Rule 33(a)'s Interrogatory Limitation: By Party or by Side?

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INTRODUCTION

> *"If you are so drawn to it, just try to go in despite my veto. But take note: I am powerful. And I am only the least of the doorkeepers. From hall to hall there is one doorkeeper after another, each more powerful than the last. The third doorkeeper is already so terrible that even I cannot bear to look at him." These are difficulties the man from the country has not expected; the Law, he thinks, should surely be accessible at all times and to everyone.*
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> –Franz Kafka, *The Trial*[1]

The Federal Rules of Civil Procedure begin with a statement of their purpose: "These rules . . . shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."[2] With this mandate, the Federal Rules identify the primary objectives of civil procedure—substantial justice and procedural efficiency. The Federal Rules operate to effectuate both aims in tandem, that is, to maximize justice without sacrificing efficiency. However, justice and efficiency vis-à-vis the Federal Rules often work at cross purposes. Efficient procedure can diminish in the name of justice, as can justice in the interests of efficiency. Thus, as Franz Kafka so memorably allegorized, neither an expedient nor deliberate system of procedure guarantees a just outcome. The challenge, then, remains for courts to construe the Federal Rules so as to facilitate decisionmaking that is both efficient and equitable.

In the past few decades, discovery under the Federal Rules has emerged as a locus of procedural discord. Interrogatory practice[3] in

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1 Franz Kafka, *Before the Law*, in Franz Kafka, *The Complete Stories* 3, 3 (Schocken 1983) (N. Glatzer, ed).

2 FRCP 1.

3 Interrogatories are written questions served by one party to another, seeking information relevant to the dispute.

particular has attracted a fair amount of recent judicial scrutiny.[4] Much of the conflict has centered on Rule 33(a), which provides that "any party may serve upon any other party written interrogatories, not exceeding 25 in number . . . to be answered by the party served." The Rule's language indicates that each party of a civil suit may serve up to twenty-five interrogatories upon any other party of the same suit. Indeed, some courts and commentators have interpreted Rule 33(a)'s limitation to apply to each and every party of a civil action.[5]

Despite Rule 33(a)'s plain meaning, other courts and commentators have articulated an alternate Rule 33(a) construction.[6] According to the alternate construction, the word "party" may in some instances refer to an entire side of a dispute in the aggregate, rather than to the individual actors that comprise each side. The alternate Rule 33(a) construction therefore applies the twenty-five-interrogatory limit by "side," and not by "party."

The semantic distinction between "party" and "side" implicates a larger procedural concern. Namely, the choice of Rule 33(a) construction—"plain language" or "alternate"—can bear upon the total number of interrogatories filed in a dispute. The plain language construction commissions a broad interrogatory practice, permitting any party to propound twenty-five interrogatories upon any other party. As a result, the plain language construction enables parties to file greater numbers of interrogatories, often substantially more than required for proper discovery.[7] A broad interrogatory practice can thus occasion gross inefficiencies and encourage abuse. This is particularly true for big-ticket cases, where the stakes frequently motivate parties to litigate by hook or crook.[8] But interrogatory abuse can reach smaller

4 The cases within this Comment's scope have all been adjudicated within the last nine years, and at least two were adjudicated within the last two years. This concentration of the case law suggests an escalation of the conflict under consideration. See, for example, *Zito v Leasecomm Corp*, 233 FRD 395, 399 (SDNY 2006); *Vinton v Adam Aircraft Industries, Inc*, 232 FRD 650, 664 (D Colo 2005); *St. Paul Fire and Marine Insurance Co v Birch, Stewart, Kolasch & Birch, LLP*, 217 FRD 288, 289 (D Mass 2003); *Missouri Republican Party v Lamb*, 87 F Supp 2d 912, 919 (ED Mo 2000).

5 See, for example, *St. Paul*, 217 FRD at 289; *Lamb*, 87 F Supp 2d at 919; James W. Moore, 7 *Moore's Federal Practice* § 33.30[1] at 33-33 (Matthew Bender 3d ed 1997 & Supp 2004).

6 See, for example, *Zito*, 233 FRD at 399; *Vinton*, 232 FRD at 664; Charles A. Wright, Arthur R. Miller, and Richard L. Marcus, 8A *Federal Practice and Procedure* § 2168.1 at 261 (West 2d ed 1994 & Supp 2007).

7 See, for example, *Zito*, 233 FRD at 399 (noting that Rule 33(a)'s plain language would entitle the plaintiffs "to propound more than 5,000 interrogatories").

8 See Thomas E. Willging, et al, *Discovery and Disclosure Practice, Problems, and Proposals for Change: A Case-based National Survey of Counsel in Closed Federal Civil Cases* 1, 21 (Federal Judicial Center 1997) (conducting a study of discovery practices in over 1,000 cases and finding a high correlation between excessive discovery and the monetary stakes of the case).

cases as well, where moneyed parties can protract discovery beyond the means of their less wealthy opponents.[9]

In response to such ills, courts and commentators conceived the alternate construction. The alternate construction, however, introduces problems not at issue under Rule 33(a)'s plain language. These problems derive largely from the mechanics of the alternate construction's implementation. Specifically, the alternate construction requires courts to make case-by-case determinations of applicable construction. And although case-by-case determinations confer upon courts the flexibility to curb interrogatory abuse, they also create serious line-drawing problems that undermine the alternate construction's utility. In consequence, neither the plain language nor the alternate construction is adequate for the purpose of regulating a just or efficient interrogatory practice.

This Comment addresses the shortcomings of both Rule 33(a) constructions and posits an ad interim rule as an alternative. The ad interim rule begins with Rule 33(a)'s plain language and implements the twenty-five-interrogatory limit by "party" rather than by "side." The by-party limitation, however, remains conditional. The ad interim rule directs the court to establish an absolute baseline limit. When the number of interrogators on a side reaches that limit, a ceiling automatically triggers to cap further interrogatories. Any additional interrogatories would then require the court's permission. The ad interim rule, through the operation of its baseline limit, casts a wider net against abuse than does the plain language construction, while obviating the line-drawing problems associated with the alternate construction. Furthermore, the absolute baseline limit works in conjunction with the court-leave requirement in order to engage courts earlier and more actively in discovery, thus promoting the proper exchange of interrogatories.

This Comment proceeds in four Parts. Part I frames the problem, explaining the plain language and alternate constructions and assessing the relevant case law and commentary. Part II performs a telescopic analysis of Rule 33(a), beginning in sharp relief with the Rule's text and then pulling back to consider the Rule's policies and historical context. Part III evaluates the plain language and alternate constructions and determines that neither squares with the Rule 33(a) analysis. Part IV promulgates the ad interim rule and sets forth its justifications and methodology.

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[9] See Fleming James, Jr., Geoffrey C. Hazard, Jr., and John Leubsdorf, *Civil Procedure* § 5.2 at 289 (Foundation 5th ed 2001) (underscoring the potential for abuse in "'little' cases . . . in which one party has an incentive to overpower the other").

Excepting brief treatise review,[10] commentators have not yet undertaken to resolve the disparity in Rule 33(a) constructions. This Comment aims to quiet this tension and establish a roadmap that decisionmakers and commentators can consult for their own Rule 33(a) analyses.

I. RULE 33(A) CASE LAW AND COMMENTARY

Part I addresses the two lines of Rule 33(a) construction advanced by courts and commentators. Part I.A considers Rule 33(a)'s plain language construction. Courts and commentators that favor this interpretation advocate a literal application of Rule 33(a)'s interrogatory limit—that is, the limit should apply to the individual parties that constitute each side of a dispute. Other courts and commentators, however, have espoused an alternate reading. Part I.B examines this alternate Rule 33(a) construction, which maintains that the twenty-five-interrogatory limit may apply to the collective sides of a dispute, rather than to the individual parties on each side.

A. The Plain Language Construction

Rule 33(a) regulates interrogatory practice:

> Without leave of court or written stipulation, any party may serve upon any other party written interrogatories, not exceeding 25 in number including all discrete subparts, to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Rule 26(b)(2).

Rule 33(a)'s language indicates that each party of a civil suit may serve up to twenty-five interrogatories upon each and any other party of the same suit. For example, if *A*, *B*, and *C* filed a civil action against *D* and *E*, then *A*, *B*, and *C* can each serve *D* and *E* each with twenty-five interrogatories (for a total of 150 interrogatories served). And the same arrangement would apply to any interrogatories filed by *D* and *E* upon *A*, *B*, and *C*. Furthermore, Rule 33(a)'s language enables parties on the same side of the dispute to file interrogatories upon one another.[11] Thus, *A* can file twenty-five interrogatories upon each *B* and

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10 See Wright, Miller, and Marcus, 8A *Federal Practice and Procedure* § 2168.1 at 261–63 (cited in note 6) (proposing a supplementary solution discussed further in Part III.C).

11 Michael C. Smith, ed, *O'Connor's Federal Rules* 372 (Jones McClure 2003) ("Parties do not have to be adverse to one another to seek discovery by interrogatories.").

C, as can *D* upon *E*. Rule 33(a) therefore defines "party" as any named actor in a civil action.

Moore's Federal Practice has adopted Rule 33(a)'s plain language construction:

> As noted, any party may serve interrogatories on any other party to a proceeding. Therefore, in multiparty cases, a party may serve 25 interrogatories on each other party involved. For example, if parties A and B are suing parties X, Y, and Z, then A can serve 25 interrogatories on X, 25 on Y, and 25 on Z, and B can do the same.[12]

Furthermore, at least one court has upheld Rule 33(a)'s plain language construction. In *St. Paul Fire and Marine Insurance Co v Birch, Stewart, Kolasch & Birch, LLP*,[13] three defendants each served twenty-five interrogatories upon the plaintiff, for a total of seventy-five interrogatories served by the defendants.[14] The Local Rules of the District Court for the District of Massachusetts, however, limited the number of interrogatories to twenty-five per collective side. Specifically, Local Rule 26.1(C) provided that, "[u]nless the judicial officer orders otherwise, the number of discovery events shall be limited for *each side* (or group of parties with a common interest) to . . . twenty-five (25) interrogatories."[15]

Despite the by-side limitation set forth by the Local Rules, the court held for the defendants: "[T]hose parts of Local Rule 26.1(C) which limit the number of interrogatories to 25 for each side . . . are unenforceable" because "[a] court's local rules must be consistent with . . . the Federal Rules of Civil Procedure."[16] In other words, the court read Rule 33(a)'s interrogatory limit to apply to the individual parties on each side of the dispute, not to each side in the aggregate. Accordingly, the court deemed Local Rule 26.1(C) inconsistent with Rule 33(a) and therefore "unenforceable."[17]

Other courts, while not ruling directly on the issue, have acknowledged the plain language construction by implication. For example, in *Missouri Republican Party v Lamb*,[18] the court established a scheduling plan that maintained a distinction between interrogatory limitations by "party" and deposition limitations by "side."[19] Specifically, the scheduling plan provided that "[t]he presumptive limits of ten (10)

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12 Moore, 7 *Moore's Federal Practice* § 33.30[1] at 33-33 (cited in note 5) (citation omitted).
13 217 FRD 288 (D Mass 2003).
14 See id at 289.
15 Quoted in id (emphasis added).
16 Id (quotation marks omitted).
17 See id.
18 87 F Supp 2d 912 (ED Mo 2000).
19 See id at 919.

depositions *per side* as set forth in Rule 30(a)(2)(A) [ ] and twenty-five (25) interrogatories *per party* as set forth in Rule 33(a) [ ] shall apply."[20] Although the court may have chosen simply to reproduce the Federal Rules' language in its decision,[21] the court nonetheless recognized the distinction. In fact, the court's decision to incorporate the Federal Rules' "per side" and "per party" language signals that the court likely found the distinction meaningful.

B. The Alternate Construction

The alternate Rule 33(a) construction first appeared in Wright, Miller, and Marcus's *Federal Practice and Procedure*,[22] and some courts have adopted this construction in subsequent decisions.[23] According to this view, Rule 33(a) may in some cases limit interrogatory practice by "side" rather than by "party." So the alternate construction applies Rule 33(a)'s interrogatory limitation to the two sides of the dispute as collective wholes, rather than to each and every party named in the dispute. Referring, then, to the example set forth in Part I.A, plaintiffs *A*, *B*, and *C* under the alternate construction may collectively file no more than twenty-five interrogatories upon *D* and *E* collectively, and so too *D*/*E* upon *A*/*B*/*C* collectively.[24]

Wright, Miller, and Marcus conceived the alternate construction to remedy the shortcomings of Rule 33(a)'s plain language:

> Because it frequently happens that a number of parties on the same side are represented by a single attorney and in that sense act in unison, [the alternate construction] might be attractive in the interrogatory setting . . . . Consider, for example, a situation in which ten people injured in a bus crash sue the bus company in a single suit represented by the same lawyer. Should they be considered one party or ten for purposes of the interrogatory limitation? The best result would seem to be to recognize that in some

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20 Id (emphasis added).

21 Compare FRCP 30(a)(2)(A) (limiting depositions by "side"), with FRCP 33(a) (limiting interrogatories by "party").

22 Charles A. Wright, Arthur R. Miller, and Richard L. Marcus, 8A *Federal Practice and Procedure* (West 2d ed 1994).

23 *Zito v Leasecomm Corp*, 233 FRD 395, 399 (SDNY 2006); *Vinton v Adam Aircraft Industries, Inc*, 232 FRD 650, 664 (D Colo 2005).

24 Of course, circumstances could exist where *A*/*B*/*C* would need to file twenty-five interrogatories upon *each* of *D* and *E* (and *D*/*E* upon *each* of *A*, *B*, and *C*). However, the case law and commentary have not addressed this possibility, nor have they explored other implications of limiting interrogatories by side. For example, how would the alternate construction regulate the exchange of interrogatories between adverse parties on the same side of the dispute? As it stands, the alternate construction limits interrogatory practice only to parties opposite one another—the two "sides" of the dispute. This Comment considers these issues in Part III.B.

> instances nominally separate parties should be considered one party for purposes of the 25-interrogatory limitation.[25]

As the bus crash hypothetical demonstrates, Rule 33(a)'s plain language can result in considerable inefficiencies that parties may work to exploit.[26]

Courts have recognized this potential for inefficiency and abuse. In *Vinton v Adam Aircraft Industries, Inc*,[27] the plaintiff argued that the magistrate had abused his discretion by limiting the number of interrogatories to twenty-five per side, as opposed to twenty-five per party.[28] Citing Wright, Miller, and Marcus, the *Vinton* court ruled that the particular facts of the case—the two defendants were alter egos—represented an instance where "nominally separate parties should be considered one party for purposes of the 25-interrogatory limitation."[29] The court further noted that the plaintiff did not "explain how the presence of two parties should justify increasing the number of permitted interrogatories."[30] In other words, the court sought a justification for interrogatories otherwise guaranteed under Rule 33(a)'s plain language. This marked a significant departure from prior Rule 33(a) decisions. By requiring the plaintiff to justify the interrogatories, the court implicitly rejected the presumption of the Rule's plain language.

Other courts, while not explicitly adopting the alternate Rule 33(a) construction, have recommended or otherwise affirmed the interpretation. For example, in *Zito v Leasecomm Corp*,[31] the District Court for the Southern District of New York acknowledged the alternate construction's utility in cases where Rule 33(a)'s plain language could result in inefficiency or abuse. The court observed that the plain language approach would entitle the plaintiffs to "propound more than 5,000 interrogatories."[32] In reaching its decision, the court weighed Rule 33(a)'s literal language against the potential for misapplication. Although it did not ultimately decide "whether the plain language of Rule 33(a) must be strictly applied in all circumstances," the court deemed the alternate construction the "more sensible approach."[33]

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25 Wright, Miller, and Marcus, 8A *Federal Practice and Procedure* § 2168.1 at 261 (cited in note 6).

26 This Comment examines Rule 33(a)'s policies in Parts II.B–D.

27 232 FRD 650 (D Colo 2005).

28 See id at 664.

29 Id (quotation marks and citation omitted).

30 Id at 664 n 12.

31 233 FRD 395 (SDNY 2006).

32 Id at 399.

33 Id.

II. RULE 33(A) ANALYSIS

Given two plausible lines of Rule 33(a) interpretation, this Comment looks to the principles of statutory construction for guidance.[34] The Supreme Court has consistently performed two primary operations of construction. First, the Court examines the statute's immediate text and the relevant portions of the broader statute. The Court then considers the statute's context—the legislative history and other sources of policy.[35] This Comment appropriates this framework, and the Rule 33(a) analysis proceeds in kind from text to context. Part II.A parses the relevant Federal Rules language. Part II.B considers the policies that inform Federal Rules discovery. Parts II.C and II.D place those policies within a historical framework. With a few minor exceptions,[36] the relevant case law and commentary have not submitted Rule 33(a) to this basic review.

A. Rule 33(a) Textual Analysis

Proper rule construction begins with the text,[37] and Rule 33(a) adverts no immediate ambiguity or tension—"any party may serve upon any other party written interrogatories, not exceeding 25 in number." The word "any," which modifies the words "party" and "other party," predicates a straightforward interrogatory practice. Namely, any party may file up to twenty-five interrogatories upon any other party, including parties on the same side of the dispute.

As noted, however, rule construction requires examination of all material portions of the "statute."[38] Accordingly, Rule 33(a)'s textual analysis must account for Rule 26, which qualifies the limitations placed on discovery practices under the Federal Rules. Specifically, Rule 26(b)(2)(A) provides that "the court may alter the limits . . . on

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34 The canons of statutory construction apply to Federal Rules construction. See, for example, *Leatherman v Tarrant County Narcotics Intelligence and Coordination Unit*, 507 US 163, 168 (1993) (applying a particular canon of construction—*expressio unius est exclusio alterius*—to FRCP 9(b)).

35 For examples of the Supreme Court's application of these two operations, see generally *Muscarello v United States*, 524 US 125 (1998); *Bailey v United States*, 516 US 137 (1995); *Smith v United States*, 508 US 223 (1993); *United Steel Workers of America, AFL-CIO-CLC v Weber*, 443 US 193 (1979); *Tennessee Valley Authority v Hill*, 437 US 153 (1978); *Church of the Holy Trinity v United States*, 143 US 457 (1892).

36 See, for example, Wright, Miller, and Marcus, 8A *Federal Practice and Procedure* § 2168.1 at 256–60 (cited in note 6) (discussing how a limit on interrogatories has evolved since the inception of the Federal Rules).

37 See, for example, *Muscarello*, 524 US at 127; *Smith*, 508 US at 228; *Hill*, 437 US at 173.

38 See, for example, *Bailey*, 516 US at 146 (referring to another subsection to help interpret meaning); *Weber*, 443 US at 204–06 (same); *Holy Trinity*, 143 US at 462–63 (analyzing the title of the statute).

the number of depositions and interrogatories." Rule 26 thus renders Rule 33(a)'s twenty-five-interrogatory limit a default limitation that courts may adjust as circumstances require. Furthermore, Rule 26 places no condition on the court's power to alter interrogatory limits, establishing broad discretion for courts to shape and modify interrogatory practice.

The Supreme Court case law corroborates this broad Rule 26 discretion. In *Crawford-El v Britton*,[39] the Court deemed that "Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly."[40] Rule 26(b)'s Advisory Committee Notes[41] further demonstrate the Supreme Court's intent to cede open-ended discretion:

> The revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose *additional* restrictions on the scope and extent of discovery and to authorize courts that develop case tracking systems based on the complexity of cases to *increase or decrease* by local rule the presumptive number of depositions and interrogatories allowed.[42]

Certainly, such broad discretion opens up the potential for abuse. But Supreme Court case law suggests that abuse occurs only when the exercise of Rule 26 discretion violates the due process rights of the interrogator.[43] This Comment addresses the Supreme Court's due process standard in Part IV.C. Suffice it to say that the Supreme Court's due process standard accords district courts near carte blanche to "tailor discovery narrowly"[44] as each court sees fit.

In consequence, fidelity to Rule 33(a)'s plain language should not determine Rule 33(a)'s construction.[45] Rather, the success or failure of

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39 523 US 574 (1998).

40 Id at 598. See also *Bell Atlantic Corp v Twombly*, 127 S Ct 1955, 1988 n 13 (2007) ("Subsequently, Rule 26 confers broad discretion to control the combination of interrogatories, requests for admissions, production requests, and depositions permitted in a given case; the sequence in which such discovery devices may be deployed; and the limitations imposed upon them.").

41 The Advisory Committee drafts the amendments to the Federal Rules. When the Supreme Court adopts Federal Rules amendments, the Advisory Committee Notes become an important source of legislative history.

42 FRCP 26, Advisory Committee Notes (1993 Amendments) (emphasis added).

43 See *Mathews v Eldridge*, 424 US 319, 347–49 (1976) (finding that denial of the respondent's right to an evidentiary hearing did not violate due process rights because "the present administrative procedures [already] fully comport with due process").

44 *Crawford-El*, 523 US at 598.

45 Rule 33's amendment history demonstrates the relative unimportance of the rule's plain language. Prior to the 1993 Amendments, Rule 33 explicitly prohibited numeric limitations on interrogatories. See FRCP 33, Advisory Committee Notes (1946 Amendments) ("Under amended Rule 33 . . . it is provided that the number of or sets of interrogatories to be served may not be limited arbitrarily . . . to any particular number."). Nevertheless, at the time of the 1993 Amend-

any Rule 33(a) interpretation should turn on whether the construction effectuates Rule 33(a)'s purposes and intent.[46] This Comment thus examines the policies that inform Federal Rules discovery in the remainder of Part II.

B. Rule 33(a) Policy Analysis

Discovery under the Federal Rules confers many benefits upon civil procedure. For example, by expediting the process of gathering information, broad discovery enables parties to more quickly anticipate and eliminate flimsy or bogus issues.[47] Moreover, discovery allows parties to focus their efforts and resources during trial. Effective use of discovery can obviate time-consuming objections to unoffending opponent testimony and, at the same time, enable clear and concise direct examination.[48] Broad discovery also helps circumvent the inefficient process of authenticating documents during trial: "If a document's authenticity is established through discovery, it can be admitted simply by offering it in evidence, a shortcut especially important in cases involving masses of documents."[49]

Interrogatory practice under the Federal Rules features further benefits. Unlike resource-draining discovery devices such as depositions, interrogatories represent a relatively inexpensive and efficient method of obtaining testimony.[50] Interrogatories also enable parties to canvass large amounts of information. For example, interrogatories authorize parties to obtain all the information known to the responding party, not just the information held by individual deponents.[51] Moreover, because interrogatory practice requires respondents to conduct research and investigate specific matters, interrogatories tend to yield more complete information.[52]

Such benefits notwithstanding, discovery under the Federal Rules can also operate to undermine proper litigation. For one, broad discovery practices can introduce myriad inefficiencies into civil proce-

ments' adoption, over half the district courts had already implemented interrogatory number limits through local rules. FRCP 33, Advisory Committee Notes (1993 Amendments).

46 See, for example, *Weber*, 443 US at 201–04; *Hill*, 437 US at 184.

47 Testimony acquired through discovery can expose weak issues that parties can then promptly eliminate through pretrial settlement or summary judgment. See James, Hazard, and Leubsdorf, *Civil Procedure* § 5.2 at 287 (cited in note 9).

48 Id.

49 Id at 288.

50 See Jack H. Friedenthal, Mary Kay Kane, and Arthur R. Miller, *Civil Procedure* § 7.9 at 429 (West 4th ed 2005).

51 Id.

52 Id.

dure.[53] More critically, parties may actively abuse discovery's broad scope and work to debilitate the litigation process for strategic purposes. According to the observations of one judge:

> [Many lawyers] conduct seemingly endless discovery by manipulating the rules that permit the taking of depositions and written interrogatories or require production of documents. This can cause pretrial proceedings to go on and on ad nauseam. Such tactics are employed by unscrupulous counsel to discourage or exhaust the other side, which is often underfunded or outgunned. If left unchecked, this can result in the protraction of litigation, needless discovery, and incredible costs.[54]

Interrogatory practice in particular can lend itself to ready misapplication. Although interrogatories can elicit precise, comprehensive answers, interrogatory practice can also impede the exchange of information. For example, respondents in consultation with opportunistic counsel may choose to craft uninformative responses intended to circumvent proper discovery and obscure critical information.[55] Interrogators may also frame questions that require inordinate amounts of effort to answer in order to frustrate respondents.[56] Furthermore, although interrogatories represent a less expensive, more efficient alternative to depositions, their relative ease of use also renders them ripe for abuse. Parties bent on harassment can fire off hundreds of interrogatories with relatively little effort. Under these circumstances, interrogatories become instruments of abuse rather than legitimate factfinding tools. And although commentary suggests that parties and attorneys infrequently engage in the most egregious forms of manipulation,[57] interrogatory abuse and its ill effects remain a procedural reality.[58]

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53 See James, Hazard, and Leubsdorf, *Civil Procedure* § 5.2 at 288 (cited in note 9) ("Discovery increases an important part of the costs of litigation—the time of the attorneys, parties, witnesses, and court reporters consumed in taking the evidence before trial. In effect, a case may be tried twice, once in discovery and once in court, with the first 'trial' usually the longer of the two. More cost may be incurred in baselessly seeking or resisting discovery or squabbling about its details.").

54 J. Thomas Greene, *The Practice of Law: Still a Noble Profession Despite Gamesmanship and Commercialism*, 13 Experience 20, 21 (2002).

55 Friedenthal, Kane, and Miller, *Civil Procedure* § 7.9 at 429 (cited in note 50).

56 Id.

57 See, for example, Thomas E. Willging, et al, *An Empirical Study of Discovery and Disclosure Practice under the 1993 Federal Rule Amendments*, 39 BC L Rev 525, 527 (1998) (rejecting the conventional wisdom that "discovery is abusive," and noting that "the typical case has relatively little discovery, conducted at costs that are proportionate to the stakes of the litigation").

58 See *Seattle Times Co v Rhinehart*, 467 US 20, 34–35 (1984) (observing that "[i]t is clear from experience that pretrial discovery by . . . interrogatories has a significant potential for abuse . . . [that] is not limited to matters of delay and expense; discovery also may seriously implicate privacy interests of litigants and third parties"); *In re Terrorist Attacks on September 11, 2001*, 454

The Rule 33(a) policy analysis thus provides justifications for both the plain language and alternate constructions. In most cases, the plain language construction enables parties to file more interrogatories. So if circumstances dictated wide-scale discovery, the plain language construction would ostensibly better serve the interests of proper litigation. Alternatively, parties could abuse Rule 33(a)'s plain language in order to "outgun" their opponents. Under these circumstances, the alternate construction may represent the more desirable arrangement.

C. The Historical Analysis Writ Large

Rule 33(a)'s policies appear to support both the plain language and alternate constructions—parties may benefit from broad discovery practices in some circumstances but require limitations on discovery in others. This putative balance, however, does not reflect the historical reality of interrogatory practice under the Federal Rules. Policy considerations evolve, and proper rule construction must address policy within the context of that evolution.[59] To that effect, this Comment examines the historical development of discovery in general (Part II.C) and interrogatory practice in particular (Part II.D).

Before the 1938 promulgation of the Federal Rules, discovery practice remained irregular and incomplete across state and federal courts.[60] Although some courts enabled a few discovery practices, none of them maintained anything resembling the full range of discovery devices authorized under the Federal Rules.[61] Limited or otherwise, discovery had little effect on litigation just a few decades earlier, when jurors, as members of the community, had direct knowledge of the parties and facts.[62] However, as civil disputes increased in complexity and geographic scope, the inability to exchange basic information came to occlude litigation[63] and produce unjust outcomes.[64] Despite

F Supp 2d 220, 223–24 (SDNY 2006) (discussing the prejudicial effect of interrogatory practice in cases where public scrutiny becomes an issue, including exploitation of broad discovery to expose large amounts of harmful yet irrelevant information); *Walker v Lakewood Condominium Owners Association*, 186 FRD 584, 588 (CD Cal 1999) (noting that the members of the Federal Rules Committee "do not need crystal balls to envision the abuse that would occur [through interrogatory manipulation]" and that "interrogatories can be used as a costly form of harassment").

59 See, for example, *Weber*, 443 US at 202–04; *Holy Trinity*, 143 US at 465–72.

60 Richard L. Marcus, *Retooling American Discovery for the Twenty-first Century: Toward a New World Order?*, 7 Tulane J Intl & Comp L 153, 159 (1999).

61 Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 BC L Rev 691, 719 (1998) ("If one adds up all of the types of discovery permitted in individual state courts, one finds some precursors to what later became discovery under the Federal Rules; but . . . no one state allowed the total panoply of devices.").

62 Id at 695.

63 James, Hazard, and Leubsdorf, *Civil Procedure* § 5.2 at 288 (cited in note 9) ("In the era before free discovery, much or most of the trial time was spent compensating for ignorance of

these problems, courts remained slow to implement change, mainly due to the widespread policy disfavoring so-called "fishing expeditions."[65] But many commentators and legislators perceived the need for a complete and systematic approach to discovery, and their calls for discovery reform eventually led to the 1934 adoption of the Rules Enabling Act and the 1938 codification of the Federal Rules.[66]

As the enactment of the Federal Rules demonstrates, rule construction must engage policy within its larger historical context. Had the rulemakers designed the Federal Rules to reflect the status quo, the problems arising from insufficient discovery would have continued to mount. The Federal Rules' drafters, however, recognized that traditional policies no longer squared with the contemporary concerns of civil procedure.[67] The drafters therefore eschewed the outdated (but still widespread) policies that supported discovery restriction and followed the path towards greater liberalization.

The amendments to the Federal Rules over the last three decades have tracked another shift in discovery policy. Prior to the 1970s, two primary policies shaped the development of the Federal Rules: (1) liberalization of discovery practice in order to facilitate the exchange of necessary information and (2) attorney control over discovery with minimal judicial involvement.[68] During the 1970s, however, widespread discovery abuse[69] prompted a policy shift in favor of a more circumscribed discovery practice.[70] And when the policy reversed course, so too did the development of the Federal Rules. The Federal Rules amendments subsequent to the 1970 Amendments have enabled discovery-limiting measures such as sanctions;[71] number re-

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the opponent's case by such means as hypertechnical objections to the other's side presentation of evidence and painstakingly cautious cross-examination.").

64 See generally Edson R. Sunderland, *Foreword*, in George R. Ragland, *Discovery before Trial* iii (Michigan 1932) (discussing the problems with civil procedure during the pre–Federal Rules regime).

65 See Subrin, 39 BC L Rev at 697 (cited in note 61) ("[T]o permit fishing in an opponent's mind or files, under the auspices of the judiciary, was an outrage to those who opposed expanded discovery.").

66 Id at 698–729 (discussing the contributions of scholars Charles Clark, Robert Millar, George Ragland, and Edson Sunderland to the development of discovery under the Federal Rules).

67 Id.

68 Judith A. McKenna and Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 BC L Rev 785, 785–86 (1998).

69 See Charles B. Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 Cal L Rev 264, 264–66 (1979) (observing that abuse of the judicial process, most often through discovery, is widespread).

70 See Marcus, 7 Tulane J Intl & Comp L at 161–64 (cited in note 60) (remarking that "[p]erhaps every action invites a reaction" and discussing the shift in focus towards a more limited discovery practice beginning with the 1980 Federal Rules Amendments).

71 See FRCP 26, Advisory Committee Notes (1983 Amendments).

strictions on discovery devices, including interrogatories;[72] and increased judicial control over discovery practices.[73]

As this progression demonstrates, attorney control over a liberalized discovery practice has given way to greater judicial management of a more limited discovery regime. And even more so than the procedural restrictions, increased judicial involvement has become the preeminent policy concern of courts and commentators.[74] In fact, surveys indicate that both judges and attorneys have identified early and active judicial management of discovery as civil procedure's most pressing need.[75] Empirical studies have corroborated this sentiment, affirming the importance of judicial involvement to the equitable and expedient resolution of disputes.[76]

In sum, broad discovery today has come to represent as much a threat as a boon to civil procedure. Abuse has proliferated, and broad discovery has threatened to undermine the Federal Rules' twin aims of justice and efficiency.[77] Although some current policies support broad discovery, many—like the "fishing expedition" refrain of the 1930s—persist only as echoes of a past era.[78] The Rule 33(a) analysis thus must consider policy within this particular context. In 1938, civil litigation required the liberal, attorney-centric discovery practice established under the Federal Rules. Today, policies dictate a more circumscribed discovery regime.

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72 See FRCP 33, Advisory Committee Notes (1993 Amendments).

73 See, for example, FRCP 1, Advisory Committee Notes (1993 Amendments) (recognizing a court's affirmative duty to exercise authority over discovery); FRCP 26, Advisory Committee Notes (1993 Amendments) (discussing the implementation and revision of Rule 26(f), which provides for judicial supervision of discovery matters).

74 See, for example, Gene R. Shreve and Peter Raven-Hansen, *Understanding Civil Procedure* § 1.01 at 4 (Matthew Bender 3d ed 1997) ("[T]here is constant pressure for more active judicial management of litigation . . . in response to widespread criticisms of the cost and efficiency of civil litigation.").

75 See Marcus, 7 Tulane J Intl & Comp L at 166–68 (cited in note 60) (examining various studies and finding that up to 80 percent of judges and attorneys deemed further discovery reform necessary).

76 See, for example, James S. Kakalik, et al, *Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management under the Civil Justice Reform Act* 6, 13–15 (RAND 1997) (summarizing the results of a study of more than 10,000 cases that determined that early judicial management of litigation significantly reduced the duration of litigation).

77 A minority of commentators, however, have made the case that the extent of abusive discovery has been overstated. See, for example, Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 Stan L Rev 1393, 1395–96 (1994) (asserting that the myth of widespread discovery abuse based on a misconception that Americans overlitigate).

78 For example, although proponents of broad discovery cite benefits regarding trial efficacy and the earlier, more efficient settlement of cases (see Part II.B), studies have indicated that broad discovery, in fact, frustrates pretrial settlement. See, for example, McKenna and Wiggins, 39 BC L Rev at 796 (cited in note 68).

D. The Historical Analysis Writ Small

As with discovery practice in general, a historical examination of interrogatory policy provides necessary context for the Rule 33(a) analysis.[79] When first introduced in 1938, Rule 33 provided that "[n]o party may, without leave of court, serve more than one set of interrogatories to be answered by the same party."[80] Although Rule 33 did not explain the denomination "one set of interrogatories," courts generally understood Rule 33 to restrict interrogatory practice.[81] In 1946, the Supreme Court amended Rule 33 to reject explicitly any interrogatory limitations based on number.[82] The 1946 Amendments thus brought interrogatory practice in line with the larger policies in favor of broad discovery. Courts picked up on the amended language and ruled accordingly, instituting modern interrogatory practice in the process.[83]

Criticisms of Rule 33's unrestricted interrogatory practice began to surface in the 1970s.[84] During that time, several district courts passed local rules placing number limits on interrogatories, despite the Federal Rules' clear prohibition.[85] In 1977, the American Bar Association recommended that the Advisory Committee amend Rule 33 to include a thirty-interrogatory limit.[86] The Committee on Rules of Practice and Procedure proposed an alternative amendment granting district courts the authority to enact local interrogatory limitations.[87] The

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79 See, for example, *Muscarello*, 524 US at 137–38; *Weber*, 443 US at 201–07.

80 Quoted in Moore, 7 *Moore's Federal Practice* § 33App.01[1] at 33App-1 (cited in note 5).

81 See, for example, *Chemical Foundation v Universal-Cyclops Steel Corp*, 1 FRD 533, 536 (WD Pa 1941) (asserting that "the number of interrogatories should be relatively few and related to the important facts of the case"); *Graver Tank and Manufacturing v James B. Berry Sons*, 1 FRD 163, 165 (WD Pa 1940) (same); *Coca Cola Co v Dixi-Cola Laboratories*, 30 F Supp 275, 279 (D Md 1939) (same).

82 See FRCP 33, Advisory Committee Notes (1946 Amendments) ("[T]he number of or number of sets of interrogatories to be served may not be limited arbitrarily[,] . . . [and] a limit may be fixed only as justice requires to avoid annoyance, expense, embarrassment or oppression.").

83 See generally, for example, *Hickman v Taylor*, 329 US 495 (1947). *Hickman* marked a watershed in the evolution of discovery policy. In *Hickman*, the Supreme Court endorsed the broad scope of discovery under the Federal Rules and ruled that "[n]o longer can the time-honored cry of 'fishing expedition' serve to" bar discovery. Id at 507.

84 See, for example, Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking*, 52 Ala L Rev 529, 543 (2001) ("The term and the concept of 'discovery abuse' began to take hold in the American psyche during the 1970s.").

85 See Sherman L. Cohn, *Federal Discovery: A Survey of Local Rules and Practices in View of Proposed Changes to the Federal Rules*, 63 Minn L Rev 253, 276–77 (1978).

86 See ABA Section of Litigation, *Report of the Special Committee for the Study of Discovery Abuse*, 92 FRD 149, 173, 175 (1977).

87 See Committee on Rules of Practice and Procedure of the Judicial Conference of the United States ("Committee on Rules of Practice and Procedure"), *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure* ("*1978 Preliminary Draft*"), 77 FRD 613, 646 (1978) (suggesting that a district court may limit the number of interrogatories by action of a majority of the judges).

Advisory Committee ultimately rejected both recommendations,[88] but the momentum had shifted. The Advisory Committee proposed a twenty-five-interrogatory limit in 1991, and the Supreme Court adopted the proposal in the 1993 Amendments to the Federal Rules.[89]

The Advisory Committee drafted the 1993 Amendments to "reduce the frequency and increase the efficiency of interrogatory practice."[90] Aware of the growing problem of interrogatory abuse, the Advisory Committee concluded that an efficient interrogatory practice required a more substantial interrogatory limitation:

> [B]ecause the device can be costly and may be used as a means of harassment, it is desirable to subject its use to the control of the court consistent with the principles stated in Rule 26(b)(2), particularly in multi-party cases where it has not been unusual for the same interrogatory to be propounded to a party by more than one of its adversaries.[91]

Moreover, despite earlier fears that an explicit interrogatory limit would "involve the courts in endless disputes without guidelines for their resolution," the Committee came to recognize that "[e]xperience in over half of the district courts has confirmed that limitations on the number of interrogatories are useful and manageable."[92]

III. CRITICISMS OF THE PLAIN LANGUAGE AND ALTERNATE CONSTRUCTIONS

The Rule 33(a) analysis presents difficulties for both the plain language and alternate constructions. Part III examines each construction's specific weaknesses. Part III.A identifies the problems associated with the plain language construction, and Part III.B addresses the complications that undermine the alternate construction. Part III.C introduces a "supplementary" solution advanced by Wright, Miller, and Marcus, and concludes that their solution fails altogether to engage the concerns of Rule 33(a) construction.

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88 See Committee on Rules of Practice and Procedure, *Revised Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 80 FRD 323, 340–41 (1979) (containing no number limit on interrogatories, nor granting district courts discretion to establish a limit).

89 See FRCP 33, Advisory Committee Notes (1993 Amendments).

90 Id.

91 Id.

92 Committee on Rules of Practice and Procedure, *1978 Preliminary Draft*, 77 FRD at 649 (cited in note 87).

A. Criticisms of the Plain Language Construction

As the analysis in Part II indicates, Rule 33(a) has been subject to inefficiency and abuse under the plain language construction. Of course, no rule operates with absolute precision in all circumstances, and many rules abide slippage in one form or another. However, in light of Rule 33(a)'s policies, the gap in the Rule's plain language countenances an especial evil—the plain language construction enables a form of abuse that the Advisory Committee expressly intended Rule 33(a) to eliminate.

This policy concern requires some explanation. The Advisory Committee intended Rule 33(a) to restrict interrogatory practice "particularly in multiparty cases where it has not been unusual for the same interrogatory to be propounded to a party by more than one of its adversaries."[93] The Advisory Committee thus had a specific form of interrogatory misapplication in mind: the abusive duplication of interrogatories in multiparty disputes. Yet Rule 33(a)'s plain language remains particularly vulnerable to abuse in precisely these types of cases. Large multiparty disputes involve parties whose interests are frequently aligned. Interrogatories in multiparty cases therefore tend to become redundant, as one party's (or just a few parties') interrogatories often suffice for the discovery needs of the entire side.[94] As a result, parties involved in such disputes often do not require the total number of interrogatories permitted under Rule 33(a)'s plain language. Not surprisingly, multiparty disputes have become fertile grounds for abuse,[95] despite the Advisory Committee's intention to limit abuse in such cases.

The gap in Rule 33(a)'s plain language can also encourage manipulation outside the immediate context of discovery. Specifically, parties seeking to exploit Rule 33(a)'s plain language may attempt to stack the deck, so to speak, by appending as many named parties to their side as possible. For instance, a plaintiff in a car accident might have a sufficient claim to recoup all of her damages independent of any passengers. However, if bent on burying the other side under excessive discovery, that plaintiff might then draw her passengers into the suit as nominal "parties" in order to obtain further interrogatories. Although neither the case law nor commentary has addressed this

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93 FRCP 33, Advisory Committee Notes (1993 Amendments).

94 See, for example, *Zito*, 233 FRD at 399 (holding that requiring the plaintiffs to respond individually to all interrogatories "would provide little additional benefit but would be extremely expensive and time-consuming"); *Vinton*, 232 FRD at 664 (finding a limitation of twenty-five interrogatories to not be an abuse of discretion because the defendants were treated as alter egos).

95 See, for example, *Zito*, 233 FRD at 399. See also McKenna and Wiggins, 39 BC L Rev at 801–02 (cited in note 68).

potential for collusion, there are many situations where parties could perpetrate this stratagem.[96]

In response to the various problems of abuse, proponents of the plain language construction may invoke Rule 26. As noted in Part II.A, Rule 26(b) authorizes courts to "alter the limits . . . on the number of depositions and interrogatories." Rule 26 thus confers upon courts the discretion to counteract interrogatory abuse as the need arises. Rule 26 remains inadequate, however, because the Rule under the plain language construction only provides for discretionary, ex post relief from abusive practices. Although Rule 26(b) confers discretion upon courts to adjust interrogatory limits, the respondent must first file a Rule 26(c) motion. Thus Rule 26(b) provides for relief only after the perpetration of abuse (and then only after grant of the Rule 26(c) motion).[97]

The weaknesses of discretionary, ex post approaches to abuse are best addressed in relation to automatic, ex ante approaches. Automatic, ex ante measures preclude abuse up front, eliminating any foothold by which interrogators can seek to perpetrate abuse. Moreover, because such deterrents trigger automatically, they establish clear boundaries for interrogatory practice. With the operation of ex ante deterrents clearly defined, parties have less incentive to test the limits of such deterrents. In contrast, discretionary, ex post deterrents invite abusive practices. In fact, parties have continued to test Rule 33(a)'s limits, pushing every interrogatory allowed under the Rule's plain language.[98] This problem is compounded by the fact that courts generally remain unwilling to settle discovery disputes, even under the auspices of discovery-related motions.[99]

The plain language construction's ex post deterrence also remains at odds with the policies favoring greater judicial management of discovery. Recall that the Federal Rules amendments after 1970 have steadily increased judicial control over discovery practices, and that studies have demonstrated a high correlation between judicial involvement and efficient litigation.[100] The plain language construction, on the other hand, does not require the court's involvement—let

96 In fact, any tort involving multiple actors could enable such interrogatory manipulation.

97 Rule 26(b)(2)(C) does permit the court to address gross inefficiency or abuse sua sponte. However, in the Rule 33(a) case law, no contention of interrogatory abuse has arisen from sua sponte court review. In fact, studies have shown that courts are also generally unwilling to resolve discovery disputes arising from discovery-related motions. See Susan Keilitz, Roger A. Hanson, and Henry W.K. Daley, *Is Civil Discovery in State Trial Courts out of Control?*, 17 State Ct J 8, 14 (1993) (reporting that in four out of the five courts surveyed, judges ruled on less than half of the motions to compel discovery).

98 See note 58.

99 See note 97.

100 See note 76.

alone active judicial management—until much later in the discovery process. Rule 26 requires court involvement only after the perpetration of gross inefficiency or abuse, and then only after a Rule 26(c) motion.[101]

B. Criticisms of the Alternate Construction

As discussed in Part I.B, Wright, Miller, and Marcus promulgated the alternate construction to remedy the plain language construction's deficiencies. The alternate construction allows Rule 33(a)'s plain language to control in cases where interrogatory abuse never becomes an issue. When confronted with gross inefficiency or abuse, however, courts can invoke the alternate construction's by-side limitation. The alternate construction thus confers the flexibility to rectify the gap in Rule 33(a)'s plain language.

At the same time, the alternate construction bears added difficulties not at issue under Rule 33(a)'s plain language. As noted in Part I, the alternate construction's by-side limitation does not provide for same-side parties to file interrogatories upon one another. For example, if *A* files suit against *B* and *C*, and the court applies the alternate construction, then *B* may not file interrogatories upon *C*, nor may *C* upon *B*.[102] Circumstances may arise, however, where *B* and *C* may need to file interrogatories upon one another. For example, although *B*/*C* may share a common interest in prevailing over *A* in a tort claim, *B*/*C*'s interests may conflict as to their respective liabilities. Of course, the alternate construction could enable same-side interrogatories in such cases,[103] but allowing same-side interrogatories on a case-by-case basis would create significant line-drawing problems. And complex multiparty disputes would only magnify those problems.

The alternate construction also provides no guidance as to whether the by-side interrogatory limit must apply to both sides. Consider the following: *A* and *B* file suit against *C* and *D*, and the court applies the alternate construction's by-side limit to *C*/*D*. This hypothetical raises

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101 The Federal Rules do provide one other structured opportunity for courts to evaluate interrogatory practices—the Rule 26(f) discovery conference. However, because Rule 26(c) requires very little specificity with regards to the details of discovery, parties can easily obscure the nature of their interrogatories. Moreover, the discovery plan does not remain binding on either party throughout discovery. See FRCP 26(f). Of course, judges may sua sponte choose to involve themselves earlier in the process. But see note 102.

102 Of course, *B* and *C* could sue one another and avert the issue entirely. However, the alternate construction would then have the effect of encouraging further litigation, gratuitously raising the decision costs of litigation.

103 Courts, however, should not allow same-side interrogatories in all cases. For example, if the defendant's side consisted of an additional party, *D*, and *B*/*C*'s interests were aligned against *D*'s interests, same-side interrogatories would then enable *B*/*C* to exploit their additional interrogatories to perpetrate abuse upon *D*.

two initial questions regarding the alternate construction's application. First, does the by-side limitation also apply to *A* and *B*? If so, the alternate construction then limits *A*/*B* as a "side" to twenty-five total interrogatories (rather than allowing *A* and *B* *each* to file twenty-five interrogatories upon *C*/*D*). Second, does grouping *C*/*D* for the purpose of filing interrogatories also render *C*/*D* "grouped" for the purpose of answering interrogatories? If so, then *A* and *B* may only file interrogatories upon *C*/*D* as a "side," for a total of fifty interrogatories (rather than file interrogatories upon *each* of *C* and *D*, for a total of 100 interrogatories).

Both questions bear upon the total number of interrogatories that can be filed in a dispute and thus require resolution. The answer to the first question should prove relatively straightforward. As long as *A* and *B* represent independent parties—that is, their identities and interests remain sufficiently discrete—the alternate construction should permit "split" application of the by-side limit, allowing *A* and *B* each to file twenty-five interrogatories upon *C*/*D*.

The second question, however, introduces some uncertainty. Courts apply the alternate construction when parties' identities and interests interrelate such that Rule 33(a)'s plain language would otherwise allow redundancies or abuse. For the purpose of filing interrogatories, therefore, the alternate construction applies Rule 33(a)'s interrogatory limit by "side." However, although *C*/*D* may share an identity or interests, they may also possess information that only one party can provide. Thus, for the purpose of answering interrogatories, courts applying the alternate construction may want to group parties in some cases and separate them in others.

A third question complicates matters even further: does the alternate construction provide for "split" application of the by-side limit for parties on the same side of the dispute? For example, the plaintiff's side of a dispute includes the parties *A*, *B*, *C*, and *D*, and the court determines that *A* and *B* represent alter egos, while *C* and *D* relate to the case independently. Does the alternate construction then apply the by-side limit to *A*/*B*, but not to *C* and *D*? Although the interests of proper litigation may call for such an arrangement, parsing these types of disputes would render the alternate construction impracticable.

As the prior analysis demonstrates, the alternate construction requires case-by-case determinations along four different points of construction.[104] The prevalence of such line-drawing significantly undermines the alternate construction's utility, even beyond the practical

[104] In fact, the alternate construction requires case-by-case determinations along five points, including the decision of whether to even apply the alternate construction.

concerns of application. Without clear guidance,[105] Rule 33(a) case law could evolve incoherently as courts develop and apply variant criteria. Line-drawing also introduces the problem of decisionmaker error or bias. In some cases, court discretion could prove as damaging as the mindless application of bright-line rules. Even granting low error costs, the alternate construction could prompt excessive hairsplitting, as courts struggle to distinguish one case from another. The alternate construction, then, would aggravate the problem of discovery abuse by opening up further arenas of contention.

Lastly, the alternate construction fails to account for the policies in favor of increased judicial management of discovery. The alternate construction, like the plain language construction, only provides for ex post relief from abusive interrogatory practices. In other words, the alternate construction does not initiate court involvement until after the perpetration of gross inefficiency or abuse. Certainly, courts may choose to impose the alternate construction's by-side limit much earlier in the process. But recall that courts remain generally reluctant to resolve discovery disputes, even within the context of a specific motion.[106] In that sense, the alternate construction remains essentially indistinguishable from the plain language construction.[107] Because both seek to mitigate abuse through ex post solutions, neither promotes the early and active judicial management of interrogatory practice.[108]

C. Wright, Miller, and Marcus's Supplementary Solution

Wright, Miller, and Marcus did acknowledge the line-drawing problems associated with the alternate construction's application (albeit briefly).[109] In response, they proposed a supplementary solution:

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105 Bright-line rules feature several advantages over case-by-case determinations. Specifically, bright-line rules establish clear protocols for rule application. Clear protocols, in turn, engender consistency (reduced risk of decisionmaker error or bias), efficiency (fewer decision costs associated with the rule's application), and predictability (litigants know what to expect and can plan accordingly). And although bright-line rules remain inexact, they counterbalance high error costs with low decision costs. (That is, bright-line rules make up in efficiency what they lack in effectuating justice.) For further discussion, see generally Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U Chi L Rev 1175 (1989).

106 See note 97.

107 Indeed, the alternate construction's by-side interrogatory limit may represent one means by which courts applying the plain language construction resolve Rule 26(c) motions.

108 In addition to the failure to accommodate the policy favoring increased judicial involvement, the alternate construction, like the plain language construction, bears all the problems associated with ex post deterrents against abuse and inefficiency. See Part III.A.

109 See Wright, Miller, and Marcus, 8A *Federal Practice and Procedure* § 2168.1 at 261 (cited in note 6). The extent of this acknowledgment, however, remains limited to one phrase—"[r]ather than debate close cases." Id.

> Rather than debate close cases, it seems that the preferred solution would be agreement among the parties to disregard the limitation or a court order allowing more questions. Because formal discovery should await the conference required by Rule 26(f), that conference should provide an occasion to discuss the number of likely interrogatories. The parties can always stipulate in writing to allow more questions, and the conference would be a good time to consider such a stipulation. Since the desire to send additional interrogatories may in many instances be bilateral (or multilateral in multiparty cases), and since parties might learn that courts readily grant leave in proper cases, frequent agreement could be expected.[110]

Instead of addressing the problem of construction, Wright, Miller, and Marcus's supplementary solution sidesteps the issue entirely. In fact, the solution never engages Rule 33(a)'s language or construction. Instead, Wright, Miller, and Marcus propose that parties bypass Rule 33(a) altogether and establish interrogatory limits on their own. Indeed, parties can devise independent arrangements as to a wide range of discovery devices, including interrogatories.[111] However, the ability to self-determine discovery practices does not guarantee that parties will come to agreement. In fact, the contentious nature of litigation could preclude such agreement in a large number of cases.[112] Moreover, the solution would introduce further points of conflict should parties—postconference—change their minds, renege, require additional interrogatories, and so forth.[113] Of course, parties should not be dissuaded from initiating independent solutions. Such practices can even facilitate litigation on occasion. But the point remains that Wright, Miller, and Marcus's supplementary solution neither addresses nor obviates the problems of Rule 33(a) construction.

IV. THE AD INTERIM RULE

As Part III demonstrates, the two lines of Rule 33(a) construction bear significant difficulties. The plain language construction, while faithful to Rule 33(a)'s textual intent, conflicts with the Rule's policies

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110 Id at 261–62.

111 See FRCP 26(f)(5).

112 In fact, neither the case law nor the commentary indicates that the Rule 26(f) discovery conference functions as any kind of deterrent against inefficiency or abuse. See, for example, McKenna and Wiggins, 39 BC L Rev at 806 (cited in note 68) (discussing a study that concluded that "the existence of a requirement that attorneys confer in good faith to resolve discovery disputes before filing motions bore no consistent relationship to the actual number of discovery motions and rulings").

113 Rule 26(f)'s discovery plan is not binding on parties.

and historical context. The alternate construction, although more consistent with Rule 33(a)'s policies, introduces added complications not at issue under Rule 33(a)'s plain language. Moreover, neither construction properly accounts for the Federal Rules' policy favoring judicial management of discovery. In response, this Comment proposes an ad interim rule as an alternative. Part IV.A promulgates the ad interim rule, Part IV.B sets forth the rule's methodology, and Parts IV.C and IV.D discuss the rule's justification.

A. The Ad Interim Rule

The ad interim rule begins with Rule 33(a)'s plain language—"any party may serve upon any other party written interrogatories, not exceeding 25 in number." So the ad interim rule applies Rule 33(a)'s interrogatory limit by "party" rather than by "side." The by-party limitation, however, remains conditional. The ad interim rule directs each court to establish an absolute baseline limit that applies to all disputes, without exception.[114] When the number of interrogators on a side reaches that limit, a ceiling automatically triggers to cap further interrogatories. Any additional interrogatories would then require leave of court.[115] For example, if the plaintiff's side of a dispute consists of five parties, and the court has set the baseline limit at three, then up to three parties on the plaintiff's side can each file up to twenty-five interrogatories. This arrangement sets the cap on interrogatories for those plaintiffs at seventy-five. However, the three-party baseline limit does not function as an absolute seventy-five-interrogatory limit. As noted, Rule 33(a)'s plain language controls in cases where the baseline limit never triggers. If the plaintiff's side, then, consists of two parties rather than five, the two plaintiffs may each file up to—but not more than—twenty-five interrogatories. In this case, the number of parties does not exceed the three-party baseline limit; thus Rule 33(a)'s plain

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114 In other words, each court establishes its own baseline limit based on its particular experiences and requirements. Once set, however, that baseline limit remains absolute in its application.

115 The ad interim rule encourages interrogators seeking court leave to submit any such petitions during the Rule 26(f) discovery conference. Any petitions submitted after the conference will be subject to a higher burden of persuasion. Even during the discovery conference, however, the ad interim rule requires court leave to function as more than a rubber stamp. The Southern District of Indiana provides a useful framework for courts considering petitions for further interrogatories. In *Duncan v Paragon Publishing, Inc*, 204 FRD 127 (SD Ind 2001), the court required the petitioner to explain why: (1) the additional interrogatories were necessary; (2) the information sought could not be secured from other sources; (3) the use of interrogatories was more convenient; (4) the interrogatories were not unreasonably cumulative or duplicative; and (5) the interrogatories did not create annoyance or significant expense to the respondent. See id at 128–29.

language controls, capping the total number of interrogatories at fifty, not at seventy-five.

The ad interim rule's baseline limit implicates interrogatory allocation. In cases where the number of parties on a side does not exceed the baseline limit, Rule 33(a)'s plain language controls, permitting each party to serve up to twenty-five interrogatories upon any other party. In cases where the number of parties on a side does exceed the baseline limit, the ad interim rule directs the court to divide the total number of permitted interrogatories equally among all parties. For example, if the plaintiff's side of a dispute consists of *A*, *B*, *C*, and *D*, and the court has set the baseline limit at three, the baseline limit triggers and restricts the plaintiff's side to seventy-five total interrogatories. The court then divides the seventy-five interrogatories equally among *A*, *B*, *C*, and *D*. Any further interrogatories would once again require leave of court.

Courts must bear in mind that the baseline limit functions primarily as a gatekeeper. Although the ad interim rule acknowledges Rule 33(a)'s plain language, the problems of inefficiency and abuse remain coequal concerns. Therefore, because a high baseline limit would render the ad interim rule essentially indistinguishable from the plain language construction, courts must err on the side of caution when establishing a baseline limit. Studies locate the median number of parties per case at three or four.[116] Thus a baseline limit of two or three per side would enable parties in most cases to file the maximum number of interrogatories allowed under Rule 33(a)'s plain language. At the same time, the baseline limit would operate as a backstop to prevent abuse in outlier cases. A baseline limit greater than five or six, on the other hand, would likely attenuate the rule's capacity to limit discovery abuse.

As a concession to interrogators under this more-restricted regime, the ad interim rule requires implementation of Rules 26(a)(1)–(3). These rules provide for the automatic disclosure of relevant information such as names, telephone numbers, and addresses or locations. Under the ad interim rule, Rule 26(a) functions to compel the exchange of basic information in order to secure interrogatories for more critical inquiries.

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116 See, for example, Douglas A. Henderson, *Mediation Success: An Empirical Analysis*, 11 Ohio St J on Disp Resol 105, 140 (1996) (finding that the median number of parties in construction disputes is three, with a mean of approximately four); James G. Woodward, *Settlement Week: Measuring the Promise*, 11 NIU L Rev 1, 27 (1990) (finding that the median number of parties is three with a median of four in a subset of pretrial mediation cases).

B. The Ad Interim Rule's Methodology

As noted in Part II.A, the success or failure of any Rule 33(a) construction hinges on whether the construction works to execute the Rule's purposes and intent. The Rule 33 analysis identifies two principal policy considerations. First, the Advisory Committee intended Rule 33(a) to limit interrogatory practice "particularly in multi-party cases where it has not been unusual for the same interrogatory to be propounded to a party by more than one of its adversaries."[117] Second, Rule 33(a)'s historical analysis tracks a policy trend away from attorney control over a liberalized discovery practice and towards greater judicial management of a more limited discovery regime. The ad interim rule functions to accommodate the concerns of both policies. Specifically, the rule works to effectuate (1) a robust backstop against abuse and (2) earlier and more active judicial involvement in the process of discovery.

To that effect, the ad interim rule effectively eliminates all interrogatory abuse. A simple hypothetical demonstrates the rule's efficacy. If the plaintiff's side of a dispute comprises ten parties, Rule 33(a)'s plain language then permits each party to file twenty-five interrogatories (for a total of 250 interrogatories for the side). However, if the plaintiff's side only requires fifty total interrogatories for proper discovery, Rule 33(a)'s plain language enables service of the 200 "additional" interrogatories, regardless of their propriety. In contrast, the ad interim rule, with a baseline limit set at three, would concede only twenty-five additional interrogatories. Moreover, as the number of parties on the plaintiff's side increases, Rule 33(a)'s plain language enables a corresponding increase in the number of interrogatories, thus aggravating the potential for abuse. The ad interim rule, on the other hand, would again concede only twenty-five additional interrogatories, regardless of the number of parties on the plaintiff's side.[118]

The ad interim rule also limits abuse according to the Advisory Committee's specific intent—that is, in "multi-party cases where it has not been unusual for the same interrogatory to be propounded to a party by more than one of its adversaries."[119] The plain language construction's backstop is ineffective because it functions as intended

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117 FRCP 33, Advisory Committee Notes (1993 Amendments).

118 Additionally, the ad interim rule's automatic, ex ante baseline mitigates the problems of discretionary, ex post deterrents discussed in Part III.A. The ad interim rule's ex ante approach precludes abuse up front, closing all avenues by which interrogators can disrupt litigation. And because the ad interim rule's baseline triggers automatically, the construction draws bright lines as to the boundaries of interrogatory practice. With the operation of the baseline clearly defined (automatic), parties have less incentive (and opportunity) to test the limits of the deterrent.

119 FRCP 33, Advisory Committee Notes (1993 Amendments).

when least necessary (in small disputes), but fails to trigger at all when circumstances most require (in large disputes). The ad interim rule operates in reverse. In disputes involving relatively few parties, the baseline limit never triggers (or triggers only superficially). Cases involving few parties rarely see interrogatory abuse and thus have little need for the baseline limit's gatekeeping function. Judicial management of such cases would prove similarly unnecessary and, in fact, would likely represent a misappropriation of resources. In small-scale disputes, therefore, the ad interim rule provides for neither.

In larger cases, the ad interim rule exerts a more substantial influence. As discussed in Part IV.A, the ad interim rule allocates interrogatories equally among all parties on a side when the number of parties on that side exceeds the baseline limit. Accordingly, as the number of parties on a side increases, the number of interrogatories available to each party decreases. This dynamic represents an intended—indeed essential—consequence of the ad interim rule's operation. In large, multiparty cases, the interests of the parties are frequently aligned. Interrogatories in such cases thus tend to become redundant and, consequently, ripe for abuse. The ad interim rule addresses the Advisory Committee's concerns by reducing the number of interrogatories available per party as the number of parties increases, therefore curbing the potential for abuse as that potential escalates.

In addition to implementing an effective backstop against abuse, the ad interim rule accounts for the policy favoring judicial management of discovery. In larger cases, the ad interim rule's baseline limit will frequently require parties to petition for further interrogatories. This, too, represents an intended consequence of the ad interim rule's operation. As cases become larger and more complex, early and active judicial management of discovery becomes increasingly necessary. So in conjunction with the court-leave requirement, the ad interim rule's baseline limit ensures greater judicial involvement when circumstances most require. In other words, as cases become larger, parties will petition the court for additional interrogatories with greater frequency.[120] Those petitions, in turn, will obligate the court to impose order and discipline upon the exchange of interrogatories. And although the baseline limit may prompt increases in decision costs up front as parties and courts account for the baseline limit, decision

[120] The ad interim rule encourages interrogators seeking court leave to submit any such petitions during the Rule 26(f) discovery conference. Any petitions submitted after the conference will be subject to a higher burden of persuasion. This enables the court to more effectively manage interrogatory practice throughout discovery.

costs should diminish through the course of litigation as a consequence of organization and proper planning.[121]

Courts may find, however, that the decision costs of evaluating petitions in particularly large disputes outweigh the benefits of active judicial management. For example, courts typically do not have the resources to evaluate seventy-five or more individual petitions for further interrogatories. Therefore, the need may arise for a second baseline limit in order to accommodate extreme outlier disputes. However, any second baseline limit must be granted, if at all, during the Rule 26(f) conference, and only after the court has made the determination that the parties involved will in fact require the presumptive number of interrogatories.

C. The Ad Interim Rule and Rule 26 Discretion

The ad interim rule remains well within the aegis of Rule 26 discretion. Recall that Rule 26 confers broad discretion upon district courts to limit interrogatory practice. The Advisory Committee Notes to Rule 26 corroborate this discretion:

> The revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose *additional* restrictions on the scope and extent of discovery and to authorize courts that develop case tracking systems based on the complexity of cases to *increase or decrease* by local rule the presumptive number of depositions and interrogatories allowed.[122]

Consistent with the purposes set forth in the Advisory Committee Notes, the ad interim rule implements an "additional restriction on the scope and extent of discovery" (the baseline limit) that decreases the presumptive number of interrogatories by local rule, particularly in complex cases.[123] The ad interim rule also operates in accord with the "broad discretion" granted by the Supreme Court in *Crawford-El* to "tailor discovery narrowly."[124]

Furthermore, the ad interim rule does not run afoul of the Supreme Court's due process restriction. The Supreme Court intended due process to limit Rule 26 discretion only in the most egregious instances of district court abuse. In fact, the Supreme Court held that "[a]ll that is necessary [to avoid a breach of due process] is that the procedures be tailored . . . to insure that [the parties] are given a mean-

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121 See McKenna and Wiggins, 39 BC L Rev at 804 (cited in note 68) (citing an empirical study that indicates that active judicial management of discovery decreases the time spent in discovery).

122 FRCP 26, Advisory Committee Notes (1993 Amendments) (emphasis added).

123 This Comment provides further details of the ad interim rule's operation in Part IV.B.

124 523 US at 598.

ingful opportunity to present their case."[125] Although the Supreme Court did not further explicate the due process standard, federal appellate courts have interpreted Rule 26 to provide district courts the flexibility to implement almost any measure required to meet the needs of litigation. Fewer than ten challenges to Rule 26 discretion (with regards to discovery) have been heard by federal appellate courts in the last five decades, and the majority of them have involved objections to district courts allowing excessive or invasive discovery.[126]

The ad interim rule, then, represents no threat to interrogators' due process rights. With the baseline limit set at one or two above the median number of parties per side, the baseline limit never triggers in the majority of cases. The baseline limit only activates in outlier cases where the potential for abuse begins to outweigh the presumption of Rule 33(a)'s twenty-five-interrogatory limit. Furthermore, in disputes where the baseline limit restricts interrogatory practice, the ad interim rule does not limit interrogatories absolutely. Rather, the rule simply requires that interrogators petition for additional interrogatories. Therefore, the ad interim rule, consistent with Rule 33(a)'s Advisory Committee Notes, does not "prevent needed discovery, but [ ] provide[s] judicial scrutiny before parties make potentially excessive use of [interrogatories]."[127]

D. The Ad Interim Rule and the Future of Interrogatory Practice

The Supreme Court conferred broad discretion upon district courts to "tailor discovery narrowly"[128] because district court litigation represents ground zero for the praxis of civil procedure.[129] Thus district courts, which administer the Federal Rules, are in the best position to evaluate the efficacy of any given rule. In fact, the amendments to the Federal Rules regarding discovery are almost never Advisory Com-

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125 *Mathews v Eldridge*, 424 US 319, 349 (1976).

126 See, for example, *Western Electric Co v Stern*, 544 F2d 1196, 1198–99 (3d Cir 1976) (holding that the district court abused its discretion in refusing to allow discovery of any of the plaintiff's assertions, which would deny the defendant the right to present a full defense at trial); *Brennan v Local Union 639*, 494 F2d 1092, 1100 (DC Cir 1974) (finding that the district court's grant of a protective order was proper because of the court's broad powers under Rule 26(b)); *Ellis v Fortune Seas, Ltd*, 175 FRD 308, 312 (SD Ind 1997) (requiring plaintiff to provide a "threshold showing of a colorable basis" for exercising jurisdiction before allowing discovery by the plaintiff and finding such a requirement to be consistent with due process); *Helms v Richmond-Petersburg Turnpike Authority*, 52 FRD 530, 531 (ED Va 1971) (rejecting the defendants' argument that discovery of insurance agreements under Rule 26(b) was unconstitutional).

127 FRCP 33, Advisory Committee Notes (1993 Amendments).

128 *Crawford-El*, 523 US at 598.

129 Id at 600–01 ("Given the wide variety of civil rights and 'constitutional tort' claims that trial judges confront, broad discretion in the management of the factfinding process may be more useful and equitable to all the parties than the categorical rule imposed by the Court of Appeals.").

mittee innovations. Instead, the Advisory Committee typically draws the substance of these amendments from district court practices.[130]

Rule 33(a)'s 1993 Amendments represent one such example of district court appropriation. Although district courts and commentators identified interrogatory abuse as a significant problem in the early 1970s, the Supreme Court prohibited number limits on interrogatories until the 1993 Amendments. At the time of the 1993 Amendments' adoption, however, over half the district courts had already implemented number limits.[131] Rather than censure the district courts' contravention of Rule 33's plain language, the Advisory Committee appropriated the twenty-five-interrogatory limit from district court practices, reporting that such practices had helped confirm "that limitations on the number of interrogatories are useful and manageable."[132]

The ad interim rule functions in a similar capacity. The ad interim rule proposes a method of discovery limitation that district courts may adopt to counteract abusive interrogatory practices. If the ad interim rule proves "useful and manageable," the district courts' example may then provide the Advisory Committee with the data points necessary to justify Federal Rules implementation. Moreover, even beyond the practical benefits of application, the ad interim rule's adoption provides a means for testing the merits of policies such as active judicial management of discovery. The construction, then, may have broader implications for discovery—if judicial management of interrogatory practice yields the expected benefits, the ad interim rule's principles may prove similarly useful in the context of other discovery devices.

CONCLUSION

Rule 33(a) has prompted disagreement as to the number of interrogatories parties may file in a dispute. The Rule's plain language provides that each party of a civil suit may serve up to twenty-five interrogatories upon any other party of the same suit. Courts and commentators, however, have articulated an alternate Rule 33(a) construction. According to the alternate construction, the word "party" may in some instances refer to an entire side of a dispute in the aggregate, rather than to the individual actors that comprise each side. This Comment assesses each construction and concludes that both are inadequate for the purposes of regulating a just and efficient interrogatory practice.

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130 See Richard L. Marcus, *Discovery Containment Redux*, 39 BC L Rev 747, 771–72 (1998) ("[L]ocal deviation has de facto become the Advisory Committee's experimental laboratory.").

131 FRCP 33, Advisory Committee Notes (1993 Amendments).

132 Id.

In response, this Comment proposes an ad interim rule that anticipates and averts the problems of both the plain language and alternate construction. Through the operation of its baseline limit, the ad interim rule casts a wider net against abuse than does the plain language construction while eliminating the line-drawing problems associated with the alternate construction. Furthermore, the absolute baseline limit works in conjunction with the court-leave requirement in order to engage courts earlier and more actively in the discovery process, promoting the just and efficient exchange of interrogatories.