Use of Document Depositories and the Internet in Large Scale and Multi-Jurisdictional Products Liability Litigation*, 27 WM. MITCHELL L. REV. 615,

also generally obligated to tell the requesting party where, in their document production, to find documents responsive to particular requests unless the producing party has provided them in the same order that they are normally maintained.³⁹² In the past, some parties attempted to use interrogatories to obtain documents.³⁹³ However, now that the Federal Rules of Civil Procedure limit the number of interrogatories that a party may serve but do not limit the number of document requests, that practice makes little sense. Rule 34 is the proper “vehicle” for document discovery.³⁹⁴

3. Depositions

Rules 30 and 31 provide that a party may depose any person, including another party, by oral examination³⁹⁵ or by written questions,³⁹⁶ respectively. Each side is presumptively limited to a total of ten oral or written depositions.³⁹⁷ Depositions by oral examination are also limited to one day of seven hours, absent an agreement or court order to the contrary.³⁹⁸ Parties can direct a deposition notice to a specific individual³⁹⁹ or, under Rule 30(b)(6) and its equivalent under Rule 31, an organization.⁴⁰⁰ Under those rules, a party may direct a deposition notice to an organization and specify the “matters for examination.”⁴⁰¹ The organization must then designate one or more individuals to testify on its behalf.⁴⁰² Like interrogatories, responses to deposition questions are not binding, but may come into evidence anyway.⁴⁰³

Depositions by oral examination are generally more expensive to prepare than interrogatories.⁴⁰⁴ Unlike a party responding to interrogatories, a deponent generally does not have a duty to gather

617 (2000) (“Typically, of course, a party responds to document requests by making and providing hard copies of responsive documents.”).

³⁹² See FED. R. CIV. P. 34(b)(2)(E)(i)–(ii).

³⁹³ See *Hickman v. Taylor*, 329 U.S. 495, 504 (1947).

³⁹⁴ HAYDOCK & HERR, *supra* note 348, § 21.02[B]; *cf. Hickman*, 329 U.S. at 504 (noting that Rule 33 is not the proper device for seeking document production).

³⁹⁵ FED. R. CIV. P. 30.

³⁹⁶ FED. R. CIV. P. 31.

³⁹⁷ See FED. R. CIV. P. 30(a)(2); FED. R. CIV. P. 31(a)(2).

³⁹⁸ FED. R. CIV. P. 30(d)(1).

³⁹⁹ FED. R. CIV. P. 30(b)(1); FED. R. CIV. P. 31(a)(3).

⁴⁰⁰ FED. R. CIV. P. 30(b)(6); FED. R. CIV. P. 31(a)(4).

⁴⁰¹ FED. R. CIV. P. 30(b)(6); *see also* FED. R. CIV. P. 31(a)(4).

⁴⁰² FED. R. CIV. P. 30(b)(6); *see also* FED. R. CIV. P. 31(a)(4).

⁴⁰³ See Amy E. Hamilton & Peter E. Strand, *Corporate Depositions in Patent Infringement Cases: Rule 30(b)(6) Is Broken and Needs to Be Fixed*, 19 INTELL. PROP. & TECH. L.J. 5, 10 (2007) (noting that statements made in Rule 30(b)(6) deposition testimony are “[o]rdinary evidentiary admissions” which may be “controverted or explained by” a party, as distinguished from “judicial admissions” which are binding).

⁴⁰⁴ See Wilken & Bloom, *supra* note 2, § 33.05[1], at 33-17; WRIGHT, MILLER & MARCUS, *supra* note 74, § 2163.

information in response to deposition questions.⁴⁰⁵ Deponents testifying on behalf of organizations do, however, have a duty to “testify about information known or reasonably available to the organization.”⁴⁰⁶

Depositions by oral examination are one of the key discovery tools available to an attorney. They provide an attorney with the ability to evaluate how a jury will perceive a witness and expose flaws in an adversary’s case.⁴⁰⁷ They are superior to interrogatories in a number of respects. Unlike interrogatories, depositions can reveal the “demeanor and credibility” of a witness and are a better medium for discerning a witness’s interpretation of events.⁴⁰⁸ Similarly, although interrogatories can be used to obtain a party’s narrative recollection of an event, oral depositions are better suited for this type of discovery.⁴⁰⁹ Unlike interrogatories, depositions also allow for spontaneity and follow-up questions.⁴¹⁰ This substantially reduces a deponent’s ability to evade questions.⁴¹¹ Moreover, witnesses at oral depositions do not have time to review the questions beforehand and carefully craft self-serving responses with their counsel.⁴¹²

⁴⁰⁵ WRIGHT, MILLER & MARCUS, *supra* note 74, § 2163 (noting that unlike a deposition, a party responding to interrogatories “generally must make efforts to obtain desired information”).

⁴⁰⁶ FED. R. CIV. P. 30(b)(6); *see also* FED. R. CIV. P. 31(a)(4); Hamilton & Strand, *supra* note 403, at 6 (noting that an organization must gather information “reasonably available to it” and use it to educate a 30(b)(6) deponent).

⁴⁰⁷ *See* Ronald J. Berke & Andrew L. Berke, *Interrogatories*, in 2 LITIGATING TORT CASES § 16:4 (Roxanne Barton Conlin & Gregory S. Cusimano eds., 2010) (suggesting that attorneys save questions that are potentially “harmful” to the other side’s case for deposition when the deponent will not have time to prepare an answer); Stephen P. Groves, *Depositions and Interrogatories Under the Federal Rules of Civil Procedure: Before and After the 1993 Amendments*, 29 TORT & INS. L.J. 483, 484 (1994) (noting that depositions provide a party with an opportunity to evaluate a witness “under conditions similar to the trial itself” and “afford[] an excellent opportunity to catch the deponent in an inaccuracy, exaggeration, or outright lie”).

⁴⁰⁸ HAYDOCK ET AL., *supra* note 347, § 7.2.1 (acknowledging that interrogatories should not be used to seek “testimony or interpretative explanations” or “information depending on the demeanor and credibility of a person”).

⁴⁰⁹ *See* WRIGHT, MILLER & MARCUS, *supra* note 74, § 2177 (noting that a witness’s recollection of a conversation, while a proper subject of an interrogatory, is “better inquired into in a deposition”); *see also* HAYDOCK & HERR, *supra* note 348, § 21.02[B] (noting that interrogatory responses to substantive questions “may not be particularly revealing or helpful”).

⁴¹⁰ Wilken & Bloom, *supra* note 2, § 33.05[2], at 33-18 (noting the “inflexibility of interrogatories compared to depositions” because they do not allow for follow-up or repeated questions).

⁴¹¹ *See* WRIGHT, MILLER & MARCUS, *supra* note 74, § 2163 (“Attempts at evasion, which might be stymied by a persistent oral examination, cannot easily be countered by interrogatories. The flexibility and the potency of oral depositions are in large part lacking in written interrogatories.”).

⁴¹² *See id.* (noting that in depositions, a deponent “does not have the opportunity to study the questions in advance and to consult with counsel before answering, as is the case if interrogatories are used”); *cf.* Berke & Berke, *supra* note 407, at § 16:4 (“In

Depositions by written questions are probably the most similar discovery device to interrogatories.⁴¹³ Practitioners, however, use the procedure “infrequently” for many of the same reasons that most attorneys prefer oral depositions to interrogatories.⁴¹⁴ Depositions by written questions are generally not an effective means of eliciting useful information from an adverse witness.⁴¹⁵

4. *Requests for Admission*

Rule 36 provides that any party may ask any other party to admit facts, application of law to facts, similar opinions, or the authenticity of any document.⁴¹⁶ The responding party must admit the matter, deny it, or explain why the party cannot admit or deny it.⁴¹⁷ Any denial must “respond to the substance of the matter,” and where good faith requires, a party should qualify its response or only partially deny a matter.⁴¹⁸ A party may only respond by explaining why it cannot admit or deny the matter after it has conducted a “reasonable inquiry.”⁴¹⁹ If the court finds that the answer or objection is improper, it may find that the responding party has admitted the matter or that it must serve an amended answer.⁴²⁰ Admitting a matter conclusively establishes it for the purposes of the pending action, unless the court, on motion, permits the party to withdraw or amend the response.⁴²¹ Unlike interrogatories and depositions, the Federal Rules of Civil Procedure do not limit the number of requests to admit that a party may serve.⁴²²

There are three primary distinctions between interrogatories and requests for admission. First, while interrogatories may be broad and general, requests for admission must be simple and specific.⁴²³ Thus, requests to admit are easier to administer since they must be “direct

answering interrogatories, a defendant has weeks to consult with his lawyer, to think about his answer, and to craft an appropriate response.”); Flegal, *supra* note 115, at 22 (stating that interrogatory answers are “worthless” as attorneys often “answer[] with gloss and gossamer, often merely by recopying the vague allegations of a complaint, defense, or counter-claim, or writing a meaningless, unresponsive speech” (quoting Peter Gruenberger)).

⁴¹³ See Wilken & Bloom, *supra* note 2, § 33.20[1], at 33-21 to -22 (noting that “deposition by written questions” is the “closest alternative discovery device” to interrogatories).

⁴¹⁴ See Groves, *supra* note 407, at 492.

⁴¹⁵ See *id.* (citations omitted).

⁴¹⁶ FED. R. CIV. P. 36(a)(1).

⁴¹⁷ FED. R. CIV. P. 36(a)(4).

⁴¹⁸ *Id.*

⁴¹⁹ *Id.*

⁴²⁰ FED. R. CIV. P. 36(a)(6).

⁴²¹ FED. R. CIV. P. 36(a)(1); FED. R. CIV. P. 36(b).

⁴²² Compare FED. R. CIV. P. 30(a)(2), FED. R. CIV. P. 31(a)(2), and FED. R. CIV. P. 33(a)(1), with FED. R. CIV. P. 36.

⁴²³ See *Johnson v. Kraft Foods N. Am., Inc.*, 236 F.R.D. 535, 544 (D. Kan. 2006); Edna Selan Epstein, *Rule 36: In Praise of Requests to Admit*, in *THE LITIGATION MANUAL: PRETRIAL* 150, 151 (John G. Koeltl & John Kiernan eds., 3d ed. 1999).

statements of single propositions.”⁴²⁴ For those same reasons, however, requests to admit are not as effective for discovering information that a party does not already know something about. Consequently, parties tend to use them after having already obtained some information (through discovery or otherwise), in preparation for trial, rather than in preparation for obtaining other discovery.⁴²⁵ Second, unlike interrogatories, it is difficult to evade a request to admit, since they are more specific and they may be deemed admitted if not answered properly.⁴²⁶ Third, requests to admit are binding,⁴²⁷ while interrogatories are not.⁴²⁸

5. *Discovery Management Conferences*

Rule 26(f) requires the parties to confer at the outset of discovery and discuss a number of topics.⁴²⁹ Those topics include possible changes to the mandatory disclosure requirements, the subjects of discovery, and potential limits on discovery.⁴³⁰ The Advisory Committee notes indicate that the list is not intended to exclude other topics that the parties may wish to discuss.⁴³¹ Rule 26(f) works in conjunction with Rule 16, which requires the court to issue a scheduling order limiting the time for the parties to, among other things, complete discovery.⁴³² Thus, while the conference is not a formal discovery device, it does require parties to confer and plan for discovery. The parties must discuss the information they anticipate seeking in discovery and the early conference may spur the parties to exchange information and cooperate more than they otherwise would.

E. *Criticism and Proposals for Reform*

As discussed in detail in Part II.D, the rise of discovery abuse has fostered substantial criticism of discovery procedures, in general, and

⁴²⁴ Epstein, *supra* note 423, at 151.

⁴²⁵ Johnston & Johnston, *supra* note 21, at 452 (Noting that requests for admission and contention interrogatories “are similar in some ways,” but that they are “different in their focus. Contention interrogatories allow a party to narrow issues concerning discovery, whereas, requests to admit allow a party to limit proofs at trial.”); *cf.* HAYDOCK & HERR, *supra* note 348, § 21.02[B] (noting that Rule 36 is generally preferable to Rule 33 in obtaining admissions, but that Rule 33 may be used to gather information to obtain an admission or obtain information about why a party refused to admit something).

⁴²⁶ Epstein, *supra* note 423, at 151–52.

⁴²⁷ See *supra* note 421; Epstein, *supra* note 423, at 152 (noting that a Rule 36 admission “conclusively establishes for the entire action the factual or legal proposition it sets out”).

⁴²⁸ See *supra* note 316 and accompanying text.

⁴²⁹ FED. R. CIV. P. 26(f).

⁴³⁰ FED. R. CIV. P. 26(f)(3).

⁴³¹ FED. R. CIV. P. 26 advisory committee’s note (discussing the 1993 Amendment).

⁴³² FED. R. CIV. P. 16(b).

interrogatories, specifically.⁴³³ Indeed, many advocates of interrogatory discovery have acknowledged that they are often inferior to other discovery procedures⁴³⁴ and have other practical handicaps.⁴³⁵ Much of the debate over interrogatories has revolved around numerical limits. Another key area of debate is whether responses to contention interrogatories should be deferred to the end of discovery. Some, however, have levied more serious criticisms, calling for drastic action. This section summarizes some of the key criticisms of interrogatories and proposals for reform.

1. *Limits*

As discussed in Part II.F, in 1993, the Advisory Committee reluctantly agreed to limit the number of interrogatories to a total of 25 per party, “including all discrete subparts,” at the same time that it enacted mandatory disclosure procedures.⁴³⁶ Some have suggested that this limit strikes the right balance between the potential burdens imposed by interrogatories and their possible benefits.⁴³⁷ Indeed, Professor Richard Marcus has suggested that limits have essentially solved the problem.⁴³⁸

There remains, however, a significant amount of confusion over what constitutes a “subpart” for the purposes of Rule 33.⁴³⁹ The Advisory Committee itself explained, by way of example, that “a question asking about communications of a particular type should be treated as a single interrogatory even though it requests that the time, place, persons present, and contents be stated separately for each such communication.”⁴⁴⁰ Other commentators have suggested that “subparts may be counted as part of one interrogatory if they are logically and necessarily related to the primary question,” but that when a subpart

⁴³³ See *supra* note 3.

⁴³⁴ See *supra* Part III.D.

⁴³⁵ These include acknowledgements that interrogatories: (a) can be expensive; (b) produce self-serving responses; and (c) may prompt adversaries to do a better job of preparing their cases. See, e.g., HAYDOCK ET AL., *supra* note 347, § 7.1.2; see also WRIGHT, MILLER & MARCUS, *supra* note 74, § 2163 (“Particularly in this era of word processors, interrogatories can readily be misused or employed in such a rote manner as almost to ensure unhelpful answers for any but the most basic or simple questions.”). Some also acknowledge that attorneys have mixed views of interrogatories depending on their experience. HAYDOCK & HERR, *supra* note 348, § 21.01.

⁴³⁶ CLERMONT, *supra* note 111, at 381; see *supra* Part II.F, note 203.

⁴³⁷ HAYDOCK & HERR, *supra* note 348, § 22.02[B] (arguing that the 25 interrogatory limit in Rule 33 “is large enough to reveal relevant information in most cases, and reasonable enough to eliminate the harassment of another party”).

⁴³⁸ Marcus, *supra* note 78, at 777 (suggesting that limits have quelled the concerns about interrogatories expressed in the 1970s).

⁴³⁹ See Wilken & Bloom, *supra* note 2, § 33.30[2], at 33-34 (noting that district court decisions on what counts as a separate interrogatory “vary widely”); HAYDOCK ET AL., *supra* note 347, § 7.4.2.

⁴⁴⁰ FED. R. CIV. P. 33(a) advisory committee’s note (discussing the 1993 Amendment).

introduces a “separate and distinct” line of inquiry, it should be counted as a separate interrogatory.⁴⁴¹ Regardless, confusion persists.⁴⁴²

David Yoo recently examined a divide among the courts on another issue involving the current Rule 33 limit.⁴⁴³ Although the plain meaning of Rule 33 limits each “party” to 25 interrogatories, some courts have limited each “side” to 25 interrogatories in cases involving multiple plaintiffs or defendants.⁴⁴⁴ Yoo noted that judicial scrutiny of interrogatories has been increasing in light of concerns that broad discovery is undermining “the litigation process.”⁴⁴⁵ He accepted that interrogatory practice, specifically, is “ripe for abuse,” such as over-use, “uninformative responses,” and questions crafted to be burdensome.⁴⁴⁶ However, he also suggested that the most egregious forms of abuse are “infrequent[]” and noted a number of “benefits” of interrogatory practice, including lack of expense, efficiency, the ability to “canvass large amounts of information . . . known to the responding party,” and the ability to require the responding party to “conduct research and investigate specific matters.”⁴⁴⁷

Ultimately, Yoo proposed an “ad interim” rule whereby courts would set a threshold number of parties after which a limit would “cap” the total number of interrogatories that a side could serve.⁴⁴⁸ He concluded by suggesting that efficient use of limitations could “effectively eliminate[] all interrogatory abuse.”⁴⁴⁹ However, that conclusion is necessarily premised on the proposition that there is some number of “necessary” interrogatories in any given litigation.

Others have rejected limits as ineffective and misguided. Even before 1993, Judge Frank Easterbrook had called for broader reforms to address discovery abuse. Specifically, he suggested ending notice pleading and having discovery directed by judicial officers, or alternatively, a “loser pays” system.⁴⁵⁰ He rejected attempts to “tinker[]” with individual rules, using interrogatory limits as an example of an ineffective reform.⁴⁵¹ Limits, he suggested, were unworkable for a number of reasons, most prominently that no “universal” number will be correct for all cases, and cannot be set on a case-by-case basis because the “right” number of

⁴⁴¹ Wilken & Bloom, *supra* note 2, § 33.30[2], at 33-34 to -36 (citation and footnote omitted).

⁴⁴² See *supra* note 439.

⁴⁴³ Yoo, *supra* note 31, at 911-14.

⁴⁴⁴ *Id.* at 911-12.

⁴⁴⁵ *Id.* at 920-21.

⁴⁴⁶ *Id.* at 921.

⁴⁴⁷ *Id.* at 920-21.

⁴⁴⁸ *Id.* at 933-34. For example, if the court established the limit at three, then in a case with five plaintiffs, the plaintiffs’ side could serve a total of 75 interrogatories (i.e., 3 x 25). *Id.*

⁴⁴⁹ *Id.* at 935.

⁴⁵⁰ Easterbrook, *supra* note 5, at 644-45.

⁴⁵¹ *Id.* at 641-42, 647-48.

interrogatories in any particular case is unknowable even by the parties in the case.⁴⁵²

2. *Deferring Contention Interrogatories*

Other than numerical limits, the primary restriction on interrogatories involves timing. As noted above, Rule 33 explicitly authorizes courts to defer answers to contention interrogatories until later in the discovery period, recognizing that the responding party may need an opportunity to gather information supporting its contentions.⁴⁵³ Many courts have accordingly entered orders deferring contention interrogatory responses.⁴⁵⁴ Indeed, some have set a presumption that contention interrogatories should not be answered until later in the discovery period unless the requesting party can demonstrate that there is a compelling need for early answers.⁴⁵⁵

Judge Wayne Brazil's opinion in *In re Convergent Technologies Securities Litigation*⁴⁵⁶ is the leading authority on the issue. In *Convergent Technologies*, Judge Brazil discussed a number of problems with requiring early responses to contention interrogatories. First, answers at the beginning of the discovery period will necessarily be incomplete, and the responding party will just have to update the information after it has completed discovery, resulting in a waste of resources.⁴⁵⁷ Second, defendants generally already know about their own behavior and what the law requires, and therefore, do not need the plaintiffs to describe it for them.⁴⁵⁸ Third, contention interrogatories served early in discovery are frequently "used to impose economic pressures on opponents, [or] to otherwise harass them."⁴⁵⁹ Fourth, early contention interrogatories often lead to objections or "self-serving responses," both of which result in delay.⁴⁶⁰ Fifth, early responses are unlikely to produce useful information because the responding party has not had an opportunity to

⁴⁵² *Id.* at 641–42.

⁴⁵³ *See In re Convergent Techs. Sec. Litig.*, 108 F.R.D. 328, 333 (N.D. Cal. 1985).

⁴⁵⁴ *See, e.g.,* *Fischer & Porter Co. v. Tolson*, 143 F.R.D. 93, 96 (E.D. Pa. 1992); *County of Suffolk v. Lilco*, No. 87 CV 0646 (JBW), 1988 WL 69759, at *2 (E.D.N.Y. June 13, 1988).

⁴⁵⁵ *See In re Convergent Techs. Sec. Litig.*, 108 F.R.D. at 338–40; *Fischer & Porter Co.*, 143 F.R.D. at 96 (following *In re Convergent Techs. Sec. Litig.*, 108 F.R.D. at 339); S.D.N.Y. L.R. 33.3 (generally restricting the early use of interrogatories to identification interrogatories until a date "[a]t the conclusion of other discovery, and at least 30 days" prior to the close of discovery); *see also* Wilken & Bloom, *supra* note 2, § 33.41[4] ("The usual practice, as indicated by several district court opinions, is for the courts to defer contention interrogatories until a later stage of discovery unless the propounding party shows that an earlier response would assist the goals of discovery.").

⁴⁵⁶ 108 F.R.D. at 330.

⁴⁵⁷ *Id.* at 334.

⁴⁵⁸ *Id.*

⁴⁵⁹ *Id.* at 335 (citation omitted).

⁴⁶⁰ *Id.*

engage in discovery yet.⁴⁶¹ Sixth, there are other more effective means of narrowing issues for trial, such as pretrial conferences, stipulation procedures, and motion practice (specifically including partial summary judgment).⁴⁶² Seventh, early contention interrogatories are unlikely to lead to successful motions because “courts generally are reluctant to rule definitively in response to motions under Rules 12(b)(6), 12(c), or 56” before substantial discovery.⁴⁶³

Significantly, Judge Brazil also suggested that where a complaint is “relatively detailed,” the argument for early responses to contention interrogatories is less persuasive.⁴⁶⁴ Notably, several other courts have followed similar reasoning and have deferred answers to contention interrogatories where the complaint was more detailed than a typical notice pleading.⁴⁶⁵

However, some courts and commentators have disagreed with Judge Brazil’s analysis.⁴⁶⁶ The main argument against deferring answers relies

⁴⁶¹ *Id.*; see also *id.* at 338 (“Lawyers generally attempt to maximize and preserve their options while providing as little tactical help to their opponents as possible; so motivated, they are likely to search for ways to give opponents as little information as they can get away with when they respond to contention interrogatories early in the pretrial period.”); Wilken & Bloom, *supra* note 2, § 33.41[4], at 33-45 (referring to this as the “primary objection to early service” of contention interrogatories).

⁴⁶² *In re Convergent Techs. Sec. Litig.*, 108 F.R.D. at 336 (citing MANUAL FOR COMPLEX LITIGATION (SECOND) § 21.4.6 (1986)); see also DAVID F. HERR, ANNOTATED MANUAL FOR COMPLEX LITIGATION § 11.46 (4th ed. 2009).

⁴⁶³ *In re Convergent Techs. Sec. Litig.*, 108 F.R.D. at 338. *Convergent Technologies* was decided in 1985, well before the Supreme Court’s decisions in *Twombly* and *Iqbal*. Compare *In re Convergent Techs. Sec. Litig.*, 108 F.R.D. at 328, with *supra* Part II.G. In the aftermath of those decisions, it appears that courts will be less reluctant to grant Rule 12 motions. See *supra* Part II.G.

⁴⁶⁴ *In re Convergent Techs. Sec. Litig.*, 108 F.R.D. at 337.

⁴⁶⁵ See *Fischer & Porter Co. v. Tolson*, 143 F.R.D. 93, 96 (E.D. Pa. 1992) (agreeing that early responses to contention interrogatories were not proper where the complaint was “not facially infirm” and the defendants had “control over or adequate access to much of the evidence to their alleged misconduct” (citing *In re Convergent Techs. Sec. Litig.*, 108 F.R.D. at 339)); *County of Suffolk v. Lilco*, No. 87 CV 0646 (JBW), 1988 WL 69759, at *2 (E.D.N.Y. June 13, 1988) (refusing to compel early answers to contention interrogatories where the complaint was “unusually detailed”); cf. *WRIGHT, MILLER & MARCUS*, *supra* note 74, § 2163 (“The fact that a motion under Rule 12 has been denied is not a ground for sustaining objections to interrogatories seeking the same particulars.”).

⁴⁶⁶ *Johnson v. Kraft Foods N. Am., Inc.*, 236 F.R.D. 535, 544-45 (D. Kan. 2006) (finding that contention interrogatories were not premature and responses should be provided “without delay”); *Anaya v. CBS Broad. Inc.*, No. CIV 06-0476 JBKBM, 2007 WL 2219458, at *6, *8-9 (D.N.M. May 16, 2007) (similar); *Cable & Computer Tech., Inc. v. Lockheed Saunders, Inc.*, 175 F.R.D. 646, 651-52 (C.D. Cal. 1997) (disagreeing with *Convergent Technologies*); Wilken & Bloom, *supra* note 2, § 33.02[2][b] (noting that some courts still will require a party to answer contention interrogatories within the time required by the Rules “based on information it has to date”); Johnston & Johnston, *supra* note 21, at 450 (“When true notice pleadings are filed, the general rule that contention interrogatories should not be filed until the end of discovery is suspect. . . . By learning the plaintiff’s theory, a defendant will be better able to

on the fact that plaintiffs are obligated to conduct a pre-suit investigation under Rule 11.⁴⁶⁷ Thus, the reasoning goes, the plaintiff must have *some* information prior to filing the lawsuit, and should disclose that information, even if it is incomplete and the plaintiff will have to supplement it.⁴⁶⁸ For his part, Judge Brazil thought that a party seeking early responses to contention interrogatories should first have to establish that “a substantial basis for a motion under Rule 11” exists.⁴⁶⁹

3. Broader Critiques

Although most of the discussion about interrogatories has revolved around limits and timing, a few commentators have criticized Rule 33 on a more fundamental level. Well before claims of widespread discovery abuse arose, and in the same year that the Supreme Court decided *Conley*, Professor James argued that contention interrogatories, along with requests for admission, were reviving the discredited bill of particulars.⁴⁷⁰ Contention interrogatories, he explained, sought the same “substance” as the bill of particulars.⁴⁷¹ He noted that contention interrogatories, while directed to parties, rarely seek “a party’s personal knowledge or observation[s]” and generally do not seek “the party’s own selection or judgment.”⁴⁷² Rather, they seek the opposing counsel’s work product.⁴⁷³

Next, while acknowledging that contention interrogatories do not technically limit proof at trial, he noted that they have the practical effect of restricting it.⁴⁷⁴ Indeed, a party seeking to depart from a prior interrogatory answer will have to explain the change and could potentially be charged with perjury.⁴⁷⁵ Even more significantly, however, he noted that if contention interrogatories are not binding, then they

narrow the scope of discovery and seek information relevant to the claim, thereby saving valuable time and resources.”); Pietrafesa, *supra* note 332, at 11 (implying that parties should have to answer contention interrogatories early in a case given that they must satisfy Rule 11 in order to file a pleading in the first instance).

⁴⁶⁷ See FED. R. CIV. P. 11(b).

⁴⁶⁸ See, e.g., *Kraft Foods N. Am., Inc.*, 235 F.R.D. at 544–45 (finding that the plaintiff was not entitled to defer responses to contention interrogatories until later in discovery because he “must” have been “aware of some of the specific facts upon which the allegations in his Complaint are based, otherwise he would not have made the allegations in the first place.”); Berman, *supra* note 327, at 156; Pietrafesa, *supra* note 332, at 11.

⁴⁶⁹ *In re Convergent Techs. Sec. Litig.*, 108 F.R.D. at 337, 338–39.

⁴⁷⁰ James, *supra* note 315, at 1473–74.

⁴⁷¹ *Id.* at 1474.

⁴⁷² *Id.* (citations omitted); see also *id.* at 1478 (suggesting that making an individual respond to interrogatories under oath makes sense for “facts which a person thinks he knows or has observed” but not for contentions, which are better addressed by an attorney’s signature).

⁴⁷³ *Id.* at 1474.

⁴⁷⁴ *Id.* at 1475–76.

⁴⁷⁵ *Id.*

cannot accomplish their purpose of narrowing the issues for trial.⁴⁷⁶ In any event, having notice of the claims and defenses, along with full access to the available information, will necessarily allow the parties to prepare for trial and narrow the issues.⁴⁷⁷ Based on the claims and discovery, the parties can determine for themselves “what contentions are warranted by the facts.”⁴⁷⁸ To the extent that contention discovery continued, Professor James urged that responses should be “freely amendable” at trial in order to avoid injustice.⁴⁷⁹

More recently, contention interrogatories have come under renewed scrutiny. In the 1990s, a proposal to eliminate contention interrogatories garnered widespread support among Texas practitioners, but they were rebuffed by the Texas Supreme Court, which considered them to be a “necessary accompaniment to notice pleadings.”⁴⁸⁰ Indeed, this past year, even the Advisory Committee acknowledged practitioners’ frustration with contention interrogatories.⁴⁸¹

These practitioners are not alone. Professor Bradley Wendel, focusing on the effects of honor and shame as a means of regulating the legal community, has made several cogent observations about contention interrogatories.⁴⁸² He described them as “annoying, time-consuming, and expensive” devices that “produce little useful information” because “they are easy to evade.”⁴⁸³ He further likened them to “strategic nuclear weapons.”⁴⁸⁴ Thus, “a first strike, by serving a set of contention interrogatories” will “invariably produce a response in kind by the opponent.”⁴⁸⁵ The only effective use for the device is to “snow[]” a less

⁴⁷⁶ *Id.*

⁴⁷⁷ *Id.* at 1483–85.

⁴⁷⁸ *Id.* at 1484.

⁴⁷⁹ *Id.* at 1485. As discussed above, interrogatories can generally be amended absent prejudice. FED. R. CIV. P. 33 advisory committee’s note (discussing the 1970 Amendment). That does not change the fact, however, that they may be binding in effect. *See supra* notes 474–76. Rule 15 now generally provides that the court may permit amendments to the pleadings at trial “when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party’s action or defense on the merits.” FED. R. CIV. P. 15(b) (1).

⁴⁸⁰ Albright, *supra* note 337, at 285.

⁴⁸¹ Memorandum from the Honorable Mark R. Kravitz, Chair, Advisory Committee on Federal Rules of Civil Procedure 14 (May 17, 2010), *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2010.pdf> (noting that some “decried” contention interrogatories, arguing that they “are so often useless that they should either be eliminated or subjected to numerical limits”).

⁴⁸² *See* notes 483–86, *infra*.

⁴⁸³ Wendel, *supra* note 206, at 1602; *see also* Bogue, *supra* note 115, at 204.

⁴⁸⁴ W. Bradley Wendel, *Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities*, 54 VAND. L. REV. 1955, 2010 (2001); *see also id.* at 2010 n.209 (stating that contention interrogatories “are incredibly time-consuming to answer, and are generally acknowledged as producing little information of value”).

⁴⁸⁵ *Id.* at 2010.

sophisticated “adversary under a blizzard of paper, forcing that party to settle cheaply.”⁴⁸⁶

In 2005, Luria and Clabby went even further, calling for the abolition of all interrogatories, with several key caveats.⁴⁸⁷ They noted that “[t]he norms of practice encourage” lawyers to serve interrogatories, but that they rarely produce anything other than objections or evasive answers.⁴⁸⁸ They further argued that limits were not effective.⁴⁸⁹

Accordingly, they suggested that interrogatories could be eliminated and that their functions could be replaced by modifying other discovery rules.⁴⁹⁰ Indeed, they noted that the mandatory disclosure provisions had taken over many of the traditional functions of interrogatories.⁴⁹¹ Thus, they suggested that Rule 26(a) could be broadened to require disclosure of “any person who has knowledge of any particular discoverable matter” and “a summary of technical and statistical data . . . of central concern to the litigation.”⁴⁹²

More significantly, at the same time they suggested eliminating Rule 33, Luria and Clabby urged the Advisory Committee to find a way to “preserve” contention interrogatories.⁴⁹³ Relying in part on an article by Kenneth Berman,⁴⁹⁴ they argued that contention interrogatories are “valuable” for three reasons.⁴⁹⁵ First, they “force[] the adversary to reveal her basis for positions taken in the pleadings.”⁴⁹⁶ Second, they are “generally immune from evasion because the responding party cannot claim ignorance of the answer when the question is based on the responding party’s claims.”⁴⁹⁷ Third, they “are often ‘invaluable in narrowing the issues, laying foundations for motions, and preparing a thorough trial defense.’”⁴⁹⁸ However, they ultimately concluded that even if contention interrogatories could not be preserved, “losing the current system of contention interrogatories is not really losing much” because, as they are currently used, responses to contention interrogatories “rarely” provide “the meat behind” a party’s pleading.⁴⁹⁹

⁴⁸⁶ Wendel, *supra* note 206, at 1602.

⁴⁸⁷ Luria & Clabby, *supra* note 3, at 43–48.

⁴⁸⁸ *Id.* at 30 (citation omitted).

⁴⁸⁹ *Id.* at 37 (stating that “interrogatories remain a serious drain on client resources with little return on value”).

⁴⁹⁰ *Id.* at 43.

⁴⁹¹ *Id.* at 44.

⁴⁹² *Id.* at 44–45. They also suggested that Rule 26(f) and Rule 16 conferences, as well as Rule 36 requests for admissions, may “make up for” an elimination of Rule 33 interrogatories. *Id.* at 46–47.

⁴⁹³ *Id.* at 45–46.

⁴⁹⁴ See *id.* at 34 n.19 (quoting Berman, *supra* note 327, at 155).

⁴⁹⁵ *Id.* at 34–35 (citations omitted).

⁴⁹⁶ *Id.*

⁴⁹⁷ *Id.* at 35 (citation omitted).

⁴⁹⁸ *Id.* (citation omitted).

⁴⁹⁹ *Id.* at 45–46.

As an alternative to eliminating Rule 33, Luria and Clabby also suggested that the Advisory Committee could amend Rule 33 to create “standardized interrogatories” for various “substantive areas of the law” which would be inherently “non-objectionable.”⁵⁰⁰ However, they conceded that the process of creating these standard interrogatories “would be highly politicized.”⁵⁰¹ Additionally, the proposal would be problematic for cases involving “compound” claims, since “federal practice does not reduce itself to discrete areas of the law.”⁵⁰² It would also be a noticeable departure from the trans-substantive nature of the Federal Rules.⁵⁰³ Nonetheless, they ultimately concluded that it might be possible to retain substance-specific standardized contention interrogatories while expanding mandatory disclosures and otherwise eliminating interrogatories.⁵⁰⁴

IV. ANALYSIS

Prior Parts of this Article have explained the function of interrogatories within the evolving context of pretrial civil practice. This Part first discusses the costs and burdens applicable to both types of interrogatories, and then evaluates identification and contention interrogatories in light of the larger context of pretrial civil litigation.

A. *Costs and Utility*

Before discussing each type of interrogatory separately, this Section will first note several considerations applicable to both of them. Both identification and contention interrogatories have been properly criticized as being ineffective and susceptible to abuse.

Interrogatories are not cheap. Although proponents of interrogatories suggest that they are inexpensive, what they really mean is they *can be* relatively cheap to prepare, particularly in comparison to depositions.⁵⁰⁵ Others have acknowledged, however, that truly useful

⁵⁰⁰ *Id.* at 37.

⁵⁰¹ *Id.* at 38; *see also id.* at 42.

⁵⁰² *Id.* at 41.

⁵⁰³ *Id.* at 42.

⁵⁰⁴ *Id.* at 49.

⁵⁰⁵ *See, e.g.,* HAYDOCK ET AL., *supra* note 347, § 7.1.1 (indicating that the “advantages” of interrogatories include that they can be an inexpensive and efficient alternative to other forms of discovery); HAYDOCK & HERR, *supra* note 348, § 21.01[A]; WRIGHT, MILLER & MARCUS, *supra* note 74, § 2163 (suggesting that serving interrogatories is “much less expensive” than deposing another party); Wilken & Bloom, *supra* note 2, § 33.05[1], at 33-17 (stating that the advantages of interrogatories include that they are “[c]onvenient and inexpensive to prepare . . . particularly in contrast to depositions”).

interrogatories—the type that are more difficult to evade—require more thought, and are accordingly more expensive to prepare.⁵⁰⁶

More significantly, those who count lack of expense as being among the benefits of interrogatories neglect the costs of *responding to* interrogatories. Even basic identification interrogatories—such as those identifying documents and potential witnesses—can engender significant costs.⁵⁰⁷ The costs of responding to more complex interrogatories seeking summaries of technical or statistical data or information about contentions can be extraordinary. Indeed, responding to contention interrogatories requires parties to develop the legal and factual bases of their claims—not unlike responding to a summary judgment motion. Thus, they are highly susceptible to abuse because it is so easy to impose costs on an adversary with them.⁵⁰⁸ Parties are incented to use them because there is a possibility that they may develop useful information and, even if they do not, they are certain to impose costs on their adversaries.⁵⁰⁹ Practice norms⁵¹⁰ and “retaliatory” impulses⁵¹¹ spur parties to serve burdensome interrogatories.

In addition to being expensive, interrogatories rarely yield useful information. Take the example contention interrogatory noted in Part III.B, where the defendant in a products liability action sought “all . . . facts” supporting the plaintiff’s allegation that the defendant’s product was “unreasonably dangerous” due to inadequate warnings or instructions.⁵¹² Here, the defendant is essentially looking to unearth the plaintiff’s theory of the case. Envisioning a revealing response detailing the proof that the plaintiff intends to rely on at trial that the defendant can then attempt to pick apart on summary judgment, our defendant will probably be disappointed to receive a response akin to the following:

Plaintiff objects to Defendant’s interrogatory because it is overly broad and unduly burdensome in that it purports to require Plaintiff to gather “any and all . . . facts” regarding Defendant’s defective product. Defendant is aware of Defendant’s own conduct and is in a better position to gather “all . . . facts” regarding its own tortious activities. Moreover, Defendant’s interrogatory is premature. Plaintiff cannot—and is not required—to marshal all of its evidence prior to having an opportunity to conduct discovery of information that is primarily in Defendant’s possession, custody, or control. Similarly, Plaintiff objects to Defendant’s conduct because

⁵⁰⁶ See, e.g., HAYDOCK ET AL., *supra* note 347, § 7.1.2; HAYDOCK & HERR, *supra* note 348, § 21.01[B]; see also Luria & Clabby, *supra* note 3, at 33.

⁵⁰⁷ Cf. *supra* note 298.

⁵⁰⁸ See Albright, *supra* note 337, at 278 (noting that Texas contemplated limitations for contention interrogatories, among other discovery tools, because they “were seen as [a] primary culprit[] of excessive and expensive discovery”).

⁵⁰⁹ See Easterbrook, *supra* note 5, at 641.

⁵¹⁰ See Luria & Clabby, *supra* note 3, at 30 (citations omitted).

⁵¹¹ See *supra* notes 484–85 and accompanying text.

⁵¹² See *supra* note 336 and accompanying text.

it concerns a subject covered by expert discovery. Plaintiff will exchange its expert disclosures in accordance with the scheduling order. Plaintiff further objects to Defendants interrogatory as it seeks information protected by the attorney-client privilege and work product doctrine. Without waiving the foregoing objections or any applicable privileges or immunities, Plaintiff directs Defendant to its Complaint and Initial Disclosures in this action, which Plaintiff hereby incorporates by reference.

In essence, the practice devolves to a juvenile “tell me what you think I did wrong” / “you know what you did” exchange that provides no new information.

Moreover, even where responding parties do provide some substantive information in response to interrogatories, they have weeks to confer with their attorneys before responding to them⁵¹³ and, as many have recognized, it is the attorneys who actually write the responses.⁵¹⁴ Thus, they are necessarily written to make the responding party sound like a saint while the requesting party might be mistaken for the spawn of Mephistopheles.⁵¹⁵ Indeed, if the defendant sending the hypothetical interrogatory above were fortunate enough to receive some substantive information after the litany of objections, it would probably resemble the following utterly useless response:

Without waiving the foregoing objections or any applicable privileges or immunities, Plaintiff states that Defendant’s product exploded in Plaintiff’s hands the first time Plaintiff plugged it into an electrical outlet. While Plaintiff is aware that the box and instructions that came with Defendant’s product include some information in extraordinarily small type, that text provides no “warning” that Defendant’s product explodes in the user’s hands the first time that it is plugged in, causing extreme bodily harm, loss of income for months on end, and a lifetime of mental anguish.

⁵¹³ See FED. R. CIV. P. 33(b) (2).

⁵¹⁴ See *In re Convergent Techs. Sec. Litig.*, 108 F.R.D. 328, 338 (N.D. Cal. 1985) (noting that attorneys “are likely to search for ways to give opponents as little information as they can get away with when they respond to contention interrogatories early in the pretrial period”); HAYDOCK ET AL., *supra* note 347, § 7.6.4 (noting that attorneys are expected to prepare interrogatory responses by “mold[ing] and shap[ing]” information received from the client); WRIGHT, MILLER & MARCUS, *supra* note 74, § 2172 (explaining that it is “undoubtedly the common practice . . . for the attorney to prepare the answers and have the party swear to them”); Berman, *supra* note 327, at 155 (noting that interrogatory responses are frequently drafted by the other side’s lawyer, and accordingly, will be “well thought out[,]” be “carefully phrased[,]” “be filled with self-serving statements[,]” and “highlight the virtues of the answering party and the sins of the questioning party”); Johnston & Johnston, *supra* note 21, at 444 (observing that contention interrogatories are generally answered by the attorneys in complex cases); Wilken & Bloom, *supra* note 2, § 33.104[1], at 33-77 (“Courts are aware that a party often will require and receive assistance from counsel in the preparation of responses to interrogatories.”).

⁵¹⁵ See Berman, *supra* note 327, at 155.

The morsels of actual information, spattered amongst the blunderbuss and bombast, are simply not worth the costs—namely, the attorneys’ time and effort, the clients’ time and money, and the negative impact on public perception of the legal system. The parties are then left with the option of moving to compel real answers to their own flawed questions⁵¹⁶ (which will undoubtedly prompt a retaliatory cross-motion from the adversary), or doing nothing with the useless, but expensive, responses. In short, there are few worse examples of pointless but costly “lawyering.” No layperson with the misfortune to encounter interrogatories will walk away with a positive view of the process.

The current procedures are insufficient for controlling these problems, which are essentially hard-wired into Rule 33. Although Rule 26 does provide some limits on discovery⁵¹⁷ and makes protective orders available on a showing of “good cause,”⁵¹⁸ these are essentially after-the-fact “fixes” that can be used to try to compensate for abuse once it has already occurred.⁵¹⁹ They cannot alter the fundamental “garbage-in, garbage-out” nature of interrogatory practice.

B. Identification Interrogatories

Proponents of interrogatories have argued that they are an effective means of obtaining objective factual information, technical and statistical data, and information from an entire organization. These uses are better suited to identification interrogatories. As discussed below, there is some merit to these points; however, they are overstated.

Some commentators have argued that parties can effectively use identification interrogatories to request objective information.⁵²⁰ The theory is that if all the interrogatories sought are simple, straight-forward facts, then there is no way for the attorneys drafting the responses to obscure the responsive information with self-serving tirades.⁵²¹ Even if counsel for the responding party attempted to “stonewall,” the

⁵¹⁶ Since the interrogatories are also drafted by counsel, they will also reflect the same kind of extreme characterizations that the responses do. *Cf. supra* note 514.

⁵¹⁷ See FED. R. CIV. P. 26(b).

⁵¹⁸ FED. R. CIV. P. 26(c)(1).

⁵¹⁹ See Yoo, *supra* note 31, at 928 (noting that protective orders under Rule 26(c) are not ideal solutions to abuse because that Rule “provides for relief only after the perpetuation of abuse (and then only after grant of the Rule 26(c) motion),” while “[a]utomatic . . . measures preclude abuse up front”). Notably, even if a party moves for a protective order before answering a burdensome interrogatory, it will incur costs in making the motion which may be just as burdensome to make as it would have been to respond to the interrogatory in the first instance.

⁵²⁰ See *supra* Part III.C.2; see also HAYDOCK & HERR, *supra* note 348, § 21.01[D] (suggesting that “interrogatories are often best used in the early stages of discovery to obtain objective, specific information,” including “who to depose, what areas merit inquiry, and whether documents might be available prior to the deposition . . . or at the deposition”).

⁵²¹ See *supra* note 514.

requesting party would then have strong grounds for a motion to compel that would not only succeed in obtaining the requested information, but also expose the adversary's abusive tactics to the judge.

This argument is persuasive, but overstates the case. Mandatory disclosures have largely replaced "objective" interrogatories.⁵²² Mandatory disclosures cover potential witnesses, documents, damages, insurance, experts, and trial witness and exhibit lists.⁵²³ It is true that mandatory disclosures do not require parties to reveal all of the information related to these subjects that most parties would prefer.⁵²⁴ In particular, the current version of Rule 26(a) only requires parties to disclose information about potential witnesses and documents that they "may use," and thus, does not require parties to disclose information about potentially damaging witnesses or documents.⁵²⁵ Accordingly, under the current system, identification interrogatories are necessary to supplement mandatory disclosures.

Some have also argued parties may need to use identification interrogatories to seek other objective factual information, such as summaries of technical or statistical data.⁵²⁶ Supposedly, this information is not susceptible to stonewalling tactics because the responding party's attorney will have to rely on a "technical person" to draft the response.⁵²⁷ This argument ignores the fact that unless the information is truly unimportant,⁵²⁸ no competent attorney would simply "cut-and-paste" technical information from a non-attorney into an interrogatory response. Like an expert report, any competent attorney should vet the technical expert's work, which will necessarily result in the most favorable analysis of the information possible for the responding party.⁵²⁹ Accordingly, the requesting party will want to have their own technical expert evaluate the source information.

Moreover, a responding party may invoke the business records option in response to a request for technical or statistical data.⁵³⁰ The requesting party would then have to make a motion to compel a traditional response to the interrogatory.⁵³¹ If the burden of summarizing the records is the same for both parties, the requesting party will lose that motion.⁵³² At the same time, if it is more burdensome for the responding

⁵²² See *supra* note 348.

⁵²³ See FED. R. CIV. P. 26(a)(1).

⁵²⁴ See *supra* Part III.C.1.

⁵²⁵ FED. R. CIV. P. 26(a)(1).

⁵²⁶ See *supra* Part III.C.3.

⁵²⁷ See *supra* note 359 and accompanying text.

⁵²⁸ If the information were truly unimportant, then the responding party should probably not be requesting it in the first place.

⁵²⁹ Cf. MODEL RULES OF PROF'L CONDUCT 1.1, 1.6 (2007) (requiring attorneys to diligently and competently represent their clients).

⁵³⁰ See FED. R. CIV. P. 33(d).

⁵³¹ See Berman, *supra* note 327, at 161.

⁵³² See FED. R. CIV. P. 33(d).

party to produce the underlying documents than to summarize them, the responding party would be well advised to offer to perform the analysis in lieu of responding to a Rule 34 document request. This would be particularly true if a computer program could quickly perform the analysis.

Beyond the mandatory disclosure topics and technical and statistical data, parties may also use identification interrogatories to seek simple objective information like measurements and an entity's legal status.⁵³³ However, even here, the requesting party would probably prefer to have documentary proof. In modern society, where almost everything is memorialized in some form, that documentation will likely exist. Even with respect to information like a measurement, a party would probably prefer to inspect the material in question and record its own measurement. If the measurement was not controversial, the party could then seek to confirm it in a stipulation or a request for admission.

Proponents of interrogatories have also noted that interrogatories require a party to research and gather information from all available sources—i.e., everyone within an organization.⁵³⁴ That is also true, to some extent, of depositions under Rule 30(b)(6), and its equivalent under Rule 31.⁵³⁵ However, some factual information—particularly, a lengthy list—is easier to understand in written form than in a rambling oral deposition response. An organization receiving a Rule 30(b)(6) notice on a topic that is better addressed through a written response might offer to provide such a written response in lieu of offering a deponent.

To the extent that a requesting party does not want to take any chances, however, depositions on written questions under Rule 31 are the closest analogue to interrogatories under Rule 33.⁵³⁶ Rule 31 is rarely used in this manner because parties generally only have one opportunity, either under Rule 30 or 31, to depose an individual.⁵³⁷ Because of the many advantages of oral depositions,⁵³⁸ a party is unlikely to forego an oral deposition in order to obtain factual information in writing. Parties can, however, depose an organization on a number of different topics.⁵³⁹ A party could, therefore, prepare a combined deposition notice for an organization under Rule 31 on one topic and under Rule 30 for other topics. In either instance, however, a Rule 31 deposition would count against the ten deposition limit.⁵⁴⁰

⁵³³ See *supra* Part III.C.2.

⁵³⁴ See *supra* Part III.C.4.

⁵³⁵ See FED. R. CIV. P. 30(b)(6), 31(a)(4).

⁵³⁶ See *supra* note 413.

⁵³⁷ See FED. R. CIV. P. 30(a)(2)(A)(ii), 31(a)(2)(B) (requiring parties to seek leave of court before deposing a person who has already been deposed once in a case).

⁵³⁸ See *supra* Part III.D.3.

⁵³⁹ See FED. R. CIV. P. 30(b)(6).

⁵⁴⁰ See FED. R. CIV. P. 30(a)(2); FED. R. CIV. P. 31(a)(2).

In summary, identification interrogatories remain important under the current rules because they allow parties to supplement information obtained through mandatory disclosures. In some instances, they may be useful in obtaining technical and statistical data, other objective information, and information gathered from an entire organization. They are not perfect vehicles for obtaining these types of information, however, and there are other means of obtaining similar information under the Rules.

C. *Contention Interrogatories*

While identification interrogatories arguably still have a few redeeming qualities, contention interrogatories have none. Professor James's analysis, now over 50 years old and explicitly rejected by the Advisory Committee, is even more compelling today than it was when he wrote it.⁵⁴¹ The issues raised by others, like Professor Wendel, only reinforce the problems with contention interrogatories.⁵⁴² Moreover, many of the reasons for deferring contention interrogatories—such as those described by Judge Brazil—weigh in favor of completely eliminating them.⁵⁴³ The Supreme Court's de facto repudiation of notice pleading removes the last remaining legitimate justification for contention interrogatories.

The first problem with contention interrogatories is that directing questions about contentions—particularly contentions involving legal standards⁵⁴⁴—to parties is preposterous. No attorney in his or her right mind would pose the kinds of questions regularly propounded in contention interrogatories to a witness at a deposition or trial.⁵⁴⁵ Take the example of the products liability contention interrogatory described in Part III.B. Initially, the multi-part structure makes it confusing and

⁵⁴¹ See *supra* notes 315–16, 470–79 and accompanying text.

⁵⁴² See *supra* notes 482–86 and accompanying text.

⁵⁴³ See *supra* notes 456–64 and accompanying text.

⁵⁴⁴ Although the Advisory Committee has prohibited interrogatories about questions of “pure law,” the distinction between questions of “pure law” and “mixed questions of law and fact” is a sham. See *supra* note 369. To the extent that it does exist, the “pure law” category includes such a narrow set of questions (e.g., seeking legal opinions on theoretical issues) it is largely irrelevant.

⁵⁴⁵ This becomes particularly evident when witnesses are questioned about interrogatory responses that they have supposedly prepared. Over the course of my career as a litigator, I participated in several depositions where witnesses who had signed interrogatory responses plainly had no idea what they said or meant. I do not doubt that their attorneys explained the responses to those witnesses before they signed them, but people simply have better things to do than memorize the details of arcane legal documents that their attorneys advise them to sign. I recall one deposition where I pressed a witness who admitted that she did not know what a particular interrogatory response meant. She replied, “That’s why I have attorneys.” She was right.

objectionable⁵⁴⁶—not to mention, difficult to say out loud. The question refers to a legal term of art, whether the product in question was “unreasonably dangerous.”⁵⁴⁷ A witness is likely to respond by saying something to the effect of, “well, nobody told me that it was going to explode, so I think that is pretty dangerous.”

Contention interrogatories, therefore, necessarily presume that opposing counsel will be providing the answer.⁵⁴⁸ If everyone knows that the attorneys are both propounding the interrogatories and answering them, there is no need to go through the charade of a quasi-testimonial question and answer format with the party signing the answers. Attorneys already have a written process for airing disputes that is far superior to exchanging contention interrogatories: briefing. Briefs are addressed to an impartial third party (the court), and thus—unlike contention interrogatories, which are exchanged between the parties—must be coherent and persuasive.⁵⁴⁹ Briefs are submitted in support of or in opposition to motions that will actually resolve issues, not debate them to death in pointless shadow boxing. To the extent that less formal procedures are necessary, courts can use management procedures under Rules 16 and 26(f) to help narrow the issues.⁵⁵⁰

Along these same lines, one of the main justifications for preserving contention interrogatories is that they are necessary to uncover possible bases for dispositive motions.⁵⁵¹ But as Professor James noted, all parties know what all the other parties are contending and learn the facts through discovery.⁵⁵² They are perfectly capable of evaluating the viability of each other’s contentions. Contentions are better evaluated in the context of a pending motion through briefs prepared by attorneys, not farcical “responses” supposedly prepared by witnesses. Moreover, the summary judgment process has evolved to the point that the parties must set forth their contentions about the allegedly undisputed material facts along with their briefs.⁵⁵³ Similarly, as Judge Brazil noted, courts are unlikely to grant a motion under Rule 56 based on non-binding responses to contention interrogatories before the plaintiff has had an

⁵⁴⁶ See CHRIS MARTINIAK, *HOW TO TAKE AND DEFEND DEPOSITIONS* § 7.07, at 198 (Aspen 2007) (noting that attorneys may object to confusing or unintelligible deposition questions as being vague and ambiguous).

⁵⁴⁷ See RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965).

⁵⁴⁸ See *supra* note 514.

⁵⁴⁹ Unlike pleading and discovery practice, briefing has evolved over the years with the goal of maximizing common sense readability. See, e.g., BRYAN A. GARNER, *THE WINNING BRIEF: 100 TIPS FOR PERSUASIVE BRIEFING IN TRIAL AND APPELLATE COURTS* (1999) (providing guidance to practitioners in drafting persuasive and compelling briefs).

⁵⁵⁰ See *supra* notes 142, 429–32, 454 and accompanying text.

⁵⁵¹ See Pietrafesa, *supra* note 332, at 11–12.

⁵⁵² See James, *supra* note 315, at 1483–85.

⁵⁵³ See *supra* notes 176–82 and accompanying text.

opportunity to conduct discovery.⁵⁵⁴ At the end of discovery, requests for admission and statements of undisputed material facts are better vehicles for exploring these issues.⁵⁵⁵

Indeed, as Professor James also noted, because interrogatory responses are not binding, they are not truly effective at narrowing the issues for trial.⁵⁵⁶ If a party can change its response to a contention interrogatory at any time without consequence, it is meaningless. If a party cannot change its response, however, then contention interrogatories are just as bad as the bill of particulars ever was. Arguably, contention interrogatories chart a middle ground through these extremes—they are not technically binding, but a party may have to explain any changes if they come into evidence.⁵⁵⁷ Still, these possibilities may make them binding in effect.⁵⁵⁸

One could argue that these concerns are limited to interrogatories requesting the responding party to apply legal standards to the facts. But even contention interrogatories that seek strictly factual information are hopelessly flawed. Take the example of an interrogatory that simply seeks a party's narrative description of factual events.⁵⁵⁹ Responses to this type of interrogatory will likely produce some information; however, interrogatories are vastly inferior to oral depositions for obtaining it. Any narrative will be drafted by opposing counsel and will thus necessarily be heavily slanted in the responding party's favor.⁵⁶⁰ A deposition, on the other hand, will provide the requesting party with the opportunity to press a witness on incredible points, follow up on vague testimony, and get the witness to concede the limits of his or her knowledge.⁵⁶¹ Few witnesses can simply stick to the kind of one-sided script that an attorney is likely to draft in response to an interrogatory without sounding completely absurd. (Most, thankfully, are not willing to try.)

Another major problem with contention interrogatories is that they disproportionately burden plaintiffs. Proponents of contention interrogatories have argued that they are effective because the

⁵⁵⁴ See *supra* note 463 and accompanying text.

⁵⁵⁵ Professor James also criticized requests for admission. See James, *supra* note 315, at 1473–74. However, as other commentators have noted, requests for admission are more like a trial procedure than a discovery device. See Johnston & Johnston, *supra* note 21, at 452. Unlike interrogatories, they are targeted to specific issues and are solely aimed at limiting issues for trial. In this respect, they are much more like a motion in limine than an interrogatory.

⁵⁵⁶ James, *supra* note 315, at 1476.

⁵⁵⁷ See HAYDOCK ET AL., *supra* note 347, § 7.8.2.

⁵⁵⁸ See James, *supra* note 315, at 1475–76 (accepting that interrogatory responses do not technically limit proof, but suggesting that that is their practical effect).

⁵⁵⁹ See *supra* note 333.

⁵⁶⁰ See Bogue, *supra* note 115, at 204 (noting that interrogatories seeking substantive information “for the most part, spawn objections of frivolous responses which waste time and frustrate the intent of the discovery process”).

⁵⁶¹ See *supra* notes 407–12 and accompanying text.

responding party cannot evade questions about allegations that it has certified as proper under Rule 11.⁵⁶² Certainly, plaintiffs may also direct contention interrogatories to defendants.⁵⁶³ But plaintiffs are generally the parties who have the burden of setting forth their contentions in their pleadings.⁵⁶⁴ Defendants' pleading duties are more limited, and they can always claim ignorance—Rule 8 provides that defendants can claim that they lack “knowledge or information sufficient to form a belief as to the truth of an averment” which has the same effect as a denial.⁵⁶⁵ Beyond the pleadings, contention interrogatories are easily evaded and more likely to be deferred to the end of discovery because they do not implicate Rule 11.⁵⁶⁶

Some have suggested that contention interrogatories remain necessary because they allow a party to obtain an adversary's work product.⁵⁶⁷ The Advisory Committee's note to the 1970 Amendments encouraged the view that the work product doctrine does not protect interrogatory responses because Rule 26(b)(3) only applies to documents and tangible things.⁵⁶⁸ Indeed, there does appear to be some precedent supporting this view.⁵⁶⁹ Regardless, the better view is that intangible work product sought through interrogatories or depositions is no more discoverable than tangible work product sought through document requests.⁵⁷⁰ As several circuits have noted, Rule 26(b)(3) only

⁵⁶² See Luria & Clabby, *supra* note 3, at 35.

⁵⁶³ See Bogue, *supra* note 115, at 203 (noting that a contention interrogatory may seek “all facts supporting an alleged claim or defense” (emphasis added)). Indeed, the heightened pleading standards under *Twombly* and *Iqbal* may also apply to affirmative defenses. See Manuel John Dominguez et al., *The Plausibility Standard as a Double-edged Sword: The Application of Twombly and Iqbal to Affirmative Defenses*, 84 FLA. B.J., June 2010, at 77, 78 (noting that most courts have applied the plausibility standard to affirmative defenses).

⁵⁶⁴ See Elizabeth Thornburg, *Rethinking Work Product*, 77 VA. L. REV. 1515, 1561–71 (1991) (noting that defendants do not have to reveal their contentions in their pleadings as plaintiffs do and arguing that this disparity is a basis for abandoning the work product doctrine).

⁵⁶⁵ FED. R. CIV. P. 8(b).

⁵⁶⁶ See *supra* Part III.E.2. To the extent that responses to contention interrogatories are deferred to the end of discovery, requests for admission are a superior option anyway because the responses are binding. See *supra* Part III.D.4.

⁵⁶⁷ See *supra* Part III.C.8.

⁵⁶⁸ See FED. R. CIV. P. 26(b)(3) advisory committee's note (discussing the 1970 Amendment).

⁵⁶⁹ See *In re Convergent Techs. Sec. Litig.*, 108 F.R.D. 328, 334 n.20 (N.D. Cal. 1985) (rejecting a party's argument that the responses to contention interrogatories were protected by the work product doctrine because “by its own terms,” Rule 26(b)(3) only protects “documents and tangible things” from disclosure); see also *supra* notes 377–78.

⁵⁷⁰ See Beerly, *supra* note 331, at 468 (suggesting that protecting intangible work product requires eliminating interrogatories seeking “opinions related to facts” because they “seek the thoughts and mental impressions of the opposing attorney, which are protected opinion work product” (citation omitted)). Some of the confusion surrounding this issue may result from the fact that underlying factual

codified one-half of the work product doctrine.⁵⁷¹ *Hickman v. Taylor* explicitly provided that the work product doctrine protects intangible work product, such as an attorney's mental impressions, opinions, and trial strategy.⁵⁷² Furthermore, elsewhere, the Rules acknowledge that the work product doctrine protects intangible information.⁵⁷³

Up until recently, the last remaining justification for retaining contention interrogatories has been that they are a necessary counterpart of the notice pleading system. Courts and commentators alike have insisted that contention interrogatories are necessary to flesh out bare-bones pleadings.⁵⁷⁴ After the 1983 Amendments, some courts also

information that is contained in materials protected by the work product doctrine may be discoverable. *See, e.g.,* ADT Sec. Servs., Inc. v. Swenson, No. 07-2983 (JRT/AJB), 2010 WL 276234, at *5 (D. Minn. Jan. 15, 2010). Just because underlying facts may be discoverable in redacted documents or through deposition testimony, however, does not mean that opinion work product may also be discovered through those means.

⁵⁷¹ *See* United States v. Deloitte L.L.P., 610 F.3d 129, 136 (D.C. Cir. 2010) (noting that under *Hickman*, an attorney's mental impressions are protected from discovery and that *Hickman* protects "intangible work product independent of Rule 26(b)(3)"); *In re* Seagate Tech., L.L.C., 497 F.3d 1360, 1376 (Fed. Cir. 2007); *In re* Cendant Corp. Sec. Litig., 343 F.3d 658, 662, 666 (3d Cir. 2003); United States v. 266 Tonawanda Trail, 95 F.3d 422, 428 n.10 (6th Cir. 1996); *see also* United States v. Dist. Council, No. 90 Civ. 5722 (CSH), 1992 WL 208284, at *7 (S.D.N.Y. Aug. 18, 1992); State *ex rel.* Atchison, Topeka & Santa Fe Ry. Co. v. O'Malley, 898 S.W.2d 550, 553 (Mo. 1995) (finding that the Missouri equivalent of Rule 26(b)(3) only codified "half of the work product doctrine," and did not "alter or abrogate the protections of intangible work product, which exist independently of" the rule under *Hickman*, and therefore, interrogatories seeking information about witness interviews were improper because the information was "clearly protected as intangible work product"); *cf.* Upjohn Co. v. United States, 449 U.S. 383, 398 (1981) (noting that *Hickman* was "substantially" incorporated into Rule 26(b)(3)).

⁵⁷² 329 U.S. 495, 510–11 (1947) (noting that an attorney's trial preparation "is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case as the 'work product of the lawyer.' Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own.").

⁵⁷³ The recent amendments to Rule 26 making expert witness preparation materials protected work product indicate that this protection extends to intangible work product as well. *See* FED. R. CIV. P. 26(b)(4) advisory committee's note (discussing the 2010 Amendment) ("Rule 26(b)(4)(C) is added to provide work-product protection for attorney-expert communications regardless of the form of the communications, whether oral, written, electronic, or otherwise."). A full discussion of this issue is beyond the scope of this Article; however, it is also worthy of note that even if work product is properly discoverable through interrogatories, the same information could be discovered through depositions. *Cf.* Hamilton & Strand, *supra* note 403, at 8 (stating that there is "no clear rule" on whether a party may discover work product through organizational depositions).

⁵⁷⁴ *See supra* note 337.

required litigants to answer contention interrogatories early in discovery to force them to reveal their Rule 11 investigations.⁵⁷⁵

Now, while the Supreme Court has not explicitly abrogated notice pleading, it has required plaintiffs to plead enough “factual matter” to render their claims “plausible.”⁵⁷⁶ Thus, the new pleading regime is much closer to the fact pleading system used in states like Missouri than the one originally contemplated by the Federal Rules.⁵⁷⁷ As the court in *Litz* explained, contention interrogatories are unnecessary where plaintiffs must already provide the underlying factual information in their complaints.⁵⁷⁸ Of course, even if plaintiffs survive the motion to dismiss stage, they must still defeat summary judgment after discovery in order to get to trial. Contention interrogatory responses are, in essence, the second of three detailed apply-the-law-to-the-facts submissions that plaintiffs must prepare before they ever get to trial. Plaintiffs already face two staunch hurdles before trial—a third round of “shadow briefing” is unnecessary, pointless, and wasteful.

Similarly, where plaintiffs already must plead enough facts to render their claims “plausible,” there is no need to disclose any remaining details of their Rule 11 investigations. If the plaintiffs’ factual investigation was insufficient, it will become evident over the course of discovery if the claim is permitted to proceed. As Judge Brazil noted, there is no point in encouraging parties to accuse each other of Rule 11 violations early in a lawsuit without any basis for believing that a violation has occurred.⁵⁷⁹

To the extent that contention interrogatories had any redeeming values when the Advisory Committee blessed them in 1970, now, as Professor Wendel has suggested, they are only good for one thing: abuse.⁵⁸⁰

V. PROPOSAL FOR REFORM

As discussed in detail in Part IV, interrogatories are deeply flawed and have few redeeming qualities. Contention interrogatories, in particular, are simply not worth their costs and should be eliminated. However, certain functions of identification interrogatories remain

⁵⁷⁵ See *supra* notes 466–68.

⁵⁷⁶ See *supra* Part II.G.

⁵⁷⁷ Mo. Ct. R. 55.05.

⁵⁷⁸ See *supra* notes 338–46 and accompanying text.

⁵⁷⁹ See *In re Convergent Techs. Sec. Litig.*, 108 F.R.D. 328, 338–39 (N.D. Cal. 1985).

⁵⁸⁰ See Wendel, *supra* note 206, at 1602 (explaining that the “only function” of contention interrogatories is for use “as a weapon”); see also Albright, *supra* note 337, at 284–85 (“The contention interrogatory, which began as a tool to require parties with notice pleadings to plead more particularly, has become a tool for harassment, requesting parties to marshal all proof that might be presented at trial concerning a particular contention.” (footnote omitted)).

important in civil litigation. This Part describes my proposal for reform. As explained in detail below, I propose eliminating Rule 33 and modestly expanding parties' obligations under Rule 26(a) and Rule 34 to perform the key functions of identification interrogatories. Arguably, the Rules already provide case management procedures that can take the place of identification interrogatories.⁵⁸¹ However, because those procedures may not be consistently utilized from courtroom to courtroom, my proposed reforms would allow the parties to seek that discovery without the court's intervention.

A. *Eliminate Rule 33*

Discussions about the Federal Rules of Civil Procedure have been dominated by the discovery abuse problem for the past 30 years.⁵⁸² Although interrogatories certainly do not cause all discovery abuse, that is their primary function in modern litigation. It follows that eliminating interrogatories can only help to decrease discovery abuse.

Some may disagree. Notably, some commentators—particularly those who believe that discovery abuse is widespread—have suggested that “tinkering” with individual rules cannot solve the discovery abuse problem.⁵⁸³ By way of example, Judge Easterbrook suggested that imposing limits on interrogatories would be pointless because universal limits fail to take account of differences between cases and the “right amount” of interrogatories for any particular case may be unknowable.⁵⁸⁴ Judge Easterbrook argued for more fundamental reforms—eliminating the notice pleading and broad discovery system, and replacing it with a system of discovery directed by judicial officers.⁵⁸⁵

Eliminating interrogatories is a more fundamental reform than simply limiting them. It is possible that eliminating one discovery device, without changing the underlying incentives, may simply cause parties to direct their abusive efforts to other channels.⁵⁸⁶ Indeed, eliminating interrogatories will not eliminate all discovery abuse. However, given that interrogatories are so susceptible to abuse and have virtually no redeeming qualities, eliminating them can only help deal with the problem. Additionally, although eliminating interrogatories is a far more

⁵⁸¹ See *supra* notes 142, 429–32, 462 and accompanying text.

⁵⁸² See *supra* Part II.

⁵⁸³ Brazil, *supra* note 80, at 1332, 1348–57 (rejecting limited scope of the rule changes proposed in the 1970s and proposing a “major” restructuring of the discovery process); Easterbrook, *supra* note 5, at 647–48; Flegal, *supra* note 115, at 39 (suggesting that discovery abuse cannot be “cured simply by tinkering with the existing rules to curb particular practices”).

⁵⁸⁴ Easterbrook, *supra* note 5, at 641–42.

⁵⁸⁵ *Id.* at 643–45.

⁵⁸⁶ See Brazil, *supra* note 80, at 1337 (suggesting that limiting or eliminating interrogatories will simply cause litigators to “spend the resources they would have committed to interrogatories on other discovery vehicles”).

significant reform than limiting them, it is considerably more palatable than the fundamental restructuring of the American legal system that commentators like Judge Easterbrook have proposed.⁵⁸⁷ Given that the basic structure of the legal system is unlikely to change any time in the foreseeable future, this reform is both achievable and warranted. If discovery abuse demonstrably continues undeterred and there is no impact on litigation costs after interrogatories are eliminated, that may weigh in favor of stronger measures.

Some might also argue that eliminating interrogatories will cause too many other problems. Notably, an experiment in two California state courts that involved eliminating interrogatories failed.⁵⁸⁸ That experiment, however, did not only involve eliminating interrogatories, but also significantly curtailed other discovery procedures without replacing their functions.⁵⁸⁹ Unlike that experiment, here, I am not proposing eliminating multiple discovery devices in a draconian effort to cut the price tag on civil litigation across the board. To the contrary, my proposal seeks to improve the efficiency of the discovery process by eliminating one aspect of it that does not work. Notably, since the failed California experiments, others have come out in favor of interrogatory reform.⁵⁹⁰

As another alternative to eliminating interrogatories, Luria and Clabby proposed a new system of standard interrogatories, specific to different types of claims.⁵⁹¹ These interrogatories would be inherently non-objectionable, and, therefore, would supposedly be easier to administer.⁵⁹² Luria and Clabby readily concede, however, that the process of creating these “substance-specific” interrogatories “would be highly politicized.”⁵⁹³ Moreover, they also acknowledge that federal practice typically includes multiple claims, and that many cases will not lend themselves to cookie-cutter categorizations.⁵⁹⁴ Indeed, the process of determining which sets of standard interrogatories apply would create a substantial administrative burden. Alternatively, if a party had to answer a set of standard interrogatories for each claim, this proposal could drastically expand interrogatory practice.

Additionally, even “non-objectionable” standard interrogatories cannot eliminate the objection process entirely. For example, in cases involving numerous claims or novel theories, standard interrogatories

⁵⁸⁷ Judge Easterbrook readily acknowledges this, alternatively proposing a “loser pays” system. See Easterbrook, *supra* note 5, at 644–45. Even that more modest proposal, however, appears to have been too drastic to have gained any real traction.

⁵⁸⁸ See Weller, Ruhnka & Martin, *supra* note 149, at 8–9, 13, 15, 46.

⁵⁸⁹ *Id.* at 8–9.

⁵⁹⁰ See *supra* notes 480–81 and accompanying text.

⁵⁹¹ Luria & Clabby, *supra* note 3, at 37–42.

⁵⁹² *Id.* at 37.

⁵⁹³ *Id.* at 38, 42.

⁵⁹⁴ *Id.* at 41.

could be much more burdensome than the drafters contemplated. Similarly, even if the standard questions were generally non-objectionable, the new rule(s) would still have to permit parties to make privilege objections. Consequently, a system of standard interrogatories specific to different areas of the law would be just as difficult to administer as the current system. This proposal also does little to address the inherent problems with interrogatory practice.

Some might also argue that eliminating interrogatories entirely is too drastic. Perhaps the 25 interrogatory limit should be lowered or the device could still be available on a showing of “good cause.” These proposals are also flawed.

First, limits are not a realistic answer. The current limits still may result in hundreds of interrogatories in multi-party cases.⁵⁹⁵ The only way a limit would even be remotely effective would be if it were considerably lower than anyone has previously contemplated—e.g., *five per side*. Even then, however, they would still be problematic. As Judge Easterbrook noted, limits are difficult to administer.⁵⁹⁶ Moreover, as the quibbles over what constitutes a “subpart” demonstrate,⁵⁹⁷ all limits accomplish is to engender more gamesmanship to try to find a way around them.⁵⁹⁸

Second, although making the interrogatory device available after an application to the court would have some precedent, it is not necessary. Before 1970, a party could only propound document requests after demonstrating “good cause,”⁵⁹⁹ and presently, parties seeking to exceed the interrogatory and deposition limits must obtain court approval.⁶⁰⁰ However, if the useful functions of interrogatories can be shifted to other discovery devices (which, as discussed below, they can), then there would never be any legitimate need for interrogatories on any showing.

The only reform short of completely doing away with Rule 33 in its entirety that might make sense as a transitional reform—or, if the other changes that I propose here prove to be too contentious—would be to eliminate contention interrogatories. This could be accomplished by inverting the language in Rule 33 that currently condones contention interrogatories. Thus, the revised language might read:

⁵⁹⁵ Cf. *supra* note 448.

⁵⁹⁶ Easterbrook, *supra* note 5, at 641–42. Indeed, even before the federal rules were adopted, commentators noted that there was still a considerable administrative burden in dealing with interrogatories, even when limited. See Subrin, *supra* note 32, at 708.

⁵⁹⁷ See *supra* notes 439–42.

⁵⁹⁸ See, e.g., Luria & Clabby, *supra* note 3, at 37 (suggesting that limits changed the “strategic use of interrogatories” but not the “game playing”); cf. HAYDOCK ET AL., *supra* note 347, §7.4.3 (suggesting that litigants may want to consider adding parties so that they may have the opportunity to serve more interrogatories).

⁵⁹⁹ See FED. R. CIV. P. 34 advisory committee’s note (discussing the 1970 Amendment).

⁶⁰⁰ See FED. R. CIV. P. 30(a)(2)(A)(i), 31(a)(2)(A), 33(a)(1).

An interrogatory is objectionable where an answer to the interrogatory involves an opinion or contention that relates to fact, the application of law to fact, or a purely legal issue.⁶⁰¹

This reform might also be accompanied by a reduction in the numerical limit to ensure that the elimination of contention interrogatories is not accompanied by an increase in unnecessary identification interrogatories. This solution is still inferior to completely eliminating Rule 33, however, because it will likely engender gamesmanship in phrasing to try to get around the prohibition and subsequent disputes over what constitutes an impermissible contention interrogatory versus a permissible identification interrogatory.

B. Broaden Mandatory Disclosures

Mandatory disclosures have already taken over many of the functions of interrogatories. Broadening one aspect of Rule 26(a) can help completely eliminate the need for them. Specifically, Rule 26(a)(1)(A) only requires parties to disclose information about potential witnesses “that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment.”⁶⁰² Identification interrogatories are thus still necessary to obtain information about potential witnesses to the extent that it is potentially damaging to the disclosing party’s case. This provision, however, can be broadened to require parties to disclose information about potential witnesses and discoverable documents by eliminating the qualifying phrase quoted above. The potential witness disclosure provision would thus encompass both helpful *and* damaging information, which parties currently must disclose on request.

The primary objection to requiring parties to disclose potentially damaging information appears to be that it is inconsistent with the adversarial nature of the American legal system and potentially damaging to the attorney-client relationship.⁶⁰³ Mandatory disclosures, however, are now firmly imbedded in the Rules; there is no reason not to require parties to disclose information automatically that their adversaries are certain to request. Moreover, my proposal to expand mandatory disclosures is narrowly tailored by design. The document disclosure provision in subdivision (a)(1)(B) mirrors the current language in the potential witness disclosure provision;⁶⁰⁴ however, I am not proposing an expansion of mandatory document disclosure. (I address document discovery through proposed reforms to Rule 34, discussed in Part V.C below.)

⁶⁰¹ Cf. FED. R. CIV. P. 33(a)(2); FED. R. CIV. P. 33 advisory committee’s note (discussing the 1970 Amendment).

⁶⁰² FED. R. CIV. P. 26 (a) (1) (A).

⁶⁰³ See *supra* note 213.

⁶⁰⁴ See FED. R. CIV. P. 26(a)(1)(A)–(B).

Disclosing potentially harmful witnesses is unlikely to wreak the kind of havoc on the attorney-client relationship that the mandatory disclosure of potentially harmful documents arguably could. The universe of potential witnesses tends to be significantly smaller than the universe of potentially discoverable documents. In the first instance, attorneys generally ask their clients to identify the individuals with information about the underlying events in dispute. Parties would simply be required to disclose that information. If an opposing party determined that the disclosing party's list was missing potential witnesses with information about a given subject, it would then notify the disclosing party and request it to supplement the disclosure.⁶⁰⁵ This process would not require attorneys to engage in extensive strategizing on their adversaries' behalf, as gathering and producing harmful documents arguably would.

While my proposal will have little practical impact on the nature of the attorney-client relationship, it will help curtail costly and unproductive interrogatory discovery. This reform will make identification interrogatories seeking additional information about potential witnesses unnecessary. To the extent that parties require information about different topics that may lend themselves to the initial disclosure format, they are required to discuss these issues at the Rule 26(f) discovery conference.⁶⁰⁶

C. Broaden Rule 34

Two reforms to Rule 34 can also help preserve the useful functions of identification interrogatories: (1) require parties to disclose the identity of third parties who may have documents responsive to individual document requests; and (2) allow parties to substitute summaries of technical or statistical information in lieu of source documents.

First, a party responding to a Rule 34 request must presently state its objections or agree to provide materials in response to each item or category of materials requested.⁶⁰⁷ Where it agrees (or is ordered) to do so, it must provide documents or materials that are within its "possession, custody or control."⁶⁰⁸ Most parties will simply provide copies of the

⁶⁰⁵ Indeed, parties have a duty to confer in good faith before making a motion to compel disclosure or discovery. FED. R. CIV. P. 37(a)(2).

⁶⁰⁶ FED. R. CIV. P. 26(f)(3)(A). Luria and Clabby's proposal to require mandatory disclosure of "a summary of technical and statistical data . . . of central concern to the litigation" is unnecessary given that the source documents will prove more revealing. Luria & Clabby, *supra* note 3, at 44-45; *supra* Part IV.B. In any event, the language Luria and Clabby propose is too broad to provide the parties with any guidance, and drafting anything more specific while preserving the trans-substantive nature of the Rules would prove exceedingly difficult, if not impossible.

⁶⁰⁷ FED. R. CIV. P. 34(b).

⁶⁰⁸ FED. R. CIV. P. 34(a)(1).

documents or other materials to the requesting party.⁶⁰⁹ Responding parties must also direct the requesting party to the materials in their production that are responsive to each request, unless they have provided the materials in the same order that they are normally maintained.⁶¹⁰

Identification interrogatories are occasionally used to obtain information to aid document discovery. Thus, where the responding party has the documents in its possession, identification interrogatories can be unnecessarily duplicative of document requests. Generally, in that case, the responding party will simply state that it is producing the documents and direct the requesting party to the part of the production where they can be found. This is essentially the same thing that a responding party would do in response to a Rule 34 request. However, identification interrogatories may also require a responding party to disclose information about documents held by third parties. The requesting party can then subpoena the documents from the third parties.⁶¹¹ Rule 34, understandably, does not require a party to produce documents that are held by third parties that are not within the responding party's "possession, custody or control."⁶¹²

Rule 34 can be amended to require the responding party to identify where the responsive documents may be found to the extent that it does not have access to them. This will account for the loss of interrogatories and will reinforce the responding party's obligation to disclose the information that it has about the documents. This amendment would also be preferable to expanding the document disclosure requirement in Rule 26(a)(1)(A) because it would require adverse parties to request the documents first. Therefore, the responding parties would not be asked, in essence, to strategize on behalf of their adversaries. Thus, the following sentence could be added as a new subdivision under existing Rule 34(b)(2):

Responsive Materials or Access Controlled by Third Parties. To the extent that a party does not have documents, electronically stored materials, tangible things, or access to designated land or other property responsive to a request under this rule, it must identify any third parties that it believes are reasonably likely to have access to the responsive materials or property.

The requesting party will then be able to subpoena any additional documents from the third parties, just as it would if the same information were provided in response to an identification interrogatory. Since parties responding to Rule 34 requests are already required to respond to each category of materials requested, this amendment will not create a significant additional burden.

⁶⁰⁹ See *supra* note 391.

⁶¹⁰ FED. R. CIV. P. 34(b)(2).

⁶¹¹ See FED. R. CIV. P. 45.

⁶¹² See FED. R. CIV. P. 34(a)(1).

Second, Rule 34 can be amended to allow parties to substitute summaries of technical or statistical information in lieu of source documents in response to document requests. This will help compensate for the loss of interrogatories seeking summaries of technical or statistical data.

This amendment would essentially turn Rule 33(d)'s business records option on its head. Thus, the following provision could be added as a new subdivision to Rule 34:

Option to Produce Summaries of Technical or Statistical Materials. If substantially equivalent information sought by a request for business records under this rule may be provided by auditing, abstracting or summarizing a party's technical or statistical materials, and if the burden of deriving or ascertaining the information is substantially lower than producing the materials, the responding party may respond by providing a written summary, abstract, or report in lieu of producing the records.⁶¹³ The requesting party may seek production of the source materials under Rule 37(a) where the written summary, abstract, or report is an inadequate substitute for the source materials under the circumstances.

Thus, the responding party would then have the option to provide an interrogatory-like response summarizing complex information where producing the underlying materials would be burdensome. For example, where the responding party may simply run a program summarizing statistical information rather than producing a large database of information, which may be substantially more difficult, it can simply run the statistical report. The last sentence of the revision protects against over-use of the option by providing the requesting party with the option to ask the court to compel production of the source documents in situations where the summary will not be sufficient for the requesting party's purposes.⁶¹⁴

Accordingly, these two arguably useful functions of identification interrogatories could be encompassed by an expanded version of Rule 34.

⁶¹³ Cf. FED. R. CIV. P. 33(d).

⁶¹⁴ In addition to the reforms discussed here, my analysis might also suggest reforming Rule 30(b)(6) and Rule 31 to allow a responding party to substitute a written list or summary of information in response to an organizational deposition notice for a given topic. *See supra* notes 400–02 and accompanying text. Because depositions are arguably the most effective discovery device and are already limited to ten per side, however, there is less of a need to protect the responding party against abuse. Moreover, a party responding to a Rule 30(b)(6) notice is, of course, already free to propose that it will provide a written list or summary in exchange for the requesting party to withdraw the deposition notice.

VI. CONCLUSION

After seven decades of experience under the Federal Rules of Civil Procedure, the time has come to eliminate Rule 33. Although interrogatories predate the Rules, their useful functions have since been largely superseded by new procedures and court-imposed reforms. Presently, they have few legitimate functions. To the extent that they have not been rendered completely useless by these developments, other discovery devices can be expanded to account for their remaining functions.

At the same time that they have few redeeming qualities, interrogatories are tailor-made for abuse. They are expensive and impose substantial burdens on responding parties. In particular, while plaintiffs must now provide factual detail in their pleadings, defendants can presently force them to expound on already detailed allegations through contention interrogatories. This process increases the already immense burden on plaintiffs, essentially forcing them to prepare a mid-discovery brief defending their claims.

Even where interrogatories are narrowly targeted to legitimate areas of discovery, responses rarely consist of more than evasive legal gibberish. In short, interrogatory practice does nothing to advance the goals of the Federal Rules of Civil Procedure, and instead, contributes to the popular dissatisfaction with the American justice system both in the legal community and the public at large. It is time for it to end.