

AMENDMENT BY PUBLIC LAW

1988—Subd. (a). Pub. L. 100-690, §7047(b)(1), substituted “physical examination by a physician, or mental examination by a physician or psychologist” for “physical or mental examination by a physician”.

Subd. (b). Pub. L. 100-690, §7047(b)(2), inserted “or psychologist” in heading, in two places in par. (1), and in two places in par. (3).

Subd. (c). Pub. L. 100-690, §7047(b)(3), added subd. (c).

Rule 36. Requests for Admission

(a) REQUEST FOR ADMISSION. 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)(1) 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. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Without leave of court or written stipulation, requests for admission may not be served before the time specified in Rule 26(d).

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow or as the parties may agree to in writing, subject to Rule 29, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. 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.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial.

The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(b) EFFECT OF ADMISSION. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provision of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subverted thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission for any other purpose nor may it be used against the party in any other proceeding.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Mar. 30, 1970, eff. July 1, 1970; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Compare similar rules: [Former] Equity Rule 58 (last paragraph, which provides for the admission of the execution and genuineness of documents); *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 32; Ill.Rev.Stat. (1937) ch. 110, §182 and Rule 18 (Ill.Rev.Stat. (1937) ch. 110, §259.18); 2 Mass.Gen.Laws (Ter.Ed., 1932) ch. 231, §69; Mich.Court Rules Ann. (Searl, 1933) Rule 42; N.J.Comp.Stat. (2 Cum.Supp. 1911-1924) N.Y.C.P.A. (1937) §§322, 323; Wis.Stat. (1935) §327.22.

NOTES OF ADVISORY COMMITTEE ON RULES—1946
AMENDMENT

The first change in the first sentence of Rule 36(a) and the addition of the new second sentence, specifying when requests for admissions may be served, bring Rule 36 in line with amended Rules 26(a) and 33. There is no reason why these rules should not be treated alike. Other provisions of Rule 36(a) give the party whose admissions are requested adequate protection.

The second change in the first sentence of the rule [subdivision (a)] removes any uncertainty as to whether a party can be called upon to admit matters of fact other than those set forth in relevant documents described in and exhibited with the request. In *Smyth v. Kaufman* (C.C.A.2d, 1940) 114 F.(2d) 40, it was held that the word “therein”, now stricken from the rule [said subdivision] referred to the request and that a matter of fact not related to any document could be presented to the other party for admission or denial. The rule of this case is now clearly stated.

The substitution of the word “served” for “delivered” in the third sentence of the amended rule [said subdivision] is in conformance with the use of the word “serve” elsewhere in the rule and generally throughout the rules. See also Notes to Rules 13(a) and 33 herein. The substitution [in said subdivision] of “shorter or longer” for “further” will enable a court to designate a lesser period than 10 days for answer. This conforms with a similar provision already contained in Rule 33.

The addition of clause (2) [in said subdivision] specifies the method by which a party may challenge the propriety of a request to admit. There has been considerable difference of judicial opinion as to the correct method, if any, available to secure relief from an allegedly improper request. See Commentary, *Methods of Objecting to Notice to Admit* (1942) 5 Fed.Rules Serv. 835; *International Carbonic Engineering Co. v. Natural Carbonic Products, Inc.* (S.D.Cal. 1944) 57 F.Supp. 248. The changes in clause (1) are merely of a clarifying and conforming nature.

The first of the added last two sentences [in said subdivision] prevents an objection to a part of a request from holding up the answer, if any, to the remainder. See similar proposed change in Rule 33. The last sentence strengthens the rule by making the denial accurately reflect the party's position. It is taken, with necessary changes, from Rule 8(b).

NOTES OF ADVISORY COMMITTEE ON RULES—1970
AMENDMENT

Rule 36 serves two vital purposes, both of which are designed to reduce trial time. Admissions are sought, first to facilitate proof with respect to issues that cannot be eliminated from the case, and secondly, to narrow the issues by eliminating those that can be. The changes made in the rule are designed to serve these purposes more effectively. Certain disagreements in the courts about the proper scope of the rule are resolved. In addition, the procedural operation of the rule is brought into line with other discovery procedures, and the binding effect of an admission is clarified. See generally Finman, *The Request for Admissions in Federal Civil Procedure*, 71 Yale L.J. 371 (1962).

Subdivision (a). As revised, the subdivision provides that a request may be made to admit any matter within the scope of Rule 26(b) that relate to statements or opinions of fact or of the application of law to fact. It thereby eliminates the requirement that the matters be "of fact." This change resolves conflicts in the court decisions as to whether a request to admit matters of "opinion" and matters involving "mixed law and fact" is proper under the rule. As to "opinion," compare, e.g., *Jackson Bluff Corp. v. Marcelle*, 20 F.R.D. 139 (E.D.N.Y. 1957); *California v. The S.S. Jules Fribourg*, 19 F.R.D. 432 (N.D.Calif. 1955), with e.g., *Photon, Inc. v. Harris Intertype, Inc.*, 28 F.R.D. 327 (D.Mass. 1961); *Hise v. Lockwood Grader Corp.*, 153 F.Supp. 276 (D.Nebr. 1957). As to "mixed law and fact" the majority of courts sustain objections, e.g., *Minnesota Mining and Mfg. Co. v. Norton Co.*, 36 F.R.D. 1 (N.D. Ohio 1964), but *McSparran v. Hanigan*, 225 F.Supp. 628 (E.D.Pa. 1963) is to the contrary.

Not only is it difficult as a practical matter to separate "fact" from "opinion," see 4 *Moore's Federal Practice* ¶36.04 (2d ed. 1966); cf. 2A Barron & Holtzoff, *Federal Practice and Procedure* 317 (Wright ed. 1961), but an admission on a matter of opinion may facilitate proof or narrow the issues or both. An admission of a matter involving the application of law to fact may, in a given case, even more clearly narrow the issues. For example, an admission that an employee acted in the scope of his employment may remove a major issue from the trial. In *McSparran v. Hanigan*, *supra*, plaintiff admitted that "the premises on which said accident occurred, were occupied or under the control" of one of the defendants, 225 F.Supp. at 636. This admission, involving law as well as fact, removed one of the issues from the lawsuit and thereby reduced the proof required at trial. The amended provision does not authorize requests for admissions of law unrelated to the facts of the case.

Requests for admission involving the application of law to fact may create disputes between the parties which are best resolved in the presence of the judge after much or all of the other discovery has been completed. Power is therefore expressly conferred upon the court to defer decision until a pretrial conference is held or until a designated time prior to trial. On the other hand, the court should not automatically defer decision; in many instances, the importance of the admission lies in enabling the requesting party to avoid the burdensome accumulation of proof prior to the pretrial conference.

Courts have also divided on whether an answering party may properly object to request for admission as to matters which that party regards as "in dispute." Compare, e.g., *Syracuse Broadcasting Corp. v. Newhouse*, 271 F.2d 910, 917 (2d Cir. 1959); *Driver v. Gindy Mfg. Corp.*, 24 F.R.D. 473 (E.D.Pa. 1959); with e.g., *McGonigle v. Baxter*, 27 F.R.D. 504 (E.D.Pa. 1961); *United States v. Ehbauer*, 13 F.R.D. 462 (W.D.Mo. 1952). The proper response in

such cases is an answer. The very purpose of the request is to ascertain whether the answering party is prepared to admit or regards the matter as presenting a genuine issue for trial. In his answer, the party may deny, or he may give his reason for inability to admit or deny the existence of a genuine issue. The party runs no risk of sanctions if the matter is genuinely in issue, since Rule 37(c) provides a sanction of costs only when there are no good reasons for a failure to admit.

On the other hand, requests to admit may be so voluminous and so framed that the answering party finds the task of identifying what is in dispute and what is not unduly burdensome. If so, the responding party may obtain a protective order under Rule 26(c). Some of the decisions sustaining objections on "disputability" grounds could have been justified by the burdensome character of the requests. See, e.g., *Syracuse Broadcasting Corp. v. Newhouse*, *supra*.

Another sharp split of authority exists on the question whether a party may base his answer on lack of information or knowledge without seeking out additional information. One line of cases has held that a party may answer on the basis of such knowledge as he has at the time he answers. E.g., *Jackson Bluff Corp. v. Marcelle*, 20 F.R.D. 139 (E.D.N.Y. 1957); *Sladek v. General Motors Corp.*, 16 F.R.D. 104 (S.D.Iowa 1954). A larger group of cases, supported by commentators, has taken the view that if the responding party lacks knowledge, he must inform himself in reasonable fashion. E.g., *Hise v. Lockwood Grader Corp.*, 153 F.Supp. 276 (D.Nebr. 1957); *E. H. Tate Co. v. Jiffy Enterprises, Inc.*, 16 F.R.D. 571 (E.D.Pa. 1954); Finman, *supra*, 71 Yale L.J. 371, 404-409; 4 *Moore's Federal Practice* ¶36.04 (2d ed. 1966); 2A Barron & Holtzoff, *Federal Practice and Procedure* 509 (Wright ed. 1961).

The rule as revised adopts the majority view, as in keeping with a basic principle of the discovery rules that a reasonable burden may be imposed on the parties when its discharge will facilitate preparation for trial and ease the trial process. It has been argued against this view that one side should not have the burden of "proving" the other side's case. The revised rule requires only that the answering party make reasonable inquiry and secure such knowledge and information as are readily obtainable by him. In most instances, the investigation will be necessary either to his own case or to preparation for rebuttal. Even when it is not, the information may be close enough at hand to be "readily obtainable." Rule 36 requires only that the party state that he has taken these steps. The sanction for failure of a party to inform himself before he answers lies in the award of costs after trial, as provided in Rule 37(c).

The requirement that the answer to a request for admission be sworn is deleted, in favor of a provision that the answer be signed by the party or by his attorney. The provisions of Rule 36 make it clear that admissions function very much as pleadings do. Thus, when a party admits in part and denies in part, his admission is for purposes of the pending action only and may not be used against him in any other proceeding. The broadening of the rule to encompass mixed questions of law and fact reinforces this feature. Rule 36 does not lack a sanction for false answers; Rule 37(c) furnishes an appropriate deterrent.

The existing language describing the available grounds for objection to a request for admission is eliminated as neither necessary nor helpful. The statement that objection may be made to any request, which is "improper" adds nothing to the provisions that the party serve an answer or objection addressed to each matter and that he state his reasons for any objection. None of the other discovery rules set forth grounds for objection, except so far as all are subject to the general provisions of Rule 26.

Changes are made in the sequence of procedures in Rule 36 so that they conform to the new procedures in Rules 33 and 34. The major changes are as follows:

(1) The normal time for response to a request for admissions is lengthened from 10 to 30 days, conforming

more closely to prevailing practice. A defendant need not respond, however, in less than 45 days after service of the summons and complaint upon him. The court may lengthen or shorten the time when special situations require it.

(2) The present requirement that the plaintiff wait 10 days to serve requests without leave of court is eliminated. The revised provision accords with those in Rules 33 and 34.

(3) The requirement that the objecting party move automatically for a hearing on his objection is eliminated, and the burden is on the requesting party to move for an order. The change in the burden of going forward does not modify present law on burden of persuasion. The award of expenses incurred in relation to the motion is made subject to the comprehensive provisions of Rule 37(a)(4).

(4) A problem peculiar to Rule 36 arises if the responding party serves answers that are not in conformity with the requirements of the rule—for example, a denial is not “specific,” or the explanation of inability to admit or deny is not “in detail.” Rule 36 now makes no provision for court scrutiny of such answers before trial, and it seems to contemplate that defective answers bring about admissions just as effectively as if no answer had been served. Some cases have so held. *E.g.*, *Southern Ry. Co. v. Crosby*, 201 F.2d 878 (4th Cir. 1953); *United States v. Laney*, 96 F.Supp. 482 (E.D.S.C. 1951).

Giving a defective answer the automatic effect of an admission may cause unfair surprise. A responding party who purported to deny or to be unable to admit or deny will for the first time at trial confront the contention that he has made a binding admission. Since it is not always easy to know whether a denial is “specific” or an explanation is “in detail,” neither party can know how the court will rule at trial and whether proof must be prepared. Some courts, therefore, have entertained motions to rule on defective answers. They have at times ordered that amended answers be served, when the defects were technical, and at other times have declared that the matter was admitted. *E.g.*, *Woods v. Stewart*, 171 F.2d 544 (5th Cir. 1948); *SEC v. Kaye, Real & Co.*, 122 F.Supp. 639 (S.D.N.Y. 1954); *Seib's Hatcheries, Inc. v. Lindley*, 13 F.R.D. 113 (W.D.Ark. 1952). The rule as revised conforms to the latter practice.

Subdivision (b). The rule does not now indicate the extent to which a party is bound by his admission. Some courts view admissions as the equivalent of sworn testimony. *E.g.*, *Ark.-Tenn Distributing Corp. v. Breidt*, 209 F.2d 359 (3d Cir. 1954); *United States v. Lemons*, 125 F.Supp. 686 (W.D.Ark. 1954); 4 *Moore's Federal Practice* ¶36.08 (2d ed. 1966 Supp.). At least in some jurisdictions a party may rebut his own testimony, *e.g.*, *Alamo v. Del Rosario*, 98 F.2d 328 (D.C.Cir. 1938), and by analogy an admission made pursuant to Rule 36 may likewise be thought rebuttable. The courts in *Ark-Tenn* and *Lemons*, *supra*, reasoned in this way, although the results reached may be supported on different grounds. In *McSparran v. Hanigan*, 225 F.Supp. 628, 636-637 (E.D.Pa. 1963), the court held that an admission is conclusively binding, though noting the confusion created by prior decisions.

The new provisions give an admission a conclusively binding effect, for purposes only of the pending action, unless the admission is withdrawn or amended. In form and substance a Rule 36 admission is comparable to an admission in pleadings or a stipulation drafted by counsel for use at trial, rather than to an evidentiary admission of a party. Louisell, *Modern California Discovery* §8.07 (1963); 2A *Barron & Holtzoff, Federal Practice and Procedure* §838 (Wright ed. 1961). Unless the party securing an admission can depend on its binding effect, he cannot safely avoid the expense of preparing to prove the very matters on which he has secured the admission, and the purpose of the rule is defeated. Field & McKusick, *Maine Civil Practice* §36.4 (1959); Finman, *supra*, 71 *Yale L.J.* 371, 418-426; Comment, 56 *Nw.U.L.Rev.* 679, 682-683 (1961).

Provision is made for withdrawal or amendment of an admission. This provision emphasizes the importance

of having the action resolved on the merits, while at the same time assuring each party that justified reliance on an admission in preparation for trial will not operate to his prejudice. *Cf. Moosman v. Joseph P. Blitz, Inc.*, 358 F.2d 686 (2d Cir. 1966).

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

The rule is revised to reflect the change made by Rule 26(d), preventing a party from seeking formal discovery until after the meeting of the parties required by Rule 26(f).

Rule 37. Failure to Make Disclosure or Cooperate in Discovery; Sanctions

(a) **MOTION FOR ORDER COMPELLING DISCLOSURE OR DISCOVERY.** A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery as follows:

(1) *Appropriate Court.* An application for an order to a party shall be made to the court in which the action is pending. An application for an order to a person who is not a party shall be made to the court in the district where the discovery is being, or is to be, taken.

(2) *Motion.*

(A) If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

(B) If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(3) *Evasive or Incomplete Disclosure, Answer, or Response.* For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.

(4) *Expenses and Sanctions.*

(A) If the motion is granted or if the disclosure or requested discovery is provided