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An Expense out of Control: Rule 33 Interrogatories After the Advent of Initial Disclosures and Two Proposals for Change

Amy Luria & John E. Clabby⁺*

Interrogatories exchanged under Federal Rule of Civil Procedure 33 drain litigation resources while providing few concomitant benefits to litigants. Despite this problem, there is no recent scholarly literature suggesting reform to this device. Other discovery devices, including initial disclosures and requests for admission, better serve parties as relatively fast and cheap exchanges of information in advance of trial. This Essay describes the wastes and benefits of Rule 33 interrogatories as parties use them in practice today. Then, this Essay makes and evaluates two proposals for change. In the first proposal, the Essay suggests creating mandatory, uniform interrogatories keyed to substantive areas of law, following a model that several states have already incorporated into their civil rules. In the second and alternative proposal, this Essay proposes eliminating Rule 33 interrogatories altogether, because most of the work that the Advisory Committee on Civil Rules first intended interrogatories to do is now better accomplished through other discovery devices.

I. INTRODUCTION

In practice, Federal Rule of Civil Procedure 33 interrogatories exchange little substantive information between

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parties. Sending interrogatories costs a litigant more than that party earns in information. Often, filing interrogatories generates nothing but unresponsive, by-the-book objections or otherwise evasive answers from an opponent.¹ The norms of practice encourage a lawyer to file interrogatories, even though the answers to those interrogatories would not help that lawyer's client.²

Interrogatories are the most abused discovery vehicle, and what is more problematic is that their cost generates little value.³ Attorneys ask questions drawn from a stock reserve and those questions return only objections, vague answers, and very little information.⁴ This is due in part to the ease with which one can generate interrogatories, as well as "the proliferation of machine-stored questions."⁵ As a result, interrogatories are often "frustrating, costly, and ineffective for both parties."⁶ The standard objections of "overly broad," "vague," and "unduly burdensome" provide no substantive content to the sender of the interrogatories.⁷ Compounding the problem, adversaries and the courts are normally reluctant to condemn the liberal objector.⁸ Courts want to stay out of discovery disputes except in the worst cases, and adversaries themselves are playing similar games with their own objections.

¹ See ROGER S. HAYDOCK ET AL., FUNDAMENTALS OF PRETRIAL LITIGATION 364-65 (4th ed. 2000) (discussing the "limitations, weaknesses, and risks" of using interrogatories and warning against attorneys who abuse the system).

² See THOMAS E. WILLGING ET AL., FED. JUDICIAL CTR., DISCOVERY AND DISCLOSURE PRACTICE, PROBLEMS, AND PROPOSALS FOR CHANGE: A CASE-BASED NATIONAL SURVEY OF COUNSEL IN CLOSED FEDERAL CIVIL CASES 13 tbl.2 (1997) (reporting one survey of attorneys in federal court showing that in cases involving some discovery, 81% of attorneys used interrogatories).

³ C. Lynn Oliver, Note, *Economical Litigation: Kentucky's Answer to High Costs and Delay in Civil Litigation*, 71 KY. L.J. 647, 659 (1983) (citing Weyman I. Lundquist, *In Search of Discovery Reform*, 66 A.B.A. J. 1071, 1072 (1980)).

⁴ See FRANCIS H. HARE, JR. ET AL., FULL DISCLOSURE: COMBATING STONEWALLING AND OTHER DISCOVERY ABUSES 83-88 (2d prtg. 1995) (describing common tactics for evading disclosure under interrogatories, and under other discovery requests, such as boilerplate objections, use of semantics, unilaterally limiting the scope of relevance, and misleading responses).

⁵ Oliver, *supra* note 3, at 659.

⁶ U.S. Army Legal Servs., *USALSA Report: Litigation Division Note*, 1997 ARMY LAW. 38, 38 (Aug. 1997).

⁷ HARE, *supra* note 4, at 83-84.

⁸ Haydock and his co-authors discuss the "Nightmare" test as a guide for when to know, as a lawyer, if your response to an interrogatory fails Rule 33's reasonableness standard. HAYDOCK ET AL., *supra* note 1, at 394 ("Pretend that the opposing attorney has brought a Rule 37 motion before a judge whom you have recently skunked in racquetball and that the judge asks you, 'How in the discovery world can you justify your response?' If you defend with a winning retort, your interrogatory response is reasonable. If you wake up in a sweat, you need to redraft your response.").

Put broadly, the problem with interrogatories is that lawyers believe, and the system reinforces, that the exchange and answer of interrogatories is a game.⁹ That a lawyer expects an objection causes the sender to wrangle over the form of a question and to hesitate over the proper term with which to define a thought.¹⁰ Historically, “practitioners have used interrogatories as a litigation tactic to harass and to overwhelm an opponent or to delay the resolution of a dispute.”¹¹ In return, an entire body of literature explains how to avoid giving thorough and responsive answers to interrogatories.¹²

At base, the problem with interrogatories is lawyer conduct. Lawyers must somehow be held accountable for their zealous but inefficient use of the device. Burdensome, overreaching, and frivolous questions — and boilerplate, bad-faith objections in return — cause delay instead of enlightenment. Any consideration of how to reform the interrogatory device must acknowledge the lack of incentives for lawyers to exchange and to request information from one another in good faith.

While some critics suggest that only severe sanctions for this stonewalling can prevent such discovery evasion,¹³ the structure of the rules and cooperative norms also play important roles. Reforming the structure of the interrogatory device, or isolating what is good about the device and transferring that to other devices more easily monitored, might structurally solve a problem without harsher sanctions or greater judicial involvement. Any change must attempt to decrease the role of

⁹ When one party has deviated from fair play into the strategic world of objections, tit-for-tat will govern. HAYDOCK ET AL., *supra* note 1, at 387 (“Strategically speaking, objections to borderline interrogatories may also cause the other side to object to borderline interrogatories you submit to them.”).

¹⁰ Ronald J. Schutz & Darren B. Schwiebert, *Interrogatories*, in PATENT LITIGATION STRATEGIES HANDBOOK 135, 139 (Barry L. Grossman & Gary M. Hoffman eds., 2000) (advising a patent litigant that “the specific wording of a well-drafted interrogatory should be strategically calculated to elicit the information useful to your position”).

¹¹ U.S. Army Legal Servs., *supra* note 6, at 38.

¹² *E.g.*, LAWRENCE A. MORSE, OBJECTIONS TO INTERROGATORIES § 1250 (Joan Manno ed., 1990) (explaining several different types of objections that one can use in “avoiding or limiting” responses to interrogatories); *see also* United States Army Legal Services, *supra* note 6, at 40 (“The simple goal of Rule 33 is to ensure that a party answers the relevant questions of an opposing party. That is not to say that a party must divulge all information in his possession to the opposing party. Answers to interrogatories should be responsive, accurate, and complete, but they should be made with the understanding that they will be used against the responding party. Consequently, interrogatories should be approached with a defensive frame of mind. Words should be chosen carefully, with an eye toward their use at trial.”).

¹³ HARE ET AL., *supra* note 4, at 79 (arguing for “severe sanctions” to deter stonewalling in interrogatories and in other discovery devices, a problem that is now in “epidemic proportions” due to the economic incentives of corporate parties to a litigation).

gamesmanship and to increase the profitable exchange of pretrial information between the parties to a lawsuit. Any change should also seek to minimize judicial involvement and help to limit the cost to the litigants of pretrial exchanges of questions while maximizing their value. With these ends in mind, any amendment to Rule 33 should weigh the benefits of retaining the interrogatory device against its expense and efficiency in fairly exposing valuable information between adversaries.

Scholars have failed to address the root cause of the inefficiency of interrogatories. Practitioners have written volumes on how to “game” the interrogatory system. And many states have started to amend their rules of civil procedure to address this gaming, including experimenting with ideas such as uniform interrogatories. Yet, despite the prominence of the problem, scholars have failed to suggest reforming this device.

This Essay seeks to explore the problem, and makes two proposals for change. Part I explores what is useful about interrogatories, both as the device is conceived in theory and as the device is used in practice (where the benefits are much narrower) and should therefore be preserved. Specifically, one finds that interrogatories are useful in three areas: discovery of contentions, discovery of technical or statistical data, and discovery of knowledgeable persons. Such findings are important in evaluating the two proposals for change that follow, as we are then aware of what may be lost through amendment or elimination of Rule 33 interrogatories. The findings of Part I also allow us to evaluate how successful other discovery devices will be at replacing the work that interrogatories are intended to accomplish.

In Part II of the Essay, we describe and evaluate two proposals for change to the interrogatory device that we believe will decrease the role of gamesmanship and increase the profitable exchange of pretrial information between the parties to a lawsuit. The first proposal seeks a rehabilitation of Rule 33 to preserve what was intended as a meaningful pretrial exchange of information between parties. Proposal I suggests limiting interrogatories to certain standardized interrogatories, perhaps organized by substantive areas of the law, to which parties would be unable to object on grounds other than those of privilege. These form interrogatories would include contention interrogatories, technical or statistical data interrogatories, and knowledgeable person interrogatories. Failure to answer these interrogatories would result in sanctions. In forming and evaluating this proposal, we rely on the rules of civil procedure of

a few states that have mandatory interrogatories, uniform interrogatories, and both.

The second proposal is more dramatic: the elimination of Rule 33 interrogatories altogether. The current Federal Rules, which already require certain initial disclosures under Rule 26(a), might benefit from the *elimination* of the Rule 33 device and a concomitant editing of other rules – pertaining to requests for admissions, initial disclosures, and pretrial discovery conferencing – to retain much of the best features of interrogatories. In analyzing this proposal, we discuss how other discovery devices, mainly initial disclosures under Rule 26 and requests for admission under Rule 36, are being used by parties today to perform the issue-narrowing functions that interrogatories were intended to perform.

Finally, we conclude with a summary of our findings and a suggestion to the Advisory Committee on Civil Rules (Committee) for how it might combine the two proposals. The federal discovery rules, including Rule 33, were intended to aid in the “just, speedy, and inexpensive determination of every action,”¹⁴ and the reformation or elimination of Rule 33 interrogatories might rehabilitate what is good about the historically “most abused discovery mechanism.”¹⁵

II. FOR WHAT PURPOSES ARE INTERROGATORIES USEFUL?

Interrogatories are supposed to be cheap, fast, and binding on a party. “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.”¹⁶ Therefore, the current form of interrogatories helps lawyers when used efficiently.¹⁷ However, when attorneys spin their wheels to draft unobjectionable questions, and their adversary attorneys retort by spinning their wheels to craft objections, seldom does information change hands. Any cost, then, to a useless device is too high a cost.

¹⁴ FED. R. CIV. P. 1 official cmt; see Meade W. Mitchell, Comment, *Discovery Abuse and a Proposed Reform: Mandatory Disclosure*, 62 MISS. L.J. 743, 764 (1993). “The speedy and inexpensive resolution of civil procedures was recognized as the most important mandate of the rules, embodying the very ‘spirit of the rules.’” Mitchell, *supra*, at 744 n.7.

¹⁵ Oliver, *supra* note 3, at 659 (citing Lundquist, *supra* note 3, at 1072).

¹⁶ United States Army Legal Servs., *supra* note 6, at 38.

¹⁷ See generally HAYDOCK ET AL., *supra* note 1, at 364 (listing the advantages of interrogatories over other forms of discovery).

But interrogatories, in theory, should lead to the inexpensive exchange of information between the parties. An exchange of information early in litigation should lead to a faster resolution of the dispute and might even encourage settlement.¹⁸ Substantive answers to interrogatories should also lead to more targeted discovery requests, which in turn might lead to a faster resolution of the dispute. If the device worked more efficiently, then it should help decrease the cost of litigation and increase its speed.

The question then becomes what about interrogatories is useful and should therefore be preserved. Interrogatories serve a useful function in three areas: “discovery of contentions, discovery of technical or statistical data, and discovery of knowledgeable persons.”¹⁹ At base, interrogatories are useful for the discovery of contentions and the discovery of certain fact lists. For these areas, “there probably is no better way to get information.”²⁰

Contention interrogatories are inquiries that require the identification of positions on issues in the case.²¹ Contention interrogatories “seek to clarify the basis for or scope of an adversary’s legal claims. The general view is that contention interrogatories are a perfectly permissible form of discovery, to which a response ordinarily would be required.”²² An example of a contention interrogatory is: “Do you contend that plaintiff was contributorily negligent regarding the accident on August 6, 1998?”²³

The contention interrogatory is valuable for a few reasons. First, it forces the adversary to reveal her basis for positions

¹⁸ HAYDOCK ET AL., *supra* note 1, at 364 (The interrogatory device “reveals information that will put the parties in realistic and informed positions from which to negotiate a settlement or stipulate to agreed facts.”).

¹⁹ 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., 3rd ed. 1999) (discussing when interrogatories serve a useful and sometimes critical function). This paper relies on Berman’s framework for when interrogatories are useful.

²⁰ *Id.* at 155.

²¹ Rule 33(c) specifically allows these types of interrogatories: “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” FED. R. CIV. P. 33(c).

²² *Starcher v. Corr. Med. Sys.*, 144 F.3d 418, 421 n.2 (6th Cir. 1998); *see, e.g., Taylor v. Fed. Deposit Ins. Corp.*, 132 F.3d 753, 762 (D.C. Cir. 1997) (explaining that when a complaint is vague and conclusory, a defendant should not move for dismissal, but rather should serve contention interrogatories); *Vidimos, Inc. v. Laser Lab Ltd.*, 99 F.3d 217, 222 (7th Cir. 1996) (explaining that if a defendant wishes to minimize uncertainty concerning the scope of a plaintiff’s claim, the defendant could serve contention interrogatories).

²³ HAYDOCK ET AL., *supra* note 1, at 370.

taken in the pleadings.²⁴ Second, it is 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.²⁵ In fact, if in a negligence case, one's adversary responds, "I do not know at this time," she is "invit[ing] a motion for summary judgment or a motion to strike under Rule 11."²⁶ Third, contention interrogatories are often "invaluable in narrowing the issues, laying foundations for motions, and preparing a thorough trial defense."²⁷

In addition, interrogatories target technical and statistical data better than do other forms of discovery, in part because depositions and document requests cannot readily expose this information.²⁸ Technical and statistical interrogatories force opposing counsel to ask the client to prepare the answer, as it is unlikely that the attorney will have all of the necessary information at his or her fingertips.²⁹ Moreover, the only evasion of such an interrogatory appears to be limited to Rule 33(d), which allows one to avoid answering when the answer may be derived from reviewing business records, and when the burden of deriving such information is the same for both the questioner and the answerer.³⁰

The final area in which interrogatories are useful is in the discovery of knowledgeable persons.³¹ An example of such an interrogatory reads: "Please state the name and address of each

²⁴ See Berman, *supra* note 19, at 156 (explaining why contention interrogatories are valuable); HAYDOCK ET AL., *supra* note 1, at 367 (explaining that interrogatories are useful for explaining pleading allegations in specific detail).

²⁵ Berman, *supra* note 19, at 156.

²⁶ Berman, *supra* note 19, at 156 (citing FED. R. CIV. P. 11 Advisory Committee Note to 1993 Amendment).

²⁷ U.S. Army Legal Servs., *supra* note 6, at 39.

²⁸ See Berman, *supra* note 19, at 160 (explaining why interrogatories seeking technical or statistical data are useful); see also HAYDOCK ET AL., *supra* note 1, at 368 (finding that interrogatories may pursue "[s]ummary explanations of technical data and statistics, manuals, reports, studies, and materials containing technical information").

²⁹ Berman, *supra* note 19, at 161.

³⁰ Berman, *supra* note 19, at 161 ("The answerer is more familiar with the documents that contain the information; she will know the meaning of special codes or abbreviations in the documents; and she will know how to use the documents to obtain the answer.").

³¹ It is important to note that asking about "knowledgeable persons" through interrogatories is still helpful even after the 1993 amendments to the Federal Rules of Civil Procedure added initial disclosures. Although under Federal Rule 26(a)(1)(A), "a party must automatically disclose the identity of persons likely to have information relevant to disputed facts alleged with particularity in the pleadings," the term "alleged with particularity" is not always clear, and as such, an adversary who concludes that the complaint alleges facts without particularity may not disclose the names of important witnesses in a Rule 26(a)(1)(A) initial disclosure. Berman, *supra* note 19, at 162-63 (citing FED. R. CIV. P. 26(a)(1)(A) Advisory Committee Note to the 1993 Amendment).

person who has knowledge of a particular subject matter.” One would think that the following two objections to such an interrogatory would be quite common: (1) the interrogatory is overbroad; and (2) the attorney cannot speculate as to the knowledge. However, Rule 26 appears to preclude the latter objection because it assumes that a party answering will in good faith disclose the persons the respondent knows or ought to know has facts relevant to the particular subject matter.³² However, it appears likely that there will always be an “overbroad” objection.

Despite the possible “overbroad” objection to the interrogatory, this particular type of interrogatory adds value to the propounding party’s case when it is answered. First, “the answer will be the next best thing to the adversary’s witness list.”³³ Second, “the answer will guide [one] in framing a deposition program” in that it may help narrow “the cast of characters.”³⁴ Lastly, the answers to these interrogatories “will make document production more meaningful” in that the answers will help an attorney request documents by reference to named individuals, as well as alert him or her to names to search for in the produced documents.³⁵

Essentially, interrogatories work when lawyers ask for specific lists, such as everyone in a company who has information about X.³⁶ What this all means is that contention interrogatories and those interrogatories that seek “lists” as answers are generally the most useful in discovering necessary information. As such, the usefulness of these types of interrogatories must be retained when crafting any type of rule to increase the effectiveness of the discovery process.

III. PROPOSALS FOR CHANGE

A. Proposal I: Create Standardized Interrogatories Based on

³² Berman, *supra* note 19, at 162 (discussing the possible objections to knowledgeable person interrogatories).

³³ Berman, *supra* note 19, at 162 (citing *Brock v. R.J. Auto Parts & Serv., Inc.*, 864 F.2d 677, 679 (10th Cir. 1988)). The majority rule in the federal courts is that witness lists are not discoverable through interrogatories. HAYDOCK ET AL., *supra* note 1, at 369-70; cf. FED. R. CIV. P. 26(a)(3)(A) (requiring *pretrial* disclosure of a witness list).

³⁴ Berman, *supra* note 19, at 162 (citing *Eppler v. Ciba-Geigy Corp.*, 860 F. Supp. 1391, 1396 (W.D. Mo. 1994)).

³⁵ Berman, *supra* note 19, at 162 (explaining the benefits of knowledgeable person interrogatories); see HAYDOCK ET AL., *supra* note 1, at 364 (discussing how interrogatories can help target people and topics for later discovery).

³⁶ HAYDOCK ET AL., *supra* note 1, at 367 (“Categories of information that interrogatories do disclose in an effective and economical way include specific, objective types of information.”).

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Subject Matter

The first proposal would amend Rule 33 to require answers to certain standardized interrogatories. These non-objectionable interrogatories would be categorized according to substantive areas of the law, such as antitrust or patent cases. This proposal addresses the gamesmanship of the current interrogatory practice by stamping certain questions as non-objectionable.

This amendment to Rule 33 would sacrifice the current breadth of interrogatories in favor of *requiring* answers to certain interrogatories. The proposal would add several forms to Rule 33, each designed with a specific practice area in mind. These forms would list a handful of interrogatory questions to which objections would be impossible. A party would face sanctions immediately upon failure to answer these questions.

This proposal suggests that the 1993 amendments to Rule 33, limiting the number of interrogatories that each party may file, changed the strategic use of interrogatories, but did not eliminate the game playing. That is, historically, parties abused the device by burying an opponent in interrogatories; but today, parties carefully craft the few interrogatories they send and spend an equal time crafting objections.³⁷ So while the 1993 amendments to Rule 33 addressed both overuse and stonewalling, overuse is more easily detected and solved than is stonewalling.³⁸ Prior to the 1993 amendments, many commentators cited interrogatories as the most abused form of discovery.³⁹ Because the 1993 amendments did little to address *abuse*, interrogatories remain a serious drain on client resources with little return on value. Eliminating the possibility for objection, at least for a few categories of substantive law, would eliminate the objection game-playing altogether.

1. Uniform Interrogatories in the State Courts

Included in these standardized interrogatories might be contention interrogatories, technical or statistical interrogatories, and knowledgeable person interrogatories.⁴⁰ Because these

³⁷ Schutz & Schwiebert, *supra* note 10, at 135-37 (reporting how the amendments to Rule 33 in 1993 changed the strategic use of interrogatories from a paper-dump problem to a wordsmithing problem); *see also* Oliver, *supra* note 3, at 659 (describing one problem of interrogatories as “overuse” and another as “abuse”).

³⁸ HARE ET AL., *supra* note 4, at 66, 79.

³⁹ *E.g.*, Schutz & Schwiebert, *supra* note 10, at 135 (citing JOHN J. COUND ET AL., CIVIL PROCEDURE—CASES AND MATERIALS 743 (5th ed. 1989)).

⁴⁰ *See supra* Part I. INTRODUCTION (explaining how these three types of questions are the most useful and fair interrogatories).

interrogatories would be tailored to specific practice areas – the interrogatories for an antitrust suit would differ from the interrogatories for an employment discrimination suit – the adoption of the forms would be highly politicized. However, several states have in fact adopted uniform interrogatories,⁴¹ and these proposals operate in the states with some success.⁴² In writing the federal forms, the Committee should borrow the design of those states that have adopted uniform interrogatories, triggered by certain substantive claims.

For example, Connecticut limits the interrogatories one can use in personal injury actions arising from the operation or ownership of a motor vehicle, or the ownership, maintenance, or control of real property, to those interrogatories set forth in specified forms.⁴³ As such, it appears that if a party wishes to serve interrogatories, she can only use the interrogatories set forth in the forms. However, if a party does not wish to serve certain interrogatories listed on the forms, or does not wish to serve any interrogatories, she is not required to do so.

In contrast, in New Jersey, personal injury claims have *mandatory* uniform interrogatories.⁴⁴ These interrogatories are mandatory in that upon service of the complaint and defendant's answer to the complaint, the uniform interrogatories are deemed automatically served; both sides *must* serve the uniform interrogatories.⁴⁵ Moreover, the responding party *must* answer

⁴¹ See, e.g., N.J. CT. R. 4:17-1 (explaining the rules pertaining to uniform interrogatories in certain actions); CONN. R. CT. § 13-6 (discussing the rules pertaining to interrogatories); ARIZ. R. CIV. P. 33.1 (explaining the rules regarding uniform and non-uniform interrogatories).

⁴² This proposal would benefit greatly from such empirical data as that gathered prior to the Advisory Committee on Civil Rules' changes to Rule 33 in 1993. See JOHN SHAPARD & CARROLL SERON, FED. JUDICIAL CTR., ATTORNEYS' VIEWS OF LOCAL RULES LIMITING INTERROGATORIES (1986) as an example of a study that polled attorneys on how state changes to the interrogatory device helped and hurt those attorneys in practice.

⁴³ CONN. R. CT. § 13-6(b) ("In all personal injury actions alleging liability based on the operation or ownership of a motor vehicle or alleging liability based on the ownership, maintenance or control of real property, the interrogatories served shall be limited to those set forth in Forms 201, 202 and/or 203 of the rules of practice, unless upon motion, the judicial authority determines that such interrogatories are inappropriate or inadequate in the particular action.").

⁴⁴ See N.J. CT. R. 4:17-1(b) (discussing when uniform interrogatories are mandatory).

⁴⁵ The relevant section of N.J. CT. R. 4:17-1(b)(2) reads: "A party defendant served with a complaint in an action subject to uniform interrogatories as prescribed by subparagraph b(1) of this rule shall be deemed to have been simultaneously served with such interrogatories. The defendant shall serve answers to the appropriate uniform interrogatories within 60 days after service by that defendant of the answer to the complaint. The plaintiff in such an action shall be deemed to have been served with uniform interrogatories simultaneously with service of defendant's answer to the complaint and shall serve answers to the interrogatories within 30 days after service of the answer to the complaint."

the uniform interrogatories within a specified number of days.⁴⁶

New Jersey Rule of Court 4:17-1(b), sets out when a party must use uniform interrogatories.

In all actions seeking recovery for property damage to automobiles and in all personal injury cases other than wrongful death, toxic torts, cases involving issues of professional malpractice other than medical malpractice, and those products liability cases either involving pharmaceuticals or giving rise to a toxic tort claim, the parties *shall be limited to the interrogatories prescribed by Forms A, B, and C of Appendix II*, as appropriate⁴⁷

New Jersey does allow each party to propound ten additional questions without leave of court.⁴⁸ Any additional interrogatories, however, shall be permitted only with the court's permission.⁴⁹

New Jersey and Connecticut are not alone in their creation of uniform interrogatories. There is “[a]n accelerating trend in state civil procedure rules” toward the use of court-created rather than lawyer-initiated discovery.⁵⁰ For example, California provides uniform interrogatories merely as a guide, allowing for other interrogatories and permitting the responding party its full catalog of objections.⁵¹

⁴⁶ N.J. CT. R. 4:17-1(b)(2); N.J. CT. R. 4:17-1(b)(4) (“Except as otherwise provided in subparagraph (b)(3) of this rule, every question propounded by a uniform interrogatory must be answered unless the court has otherwise ordered.”). As such, the only valid objections to these uniform interrogatories are claims of privilege and claims that the information sought “is the subject of an identified protective order issued pursuant to R. 4:10-3.” N.J. CT. R. 4:17-1(b)(3). Examples of some of the uniform interrogatories provided in Appendix II of Rule 4:17-1 are as follows:

1. State: (a) the full name and residence address of each defendant; (b) if a corporation, the exact corporate name; and (c) if a partnership, the exact partnership name and the full name and residence address of each partner.

. . .

3. If you intend to set up or plead or have set up or pleaded negligence or any other separate defense as to the plaintiff or if you have or intend to set up a counterclaim or third-party action, (a) state the facts upon which you intend to predicate such defenses, counterclaim or third-party action; and (b) identify a copy of every document relating to such facts.

N.J. CT. R.4:17-1, app. II.

⁴⁷ N.J. CT. R. 4:17-1(b)(1) (emphasis added).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See Seymour Moskowitz, *Rediscovering Discovery: State Procedural Rules and the Level Playing Field*, 54 RUTGERS L. REV. 595, 616-17 (2002) (discussing the implementation of uniform interrogatories in certain states).

⁵¹ See, e.g., Judicial Council of California, Form Interrogatories—Employment Law (2002), available at <http://www.calbar.ca.gov/calbar/pdfs/sections/laborlaw/2002-form-interrogatories.pdf>.

Arizona also has uniform interrogatories, for specific causes of action, which serve as a guide.⁵² “In Arizona, there are twenty-two standard uniform interrogatories for personal injury actions and twenty-three standard uniform interrogatories for contract actions.”⁵³ Although in Arizona an attorney does not have to use these uniform interrogatories, Arizona’s Special Bar Committee to Study Civil Litigation Abuses proposed the creation of uniform interrogatories to address the same problems presently facing the federal system — namely discovery abuse that leads to inefficiency.⁵⁴ The Arizona Supreme Court’s Comment in accepting Rule 33.1 explained that the creation of uniform interrogatories “was part of a comprehensive set of rule revisions proposed by the Special Bar Committee to Study Civil Litigation Abuse, Cost and Delay, which was specifically charged . . . with the task of proposing rules to *reduce discovery abuse* and to *make the judicial system in Arizona more efficient, expeditious, and accessible to the people*.”⁵⁵ As such, it appears that Arizona attempted to address the problem of abuse, rather than overuse, of its state’s interrogatories.

The state models will help the Committee navigate the political waters of deciding which interrogatories in each substantive area of the law to make non-objectionable, at least as far as federal and state claims overlap.⁵⁶

The state models will also help the Committee decide if the federal uniform interrogatories (1) will be mandatory to ask; (2) will be mandatory to answer; and (3) will be exclusive (the only interrogatories a party may send). The answer to the first question should be “no,” in order to preserve the traditional optional nature of sending interrogatories. The answer to the second question must be “yes,” in order to eliminate the game playing in interrogatory battles, and because the questions have

⁵² ARIZ. R. CIV. P. 33.1(f) (“The use of Uniform Interrogatories is not mandatory. The interrogatories should serve as a guide only, and may or may not be approved as to either form or substance in a particular case. They are not to be used as a standard set of interrogatories for submission in all cases. Each interrogatory should be used only where it fits the particular case.”).

⁵³ Moskowitz, *supra* note 50, at 616.

⁵⁴ ARIZ. R. CIV. P. 33.1 (Court Comment to the 1991 Amendment).

⁵⁵ *Id.* (emphasis added).

⁵⁶ Other sources from which the Committee might pull non-objectionable interrogatories, more keyed to federal claims, are those handbooks that set forth “boilerplate” interrogatories. In fact, lawyers who specialize in certain substantive areas of the law already rely on form interrogatories. See, e.g., DOUGLAS DANNER & LARRY L. VARN, *PATTERN DISCOVERY: TORT ACTIONS* (3d. ed. 2004). Such sources, though, do not have the benefit of having passed through the deliberative process of a state government and may favor one party unduly over another.

already been screened so as to be non-objectionable.

Answering the third question is more challenging. Amendments to Rule 33 should not permit the parties to set forth any additional interrogatories beyond the uniform interrogatories provided for in the amended Rule 33, without leave of court. If Rule 33 allowed for such additional interrogatories, the room for abuse by attorneys that currently exists would remain. As such, Rule 33 should provide for additional interrogatories only with leave of the court.

2. Possible Objections to the Proposal

The above discussion points to one specific problem with this proposed model: from what sources should the Committee draw non-objectionable interrogatories for each form? Two more objections to uniform interrogatories at the federal level present themselves. First, compound fields, such as environmental law, may not be amenable to uniform interrogatories that are mandatory to answer. Second, these forms breach the trans-substantivity to which the Rules aspire.

First, federal practice does not reduce itself to discrete areas of the law. For example, in an environmental justice suit, claims may include Equal Protection Clause violations, Fair Housing Act violations, and private and public nuisance claims.⁵⁷ At first glance, perhaps Rule 33 uniform interrogatories should not be created for these compound fields. However, in such a compound claim, perhaps a litigant could trigger multiple forms depending on the nature of the complaint. There is a more important question, though, for the Committee to answer: what would happen if a litigant triggered none of the forms? Would that litigant be denied the interrogatory device, or would the forms only modify Rule 33 when that substantive area of the law is part of the complaint?

A preliminary answer denies any interrogatories in this case, without leave of court. If the Committee has yet to approve forms that capture the complaint, the parties will waste their time, as under the current system, designing and evading crafted interrogatories. The Rule should deny the device in this instance.

⁵⁷ See generally *S. Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot.*, 254 F. Supp. 2d 486, 489 (D.N.J. 2003) (plaintiffs alleged that the New Jersey Department of Environmental Protection (NJDEP) violated the Fair Housing Act and the Equal Protection Clause of the Fourteenth Amendment, and that the NJDEP created both public and private nuisances to the citizens of Camden by issuing a permit to an industrial facility in Camden).

Next, what interrogatories are available when the case presents a complaint combining a claim that will trigger a form with one that will not? One sensible answer would be to deny the litigant the free choice of which interrogatories to send. This is because a complaint containing one claim that would trigger a form and one that would not fit under a form might otherwise allow a litigant to sneak in interrogatories related to the form-controlled claim by adding interrogatories related to the other claim.

The second objection to this proposal is the lack of trans-substantivity created by dividing the forms based on the substantive law raised in the complaint. At this time, it appears the Federal Rules of Civil Procedure make few, if any, distinctions based upon the area of law raised in the complaint.⁵⁸ Many Federal Rules “make no policy choice[], . . . thereby insulating the Rules from effective challenges under the statute delegating rulemaking power to the Supreme Court”⁵⁹ However, the Federal Rules “confer discretion on the trial judge[s],” in actuality making Federal Rules “trans-substantive only in the most trivial sense.”⁶⁰

Some scholars contend that if rulemakers consider Rules aimed at specific kinds of litigation, “the resulting rules would favor the interests of those groups that were best able to influence the rulemaking process.”⁶¹ However, other commentators note that “maintaining a facial appearance of trans-substantivity does not remove politics from the rulemaking process.”⁶² Rather, considering substance-specific Rules allows for closer consideration of the possible effects of the proposed Rule on interested groups.⁶³ As such, substance-specific interrogatories are not inherently problematic.⁶⁴

⁵⁸ See Catherine T. Struve, *Doctors, the Adversary System, and Procedural Reform in Medical Liability Litigation*, 72 FORDHAM L. REV. 943, 1011 (2004) (discussing the trans-substantivity of the Federal Rules of Civil Procedure).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 1012; see Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1473 (1987) (book review) (surveying books discussing the law of complex litigation).

⁶³ Struve, *supra* note 58, at 1012; see Burbank, *The Costs of Complexity*, *supra* note 62, at 1473 (discussing the impact of procedural and substantive rules); see also Stephen P. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 716-18 (1988) (promoting the creation and use of separate sets of procedural rules for different bodies of complex substantive law).

⁶⁴ See Struve, *supra* note 58, at 1012. However, it is important to note that substance-specific rulemaking is complicated by the fact that under the Rules Enabling Act, the Federal Rules must not “abridge, enlarge or modify any substantive right.” 28 U.S.C. § 2072(b) (2003).

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Amending Rule 33 in this way would not solve all of the problems associated with pretrial written exchanges between parties, but this proposed amendment, which narrows the scope of Rule 33 by requiring answers to approved questions based on the substantive area of the law at issue, might add utility to the device.

B. Proposal II: Eliminate Rule 33 Interrogatories

Perhaps the problems that interrogatories cause outweigh the benefits. The adoption of required disclosures in Rule 26 ensures that information is actually exchanged between parties; this is precisely what interrogatories were originally designed to achieve. Modifying the mandatory disclosure rule, and encouraging the use of requests for admission, might replace the bulk of the function of interrogatories. Considering the benefits of interrogatories after taking into account other discovery devices might tip the balance in favor of eliminating Rule 33 altogether.

Thus, any reform to the interrogatory device benefits from viewing the device as useful only after the exhaustion of requests for admissions, of initial disclosures, and of pretrial and discovery conferencing.⁶⁵ If what remains is too slight to justify the expense of the device, or if amendments to the other devices can reduce to nil what value remains in interrogatories, then the device should be abolished.

1. Initial Disclosures

Much of the benefit that Rule 33 interrogatories traditionally brought to litigation is now provided through other means. Adding a certain provision to Rule 26(a) could preserve those functions unique to Rule 33. If the Committee made these changes, Rule 33 could be eliminated.

Mandatory initial disclosures were “designed to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information.”⁶⁶ Rule 26 requires that each party within fourteen days after the Rule 26(f) conference disclose the identity of any person likely to have

⁶⁵ See HAYDOCK ET AL., *supra* note 1, at 364 (suggesting that attorneys only use interrogatories “when no other discovery request is available to produce the needed information”); Schutz & Schwiebert, *supra* note 10, at 137 (advising that attorneys not “waste” their interrogatories searching for information that can be obtained through other means).

⁶⁶ Angela R. Lang, Note, *Mandatory Disclosure Can Improve the Discovery System*, 70 IND. L.J. 657, 657-58 (1995) (quoting FED. R. CIV. P. 26(a) Advisory Comm. Note).

“discoverable information” about the case, disclose a copy or description of relevant documents, disclose computations related to any category of damages claimed, and disclose any insurance agreement likely to be involved in the case.⁶⁷

Despite debate regarding the effectiveness of mandatory initial disclosures, an empirical study conducted by the Federal Judicial Center found that “[i]nitial disclosure is being widely used and is apparently working as intended, increasing fairness and reducing costs and delays far more often than decreasing fairness or increasing costs and delays.”⁶⁸ As such, in contrast to interrogatories, mandatory initial disclosures increase the efficiency of litigation.

Initial disclosures answer basic questions of fact, and this instrument eliminates much of the work for which parties had historically drafted interrogatories.⁶⁹ “[T]he ‘court-ordered’ interrogatories of Rule 26(a)(1) address one of the historical functions of Rule 33 interrogatories — to explore broadly the source of evidence available to the opposing party by obtaining the identity of witnesses and the existence of documents.”⁷⁰

Rule 26(a) may need to be altered to bear the brunt of the elimination of interrogatories. This must be done carefully, however, to avoid losing the benefits of interrogatories. In order to abandon interrogatories altogether, the Committee should amend Rule 26(a)(1) specifically to allow for the standard exchange of certain lists between parties.

The elimination of Rule 33 interrogatories would, for

⁶⁷ FED. R. CIV. P. 26(a)(1) (requiring these disclosures unless a party objects during the Rule 26(f) conference that initial disclosures are not appropriate in the circumstances of the action and states the objection in the Rule 26(f) discovery plan). The Advisory Committee Note to the 1993 Amendment further provides that: “Unless the court directs a different time, the disclosures required by subdivision (a)(1) are to be made at or within 10 days after the meeting of the parties under subdivision (f). . . . As provided in the last sentence of subdivision (a)(1), a party is not excused from the duty of disclosure merely because its investigation is incomplete. The party should make its initial disclosures based on the pleadings and the information then reasonably available to it.” FED. R. CIV. P. 26(a) Advisory Comm. Note.

⁶⁸ WILLGING ET AL., *supra* note 2, at 2. The result of this study, in part, encouraged the Committee to amend Rule 26 to eliminate the opt-out provision. *See also* Kuo-Chang Huang, *Mandatory Disclosure: A Controversial Device with No Effects*, 21 PACE L. REV. 203, 237-39 (2000) (explaining major findings of the study).

⁶⁹ HAYDOCK ET AL., *supra* note 1, at 363 (explaining how mandatory disclosures have eliminated much of what interrogatories used to accomplish); *see also* Oliver, *supra* note 3, at 660 (describing how Kentucky’s use of initial disclosures “is intended to eliminate the need for lengthy interrogatories”).

⁷⁰ Schutz & Schwiebert, *supra* note 10, at 136. Schutz and Schwiebert later explain that while initial disclosures “do not eliminate the need for interrogatories directed toward these issues,” Rule 26(a) does “allow for fewer and more focused interrogatories about these broad categories.” *Id.*

example, disallow a party from obtaining information regarding all knowledgeable persons. As noted above, Rule 26(a)(1)(A) requires a party automatically to disclose the identity of persons likely to have information relevant to disputed facts alleged with particularity in the pleadings. However, “whether a disputed fact is ‘alleged with particularity’ is not always clear. Should [an] adversary conclude that [a] complaint alleges facts generally, rather than with particularity,” she will not provide the names of all important witnesses.⁷¹ Therefore, unlike Rule 33 interrogatories, Rule 26(a)(1)(A) does not ensure that an adversary will be able to find out the names of all knowledgeable persons. If Rule 33 interrogatories are eliminated, then the Committee should alter Rule 26(a)(1)(A) to require the discovery of any person who has knowledge of any particular discoverable matter, regardless of whether the disputed fact is alleged with particularity.

Also, the Committee should amend Rule 26(a) to require a party to release a summary of technical or statistical data, if that data is of central concern to the litigation, a disclosure for which at present the Rule does not provide. This technical or statistical data, set forth in list form, is essential because document requests, such as those required by Rule 26(b)(1), cannot readily reveal the needed information.⁷² The Rule as it stands is inadequate for this proposition. Rule 26(a)(1)(B) requires the disclosure of “a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment.”⁷³ The disclosure of documents, although requiring the disclosure of data compilations, significantly differs from the disclosure of technical and statistical data.⁷⁴

Lastly, the Committee should alter Rule 26(a) to preserve the utility of contention interrogatories. Contention

⁷¹ Berman, *supra* note 19, at 162-63.

⁷² See *supra* text accompanying notes 28-30.

⁷³ FED. R. CIV. P. 26(a)(1)(B).

⁷⁴ Technical and statistical data describes, for example, how many different types of bottles a manufacturer produces and in what quantities consumers purchase these types of bottles, rather than just showing invoices. See FED. R. CIV. P. 33(d) (allowing a responding party to direct the propounding party to the primary business records, when both parties could expend equal effort in crafting a list from the source documents). In this view, then, Rule 33(d) does not differ greatly from Rule 26(a) as both now stand, and therefore the Committee might not have to amend Rule 26(a) in this respect were it to eliminate Rule 33.

interrogatories protect parties by eliminating:

the potential prejudice or surprise to the party responding to the fraud claim [for example] that might arise from the insertion at some point in the litigation of unexpected and unpleaded allegations of misrepresentations, and also saves the courts and litigants time spent on litigating the adequacy of the . . . pleading of fraud and the . . . attempt to replead the claim with the requisite particularity.⁷⁵

At this time, however, it is unclear how to obtain the invaluable information from contention interrogatories through Rule 26(a) were Rule 33 eliminated. Conceived in theory, losing the contention interrogatory is a major loss to a party who wants to learn the meat behind their opponents' pleadings. It should be kept in mind, though, that the evasive interrogatory exchange as it now exists rarely exchanges this information anyway; losing the current system of contention interrogatories is not really losing much.

2. Other Discovery Devices

Rule 26 is not the only rule that overlaps with much of what is useful about today's Rule 33.⁷⁶ Increasing the use of requests for admissions might do much of the work that interrogatories could theoretically do, and make up for the resulting elimination of Rule 33's current breadth. Pretrial conferences provide for an additional exchange of meaningful information, albeit at a time further along in the case than when interrogatories would normally be sent.

Requests for admissions are similar to interrogatories in that both allow one party to discover more about how the adversary plans to act at trial and how the adversary views its own case. While the two methods seek the information in different ways — asking for a list of previously unknown parties versus a confirmation of suspected parties — the request for admission mimics the best of what interrogatories have to offer a litigant during early pretrial.⁷⁷ Also, both interrogatories and admissions

⁷⁵ David Hricik, *Wrong About Everything: The Application by the District Courts of Rule 9(b) to Inequitable Conduct*, 86 MARQ. L. REV. 895, 921 n.100 (2003) (quoting *Schaller Tel. Co. v. Golden Sky Sys., Inc.*, 139 F. Supp. 2d 1071, 1099-1100 (N.D. Iowa 2001)).

⁷⁶ See HAYDOCK ET AL., *supra* note 1, at 364 (reporting that many practitioners prefer to use document production requests and depositions instead of interrogatories to obtain the same information).

⁷⁷ Edna Selan Epstein, *Rule 36: In Praise of Requests to Admit*, in THE LITIGATION MANUAL PRETRIAL 150-53 (John G. Koeltl & John Kiernan eds., 3d ed., 1999) ("[A]nswers to interrogatories are rarely as useful as the responses that must be made to well-framed requests to admit."). *But see* Cecilia H. Gonzalez, *Requests for Admissions*, in PATENT

may be served on parties only.

However, there is no limit in Rule 36 comparable to that in Rule 33 as to how many requests for admission a party may file, so an increased reliance on requests for admission might resurrect some of the problems that the cap on the number of interrogatories solved. Unlike interrogatories, though, courts in complex litigation do not view successive sets of requests for admission as burdensome or oppressive; admissions practice presents different problems than does interrogatories practice.⁷⁸ We also note that, “answers to interrogatories . . . are not admissions, and a party can supplement or amend its answers” to interrogatories, so parties answering admissions are more careful to avoid traps.⁷⁹

Pretrial conferences under Rule 16 and discovery conferences under Rule 26(f) might also carry much of the weight that the drafters of Rule 33 intended that Rule to cover. Both meetings contemplate another set of disclosures, at different distances from trial. Rule 26(f)’s encouragement of settlement discussions might help replace what benefit contention interrogatories brought to the parties under Rule 33. As for timing, parties most often use interrogatories well in advance of trial, before the deposition phase, and reserve the ability to propound more interrogatories after objections or inadequate responses.⁸⁰ This proposed revision to the Federal Rules — eliminating Rule 33 interrogatories and adding certain provisions to Rule 26(a) — would not therefore disrupt the timing of discovery exchange. That is, requests for admissions may be made at any time, like interrogatories; Rule 26(f) contemplates a conference early on in discovery, and Rule 16 contemplates a conference very near to trial. Because interrogatories are most often used early in litigation, and then supplemented as needed later, these alternate devices cover the span of time in which interrogatories are useful. The robustness of the exchange of information at Rule 16 and Rule 26(f) conferences, though, is a question for

LITIGATION STRATEGIES HANDBOOK 183, 188 (Barry L. Grossman & Gary M. Hoffman eds., 2000) (“[T]he request for admission is not the proper tool for discovering general information about the position of the opposing party” but rather “is a basic tool that allows the parties to narrow the issues of the case.”).

⁷⁸ For a comparison of interrogatories and requests to admit related to this point, see Epstein, *supra* note 77, at 150-51 (“The rules recognize the value of requests to admit by not limiting their number.”).

⁷⁹ See Schutz & Schwiebert, *supra* note 10, at 146 (explaining parties’ use of interrogatories and admissions as a tactical measure).

⁸⁰ See HAYDOCK ET AL., *supra* note 1, at 366 (advising parties “that interrogatories are best used in the early stages of discovery” and explaining the timing of the various discovery devices).

further study.

3. Possible Objections to the Proposal

The expanded use of Rule 26 requests for admission and of pretrial and discovery conferences might not replace all of the work that interrogatories do or should do. Requests for admission, for example, require phrasing similar to that of a cross-examination at trial;⁸¹ a request for admission requires that the proponent “have some knowledge of the genuineness of the matter requested.”⁸² Interrogatories, on the other hand, allow for narrative answers, and do not require the sender to have certain knowledge of the opponent.⁸³

The requests for admission device does not perfectly replace the interrogatory, at least not as the interrogatory is conceived in theory. However, the request for admission device in practice today serves the function the drafters intended interrogatories to serve. Requests for admission are a less burdensome discovery device and courts have had fewer problems with them than with the interrogatory exchange. Because requests for admission do most, though not all of what interrogatories were intended to accomplish, and because interrogatories actually accomplish very little, there is little risk in eliminating interrogatories. Consider also the great expense that interrogatories mean for parties as compared to their utility. The expanded use of pretrial conferences, considered here particularly for the conferences’ ability to narrow issues for trial, overlaps with much of what interrogatories might have done, as conceived in Rule 33. Finally, because interrogatories in practice exchange very little substantive information, interrogatories are failing to live up to their expectation and theoretical utility. If the device does not work, if it costs a great deal, and if other discovery devices better accomplish what interrogatories were intended to accomplish, then there is little reason to maintain the device.

⁸¹ See Gonzalez, *supra* note 77, at 192 n.57 (“[M]any do not [even] view the request for admission as a discovery tool . . .”).

⁸² Gonzalez, *supra* note 77, at 194 (adding that “the responding party is not compelled to respond to ambiguous requests”).

⁸³ See HAYDOCK ET AL., *supra* note 1, at 369 (“The interrogatory, ‘State all facts upon which you base your claim of failure to warn in Paragraph 3 of the Complaint,’ is preferable to the request for admission, ‘You know of no facts upon which you base your claim for failure to warn.’”) (quoting CAL. CONTINUING EDUC. OF THE BAR, CALIFORNIA CIVIL DISCOVERY PRACTICE 333 (1975)). Haydock and his co-authors assume, however, that these hypothetical interrogatories will produce a responsive answer.

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IV. CONCLUSION

Any proposal for change to Rule 33 needs to be sensitive to what, if anything, interrogatories can accomplish under the current Rules, taking into account the contribution of initial disclosures. While both of the above proposals would eliminate the objections that automatically fly when parties exchange interrogatories, neither can entirely replace interrogatories because neither allows specific and searching questions as to the other parties' contentions. The Committee should consider whether keeping the opportunity for parties to exchange questions regarding contentions is worth the inefficiency and expense of the interrogatory device, particularly when even contention interrogatories rarely work as the sender intends them to work. After all, as the discussion of the second proposal above shows, existing discovery devices, including requests for admissions, initial disclosures, and discovery and pretrial conferences, can accomplish much of the positive work of interrogatories, such as narrowing the issues that are to be tried. In contrast, the first proposal shows great promise if the Committee could draft uniform questions for certain areas of the law. The proposal should also focus on contentions. The Rules should combine both proposals, keeping the interrogatory device only as far as it allows non-objectionable contention interrogatories in certain areas of the law, and expanding initial disclosures to address whom within the client's reach is a person most knowledgeable.