

4-1-1975

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Recommended Citation

Ronald G. Baker, *Civil Procedure -- Opinion Interrogatories after the 1970 Amendment to Federal Rule 33(b)*, 53 N.C. L. REV. 695 (1975).
Available at: <http://scholarship.law.unc.edu/nclr/vol53/iss4/3>

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Comments

Civil Procedure—Opinion Interrogatories After the 1970 Amendment to Federal Rule 33(b)

In 1970 rule 33(b) of the Federal Rules of Civil Procedure was amended by, among other things, the addition of the following language: "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" The purpose of this comment is to examine briefly the reasons for the 1970 amendment and to survey the cases decided under the amended rule in an attempt to synthesize a test for determining the permissibility of an interrogatory calling for an opinion or contention of fact or law applied to fact.

I. REASONS FOR THE AMENDMENT

Prior to the 1970 amendment of rule 33(b), the scope of discovery by interrogatory was stated as "any matters which can be inquired into under rule 26(b)."¹ Equity rule 58², on which rule 33 was based,³ limited discovery by interrogatory to facts and documents. Initially courts tended to read the same limitation into rule 33⁴ by refusing to permit interrogatories calling for opinions, contentions or conclusions.

In *Pankola v. Texaco, Inc.*⁵ the following interrogatory was before the court: "Set forth all information . . . in possession of you, your attorneys, investigators, underwriters, or other representatives, relating to the accident to plaintiff"⁶ Notwithstanding that the only apparent opinions or conclusions requested by the question was whether

1. FED. R. CIV. P. 33 (1946). The provision is retained in the revised rule. The scope of discovery as defined by rule 26(b) is "any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party It is not ground for objection that the testimony sought will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence" FED. R. CIV. P. 26(b)(1).

2. 28 U.S.C.A., Equity Rule 58 (1927).

3. 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2167, at 497 (1970) [hereinafter cited as WRIGHT & MILLER].

4. *Id.*

5. 25 F.R.D. 184 (E.D. Pa. 1960).

6. *Id.* at 186.

a particular fact related to the plaintiff's accident, the court sustained the objection to the interrogatory on the ground that it called for an opinion or conclusion. Decisions such as this were common.⁷

Hence interrogatories were rejected that call upon a party to classify his injuries as temporary or permanent and to approximate the date of partial or complete recovery, or to state what he did in an attempt to avoid an accident, or to state the speed at which he was travelling or what he was intending to do at the time of a collision, or to state which of certain companies the defendant in an antitrust suit regards as competitors and why any of them are not so regarded, or to state whether an estate was solvent, or to say what in the party's opinion was the nature and cause of an alleged unsafe or defective condition of a motor.⁸

In addition to disallowing interrogatories calling for opinion or conclusions, many courts would not allow interrogatories seeking the other party's contentions with regard to matters in issue. In *United States v. Galaxo Group Ltd.*⁹ the court held that defendant would not be required to answer interrogatories submitted by the United States concerning certain affirmative defenses put forth by defendant.¹⁰ This type of decision was also common. In several cases courts declined to make plaintiffs answer interrogatories asking what act or acts the defendant did or failed to do which caused plaintiff's injury.¹¹ In other cases defendant was not forced to answer interrogatories asking what acts or omissions of plaintiff defendant contended contributed to plaintiff's injuries.¹²

The only tenable basis offered to support this narrow scope for interrogatories was that "the discovery process is intended to lead to the ascertainment of facts and nothing else."¹³ Apparently some courts thought that any opinions, conclusions, or contentions expressed by a

7. See, e.g., *Schotthofer v. Hagstrom Constr. Co.*, 23 F.R.D. 666 (S.D. Ill. 1958); *Kluchenac v. Oswald & Hess Co.*, 20 F.R.D. 87 (W.D. Pa. 1957); *Helverson v. J.J. Newberry Co.*, 16 F.R.D. 330 (W.D. Mo. 1954); *United States ex rel. Tennessee Valley Authority v. Bennett*, 14 F.R.D. 166 (E.D. Tenn. 1953); *Needles v. F.W. Woolworth Co.*, 13 F.R.D. 460 (E.D. Pa. 1952); *Porter v. Montaldo's*, 71 F. Supp. 372 (S.D. Ohio 1946); *Caggiano v. Socony Vacuum Oil Co.*, 27 F. Supp. 240 (D. Mass. 1939).

8. 4A J. MOORE, FEDERAL PRACTICE ¶ 33.17, at 33-75 to -76 (2d ed. 1974) (footnotes omitted) [hereinafter cited as MOORE].

9. 302 F. Supp. 1 (D.D.C. 1969).

10. *Id.* at 18.

11. E.g., *Doucette v. Howe*, 1 F.R.D. 18 (D. Mass. 1939); *Bailey v. General Sea Foods, Inc.*, 26 F. Supp. 391 (D. Mass. 1939).

12. E.g., *Ryan v. LeHigh Valley R.R.*, 5 F.R.D. 399 (S.D.N.Y. 1946); *Tudor v. Leslie*, 1 F.R.D. 448 (D. Mass. 1940).

13. 4A MOORE ¶ 33.17, at 33-79.

party in answers to interrogatories would be binding on him at trial.¹⁴ Thus, subsequently discovered information could not be used by him. Under such a rule it would be highly advantageous to pin down a party's position on crucial points early in the course of the litigation, thus preventing him from deriving any benefit from discovery.

Significantly, however, it has never been held that a party was limited in his proof at trial by good faith answers he made to interrogatories, although such answers, subject to the rules of evidence, are admissible at trial against the answering party.¹⁵ In fact, in *Freed v. Erie Lackawanna Railway*¹⁶ the court allowed defendant to prove facts at trial diametrically opposed to those he had stated in answers to plaintiff's interrogatories. The court held that the answer to the interrogatory was not a binding admission and stated that such an answer

is comparable to answers, which may be mistaken, given in deposition testimony or during the course of the trial itself. Answers to interrogatories must often be supplied before investigation is completed and can rest only upon knowledge which is available at the time. When there is conflict between answers supplied in response to interrogatories and answers obtained through other questioning, either in deposition or trial, the finder of fact must weigh all of the answers and resolve the conflict.¹⁷

The only case that can be found that even remotely suggests that a party might, in some circumstances, have his proof at trial limited by answers given to interrogatories is *Zielinski v. Philadelphia Piers, Inc.*¹⁸ However, a close reading of the case reveals that, rather than binding a party to answers he gave to interrogatories, the court merely applied the doctrine of equitable estoppel to prevent the defendant from utilizing intentionally misleading pleadings and answers to interrogatories to deprive the plaintiff of any recovery.¹⁹

Although the rule barring interrogatories calling for opinions, contentions, and conclusions was followed by many courts, there was, from the first, a competing line of thought. As early as 1939 it was recog-

14. *Ryan v. LeHigh Valley R.R.*, 5 F.R.D. 399 (S.D.N.Y. 1946). It is interesting to note that no court has ever said that statements of *fact* in answers to interrogatories would be binding at trial, yet it is difficult to find a basis for distinction.

15. See *Gridiron Steel Co. v. Jones & Laughlin Steel Corp.*, 361 F.2d 791 (6th Cir. 1966) (held that answers by a party to interrogatories may be used for any purpose and may constitute admissions against interest).

16. 445 F.2d 619 (6th Cir. 1971).

17. *Id.* at 621, quoting *Victory Carriers, Inc. v. Stockton Stevedoring Co.*, 388 F.2d 955, 959 (9th Cir. 1968).

18. 139 F. Supp. 408 (E.D. Pa. 1956).

19. *Id.*

nized that the purpose of rule 33 interrogatories was to narrow the issues in the case and thus to avoid unnecessary preparation for and testimony at trial.²⁰ Thus, in several patent infringement cases the courts required parties to answer interrogatories calling for opinions, contentions, and conclusions.²¹ Finally, in *Taylor v. Sound Steamship Lines, Inc.*,²² a district court abandoned completely the rule that interrogatories were objectionable solely on the ground that they called for opinions, contentions, or conclusions. Instead, the court stated that the real and only test should be whether the interrogatory in question served any substantial purpose.²³ Thereafter numerous courts²⁴ adopted the position that

"[i]f the answer might serve some legitimate purpose, either in leading to evidence or in narrowing the issues, and to require it would not unduly burden or prejudice the interrogated party, the court should require answer."

Any rule which attempts to make rigid distinctions between matters of fact and conclusions of fact will prove unworkable, since the differences between the two categories are ones of degree, not kind.²⁵

By the mid-1960's, the federal district courts had become hopelessly divided on the question, some following the strict rule and others following the more progressive rule.²⁶

II. THE ADVISORY COMMITTEE ON RULES RESPONDS

On March 1, 1970, rule 33 was amended as noted above.²⁷ Noting the conflicting decisions on the point,²⁸ the Advisory Committee stated that:

Rule 33 is amended to provide that an interrogatory is not ob-

20. *Schwartz v. Howard Hosiery Co.*, 27 F. Supp. 443 (E.D. Pa. 1939).

21. *Armour Research Foundation v. Brush Dev. Co.*, 9 F.R.D. 113 (N.D. Ohio 1949); *McInerney v. Wm. P. McDonald Constr. Co.*, 28 F. Supp. 557 (E.D.N.Y. 1939); *Pierce v. Submarine Signal Co.*, 25 F. Supp. 862 (D. Mass. 1939).

22. 100 F. Supp. 388 (D. Conn. 1951).

23. *Id.* at 389.

24. *E.g.*, *Leumi Financial Corp. v. Hartford Accident & Indem. Co.*, 295 F. Supp. 539 (S.D.N.Y. 1969); *Carrier Mfg. Co. v. Rex Chainbelt, Inc.*, 281 F. Supp. 717 (E.D. Wis. 1968); *Microtron Corp. v. Minnesota Mining & Mfg. Co.*, 269 F. Supp. 22 (D.N.J. 1967); *Brunswick Corp. v. Chrysler Corp.*, 43 F.R.D. 208 (E.D. Wis. 1967); *Diversified Prods. Corp. v. Sports Center Co.*, 42 F.R.D. 3 (D. Md. 1967).

25. *Roberson v. Great Am. Ins. Cos.*, 48 F.R.D. 404, 413 (N.D. Ga. 1969), *quoting* 4A MOORE ¶ 33.17, at 33-85.

26. *See* Notes of Advisory Committee on Rules, 28 U.S.C. Rule 33 at 7792 (1970); 4A MOORE ¶ 33.17; 8 WRIGHT & MILLER § 2167.

27. *See* text accompanying note 1 *supra*.

28. Notes of Advisory Committee on Rules, 28 U.S.C. Rule 33 at 7792 (1970).

jectionable merely because it calls for an opinion or contention that relates to fact or the application of law to fact. Efforts to draw sharp lines between facts and opinions have invariably been unsuccessful, and the clear trend of the cases is to permit "factual" opinions. As to requests for opinions or contentions that call for the application of law to fact, they can be most useful in narrowing and sharpening the issues, which is a major purpose of discovery.

. . . .

. . . . The general rule governing the use of answers to interrogatories is that under ordinary circumstances they do not limit proof.²⁹

The rule as it stood prior to amendment could have been interpreted to achieve the results mandated by the amendment.³⁰ The amendment, however, was necessary to authoritatively eliminate the restrictive interpretation of rule 33 by some courts and thereby restore a proper balance between the portions of the rules dealing with pleading and those dealing with discovery. Under the federal rules, pleadings need only give notice of the claims asserted.³¹ The rationale for this is that, if a party desires further information about the matters in controversy, he may obtain it through discovery.³² If discovery does not include the use of interrogatories to ascertain opinions and contentions, the party must resort to depositions which are expensive and will often prove unavailing.³³ Therefore, the allowance of interrogatories calling for opinions and contentions of fact and law applied to fact is an essential element of the notice pleading system.

III. THE CASES UNDER THE AMENDED RULE

Rule 33(b) now provides that an interrogatory "is *not necessarily*

29. *Id.*

30. As noted earlier, prior to the 1970 amendment the scope of interrogatories was defined as any matter that could be inquired into under rule 26(b). Rule 26(b) required only that a matter inquired into be relevant and calculated to lead to admissible evidence, though not necessarily admissible itself as evidence. Clearly, nothing in that language mandates the position that opinions, conclusions and contentions do not fall within permissible discovery. *Proposed 1967 Amendments to the Federal Discovery Rules*, 68 COLUM. L. REV. 271, 284 (1968).

31. 4A MOORE ¶ 33.17, at 33-86.

32. *Id.*

33. First, assuming a prohibition on discovering a party's contentions by interrogatories, the opposing party, except in the simplest negligence cases will not know precisely what questions to ask when taking a deposition. Secondly, asking a party, during a deposition, for his contentions and conclusions of law as related to fact will usually be useless. In the vast majority of situations the deposed party would be unable to relate the facts to relevant legal conclusions. Since a party's attorney cannot be deposed, interrogatories are the only way to get this information; cf. *Microtron Corp. v. Minnesota Mining & Mfg. Co.*, 269 F. Supp. 22, 25 (D.N.J. 1967).

objectionable *merely* because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact." (emphasis added) This phrase clearly implies that, while opinions, contentions, and conclusions of law as applied to fact usually may be inquired into by interrogatory, there are some circumstances in which they may not.

In view of the purposes of interrogatories to supplement notice pleading³⁴ and to narrow and define the issues for trial,³⁵ the best criterion for evaluating an interrogatory relating to "opinion or contention of fact or the application of law to fact," is whether it relates to an "essential element"³⁶ of either party's claim or defense. This hypothesis will be tested by surveying the few cases decided since the amendment of rule 33.

In *Goodman v. IBM Corp.*,³⁷ a personal injury action, plaintiff asked defendant, by interrogatory, "[w]hy did the material fall from or above Defendant's property onto North Street on December 3, 1970?"³⁸ The defendant objected to the interrogatory on the ground that it invaded the province of the jury in seeking the defendant's conclusion on a material question of fact.³⁹ The court, citing rule 33(b), held that the interrogatory would be proper if amended to read "How, if you know, did the material fall"⁴⁰

As formulated by both plaintiff and the court,⁴¹ the interrogatory sought facts, or opinions and conclusions of fact concerning what caused the material to fall from defendant's property. Since an essential element of any case involving personal injury caused by a falling object is proof of some negligent act or omission causing the object to fall, the interrogatory in question clearly was related to an "essential element."⁴²

34. See text accompanying notes 31-33 *supra*.

35. See text accompanying notes 23-25 *supra*.

36. The term "essential element" is intended to refer to those things that must be shown to make out a prima facie claim or defense.

37. 59 F.R.D. 278 (N.D. Ill. 1973).

38. *Id.* at 279.

39. *Id.*

40. *Id.*

41. There seems to be no significant difference between the question as put by plaintiff and as rephrased by the court. The court appears to be quibbling over semantics. Clearly, all parties and the court knew what information was requested by the interrogatory. Further, it would seem that the defendant would be privileged to answer "I do not know," if applicable, whether or not the words "if you know" were in the question.

42. Perhaps the information sought by the interrogatory would not be essential to a claim based on the doctrine of *res ipsa loquitur*. However, this was not such a claim,

In *Scovill Manufacturing Co. v. Sunbeam Corp.*⁴³ plaintiff sought to have certain of defendant's patents declared void. Defendant counterclaimed for patent infringement. Plaintiff addressed interrogatories to defendant relating to defendant's interpretation of the latter's patents. Defendant objected on the grounds that the interrogatories called for speculative answers. The court ordered the interrogatories answered, finding that, even though the answer would include opinions, in this case they would serve the substantial purpose of refining the issues for trial and limiting the necessary proof.⁴⁴ As in *Goodman*, these interrogatories qualify under the "essential element" analysis. The interpretation of the patent in question is clearly an essential element of either a claim of the invalidity of the patent or a claim for its infringement.

*Spector Freight Systems, Inc. v. Home Indemnity Co.*⁴⁵ is a case in which an interrogatory requesting an opinion or conclusion of law as applied to fact was held to be improper. Plaintiff sued defendant on a surety bond. Defendant submitted interrogatories to plaintiff asking him to state generally the nature of testimony that certain persons having knowledge of relevant facts were competent to give. The court denied defendant's motion to compel answers. It held that

[t]he competency of a witness to give testimony is strictly a question of evidence for the court to rule on at trial. A party is not permitted to obtain through discovery a pure conclusion of evidence law or an opinion which calls for a degree of expertise which the other party is not expected to possess. . . . Requiring answers to these interrogatories will not result in a narrowing of the issues presented, nor will it accomplish any other legitimate purpose.⁴⁶

The court apparently treated the challenged interrogatory as one calling for a purely legal conclusion, which even amended rule 33 does not allow.⁴⁷ However, the interrogatory did not call for a purely legal conclusion, but rather for a conclusion of law as related to fact. Deciding whether a particular witness is competent to testify to particular facts involves the application of evidentiary law to facts concerning the witness. That is no more solely a question of law than an interrogatory asking a party whether he had ever been an assignee of certain promis-

and in any event, a *res ipsa* claim is essentially a negligence claim such that the facts sought by the question are arguably related to an "essential element."

43. 357 F. Supp. 943 (D. Del. 1973).

44. *Id.* at 948.

45. 58 F.R.D. 162 (N.D. Ill. 1973).

46. *Id.* at 164.

47. *Sargent-Welch Scientific Co. v. Ventron Corp.*, 59 F.R.D. 500, 503 (N.D. Ill. 1973); Notes of Advisory Committee on Rules, 28 U.S.C. Rule 33, at 7791 (1970).

sory notes.⁴⁸ This does not mean, however, that the case was improperly decided. It appears that the trial judge reached the proper result, but not entirely for the proper reasons. The interrogatory in *Spector* was improper, not because it called for a conclusion of law, but rather because it called for a conclusion of law as applied to fact which did not relate to an "essential element" of either a claim or defense in the case. Clearly, the question of whether a particular witness is competent to give particular evidence does not aid in the establishment of a prima facie claim or defense. Therefore this case is consistent with the suggested "essential element" test.

In *Union Carbide Corp. v. Travelers Indemnity Co.*⁴⁹ each of two defendant insurance companies provided products liability insurance to plaintiff. The determinative issue in the case was which insurance company provided the coverage of the risk in question. Defendant Travelers posed interrogatories to defendant Aetna asking what reserves Aetna carried on the liability asserted by plaintiff and what reserves it carried on product risk claims against plaintiff during a relevant period.⁵⁰ Upon objection to the interrogatories, the trial court ruled them improper, holding that, while the 1970 amendments rendered opinions discoverable, "the intent of the Rules is directed to opinions as to factual issues in controversy and do not render discoverable the internal opinions and conclusions of Aetna"⁵¹

The amount of reserves carried on its policy, while probably indicating Aetna's opinion on the risks covered by the policy, was not an essential element of either company's claimed construction of its policy. Therefore, the interrogatory did not qualify under the "essential element" test. In fact, when the court stated that "the intent of the Rule is directed to opinions as to factual issues in controversy" it was, in effect, stating the "essential element" test.

In *Sargent-Welch Scientific Co. v. Ventron Corp.*⁵² plaintiff alleged violations of the Sherman and Clayton Acts. Count I of the complaint alleged that the defendant monopolized and attempted to

48. *Joseph v. Norman's Health Club, Inc.*, 336 F. Supp. 307 (E.D. Mo. 1971). The question here clearly involves the application of the law of assignment of contract rights to the particular facts of the case.

49. 61 F.R.D. 411 (W.D. Pa. 1973).

50. *Id.* at 413. Other interrogatories before the court requested facts concerning defenses raised by the answering defendants. Since those interrogatories so clearly qualify under the suggested "essential element" analysis, they are not discussed here.

51. *Id.*

52. 59 F.R.D. 500 (N.D. Ill. 1973).

monopolize trade and commerce in six markets; Count II alleged that the defendant had entered exclusive dealing and tying arrangements with certain distributors; and Count III alleged that the defendant fixed resale prices and imposed customer and territorial restrictions on distributors. Defendant's interrogatories sought the factual basis for plaintiff's allegations concerning the defendant's market power and dominance and concerning the alleged injury to the plaintiff resulting from the alleged antitrust violations. The court allowed the interrogatories holding that "[a]n interrogatory which inquires into the facts upon which certain vague and general allegations of a complaint are founded . . . is not objectionable on the ground that it calls for a legal conclusion."⁵³

Once again it is obvious that all of the interrogatories submitted by the defendant and allowed by the court relate to essential elements of the plaintiff's claim. Proof of market power and dominance is an essential element of a monopolization claim, and proof of injury is necessary for a recovery of damages under any of the theories alleged.

*Joseph v. Norman's Health Club, Inc.*⁵⁴ involved a class action under the Truth in Lending Act.⁵⁵ Some of the plaintiff's interrogatories asked whether the defendant had ever been the assignee of certain promissory notes which allegedly violated the Truth in Lending Act. The court ruled that, although the interrogatories required conclusions of law as applied to fact, they were proper under rule 33(b).⁵⁶ Again, the information sought by the contested interrogatories was related to an essential element of plaintiff's claim because to recover he needed to establish a connection between defendant and the allegedly illegal promissory notes.

The only case decided since rule 33 was amended that cannot clearly be analyzed with the "essential element" test is *Philadelphia Resistance v. Mitchell*.⁵⁷ There plaintiffs were suing then-Attorney General John Mitchell and others for illegal wiretapping and surveillance. Some of plaintiffs' interrogatories were disallowed by the court because of governmental privilege,⁵⁸ but others, not relevant to the discussion

53. *Id.* at 502.

54. 336 F. Supp. 307 (E.D. Mo. 1971).

55. 15 U.S.C. §§ 1601-1681 (1970).

56. 336 F. Supp. at 319.

57. 58 F.R.D. 139 (E.D. Pa. 1972).

58. *Id.* at 142. Privilege as related to interrogatories is beyond the scope of this comment.

here, were allowed.⁵⁹ The troublesome interrogatories were those relating to a document stolen from an office of the Federal Bureau of Investigation in Media, Pennsylvania and possessed by plaintiffs.⁶⁰ The document was a memorandum of a conference of government officials. In it, the conclusions of the conference were stated to be that federal investigative agencies should follow a policy of "enhancing the paranoia of the New Left,"⁶¹ and that there should be an attempt to convince the "New Left" that there was an F.B.I. agent "behind every mailbox."⁶² Plaintiffs sent interrogatories seeking the following information: who attended the conference, what was its purpose, and who authorized it; under what legal authority was the document written and distributed; what was the government's purpose in "enhancing the paranoia of the New Left"; what steps had been taken to "enhance the paranoia"; which of the plaintiffs were considered in that section of the population denominated "New Left"; and which plaintiffs had been the subject of the policy of "enhancing the paranoia of the New Left" and under what circumstances and when and where had the defendants or their agents implemented or attempted to implement this policy with respect to any plaintiff.⁶³ Nothing on the face of the document referred to any plaintiff.

Upon the government's motion the court struck all of the interrogatories ruling that "they request legal conclusions and interpretation of [the document], questions beyond the scope of discovery."⁶⁴ The court's stated reasons for its ruling are so broad and conclusory as to make any analysis difficult. However, at least as to some of the interrogatories the ruling clearly seems erroneous.

The questions concerning who attended the conference, its purpose, the authority under which the document was written and distributed, and the government's purpose in "enhancing the paranoia of the New Left," are probably objectionable, not because they call for legal conclusions or documentary interpretation, but because they are not "relevant to the subject matter involved in the pending action."⁶⁵ How-

59. *Id.* at 144-45.

60. *Id.* at 147-48.

61. *Id.* at 147.

62. *Id.* at 148.

63. *Id.* at 147-48.

64. *Id.* at 148.

65. FED. R. CIV. P. 26(b)(1). Except to the extent that an answer to the question might reveal that one of the defendants attended the conference, it is not obvious that any of these questions would be relevant to a claim of excessive and illegal surveillance.

ever the same objection cannot be made to the questions relating to which plaintiffs had been the subject of the policy of "enhancing the paranoia of the New Left" and when, where and under what circumstances the defendants or their agents implemented that policy with regard to any plaintiff. All of the information sought by these questions would be relevant to the action, and the questions seem to be directed toward eliciting admissible evidence. Further, the questions clearly do not seek conclusions of law. The only conclusion apparently sought by the interrogatories is whether or not the policy of "enhancing the paranoia" was implemented against any plaintiff. Clearly, these questions qualify under the "essential element" test. Proof of surveillance under this or any policy is an essential element of a claim of illegal surveillance. Therefore, as to these interrogatories, *Philadelphia Resistance* was wrongly decided and should not impugn the validity of the suggested "essential element" test.⁶⁶

IV CONCLUSION

The 1970 amendment to rule 33 was intended to resolve the conflict on the question of the permissibility of interrogatories dealing with opinions and contentions of fact or law as applied to fact. The cases under the new rule seem to indicate that the desired result has been achieved. Courts no longer have to waste time pondering the difficult question of what is fact and what is opinion nor must they attempt to decide what is a question of law as applied to fact and what is a question of pure law. No longer are interrogatories automatically disallowed by courts upon the finding that they call for an opinion or contention. The amendment, however, by stating that such interrogatories are *not necessarily* improper, recognizes that there are other considerations. Thus courts allow such interrogatories only where they will serve some substantial purpose. The cases decided under the amendment suggest that a good test of whether an interrogatory calling for an opinion or contention of fact or the application of law to fact serves some substantial purpose, is whether the interrogatory relates to an "essential element" of a claim or defense.⁶⁷ The net result of the amend-

Further, they do not seem to be calculated to lead to admissible evidence as required by rule 26(b)(1).

66. The writer does not believe that this case should be cited as precedent for striking certain types of interrogatories in ordinary civil actions because there were special considerations concerning stolen government documents, governmental privilege, and national security claims involved.

67. An interrogatory that relates to an "essential element" should always be per-