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THE REQUEST FOR ADMISSIONS IN FEDERAL CIVIL PROCEDURE

TED FINMAN†

Almost a quarter-century has passed since the adoption of the Federal Rules of Civil Procedure. Though it would be foolhardy to proclaim the system a perfect one, on the whole it has worked well, and further progress has been continually sought through examination and improvement of its specific parts. One of those parts is the request-for-admissions mechanism contained in Rules 36 and 37(c).

†Assistant Professor of Law, University of New Mexico School of Law.

1. The Rules became effective on September 16, 1938. 1 Moore, Federal Practice ¶ 0.523[5], at 5614 (2d ed. 1960) [hereinafter cited as Moore].

2. For appraisals of the Rules see 1 Moore ¶ 0.504; Clark, Two Decades of the Federal Civil Rules, 58 Colum. L. Rev. 435 (1958); Holtzoff, A Judge Looks at the Rules After Fifteen Years of Use, 15 F.R.D. 155 (1954).

3. In 1946 and 1955, after extended consideration, the Supreme Court’s Advisory Committee suggested numerous amendments to the Rules. All but 3 of the 35 proposals made in 1946 were adopted; none of the 23 proposals made in 1955 was adopted. For the history of these and other amendments proposed by the Advisory Committee, see 1 Moore 5614-33. For the text of the proposed amendments and the Committee’s reasons for urging them, see Advisory Committee on Rules for Civil Procedure, Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States (1946), and Advisory Committee on Rules for Civil Procedure, Report of Proposed Amendments to the Rules of Civil Procedure for the United States District Courts (1955).

4. Fed. R. Civ. P. 36:

(a) REQUEST FOR ADMISSION. After commencement of an action a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth in the request. If a plaintiff desires to serve a request within 10 days after commencement of the action leave of court, granted with or without notice, must be obtained. Copies of the documents shall be served with the request unless copies have already been furnished. Each of the ma-
Briefly described, the request for admissions is a device through which a litigant demands that his adversary admit the truth of a proposition pertinent to their controversy; if the adversary refuses and the proposition is proved during trial, and if the court in a post-trial hearing finds that the refusal was improper, the costs of proof are imposed on the recalcitrant party. This is the theme. It has, however, many variations. The problems that arise in the administration of the admissions procedure have been solved in different ways. Experience with the solutions set forth in Rules 36 and 37(c) has indicated that in some respects the basic design of those rules may be deficient. Other problems, not inherent in the rules themselves, have been raised by numerous conflicts in the cases construing them. The purpose of this article is to examine and evaluate the rules and the judicial interpretation of them and to consider ways in which both might be improved.

Before such an analysis can be undertaken, however, a prologue is necessary. In order to evaluate the operation of a procedural device one must

\text{Fed. R. Civ. P. 37:}

\begin{itemize}
  \item \text{(c) Expenses on Refusal to Admit.} If a party, after being served with a request under Rule 36 to admit the genuineness of any documents or the truth of any matters of fact, serves a sworn denial thereof and if the party requesting the admissions thereafter proves the genuineness of any such document or the truth of any such matter of fact, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making such proof, including reasonable attorney's fees. Unless the court finds that there were good reasons for the denial or that the admissions sought were of no substantial importance, the order shall be made.
\end{itemize}

5. See, \textit{e.g.}, \textsc{Ragland, Discovery Before Trial} 194-205 (1932).

6. For prior commentary on Rules 36 and 37(c), see \textsc{Conway, Admissions of Fact Under the Federal Rules of Civil Procedure}, 26 \textsc{J. Bar Ass'n D.C.} 421 (1959); \textsc{Dix, Requests for Admissions Under Rule 36 of the Federal Rules of Civil Procedure}, 10 \textsc{Fordham L. Rev.} 74 (1941); \textsc{Developments in the Law—Discovery}, 74 \textsc{Harv. L. Rev.} 940, 968-70 (1961); \textsc{Note, 29 Calif. L. Rev.} 783 (1941); \textsc{Note, 16 Rocky Mt. L. Rev.} 167 (1944).
understand its over-all function. Consequently, in the first part of this article I shall examine the following questions: What specifically can be accomplished through the use of the request for admissions—what are its potentialities? Of what importance are these objectives? Assuming their importance, can these ends be attained most effectively through the submission of requests to admit, or can the same results be produced either informally or through the use of other procedural mechanisms?

THE ROLE OF THE REQUEST FOR ADMISSIONS

The Potentialities

The request for admissions is one of several pre-trial mechanisms available in federal practice. As a group, these mechanisms serve three functions: to define the controversy, i.e., to provide a clear picture of the conflicting contentions which constitute the dispute; to resolve some or all of those conflicts prior to trial; and to uncover factual material for use in preparing and trying the case.

The last of these objectives cannot be effectively attained through the admissions procedure. Requests cannot be used, for example, to discover the names of unknown witnesses. This becomes apparent when one considers a request’s linguistic form: “Admit that ‘such-and-such’ is true.” Before such a demand can be formulated, the demanding party must be able to specify the content of “such-and-such,” and before he can do this he must be aware of “such-and-such.” If awareness exists before the request is formulated, the answer to the request will not add to the requesting party’s knowledge. Requests are thus virtually useless as investigative tools. They can, however, further the first two objectives of pre-trial procedure by defining and limiting the contentions to be investigated and, ultimately, litigated.

The process of definition and limitation begins with the pleadings. Under the Federal Rules of Civil Procedure, however, the function of the pleadings is to give only general notice of the matter being asserted, and thus, with but few exceptions, the Rules permit the plaintiff’s claim and the defendant’s affirmative defenses to be formulated in broad, conclusionary terms. As a consequence, the definition of the dispute afforded by the pleadings is crude, us-

7. 2 Moore ¶ 8.13, at 1648-49.
8. Rule 8(a) (2) states that a pleading asking for relief shall contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Rule 8(b) states that defenses shall be alleged “in short and plain terms.” An Appendix to the Rules contains forms which illustrate the meaning of and are sufficient to comply with the provisions of Rule 8. Fed. R. Civ. P. 84. Under Form 9 the phrase “negligently drove” is sufficient without further detail. An allegation that defendant “owes plaintiff” a certain amount “for goods sold and delivered” is sufficient under Form 5. An allegation that “defendant converted to his own use” certain property is proper under Form 11. Rule 9(b), which provides that in “all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity,” is an exception to the generalized pleading permitted by the Rules, but even here, Rule 9(b) goes on to say that “malice, intent, knowledge, and other condition of mind of a person may be averred generally.”
able primarily as a starting point for efforts to obtain a more precise definition.9

These efforts point in two directions. On the one hand, a litigant wants a specification of the concrete contentions underlying the conclusions contained in his opponent's pleading. On the other hand, he wishes to know which of his own contentions will be contested, and to limit the contested area by obtaining as many concessions as possible.

The admissions procedure is ill-adapted to the definition and limitation of an adversary's contentions. Again the problem is one of linguistic form. For example, if a defendant in an auto collision case seeks a particularization of the plaintiff's charge of "negligence," a request to admit would have to read: "Admit that the conduct of defendant which you claim to have been negligent consists of 'such-and-such.'" Since defendant is ignorant of plaintiff's specific charge, he cannot concretize "such-and-such," and therefore must look to some other procedural mechanism.10

The other aspect of the problem involves the definition and limitation of the controversy concerning the litigant's own contentions. The admissions procedure is well-adapted to this task. The litigant will have no problem formulating the request since the "such-and-such" to be stated consists of contentions being asserted by and therefore known to him. The answer to the request will show which points are contested and thus furnish a definition of the dispute. The penalty which attaches to an improper denial encourages candor and thus tends to limit the controversy to legitimate disputes.

By using requests a litigant can define and limit his contentions at two levels. At one level his contentions consist of pleading allegations. Although the opposing pleading usually shows whether these are contested, it will not always do so.11 Moreover, a litigant may be misled if he assumes that every conflict indicated by the pleadings is a real one. In many cases—especially


10. Of course, a party might hypothesize the content of "such-and-such," direct a request to each hypothesis, and in this manner attempt to obtain a particularization of his opponent's allegations. Such a use of requests, however, would be inefficient and would not work at all if the requesting party failed to hit upon the correct hypothesis. Moreover, the propriety of such request is questionable. Cf. United States v. New Wrinkle, Inc., 16 F.R.D. 35 (S.D. Ohio 1954).

Interrogatories under Rule 33 constitute an appropriate mechanism for asking an opponent to concretize his contentions. Whether such interrogatories are permissible, however, is not clear. 4 Moore ¶ 33.17, at 2305, 2309, 2311-12; Developments in the Law—Discovery, 74 Harv. L. Rev. 940, 1039-43 (1961).

11. A reply to an answer is improper unless the court orders that a reply be filed. Fed. R. Civ. P. 7(a). Nor is an answer to a counterclaim which is not "denominated as such" proper unless ordered by the court. Ibid. Thus the pleadings might not reveal whether the allegations constituting an affirmative defense and the allegations constituting a counterclaim are denied or admitted.
when a general denial is available—a party will enter denials without carefully considering the specific allegations he thereby purports to dispute. Consequently, allegations controverted in a pleading sometimes are admitted when inquiry is aimed directly at them.

Even if no problem arose at the pleading level, other problems of definition and limitation would remain. Though the pleadings normally show only whether ultimate issues are disputed, a dispute over an ultimate issue normally consists of attempts to prove and disprove various specific occurrences and conditions. Thus a controversy concerning "negligence" may be broken down into specific disputes concerning several concrete propositions: defendant was driving 40 miles per hour; he was intoxicated; the road was wet; the traffic-control signal was red. Though an ultimate issue, as alleged in a pleading, is controverted, some of the specific propositions probative of the ultimate issue may be uncontested. Through the use of requests to admit, specific propositions that are not contested can be removed from the sphere of dispute.

The Importance of Controversy Definition and Limitation

No lawsuit could be prepared or tried without some statement of the opposing contentions that constitute the terms of the dispute. A definition of the controversy is essential. The more specific the definition, the greater its utility. A precise statement of the opposing contentions focuses the attention of the litigants and the tribunal on the critical questions. This permits the litigants to direct their necessarily limited investigative capacities to the determinative issues. It also facilitates the deliberations of the tribunal by presenting the questions to be decided in sharp, concise form. And, since obscurely defined

13. United States v. Natale, 99 F. Supp. 102 (D. Conn. 1950), is a striking illustration. In answering the complaint, defendant denied all material allegations. However, when requests to admit were directed to those allegations, they were admitted, and plaintiff was able to obtain summary judgment.

In Knowlton v. Atchison, T. & S.F. Ry., 11 F.R.D. 62 (W.D. Mo. 1951), a wrongful death action under the FELA, plaintiff's complaint alleged that defendant had ordered plaintiff's decedent to be vaccinated against smallpox and that the vaccination eventually caused decedent's death. In answering the complaint, defendant denied that it had ordered the vaccination. Plaintiff had also alleged, and defendant had denied, that decedent was told that he would be fired if he refused to be vaccinated. Complaint, pp. 2-4, First Amended Answer, p. 2, Knowlton v. Atchison, T. & S.F. Ry., supra, Civil No. 6358. These and numerous other matters that defendant had denied in its answer were admitted when requests to admit were directed to them. Request For Admission Under Rule 36, p. 2; Answer to Plaintiff's Requests For Admissions Under Rule 36, pp. 1, 2.

14. In Jackson Buff Corp. v. Marcell, 20 F.R.D. 139 (E.D.N.Y. 1957), for example, the controversy, as defined by the pleadings, was whether plaintiff was "exempt from tax." Though this ultimate issue could not have been resolved through the use of requests to admit, many facts pertinent to taxability were established through admissions. See Complaint, pp. 2, 3, Answer, pp. 1, 2, Request for Admission of Facts, Answer to Request for Admissions, Jackson Buff Corp. v. Marcell, supra, Civil No. 13874.
questions sometimes cause erroneous decisions, a precise definition promotes an accurate and just resolution of the dispute.15

A controversy should be limited as well as defined. It is self-evident, even in an adversary system, that contentions not subject to good faith dispute should be resolved through concession rather than by submission to a judge or jury. The adversary attitude is not an end in itself. It promotes a thorough presentation of opposing positions, and this is desirable when opposition is legitimate. But when a contention cannot be honestly and reasonably disputed, the adversary approach delays and even endangers a just resolution of the case. Quite the opposite effect is produced if the contention is admitted.

Through such definition and limitation, admissions promote both efficiency and economy in resolving disputes. If a point is conceded, litigants need not expend effort in investigations concerning it nor incur expense in presenting evidence to prove it.16 Judicial administration is also aided. Admissions reduce the time required to try a case. Indeed, they often make summary judgment possible.17 Finally, admissions encourage litigants to evaluate realistically the hazards of trial and thus tend to promote settlements.18

Defining and Limiting a Controversy: The Request for Admissions and Other Methods

Whether the admissions device has a significant role to play in federal civil procedure depends not only on the objectives attainable through its use, but also on whether its use is important to the attainment of those objectives. This in turn depends on whether a controversy can best be defined and limited through use of the admissions procedure. Other approaches are possible.

One approach is to propose an appropriate stipulation. This is often effective but it has an obvious weakness: Everything depends on the voluntary cooperation of an adverse party. Opposing litigants do not willingly help one another, and admissions—even of indisputable contentions—do aid one’s adversary.19 In brief, admissions are generally incompatible with immediate self-
interest. As a corollary, the voluntary stipulation, though perhaps helpful, is not an adequate device for defining and limiting controversies. A coercive mechanism is needed.

The available tools, in addition to the request for admissions, are depositions, interrogatories, and the pretrial conference. In comparing the latter three with the admissions device, I shall consider depositions and interrogatories together and then examine the pre-trial conference.

A request to admit, a deposition and an interrogatory all can be used to ask a litigant whether he disputes or concedes the contentions of the inquiring party. Asking the question, however, does not limit or define the controversy. Only the answer can do that, and only certain types of answers do so effectively. To be effective, an answer must state unambiguously whether a contention is admitted or denied, admit contentions not subject to reasonable dispute, and be binding if it is an admission. In considering whether the admissions procedure or the deposition-interrogatory machinery is more likely to produce such answers, it is helpful to distinguish between (a) situations in which a litigant knows from personal observation whether a contention is true and (b) situations in which his belief must be based on information supplied by others.

A litigant who lacks personal knowledge is not likely to make an admission in answering questions put at the taking of a deposition or through an interrogatory. Though he will be subject to sanctions if he refuses to answer at all and can be prosecuted for perjury if he answers dishonestly, his only obligation when he answers is to reveal what he knows. If what he knows about a proposition consists of information furnished by others, he can answer questions concerning that proposition—and answer them fully and truthfully—without conceding its truth. He need simply say, “Mr. X has told me ‘such-and-such’!” This form of statement does not constitute an admission.

admission. To ease his trial burden is to enhance his settlement position, since settlement value depends in part on the cost and difficulties that would be involved at trial.

Also, an attorney may be unwilling to admit a matter which he knows to be true if he believes that his opponent will be unable to produce proof of the matter. See Ehrich, *Unnecessary Difficulties of Proof*, 32 YALE L.J. 436, 437-38 (1923). Indeed, the costs of proving a claim may make it impractical to press the claim, thus providing an additional reason for refusing an admission. *Id.* at 438.

The rules providing for these devices are: *Fed. R. Civ. P.* 26, 30, 31 (depositions); *Fed. R. Civ.* P. 33 (interrogatories); *Fed. R. Civ.* P. 16 (pre-trial conference). Also available, though not of such general utility as the devices mentioned in the text, are discovery of documents under Rule 34 and medical examinations under Rule 35.


22. 4 Moore § 37.04, at 2809.

23. In Coyne v. Monongahela Connecting R.R., 24 F.R.D. 357 (W.D. Pa. 1959), plaintiff served an interrogatory which asked defendant to state how the accident in question had occurred; defendant objected on the ground that the interrogatory called for an opinion and conclusion. The court overruled the objection, but said, “The answer, of course, may state the basis upon which it is made in order to avoid an admission of something defendant does not admit.” *Id.* at 359. Similarly, in Taylor v. Sound S.S. Lines, 100 F. Supp. 388...
On the other hand, the efficacy of a request for admissions does not depend on the answering litigant's personal knowledge. The admissions procedure is an issue-resolving rather than an information-gathering device. Its sanction falls not on a failure to disclose but on an improper refusal to admit. A refusal is improper if a contention is beyond reasonable dispute, and even when belief must be based on information furnished by others, a contention can be indisputable.

If a litigant does have personal knowledge, an honest disclosure would be equivalent to an admission, and the fact that depositions and interrogatories call for disclosure while requests to admit call for admissions would be unimportant. However, since admissions typically cause a loss of tactical advantage, litigants are not always willing to answer candidly. Consequently, it is important to consider how effectively the deposition-interrogatory machinery, on the one hand, and admissions procedure on the other encourage candor.

In this respect the distinction between open-ended and closed-ended inquiries is important. An open-ended inquiry is one in which the answering party has full control over the formulation of his reply, while in a closed-ended inquiry the person asking the question formulates and limits the pos-

(D. Conn. 1951), the court overruled defendant's objection that plaintiff's interrogatory called for an opinion and conclusion, stating, "Under this rule [Rule 33] the defendant will sufficiently answer if it 'shall furnish such information as is available' to it. This done, the defendant's duty will be discharged ... ." Id. at 389. The court then noted that if defendant's answer were based on information furnished by third persons, the answer would be hearsay and not admissible at trial. Ibid. See also F. & M. Skirt Co. v. A. Wimpfheimer & Bro., 25 F. Supp. 898 (D. Mass. 1939), in which the court held that a party lacking personal knowledge was entitled to preface his answer to an interrogatory with the words "I believe that."

24. If offered in evidence at trial to prove that the matter recited by X was true, the answer to the interrogatory would be objectionable as hearsay.

The Bar seems well aware of this limitation on the use of interrogatories. The authors of an article on Rule 33 report that it "is common practice to attach to answers to interrogatories" the following statement, "Necessarily, the information contained in said answers was gathered from many sources and is subject to verification and correction." Caskey & Young, Some Further Comments Upon Rule 33 of the Federal Rules of Civil Procedure, 33 Va. L. Rev. 125, 139 n.48 (1947).

25. See text at notes 151-60 infra.


27. Rule 37(c) states that costs shall be granted against a party who denied a request to admit unless "the court finds that there were good reasons for the denial... ." Clearly the fact that a party lacked personal knowledge should not be a good reason for a denial if the party possessed information that eliminated all doubt concerning the truth of the matter in question.

28. See note 19 supra.

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sible answers to it. Depositions and interrogatories are open-ended.\textsuperscript{30} Thus if these devices are used in seeking admissions, the answering party, even though he knows a contention is true, can frame a reply which states his position in an ambiguous, equivocal manner. If he does—if there is any ambiguity—the inquiring litigant must interpret the answer as a denial. His trial preparation will be based on this interpretation, and he cannot assume that preparation is unnecessary unless a contention has been unequivocally conceded. Therefore, if the mechanism used to ask for an admission is a deposition or interrogatory, the attempt will fail if the responding litigant is willing to be evasive. Evasion would not suffice if a request to admit were used. Here the inquiry is closed-ended. The only possible responses are (a) an admission, (b) a denial or (c) a statement that the contention cannot honestly be either admitted or denied.\textsuperscript{31} If the contention is known to be true, an admission can be avoided only if the answering litigant is willing to submit an answer which is patently false, not merely evasive.\textsuperscript{32}

In some situations litigants willing to practice minor evasions would not be willing to submit clearly false replies. In such situations the open-ended character of depositions and interrogatories will make them less effective than the closed-ended request for admissions. In other situations only the threat of punishment can prevent dishonesty. Here the admissions procedure will be more effective because it has a built-in sanction against dishonesty whereas depositions and interrogatories do not.\textsuperscript{33} It is true, of course, that a willfully false reply exposes the deponent to a perjury prosecution. Realistically, however, it is widely known that the possibility of such criminal proceedings is

\textsuperscript{30} The rules regulating depositions and interrogatories do not specify the form in which questions are to be answered. The interrogating party, of course, can frame a question which calls for a specific, unequivocal answer. He could, for example, ask, "Is it true or false that 'such-and-such'?" The answering party, however, can disregard the form of the question and frame his reply in a manner that suits his purposes. Since depositions are taken in a face-to-face confrontation, further questions can often eliminate ambiguities, but the problem of evasion remains.

\textsuperscript{31} FED. R. CIV. P. 36(a).

\textsuperscript{32} I do not mean to suggest that a refusal to admit in response to a request for admissions would be more culpable as an ethical matter than an evasive response to an interrogatory or a deposition. I believe, however, that the average practitioner would view the evasion differently from the false response to the request for admissions. One cannot escape the fact that a person who knows something is true is lying if he either denies it or says that he cannot honestly admit or deny. There is no room for argument. A skillfully drafted answer to an interrogatory, however, while sufficiently ambiguous to avoid an admission, could be close enough to the truth to make the question of propriety at least debatable.

\textsuperscript{33} The rules regulating depositions and interrogatories do not provide for a proceeding in which sanctions may be imposed on a party who has answered questions dishonestly. In Crosley Radio Corp. v. Heib, 40 F. Supp. 261 (S.D. Iowa 1941), however, the court said that under its statutory power to punish for contempt it could entertain a motion to hold a party in contempt on the ground that he had falsely or evasively answered interrogatories. The court found that there had been no contempt in the \textit{Crosley} case, however, and I have found no case in which the contempt power was used in the manner suggested in \textit{Crosley}.
virtually nil. 34 The same is true, with rare exceptions, of the institution of disciplinary action against an attorney who helps his client circumvent the truth. 35 A perjury prosecution requires the cooperation of the district attorney. His attitude frequently, and perhaps justifiably, is that the general work-load of his office makes strict enforcement of the perjury law impractical. 36 This is especially true when the conduct complained of is not clearly perjurious. Such would be the situation here, since, as previously noted, a minor evasion would serve the purpose of the answering litigant. The reluctance of attorneys to bring charges against their brethren also will increase when the basis of the charge is a minor evasion.

The request-for-admissions sanction is not subject to such infirmities. It is imposed in the very case in which the admission was sought and at the initiative of the party who sought it. Clearly his motivation will be greater than that of a district attorney asked to press a perjury charge. Moreover, in answering a request for admissions, a litigant cannot employ borderline evasions which make it difficult to characterize his reply as dishonest. Finally, if the sanction runs against the opposing party rather than his attorney—as it does under Rule 37(c)—there should be little of the reluctance associated with the institution of disciplinary proceedings.

Thus far, in comparing depositions and interrogatories with the request for admissions, I have been concerned with the content of the responding litigant's answer. An equally significant consideration is whether the answer, if it is an admission, will be dispositive at trial. If an admission is merely evidence, not
conclusive proof—if a litigant is free to dispute a contention even though he has "admitted" it—the controversy is not limited. The party asserting the contention must be fully prepared to prove it at trial. Concessions obtained through the admissions procedure can and should be binding. But whether a party is bound by his answers to depositions or interrogatories is not clear.

The pre-trial conference affords another opportunity to make the same kind of inquiry as the request for admissions. Both can be used to ask a litigant whether he admits or denies a contention. In other respects, however, these devices differ significantly. Whether the admissions procedure is to be used is determined by the parties, whereas the court decides whether a pre-trial conference will be held. Where such a conference is not held, the importance of the request for admissions is obvious. Also, in the main, the admissions procedure operates extrajudicially, while a pre-trial conference cannot be held without a judge. With judicial dockets as crowded as they are today, this factor hardly can be ignored. Finally, the rules regulating the pre-trial conference do not deter improper denials.

37. See text at notes 188-89 infra.
38. One question is whether under the applicable rules of evidence a party can introduce evidence to contradict statements he has made in responding to a deposition or interrogatory. The courts take different positions. See McCormick, Evidence 513-16 (1954). Another problem is whether a party has a duty to rectify errors in answers to interrogatories, and whether, if he fails to do so, he will be precluded from taking a position at trial which conflicts with the position he took in answering the interrogatory. See Developments in the Law—Discovery, 74 Harv. L. Rev. 940, 961-63 (1961).
39. "In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a [pre-trial] conference..." Fed. R. Civ. P. 16.
40. The use of the pre-trial conference has been increasing greatly. Administrative Office of the United States Courts Ann. Rep. 120 (1960). In some districts pre-trial is mandatory. Clark, What Remedies for Refusal of a Pre-Trial Conference?, 23 F.R.D. 334, 335 (1959). However, in many cases no pre-trial conference is held. Ibid.
42. Rule 16, the rule providing for pre-trial conferences, contains no sanction provisions at all. Authority to compel attendance at a conference by dismissing for failure to attend can be found in Rule 41(b). Wisdom v. Texas Co., 27 F. Supp. 992 (N.D. Ala. 1939). Pre-trial orders directing a party to furnish his opponent with information can be treated as orders under Rule 37(a), and failure to comply with such orders can be punished in the manner provided for in Rule 37(b). 3 Moore ¶ 16.19, at 1130 nn.17 and 18. For cases which, without mentioning Rule 37(b) by name, support judicial power to invoke the sanctions provided for in Rule 37(b), see Syracuse Broadcasting Corp. v. Newhouse, 271 F.2d 910, 914-15 (2d Cir. 1959); Matheny v. Porter, 158 F.2d 478, 480 (10th Cir. 1946).

In Berger v. Brannan, 172 F.2d 241, 243 (10th Cir. 1949), the court said, "The court has power to compel parties to agree as to all facts concerning which there can be no real issue." On the facts of the case, however, the quoted statement is obiter dictum. No federal court has held that a court at a pre-trial conference has power to hold that a matter which a party expressly refuses to admit is admitted. Of course, if a party refuses to make an admission but fails to show that he has any ground for his refusal, a court might grant summary judgment. This, in effect, seems to be what the court did in Berger v. Brannan, supra.
These differences indicate that the pre-trial conference does not reduce the importance of the request for admissions. The way in which the conference is used reinforces this conclusion and reveals important interaction between the two devices.

The process of defining a controversy is a continuing one. At the beginning of the lawsuit the litigants know little about the details of the case. Their investigative efforts have hardly begun. Being relatively uninformed, they will not be prepared to make many concessions. However, the disclosure of even a few uncontested points will limit the subsequent discovery efforts of the litigants, thus effecting some saving of time and expense. This initial disclosure can be obtained through requests to admit but not through a pre-trial conference since it usually is held shortly before trial. Later in the case, after depositions and other discovery devices have been used and the parties are better informed, further definition and limitation may be called for. The litigants’ newly-gained knowledge will make further admissions appropriate. These can be obtained either through the submission of new requests to admit or in the course of the pre-trial conference. Although, as previously noted, the pre-trial rules themselves do not compel candor, the existence of an effective request-for-admissions procedure tends to fill this gap. The mere availability of the admissions procedure should encourage voluntary cooperation, since the person whose cooperation is sought knows that a sanction-carrying procedure can be invoked outside the pre-trial conference if he refuses to act reasonably within it.

The Request for Admissions in Operation: Rules 36 and 37(c)

Rules 36 and 37(c) and the cases construing them determine whether the potentialities of the admissions device can be fully realized in federal civil procedure. Those rules and cases also determine whether the request for admissions can be misused. In the following analysis I shall attempt to ascertain whether the federal admissions procedure as currently administered is designed to achieve maximum utility with minimum abuse. Where the existing design is deficient or where ambiguities have arisen, possible avenues to reform through interpretation or amendment will be explored.

43. 3 Moore ¶ 16.08, at 1111; Nims, Pre-Trial 69 (1950). See Bradford Novelty Co. v. Samuel Eppy & Co., 164 F. Supp. 798 (E.D.N.Y. 1958), in which the court, in setting a date for a pre-trial conference, ordered that discovery proceedings, including requests for admissions, be completed 50 days prior to the conference.

44. Rule 36 does not state whether successive requests for admissions are permissible. In United States v. Watchmakers of Switzerland Information Center, Inc., 25 F.R.D. 197, 201-02 (S.D.N.Y. 1959), the court recognized that a party’s knowledge increases as litigation proceeds and consequently upheld the right to submit a second request for admissions. See also 4 Moore ¶ 36.05, at 2715.

The Scope of Requests to Admit

The potentialities of the admissions procedure are determined initially by the area within which it can be used. This area is restricted whenever a court upholds an objection to a request. Consequently, the sphere of permissible use as currently limited is defined by stating the grounds upon which such objections will be sustained. Although there are conflicting decisions, courts have upheld each of the following objections:

1. The admission requested is privileged.
2. The request calls for an irrelevant admission.
3. Under some exclusionary rule of evidence the admission would be inadmissible at trial.
4. The subject matter of the request is a disputed contention.
5. The request attempts to cover the “entire case.”
6. The answering party, because of insufficient knowledge, is unable to determine the truth or falsity of the contention whose admission is requested.
7. The admission requested is matter of “opinion” or “law” rather than a matter of “fact.”

These objections raise individual problems which will be separately considered. At the outset, however, it is appropriate to note the practical effect of a ruling on an objection. An order sustaining an objection permits the answering litigant to ignore the request. He need not reveal his position on the contention in question, and this is true even though in some cases he might admit the contention if an answer were required. An order overruling an objection compels a statement of position but does not compel an admission. The litigant decides for himself whether he will admit, deny, or claim that he can not honestly do either.

Privilege. A request to admit is subject to objection if the requested admission is privileged. Rule 36 expressly so provides. Cases involving the confidential-communication privileges—those of husband and wife, attorney and client, and so on—raise no problems peculiar to the admissions procedure. The decisions dealing with self-incrimination, on the other hand, display both conflict and confusion.

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46. The pertinent cases will be discussed in the text which follows and therefore are not cited at this point.
48. Woods v. Robb, 171 F.2d 539 (5th Cir. 1948); FDIC v. Logsdon, 18 F.R.D. 57
The troublesome question is whether Rule 36(b) protects litigants against incriminatory use of their answers to requests. If it does, answers could not be refused on grounds of possible self-incrimination. Rule 36(b) states:

Any admission made by a party pursuant to such request is for the purpose of the pending action only and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding.

In all the cases involving Rule 36(b), the courts have assumed without discussion—indeed, without even expressly stating the assumption—that the prohibition against using answers in "any other proceeding" precludes their use in criminal cases. The validity of that assumption is questionable. The Federal Rules were promulgated pursuant to a statute that grants authority to regulate only civil procedure, and the Rules themselves contain a like limitation. Congress, however, does have power to regulate criminal procedure, and consequently it can be argued that, by tacitly approving Rule 36(b), Congress ratified the regulation of criminal procedure that seems to be implicit in the Rule's reference to "any other proceeding." It might further be contended that the express authority to promulgate civil rules included an implied authority to affect criminal procedure insofar as such effects were necessary to the effective regulation of procedure in civil cases. Reliance on such arguments, however, is unnecessary. Doubts could easily be resolved by an appropriate amendment of Rule 36(b).

For purposes of discussion, let us assume, as the courts have, that under Rule 36(b) a litigant's answer to a request for admissions could not be used as evidence in a criminal proceeding. The question then becomes whether, as thus interpreted, Rule 36(b) removes all danger of incrimination. Here the courts disagree. Three cases state or imply that, since an answer to a request cannot be used as evidence in a criminal case, the answer cannot be incriminating, and therefore a request cannot be objectionable on self-incrimination grounds.


49. FED. R. Civ. P. 36(b).
51. See cases cited note 48 supra.
52. 28 U.S.C. § 2072 (1958). Inasmuch as the Supreme Court has authority to promulgate rules for the regulation of criminal procedure, 18 U.S.C. § 3771 (1958), it is arguable that the Court needs no further authorization in order to make Rule 36(b) applicable in criminal cases. The Court's power to make rules of criminal procedure, however, came in 1940, Act of June 29, 1940, ch. 445, 54 Stat. 688 (1940), and thus could not have provided any authorization in 1938 when Rule 36 was adopted.
53. "These rules govern the procedure in the United States district courts in all suits of a civil nature..." FED. R. Civ. P. 1.
This conclusion is erroneous. The privilege may be claimed unless the witness is immunized against future prosecution based on knowledge or information obtained as a result of his testimony. Rule 36(b) does not confer this kind of immunity and consequently would not preclude a claim of privilege if the litigant's answer might cause criminal charges to be brought against him.

The limited protection afforded by Rule 36(b) was recognized in *FDIC v. Logsdon*. Plaintiff, claiming that defendant had overdrawn his bank account and seeking to recover the amount of the overdraft, asked defendant to admit that he had signed and issued the checks which produced the overdraft. Whether defendant had signed and issued those checks was also pertinent in a pending criminal case in which defendant was charged with willful misapplication of national bank funds. Defendant accordingly contended that the request to admit in the civil action was objectionable on self-incrimination grounds. Although the court assumed that a reply to the request could not be used as evidence in the criminal action, defendant's objection was sustained. This result was necessary, the court said, because Rule 36(b) did not grant immunity from prosecution.

Though the court was correct in recognizing that Rule 36(b) affords only limited protection, the decision seems questionable in light of the facts of the case. The indictment against defendant had been returned before he would have answered the request for admissions. Consequently, no matter how he answered, his reply could not have been the cause of the indictment. Therefore, unless an answer would have been incriminating in some other sense, Rule 36(b) adequately protected defendant and the claim of privilege should have been denied. Of course, if a litigant's admission would lead to the discovery of

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56. One might argue that a request to admit asks only for an affirmation of a fact of which the requesting party already has knowledge, and therefore that an admission would not provide any additional impetus to the institution of criminal proceedings and consequently could not be incriminating. This argument, however, seems to be foreclosed by Counselman v. Hitchcock, supra note 55. Many of the questions which the Court there held violative of the privilege called for a mere affirmation or denial. Counselman v. Hitchcock, supra note 55, at 549-50.

An additional problem is whether in order to grant adequate protection Rule 36(b) would have to protect a party against state criminal proceedings, and, if so, whether it might be construed as doing so. For discussion of the question whether immunity from incrimination under state law would be necessary, see Kroner, *Self Incrimination: The External Reach of the Privilege*, 60 COLUM. L. REV. 816 (1960); McNaughton, *Self-Incrimination Under Foreign Law*, 45 VA. L. REV. 1299 (1959).
57. 18 F.R.D. 57 (W.D. Ky. 1955). In United States v. Fishman, 15 F.R.D. 151, 153 (S.D.N.Y. 1953), and *In re Stein*, 43 F. Supp. 845, 847 (N.D. Ill. 1942) (dictum), the courts without discussing Rule 36(b), said that requests to admit were subject to objection on grounds of self-incrimination.
58. FDIC v. Logsdon, 18 F.R.D. 57, 58 (W.D. Ky. 1955). The assumption, as in the other self-incrimination cases, is implicit rather than express.
59. Ibid.
60. Ibid.
other evidence that might be used against him in a criminal proceeding, a claim of privilege should be sustained. The opinion in the Logsdon case, however, in no way indicates that this danger was present, and it is difficult to see how the admission called for could have led to other evidence. A further danger is that an admission, though made after a prosecution has been commenced, might harm the defendant by causing a prosecutor to press a charge that he would otherwise have compromised or dismissed. This danger would be especially great if the prosecutor had obtained a broad indictment containing varied charges so that he might later induce a compromise by offering to dismiss some of the charges. However, it is not clear whether an admission would be held incriminating if its sole effect would be to cause the pursual of a previously instituted prosecution.

Irrelevance. A request to admit is pointless unless it calls for the admission of a proposition which a court would consider, or permit a jury to consider, in resolving the controversy. If a proposition is irrelevant, neither the court nor the jury should consider it. Thus the provision in Rule 36 permitting requests to be challenged as irrelevant is in theory appropriate and desirable.

61. See cases cited note 55 supra.
62. For the text of Rule 36, see note 4 supra. As originally promulgated, Rule 36 made no provision for attacking a request on the ground that it was irrelevant. 4 MOORE ¶ 36.01. Nonetheless, most courts agreed that a party need not answer an irrelevant request. Fidelity Trust Co. v. Village of Stickney, 129 F.2d 506, 511 (7th Cir. 1942) (request relating to defense which defendant might raise but not related to plaintiff's prima facie case held improper); Sulzbacher v. Travelers Ins. Co., 2 F.R.D. 491, 492 (W.D. Mo. 1942) (dictum that motion would lie to suppress irrelevant request); Walsh v. Connecticut Mut. Life Ins. Co., 26 F. Supp. 566, 571 (E.D.N.Y. 1939) (dictum that party not required to admit irrelevant matters). Contra, In re Stein, 43 F. Supp. 845, 848 (N.D. Ill. 1942).

Booth Fisheries Corp. v. General Foods Corp., 27 F. Supp. 268 (D. Del. 1939), is another pertinent case decided before Rule 36 specifically authorized objections to requests. Plaintiff objected to certain requests on the ground that they were irrelevant. See Plaintiff's Reply Memorandum Re "Plaintiff's Objections to Defendants' Requests Made Under Rule 36," pp. 3-4, Booth Fisheries Corp. v. General Foods Corp., supra, Civil No. 1267. The court sustained the objection though without expressly mentioning irrelevance, 27 F. Supp. at 270-71.

In 1946, Rule 36 was amended to provide that a party could object to an irrelevant request. 4 MOORE ¶ 36.01. There have been 8 pertinent decisions since the amendment. In four of these cases the request objected to was clearly relevant and the objection was overruled. McGonigle v. Baxter, 4 Fed. Rules Serv. 2d 36a.21 (E.D. Pa., May 10, 1961); Hise v. Lockwood Grader Corp., 153 F. Supp. 276 (D. Neb. 1957); Jones v. Piper Aircraft Corp., 18 F.R.D. 181 (M.D. Pa. 1955); E. H. Tate Co. v. Jiffy Enterprises, Inc., 16 F.R.D. 571 (E.D. Pa. 1954). In two cases in which relevance was debatable, the court overruled the objection. United States v. Watchmakers of Switzerland Information Center, Inc., 25 F.R.D. 203 (S.D.N.Y. 1960); Ruoff v. Brownell, 14 F.R.D. 371 (D.D.C. 1953). The objection was sustained in one case involving a request of debatable relevance. Waider v. Chicago, R.I. & Pac. R.R., 10 F.R.D. 376 (S.D. Iowa 1950). And, in Johnstone v. Cronlund, 25 F.R.D. 42, 45-46 (E.D. Pa. 1960), the court held the request objectionable on the ground that the admissions would be relevant only to impeachment and that the need for impeachment should not be assumed. In effect, the court said that the issue to which the request pertained was not then present in the case and therefore the request was irrelevant.
In practice, however, challenges to relevance can thwart legitimate uses of the admissions procedure.

The judge who passes on the relevance of a request seldom presides when the case comes to trial, and if he should preside his view of the case may become altered during the intervening period or at trial. He cannot be sure, therefore, that a proposition will be considered irrelevant at trial. If a request is held improper on the assumption that the admission sought is irrelevant, but the judge at trial disagrees, the ruling on the request would have prevented a legitimate use of the admissions procedure. Had the objection been overruled, the proposition in question might have been admitted, thus facilitating both preparation for trial and the trial itself. Hence, a rule which permits requests to be challenged as irrelevant can frustrate the objectives of the admissions procedure. The danger is not a fanciful one.3

Determinations of relevance turn on estimations of probability. Whether \( X \) is relevant as proof of \( Y \) depends on whether proof of \( X \) to some degree increases the probability that \( Y \) is true.64 Estimations of probability, however, are based on the personal knowledge, information and judgment of the persons making them. Disagreement is virtually inevitable.65

In summary, excluding the cases in which relevance was clear and the objections were overruled, and looking only to the cases in which the requests might well have been held relevant, the decisions are equally divided: Objections have been overruled in two cases, the Watchmakers and Ruoff cases, and sustained in two, the Waider and Johnstone cases.


64. In districts which do not use the master-calendar system, a case is assigned to a specific judge shortly after the complaint is filed, and this judge handles all proceedings relating to the case, including the trial. Because of the press of business and the posture of the case when he hears an objection to a request, the judge may at that time view as irrelevant an admission which he would consider relevant when presiding at the trial. Moreover, even in these districts the judge who hears the objection might not be the one who presides at trial. The judge to whom the case was assigned may not be available to hear the objection, or, though he hears the objection, he may be unavailable at the time of trial. This might happen, for example, if the judge in question is a visiting judge.

64. McCORMICK, EVIDENCE 317-18 (1954); James, Relevancy, Probability and the Law, 29 Calif. L. Rev. 689, 694-99 (1941); Slough, Relevancy Unraveled, 5 Kan. L. Rev. 1, 7-10 (1956).

65. In addition to conflicting estimates of probability, other factors will cause judges to disagree on whether evidence is relevant.

(1) If \( X \) is offered as proof of \( Y \), some courts say that \( X \) is relevant if \( Y \) would be
Waider v. Chicago, R.I. & Pac. R.R.\textsuperscript{66} is illustrative. Plaintiffs were injured when their car collided with defendant's train at the Schmidt Road crossing in Davenport, Iowa, and they sued to recover damages for personal injuries.\textsuperscript{67} Defendant's train, plaintiffs contended, had been traveling at an excessive rate of speed,\textsuperscript{68} and they asked defendant to admit that

\[ \text{... [T]he aforesaid train prior to reaching Schmidt Road was traveling within the city limits of the City of Davenport, Iowa, at a speed of more than 25 miles per hour and continued at approximately that speed until just before reaching Schmidt Road.}\textsuperscript{69} \]

more probable after \( X \) is proved than before. Other courts, however, say that \( X \) is relevant only if the inference from \( X \) to \( Y \) is more probable than other inferences that might be drawn from \( X \). McCormick, Evidence 317-18 (1954); Slough, \textit{supra} note 64, at 7-10.

\[(2) \text{ Even if courts agree that } X \text{ is relevant as proof of } Y \text{ if upon proof of } X \text{ the probability of } Y \text{ increases to some extent, there may be disagreement concerning the probative weight which the inference from } X \text{ to } Y \text{ must possess in order to make } X \text{ relevant. If } X \text{ is offered as relevant to } Y \text{ on the theory that } Z \text{ may be inferred from } X \text{ and that } Z \text{ being true } Y \text{ is more probable than if } Z \text{ had not been established, whether } X \text{ is relevant to } Y \text{ turns on whether } Z \text{ may be inferred from } X. \text{ If } Z \text{ is logically inferable from } X, \text{ some courts will find } X \text{ relevant, while other courts say that logical relevance is not enough; some undefined higher degree of probative value is required. Slough, } \textit{supra} \text{ note 64, at 10-12. Trautman, } \textit{Logical or Legal Relevancy—A Conflict in Theory, } 5 \textit{VAND. L. REV.} 385, 388-92 (1952). Compare Thayer, A Preliminary Treatise on Evidence 265 (1898) ("The law furnishes no test of relevancy. For this, it tacitly refers to logic and general experience . . . ")., with 1 Wigmore, Evidence 409-10 (3d ed. 1940) ("In other words, legal relevancy denotes, first of all, something more than a minimum of probative value. Each single piece of evidence must have a plus value.").} \]

\[(3) \text{ In determining whether evidence is admissible, probative value is only one consideration. The prejudicial effect of evidence, the confusion of issues that might result from its admission—these and other factors may cause evidence to be excluded. For some courts the question of relevance is purely one of probative value, prejudice and the like being pertinent only after relevance has been established. Other courts, however, take prejudice, confusion of issues and the like into consideration in passing on relevance itself. McCormick, } \textit{op. cit. supra} \text{ at 319-20. This difference in approach can easily lead to conflicting decisions on relevance. Moreover, judges have considerable discretion in weighing the probative value of evidence against its possible harmful effects and can reach different conclusions on where the balance lies. Id. at 320.} \]

\[(4) \text{ If } X \text{ is offered as proof of } Y \text{, but } Y \text{ has no significance under the substantive law, } X \text{ is not admissible. Judges who distinguish relevance from materiality assign immateriality, not irrelevance, as the reason for excluding } X \text{. Some courts, however, confuse relevance and materiality and label as "irrelevant" evidence which is objectionable as immaterial. Id. at 315; Slough, } \textit{supra} \text{ note 64, at 5. In such courts, disagreements on "relevance" can result from conflicting views on the applicability or tenor of rules of substantive law.} \]

The distance from the city limits to Schmidt Road was about a mile.\textsuperscript{70} Thus the relevance of the request turned on whether proof that the train's speed exceeded 25 miles per hour at points up to a mile distant from Schmidt Road increased the probability that the train was exceeding the speed limit —12 miles per hour \textsuperscript{71}— as it crossed Schmidt Road. Defendant objected to the request, contending that "the speed of the train within the city limits of . . . Davenport, at points remote from the crossing . . . is irrelevant and immaterial . . . ."\textsuperscript{72} The objection was sustained. Since the case was settled prior to trial,\textsuperscript{73} we will never know whether the trial judge would have permitted proof of the train's speed during the mile preceding the accident. He might have. Other courts have held similar evidence relevant.\textsuperscript{74}

Narrow and unduly restrictive rulings on relevance occur not only because of judicial disagreements concerning probability but also because of the differing ways in which judges answer the question, "To what kind of issue must a matter relate in order for the matter to be 'relevant' ?" The decision in \textit{Johnstone v. Cronlund} \textsuperscript{75} is illustrative here. This was an action to recover for the wrongful death of an eleven year old boy who had been unintentionally shot and killed by his playmate, John Cronlund. John, his mother and his father were named as defendants. The parents were charged with negligently permitting John to have access to a gun and bullets.\textsuperscript{76} A request was served which asked defendants to admit that they had given certain quoted testimony at the coroner's inquest that followed the shooting.\textsuperscript{77} The statements attributed to the father were that he knew "the seriousness of children . . . handling guns" and that he had been "careless" in permitting his son to have the gun.

\textsuperscript{71} Plaintiffs contended that the speed limit was 12 miles per hour. See note 68 \textit{supra}. Defendant denied this. See Answer of Defendant, \textit{supra} note 67, at p. 2. The court's decision on the relevance of the request for admissions did not turn on the validity of plaintiff's contention.
\textsuperscript{73} Letter from A. G. Bush to Ted Finman, March 1, 1960.
\textsuperscript{74} \textit{E.g.}, Comins v. Scrivener, 214 F.2d 810 (10th Cir. 1954) (speed of automobile at 3, 5 or 10 miles prior to collision); United States v. Uarte, 175 F.2d 110 (9th Cir. 1949) (speed of automobile four miles prior to collision); Dromey v. Inter-State Motor Freight Serv., 121 F.2d 361 (7th Cir. 1941) (speed of automobile one and a half miles prior to accident). See Annot., 46 A.L.R.2d 9, 35-73 (1956).
\textsuperscript{76} Complaint, p. 2, Johnstone v. Cronlund, \textit{supra} note 75, Civil No. 26674.
\textsuperscript{77} Requests for Admission under Rule 36, p. 4, Johnstone v. Cronlund, 25 F.R.D. 42 (E.D. Pa. 1960), Civil No. 26674. The request specifically referred to the coroner's inquest and thus defendants were informed of the basis for the assertions that they had made the statements quoted in the request. The transcript of the coroner's inquest was available to plaintiff's attorney and presumably was equally available to defendants. It was 18 pages in length. Consequently defendants would have had little trouble checking it to see whether
in question; the statements of the son were that he had purchased the bullets in question "in company with my mother," that on the morning of the shooting he had taken the gun and bullets from his desk drawer, and that he "wasn't paying any attention."\textsuperscript{78}

The judge who heard the pre-trial objection held the request improper. The pertinent part of his opinion reads as follows:

Such a statement obviously could be used to attack credibility or to impeach the witness . . . . Can we say that party to litigation of this type can presume that perjury will be committed or that a statement will be made differently at the trial than it was in another proceeding and that therefore he should be prepared to meet that by having proof of contradiction in advance?\textsuperscript{79}

The court's theory is that impeachment may be unnecessary and therefore the requests are objectionable. The implication is that relevance should be

\textsuperscript{78} Requests for Admission Under Rule 36, \textit{supra} note 77, at 4.

\textsuperscript{79} Johnstone v. Cronlund, 25 F.R.D. 42, 46 (E.D. Pa. 1960). In addition the court said that the defendants' statements would not be admissible in evidence unless a proper foundation were laid at trial. \textit{Ibid.} This would be true if, as the court seemed to assume, the statements would be usable only for purposes of impeachment. However, in answering the complaint, defendants denied negligence. Answer to Complaint, p. 2, Johnstone v. Cronlund, \textit{supra}, Civil No. 26674. Consequently, the father's statement that he had been "careless" constituted an admission and probably would have been admissible on the merits to prove negligence; this might also be true of the son's statement that he "wasn't paying any attention." See generally, 4 \textsc{Wigmore}, \textsc{Evidence} \S 1048 (3d ed. 1940).

The court also said that the request was objectionable because it constituted an attempt to "avoid the time-honored restrictions of leading questions." Johnstone v. Cronlund, \textit{supra} at 46. In making this argument the court overlooked the fact that leading questions are proper when the witness is an adverse party. \textit{Fed. R. Civ. P. 43(b).}

Another objection raised by the \textit{Johnstone} case is not related to the relevance problem but will be considered here since it will not be separately treated in the text. Defendants were asked to admit that "A box containing the guns . . . . was left by the defendant, Philip R. Cronlund [the father], in the hallway of his home . . . . readily available and accessible to the minor defendant, John Cronlund." Johnstone v. Cronlund, \textit{supra} at 45. The court held this and other requests objectionable on the ground that they were "half truths." \textit{Id.} at 44-45. The phrase "half truths," the court explained, refers to statements which, though accurate in themselves, may be misleading when removed from the context of the entire facts of the case. \textit{Id.} at 44. Thus, speaking of the request quoted above, the court said that if admitted it might convey the idea that the father had carelessly left the guns in the hallway, whereas he may have done so intentionally so that his son could clean them. \textit{Id.} at 45. To me the court's argument is untenable. Any fact may be misleading when taken out of context. If a party to an automobile accident case admitted that he ran into the other litigant's car, the admission might carry an unwarranted implication of negligence. Questioning at trial, however, can convey the same kind of inference. It is up to the party to supply other facts to refute the inference, assuming such facts are available. This he may do either on cross-examination by his own counsel or in putting on his own case. Certainly plaintiff in the \textit{Johnstone} case could have asked defendant whether the guns had been left in the hallway and dropped the matter upon receiving an affirmative answer. If this could be done at trial, there should be no objection to the request for admissions.
determined by considering only the issues actually in dispute at the time the request is made. A potential issue, even though the potentiality is clearly perceived, is thought insufficient. This theory should be rejected. There is never any assurance that the answer to a request will be used at trial. Indeed, since most cases are settled rather than tried, the usefulness of most replies lies in the fact that they facilitate preparation for trial. Requests have this value even though the issue to which the concession is relevant is merely a potential issue.

If decisions like those in the *Johnstone* and *Waider* cases indicate the harm that pre-trial rulings on relevance can cause, they also raise the question whether relevance-at-trial should be retained as a test for the propriety of requests. Some such restriction is important, since otherwise a party would be obligated to answer requests that have nothing at all to do with the case, and requests of that nature would constitute a wholly unjustified intrusion into the party's private affairs. The problem is to interpret "relevant" in a manner which neither unduly limits the scope of requests nor permits them to be used for improper purposes.

Both goals could be attained if the courts would give to "relevant" as used in Rule 36 the meaning it has in Rule 26(b), the rule which defines the scope of depositions and interrogatories. If an inquiry has some relation to the issues in a case, it is "relevant" under Rule 26(b) even if the answer would not be admissible at trial. Unless the scope of the deposition-interrogatory machinery were thus defined, it could not accomplish its function, since one of its roles is to provide a means for discovery of information which, though not admissible at trial, might lead to other materials which would be admissible. Since requests to admit are closed-ended and thus not useful for discovery purposes, the theory behind the construction of "relevant" as used in Rule 26(b) seems

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80. Essentially the same position was taken in *Fidelity Trust Co. v. Village of Stickney*, 129 F.2d 506, 511 (7th Cir. 1942).

81. The decision in *Rice v. United Air Lines*, Inc., 10 F.R.D. 161 (N.D. Ohio 1950), is, on its facts, in direct conflict with *Johnstone v. Cronlund*. In the *Rice* case plaintiff asked defendant to admit that certain statements had been made in the course of a deposition taken in a different action. The court, in overruling defendant's objection to the request, said, "The court is not called on now to rule definitively that these will be allowed in evidence . . . . Suffice it to say that under some circumstances a deposition in a former action is sometimes admissible as original testimony . . . or is admissible for purposes of impeachment . . . ." *Id.* at 162. In *Barreca v. Pennsylvania R.R.*, 5 F.R.D. 391 (E.D.N.Y. 1946), the court granted a motion under Rule 34 for the production of written statements, though it seemed that the statements would be useful only for the purpose of impeaching the persons who had made them. That the uncovering of impeaching material is a valid objective of discovery was recognized by the Supreme Court in *Hickman v. Taylor*, 329 U.S. 495, 511 (1947).

82. See *ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES* 34-35 (1946), in which the draftsmen explain that, insofar as "relevance" is concerned, an inquiry would be improper only if directed to "matters entirely without bearing either as direct evidence or as leads to evidence . . . ." See also 4 *Moore* 1062-1183.
inapplicable to Rule 36. The underlying rationale for that construction, however, is applicable. The reason for broadly defining the scope of depositions and interrogatories is to facilitate the effective functioning of those devices. For the same reason a broad interpretation of “relevant” as used in Rule 36 is necessary: The restrictions on the use of requests that result from a narrow interpretation prevent full realization of the admission procedure’s potential. The courts would be fully justified, therefore, in defining “relevant” for Rule 36 purposes to mean “related to the issues in the case.”83 This would mean that a request would be proper if germane to the case even though the judge believed that under the rules regulating relevance the requested admission would not be usable at trial.

Though the courts can and should reach this result through interpretation, an amendment of Rule 36 clarifying the matter would be desirable. Deletion of the word “relevant” and insertion of the phrase “clearly unrelated to the issues that have arisen or might arise in the case” would provide a proper definition of the scope of requests.

Two arguments can be advanced against both the suggested judicial construction and the proposed amendment. The first is that requests, though related to the case, serve no function unless the admissions produced can be used at trial; therefore the time taken in answering such requests is wasted; and consequently objections on the ground of irrelevance-at-trial should be retained. The preparation and filing of an objection, however, also takes time. Nor is the process ended there. A hearing must be held. Attorneys must appear in court. And the court must listen to, weigh, and then resolve the question raised by the objection.84 In brief, it probably takes more time to object than to answer. The other argument is that challenges based on irrelevance-at-trial provide protection against harassment. This is true. If irrelevant

83. In Rice v. United Air Lines, Inc., 10 F.R.D. 161, 162 (N.D. Ohio 1950), the court recognized that “relevancy for purposes of Rule 33 [Interrogatories to Parties] should be more liberally construed [than “relevance” for Rule 36 purposes], for Rule 33 recognizes inquiry into matters inadmissible in evidence while Rule 36 is intended to facilitate proof at trial.” The court also realized, however, that an erroneous pre-trial ruling on the admissibility of an admission at trial would prevent a proper use of the admissions procedure: “No burden on or prejudice to the defendant will result from requiring it to answer the requests for admissions subject to the right to make all pertinent objections at the trial, whereas plaintiff will be prejudiced if the items in question are ruled admissible on trial and he has no expeditious way to prove them.” Id. at 163. In two other cases the judicial construction of “relevant” has come close to the interpretation suggested in the text above. See United States v. Watchmakers of Switzerland Information Center, Inc., 25 F.R.D. 203, 205 (S.D.N.Y. 1960) (“[U]nless it can be shown by the objecting party that under no possible circumstances could a document be admissible, the objection must be overruled.”); Sulzbacher v. Travelers Ins. Co., 2 F.R.D. 491, 492 (W.D. Mo. 1942) (“I think it is sufficiently debatable with respect to the . . . requests . . . whether they are relevant that the motion to suppress . . . should be overruled.”).

84. For obvious reasons, courts have thought it important that Rule 36 operate extra-judicially insofar as is feasible. See, e.g., Knowlton v. Atchison, T. & S.F. Ry., 11 F.R.D. 62, 65 (W.D. Mo. 1951).
requests were always proper, such requests could be deliberately used to annoy and harass an opponent. A party should be able to protect himself against such tactics. It is possible, however, to afford such protection and still avoid much of the danger inherent in pre-trial determinations of relevance. The danger of harassment would be adequately met if requests could be challenged on the ground that the admissions procedure is being used improperly, and relevance, though not controlling, was considered in determining propriety. If one of several propositions contained in a request was irrelevant, no objection would lie. But if a litigant was served with a series of irrelevant requests or a single request containing numerous irrelevant propositions, and the court found that the admissions mechanism was being used to harass the litigant, the objection would be sustained.

Other Objections Based On Inadmissibility of the Admission at Trial. Although objections based on privilege and irrelevance are expressly recognized by Rule 36, it is not clear whether other causes of inadmissibility at trial will defeat a request. While some courts have held that only irrelevance and privilege will be considered prior to trial, other decisions indicate that any objection to admissibility at trial can be asserted as an objection to a request. Neither of these extremes constitutes a proper solution.

If a proposition would clearly be inadmissible at trial, a request directed to it is pointless, a waste of time, and, if permissible, creates a danger of harassment. Consequently, some consideration of admissibility is warranted. There

85. Harassment would take the form of wasting an opponent's time by requiring him to answer numerous pointless requests. The expense problem that arises in connection with the use and possible abuse of depositions, see Comment, Tactical Use and Abuse of Depositions Under the Federal Rules, 59 Yale L.J. 117 (1949), would not be present, since relatively little expense is involved in replying to requests for admissions.

86. For the text of Rule 36, see note 4 supra.

87. The pertinent portion of Rule 36 states that a party may object to a request on the ground that "some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part..." If the admission requested would be inadmissible at trial, the request might be considered "otherwise improper." However, the officially approved form for a request states that the admissions requested are "subject to all pertinent objections to admissibility which may be interposed at the trial." Fed. R. Civ. P., Appendix of Forms, Form 25. While this ambiguous clause may indicate that the drafter's intent was to save till trial, it would be fallacious to argue that Form 25 precludes a pre-trial objection on the ground of inadmissibility. A paper drafted in compliance with the official forms is sufficient to withstand attack, Fed. R. Civ. P. 84, but divergence from these forms is not prohibited. 7 Moore ¶ 84.02, at 4803.


is the danger, however, that judges may disagree on the proper application of evidentiary rules. Propositions which seem inadmissible in a pre-trial context may become admissible because of developments at trial—a proposition which seemed to be hearsay, for example, might be usable for a non-hearsay purpose. And, in addition, the trial court has a broad discretion which cannot be exercised intelligently or accurately without knowledge of the concrete trial situation. Consequently, although the judge who hears an objection to a request may find a proposition inadmissible, the judge presiding at the trial may take a different view. As already noted, such conflicts produce undue restrictions on the use of the admissions procedure.

The solution suggested in the discussion of relevance is equally appropriate here. A request should not be objectionable because of inadmissibility per se. Only if a request or series of requests is so infected by inadmissibility as to indicate the presence of harassment should a court hold the request improper.

“Controversial” or “Disputed” Matters. In numerous cases the courts have said that requests for the admission of a “controversial fact,” a “vitaly disputed” contention, or the “main” or “principal” issue in a case are improper.

One obvious argument for permitting disputability-objections is that requests directed to disputed matters will be denied and thus serve no function. As we have noted before, however, though a request that will be denied is a waste of everyone’s time, an objection to a request and the hearing on the objection are also time-consuming. If a party is requested to admit a matter that he really disputes, the most expeditious action he can take is to answer the re-

90. See note 63 supra and accompanying text.
91. See text at notes 82-83 supra.


Rule 36 does not specifically limit requests to undisputed matters. The Rule's phrase permitting requests to be challenged as “otherwise improper,” however, is broad enough to encompass disputability-objections. The problem, therefore is not whether Rule 36 can be interpreted as permitting such objections but whether it should be so construed.

93. Obvious as this argument may be, I have found no case in which it has been advanced.
quest with a denial. Insofar as requests relate to matters that are truly disputable, therefore, objections are unnecessary and can serve only to delay the course of the proceeding.

It is not always clear, however, whether a proposition is subject to reasonable dispute. Yet a litigant who denies a proposition may be subject to the sanctions of Rule 37(c) if, after trial, a court holds that the proposition was not legitimately disputable and therefore that the denial was improper. If a request must be answered without an opportunity to ascertain whether a denial will be held proper, a litigant, wishing to deny but fearing sanctions, might concede a proposition though he could properly have contested it. Consequently it is arguable that disputability-objections should be entertained so that litigants can obtain judicial guidance before replying to requests. This argument would be tenable, however, only if the objecting litigant intends to admit the request if the court should overrule his objection. If the litigant intends to file a denial regardless of the court’s ruling, the hearing on the objection could hardly be justified as filling a need for judicial guidance. Consequently, if disputability-objections are to be heard at all, they should be heard only on condition that the objecting litigant be deemed to have admitted the proposition in question if the court finds that it is not disputable. If this condition is imposed, objections based on disputability could serve a legitimate function.

The same function, however, can be fulfilled in a different and better manner. Freedom from fear of sanctions can be provided by the application of proper criteria in determining whether sanctions are imposable. Whatever a litigant might assert prior to trial in support of a disputability-objection can also be asserted at the post-trial hearing to show that his denial was proper and therefore that sanctions are not warranted. Whatever a court might hold sufficient to sustain a disputability-objection can also be a ground for withholding sanctions. Only unreasonable rulings on sanctions could create an atmosphere that might stifle legitimate disputation. The sanction decisions thus

94. In Dulansky v. Iowa-Illinois Gas & Elec. Co., 92 F. Supp. 118, 122 (S.D. Iowa 1950), the court, in discussing disputability-objections, says, “The rule itself . . . it should be remembered . . . provides a mechanism for specific denial or [sic] requests as well as qualified responses. If contested or disputed facts are not properly the subject matter of this procedure, no such safeguards would have been set up in the rule itself.”

95. But see Photon, Inc. v. Harris Intertype, Inc., 23 F.R.D. 327, 329 (D. Mass. 1961) (court, in ruling on objections, said, “Plaintiff’s apprehensions relative to possible sanctions under Rule 37(c) are premature.”); Loring v. United Air Lines, Inc., 19 F.R.D. 322, 323 (D. Mass. 1956) (same); Knowlton v. Atchison, T. & S.F. Ry., 11 F.R.D. 62, 65 (W.D. Mo. 1951) (“Parties must . . . respond to requests propounded thereunder within the time and manner therein specified, and at the peril of the sanctions provided within . . . Rule 37(c), without permission or guidance and directions from the court . . . .”); Dulansky v. Iowa-Illinois Gas & Elec. Co., supra note 94, at 124 (“[T]he burden of making proper responses under Rule 36(a) is squarely upon the party to whom the requests are directed, [and] that party must under ordinary circumstances decide for himself the propriety of each given response . . . .”).
far reported provide no basis for believing that such an atmosphere is likely to arise.96

The fact that disputability-objections are unnecessary constitutes only half of the argument against them. The other half is that recognition of such objections seriously endangers the operation of the admissions procedure. This danger stems from difficulties inherent in determining before trial whether a contention is legitimately disputed.

One problem is that the courts may too readily find that a contention is disputable. For example, the language in some opinions suggests that the test for disputability is whether a contention is the “main”97 or “principal”98 issue in a case. While this test may work well generally, it will not always yield accurate results. There are fictitious claims and fictitious defenses, and therefore fictitious “principal” issues. The importance of an issue does not establish its disputability. Nor do pleadings,99 depositions or interrogatories operate with litmus-paper accuracy. None of these devices is as effective in inducing concessions as the admissions procedure.100 Consequently a contention which appears to be disputed will sometimes be conceded if a litigant is required to

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96. In general, the courts have shown considerable leniency in applying discovery sanctions. Rosenberg, Sanctions to Effectuate Pretrial Discovery, 58 COLUM. L. REV. 480, 494-96 (1958); Developments in the Law—Discovery, 74 HARV. L. REV. 940, 990-91 (1961). The cases which deal with the imposition of sanctions for failure to admit are cited at note 214 infra. None of these cases indicates that this sanction is being harshly administered. The courts recognize that a denial must be unreasonable, and the fact that a matter turns out to be true is not enough to show that a denial was improper. See Tyler State Bank & Trust Co. v. Bullington, 179 F.2d 755, 760 (5th Cir. 1950); cf. Modern Food Process Co. v. Chester Packing & Provision Co., 30 F. Supp. 520 (E.D. Pa. 1939). In the Tyler case, the court, in refusing to impose sanctions, noted that the request related to an ultimate issue and seemed to imply that the nature of the issue should be considered in determining whether a denial was proper. Ibid.

Reserving the question of disputability to the sanction hearing has two advantages: (1) Sanction hearings occur only after trial. In the many cases that are settled prior to trial, no such hearing would be held, and thus time and effort would be saved. (2) Post-trial consideration facilitates intelligent decision, since the trial judge has observed the manner in which a contention has been disputed and thus is well equipped to determine whether it was disputed reasonably and in good faith. The judge who rules on an objection to a request must rely on what the objecting litigant says he will do rather than on observation of what he has in fact done.

99. “By the use of the procedure devised by this rule [Rule 36], sham pleadings and fictitious defenses may be easily uncovered and disclosed. When I first noticed the provision of Rule 11, to the effect that in most cases ‘pleadings need not be verified or accompanied by affidavit,’ I was somewhat disturbed for fear that . . . we would be burdened and obstructed by many fictitious issues and sham pleadings. . . . This rule has allayed all fears which I entertained along that line.” Ford, More Expeditious Determination of Actions Under the New Federal Rules of Civil Procedure, 1 F.R.D. 223, 226-27 (1940).
100. See text at notes 19-45 supra.
answer a request for its admission.\textsuperscript{101} There will be no opportunity to obtain such admissions, however, if surface appearances are relied on in determining whether a matter is disputable.

Of course, full scale hearings might be held so that the parties could present and the judge consider everything pertinent to the question of disputability. This might alleviate but could not eliminate the problem. A litigant sometimes decides not to contest a point even though it is disputable. If he is requested to admit this point, he should do so since the party seeking the admission is entitled to know what the issues will be at trial in order to prepare and plan accordingly. To gain tactical advantage, however, the litigant might refuse an admission unless some compulsion is exerted. In this situation, the admissions procedure might induce an admission if the litigant must answer the request and thus expose himself to sanctions if he refuses to admit. But by interposing a disputability-objection, even if the court holds a full hearing on it, the litigant can avoid an answer. He need simply show that the contention is disputable and profess—albeit falsely—his intention to dispute it. Moreover, even though a contention is not contestable, doubts about its truth are easily raised. An objecting litigant can claim that he has a witness, question the credibility of his opponent's witnesses, and challenge the convincing force of his opponent's other evidence. It is difficult to determine whether such claims are made in good faith, and erroneous determinations seem inevitable. Thus, even if disputability-objections are accorded full hearings, a litigant may be able to avoid an admission that he should make and would have made if the objection had been unavailable.

Disputability-objections, since they are not needed and can frustrate proper uses of the admissions procedure, should be refused a hearing. The weight of judicial authority, however, is apparently to the contrary. Ten decisions state that such objections should be permitted; six say they should not.\textsuperscript{102} However, only five of the "majority" decisions unequivocally hold that requests may not be directed to controversial matters, and counter-balancing this are five

\textsuperscript{101} See note 13 \textit{supra}.
\textsuperscript{102} See cases cited note 92 \textit{supra}.


In four other "majority" decisions the courts state that requests for the admission of disputed matters are improper but also refer to other grounds for holding the requests improper, and it is not clear whether or to what extent the decisions rest on recognition of disputability-objections. See Fuhr v. New Foundland-St. Lawrence Shipping Ltd., 24 F.R.D. 9, 13 (S.D.N.Y. 1959) (requests directed to "vitally disputed questions . . . and
“minority” cases squarely holding that disputability-objections should not be heard.104

Moreover, none of the “majority” opinions indicates that judicial consideration of the disputability-objection was warranted by the facts of the case. As we have noted, a disputability-objection can serve a legitimate function only when the objecting party is uncertain concerning disputability and is seeking judicial guidance. No such purpose is apparent in any of the ten “majority” decisions. Furthermore, it is apparent in some cases that the objection was unnecessary, and in others it may have thwarted a proper use of the admissions procedure. In Electric Furnace Co. v. Fire Ass’n,105 for example, plaintiff, suing to recover on an insurance policy, asked defendant to admit that the policy was in “full force and effect” on the date of loss.106 Defendant objected to the request, pointing out that since its answer to the complaint raised the defense of misrepresentation in obtaining the policy, the question whether the policy was in “full force and effect” was an important issue in the case.107 The court sustained the objection, characterizing the requested admission as a “principal issue.”108 No doubt the validity of the policy was disputed and which deal not with facts reasonably ascertainable, but on the contrary involve opinions and interpretations which prima facie are untenable” are improper); Benton v. McCarthy, 23 F.R.D. 235, 236 (S.D.N.Y. 1959) (Rule 36 should not be used to request admission of disputed matters or to cover the entire case and every item of evidence); Petition by Reinauer Oil Transport, Inc., 19 F.R.D. 5 (D. Mass. 1956) (requests should relate to “singular relevant facts . . . not . . . complicated situations involving many distinct and vital controversial issues . . . [S]hould not be used as a means of covering the entire case and every item of evidence.”); California v. The S.S. Jules Fribourg, 19 F.R.D. 432, 436 (N.D. Cal. 1955) (request for admission of “legal conclusion which may be an important element in the case” improper).

In Demmert v. Demmert, 115 F. Supp. 430, 432-33 (D. Alaska 1953), plaintiff had asked defendant to admit that plaintiff was a member of a certain partnership. Defendant, by failing to respond, had made the admission. The trial judge disregarded the admission, stating that the request concerned the central issue in the case and therefore was objectionable. This statement, however, is dictum, since the judge actually held that the evidence in the case proved plaintiff’s membership in the partnership. Id. at 434.


106. Request for Admissions of Fact, p. 1, Electric Furnace Co. v. Fire Ass’n, supra note 105, Civil No. 26107.

107. Reply to Request for Admissions of Fact, p. 1, Electric Furnace Co. v. Fire Ass’n, 9 F.R.D. 741 (N.D. Ohio 1949), Civil No. 26107. Actually, defendant did not formally object to the request but rather stated that the matter could be neither admitted nor denied because it was one of the issues in the case. Plaintiff then moved to require defendant to either admit or deny, and the propriety of the request was considered in ruling on plaintiff’s action.

108. Electric Furnace Co. v. Fire Ass’n, supra note 107, at 742-43. The court does not quote the request in its opinion. However, the “item (b)” of the request to which the court
nothing would have been gained had defendant been required to answer the request. But the objection was unnecessary. An answer denying that the policy was in “full force and effect” would have sufficed.

In Alaska Credit Bureau v. Stevenson,109 another “majority” decision, plaintiff was suing as the assignee of a claim for money allegedly due for work and materials furnished in rebuilding a boat. The central issue in the case was whether defendant, who did not own the boat, had agreed to pay all the reconstruction costs or had simply made certain specific payments on behalf of the owner.110 Plaintiff served requests asking defendant to admit that the labor and materials had been furnished and that he had agreed to pay for them.111 Defendant objected, claiming that the request asked for the admission of controversial issues,112 and the objection was sustained. Whether defendant had agreed to pay was disputed, and he might have replied by denying the agreement. There seemed to be no dispute, however, concerning most of the labor and material charges. Defendant had paid several bills and had authorized a bank to pay others on his behalf.113 In taking the deposition of the person who rebuilt the boat, defendant’s attorney questioned the validity of certain labor charges but did not challenge any other items.114 No doubt many of the charges were indisputable. Because of the court’s ruling, however, defendant was not obliged to answer the request and thus was under no compulsion to admit anything.115

110. Id. at 410.
115. See also Syracuse Broadcasting Corp. v. Newhouse, 271 F.2d 910 (2d Cir. 1959).

Pursuant to a pre-trial order, plaintiff furnished defendants with a statement, 184 pages long, particularizing its anti-trust claim, and then served defendant with a request to admit each of the factual contentions contained therein. Id. at 917; Brief for Appellee, p. 39. Though many of these contentions probably were disputed, others probably were indisputable and should have been admitted. For example, plaintiff’s 184 page statement alleged:

(1) “At all times hereinafter mentioned the capital stock of The Herald Company was owned by the Long Island Daily Press and the Staten Island Advance Company ...”;
(2) “In the latter part of June, 1947, defendant Newhouse offered in Syracuse, N.Y. to purchase all of the capital stock of plaintiff ...”;
(3) “By contract dated Nov. 3, 1947, Radio Projects, Inc., of which Newhouse owned 86.9% of the capital stock, agreed to purchase the capital stock of WSYR for $1,200,000 cash.” Appellant’s Appendix, pp. 19, 20, 21. Though these and many other matters probably would have been admitted had defendant been required to answer the request, the court found the request objectionable, and as a result no admissions were made.

It should be noted that in the Alaska Credit Bureau and Syracuse Broadcasting cases
The "majority" decisions are not only unwarranted on their facts but also are unsupported by the four cases and two secondary sources which they cite in support of disputability-objections. The first of the cited cases is not in point on its facts and does not contain even a relevant dictum. In the second and third cases the courts found requests improper but without any mention of disputability. Nor was a disputability-objection involved in the last of the cited cases. One of the two secondary sources, the Cyclopedia of Federal Procedure, states that "requests should not be made for admission of controversial facts." Apparently the citing court construed this language as an assertion that requests are subject to objection if directed to controversial matters. Such a construction is doubtful. In 1943, when the Cyclopedia was published, Rule 36 did not contain a provision permitting objections to requests, and the prevailing view was that the courts lacked authority to hear any objection. Thus, in making the statement quoted above, the authors of the Cyclopedia probably intended to indicate a practical rather than a legal limitation on the use of requests.

there was a valid reason for holding the requests objectionable. The contentsions to be admitted were contained in documents attached to the requests and incorporated by reference. In order to make their replies, the answering parties would have had to analyze these documents and extract the assertions to which the requests were directed. Because of the burden thus imposed on the answering party, and for other reasons, incorporation by reference has been held to make a request objectionable. United States v. Watchmakers of Switzerland Information Center, Inc., 25 F.R.D. 197, 200 (S.D.N.Y. 1959); SEC v. Micro-Moisture Controls, Inc., 21 F.R.D. 164 (S.D.N.Y. 1957); Kraus v. General Motors Corp., 29 F. Supp. 430 (S.D.N.Y. 1939); cf. Baldwin v. Hartford Acc. & Indem. Co., 15 F.R.D. 84 (D. Neb. 1953). But see In re Pittsburgh Terminal Coal Corp, 14 F.R.D. 219 (W.D. Pa. 1953). Thus the results in these cases seem correct. Insofar as the decisions were based on recognition of disputability-objections, however, these cases illustrate that such objections can block a proper use of the admissions procedure.

In addition to the cases named at notes 117-20 infra, the "majority" decisions cite one another. These citations are in point. However, since the question considered in the text above is whether the "majority" decisions as a group are based on persuasive authority, the citation by one "majority" case of the decision in another adds nothing. Fidelity Trust Co. v. Village of Stickney, 129 F.2d 506 (7th Cir. 1942), cited in Demmert v. Demmert, 115 F. Supp. 430, 433 (D. Alaska 1953), and Electric Furnace Co. v. Fire Ass'n, 9 F.R.D. 741, 743 (N.D. Ohio 1949).


4 Moore § 36.06.

This interpretation is supported by the footnote accompanying the Cyclopedia's textual statement. See 6 Cyclopedia of Federal Procedure § 2914 n.63, in which the authors state, "Federal Rule 36 authorizes a request . . . without regard to whether there is a reason to believe such matters will be disputed."
Moore's Federal Practice, the other secondary authority relied on in the "majority" decisions, may be largely responsible for the widespread lipservice paid to disputability objections. It has been cited in seven124 of the ten "majority" decisions, and is the only authority referred to in the two most recent decisions.125 Moore, in both his first and second editions, says that Rule 36 should "be used to obtain the admission of facts as to which there is no real dispute."126 This statement, however, seems ambiguous. Certainly it is not an unequivocal declaration that requests directed to disputed matters should be held objectionable. Moreover, in his first edition Moore notes with approval that Rule 36 authorizes no objections to requests127 and consequently cannot be read as supporting disputability-objections. Moore's first edition, like the Cyclopedia, seems to be issuing only a practical admonition.

Judicial reliance on the second edition is more tenable since it was published after Rule 36 was amended to authorize objections to requests. But the ambiguity in Moore's comment is still present, and it would seem, therefore, that before relying on that comment the courts should have determined whether the authorities Moore cited support disputability-objections. An examination of those authorities would have revealed that, aside from cases decided under Rule 36 itself, none of the decisions cited by Moore uphold disputability-objections. A portion of Moore's treatise not thus far cited by the courts gives the impression that he does approve such objections.128 This impression, however, as a reading of the case cited by Moore shows, is due to a typographical error, and when the error is corrected Moore's position seems to be that disputability-objections should not be recognized.129 Thus neither Moore's


126. 2 Moore § 36.03, at 2658 (1938); 4 Moore ¶ 36.04, at 2711 (2d ed. 1950).

127. 2 Moore § 36.03, at 2660-61 (1938).

128. Moore cites 11 cases. 4 Moore ¶ 36.04, at 2711 n.1 (1950; Supp. 1960, at 173). Six of these are among the "majority" decisions we are discussing and for reasons already stated and to be stated lend little support to disputability-objections. The other 5 are: Moscovitz v. Baird, 10 F.R.D. 233 (S.D.N.Y. 1950); Van Horne v. Hines, 31 F. Supp. 346 (D.D.C. 1940); Hanauer ex rel. Wogahn v. Siegel, 29 F. Supp. 329 (N.D. Ill. 1939); Gordon v. American Tankers Corp., 286 Mass. 349, 191 N.E. 51 (1934); Clarke v. Clarke, [1899] 34 Weekly N. 130 (C.A.). None of these cases even mentions disputability-objections. In Clarke v. Clarke, supra, the court says that as a practical matter, requests will be ineffective if directed to matters that are likely to be disputed, but the case has nothing to do with whether a request for admissions is legally objectionable.

129. 4 Moore ¶ 36.05, at 2719 & n.21a (Supp. 1959, at 167; Supp. 1960, at 178).

130. The portion of Moore's treatise in question states, "It is a valid objection to a request . . . that the request calls for controversial facts." Ibid. (Emphasis added.) The
Federal Practice nor any of the other authorities cited in the “majority” cases furnishes a persuasive legal foundation for those decisions.

A final reason for refusing deference to the “majority” decisions is the fact that the courts rendering those decisions may have been unaware of the arguments against recognition of disputability-objections. Neither the texts on federal procedure 131 nor the judicial opinions in the field 132 adequately discuss the problem. And it seems to have received little attention in the briefs of counsel. 133

Covering the Entire Case. Several courts have said that requests to admit should not be used to “cover the entire case” or “every item of evidence” in the case. 134 Whether any court has held a request objectionable on this ground is doubtful. 135 But the existing dicta indicate the possibility of such a holding and thus create a need for consideration of the “entire case” notion.

On principle there is no reason why requests should not “cover the entire case.” A comprehensive use of requests may reveal that the primary dispute

case cited in support of this proposition is United States v. Ehbauer, 13 F.R.D. 462 (W.D. Mo. 1952). The Ehbauer case, however, states and holds that it “is not a valid objection to a request . . . that it calls for ‘controversial facts.’” Ibid. (Emphasis added.) It seems obvious that Professor Moore must have intended to include the word “not” and that the omission was an inadvertent typographical error.


132. See cases supporting disputability-objections cited in note 92 supra.

133. I have examined the briefs and memoranda filed in support of the requests in four cases. In three instances there is a complete absence of discussion concerning disputability-objections. See Brief for Appellant, p. 36, Syracuse Broadcasting Co. v. Newhouse, 271 F.2d 910 (2d Cir. 1959); Plaintiff’s Brief (January 27, 1954), pp. 1-2, Alaska Credit Bureau v. Stevenson, 15 F.R.D. 409 (D. Alaska 1954), Civil No. 6937-A; Motion to Require Defendant to Answer Interrogatories, and Request for Admissions of Fact, pp. 2-4, Memorandum in Support of Foregoing Motion, pp. 7-10, Electric Furnace Co. v. Fire Ass’n, 9 F.R.D. 741 (N.D. Ohio 1949), Civil No. 26107; in the fourth case, the memorandum argues that the objections are unnecessary, since disputed matters may be denied; however, the difficulties of determining disputability prior to trial, and the dangers inherent in disputability-objections are not brought to the court’s attention. Memorandum in Support of Interrogatories and Requests for Admissions Directed to Arrow Steamship Company, p. 7, California v. The S.S. Jules Fribourg, 19 F.R.D. 432 (N.D. Cal. 1955), Admiralty No. 26612.


135. In each of the cases cited in note 134 supra, except Arcidia v. Fusaro, the court mentions two or more grounds for holding the request objectionable. The basis of the decision in Alaska Credit Bureau v. Stevenson was that the request related to controversial
between the parties is one of law rather than fact and thus facilitate a quick resolution of the controversy.\textsuperscript{136} Nor is there any ground for holding that requests should not relate to “every item of evidence,” \textit{i.e.} to specific propositions probative of the overall contentions in a case. A dispute concerning “negligence,” and other broad issues, consists of a series of disputes over concrete occurrences and conditions. And while neither party may be willing to make a concession on the broad issue, many of these concrete elements can be resolved through the admissions procedure.\textsuperscript{137}

The “entire case” theory seems to have originated with Professor Moore, who states in both editions of his treatise that the admissions procedure “is not intended to be used to cover the entire case and every item of evidence.”\textsuperscript{138} As an example of what he means, Moore cites a New York case involving a notice to admit which contained 226 separate paragraphs.\textsuperscript{139} Some of these were held objectionable, but not on the ground that the notice to admit was unreasonably extensive or detailed.\textsuperscript{140} In the supplement to his second edition, Moore cites two other cases.\textsuperscript{141} Neither of these stands for the proposition that comprehensiveness per se is objectionable, but they do reveal a different objection and a sense in which the “entire case” theory has some validity.

In both cases the form of the request was improper. Instead of formulating a series of specific propositions, each limited to a single fact, the parties seeking the admissions submitted lengthy, involved narratives and asked that these be conceded.\textsuperscript{142} The answering litigants could not have replied without first analyzing the requests and recasting these narratives so that the numerous contentions involved would be separately stated. Moreover, legal and factual matters. For statement of the additional grounds of objection mentioned in the other cases cited in note 134 \textit{supra}, except \textit{Arcidia v. Fusaro}, see note 103 \textit{supra}.

In the \textit{Arcidia} case the court states that the request, which contained 105 items, appears “to embrace every conceivable issue in the suit.” \textit{Arcidia v. Fusaro}, \textit{supra} note 134, at 735. Nonetheless, the court held that some of the requests were proper.

\textsuperscript{136} See, \textit{e.g.}, \textit{United States v. Wheeler}, 161 F. Supp. 193 (W.D. Ark. 1958), and \textit{Merriman v. Broderick}, 38 F. Supp. 13 (D. R.I. 1941), in which plaintiffs were able to obtain summary judgment on the basis of admissions.

\textsuperscript{137} See note 14 \textit{supra} and accompanying text.

\textsuperscript{138} See note 134 \textit{supra} and accompanying text.


\textsuperscript{140} In holding some of the requests improper, the court relied on three grounds: (a) the answering party lacked sufficient knowledge and thus could neither admit or deny; (b) the request called for opinion evidence; (c) the request was misleading. \textit{Id.} at 673-74, 195 N.Y. Supp. at 26-27.


\textsuperscript{142} \textit{Syracuse Broadcasting Co. v. Newhouse}, \textit{supra} note 141, at 917; \textit{Baldwin v. Hartford Acc. & Indem. Co.}, \textit{supra} note 141, at 85.
propositions were intermixed and would have required unraveling. In both cases, the courts held the form of the requests objectionable. In neither case, however, did the courts suggest that comprehensiveness per se made the request improper.\textsuperscript{143} Interpreted in the light of these cases, Professor Moore's admonition concerning the "entire case and every item of evidence" is reasonable. A request should be formulated so that a litigant can perceive clearly the propositions he is being asked to admit. And since the possibility of intermingling one contention with another grows as the number of contentions increases, the broader the scope of a request, the more careful one must be in framing it. It is appropriate, therefore, to note that a party who wishes to cover the entire case should proceed with care. There should be no question, however, concerning his right so to proceed.\textsuperscript{144}

\textbf{Lack of Personal Knowledge.} Perhaps the most frequently asserted objection to requests for admissions is that the objecting litigant does not know whether the proposition stated in the request is true or false.\textsuperscript{145} Two prob-

\begin{itemize}
\item[143.] In the Baldwin case the court said, "The court has carefully examined all of the requests. . . . The statement of its facts should be simplified through their assertion, in many separate and successive paragraphs, each dealing with a single fact, of material which is now lumped together in a single declaration." The court then ordered that the objections be upheld, but with leave to reframe the requests. Baldwin v. Hartford Acc. & Indem. Co., 15 F.R.D. 84, 85 (D. Neb. 1953).
\item[145.] Of course, if the purpose of the request is to harass an opponent, an objection on this ground would be warranted. Length alone, however, should not lead a court to the conclusion that a request is improper.
\end{itemize}
lems are raised by such objections: When may a litigant refuse to admit a proposition on the ground of lack-of-knowledge? If the litigant who lacks knowledge would be justified in refusing to admit, is the request to admit therefore improper and subject to objection? Let us first examine the relationship between knowledge and the duty to admit.

Some courts have said that a litigant need not admit something unless it is

146. In the following groups of cases the courts have taken the position that a litigant's answer to a request for admissions should be based on such information as he can obtain through reasonable inquiry:


(2) Request objected to on ground of lack-of-knowledge; objection sustained because "ascertainment of the truth or falsity . . . not reasonably within the power of the plaintiff"; facts were "exclusively within the knowledge of the party serving the request": J.R. Prewitt & Sons, Inc. v. Willimon, 20 F.R.D. 149, 151 (W.D. Mo. 1957).


(4) Motion attacking sufficiency of answer overruled on ground that all matters "reasonably susceptible of knowledge" had been admitted: United States v. Watchmakers of Switzerland Information Center, Inc., 25 F.R.D. 197, 199 (S.D.N.Y. 1959).


In the following cases the courts have taken the position that a litigant, in answering a request for admissions, has no duty to obtain information:


(7) Request objected to on ground of lack-of-knowledge; objection overruled on ground that, although there is no duty to investigate, lack-of-knowledge should be asserted in answer to request rather than by objection: United States v. Lewis, 10 F.R.D. 56, 58 (D. N.J. 1950).


147. The cases in which the court considered whether lack-of-knowledge may be asserted by objecting to a request are as follows:

“within his knowledge.” The quoted phrase can be construed to mean that a litigant may refuse to admit a proposition unless he has verified its truth through direct personal observation. No court has expressly adopted this theory, and no court should. The obligation to admit should exist whenever a party is convinced that a proposition is true, regardless of the factors which led to his conviction. Whether belief is based on personal observation or information furnished by others, a proposition that is not disputed should be conceded. The only debatable question is whether a party who lacks the information necessary to form a belief should be required to inform himself.

A few courts have argued that litigants should not be burdened with proving their adversaries’ cases, and therefore no investigation should be required. The exceptions to this rule are a few cases in which the courts have said that requests not within a party's knowledge are improper. In some instances defendant's knowledge of the matters could have been acquired only through information furnished by others, not through personal observation. Thus the court directed defendant to answer request No. 1. This request called upon defendant, a collector of internal revenue, to admit that the “Zachary Smith Reynolds Trust... was established by an Indenture of Trust, dated August 21, 1936, by Richard J. Reynolds, Mary Reynolds Babcock and Nancy Reynolds Bagley...” Request for Admission of Facts, p. 1, Jackson Buff Corp. v. Marcelle, supra note 148, at 140-41. The courts which state that a litigant has a duty to make reasonable inquiry, see cases cited divisions (1), (2), (3), (4) and (5) note 146 supra, necessarily assume that matters known to be true should be admitted regardless of the source of a litigant's knowledge.
In nonemotional terms, these courts are saying that if we compel a litigant to investigate, we require him to do something that he has a right to avoid. It is difficult, however, to see just what that something is. If these courts are contending that a party is entitled to refrain from all acts that aid his adversary, the contention should be summarily rejected. The sporting theory of litigation presumably went out when the Federal Rules came in. If the contention is that a party has a right to avoid special efforts on his opponent's behalf, it seems erroneous on two grounds. First, in many cases no special effort would be involved; the investigation required by the request would be one the answering litigant would pursue as part of his own trial preparation. Second, the entire structure of discovery depends on an accommodation between the litigant's interest in doing only what he wants to do and society's interest in requiring such conduct as promotes the "just, speedy, and inexpensive" determination of the case. Both in theory and practice this need for accommodation has meant that a litigant may be required to cross the line of immediate self-interest and exert efforts which, though unnecessary to his own case, are designed to further a proper resolution of the case as a whole. He must appear at depositions, answer interrogatories, attend physical examinations, and so on. Though all this requires time and effort and sometimes entails expense, we do not view these situations as invasions of some sacred right. Quite the contrary. We consider the imposition of these "burdens" reasonable because of the desirable consequences attained. No reason exists for approaching differently the question whether a litigant lacking knowledge should seek information before answering a request to admit.

Acceptance of a duty to inquire makes possible the resolution of many contentions that otherwise would have to be established through proof at trial. For example, in Knowlton v. Atchison, T. & S.F. Ry., a death action under the FELA, plaintiff asked defendant to admit that the decedent had been confined in the Santa Fe Hospital during certain specified times; that a brain operation failed to reveal a tumor; and that he was subsequently confined in a state mental institution. Defendant objected, claiming lack of knowledge. When the court overruled the objections, defendant admitted each of these requests. Here, as in other cases, a relatively effortless inquiry opened the

\[\text{152. Fed. R. Civ. P. 1.}
\[\text{153. 11 F.R.D. 62 (W.D. Mo. 1951).}
\[\text{155. Defendant's Objections to Plaintiff's Requests for Admissions, pp. 1, 2, Knowlton v. Atchison, T. & S.F. Ry., 11 F.R.D. 62 (W.D. Mo. 1951), Civil No. 6358.}
\[\text{156. Defendant's Responses to Plaintiff's Request for Admissions, pp. 1, 2, Knowlton v. Atchison, T. & S.F. Ry., supra note 155.}
\[\text{157. See, e.g., the discussion of the Jackson Buff case at note 149 supra. See also Booth Fisheries Corp. v. General Food Corp., 27 F. Supp. 268 (D. Del. 1939). In this case}
door to admissions. This is sufficient justification for requiring such inquiry. Fortunately, most courts have said that the answer to a request should be based not only on what the litigant knows when he is served with the request but also on information readily available to him.\footnote{168}

Acceptance of a duty to inquire, however, does not mean that the inquiring litigant will be obligated to admit the proposition under inquiry. Whether an admission should be made will turn on the result of the investigation. In some cases the investigation will not show whether the proposition in question is true or false. Rule 36 expressly provides that a party may answer a request by stating that he is unable truthfully to admit or deny it. Thus the litigant lacking knowledge would have no difficulty in formulating an answer. For this reason most courts have said that lack of knowledge should be asserted in an answer to the request rather than by an objection to it.\footnote{159} The virtues of this approach are clear. If objections are permitted, hearings must be held, and hearings increase the costs of litigation and add to the workload of an already shorthanded trial bench. Moreover, if a litigant may object on the ground of lack of knowledge, he is under little compulsion to act with candor and honesty. No penalty attaches to an objection even though it is baseless. Nor is there much danger that an objection based on false assertions will lead to sanctions. However, if lack of knowledge must be raised in an answer to the request, the sanctions applicable to an improper answer are available.\footnote{160}

The only argument for permitting objections is that a litigant could thereby determine what he must do in order to avoid sanctions. The argument has

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\footnote{158} See cases cited divisions (1), (2), (3), (4) and (5), note 146 supra. See also, urging the same position, 4 Moore \textsuperscript{36.04}, at 2712-13; Conway, \textit{Admissions of Fact Under the Federal Rules of Civil Procedure}, 26 J. Bar Ass'n D.C. 421, 428 (1959); Developments in the Law—Discovery, 74 Harv. L. Rev. 940, 970 (1961).

\footnote{159} See note 147 supra.

\footnote{160} At present a party who answers by stating that he can neither admit nor deny is not subject to sanctions even though his refusal is baseless. Rule 37(c) makes sanctions available only if a party without good reason answers with a sworn “denial.” In this respect, Rule 37(c) is inadequate. For further discussion of this problem, see text at notes 215-16 infra.

Notwithstanding the shortcomings of Rule 37(c), litigants who have asserted lack-of-knowledge objections have made admissions when their objections were overruled. For examples, see the discussion of the Jackson Buff case at note 149 supra, and the discussion of Knowlton \textit{v. Atchison, T. \& S.F. Ry.} in text at notes 153-56 supra. In such cases no admissions would be obtained if lack-of-knowledge objections are sustained.
force, since the courts have disagreed on whether there is a duty to investigate.\footnote{61} The confusion caused by this conflict in the cases would be resolved if the rules stated clearly that a refusal to admit is improper if information demonstrating the truth of a proposition is readily available.\footnote{62} Questions about the extent of the investigative duty still would arise. These doubts, however, should be resolved by the litigant himself without judicial aid. And the resolution should not be too difficult. A person knows whether he can acquire information by such means as examining records at his disposal and consulting persons accepted as reliable. Having made such inquiries, a party can determine whether he properly may deny, or refuse to admit because of a continuing lack of knowledge.

\textit{Matters of “Fact.”} Rule 36 states that a party may request the admission of a matter of “fact.” This term—“fact”—has provided the doctrinal basis for a series of decisions in which requests have been held improper on the ground that they called for the admission of an “opinion,” a “conclusion” or a matter of “law.”\footnote{163} On one level the question raised by these decisions is whether

\begin{footnotes}
\item[61] See cases cited note 147 \textit{supra}.
\item[62] In 1955 the Supreme Court’s Advisory Committee proposed that the following sentence be added to Rule 36(a): 
\begin{quote}
If a request is refused because of lack of information or knowledge upon the part of the party to whom the request is directed, he shall also show in his sworn statement that the means of securing the information or knowledge are not reasonably within his power.
\end{quote}
\textit{Advisory Committee on Rules for Civil Procedure, Report of Proposed Amendments to the Rules of Civil Procedure for the United States District Courts 43-45 (1955).} Neither this nor any of the other 1955 proposals were adopted. Although the committee’s objective seems to me a desirable one, I question the approach to the problem. A more effective method of inducing litigants to acquire information would be to provide that a party who answers a request by asserting lack-of-knowledge will be subject to sanctions if, through a reasonable inquiry, he could have obtained the requisite information. See text at note 250 \textit{infra} for a suggested amendment adopting this approach.
\end{footnotes}
the word "fact" is being properly interpreted. A more basic problem, however, and the one I shall consider first, is whether the fact-opinion and fact-law distinctions should play any role in determining the propriety of requests for admissions.

Courts and commentators have traditionally espoused a tripartite division of propositions into statements of "fact," "opinion," and "law." This division is based on differences in the kinds of assumptions that may underlie the assertion that a statement is true. Statements that appear to report only the speaker's sensory perceptions, and thus involve only the assumption that perception was accurate, are classified as "fact," e.g., the statement "Mr. X drove his car back and forth across the center-line of the highway." Statements that assert factual inferences, and thus involve assumptions concerning the relationship between one state of affairs and another, are candidates for the "opinion" label, e.g., the statement "X drove while intoxicated." When the term "law" is applied, the statement will be one based in part on a legal assumption, an assumption concerning the tenor or proper application of a rule of law, e.g., of train within 200 to 300 feet is opinion and conclusion); Moscowitz v. Baird, 10 F.R.D. 233, 235 (S.D.N.Y. 1950) (conclusions); Phillips v. Hickey, 14 Fed. Rules Serv. 36a.27, Case 1, at 633 (S.D.N.Y. March 13, 1950) (whether effect of corporate by-laws is to give chairman power to adjourn annual meeting is opinion, perhaps legal opinion); Electric Furnace Co. v. Fire Ass'n, 9 F.R.D. 741, 743 (N.D. Ohio 1949) (whether firm of insurance investigators was "skilled" and "experienced" is opinion; for content of item "i" of request, see Request for Admissions of Fact, p. 2, Electric Furnace Co. v. Fire Ass'n, supra, Civil No. 26107); Bowles v. Soverinsky, 65 F. Supp. 808, 810 (E.D. Mich. 1946) (whether it is custom of brokers in waste rags not to examine shipment from dealer but to rely on his rating of quality is opinion); United States v. Schine Chain Theatres, Inc., 4 F.R.D. 109, 112 (W.D.N.Y. 1944) (conclusions).

The characterizations stated in the parentheses above are those of the courts. The content of the request has been shown if reported in the case or revealed by a file made available to me.

In the following cases the requests were challenged on the ground that they called for the admission of a matter of "law" or a "conclusion," but the court said that the matter in question was one of "fact": Loring v. United Air Lines, Inc., 19 F.R.D. 322-23 (D. Mass. 1956); United States v. Lewis, 10 F.R.D. 56, 57-58 (D. N.J. 1950); Demmert v. Demmert, 115 F. Supp. 430, 433 (D. Alaska 1953) (dictum).

In Photon, Inc. v. Harris Intertype, Inc., 28 F.R.D. 327, 329 (D. Mass. 1961), the court, in overruling the objection that the request called for "opinions," said, "In many areas the distinction between matters of fact and matters of opinion is extremely fine. In context, if this be opinion, it is opinion of a type which plaintiff is certainly in a position to express, and express by making an absolutely minimal departure from the area of fact."

In Knowlton v. Atchison, T. & S.F. Ry., 11 F.R.D. 62 (W.D. Mo. 1951), the court held that an objection asserting that the request called for "opinions," said, "In many areas the distinction between matters of fact and matters of opinion is extremely fine. In context, if this be opinion, it is opinion of a type which plaintiff is certainly in a position to express, and express by making an absolutely minimal departure from the area of fact."

In Knowlton v. Atchison, T. & S.F. Ry., 11 F.R.D. 62 (W.D. Mo. 1951), the court held that an objection asserting that the request called for the admission of an opinion or a conclusion did not lie. This holding was cited with approval in a dictum in Shawmut, Inc. v. American Viscose Corp., 12 F.R.D. 488, 489 (D. Mass. 1952).

In Jones v. Boyd Truck Lines, Inc., 11 F.R.D. 67 (W.D. Mo. 1951), the court overruled an objection that the request called for conclusions. The rationale of the decision was that the word "fact" in Rule 36 should be construed to include "ultimate facts, that is, facts which are conclusions acquired by reflection and natural reasoning deduced from primary evidentiary facts." Id. at 70.
the statement "Mr. X drove negligently." The precise question to be considered in this section is whether the type of assumption underlying a proposition should make a difference when the propriety of a request for admissions is before the court.

Insofar as propriety should turn on the usefulness of a request, the fact-opinion and fact-law distinctions are irrelevant. Indeed, the admission of a proposition based on inferences usually limits the issues in a case more extensively, saves more time, and reduces the expenses of litigation further than the concession of a statement reporting only sensory perceptions. For example, in an auto accident case an admission that defendant was driving while "intoxicated" advances the case further than concessions which describe defendant's conduct but draw no conclusions concerning his condition.

To be sure, propositions based on inferences, especially those based on legal principles, are apt to be disputed, and requests directed to them often will be answered with denials. But this is not always true. Even "opinions" and matters of "law" can be beyond legitimate dispute. In Electric Furnace Co. v. Fire Ass'n of Philadelphia, for example, defendant was asked to admit that a certain firm of insurance investigators was "skilled" and "experienced." The firm in question had been hired by defendant to make investi-
gations,\textsuperscript{169} and it seems obvious that defendant believed this firm to be "skilled" and "experienced," \textit{i.e.}, that the "opinion" in question was not disputed. As another example, in \textit{Bowles v. Soverinsky} \textsuperscript{170} plaintiff was asked to admit that a certain custom prevailed in a certain business. Clearly custom and usage may be so well established as to be indisputable.\textsuperscript{171}

Propositions that are indisputable, whatever the nature of the assumptions underlying them, should be admitted. The fact-opinion and fact-law distinctions, however, do not discriminate between propositions that are and those that are not disputable. Thus when these distinctions are used in determining the propriety of a request, requests may be held objectionable even though the proposition in question could not be honestly contested. Needless to say, if the objection is sustained and the objecting litigant is thus permitted to ignore the request, he is not likely to enter an admission voluntarily; had he been required to answer the request, however, and thus been subject to sanctions if he answered improperly, the contention in question might have been conceded. To this extent, an approach which makes the propriety of a request turn on analytical distinctions between "fact," on the one hand, and "opinion" and "law," on the other, thwarts effective use of the admission procedure. Nonetheless, two arguments have been suggested in support of that approach.

One argument is that "opinions" and "conclusions" are not admissible in evidence, and thus requests directed to such matters serve no function.\textsuperscript{172} However, the introduction at trial of a litigant's admission would not be controlled by the rules relating to opinion testimony. Those rules protect the interests of a party who is disputing the conclusion which the witness wishes to ex-

\textsuperscript{171} In one case a party was asked to admit that "for many years prior to 1952, and at all times subsequent thereto, it has been the practice and custom for towage contracts for services in and about San Francisco Bay to contain a clause providing that 'When the captain...of any tug furnished to or engaged in the service of assisting or towing a self-propelled vessel goes on board such vessel... it is understood and agreed that such tug captain... becomes the servant of the vessel... and her owner...'." Request for Admissions of Fact, p. 1, California v. The S.S. Jules Fribourg, 19 F.R.D. 432 (N.D. Cal. 1955), Admiralty No. 26612. The court held that this request called for a legal conclusion and thus was objectionable. No doubt the statement that something is a "custom" involves factual inferences and perhaps the application of legal criteria. However, if, as the request for admissions suggests, virtually every contract of this type contained such a clause, the existence of a custom would seem beyond the realm of legitimate dispute.

\textsuperscript{172} This seems to have been the thrust of the objecting party's argument in \textit{Knowlton v. Atchison}, T. & S.F. Ry., \textit{11 F.R.D.} 62 (W.D. Mo. 1951). The court's discussion is directed to the contention that the admissions called for would be inadmissible at trial. \textit{Id.} at 65.

For discussion of inadmissibility at trial as a ground of objection to the request, see text at notes 86-91 \textit{supra}.
If a proposition has been conceded, the evidentiary rules have no function to perform. The situation is the same as when parties enter into a stipulation. The stipulation is controlling, and the fact that it asserts an inference—an "opinion" or a matter of "law"—is irrelevant.

The other argument is that requests directed to "opinions" and matters of "law" impose too great a burden on the answering litigant. In order to answer properly so that he will not be subject to sanctions, a litigant may have to investigate the facts and determine the validity of the assumptions upon which a proposition is based; moreover, even after doing these things, the litigant still may be unable to say whether the proposition is true or false. Insofar as the basis of this argument is the lack-of-knowledge complaint, our discussion of that problem is applicable here. As for determining the validity of assumptions underlying a proposition, the problem is often more apparent than real, and even when difficulties do exist they do not justify an objection to the request.

Many inferences can be easily evaluated. Sometimes a litigant's common experience will tell him whether the conclusion in question is valid. Thus most laymen can recognize the symptoms of intoxication and judge whether someone is or is not intoxicated. Consequently, if a litigant who has observed X's conduct is asked to admit that X was intoxicated, the litigant's experience with similar situations often would enable him to say whether the conclusion concerning X's condition is disputable. In other situations the opinion of a qualified expert, one the answering litigant accepts as reliable, would show whether an admission was warranted. Thus a party would have little if any basis for disputing the findings of his own expert. For example, the plaintiff in a personal injury case usually is examined by a doctor of defendant's choosing, and normally the defendant would have no reason to question the conclusions of this doctor.

173. Opinion testimony, of course, is not automatically excluded. There must be an appropriate objection, and failure to object is a waiver.

174. This was the argument put forth in Points and Authorities in Support of Objections to Request for Admissions of Fact, p. 2, California v. The S.S. Jules Fribourg, 19 F.R.D. 432 (N.D. Cal. 1955), and seems to have been the contention advanced in Jones v. Boyd Truck Lines, Inc., 11 F.R.D. 67, 69 (W.D. Mo. 1951).

175. See text at notes 145-62 supra.

176. The ability of laymen to recognize the signs of intoxication and make accurate inferences concerning this condition is accepted by the many courts which permit a laymen to testify that a person was or was not intoxicated. See cases collected in 7 WIGMORE, EVIDENCE § 1974 n.1 (3d ed. 1940, Supp. 1959).

177. In Knowlton v. Atchison, T. & S.F. Ry., 11 F.R.D. 62 (W.D. Mo. 1951), for example, decedent had been treated in the Santa Fe Hospital. See text at notes 154, 156 supra. Presumably the reports of the doctors who examined and treated decedent were available to defendant. It seems unlikely that defendant would have any legitimate basis for questioning the "opinions" and "conclusions" contained in those reports. Thus, when plaintiff asked defendant to admit that decedent had undergone an operation "for the purpose of removing a pressure on the brain," see Request for Admission Under Rule 36, supra note 154, at 4-5, defendant should have been able to answer the request. However,
Nor is the verification of a proposition based on legal assumptions necessarily a difficult task. The proper interpretation of a provision of foreign law, for example, might in some instances be well established and easily ascertainable. Whether a "partnership" was created or terminated, whether a "contract" was formed, the maximum rent under a rent control statute—the rules governing these and innumerable other matters of "law," and the application of those rules in specific situations, can be obvious to the point of indisputability. That such questions often are debated hardly indicates that they never are clear. After all, even so controversial and disputable a question as "negligence" sometimes is conceded voluntarily. If such voluntary concessions occur, surely litigants prodded by the sanctions available under the admissions procedure will find it possible to determine whether other factual and legal assumptions are valid.

In many instances validity will be neither obvious nor easily determinable. This does not create an insurmountable problem, however. A litigant who disputes a proposition or is uncertain of its truth can answer with a denial or a statement that he is unable honestly to admit or deny. And, assuming good faith, there would be little if any danger that such answers would be held improper. No judge expects a litigant experimentally to test factual assumptions. Thus if the assumptions underlying an "opinion" are verified neither by

178. In Moumdjis v. The S.S. Ionian Trader, 157 F. Supp. 319, 320 (E.D. Va. 1957), the court, while holding improper a request for the admission that a letter from an attorney accurately interpreted a provision of foreign law, said that a party could be asked to admit the validity of an English translation of the foreign law. Clearly a translation may involve opinions and conclusions. The point that seemed to bother the court was that the request as submitted may have involved a disputed matter. If so, the answering party was free to enter a denial. This would be equally true if a party was asked to admit the accuracy of an English translation. In both situations the request should be held proper so that if there is no legitimate basis for dispute the answering party will be induced to make an admission.

See also comments to the effect that the genuineness of a certified copy of a foreign judgment is a proper subject of a request for admissions, A Panel Discussion of the Practical Operation of the Colorado and Federal Rules of Civil Procedure Concerning Depositions and Discovery and Pre-Trial Procedure, 21 Rocky Mt. L. Rev. 38, 48 (1948).

179. See, e.g., United States v. Lewis, 10 F.R.D. 56 (D. N.J. 1950), in which the court upheld a request asking defendant to admit that the maximum legal rent for a certain apartment was $80. per month. The court answered the objection that the request was directed to a matter of "law" by pointing out that the area rent director's order fixing the maximum rent is final unless appealed, and that the existence of such an order and whether it has been appealed can be determined as matters of fact. Id. at 57-58.
the litigant's own experience nor by sources he accepts as reliable, he should have no qualms about refusing to admit it. Likewise as to matters of "law." Judges will be quick to understand a party's doubts concerning a proposition based upon a particular construction or application of a legal principle. If a proposition is at all debatable, a litigant who honestly questions its validity and is reluctant to admit it need not be deterred by fear of sanctions.480

If the above conclusions are correct, requests should be held proper without asking whether the admission sought is a "fact," an "opinion" or a matter of "law." The courts that have attempted to distinguish "fact" from "opinion" and "law" have implicitly assumed that in using the word "fact" the drafters of Rule 36 intended to distinguish propositions of "fact" from "opinions" and matters of "law." This assumption is doubtful. The drafters knew full well that the term "fact" as used in pleading rules, and the attempt to distinguish "facts" from other types of assertions, had caused constant and

180. In Tyler State Bank & Trust Co. v. Bullington, 179 F.2d 755 (5th Cir. 1950), a party had denied a proposition which the court characterized as a "conclusion of law." After trial, the trial court held the denial improper and awarded costs. In reversing, the court of appeals said that the denial "can not properly be denominated as unreasonable . . . merely because, upon the trial . . . it may be clearly shown by the evidence" that the matter denied was true. Id. at 760.

In United States ex rel. Westinghouse Elec. Supply Co. v. National Surety Corp., 25 F.R.D. 249 (E.D. Pa. 1960), defendant had denied (i) that certain invoices had been sent to M, and (ii) that certain statements of account had been "periodically" sent to M. In holding that Rule 37(c) sanctions would not be imposed on defendant because of these denials, the court said, as to item (ii), that the denial was proper because "the interpretation of the word 'periodically' is subject to differences of opinion." Id. at 251. As for item (i), the evidence showed clearly that the invoices had been sent to X, and plaintiff had proved that X was M's agent; the denial was held proper because defendant had contested the agency relationship. See also United States v. Classified Parking System, Inc., 213 F.2d 631, 634-35 (5th Cir. 1954), in which the court held that sanctions should not be imposed because the request was subject to conflicting interpretations, and the reply to the request was proper under one of these interpretations.

Another case worth mention is Modern Food Process Co. v. Chester Packing & Provision Co., 30 F. Supp. 520 (E.D. Pa. 1939). The court, in addressing itself to the question whether sanctions would be proper if a party claimed inability to admit or deny, said, "If the legal reasons for not answering present a fairly debatable question and have been presented in good faith, the Court would probably find them 'good,' even though not sustained." Id. at 521.

Other cases also indicate that the courts would deal leniently with denials of assertion of opinion and statements involving legal assumptions. In characterizing the situations in which sanctions should be imposed, the courts have referred to denials not in "good faith," e.g., United States v. Ehbauer, 13 F.R.D. 462 (W.D. Mo. 1952), and "sham" replies, Metropolitan Life Ins. Co. v. Everett, 15 F.R.D. 498, 499 (S.D.N.Y. 1954); Electric Furnace Co. v. Fire Ass'n, 9 F.R.D. 741, 743 (N.D. Ohio 1949). A denial of an opinion may be erroneous in the sense that the opinion turns out to be true, but it is difficult to consider the denial as "sham" or not in "good faith" if the answering party had any tenable basis for his denial. In this connection it is worth pointing out that in holding that a party has a duty to investigate if he lacks information and knowledge, the courts have used phrases such as "reasonable inquiry," e.g., Shawmut, Inc. v. American Viscose Corp., 12 F.R.D. 488, 489 (D. Mass. 1952), and have referred to information that can be "obtained from
fruitless litigation. Consequently the drafters deliberately omitted this word from the pleading rules they formulated. It is almost inconceivable that the drafters intended to inject into the admissions procedure the confusion they so scrupulously avoided elsewhere. A court would be on sound ground, therefore, in holding that Rule 36 does not call for an application of the fact-opinion and fact-law distinctions.

Moreover, even a court that feels compelled to apply these distinctions can reach desirable results. No magic formula dictates that a proposition must be classified as “opinion” or “law” rather than “fact.” All assertions are to some extent based on assumptions, and this is reflected in the uncertainty of the legal lines dividing “facts” from “opinion” and “law.” In determining where to draw those lines, a judge properly can consider the function of the distinctions he is making and decide the case accordingly. The question in the request-for-admissions cases is whether a request is proper and should be answered or is improper and may be ignored. Since distinctions in the types of assumptions underlying propositions should make no difference in the resolution of this question, propositions can and should be classified as “fact” for this purpose.

Here, as with the problems raised by the word “relevant,” a simple amendment of Rule 36 would seem desirable. Deletion of the word “fact” would make it clear that the fact-opinion and fact-law dichotomies should not be invoked in passing on the propriety of requests.

Summary. As originally promulgated, Rule 36 did not state whether a request to admit might be challenged. This gap was filled in 1946 by an amendment which permitted objections to be made on the grounds that a request was “privileged or irrelevant or . . . otherwise improper.” That objections are warranted in some cases is clear. The admissions procedure, like other devices, is subject to abuse. Litigants should have a means of protecting themselves, and courts should be able to prevent abuses.

The right to object, however, is not an unmixed blessing. It, too, can be abused. Objections can be employed not only to attack improper requests but also to defeat legitimate uses of the admissions procedure. This danger is one
the courts should recognize and guard against. In this respect practice under
the 1946 amendment leaves much to be desired. There seems to be little reali-
zation that a litigant may be objecting to a request not because he would have
difficulty answering it, but because the only proper answer would be an
admission. Often objections are sustained without careful consideration of
whether the objecting litigant's complaint constitutes a valid ground for per-
mitting him to ignore the request. A litigant's assertion that a proposition is
disputed, or that he lacks knowledge has been accepted at face value and with-
out further inquiry.

Ultimately, avoidance of illegitimate objections depends upon judicial recog-
nition and articulation of the principles that should limit the role played by
objections. It is important to realize that a judge hearing an objection seldom
can say with certainty that a request will fail to produce an admission. He
cannot be sure that the objecting party's motive is proper, and thus he can-
not predict how the request will be answered if the objection is overruled.
And, though an admission seems to have little value, the judge cannot fore-
see events that might give it critical importance. Therefore, in deciding what
kinds of objections will be heard and in ruling on particular objections, one
guiding principle should be that the propriety of a request should not turn on
a judge's forecast of its usefulness. The proper function of objections is to
afford relief when it is unreasonable to require that the request be answered.
If a party is asked to admit a privileged matter or is being harassed, he does
need protection. Objections of this nature should be heard. On the other hand,
the party raising a disputability-objection could have made the same claim by
answering the request with a denial. His objection should not be heard. In
short, no hearing should be given an objection if the objecting litigant's com-
plaint is one he could adequately assert by answering the request.

Though the courts bear primary responsibility for preventing improper ob-
jections, the formulation of Rule 36 is also important. The Rule itself should
answer so fundamental a question as whether a litigant lacking personal
knowledge has a duty to inquire. And insofar as the Rule's present language
has caused conflicting decisions on the scope of requests, amendments point-
ing to the proper resolution of the conflict should be adopted.

One further point should be made. Some cases seem to call for a procedure
not now expressly available under Rule 36. In two situations a litigant may
be unable to admit or deny because of difficulties the requesting party might
be able to eliminate. The answering litigant may lack knowledge that the
requesting party could provide. 185 The answering litigant may be unable to
admit or deny because of an ambiguity in the request itself. 186 In these situa-

185. In United States v. Watchmakers of Switzerland Information Center, Inc., 25
F.R.D. 197, 200 (S.D.N.Y. 1959), for example, the court, in overruling an objection to a
request, directed the requesting party to furnish the answering litigant with citations to
"source material for the facts concerning which admissions are sought."

186. For example, in United States v. Watchmakers of Switzerland Information Cen-
ter, Inc., supra note 185, at 201, the request referred to "price cutting activities" and "ex-
cessive quantities."
tions the request should be answered, but the answer will consist of a statement that the proposition in question can be neither denied nor admitted, and an explanation of the difficulty. If the reason given is lack-of-knowledge or ambiguity, the requesting party should have an opportunity to supply information or clarify the request. If, after receiving such information or clarification, the answering litigant decides that an admission is warranted, he should be permitted to amend his answer. This kind of interchange can occur even in the absence of formal procedures. It may be occurring now.\textsuperscript{187} Formalization, however, might encourage the practice and thus lead to admissions that parties are failing to obtain today.

\textit{The Effect of Admissions}

If Rule 36 is to fulfill its function, the admissions it produces should be held conclusive at trial: A proposition that stands admitted should be deemed established without further proof, and disproof should not be permitted. Unless admissions are given this effect, they will do little either to ease the burdens of trial preparation or to facilitate the trial itself. If a contention may be disputed even though it has been admitted, the party asserting the contention must be fully prepared to prove it and the tribunal hearing the case will have to debate and resolve it.

Though Rule 36 does not state the effect of admissions,\textsuperscript{188} the courts have for the most part treated admissions properly.\textsuperscript{189} There are two cases, however, which might be construed as authority for permitting litigants to introduce evidence contradictory to their admission.

\textsuperscript{187} There is some indication that the courts attempt to encourage counsel to informally dispose of objections to requests. Local Rule 20(d) of the District Court for the Eastern District of Pennsylvania states that if the sole objection to an interrogatory is that it is too broad, general, extensive or vague, the court will not hear the objection unless counsel have certified to the court that they cannot reach an agreement that would eliminate the objection. See 2 Fed. Rules Serv. 2d 1059, 1062 (1959). In Griffin v. Wilhelmsen, 24 F.R.D. 431, 433 (E.D. Pa. 1959), the court suggested to counsel that they follow the spirit of Local Rule 20(d) in dealing with objections to requests for admissions.

\textsuperscript{188} It seems likely that the draftsmen of the Rules intended admissions to be binding and conclusive. The basic notion behind Rule 36 is that litigants should admit matters not subject to legitimate dispute. To say that a party should concede such a matter but still is free to dispute it would be contradictory. Also, if admissions obtained under Rule 36 were merely evidence, the admissions procedure would add little to the deposition-interrogatory machinery.

\textsuperscript{189} The following cases indicate judicial acceptance of the proposition that admissions are in themselves sufficient proof of the matters admitted:


\textit{Admissions relied on to sustain findings upon which determinations below rested:} Princess Pat, Ltd. v. National Carloading Corp., 223 F.2d 916 (7th Cir. 1955); Adventures In Good Eating, Inc. v. Best Places To Eat, Inc., 131 F.2d 809, 811-12 (7th Cir. 1942)
In United States v. Lemons, plaintiff contended that defendants had executed a certain promissory note. Defendants had conceded execution in their answer to the complaint, but at the pre-trial conference they were granted permission to amend the answer and deny execution. Execution also was admitted in defendants' reply to plaintiff's request for admissions, and this was not amended. During the trial of the case, which was heard by a judge sitting without a jury, defendants were permitted to testify over objection that they had not signed the promissory note. Thus a party was permitted to introduce evidence to controvert his own admission. The trial judge's reasons for permitting such evidence, however, show that the case stands for a limited proposition. His theory was that an answer to a request for admissions can be amended if "justice would be served," and that, in effect, defendants, by amending their answer to the complaint, put plaintiff on notice that the admission under Rule 36 was withdrawn.

Insofar as the Lemons case holds that the courts have power to permit the withdrawal of an admission, there is no reason to quarrel with the decision. If a party through no fault of his own admits something which he later discovers is false, and if his opponent would not be harmed by a withdrawal of the admission, withdrawal should be permitted. Whether the power to grant such relief was judiciously exercised in the Lemons case is another question, one to which we shall return.

\[\text{copyright infringement suit; finding that defendant had copied plaintiff's book corroborated by facts established through admissions); In re Independent Distillers, 34 F. Supp. 724, 728-29 (W.D. Ky. 1940) (order of referee in bankruptcy sustained on alternative grounds; facts established through admissions essential to one of said grounds).}\]

\[\text{Admission held sufficient ground for sustaining fact essential to judgment below, though same fact also supported by evidence introduced at trial: Smyth v. Kaufman, 114 F.2d 40 (2d Cir. 1940); Southern Ry. v. Crosby, 201 F.2d 878 (4th Cir. 1953).}\]

\[\text{In non-jury case, trial judge held alternatively that evidence established facts asserted by plaintiff and that, evidence aside, facts were established by admissions: Beasley v. United States, 81 F. Supp. 518, 526-30 (E.D.S.C. 1948).}\]

The question whether a party who has admitted a matter may introduce evidence contradictory of his admission was not raised in the above cases. In Smyth v. Kaufman, supra at 42, however, the court states, "But in any event the fact of insolvency stands admitted because of defendants' failure to deny it after being served with a notice to admit that fact . . . . Under the rule [Rule 36], therefore, the defendants cannot now controvert the fact of insolvency. . . ." (Emphasis added.)


191. Id. at 690. The court qualifies this general statement by placing the burden of proof on the admitting party.

\[\text{[I]f a party desires to deny the truth of his admission or admissions, the burden rests upon him to explain the reason said admission was false and to establish that his subsequent testimony, in contradiction of the admission, is in fact the truth. The showing in this regard must be clear and convincing. Otherwise, the salutary purpose of the Rule might be circumvented.}\]

\[\text{Id. at 689.}\]

192. Id. at 690.

193. See text at notes 209-13 infra.
In *Ark-Tenn Distrib. Corp. v. Breidt*, plaintiff contended that the defendants, *H* and *J*, had actively participated in the management of a certain corporation. As proof of this, plaintiff relied on defendants' admission that they were officers of the corporation. *H* sought to introduce evidence, including his own testimony, to show that he had been an officer in name only and had never exercised any control over corporate affairs. Plaintiff objected, but the trial judge, who also was the trier of fact, permitted the evidence and ultimately found that *H* had played no part in managing the corporation and thus was not liable. Plaintiff appealed, contending, among other things, that the trial court erred in permitting evidence contradictory of *H*’s admission. The appellate court affirmed. The decision in itself is correct. As the Court of Appeals noted, “[A]n admission that one is an officer of a corporation is a far cry from admitting that one is active in its corporate affairs.”

Since *H* had only admitted holding a corporate office, his testimony of nonparticipation in corporate affairs did not conflict with his admission.

The opinion of the appellate court, however, contains the following passage:

"[U]nder the Federal Rules of Civil Procedure ... technical considerations will not be allowed to prevail to the detriment of substantial justice ... and admissions ... in response to a request for admissions stand in the same relation to the case that sworn testimony bears ... Since the evidence is not contradicted ... that Harry Breidt took no active part in the management, operation or control of [the corporation] ... there is ample support for the conclusion of the District Court ..."  

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195. Id. at 360.
196. A similar situation arose in United States v. Newhard, 17 F.R.D. 285 (W.D. Pa. 1955). The critical factual question was whether Fayette County had been indebted to Newhard on October 13, 1953, the date on which plaintiff had purported to attach the wages allegedly due from the County to Newhard. Using Rule 36, plaintiff obtained an admission that Fayette County was indebted to Newhard in the sum of $359.54, but the date on which the indebtedness arose was not stated in the request and thus was not admitted. At trial, only counsel for plaintiff appeared. The court held that the admission provided a sufficient basis for a finding that the indebtedness existed on October 13, 1953, the critical date. The court said, however, that if defendants had appeared at trial, they could have offered evidence to show that the wages in question had not accrued until after October 13, 1953. *Id.* at 285-86. The court’s statement should not be considered as indicating that evidence is admissible to contradict an admission. The admission itself did not establish the date on which the wages accrued. Consequently, the evidence that the court says would have been admissible would have contradicted a fact inferrable from the admission but would not have contradicted the admission itself.
197. 209 F.2d at 360.

The opinion in *Frankel v. International Scrap Iron & Metal Co.*, 157 F. Supp. 709 (E.D. Pa. 1957), contains a similar statement: “The admissions cannot be taken as controlling. Decision should not be based on mere matters of pleadings or technical admission.” *Id.* at 713. The statement is dictum, however. The issue in the case was whether defendant had been decedent’s employer within the meaning of the Pennsylvania workmen’s compensation statute. Defendant had admitted that one Konopka, the actual employer of decedent, was an “independent contractor” over whom defendant had no control or right of control. As the court pointed out, however, under the Pennsylvania decisions, Konopka,
The court's suggestion—that free contradiction of admissions should be permitted in order to prevent "technical considerations" from triumphing over "substantial justice"—is untenable.

A rule which allowed dispute at trial would turn the admissions procedure into a useless appendage. The preservation of Rule 36 in an effective form hardly can be characterized as a "technical consideration." Nor is the procedure through which a party becomes bound "technical." Admissions are not the result of inadvertence or inattention to procedural niceties but of a litigant's deliberate, conscious choice. As for "substantial justice," the interests of both litigants—the one who obtained and relied upon an admission as well as the one who made the admission—must be considered. If Rule 36 is to operate effectively, we must accept the fact that on occasion, in order to protect a party who has relied on an admission, the admitting party must be held to an erroneous admission. To bind a party in this manner is not new and has never been considered a denial of "substantial justice." Even under the Federal Rules a party may be refused permission to amend his pleadings and thus be prevented from fully presenting the merits of his claim.

One further aspect of the Lemons and Ark-Tenn cases should be considered. The opinions in both cases state that "admissions . . . in response to a request for admission stand in the same relation to the case that sworn testimony bears" and cite an earlier case in which the same statement is found. Presumably the courts are suggesting that since sworn testimony may be contradicted, and since admissions are like testimony, admissions, too, may be contradicted. This theory is untenable. The cases that have compared admissions with sworn testimony, including the one cited in the Ark-Tenn and Lemons decisions, were not concerned with whether admissions are conclusive. The comparisons were made in reasoning about other questions, and admissions were said to be similar to testimony in one specific respect, not in all respects. To argue from these cases that admissions may be contradicted is

even though an independent contractor in one sense, stood in such a relationship to defendant that Konopka's employees were considered to be the employees of defendant. The admission that Konopka was an independent contractor, therefore, was immaterial.

198. See, however, text at notes 224-38 infra, for discussion of decisions in which some courts, applying the literal language of Rule 36, have applied technical criteria in determining the sufficiency of a reply to a request and have held that replies are admissions though the obvious intent of the answering party was not to admit.

199. Fed. R. Civ. P. 15(a) and (b). The rule states that leave to amend shall be "freely" granted "when justice so requires." As for amendments to conform to the evidence, the rule states that leave to amend shall be granted unless the objecting party shows that he would be prejudiced. See generally, 3 Moore § 15.08, 15.13.


201. In two of these cases the question was whether a reply to a request must be verified, and the sworn-testimony analogy was advanced as a reason for holding that an unveri-
to assume erroneously that because testimony and admissions have one common attribute they must be identical in other respects. Moreover, even if the analogy between admissions and testimony is extended, it would not necessarily follow that admissions may be contradicted. In some situations litigants are not permitted to contradict their own sworn testimony.\textsuperscript{202} Thus, if admissions and testimony are to be similarly treated, a court might well conclude that if a party has made an admission under Rule 36, the situation is one in which contradiction is not permitted.

Though Rule 36 would lose its efficacy if admissions could be freely contradicted, in some cases a party should be allowed to withdraw his admission. If the admitting litigant has acted diligently, if adherence to the admission might cause suppression of the truth, and if withdrawal would be harmless,\textsuperscript{203} relief should be granted. Easy withdrawal, however, no less than free contradiction, would make reliance on admissions impossible and thus would tend to destroy the value of Rule 36. Consequently, though courts should have power to grant relief, the rules regulating this matter should be designed to prevent injudicious exercise of that power.

As one safeguard, relief should be granted only on motion. The party who obtained the admission should have an opportunity to oppose its withdrawal so that the court will have the benefit of his arguments. In ruling on such motions, a court should consider how withdrawal in the case at hand would affect the use of Rule 36 in the future. If a decision permitting withdrawal would make lawyers reluctant to rely on admissions, relief should be denied. The factors to which lawyers are likely to look are whether withdrawal is permitted under circumstances creating a danger of prejudice to a party who has relied on an admission and whether the litigant seeking relief is required to show that he has acted diligently.

Evidence available at one stage of a case may be unavailable at a later date. Consequently a party who assumes that an admission has eliminated the need for evidence can be prejudiced by its withdrawal. He may be unable to obtain evidence that was previously available to him. Clearly, if a court concludes that withdrawal would cause prejudice to a party who has relied on the admission, withdrawal should be denied. What kind of showing should suffice as proof of prejudice, however, is not so clear. There are two problems: What

\textsuperscript{202} See 9 WIGMORE, EVIDENCE § 2594a (3d ed. 1940).

\textsuperscript{203} The fact that the party in whose favor an admission would have operated must, if the admission is withdrawn, adduce and introduce evidence of the matter previously admitted does not constitute "harm" within the meaning of the term "harmless" as that word is used in the text above, nor does the necessity of proving a matter constitute "prejudice" or make withdrawal of an admission "prejudicial" within the meaning of those terms as they are used in the text which follows.
should be accepted as proof of reliance? What will be sufficient to show that reliance has caused prejudice?

A party's sworn statement that an admission caused him to refrain from gathering evidence should constitute prima facie proof of reliance. The only other way to show reliance would be by describing one's trial preparations in detail, thus permitting the court to observe an absence or curtailment of preparation relating to the admitted contention. Such a showing would be burdensome and would serve no function. Reliance can be disproved only with evidence of specific nonreliance, i.e., proof of specific acts directed toward obtaining evidence of the admitted contention. If such evidence is not produced, there is no reason to question reliance. If evidence of nonreliance is produced, the court's decision will turn on whether the evidence is believed and, if so, whether it fully negates reliance. In either event, detailed proof of trial preparations would be superfluous.

Claims of prejudice can take different forms. In some cases the claim will be loss of a particular piece of favorable evidence. Ordinarily a person making this assertion will be in a position to produce evidence to substantiate it, and such proof should be required. Once it is adduced, the burden should shift so that parties who rely on admissions will be protected. Withdrawal should be denied unless the litigant seeking relief convinces the court that there has been no loss of evidence, or that the loss is insignificant, or that withdrawal can be permitted on conditions which will prevent prejudice.

204. A demonstration of reliance is essentially a showing of what the party would have done had the statement relied on not been made. In attempting to prove reliance, a party is thus attempting to prove that something has not occurred. The only way in which the nonoccurrence of an event can be demonstrated is through proof of what has occurred, i.e., by showing what has occurred at every point in time at which the event in question might have occurred. The situation is like that which exists in a suit to recover money due. Nonpayment is an essential element of the plaintiff's case, but the plaintiff would labor under an overwhelming burden if he were required to show that at all times at which payment might have occurred it did not occur. Thus, though the plaintiff must allege non-payment, defendant, if he raises this defense, must prove payment. Field & Kaplan, Materials on Civil Procedure 426 (1953).

205. The loss of a key eye-witness to an event normally proved through eye-witnesses is obviously detrimental and should constitute "prejudice." On the other hand, the loss of a character witness whose testimony would be no different and no more impressive than that of numerous other available witnesses seems unimportant. In many situations, however, whether a loss of evidence is "insignificant" will be a troublesome problem. Only wisdom at the trial court level can provide the solution. It may be worthwhile suggesting, however, that doubts should be resolved against the party seeking withdrawal, since the opposite approach would undermine reliance on admissions.

206. In some cases a witness may be available but only at greatly increased cost to the party who has relied on the admission. Thus the witness may have moved to a foreign county and it may be necessary either to go there and take his deposition or pay the expense of bringing him to the place of trial. In such a situation, withdrawal might be permitted on condition that the expense involved be paid by the litigant who seeks relief from his admission.

Also, the evidence that has been lost might be available in a form normally objectionable under the rules of evidence. For example, the party opposing withdrawal might have
More difficult problems arise if the party claiming prejudice shows that a specific witness is unavailable but is unable to show how the witness would have testified, or claims that, in reliance on the admission, he refrained from all inquiry and thus does not know whether evidence has become unavailable. In such cases one cannot rationally decide whether reliance has led to a loss of evidence. Any answer would be pure conjecture. The problem might be resolved by applying a blanket rule under which withdrawal of the admission would always be either permitted or denied. Thus a court might hold that the party claiming prejudice has the burden of showing that a particular piece of helpful evidence has been lost, or that the litigant seeking withdrawal must prove that no loss would result.

Such rules would be unwise. The ultimate question is whether withdrawal would cause prejudice, and though a possible loss of evidence is important, other factors should be considered. The admitted contention, for example, may be one normally proved through specific, identifiable evidence, and it may be clear that this evidence is available. Thus if the admission concerns the genuineness of a signature, and the customary avenues of proof are still open, it would be reasonable to find that the conjectural loss of other proof does not amount to prejudice. On the other hand, if withdrawal would leave a party without adequate means of proof, perhaps prejudice should be found even though he cannot show a loss of specific, favorable evidence. Numerous other factors, difficult if not impossible to hypothesize, might also be significant. Consequently no attempt will be made here to formulate general rules for deciding whether a conjectural loss of evidence constitutes prejudice.

Prejudice aside, withdrawal of an admission should not be permitted unless the party seeking relief was careful in making the admission and diligent in asking for its withdrawal. No reasonable allocation of the burden of proving prejudice can eliminate completely the danger that withdrawal will harm a party who has relied on an admission. The argument for tolerating this danger is that we should—as a matter of fairness and justice—protect the interests of the litigant seeking relief from the admission. If this litigant has acted carelessly, however, it would be neither fair nor just to protect him at the risk of harming his opponent. Moreover, since the danger of prejudice cannot be entirely avoided, the possibility of withdrawal necessarily impairs reliance on admissions to some extent. The impairment would be greater, and the reliance less, if no showing of diligence were required.

The litigant seeking relief will be familiar with the facts relevant to diligence and therefore should have the burden of proving it. He should explain why the facts that now cast doubt on his admission were unknown to him when he

a signed statement from the witness. If the court finds that prejudice could be eliminated by permitting the statement to be read in evidence, withdrawal could be permitted on condition that any objections to the statement be waived. In such a case, however, the court should consider carefully whether reading the statement is an adequate substitute for the witness himself. Certainly, if the testimony is at all important, and if the witness' presence can be obtained by paying his traveling expenses, payment should be required.
made the admission. Speed in seeking relief also is important. The more time that elapses, the greater the risk that evidence will be lost. Consequently withdrawal should be permitted only if sought promptly after discovery of the grounds relied on in the motion.

Three reported cases deal with withdrawal of admissions.\textsuperscript{207} Each upholds judicial power to permit withdrawal, and each is consistent with the principle that relief should be sought through a motion.\textsuperscript{208} Further generalization would be premature, but some additional comment is warranted.

In \textit{United States v. Lemons},\textsuperscript{209} the court, in explaining why a motion should be made, stated:

Ordinarily, the best practice—when it is learned that a party's admission is untrue—would be to request permission of the Court to execute amended . . . admissions . . . . If this procedure is followed, the opposing party will not be subject to surprise. On the other hand, if a party were to wait until the trial of a case before seeking to deny admissions . . . it would require exceptional circumstances before the Court would be justified in permitting him to deny said admissions. The reason for this is that the opposing party has the right to rely on said admissions . . . and might not have witnesses available (whose attendance could have been secured if the party had received notice of the proposed repudiation of the admissions) to prove the facts admitted . . . .\textsuperscript{210}

Though these statements are dicta, they constitute the only judicial discussion in point and thus could exert considerable influence in future cases.\textsuperscript{211} As a guide for the future, the court's comments are deficient in two respects. First,


\textsuperscript{208} In United States v. Wimbley, supra note 207, at 694, the admitting party had made a motion to amend his reply to the request and the court granted the motion. In Nicholson v. Bailey, supra note 207, at 511-12, the problem before the court was whether defendant's motion for summary judgment should be granted. One question was whether there was a genuine issue of fact as to whether plaintiff had placed the word "patent" on certain articles. In replying to a request for admissions, plaintiff had admitted that he had not affixed "patent" to these articles, but thereafter, when his deposition was taken, plaintiff said that he had erred in replying to the request and that the articles had been appropriately labeled. The court held that plaintiff would not be held to the admission without first having an opportunity to explain why he made the admission and then repudiated it. In United States v. Lemons, supra note 207, at 689-90, the court said that withdrawal should be sought by motion but held that withdrawal should be permitted despite defendants' failure to make a motion. The court said that since defendants had denied the genuineness of the promissory note in question by amending their answer to the complaint, plaintiff was put on notice that the admission of genuineness contained in defendant's reply to the request also was withdrawn.


\textsuperscript{210} Id. at 689-90.

\textsuperscript{211} The passage from the \textit{Lemons} case reproduced in the text above was quoted in United States v. Wimbley, 125 F. Supp. 691, 693-94 (W.D. Ark. 1954). Both the \textit{Lemons} and \textit{Wimbley} cases, however, were decided by the same judge, and thus the quoted passage should not be considered as supported by two independent authorities.
the court's conception of prejudice is too narrow. Though the danger of surprise at trial is seen, the court overlooks the fact that reliance can cause an irreparable loss of evidence even though withdrawal is sought well in advance of trial. No such danger was present in the Lemons case itself,\textsuperscript{212} however, and thus the failure to note this problem is understandable. Second, by stating that only "exceptional circumstances" would justify withdrawal \textit{at trial}, the court seems to imply that such circumstances need not be shown if the motion to withdraw is made prior to trial. It would be unfortunate if the courts were to adopt this attitude toward withdrawal. If Rule 36 is to operate effectively, the power to permit withdrawal must be exercised sparingly. A grant of relief should be the exception rather than the rule. And a showing of exceptional circumstances should always be required: The litigant seeking relief should always be required to explain why the facts which have led him to ask for relief were unknown to him when he made his admission.\textsuperscript{213}

Since the usefulness of Rule 36 depends in large part on the effect of an admission, it is important that the law on this point be correctly formulated and clearly stated. At present Rule 36 contains no provision regulating this matter. An amendment stating the effect to be given admissions can and some day may be adopted. In the meantime, however, the courts must fill the gap. In doing so, they should be guided by the purposes behind Rule 36. Dicta to the effect that admissions are not binding should be rejected as fundamentally inconsistent with those purposes. Principles should be developed under which admissions will ordinarily be conclusive, but which make some provision for granting relief if no prejudice would result to a party who has relied on the admission, and the litigant seeking relief has acted diligently.

\textit{Sanctions: Rule 37(c)}

The vital force behind the admissions procedure is its sanction: A litigant who improperly refuses to admit a matter may be required to pay the costs incurred in proving it.\textsuperscript{214}

\textsuperscript{212} Defendants had admitted that their signatures on a promissory note were genuine. United States v. Lemons, 125 F. Supp. 686, 687 (W.D. Ark. 1954). There was no indication that plaintiff's ability to prove the signatures was in any way impaired by reliance on the admission. The court actually found that the signatures were genuine. \textit{Id.} at 690.

\textsuperscript{213} United States v. Lemons, \textit{supra} note 212, and United States v. Wimbley, 125 F. Supp. 691 (W.D. Ark. 1954), both decided by the same judge, illustrate the need for clear thought on the question of diligence. In both cases litigants who had admitted signing certain documents, copies of which had been attached to the request for admissions, later claimed that the signatures were forgeries and asked for relief from their admissions. In \textit{Lemons} no attempt is made to explain why the forgery was not detected at the time the request for admissions was served. In \textit{Wimbley} the excuse offered was that the defendant had been ill and thus had been unable to examine the document at the time the request was received. This excuse seems inadequate. The time for answering a request can be extended. \textit{Fed. R. Civ. P. 36(a)}. In fact, the defendant in \textit{Wimbley}, because of her illness, did obtain additional time within which to answer interrogatories. United States v. Wimbley, \textit{supra} at 692.

\textsuperscript{214} For cases in which sanctions have been imposed under Rule 37(c), see United
To be effective, this sanction must deter all improper refusals to admit. Under Rule 36 a litigant who wishes to avoid an admission can do so either (a) by entering a denial or (b) by stating that he cannot truthfully admit or deny. Rule 37(c), the sanction behind Rule 36, refers to only one of these two types of answers. The Rule states that sanctions may be imposed on a party who, without good reason, replies with a “denial” but there is no provision covering the litigant who claims that he is unable to admit or deny.213

States ex rel. Westinghouse Elec. Supply Co. v. National Surety Corp., 25 F.R.D. 249 (E.D. Pa. 1960) (granted in part and denied in part); Akins v. McKnight, 13 F.R.D. 9 (N.D. Ohio 1952) (costs of $3500 awarded). See also West Kentucky Coal Co. v. Walling, 153 F.2d 332 (6th Cir. 1946) (award of $560.72 reversed on ground that answer was in effect an admission); Walter Hammer Arrester Corp. v. Tower, 7 F.R.D. 620 (E.D. Wis. 1947), rev'd, 171 F.2d 877 (7th Cir. 1949) (award of $1000 reversed on ground that answer was in effect an admission); Chicago Pneumatic Tool Co. v. Ziegler, 51 F. Supp. 199, 200 (E.D. Pa. 1943), rev'd, 151 F.2d 784, 799 (3d Cir. 1945) (award of $639.50 reversed on ground that matter denied was not pertinent to the case).

For cases in which sanctions were refused on the ground that the answering party's denial was proper under the circumstances, see United States ex rel. Westinghouse Elec. Supply Co. v. National Surety Co., supra; United States v. Classified Parking Sys., Inc., 213 F.2d 631, 634-35 (5th Cir. 1954); Tyler State Bank & Trust Co. v. Bullington, 179 F.2d 755, 760 (5th Cir. 1950); cf. Garrison v. Warner Bros. Pictures, Inc., 226 F.2d 354, 356 (9th Cir. 1955). See also Harms, Inc. v. Sansom House Enterprises, Inc., 162 F. Supp. 129, 136 (E.D. Pa. 1958), in which the court denied sanctions on the ground that there had been no proof of the expenses caused by the denial.

It has been suggested that Rule 37(c) is too weak and is ineffective, and that for this reason the admissions procedure has been little used. Holtzoff, A Judge Looks at the Rules After Fifteen Years of Use, 15 F.R.D. 155, 165 (1954); Holtzoff, Instruments of Discovery Under Federal Rules of Civil Procedure, 41 Mich. L. Rev. 205, 222 (1942); Developments in the Law—Discovery, 74 Harv. L. Rev. 940, 968 (1961). I disagree. First of all, my own conclusion after talking with lawyers about Rule 36 is that there is little recognition of the differences in function between it and the deposition-interrogatory machinery, and I am inclined to believe that this is primarily responsible for the fact that requests to admit are, by comparison with depositions and interrogatories, seldom used. Secondly, while most cases require investigation and thus call for use of the deposition-interrogatory machinery, there are fewer situations in which the use of requests to admit is appropriate.

As for the strength or weakness of Rule 37(c), this must be considered in the light of the function of the admissions procedure itself. That function is to promote admissions by the action of the parties and without the need for judicial intervention. Sanctions other than the type provided by Rule 37(c) are inappropriate in this context. For example, refusal to obey a court order to answer an interrogatory can be punished by (i) denying the recalcitrant party the right to introduce evidence, (ii) staying the proceeding until the party complies with the order, (iii) striking part of the party's pleading, etc. Fed. R. Civ. P. 37(b) (2). Before any such sanction could be applied to a refusal to admit, the court would have to find that the matter which the party refused to admit is indisputable. This would change the admissions procedure from a device that operates extrajudicially in the main to one which would frequently require extended court hearings. In effect, the admissions mechanism would become a device for obtaining fragmentary summary judgment.

215. Rule 37(c), insofar as is pertinent here, provides: "If a party . . . serves a sworn denial . . . the party requesting the admissions . . . may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making such proof [proof of the matter denied] . . . ." For the full text of Rule 37(c), see note 4 supra.

213. Rule 37(c), insofar as is pertinent here, provides: "If a party . . . serves a sworn denial . . . the party requesting the admissions . . . may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making such proof [proof of the matter denied] . . . ." For the full text of Rule 37(c), see note 4 supra.
Since the absence of such a provision makes it possible for a litigant to avoid an admission without subjecting himself to sanctions, Rule 37(c) in itself does not effectively deter improper refusals to admit. Though some courts have found ways to close the loophole in Rule 37(c),\textsuperscript{216} judicial ingenuity should not be relied on in this area as a substitute for a properly drafted rule. In contrast to the scope-of-admissions problems previously discussed, here the Rule is not merely ambiguous but specifically calls for an undesirable result. The only proper solution is to amend Rule 37(c) so that sanctions could be imposed not only on improper denials but on all improper refusals to admit.

Another loophole is Rule 37(f), which provides that no expenses or attorney's fees shall be imposed upon the United States.\textsuperscript{217} This is an expression of the sovereign's common law immunity from costs,\textsuperscript{218} and so long as that immunity is accepted, its application to discovery costs seems reasonable as a general principle. The general principle, however, should not be applied to the admissions-procedure sanction. As applied elsewhere, the government's exp-

\textsuperscript{216} The problem created by Rule 37(c) was clearly perceived by the judge who decided Bertha Bldg. Corp. v. National Theatres Corp., 15 F.R.D. 339 (E.D.N.Y. 1954). The reply to the request stated that plaintiff, the answering party, was unable to admit or deny and stated the reasons for this supposed inability. In the court's opinion, the reasons were "either inadequate, indefinite or frivolous." Id. at 340. The court recognized that if plaintiff's reply was accepted at face value, plaintiff would be avoiding an admission and at the same time be immune from sanctions. Ibid. Therefore, the court held that the reply would be treated as a denial so that Rule 37(c) would be applicable. Ibid.

A different approach is to hold that answers claiming inability to admit or deny will be deemed to be admissions if the reasons asserted for the inability seem inadequate. The court so held in Heng Hsin Co. v. Stern, Morgenthau & Co., 20 Fed. Rules Serv. 36a.52, Case 1 (S.D.N.Y. Dec. 10, 1954). In United States Plywood Corp. v. Hudson Lumber Co., 127 F. Supp. 489, 497-98 (S.D.N.Y. 1954), the court found the reply to the request inadequate and ordered a further reply but did not state what would happen if a further reply was not filed. See also note 226 infra.

Some courts seem not to have noticed that Rule 37(c) by its terms is applicable only to a denial. In holding that a motion to strike an inadequate reply to a request would not lie, one judge said, "... Rule 37(c) provides for the sanction in the event admissions of fact are not made .... [T]he trial court may order the party not admitting the facts to pay to the other party the reasonable expenses incurred in proving such facts ...." Rabjohn v. Minute Maid Corp., 25 F.R.D. 195, 196 (S.D.N.Y. 1958). (Emphasis added.) And in another case he states, "A party served with a request for admissions shall be deemed to have admitted the facts unless a sworn statement is served denying the matters .... or setting forth in detail the reasons why they cannot truthfully be admitted or denied. If a denial of either kind is served, the sole sanction ... is provided for in Rule 37(c)." United States v. Watchmakers of Switzerland Information Center, Inc., 25 F.R.D. 197, 199 (S.D. N.Y. 1959). (Emphasis added.) And in Electric Furnace Co. v. Fire Ass'n, 9 F.R.D. 741, 743 (N.D. Ohio 1949), the court states in dictum that Rule 37(c) would apply if a party made a "sham" objection to a request.

\textsuperscript{217} "Expenses Against United States. Expenses and attorney's fees are not to be imposed upon the United States under this rule." Fed. R. Crv. P. 37(f). The phrase "this rule" refers to Rule 37 as a whole and thus includes subsection (c), the admissions-proce-

\textsuperscript{218} 6 Moore ¶ 54.75, at 1339.
emption from costs gives the United States a pecuniary advantage but does not excuse noncompliance with the discovery rules. Thus, though the government may not be taxed with the costs of obtaining an order directing it to answer interrogatories, the order itself is available and consequently the United States can be compelled to answer the interrogatories.\textsuperscript{219} By protecting the government from costs imposable under the admissions procedure, however, Rule 37(f) gives the government not a mere pecuniary advantage but an exemption from the procedure itself. The United States may admit something if it wishes, but no consequences attach to an improper refusal to admit. A party who serves a request on the United States is in effect asking for a voluntary stipulation. This loophole should be closed by an appropriate amendment.

If the changes suggested above were adopted, a litigant who refused to make an admission would be subject to sanctions unless the court found that he had "good reasons" for his refusal or that the admission sought was of "no substantial importance."\textsuperscript{220} The "good reasons" provision protects litigants who have acted reasonably and in good faith. The mere fact that a contention was proved at trial does not show that a refusal to admit it was improper. The function of the "no substantial importance" provision is not clear. If the matter proved had no relevance to the issues litigated at trial, the refusal to admit, in and of itself, would not have caused unnecessary expenditures and sanctions would be inappropriate. Such matters could be considered of "no substantial importance."\textsuperscript{221} The provision, however, might also be applied to matters which, though relevant, were easily and inexpensively proved, the theory being that admissions are of "substantial importance" only when they significantly reduce the difficulties or expenses of proof. \textit{Bateman v. Standard Brands, Inc.}\textsuperscript{222} illustrates this notion. Plaintiffs, suing to recover damages resulting from a fire in their building, asked defendant to admit the extent of the loss. The admission was refused, and plaintiff subsequently proved the loss at trial. The motion to recover costs under Rule 37(c) was denied for the following reasons:

In the trial . . . plaintiffs experienced no trouble in establishing the extent of their loss. One witness supplied the proof, and . . . the defendant did not contest that issue . . . . The time and expense of the plaintiff in making the proof was trivial.\textsuperscript{223}

\textsuperscript{219} As to the applicability of sanctions to the United States, see generally, 4 Moore \textsuperscript{\textcopyright} 37.04, at 2808-09; \textit{Developments in the Law—Discovery}, 74 Harv. L. Rev. 940, 988-89 (1961).

\textsuperscript{220} The pertinent portion of Rule 37(c) states, "Unless the court finds that there were good reasons for the denial or that the admissions sought were of no substantial importance, the order [requiring payment of costs] shall be made."

\textsuperscript{221} For a case so holding, see \textit{Chicago Pneumatic Tool Co. v. Ziegler}, 151 F.2d 784, 799 (3d Cir. 1945).

\textsuperscript{222} 9 F.R.D. 555 (W.D. Mo. 1949).

\textsuperscript{223} \textit{Ibid.}
This decision and the theory behind it seem wrong. If a contention is indisputable, a refusal to admit it is improper, and the impropriety does not vary with the costs of proof. Consequently the availability of sanctions should not depend on the amount involved.

The Defective Answer: Admissions by Default

The thrust of the discussion thus far has been that the federal admissions procedure is less effective than it might be. In one respect, however, the admissions procedure is too “effective.” Rule 36 states that a matter shall be deemed admitted unless . . . the party to whom the request is directed serves . . . a sworn statement denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters . . . .

Read literally—as some courts read it—this passage means that a litigant is deemed to have made an admission if his reply, though on its face a refusal to admit, either (a) is not verified or (b) does not deny “specifically” or (c) states that the litigant is unable to deny or admit but fails to explain “in detail” the reasons for his inability. The admission occurs automatically without notice to anyone and without giving the answering litigant an opportunity to cure the defect in his reply. Two undesirable consequences flow from this approach.

A litigant who admits a matter normally loses his right to dispute it. Thus to hold that a defective reply results in an admission may mean that the answering litigant, because of inadvertence, will be prohibited from presenting a


225. Southern Ry. v. Crosby, 201 F.2d 878 (4th Cir. 1953); Riordan v. Ferguson, 147 F.2d 983, 986 n.1 (2d Cir. 1945).

226. Princess Pat, Ltd. v. National Carloading Corp., 223 F.2d 916 (7th Cir. 1955); cf. West Kentucky Coal Co. v. Walling, 153 F.2d 582 (6th Cir. 1946).

227. This was true in each of the cases cited in notes 224, 225 and 226 supra, except for three. In Woods v. Stewart and SEC v. Kaye, Real & Co. the answering party was given an opportunity to correct his reply; in the Sieb’s Hatcheries case the court recognized that it might grant such relief but held that no relief was warranted on the facts there present.

228. Notwithstanding the undesirable aspects of automatic admissions, the present form of Rule 37(c) suggests an argument in their favor. Since 37(c) makes sanctions available only if a party has served a “sworn denial," litigants could avoid admissions without incurring sanctions unless unsworn denials or sham refusals to admit or deny were construed as admissions. Thus the automatic-admission approach can be viewed as an attempt to remedy the problem created by Rule 37(c). See text at notes 215-16 supra for discussion of Rule 37(c) and a suggested amendment to it.
meritorious claim or defense. If suppression of the merits were necessary in order to protect the interests of some party or to insure effective operation of the admission procedure, suppression might be justified, but there is no such justification here. The party who served the request knows that an admission was not intended, and consequently the answer can be accepted as a refusal to admit without deceiving him. The portion of Rule 36 which sets forth the requirements for a proper answer can be adequately enforced without holding that defective answers automatically result in admissions. And, though the answering litigant may have been careless in formulating his reply, carelessness per se is an insufficient reason for barring proof on the merits. Moreover, defects in the form of an answer are not always caused by carelessness. Though a litigant reasonably believes that he has adequately explained why he can neither admit nor deny, a court might find that he has not explained the matter “in detail.” And even an apparent denial can be found formally defective. In Southern Ry. v. Crosby, for example, the reply to the request read, “[D]efendant denies the accuracy of the statements contained in your notice and refuses to admit the truth thereof.” The court, stating that a denial of “accuracy” is not a denial of “essential truth” and that “a refusal to admit does not amount to a denial,” held that the contention in question had been admitted.

The second objection to an automatic-admissions rule is that it leads to absurd decisions on the availability of sanctions. If an answer appears to be a refusal to admit, the requesting party is likely to prepare and present proof of the matter in question. When he asks for costs under Rule 37(c), however, he may be met with the argument—already accepted in two cases—that since the reply to the request was defective and the contention in question therefore was admitted, no proof was necessary and consequently no costs are recoverable. The argument seems logical, but the result is ridiculous. The answering litigant wished to avoid an admission so that his opponent would have to prove the contention in question. If the wish is realized and the refusal to admit was improper, the answering litigant should bear the costs of proof.

Although defective replies should not automatically result in admissions, insistence on the form of answer required by Rule 36 may produce admissions which would otherwise be withheld and therefore is desirable. Fortunately,
we can enforce the Rule's requirements without incurring the consequences of automatic admissions. An apparent refusal to admit could be accepted as such unless it is challenged, and if a challenge is made, the answering litigant could be given an opportunity to correct his answer. Absent a challenge, all parties would assume—and correctly so—that the reply is an effective refusal to admit. If a reply is challenged, the proceedings following the challenge would make clear whether or not there has been an admission. Though some defective answers would go unnoticed, and to this extent noncompliance with the Rule would be tolerated, an automatic-admissions rule has the same weakness. Another objection to the suggested approach is that it compromises the extra-judicial character of the admission procedure. It is better, however, to compromise this principle than to accept the hazards inherent in an automatic-admissions rule. Moreover, the compromise can be minimized.

In many cases both the defect in an answer and the means of correcting it will be obvious. This would normally be true of nonverification, for example. In such cases the answering litigant probably would agree that his reply is defective, and the steps he takes to eliminate the defect probably would be acceptable to the requesting party. Judicial intervention would be unnecessary. Sometimes, of course, the sufficiency of the answer will be disputed. Both situations could be handled and unneeded hearings eliminated if objections to the answer were first submitted to the answering litigant and could be taken to court only if the parties were unable to agree on an acceptable form of answer. Should such a procedure be adopted, it would be wise to provide also that the court may impose the costs of the hearing on a party who fails to correct an obviously defective answer or objects to one that is clearly sufficient.

A problem similar to those discussed above arises if an answer to a request is not served within the proper time. Under a literal reading of Rule 36, late service results in an admission.236 Here, too, the admission should not be automatic. If it were, unjustified suppression of the merits might result.237 How-

236. Under Rule 36 the admissions requested are deemed granted unless a reply is served “within a period designated in the request, not less than 10 days after service there- of or within such shorter or longer time as the court may allow.” For cases in which late service has resulted in an admission, see note 238 infra.

237. The answering party would not be misled if he understands Rule 36 and knows that his reply to the request was not served within the allotted time. However, if the reply is but a day late and the answering litigant has miscalculated the time period, he may think that his answer was timely.

Injustice to the requesting litigant might also occur. If he fails to note that the reply was not served within the proper time and thus assumes that a matter has been denied, he will gather and introduce evidence of the matter at trial. If he later seeks sanctions under Rule 37(c), the court might hold that late service of the answer resulted in an admission, that therefore no proof was necessary, and consequently that costs are not recoverable. See text at note 234 supra.
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however, since a matter is deemed admitted if no response is made to the request, and since the requesting party should be entitled to rely on such admissions, there must be limits on the right to file a late reply. If a litigant is allowed to file a late reply, he in effect is being permitted to withdraw an admission. Consequently late filing should not be permitted if it would prejudice the requesting party. 238

CONCLUSION

No rule expressly solves all the problems that are bound to occur in the course of its application. Inevitably the courts are called upon to answer questions raised, on the one hand, by the application of general terms to specific cases and, on the other, by situations not foreseen and therefore not dealt with by the draftsmen. In passing on the propriety of requests to admit, the courts have had to answer questions of both types. Though the answers given have not always been wise, the errors that have occurred can easily be corrected. Nothing in Rule 36 itself prevents the courts from properly defining the scope of the admissions procedure. And precedent supporting a proper definition is available: Each of the objections to requests that has been asserted has been correctly handled by some courts. Although the scope problem therefore could be left entirely to the courts, three amendments dealing with scope would be desirable. In two instances words presently incorporated in Rule 36—the terms “fact” and “relevant”—have caused confusion and have led to decisions improperly restricting the use of requests. Appropriate amendments would remove all basis for the argument that such restrictions are called for by the Rule itself. The lack-of-knowledge problem should also be solved by amendment, since litigants should be able to determine by reading the Rule whether they have a duty to investigate a matter before answering a request for its admission.

In other respects, amendment is not only desirable but is the only proper remedy for the ills of the admissions procedure. The courts can neither correct the faults of the automatic-admissions provision nor plug the loopholes

238. In Creedon v. Taubman, 8 F.R.D. 268 (N.D. Ohio 1947), plaintiff’s request for admissions was served on August 12, 1947, and defendant made no response until September 11, 1947, one week after plaintiff had moved for summary judgment, at which time defendant moved for leave to file an answer to the request. The motion was denied and summary judgment was entered for plaintiff. In Berry v. United States, 157 F. Supp. 317, 318 n.1 (D. Ore. 1957), the answering party was granted a five-week extension of time within which to answer the request but made no reply until almost seven weeks after the expiration of the five week extension. The matters contained in the request were held to be admitted.

In three cases the courts have held that a party should be permitted to file a late reply to a request. Bowers v. E.J. Rose Mfg. Co., 149 F.2d 612 (9th Cir. 1945) (letter containing requests mislaid); Countee v. United States, 112 F.2d 447, 451 (7th Cir. 1940) (court noted that late filing would not cause prejudice and found no indication of bad faith); Brust v. Industrial Bank of Commerce, 18 F.R.D. 90 (S.D.N.Y. 1955) (court said there would be no prejudice after the delinquent claimed a lack of familiarity with the Federal Rules.).
in the sanction section without disregarding the express language of Rules 36 and 37. Proposed amendments to the Rules, dealing with these problems as well as problems of clarification, are set forth in an appendix to this article.

APPENDIX

Our experience with the federal admissions mechanism has revealed several problems caused by the existing formulations of the governing rules and has indicated some appropriate additions to the procedures currently available. The revisions below would furnish the needed changes. Deletions from the present rules are indicated by brackets, additions by italics.

Rule 36.

ADMISSION OF FACTS AND OF GENUINENESS OF DOCUMENTS

(a) Request for Admission. After commencement of an action a party may serve upon any other party a written request for the admission by the latter of the genuineness of any documents described in and exhibited with the request or of the truth of any matters set forth in the request. If a plaintiff desires to serve a request within 10 days after commencement of the action leave of court, granted with or without notice, must be obtained. Copies of the documents shall be served with the request unless copies have already been furnished. [Each of the matters of which an admission is requested shall be deemed admitted unless] Within a period designated in the request, not less than 10 days after service thereof or within such shorter or longer time as the court may allow on motion and notice, the party to whom the request is directed shall serve upon the party requesting the admission either (i) a sworn [statement] answer denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters or (ii) written objections on the ground that some or all of the requested admissions are privileged [or irrelevant or that the request is otherwise improper in whole or in part], or clearly unrelated to the case or would cause annoyance, embarrassment or oppression, together with a notice of hearing the

239. See note 243 infra.
240. See note 243 infra.
241. The word “fact” has been deleted so that Rule 36 itself will no longer furnish a basis for arguing that a request is objectionable because directed to an “opinion,” a “conclusion” or a matter of “law.” See text at notes 163-84 supra.
242. As Rule 36 now stands, admissions result automatically if an answer is not timely served or fails to comply with subdivision (a) (i). Automatic admissions have proved troublesome, see text at notes 224-38 supra, and the purpose of the deletion above is to eliminate them. However, under the provisions added at notes 245 and 246 infra, the requesting party may on notice and motion seek an order that a matter be deemed admitted because of late service of an answer or noncompliance with (a) (i).
243. This addition, and the deletions of the word “relevant,” are designed to eliminate rulings unduly restricting the scope of requests for admissions. See text at notes 62-85 supra.
objections at the earliest practicable time. If written objections to a part of
the request are made, the remainder of the request shall be answered within
the period designated in the request. A denial shall fairly meet the substance
of the requested admission, and when good faith requires that a party deny
only a part or a qualification of a matter of which an admission is requested,
he shall specify so much of it as is true and deny only the remainder. If the
answer asserts that a matter cannot be truthfully admitted or denied, the re-
questing party prior to trial may serve the answering party with information
concerning the matter, and within 10 days after service thereof or within such
shorter or longer time as the court may allow on notice and motion, the an-
swering party may serve an amended answer.

A matter shall be deemed admitted if no answer or objection to that part of
the request directed to the matter is served. 244

On notice and motion made by the requesting party within 10 days after
service of an answer or amended answer, the court, if it finds that the answer
or amended answer directed to a matter does not comply with subdivision
(a)(i), may order either that the matter be deemed admitted or that an
amended answer be served. If the court orders service of an amended answer
and none is served, the matter shall be deemed admitted. 245

On notice and motion made by the requesting party within 10 days after
service of an answer or amended answer, the court, if it finds that the answer
or amended answer was not timely served, shall order that the matters to
which the answer or amended answer was directed are deemed admitted, ex-
cept that such an order shall be denied if the court finds that the late service
would not prejudice the requesting party. 246

Neither an objection to a request nor a motion that a matter be deemed
admitted shall be heard unless the moving party has certified to the court in
writing that he has been unable through consultation with opposing counsel
to resolve the question raised by such objection or motion. Upon the hearing
thereof, the court, if it finds that the party making or the party opposing the
objection or motion has acted unreasonably, may award to the other party the
reasonable expenses incurred in connection with the hearing, including attor-
ney's fees.

(b) Effect of Admission. Any matter expressly admitted or deemed ad-
mitted under subdivision (a) of this rule shall be conclusively established for
purposes of the pending action unless the court on motion and notice permits
withdrawal of the admission. Withdrawal shall not be permitted unless the
court finds that the answering party acted with due diligence and that the
requesting party would not be prejudiced thereby. 247 Any such admission
made by a party [pursuant to such request] is for the purposes of the pend-

244. This addition is made necessary by the deletion at note 241 supra.
245. See note 242 supra.
246. See note 242 supra.
247. The purpose of the above provision is to clarify existing uncertainty concerning
the effect of an admission. See text at notes 188-213 supra.
ing action only and neither constitutes an admission by him for any other purpose nor may be used against him in any other civil or criminal action or any other proceeding.

Rule 37(c).

**EXPENSES ON REFUSAL TO ADMIT.** If a party, after being served with a request under Rule 36 [to admit the genuineness of any documents or the truth of any matters of fact, serves a sworn denial thereof] fails to admit the genuineness of any such document or the truth of any such matter and if the party requesting the admissions thereafter proves the genuineness of any such document or the truth of any such matter [of fact], he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making such proof, including reasonable attorney's fees. Unless the request was held objectionable under subdivision (a) or the court finds that there were good reasons for the [denial] failure to admit or that the admissions sought were of no substantial importance, the order shall be made. Lack of knowledge or information concerning the genuineness of a document or the truth of a matter shall not be a good reason for failing to admit the same if the means of acquiring the information or knowledge were reasonably within the power of the answering party.

Rule 37(f).

**EXPENSES AGAINST UNITED STATES.** Expenses and attorney's fees are not to be imposed upon the United States under this rule, except that expenses and attorney's fees under subdivision (c) of this rule may be imposed upon the United States.

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248. This addition eliminates any doubt concerning the applicability of 36(b) in criminal proceedings. See text at notes 51-53 supra.

249. This provision plugs the loophole in 37(c) noted and discussed in text at notes 215-16 supra.

250. See text at notes 145-62 supra.

251. See text at notes 217-19 supra.