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ADMISSIONS PRACTICE†

THOMAS W. EVANS*

Although Judge Lumbard's memoirs¹ do not mention admissions practice, they provide a valuable lesson to those interested in this new approach to litigation. The former Chief Judge of the United States Court of Appeals for the Second Circuit points out that when he first went on that bench, it was conventional wisdom that judges would not read briefs before oral argument. This practice had the purported benefits of saving time and keeping the bench free from prejudice. The custom might have continued for decades had it not been for a visit by Judge Lumbard and others to England, where they observed the judiciary at work, disposing of many appeals from the bench directly after argument. Thereafter, the judges of the Second Circuit began to read briefs and have the benefit of memoranda, prepared by clerks, prior to argument. Now the Second Circuit disposes "of its cases faster than any other circuit."² Advance study has made it possible for the court to decide many more cases per judge than before. So much for conventional wisdom.

Admissions practice is an attempt to break through entrenched modes of proceeding which have too often turned discovery from a useful aid in litigation to a wasteful, counterproductive process. It is a relatively new approach, modeled in part on successful local procedures and common sense, and made possible in its full vigor by significant changes in the Federal Rules of Civil Procedure over the past two decades.³ Its objective is to eliminate

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¹ COLUM. U. & N.Y.B. FOUND., *A CONVERSATION WITH J. EDWARD LUMBARD* (1980).

² Cheever & Frost, *2nd Circuit Rapped for Rushing Rulings*, *Manhattan Law.*, May 31-June 6, 1988, at 1, col. 3.

³ See FED. R. CIV. P. 11, 16, 26 & 36. Rule 36, which provides the foundation for admissions practice, states in pertinent part:

A party may serve upon any other party a written request for the admission,

unnecessary issues, narrow the ambit of proof, and define remaining issues so that they may be dealt with in the most effective way. Successful implementation, however, does require the attention of judges and diligent application by at least one of the protagonists in the adversary process. Indeed, a departure from a generation of "conventional wisdom" is required.

AN INCOMPLETE ATTEMPT AT REFORM

In *McSparran v. Hanigan*,⁴ a case later quoted with approval by the Advisory Committee on Civil Rules, Judge Freedman stressed the issue-defining function of a request for admission under rule 36 of the Federal Rules of Civil Procedure.⁵ Specifically, Judge Freedman stated:

Having adopted a simpler form of pleading the Federal Rules preserved in the request for admission the means for obtaining a conclusive admission of any relevant fact Were this otherwise then the much vaunted improved Federal Rules would be without a well-known and useful mode of limiting the factual disputes⁶

Unfortunately, after passage of the new Rules in 1938, lawyers elected not to limit the issues involved in their lawsuits. They ig-

for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact including the genuineness of any documents described in the request. . . .

. . . An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why the party cannot admit or deny it.

FED. R. CIV. P. 36(a). The enforcement mechanism of rule 36 is found in rule 37(c), which states in pertinent part:

If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees.

FED. R. CIV. P. 37(c).

⁴ 225 F. Supp. 628 (E.D. Pa. 1963).

⁵ *Id.* at 637.

⁶ *Id.*

nored requests for admission, and discovery became a morass. In recent years, however, rules 36 and 37 of the Federal Rules of Civil Procedure, which deal with requests for admission and related enforcement provisions, have been significantly strengthened.⁷ Used in conjunction with the discovery conference incorporated into federal procedure in 1980,⁸ the advanced pretrial conference procedure adopted in 1983,⁹ the 1983 amendments to the Federal Rules of Civil Procedure,¹⁰ and the heightened responsibility of attorneys under revised rules of professional conduct, a fresh approach to civil litigation can be achieved.

This new approach, which could be termed "admissions practice," is defined as the use of successive requests for admission together with discovery and pretrial conferences to narrow issues and attendant requirements of proof in the course of litigation. Simultaneous service of a single omnibus interrogatory requesting reasons for denial can further enhance the efficacy of the procedure.¹¹

Properly employed, this practice should define issues at the outset of the case and thereby enhance the opportunity for early settlement or dispositive motions; make discovery more efficient and less costly; maintain a balance between active judicial case management and the adversary process; and reduce the breadth and complexity of matters presented for trial by court or jury. In addition, by shifting the obligation of attorney's fees to the party forcing unnecessary proof, the more frequent resort to admissions practice should have the effect of deterring unnecessary litigation.

⁷ The manner in which rules 36 and 37 have been strengthened in recent years will be traced throughout this paper. A comprehensive early history is found in the oft-cited Finman, *The Request for Admissions in Federal Civil Procedure*, 71 YALE L.J. 371 (1962).

⁸ See FED. R. CIV. P. 26(f).

⁹ See FED. R. CIV. P. 16(b). Rule 16(b) advances the pretrial conference in the litigation continuum to the first 120 days after the filing of the complaint, instead of its customary posture on the eve of trial. For discussions of the effect of the 1983 amendments on rule 16, see Cavanagh, *The August 1, 1983 Amendments to the Federal Rules of Civil Procedure: A Critical Evaluation and a Proposal for More Effective Discovery Through Local Rules*, 30 VILL. L. REV. 767, 781-86, 804-05 (1985); Hall, *New Rules Amendments Are Far Reaching*, 69 A.B.A. J. 1640, 1642-43 (1983); Walker, *The Other 1983 Amendments to the Federal Rules of Civil Procedure—Pleadings and Motions; Pretrial and Discovery; U.S. Magistrate Cases*, 20 WAKE FOREST L. REV. 819, 830-39 (1984).

¹⁰ See, e.g., FED. R. CIV. P. 11, 16(f) & 26(g).

¹¹ The practice of issuing an omnibus interrogatory contemporaneously with requests for admission was first suggested to the author by John C. Hamilton, Esq., of South Bend, Indiana. "Because answering this type of interrogatory is more burdensome than simply admitting the request, it often eliminates frivolous denials." Dombroff, *Requests for Admissions: Weighing the Pros and Cons*, TRIAL, June 1983, at 82, 83.

A MISUNDERSTOOD RULE

As noted, attorneys have generally ignored requests for admission. Nevertheless, when evasive action has precluded meaningful response to a request, judges have been reluctant to pursue the stringent sanctions provided. At least part of the problem comes from a basic misunderstanding of the rule.

It has been over forty years since the scope of requests for admission was expanded to include matters of fact other than those set forth in designated documents,¹² but many lawyers continue to use requests for admissions only in relation to documents. The West Publishing Company made its own modest contribution to a narrow application of the rule by including a misprint of the title of the rule for a decade in successive editions through 1980. Although the title had been changed in 1970 from "Admission of Facts and of Genuineness of Documents" to "Requests for Admission," the West version through the 1980 edition of the Federal Rules read "Requests for Admission of Documents."

Substantial changes in the rule were brought about by the 1970 amendment, so that matters of opinion and mixed questions of law and fact are now within its ambit. The amendment did much to eliminate the traditional "matters in dispute" objection. A failure to respond is no longer acceptable, even if the matter in question "present[s] a genuine issue for trial."¹³ Of course, if the requests themselves prove to be burdensome in character, the undated party can obtain a protective order under rule 26(c). The 1970 amendment also adopted the majority view, and the position taken by most commentators, that if the responding party lacks knowledge, he must inform himself in reasonable fashion and cannot simply answer on the basis of the knowledge he happens to possess at the time of the request.¹⁴

Even after the sweeping changes of 1970, some commentators persist in their basic misunderstanding of the rule. They maintain that "[s]trictly speaking Rule 36 is not a discovery procedure at all, since it presupposes that the party proceeding under it knows the facts or has the document and merely wishes his opponent to con-

¹² See FED. R. CIV. P. 36 advisory committee's note.

¹³ FED. R. CIV. P. 36(a) advisory committee's note.

¹⁴ See FED. R. CIV. P. 36(a) advisory committee's note; see also 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2261 (1970 & Supp. 1987).

cede their genuineness."¹⁵ Such an approach is without foundation. Certainly there is no suggestion in the rule itself that the subject of the request must somehow be known to the party propounding it; to the contrary, the only limitation in the rule is that the subject matter fall within the "scope of Rule 26(b)," which defines the scope of discovery generally under the Federal Rules.¹⁶

Another misunderstanding which remains in the treatises involves a concern that requests not cover the "entire case."¹⁷ If this view ever had support, the 1970 amendment, with its broad coverage, would seem to have laid it to rest. Notions that requests should be limited to facts or documents in hand and not cover all elements of the case, stem in part from the early history and subsequent misidentification of the rule, but they have no place in admissions practice today. Greater scope flows not only from the recent amendments to the rule itself, but from the expanded responsibility of attorneys to conduct a reasonable inquiry in good faith while responding to discovery requests and to refrain from concealing documents or other material with potential evidentiary value.¹⁸

The use of requests for admission has significantly increased since 1970.¹⁹ Nevertheless, they still represent a small percentage of discovery mechanisms currently in use. A survey of requests to admit in federal practice reveals that:

Before the 1970 amendments to [rule] 36 they were used in but 10 per cent of federal cases, a lower percentage than that of any other federal discovery mechanism except depositions upon written interrogatories. After the 1970 amendments to [rule] 36, requests to admit were not used in 52 per cent of federal cases and constituted but 5.6 per cent of the total use of all discovery mechanisms in the remaining 48 per cent of cases.²⁰

Perhaps of even greater significance, of the 3,000 cases studied, there was not a single motion for sanctions under rule 37(c) for failure to admit or forcing unnecessary proof.²¹ Attorneys are ei-

¹⁵ 8 C. WRIGHT & A. MILLER, *supra* note 14, § 2253, at 706.

¹⁶ See FED. R. CIV. P. 36(a).

¹⁷ See Finman, *supra* note 7, at 402-04.

¹⁸ See FED. R. CIV. P. 11, 26(g).

¹⁹ J. LEVINE, *DISCOVERY: A COMPARISON BETWEEN ENGLISH AND AMERICAN CIVIL DISCOVERY LAW WITH REFORM PROPOSALS* 51 (1982).

²⁰ *Id.* (footnotes omitted).

²¹ *Id.* at 50-51.

ther unaware of this powerful device, or unwilling to use it.

The only factor necessary for successful implementation of admissions practice is an awakening of the bar. Rule 36 can now provide a potent weapon in the adversary process. Its scope is established by the clear and precise wording of its first sentence:

A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact including the genuineness of any documents described in the request.²²

The rule has teeth.²³ When a party requesting admission moves to determine the sufficiency of answers or objections, the court under rule 37(a)(4) may award to the prevailing party expenses entailed by the motion.²⁴ However, the key to enforcement is rule 37(c), which empowers the court to award reasonable expenses, including attorney's fees, to a party who has been put to his proof by an unreasonable failure to admit.²⁵

THE END OF THE SPORTING THEORY AND THE BEGINNING OF THE GREAT GAME

A major impetus to the passage of the Federal Rules of Civil Procedure in 1938 was Roscoe Pound's oft-quoted plea that the "sporting theory of justice" be laid to rest.²⁶ Dean Pound decried the system of litigation that permitted counsel to hold for trial dispositive evidence and key testimony. Surprise, he felt, had no place in a genuine contest on the merits.

²² FED. R. CIV. P. 36(a).

²³ "One of the most powerful tools of discovery available to trial lawyers is [the] request[] for admission provided for in Rule 36 of the Federal Rules of Civil Procedure." Dombroff, *supra* note 11, at 82.

To serve their purpose, requests to admit should be used early, often, and precisely. Skillful application of requests to all phases of case preparation and trial focuses evidence on issues to be decided and on evidence to decide those issues correctly. Proper application and enforcement of the rules on requests reduce judicial and courtroom delay and help resolve a case, and use pretrial and trial time economically.

Atkinson & White, *Requests to Admit*, TRIAL, Apr. 1987, at 45, 54.

²⁴ FED. R. CIV. P. 37(a)(4).

²⁵ See FED. R. CIV. P. 37(c).

²⁶ Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395, 404-06 (1906).

The revolutionary thrust of the new Rules was two-pronged. First, provision was made for "notice pleading." Only "a short and plain statement of the claim showing that the pleader is entitled to relief" was now required.²⁷ Litigants have derived substantial benefits from this less stringent pleading requirement, which has reduced technical battles while increasing access to the courts.

The second thrust of the rules revolution was the provision for ample discovery. As the United States Supreme Court has observed: "Such simplified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues."²⁸

However, while disclosure has been emphasized, relevance has been virtually ignored. Under the current version of the Federal Rules, it is enough if the material desired to be obtained through discovery relates "to the subject matter involved in the pending action" or is "reasonably calculated to lead to the discovery of admissible evidence."²⁹ As a result, discovery has become an end in itself, often winding aimlessly at incredible expense, with no other justification than "that is the way things are done." Over a century ago, Anthony Trollope, in *Orley Farm*, might as well have been talking about current discovery practices when he said:

Those practices in which we most widely depart from the broad and recognized morality of all civilized ages and countries are to us the Palladiums of our jurisprudence. Modes of proceeding which, if now first proposed to us would be thought to come direct from the devil, have been made so sacred by time that they have lost the horror of their falseness in holiness of their age.³⁰

Trollope's lament was echoed more recently by Justice Powell, joined by Justices Stewart and Rehnquist, who became so disenchanted with the state of modern discovery procedures that they dissented in the spring of 1980 from the Supreme Court's usually routine adoption of amendments to the Federal Rules of Civil Procedure relating to discovery.³¹ Justice Powell's opinion called for

²⁷ FED. R. CIV. P. 8(a)(2).

²⁸ *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957).

²⁹ FED. R. CIV. P. 26(b)(1).

³⁰ A. TROLLOPE, *ORLEY FARM* 159 (Knopf ed. 1950).

³¹ *Amendments to the Federal Rules of Civil Procedure*, 85 F.R.D. 521, 521-23 (1980) (Powell, J., dissenting).

something more basic than mere tinkering with the Rules. But this impressive call to action may well have underestimated the inertia which now grips the litigating bar. At least one federal district judge believes that lawyers simply do not want to get about the business of trial:

In my 13 years on the bench . . . only twice have lawyers asked me for a trial date. It's the last thing they want. It's expensive, it takes them away from their other work, they may lose the case, and most importantly, once the case is over the meter stops running.³²

Attorneys alone are not to blame. Former American Bar Association president Leonard Janofsky has observed that "the comity that exists between lawyers and judges in a jurisdiction can be the single most powerful cause of cost to the client and delay in the work of the courts."³³

Circuit Judge Parker was undoubtedly more hopeful than accurate when he said that "[a] suit at law is not a children's game."³⁴ Certainly, modern discovery has become a game of hide-and-seek. Countless waves of interrogatories, which tend to obscure and not clarify the issues, are routine. Documents are produced by the carload in the hope that clearly inculpatory papers will be lost in the shuffle. Genuine issues are masked by ambiguous pleadings. Depositions, most of which are never referred to at trial, are often taken for years, failing more often than not to yield a shred of admissible evidence. And the salutary possibility of early dispositive motions is virtually eliminated by the mere bulk of production in which a triable issue may be lurking.³⁵

Discovery has become the new "Great Game,"³⁶ as lawyers and

³² Pike, *Cures Fail: Civil Cases Drag On*, Nat'l L.J., Feb. 9, 1981, at 20, col. 1.

³³ Janofsky, A.B.A. *Attacks Delay and the High Cost of Litigation*, 65 A.B.A. J. 1323, 1324 (1979); see also Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 COLUM. L. REV. 480, 494-96 (1958) (noting reluctance of judges to "wield[] their powers under rule 37").

³⁴ *United States v. A.H. Fischer Lumber Co.*, 162 F.2d 872, 873 (4th Cir. 1947).

³⁵ Discovery abuses are well-documented. See, e.g., Edelstein, *The Ethics of Dilatory Motion Practice: Time for Change*, 44 FORDHAM L. REV. 1069 (1976) (noting attorneys' excessive use of motions under Federal Rules of Civil Procedure); Pollack, *Discovery—Its Abuse and Correction*, 80 F.R.D. 219 (1979) (much abuse has stemmed from attorneys' "virtually unbridled discretion over discovery").

³⁶ Rudyard Kipling and historian H.W.C. Davis popularized the phrase "Great Game" to describe the nineteenth century British-Russian contest, conducted largely through surrogates, for control of the central Asian plateau. The closest current parallel, in terms of intrigue as an art form, may be found in the pretrial phase of American litigation.

judges have been loath to press for full enforcement of the Rules. In regard to rules 36 and 37 specifically, courts have too often accepted without question a party's excuse under rule 36 that it "has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable [it] to admit or deny."³⁷ Similarly, courts have been reluctant to assess costs and attorney's fees under rule 37 for failure to admit, as long as counsel for the responding party has made the naked assertion that his client "had reasonable ground to believe that [it] might prevail on the matter, or [that] there was other good reason for the failure to admit."³⁸ It has been easier to delay the decision on these matters until "final disposition of the request . . . at a pre-trial conference,"³⁹ than it has been to come to grips with the matter at the outset of the case. In short, the sporting theory is by no means dead; attorneys have simply changed the way they play the game.

THE OPPORTUNITY PROVIDED BY THE NEW CONFERENCES

The new discovery conference and the advanced pretrial conference may prove to be of great value in probing the substantiality of respondent's excuses for failure to admit. Where counsel, especially in a complex case, alleges that "reasonable inquiry" has failed to produce the "readily obtainable" information needed to answer the request, the judge at the conference must press counsel to estimate the time required to review his client's files and to respond. Unless it is clear that there is a dispositive motion which should precede this undertaking, an attorney should be ordered, within a reasonable period, to learn his own case, and to admit or deny his adversary's request.

Under the Federal Rules, an application for a discovery conference must begin with a statement of issues as they then appear.⁴⁰ It is here that requests for admission can first be used to eliminate and refine issues which are too often cloaked by ambiguous pleadings. The omnibus interrogatory, served simultaneously with the requests, will act to pinpoint specific bases for denial and names of witnesses who have personal knowledge of such bases.

An attorney who causes prolonged and unnecessary discovery

³⁷ FED. R. CIV. P. 36(a).

³⁸ FED. R. CIV. P. 37(c).

³⁹ FED. R. CIV. P. 36(a).

⁴⁰ FED. R. CIV. P. 26(f).

by posing evasive or superficial responses to requests for admission must be held to account. Either he or his client should pay the costs and considerable attorney's fees engendered by such actions. Two common examples of lawyer conduct that can cause expensive litigation come to mind: the unscrupulous plaintiff's attorney in class or derivative actions who simply keeps discovery rolling for years in order to justify his fee on eventual settlement; and the well-heeled defendant's lawyer who uses discovery in complex cases as a weapon of attrition to wear down a less affluent plaintiff. Attorneys, in the past, have been permitted to proceed along these paths virtually without risk. Now, however, resourceful adversaries, supported by conscientious judges, can use admissions practice to put an end to these excesses by making the assessment of attorney's fees a likely consequence of such questionable pursuits.

There may well be a new readiness on the part of the courts to accept admissions practice as a solution to the present litigation impasse. Certainly there is a noticeable predisposition to eliminate discovery abuses. In addition to Justice Powell's dissent, there have been other indications from the Supreme Court that more stringent control by the courts over the discovery process is required.⁴¹ The creation, in 1980, of the rule 26(f) discovery conference was directly responsive to this judicial concern, as was the expansion, in 1983, of the rule 16 pretrial conference. Importantly, rule 16 continues to include as a subject for discussion "the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof."⁴² While the traditional premise for avoidance of response is still in rule 36, postponement of "final disposition" of the request until the pretrial conference no longer provides automatic delay until the eve of trial. Under the revised rule 16, the initial occasion for this judicial decision is advanced to the first 120 days of the lawsuit.⁴³

While there is fear that judges may use the new procedures to abandon the traditional adversary process in order to dispose of

⁴¹ See, e.g., *Herbert v. Lando*, 441 U.S. 153 (1979). Justice White underlined the need for judges to exercise "appropriate control" to ensure speedy and inexpensive discovery. *Id.* at 177; see also *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976) (Court upheld district judge's dismissal under rule 37 of action in which plaintiffs failed to answer written interrogatories in timely manner).

⁴² FED. R. CIV. P. 16(c)(3).

⁴³ Rule 16(b) now reads in pertinent part: "The [scheduling] order shall issue as soon as practicable but in no event more than 120 days after filing of the complaint." FED. R. CIV. P. 16(b).

cases quickly,⁴⁴ the more prevalent concern regarding judicial involvement in discovery is that the court's time is simply too valuable to spend on these matters.⁴⁵ However, the more progressive view may be seen in the work of such creative judges as Chief Judge Peckham of the United States District Court for the Northern District of California, who has been a leader in maintaining that such procedures provide for efficient judicial case management.⁴⁶ In a similar vein, Judge Medina has noted that "[o]ne of the prime objectives of [the pretrial conference] is to do away with the old sporting theory of justice and substitute a more enlightened policy of putting the cards on the table, so to speak, and keeping surprise tactics down to a minimum."⁴⁷ Admissions practice provides a procedure whereby the attorneys can give the judge sufficient information to effectively deal with issues early in the course of the litigation, while preserving the traditional adversary mode. Lawyers and judges must now learn how far a court can go at pretrial conferences under the present rules in pressing an attorney to sufficiently learn his own case in order to respond to a request to admit.

THE NEED FOR PERIODIC REVIEW

Chief Judge Peckham and others⁴⁸ have successfully used periodic discovery conferences under appropriate local rules to define issues and control discovery. Although it was originally contemplated that rule 26(f) conferences would be the exception rather than the rule,⁴⁹ the *Manual for Complex Litigation* has observed that judges should act *sua sponte* in calling such conferences in potentially complex cases where discovery seems to be getting out

⁴⁴ See, e.g., Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 445 (1982) (justice, not efficient case management, must be judiciary's paramount concern).

⁴⁵ See, e.g., Nordenberg, *The Supreme Court and Discovery Reform: The Continuing Need for an Umpire*, 31 SYRACUSE L. REV. 543, 557 (1980) (amendments to Federal Rules have attempted to reduce need for judicial intervention in discovery).

⁴⁶ See Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770 *passim* (1981).

⁴⁷ *Clark v. Pennsylvania R.R.*, 328 F.2d 591, 594 (2d Cir.), *cert. denied*, 377 U.S. 1006 (1964).

⁴⁸ See AMERICAN COLLEGE OF TRIAL LAWYERS, RECOMMENDATION ON MAJOR ISSUES AFFECTING COMPLEX LITIGATION 14-15 (1981) (describing the approach to discovery adopted by Judge Greene in *United States v. American Tel. & Tel. Co.*, 461 F. Supp. 1314 (D.D.C. 1978)).

⁴⁹ See FED. R. CIV. P. 26(f) advisory committee's note; MANUAL FOR COMPLEX LITIGATION, SECOND § 20.13 (1985).

of control.⁵⁰ Counsel have always been expected at such conferences to prepare statements of the issues as they perceive them. After a discovery conference, the court enters "an order tentatively identifying the issues for discovery purposes."⁵¹ Rule 16 also lists as a subject for the pretrial conference "the formulation and simplification of the issues."⁵² Requests for admission should be used to aid this process. It is the *combination* of the exchange of requests addressed to issue reduction and formulation within the conference setting that yields the promise of the new approach. An exchange of requests for admission prior to the discovery conference will enable the court to know the positions of the opposing parties. If more time is needed to conduct a bona fide "reasonable inquiry," periodic discovery conferences and successive requests for admission may be used.

There is concern in some quarters that the new rules of discovery will create a satellite motion practice, or a new layer of inquiry, which itself could become burdensome.⁵³ This concern is misplaced if admissions practice is properly policed by the courts. Comprehensive requests for admission—designed to elicit genuine issues and only necessary facts—might well replace "waves" of interrogatories and parades of unnecessary deponents. The single omnibus interrogatory, served simultaneously with requests for admission, can probe specific bases for denial and obtain information on the identity of witnesses who can supply further information, and all of this with far greater economy and efficiency than other devices now employed more or less automatically by litigators. However, judges must constantly be aware of the unfortunate tendency of lawyers to develop new "games." Great care must be taken lest admissions practice itself gives way to the lawyer's penchant for prolixity. Some years ago, an attorney requested expenses for failure to admit in a case in which he could have just as easily obtained the information himself. Chief Judge Hall of the United States District Court for the Southern District of California denied the request, noting that "[i]f a lawsuit is merely to be a game . . . some other court than this one is going to have to say

⁵⁰ See MANUAL FOR COMPLEX LITIGATION, SECOND, *supra* note 49, §§ 20.1, 20.13.

⁵¹ FED. R. CIV. P. 26(f).

⁵² FED. R. CIV. P. 16(c)(1).

⁵³ See Lerner & Schwartz, *Why Rule 11 Shouldn't Be Changed*, Nat'l L.J., May 9, 1983, at 13, col. 1.

so."⁵⁴ If all judges handle admissions practice with such a notion in mind, requests for admission can be effectively used in conjunction with the pretrial conferences to clarify the issues before the court and lessen the delays typically associated with discovery in the past.

SUPPORT IN THE FORM OF HEIGHTENED PROFESSIONAL RESPONSIBILITY

How far must a lawyer go in responding to a request to admit? While he may not have an ethical duty to "prove" the other side's case, "a reasonable burden may be imposed on the parties when its discharge will facilitate preparation for trial and ease the trial process."⁵⁵ At some point, counsel must conduct an investigation in order to prepare *his own case*. It is in revealing the facts unearthed in this process—or the information which becomes "readily available" as investigation proceeds—that the sporting theory dies hardest.

The draftsmen of the "Kutak Code,"⁵⁶ adopted by the American Bar Association House of Delegates in August, 1983, have attempted to create a more affirmative duty on the part of counsel in the discovery process. In some instances, there would appear to be only a moderate increase in a lawyer's professional responsibility. Rule 3.2, for example, requires a lawyer to "make reasonable efforts to expedite litigation consistent with the interests of the client,"⁵⁷ and rule 3.4(d) entreats a lawyer not to "make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request."⁵⁸ But rule 3.4(a) appears to go well beyond the requirements of the old ABA Code of Professional Responsibility. Rule 3.4(a) provides that a lawyer shall not "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value or counsel or assist another person to do any such act."⁵⁹

⁵⁴ *Goldberg v. International Testing Corp.*, 30 F.R.D. 367, 368 (S.D. Cal. 1962).

⁵⁵ FED. R. CIV. P. 36(a) advisory committee's note.

⁵⁶ MODEL RULES OF PROFESSIONAL CONDUCT (1983) (amended 1987).

⁵⁷ MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.2 (1983).

⁵⁸ MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(d) (1983).

⁵⁹ MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(a) (1983); *cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(3) (1983) (prohibiting lawyer from concealing or knowingly failing "to disclose that which he is required by law to reveal"). *See generally*

It is unlikely that the process of ethical reform will lead to *immediate* relief in the discovery process. Instructive on this point are the objections which were addressed to an earlier draft of the Model Rules by the New York State Bar Association's Special Committee to Review the ABA Draft Model Rules of Professional Conduct. The Committee found that the draft was "deficient and unacceptable," citing as major drawbacks:

Possible loss of the nationwide agreement which presently exists on matters of professional ethics . . . ; [h]ighly probable loss of the ability to use thousands of cases and ethics opinions applying the [existing Code's] principles to problems encountered in real-life situations . . . ; and [t]he need to reeducate the Bar, disciplinary agencies and the courts to the new and untried language of the Model Rules.⁶⁰

While implementation of specific rules of conduct in specific states may be delayed, the debate over the Kutak Code provides encouraging evidence that the climate for admissions practice is more favorable than ever.

Moreover, certain of the recent amendments to the Federal Rules of Civil Procedure,⁶¹ like their ethical counterparts, are intended to raise the standards of attorney conduct in the discovery process. Rules 7, 11, and 26(g), in particular, seek to subject lawyers to a "good faith" standard in all litigation papers, and a duty to conduct a "reasonable inquiry" before responding to discovery requests, specifically including, in the Advisory Committee comments to the 1983 amendments, the hitherto ignored requests to admit.⁶² On their face, these rule changes would seem to add little to the obligations already established in almost exactly the same terms under rules 36(a) and 37(g). But even if the new rules are viewed as merely duplicative of the standard already included in the admissions area, the amendments represent a reaffirmation of the attorney's duty to make reasonable inquiry in good faith. They also offer encouragement to the courts to enforce sanctions in instances of abuse.⁶³ In this context, counsel responding to a request

Edelstein, *supra* note 35, at 1078-80 (suggesting need for greater professional obligation in discovery).

⁶⁰ Hochberger, *State Bar Report Criticizes ABA Draft Code of Ethics*, N.Y.L.J., Sept. 10, 1980, at 1, col. 3 (quoting Special Committee Report).

⁶¹ See FED. R. CIV. P. 7, 11 & 26(g).

⁶² FED. R. CIV. P. 7, 11 & 26(g) advisory committee's notes.

⁶³ FED. R. CIV. P. 26(g) advisory committee's note; see FED. R. CIV. P. 7, 11 advisory

for admissions will be subjected to greater scrutiny than ever before if he seeks to justify lack of compliance by asserting that information is not "readily obtainable." This is especially true with admissions practice, where the excuse is not simply set out in an affidavit, but is reviewed in the course of a face-to-face confrontation in a discovery conference, or in response to a searching omnibus interrogatory.

Under heightened rules of professional responsibility, an attorney must keep his response current. Accordingly, admissions practice requires periodic conferences and continuing informed intercession by the court. If an attorney does not in fact have sufficient information to respond at an earlier point in the proceedings, he must, on finding that his response was incorrect, inform the court and his adversary at a subsequent conference.⁶⁴ "Good faith" requires no less.

STRATEGY UNDER THE NEW RULES

In the late nineteenth century, a commentator writing in the *Harvard Law Review* observed that "[c]ommon law pleading was the mill of justice in which an undefined, obscure mass of fact was ground down to clear and distinct issues."⁶⁵ Regrettably, this process became corrupted in time, as lawyers used assumpsit, trespass, trover, ejectment, and the other old forms to delay and obscure. It was in large part to eliminate this technical obfuscation that the Federal Rules of Civil Procedure were passed in 1938. However, as we have seen, lawyers have never fully utilized requests for admission to fill the gap in issue clarification which attended the birth of notice pleading.

The present climate is ideal for a return to the clear and distinct issue formulation enjoyed at common law, without the burden of hypertechnical pleading. But a good deal of "conventional wisdom" must be swept away in the process. It would be tragic if the opportunity provided by the early pretrial conference is ignored or abused. Ironically, those who see the judge *only* as a scheduler frequently suggest a totally mechanistic approach: allow

committee's notes.

⁶⁴ See *supra* note 59 and accompanying text.

⁶⁵ Note, *Common Law Pleading*, 10 HARV. L. REV. 238 (1896); see also Weinstein & Distler, *Drafting Pleading Rules*, 57 COLUM. L. REV. 518, 520-23 (1957) (tracing history of pleading).

one set of interrogatories, a certain number of depositions, and just so many days for document production, regardless of the nature of the case. This thinking guarantees a continuation of the same kind of mindless discovery that has led to cries for reform. It also insures satellite litigation as attorneys apply for the inevitable continuances and expanded discovery. Most importantly, the mechanistic school ignores completely the other changes in the Rules, set forth in detail above, which provide the basis for an informed approach to case management.

If discovery is directed more toward issue formulation and reduction, and less toward unbridled accumulation of information, the entire process can be made more productive.⁶⁶ The assumption that "all facts must be in" before the court can deal with issues is not well-grounded. Certain issues can be dealt with early in the case, while others may need more time—but time justified in terms of specific requests and an explanation of the difficulty in response. The process is progressive. The Advisory Committee must have believed this or it never would have recommended that the time of the pretrial conference be moved up to the beginning of the litigation continuum, while retaining the goal of formulating issues, obtaining admissions, and eliminating frivolous claims and defenses. Requests for admission lie somewhere between the pleading and fact-gathering functions. Thus, their sweep should be more fundamental, that is, more directed toward issues, than other discovery devices. If so used, their ultimate effect may be greatly to reduce, or even to replace, those other devices.

A court can pursue this productive role at the outset of a case through the method of logical analysis. Lawsuits are, inescapably, syllogistic in form. "The major premise is the rule of law involved which is never explicitly stated The minor premise consists of the facts which the pleader claims bring his case within the operation of the rule of law embodied in the major premise."⁶⁷ By ana-

⁶⁶ It has been suggested that:

Nothing can be more effective in expediting discovery and bringing litigation into focus than filing requests for admissions at the very outset of litigation. By doing so, you may find that . . . a good bit of what you felt would be in dispute in the case is not in dispute at all.

Dombroff, *supra* note 11, at 85; see also Schwarzer, *Guidelines for Discovery, Motion Practice and Trial*, 117 F.R.D. 273, 277 (1987) ("Requests for admission are an economical and efficient means of making a record of informal exchanges of information . . . and of narrowing issues.").

⁶⁷ M. GREEN, *BASIC CIVIL PROCEDURE* 109 (2nd ed. 1979).

lyzing their adversaries' pleadings—their implicit major premise, if you will—attorneys can draft their requests to ascertain whether a factual basis exists—the minor premise—for the claim or denial. Some brave pioneers have already used this method to their advantage: "If counsel is uncertain as to whether a matter will be controverted," they point out, "a request [for admission] may be stated in terms of application of law to fact. In other words, flag the issues to determine opposition counsel's position."⁶⁸

THE BENEFITS OF THE NEW APPROACH

In the past, the judge's job at the pretrial and discovery conferences has been difficult, if not impossible, mainly due to the combined effect of the lack of issue clarification engendered by notice pleading and the amorphous relevancy limitations placed by the Rules on discovery proceedings. The solution does not require statesmanship, or self-sacrifice, or an idealistic quest for reform. It simply requires one adversary who will pursue admissions practice, and a judge who will enforce the recent amendments to the civil rules relating to discovery. By serving requests for admission before the first pretrial conference, an attorney can eliminate areas of inquiry as he obtains admissions. Most likely, the process will force his adversary to do likewise.

Admissions practice can be implemented by a single party who finds the procedure to work in his particular interest. If his adversary insists on playing the conventional game, and forces the unnecessary pursuit of information by positing a false issue—or an issue in which it is highly unlikely that factual support can be mustered—the court can later order the offending party to pay the costs, including attorney's fees, involved in the fruitless search. Under admissions practice, wars of attrition will henceforth involve a considerable financial risk. Admissions practice thus moves in the direction of changing the "American rule," whereby attorney's fees have been borne by the respective parties regardless of the result of the litigation. The American rule emerged in colonial days as a meaningful part of our indigenous independent spirit. Every American would have his day in court. But admissions practice introduces a salutary middle ground. Fees, unlike under the British system, are not simply taxed to the losing party. Here they are

⁶⁸ M. CALLAHAN, B. BRAMBLE & F. RAPOPORT, *DISCOVERY IN CONSTRUCTION LITIGATION* § 9-3(A) (2d ed. 1987).

assessed to the party causing unnecessary proof.⁶⁹ In short, admissions practice presents a useful, perhaps ideal, method of deterrence of discovery abuse, while carefully retaining the traditional right to a day in court.

Throughout all of this, counsel may have a justification for failures to admit. Rule 37(c) excuses sanctions where a party had reasonable grounds to believe that he would prevail. Under a truly effective system of discovery, these are exactly the issues which should be preserved for trial.

Admissions practice also establishes a favorable vehicle for early settlement of the case or for alternate dispute resolution procedures, such as mini-trials. The parties quickly gain a more realistic understanding of their positions, fewer issues remain for trial, and a venerable weapon for forcing unmerited settlements—the expense which protracted discovery adds to the prosecution or defense of a claim—is reduced or eliminated. Furthermore, as one commentator has observed, “forcing formal admissions of facts” can be especially valuable in “laying the foundation for a motion for summary judgment.”⁷⁰ Similarly, concerns as to the suitability of juries as triers of fact in a complex modern society are allayed by admissions practice—with fewer issues and a narrower ambit of proof, complex questions are more susceptible to jury determination.

CONCLUSION

Admissions practice can mean that cases will proceed on their merits, without distraction caused by delay, concealment, or the accumulation of unnecessary attorney's fees. Discovery must be seen as the obstacle it has become, and stripped of the sacredness with which bench and bar have cloaked it. Although attorneys may never tire of treating litigation as a game, it is time, as Judge Medina observed, to use the pretrial and the discovery conferences for “putting the cards on the table.” In such a vein, admissions practice can be utilized to lead to the less protracted and more efficient resolution of disputes, as the original draftsmen of the Federal Rules of Civil Procedure intended long ago.

⁶⁹ See FED. R. CIV. P. 37(c).

⁷⁰ M. GREEN, *supra* note 67, at 158.