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It's a Trap! The Ethical Dark Side of Requests for Admission

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ARTICLE

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Abstract. Due largely to an overlap of authority between disciplinary bodies charged with supervising the professional conduct of attorneys and the authority of courts to supervise litigation, the ethical ramifications of routine discovery abuses often pass without comment. That is because disciplinary authorities routinely defer to courts to police litigation behavior despite courts frequently rejecting the role of enforcers of professional rules. A further contributing factor to unethical conduct becoming routine practice in discovery are ill-defined parameters and a dearth of guidance. One tool in particular, requests for admission, has gone overlooked in the literature and caselaw, but poses unique ethical challenges owing to its ability to transition false facts into reality.

The article first analyzes the origins of modern discovery procedures and the cultural beliefs that have historically limited the practice. It then looks to the permissible scope of requests for admission and outlines three frequent areas of abuse: requests made in bad faith, oppressive volumes of requests, and requests made in the absence of a reasonable belief that they will be admitted. Finally, the article explores how those abuses may constitute violations of specific Model Rules of Professional Conduct.

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It is no secret that discovery practice in American courts has become a quagmire capable of devouring untold time, energy, and treasure.[1] Richard Posner has called discovery "the bane of modern litigation."[2] Judge Posner's former colleague, Frank Easterbrook, has been no less critical of the bellicose nature of discovery, remarking: "That discovery is war comes as no surprise. That discovery is nuclear war, as John Setear suggests, is."[3] But often lost in the perceived utility of discovery tools as a proactive weapon in litigation are the ethical pitfalls associated with misuse.

Although a small number of courts have viewed abusive discovery practices through the lens of ethical violations,[4] it is considerably more

1. *See* John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 549 (2010) ("By some estimates, discovery costs now comprise between 50 and 90 percent of the total litigation costs in a case." (citing H.R. REP. NO. 104-369, at 37 (1995) (Conf. Rep.); Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 547–48, 548 tbl.4 (1998); *Judicial Conference Adopts Rules Changes—Confronts Projected Budget Shortfalls*, U.S. CTS. (Sept. 15, 1999), http://www.uscourts.gov/news/1999/09/15/judicial-conference-adopts-rules-changes-confronts-projected-budget-shortfalls [https://perma.cc/5L2D-FAYP])); Jay Tidmarsh, *The Litigation Budget*, 68 VAND. L. REV. 855, 861–77 (2015) (discussing rational incentives for engaging in abusive litigation conduct); Willging, *supra*, at 531–33 ("About half of [the litigation] cost was due to discovery."). It merits note that measuring discovery costs as a percentage of litigation costs may be misleading due to the rapid decline of cases proceeding to trial, such that discovery has become a greater focal point of most cases. *See* PAUL W. GRIMM ET AL., DISCOVERY PROBLEMS AND THEIR SOLUTIONS, at xi (3d ed. 2013) (discussing the declining number of cases proceeding to trial, and highlighting the importance of modern discovery tactics). *See generally* Paul W. Grimm & David S. Yellin, *A Pragmatic Approach to Discovery Reform: How Small Changes Can Make a Big Difference in Civil Discovery*, 64 S.C. L. REV. 495, 501–05 (2013) (emphasizing how the decline in trials, expenses, delays, changes in law, and the scope of discovery are dramatically affecting the civil justice system). Indeed, discovery "often 'can become an end in itself.'" *Id.* at 496 (quoting JOINT PROJECT OF AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT, at 2 (2009)).

2. Rossetto v. Pabst Brewing Co., 217 F.3d 539, 542 (7th Cir. 2000).

3. Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 635 (1989) (citing John K. Setear, *The Barrister and the Bomb: The Dynamics of Cooperation, Nuclear Deterrence, and Discovery Abuse*, 69 B.U. L. REV. 569 (1989)). The sentiment is not universal. *See* Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1393–97 (1994) ("[B]elief rested not . . . on reliable empirical research, but rather on the myth that Americans overlitigate, especially by abusing discovery."); Jack B. Weinstein, *What Discovery Abuse? A Comment on John Setear's the Barrister and the Bomb*, 69 B.U. L. REV. 649, 649–53 (1989) ("The fundamental difference between discovery in litigation and the dynamic of nuclear deterrence should be apparent . . . in litigation there is a judge, while in nuclear strategy there is not.").

4. *See* Korte v. Hunter's Mfg. Co., No. 3:12-cv-791-MJR-DGW, 2013 U.S. Dist. LEXIS 62058, at *2–4 (S.D. Ill. May 1, 2013) ("In this particular case, this [c]ourt [found] counsel's conduct to border on unprofessionalism in the length, tenor, and indignation that was displayed in the filings . . . ."); *see also* Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 362–63, 362 n.6 (D. Md. 2008) (recognizing advocacy in discovery is constrained by dictates of ethics).

common for courts to utilize their inherent, or rule-based authority, to sanction parties for conduct without invoking ethics rules.[5] As one court has noted, "[g]enerally, courts are reluctant to resolve disputes over ethical violations that arise during the course of litigation."[6] Nevertheless, as attorneys, we are bound to ethical obligations, regardless of whether violations pass without comment.[7]

One of the foremost commentators on ethics abuses in discovery practice identified the dearth of guidance for a process largely controlled by the litigants as a leading factor in discovery abuse.[8] Since that observation, local rules, caselaw, treatises, and even the American Bar Association (ABA) have attempted to provide more concrete guidance.[9] Still, despite the increase in guidance on some areas of discovery, relatively little focus has been paid to the ethical implications from misuse of discovery devices. Even in the

5. *See*, *e.g.*, Shawe v. Elting, 157 A.3d 142, 149 (Del. 2017) (en banc) ("Although there is no single definition of bad faith conduct, courts have found bad faith where parties have unnecessarily prolonged or delayed litigation, falsified records[,] or knowingly asserted frivolous claims." (quoting Johnston v. Arbitrium (Cayman Islands) Handels AG, 720 A.2d 542, 546 (1998))).

6. Tylena M. v. HeartShare Human Servs., No. 02Civ.8401 (VM)(THK), 2004 WL 1252945, at *2 (S.D.N.Y. June 7, 2004) ("The business of the court is to dispose of litigation and not to act as a general overseer of the ethics of those who practice here unless the questioned behavior taints the trial of the cause before it." (quoting W.T. Grant Co. v. Haines, 531 F.2d 671, 677 (2d Cir. 1976))). Conversely, "disciplinary authorities often defer to the trial courts in policing" conduct in civil litigation. Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 42 (1991).

7. *See* MODEL RULES OF PROF'L CONDUCT preamble ¶ 12 (AM. BAR ASS'N 2017) ("Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves."); *see also id.* at r. 3.2 cmt. 1 ("It is not a justification that similar conduct is often tolerated by the bench and bar.").

8. W. Bradley Wendel, *Rediscovering Discovery Ethics*, 79 MARQ. L. REV. 895, 901 (1996) (citing William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 711 (1989)) (attributing the point to the Honorable William W. Schwarzer, though building extensively on his view); *see also* Grimm & Yellin, *supra* note 1, at 505–07 (recognizing attorneys' ethical duties conflict with their private duty, and therefore, interfere with the discovery process).

9. *See* GRIMM, *supra* note 1, at 155–56 (providing guidance for counsel on how to respond to an inadvertent disclosure under the ABA Model Rules and applicable state law); *see also* ROGER S. HAYDOCK & DAVID F. HERR, DISCOVERY PRACTICE § 1.04, 1-5–1-6 (6th ed. 2014) ("Today, courts are continually reviewing the effect of discovery rules and procedures."); AM. BAR ASS'N, CIVIL DISCOVERY STANDARDS 5, 6, 10–12 (1999) ("Many of the practices outlined in this Standard are found in Fed. R. Civ. P. 16 and 26(f) and similar provisions in various state court rules and guidelines." (citations omitted)), *available at* http://www.americanbar.org/content/dam/aba/administrative/litigation/litigation-aba-2004-civil-discovery-standards.authcheckdam.pdf [https://perma.cc/2RJ7-94ZE].

modest literature on the topic,[10] there is one facet shown virtually no attention: requests for admission.[11]

When used properly, requests for admission streamline litigation and narrow issues for trial.[12] When used for improper purposes, however, requests for admission become nothing more than "a trap for the unwary"[13]

10. *See* Wendel, *supra* note 8, at 899–901 (describing the development of a discovery system which "impose[s] on lawyers a heavy burden of having to accommodate conflicting expectations" (quoting William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 714 (1989))); *see also* A. Darby Dickerson, *The Law and Ethics of Civil Depositions*, 57 MD. L. REV. 273, 257–77 (1998) (addressing and proposing solutions to the conflicts attorneys face between the indistinct ethical rules and court rules which lead to deposition abuse).

11. Consistent with the approach taken by the American Law Reports annotation, this Article will, unless quoting directly, use the terminology "requests for admission," and shall not distinguish between the various other terms used in rules and caselaw. *See, e.g.*, Russell G. Donaldson, Annotation, *Permissible Scope, Respecting Nature of Inquiry, of Demand for Admissions Under Modern State Civil Rules of Procedure*, 42 A.L.R.4th 489, 492 n.3 (1985) (referring to "request for admission" as "demand for admission" and "notice to admit," noting the only requirement is that they are "designed to elicit admissions as to matters"). Further, throughout, the plural form shall be "requests for admission." Robert K. Wise & Katherine Hendler Fayne, *A Guide to Properly Using and Responding to Requests for Admission Under the Texas Discovery Rules*, 45 ST. MARY'S L.J. 655, 657–58 n.1 (2014).

12. *See* FED. R. CIV. P. 36 advisory committee's notes to 1970 amendment ("Rule 36 serves two vital purposes, both of which are designed to reduce trial cost. . . . [F]irst to facilitate proof . . . and secondly, to narrow the issues by eliminating those that can be."); Leonard v. Stemtech Int'l Inc., 834 F.3d 376, 402 n.26 (3d Cir. 2016) ("Rule 36 provides a tool to streamline the proof of controverted facts." (citing FED. R. CIV. P. 36)); Dobos v. Ingersoll, 9 P.3d 1020, 1025 n.13 (Alaska 2000) (recognizing that requests for admission allow parties to determine the truth of matters prior to trial, and also to test the genuineness of documents); Attorney Grievance Comm'n v. Frost, 85 A.3d 264, 281 (Md. 2014) (agreeing with commentators that requests for admission generally streamline the matter by determining the genuineness of documents, identifying facts in dispute, and testing the truth of uncontested facts); Torres v. Pabon, 137 A.3d 502, 511 (N.J. 2016) ("Requests for admissions are intended to 'streamline litigation by "weeding out items of fact and proof over which there is no dispute . . . ."'" (quoting Hungerford v. Greate Bay Casino Corp., 517 A.2d 498, 501 (N.J. Super. Ct. App. Div. 1986))).

13. *See* Sec. Ins. Co. of Hartford v. DHL Worldwide Express NV, No. 00 C 1532, 2001 WL 55460, at *1 (N.D. Ill. Jan. 19, 2001) (illustrating the technicalities of requests for admission under Rule 36, particularly the specificity of an answer to an admission request, and stating that in this case "Rule 36 is not a trap for the unwary"); Lopez v. Superior Court, 223 Cal. Rptr. 798, 802 (Ct. App. 1986) ("The obvious purpose of the requirement that the statutory warning be given is to avoid the use of section 2033 as a trap for the unwary."); S. Jarret Raab, *Requests for Admission in Illinois: No Longer a Trap for the Unwary*, 39 LOY. U. CHI. L.J. 743, 745 (2008) (discussing a case where the plaintiff was denied the ability to amend his deficient responses, thus the deficient answers were deemed admitted even though the court acknowledged carelessness could be a factor (citing Robbins v. Allstate Ins. Co., 841 N.E.2d 22, 26 (Ill. App. Ct. 2006), *overruled by* Vision Point of Sale, Inc. v. Haas, 875 N.E.2d 1065 (Ill. 2007))); Blake Shuart, R*equests for the Admission of Facts: Compliance with Supreme Court Rule 216 After* Brookbank v. Olson, C.B.A. REC., May 2009 at 42, 45 ("Rule 216 remains a trap for the unwary—or disadvantaged—attorney who is faced with a request to admit when his or her client is nowhere to be found."); *see also* Hadra v. Herman Blum Consulting Eng'rs, 74 F.R.D. 113, 114 (N.D. Tex. 1977)

or, as one commentator puts it, "a ticking time bomb."[14] That is because a request is deemed admitted if not timely answered.[15] Under the federal rules, unless ordered otherwise, a response must be made within thirty days of service.[16]

As most litigators have experienced, often the apparent purpose of tendered requests is nothing more than "the hope that [the recipient will] not answer and that his failure to answer could be used to seek judgment against him."[17] And even when not merely a trap, requests seeking

("This court is reluctant to see Rule 36 procedures serve as a snare for the unwary."). *But see* Amy Luria & John E. Clabby, *An Expense Out of Control: Rule 33 Interrogatories After the Advent of Initial Disclosures and Two Proposals for Change*, 9 CHAP. L. REV. 29, 47 (2005) (contending that parties answering requests for admission are actually "more careful to avoid traps" than parties responding to interrogatories).

14. Jeffrey S. Kinsler, *Requests for Admission in Wisconsin Procedure: Civil Litigation's Double-Edged Sword*, 78 MARQ. L. REV. 625, 668–69 (1995) (quoting Shirley Engel, *Requests for Admission—A Discovery Trap: A Review of California Code of Civil Procedure 2033*, 18 U.W.L.A. L. REV. 61, 61 (1986)); *see also* Freshman, Mulvaney, Comsky, Kahan & Deutsch v. Superior Court, 218 Cal. Rptr. 533, 540 (Ct. App. 1985) ("No party with responses to a request for admission filed even one day late could ever be free of the danger of the opponent 'dropping the bomb' sometime before the trial.").

15. FED. R. CIV. P. 36(a)(3); *see also* Raab, *supra* note 13, at 743 ("In Illinois, as with most other jurisdictions, an untimely or procedurally defective response to a formal request to admit will result in factual admissions that can have dire consequences to the offending party's case."). Requests may also be deemed admitted if the response is found inadequate. *See* Wise & Fayne, *supra* note 11, at 671 ("A 'deemed' admission occurs when the responding party fails to timely respond to the request or when a trial court, in ruling on a motion regarding the sufficiency of a response to a request for admission, deems the request admitted because the response does not comply with the Texas Rule 198's requirements."). To combat that danger, some jurisdictions require a warning regarding failure to answer. *See* Helbig v. Comm'r, No. 8011-06, 2008 WL 4735396, at *2 n.3 (T.C. Oct. 29, 2008) (explaining that the rules regarding requests for admission had been amended to provide the consequences for failing to respond to a request because the current rule could be "a trap for the unwary"); *see also* Diggs v. Keller, 181 F.R.D. 468, 469 (D. Nev. 1998) (requiring disclosure of consequences for failure to respond to requests for pro se prisoner litigants); *Lopez*, 223 Cal. Rptr. at 800 (noting the request for admission procedures required a warning be placed at the end of the request).

16. FED. R. CIV. P. 36(a)(3). In state courts, timing may vary or depend on circumstances. *See, e.g.*, WIS. STAT. ANN. § 804.11(1)(b) (West 2017) (expanding the deadline from thirty days to forty-five days if requests were served with the summons and complaint).

17. *Hungerford*, 517 A.2d at 501; *see also* United States v. $23,940.00 in U.S. Currency, No. 3:14-CV-01226 (VLB), 2015 WL 7295430, at *3 (D. Conn. Nov. 18, 2015) ("[T]he requests for admissions were little more than a deadline trap for the unobservant claimant."); Henry v. Champlain Enters., Inc., 212 F.R.D. 73, 81 & n.5 (N.D.N.Y. 2003) ("Even though the requests were more intelligible, the Court senses a trap is laid for the unwary in many of them. The synergy of this litigation, as indicated by these pleadings, borders more on brinkmanship and sharp practice than anything else."); Vision Point of Sale, Inc. v. Haas, 875 N.E.2d 1065, 1076 n.4 (Ill. 2007) (recognizing, among critics of harsh application, an article "questioning 'whether the point of Rule 216 is to obtain information or to set a trap in hope of winning by default'" (quoting Shawn Wood, *An Inconvenient Truthiness About Rule 216*,

admissions that the party does not reasonably believe will be admitted serve to increase costs and hamper the goal of a "just, speedy, and inexpensive determination of every action and proceeding."[18] Remarkably, however, courts and commentators do not consider whether attempts to prevent decisions on the merits or extend costs through such pure procedural gamesmanship constitute ethical violations.[19]

The purpose of this Article is to expose the often-overlooked abuse of requests for admission, in which the party tendering the requests does so in order to do nothing more than circumvent a decision on the merits through gamesmanship, burden the recipient, or increase billable hours. The focus is on three common circumstances: (1) where the requests are tendered at a time and in a manner as to intentionally maximize the possibility that they will not be timely answered; (2) where the content or volume of the requests is improper; and (3) where the requests serve no defensible purpose, thereby needlessly increasing an attorney's own client's costs. An important caveat is that those do not include requests that are properly sought so as to later permit invocation of rules that allow recovery of costs and fees for later

CHI. LAW., Dec. 2006, at 26, 62)). In at least one instance, the ease of abusing requests led a *pro se* plaintiff to obtain a $30,000 judgment against a *pro se* defendant, which was reversed on appeal. *See* Costello v. Zavodnik, 55 N.E.3d 348, 353–54 (Ind. Ct. App. 2016) ("He did not send requests claiming $30,000 and $300,000 and $600,000 in damages because he believes those figures are legally justified and thought [Defendant] might agree; he sent them because he hoped [Defendant] would not respond, rendering the matters admitted by operation of Rule 36."). The Rules of Professional Conduct, however, do not apply to *pro se* parties. Zavodnik v. Harper, 17 N.E.3d 259, 267 (Ind. 2014) (per curiam).

18. FED. R. CIV. P. 1.

19. *See generally* United States *ex rel.* Thomas v. Black & Veatch Special Projects Corp., No. 11–2475–DDC, 2014 WL 2095168, at *7 (D. Kan. May 20, 2014) ("Given the relevant Rule 36 analysis, the court finds it unnecessary to agree or disagree with defense counsel's highly charged accusations about plaintiffs' counsel engaging in conduct that was 'underhanded' and 'unbecoming of the ethical practice of law.'"); Kinsler, *supra* note 14 (addressing professional discipline only for failure to timely or sufficiently respond); Raab, *supra* note 13 (discussing potential abuse of requests for admission as a procedural trap, however, failing to mention any ethical implications that may arise); Renee H. Tobias, *Deemed Admissions: Tool, Trap or Both?*, 46 BAYLOR L. REV. 709, 715 (1994) ("[C]ourts have stated that good cause is 'the threshold issue which must be determined by the trial judge before considering the other requirements set forth in the rule' . . . ." (quoting N. River Ins. Co. v. Greene, 824 S.W.2d 697, 699 (Tex. App.—El Paso 1992, writ denied))); Wise & Fayne, *supra* note 11, at 727–32 ("The withdrawal of an admission 'subserves' the presentation of the action's merits when upholding the admission would practically or effectively eliminate presentation of the action's merits." (citing Wheeler v. Greene, 157 S.W.3d 439, 443 n.2 (Tex. 2005); Rodriguez v. Kapilivsky, No. 13–11–00796–CV, 2012 WL 7849308, at *3 (Tex. App.—Corpus Christi Dec. 13, 2012, no pet.); Wells v. Best Ins. Servs., Inc., No. 13–09–00236–CV, 2010 WL 4264792, at *2 (Tex. App.—Corpus Christi Oct. 28, 2010, no pet.))).

establishing as true or authentic what was already requested to be admitted.[20]

In federal court, requests for admission are generally governed by Rule 36 of the Federal Rules of Civil Procedure.[21] Although the states have not uniformly adopted the federal rules, the majority of jurisdictions have implemented procedures mirroring the federal discovery rules.[22] Many other states have adopted provisions permitting use of requests for admission in civil proceedings.[23] Because the closest approach to a

20. FED. R. CIV. P. 37(c)(2); *see also* ARIZ. R. CIV. P. 37(e) ("If a party fails to admit what is requested under Rule 36 and if the requesting party later proves the matter true—including the genuineness of a document—the requesting party may move that the non-admitting party pay the reasonable expenses, including attorney's fees, incurred in making that proof."); IND. R. TRIAL P. 37(C) (allowing the requesting party to seek attorneys' fees and reasonable expenses if a genuine document is not admitted under the rule); OHIO R. CIV. P. 37(C)(2) (providing the requesting party with a mechanism for seeking reasonable expenses after proving the genuineness or truth of the matter asserted). Notably, rules that mirror Federal Rule 37(c)(2) specifically require that the party denying the request do so without "reasonable ground to believe that it might prevail on the matter." FED. R. CIV. P. 37(c)(2)(C); *see also* Hillside Prods., Inc. v. Cty. of Macomb, No. 06–11566, 2009 WL 3059147, at *1 (E.D. Mich. Sep. 24, 2009) (recognizing that Federal Rules of Civil Procedure 36 and 37 "allows for an award of costs and reasonable attorney's fees in cases in which a party does not comply with Rule 36" (quoting Kasuri v. St. Elizabeth Hosp. Med. Ctr., 897 F.2d 845, 855 (6th Cir. 1990))); Dobos v. Ingersoll, 9 P.3d 1020, 1025–26 (Alaska 2000) (quoting FED. R. CIV. P. 37(c)(2)) (referring to Rule 36 which provides that the requesting party may apply for recovery of reasonable expenses, but the court must also consider whether the failing party had a reasonable belief that it would ultimately prevail, even if it did not); Hewitt v. Felderman, 841 N.W.2d 258, 265 (S.D. 2013) ("The mere fact that a matter was later proved at trial does not establish that the party denying the admission was unreasonable in believing they might prevail on the matter." (citing Richardson v. Ryder Truck Rental, Inc., 540 N.W.2d 696, 702 (Mich. Ct. App. 1995) (per curiam))).

21. *See In re* Air Crash at Charlotte, 982 F. Supp. 1060, 1065 n.5 (D.S.C. 1996) ("Requests for admission are governed by Rule 36 of the Federal Rules of Civil Procedure . . . ."); *see also* Burdick v. Koerner, 179 F.R.D. 573, 576 (E.D. Wis. 1998) ("Requests for admission are governed by Rule 36 . . . ."). Requests for admission are also governed, in part, by Federal Rules 26, 37(a)(5), and 37(c)(2). *See* FED. R. CIV. P. 26(b)(1) ("For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action."); *id.* R. 37(a)(5)(A) ("[T]he court must . . . require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees."); *id.* R. 37(c)(2) (establishing the sanctions a court may impose on a party who has failed to provide required admissions under Rule 36).

22. Rules 26 through 37 of the Federal Rules of Civil Procedure, and their state counterparts, are generally referred to as "the discovery rules." Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 357 (D. Md. 2008).

23. *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 29 (1984) (recognizing the adoption of provision similar to the Federal Rules of Civil Procedure by most states (citing FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE 169 (1965))); *see also* Morgan Cloud, *Privileges Lost? Privileges Retained?*, 69 TENN. L. REV. 65, 68 (2001) ("In the decades following the adoption of the 1938 Federal Rules,

common ground is through the federal rules, the primary focus of this Article will be on requests for admission under rules substantially similar to Federal Rule 36 (Rule 36)—however, citations to and discussions of the state rules and procedures will occur throughout.

Similarly, codes and rules of ethical conduct can vary across state lines.[24] Nevertheless, most jurisdictions have adopted, to varying degrees, the ABA Model Rules of Professional Conduct.[25] Again, in a search for common ground, this Article will focus on the ABA Model Rules with limited citation to state authority implementing state rules patterned on the Model Rules.

I. BRIEF OVERVIEW & HISTORY OF DISCOVERY PRACTICE IN AMERICA

In understanding the ethical difficulties posed in discovery, it is important to view discovery proceedings through the context of history. Historically, discovery was virtually non-existent.[26] "At common law there was no

most states adopted discovery schemes modeled after the federal plan . . . ."); Seymour Moskowitz, *Rediscovering Discovery: State Procedural Rules and the Level Playing Field*, 54 RUTGERS L. REV. 595, 602 (2002) (recapping the effect of the adoption of the Federal Rules, which "marked a new approach and epoch" for many civil litigations); John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1378–1425 (1986) (comparing state civil procedures for discovery to the Federal Rules of Civil Procedure, and noting that most mirror the federal approach); Raab, *supra* note 13, at 743 (recognizing the procedures adopted in Illinois, like most other states, mirror the Federal Rules of Civil Procedure approach). As noted, many of these states have adopted procedures which permit requests for admission in civil proceedings. ALASKA R. CIV. P. 36; ILL. SUP. CT. R. 216; IND. R. TRIAL P. 36; N.Y. C.P.L.R. § 3123 (MCKINNEY 2009); TEX. R. CIV. P. 198; WIS. STAT. ANN. § 804.11 (West 2017). *But see* Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1172–74, 1184–88 (2005) (identifying a trend of states implementing discovery procedures distinct from the federal rules).

24. *See generally* Judith A. McMorrow, *The (F)Utility of Rules: Regulating Attorney Conduct in Federal Court Practice*, 58 S.M.U. L. REV. 3, 5–7 (2005) (discussing the complexity of non-uniform implementation of ethics rules across jurisdictions).

25. Stephen E. Kalish, *An Instrumental Interpretation of Model Rule 1.7(a) in the Corporate Family Situation: Unintended Consequences in Pandora's Box*, 30 MCGEORGE L. REV. 37, 38 n.1 (1998) ("This Article will focus on the Model Rules of Professional Conduct; most jurisdictions have adopted them."). *See generally State Rules Comparison Charts*, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts.html [http://perma.cc/LTC7-NHR5] ("[M]aterials show how each jurisdiction has modified . . . each of the ABA Model Rules of Professional Conduct.").

26. *See* HAYDOCK & HERR, *supra* note 9, at § 1.04, 1-5 ("The early days of dispute resolution in America involved little discovery. . . . There was nothing generations ago resembling our current discovery, motion, and practice events."); Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 694–95 (1998) [hereinafter *Fishing Expeditions*] ("Historically, discovery had been extremely limited in both England and the United States.").

provision for discovery because the adversarial system of litigation permitted each party to deal with his opponent at arm's length and to resist supplying information or evidence in his possession."[27] Under the common law, the written pleading was generally the only pretrial source for information.[28] If the pleading was unclear, a defendant could seek a bill of particulars to obtain further factual information so as to allow the defendant to come to trial prepared for the case against him.[29] Consequently, the bill proved to be more akin to a pleading than discovery.[30]

The lone tools resembling modern pre-trial discovery rested in the hands of chancery courts.[31] Although entrusted to equity, "a party in an action at common law could exhibit a bill in the Court of Chancery for the purpose of discover[ing] material evidence to be used in the trial of their existing common law action."[32] In that way, the equitable bill of discovery served as an auxiliary to the common law courts.[33] Even for a task as vital as preserving the testimony of a witness who may decease prior to trial, or of one who resided abroad, litigants were permitted to obtain depositions by writing or interrogatories *de bene esse* only through the authority of the chancery court.[34]

By modern sensibilities, a highly-limited discovery practice may seem manifestly unjust. Although practical considerations certainly buttressed

27. 22 STEPHEN E. ARTHUR, INDIANA PRACTICE SERIES: CIVIL TRIAL PRACTICE § 21.1, 394 (2d ed. 2007).

28. GEORGE RAGLAND, JR., DISCOVERY BEFORE TRIAL 1 (1932); *see also Fishing Expeditions*, *supra* note 26, at 695 ("Nor was there much need for discovery at the later period of the common law when the pleadings assumed such a critical role.").

29. RAGLAND, *supra* note 28, at 11 (citing Liscomb v. Agate, 4 N.Y.S. 167, 168 (Gen. Term 1889)).

30. ARTHUR, *supra* note 27, at § 21.1, 394.

31. Hickman v. Taylor, 329 U.S. 495, 515 (1947) (citing RAGLAND, *supra* note 28, at 13–16).

32. Robert Hardaway et al., *E-Discovery's Threat to Civil Litigation: Reevaluating Rule 26 for the Digital Age*, 63 RUTGERS L. REV. 521, 541 (2011) (citing ROBERT WYNESS MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 204 (1952)); *see also* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: IN FOUR BOOKS 1392 (William Draper Lewis ed., Rees Welsh & Co. 1898) (1765) ("But, for want of this discovery at law, the courts of equity have acquired a concurrent jurisdiction with every court in all matters of account." (citing Ludlow v. Simond, 2 Cai. Cas. 1 (N.Y. Sup. Ct. 1805); Allen v. Smith, 16 N.Y. 415, 418 (1857); Johnson v. Campbell, 13 Ill. App. 120, 124 (1883); Yates v. Stuart, 19 S.E. 423, 426 (W. Va. 1894))).

33. Michael Lobban, *Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery, Part II*, 22 L. & HIST. REV. 565, 587 (2004).

34. BLACKSTONE, *supra* note 32, at 1343.

early limitations,[35] the primary obstacle to expansive discovery was philosophical. At the core of the opposition was a belief that expansive discovery stood as a threat to the adversarial process.[36] The ardent belief in a combative system was the natural outgrowth of a theologically based judicial tradition that sought truth through divine favor, and later evolved into "a deep belief in the independence and self-sufficiency of each citizen."[37] As Professor Subrin explained, under that view, "[t]he idea that one should help opponents prepare their case was distasteful."[38]

Due to the wide-scale adoption of New York's Field Code (Field Code),[39] the common law pleadings system was largely supplanted in the United States by either code pleading or sufficient statutory incursions into the common law so as to render many other states "quasi-code states."[40] The Field Code acted to merge law and equity courts into a single entity.[41]

35. "The English barristers were centered in London. Travel was difficult. It would not have been easy for them to have participated in discovery in the counties where the assizes were held." *Fishing Expeditions*, *supra* note 26, at 695. Some authors have provided an illustrative discussion of lawyers and courts in early American society. *See* DANIEL WAIT HOWE, THE LAWS AND COURTS OF NORTHWEST AND INDIANA TERRITORIES 8–11, 18 (1886) (assessing early practices for fund raising to develop a library); Elizabeth R. Osborn, *Indiana Courts and Lawyers, 1816–2004*, *in* THE HISTORY OF INDIANA LAW 257, 262–65 (David J. Bodenhamer & Randall T. Shepard, eds., 2006) (describing the practices of the legal system in the early American West).

36. *Fishing Expeditions*, *supra* note 26, at 695 (citing ROBERT WYNESS MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 207 (1952); Edson R. Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863, 866–67 (1993)).

37. *Id.*

38. *Id.*

39. Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 L. & HIST. REV. 311, 316–17, 327 (1988) [hereinafter *The Field Code*] (citing CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM 196–98 (1981)) ("The major goal of the [Field] Code was to expedite the predictable enforcement of discretely articulated rights. . . . Field's goal was neither dispute resolution nor law reform.").

40. *See* CHARLES M. HEPBURN, THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND §§ 14–15, 15–16 (W. H. Anderson & Co. 1897) ("But not all the remaining states are 'common law states' even in this loose sense. . . . For convenience [these non-common law states] may be referred to as quasi-code states."); *see also The Field Code*, *supra* note 39, at 330 ("The drafters of the Field Code thought it critical that the parties learn each side's version of the facts through the pleadings."); *Fishing Expeditions*, *supra* note 26, at 696 (recognizing the biggest systematic change to discovery practice, following the adoption of the common-law standards, was the Field Code).

41. David M. Katz, Note, *Assessing the Federal Rules' Proportionality Amendment: Why Proportionality is Philosophically Proper, Yet Practically Problematic*, 67 SYRACUSE L. REV. 583, 587–88 (2017) (citing Alan K. Goldstein, *A Short History of Discovery*, 10 ANGLO-AM. L. REV. 257, 266–67 (1981)); *see also The Field Code*, *supra* note 39, at 328 ("The problem for Field and the other commissioners was to describe the 'what happened' and the applicable law in a way that would eliminate the law-equity separation and the

An important result of the Field Code was to place discovery devices, such as depositions, into the hands of law judges.[42] Nevertheless, many of the early adopters "overlooked the importance of discovery as such and its relation to the general scheme of pleading and pre-trial practice under the code," leaving discovery to be incrementally expanded later in many code jurisdictions.[43]

Although ostensibly expanding the role of discovery in courts of law, "[t]he Field Code eliminated equitable bills of discovery, and interrogatories as part of the equitable bill."[44] The philosophy of the Field Code's namesake, David Dudley Field, still placed a great deal of emphasis on pleadings and carried a libertarian, individualistic view that resented expansive discovery as an unbridled "fishing expedition."[45]

Federal courts, not having adopted the Field Code, remained a fora of limited discovery.[46] Finally, in 1938, the Federal Rules of Civil Procedure were adopted, which included the earliest iterations of the modern discovery rules.[47] Since their enactment, the discovery rules have been amended more

forms of action."). Federal courts did not merge law and equity until the enactment of the Federal Rules of Civil Procedure. Alexander Holtzoff, *Equitable and Legal Rights and Remedies Under the New Federal Procedure*, 31 CAL. L. REV. 127, 127 (1943).

42. RAGLAND, *supra* note 28, at 17–18; *Fishing Expeditions*, *supra* note 26, at 696–97.

43. RAGLAND, *supra* note 28, at 18.

44. *Fishing Expeditions*, *supra* note 26, at 696 (quoting *The Field Code*, *supra* note 39, at 332). Federal courts continued to embrace the overlap with chancery discovery until the enactment of the Federal Rules of Civil Procedure. *See* Ryan W. Scott, Note, *Minimum Contacts, No Dog: Evaluating Personal Jurisdiction for Nonparty Discovery*, 88 MINN. L. REV. 968, 971–72 (2004) (citing FED. R. CIV. P. 26 advisory committee's note to subdivision (a)) (noting the bill of discovery was not displaced until the adoption of the Federal Rules of Civil Procedure).

45. *Fishing Expeditions*, *supra* note 26, at 697 (quoting Edson R. Sunderland, *Foreword* to GEORGE RANGLAND, JR., DISCOVERY BEFORE TRIAL, at iii (1932)).

46. *Id.* at 698–701.

47. Grimm & Yellin, *supra* note 1, at 507.

than a dozen times.[48] As a product of a notice-pleading structure,[49] the federal rules instituted broad, liberal discovery, which was largely foreign to American practice at that point.[50] States soon followed suit.[51]

Despite centuries of change, the philosophy of zealous, singular-minded advocacy still carries weight.[52] That philosophy, once an obstacle to the

48. Charles Yablon & Nick Landsman-Roos, *Discovery About Discovery: Sampling Practice and the Resolution of Discovery Disputes in an Age of Ever-Increasing Information*, 34 CARDOZO L. REV. 719, 726 n.33 (2012); *see also* FED. R. CIV. P. 26 (amending Rule 26 twelve times since its adoption in 1937). Some have criticized that the amendments to the rules of discovery occur too frequently. *See* Scott M. O'Brien, Note, *Analog Solutions: E-Discovery Spoliation Sanctions and the Proposed Amendments to FRCP 37(E)*, 65 DUKE L.J. 151, 156 (2015) ("Since their inception in 1938, the rules of discovery have been revised with what some view as distressing frequency." (quoting Lee H. Rosenthal, *From Rules of Procedure to How Lawyers Litigate: 'Twixt the Cup and the Lip*, 87 DENV. U. L. REV. 227, 228 (2010))). In a publication by Wright, Miller, and Marcus, a narrative of Rule 36 describes the changes since its adoption. 8B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2251, 318–20 (2010).

49. John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 534–35 (2000) (citing Conley v. Gibson, 355 U.S. 41, 47–48 (1957); CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 468 (5th ed. 1994); Patrick E. Higginbotham, *General Provisions Governing Discovery: Duty of Disclosure*, *in* 6 MOORE'S FEDERAL PRACTICE § 26.02, 26-26 (3d ed. 2000)); Roberta M. Harding, *Waiver: A Comprehensive Analysis of a Consequence of Inadvertently Producing Documents Protected by the Attorney-Client Privilege*, 42 CATH. U. L. REV. 465, 480 n.83 (1993).

50. *See generally Fishing Expeditions*, *supra* note 26, at 702–39, 720 n.165 ("This momentum toward what the drafters called 'liberal' discovery gained yet more momentum in the decade after the federal rules became law, which resulted in even greater liberalization of many of the discovery rules in 1946."). In *Hickman v. Taylor*, the Supreme Court called for a liberal discovery practice under Rule 26. *See* Hickman v. Taylor, 329 U.S. 495, 506 (1947) ("It is said that inquiry may be made under these rules, epitomized by Rule 26, as to any relevant matter which is not privileged; and since the discovery provisions are to be applied as broadly and liberally as possible, the privilege limitation must be restricted to its narrowest bounds."). Interestingly, this practice did not explicitly expand beyond depositions until the 1970 amendments. Christine L. Childers, Note, *Keep on Pleading: The Co-Existence of Notice Pleading and the New Scope of Discovery Standard of Federal Rule of Civil Procedure 26(b)(1)*, 36 VAL. U. L. REV. 677, 688–90 (2002) (citing FED. R. CIV. P. 26 advisory committee's note; 6 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE (3d ed. 2000)); *see also* Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 538 (2001) (acknowledging that discovery "was not the general metastructure" that it is now).

51. *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 29 (1984) (acceding most states have adopted rules following those in the Federal Rules of Civil Procedure). Since many states have adopted procedures similar to those adopted in the Federal Rules; States now have liberal discovery provisions, following the federal rule's broad interpretations.

52. *See generally* Beckerman, *supra* note 49, at 523–24 (agreeing that "[a] lawyer '[must also] act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf'" (quoting MODEL RULES OF PROF'L CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 2017))); Allen K. Harris, *The Professionalism Crisis—The "z" Words and Other Rambo Tactics: The Conference of Chief Justices' Solution*, 53 S.C. L. REV. 549, 570 (2002) ("Zealous advocacy is the modern day plague which infects and weakens the truth-finding process and makes a mockery of the lawyers' claim to officer of the court status.'" (quoting Kathleen P. Browe, Comment, *A Critique of the Civility Movement: Why Rambo Will Not Go Away*, 77 MARQ. L. REV. 751, 767 (1994))).

creation of formal discovery procedures, now stands as a leading factor in the problems that plague its practice. The shift into the federal discovery rules did not extinguish pre-rules sensibilities. In the seminal case *Hickman v. Taylor*,[53] which did much to elevate discovery practice to its modern import,[54] the concurrence of Justice Robert H. Jackson showed trepidation toward the shifting landscape:

> Counsel for the petitioner candidly said on argument that he wanted this information to help prepare himself to examine witnesses, to make sure he overlooked nothing. He bases his claim to it in his brief on the view that the Rules were to do away with the old situation where a law suit developed into "a battle of wits between counsel." But a common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary.
>
> The real purpose and the probable effect of the practice ordered by the district court would be to put trials on a level even lower than a "battle of wits." I can conceive of no practice more demoralizing to the Bar than to require a lawyer to write out and deliver to his adversary an account of what witnesses have told him.[55]

But, as Professor Wendel has argued, and many others have agreed, discovery is a process that sits in contrast to the adversarial stages of litigation.[56] The distinct nature of discovery, routed in its history, has

53. Hickman v. Taylor, 329 U.S. 495 (1947).

54. HAYDOCK & HERR, *supra* note 9, at § 1.04, 1-6 ("After the seminal discovery case of *Hickman v. Taylor* in 1947, discovery gradually became an essential and recognized method of extracting information from opponents." (footnote omitted)); *see also Fishing Expeditions*, *supra* note 26, at 692 ("The *Hickman v. Taylor* quotation demonstrates how far attitudes about discovery had changed between 1932 and 1946.").

55. *Hickman*, 329 U.S. at 516 (Jackson, J., concurring). The specific practice at issue was a court order that required counsel to turn over his notes from an interview with a witness. *Id.* at 499–500 (majority opinion). *Hickman* established the work-product doctrine to prevent such disclosures. *Fishing Expeditions*, *supra* note 26, at 735 (citing *Hickman*, 329 U.S. at 509–14).

56. *See* Wendel, *supra* note 8, at 899–901 (identifying "profound structural tension within the discovery system" (citing Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39, 43 (1989); William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 711, 714 (1989); Michael E. Wolfson, *Addressing the Adversarial Dilemma of Civil Discovery*, 36 CLEV. ST. L. REV. 17, 19 (1988))); *see also* Beckerman, *supra* note 49, at 520–23 (recognizing that the adversarial nature present in discovery is a continuation of the conflict which brought the parties to court in the first place (citing RALPH NADER & WESLEY J. SMITH, NO CONTEST: CORPORATE

subjected attorneys to ethical challenges occasioned by service of competing masters: the court's truth-seeking function and the client's interest in achieving a favorable, even if unjust, resolution.[57]

II. PURPOSE & SCOPE OF REQUESTS FOR ADMISSION

As part of the original federal discovery rules, requests for admission are generally viewed as a facet of discovery.[58] But, in many ways, "[r]equests for [a]dmission are not a discovery device."[59] As one court remarked, "The

LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA 63 (1996))); Ronald N. Boyce, *The New Federal Discovery Rules: 26(1)&(2)—A Big Step in the Right Direction*, UTAH B.J., Winter 1998, at 16, 17 ("The adversary system in the discovery stage is subordinated to the obligation for truth." (citing Malautea v. Suzuki Motor Co., 987 F.2d 1536, 1546 (11th Cir. 1993))); Grimm & Yellin, *supra* note 1, at 524–33 ("[T]he sad reality is that if you ask anyone familiar with how litigation actually takes place in state and federal courts whether cooperation between the parties during discovery is commonplace, they will tell you with near unanimity that it is not."); Harris, *supra* note 52, at 570–72 ("Wendel criticizes what he calls the 'old school' argument that . . . *civil discovery procedures are part and parcel of the adversary system of litigation* . . . ." (quoting Wendel, *supra* note 8, at 929)); Suzanne L. McRobbie, Comment, *Move Over Work Product—It's Time for Some Real Discovery: A Call for a Cost-Allocating Amendment to Rule 26(b)3*, 54 EMORY L.J. 1407, 1408 (2005) (agreeing modern discovery practice has allowed lawyers to spend months and many billable hours on pre-trial procedure); E. Stewart Moritz, *The Lawyer Doth Protest Too Much, Methinks: Reconsidering the Contemporaneous Objection Requirement in Depositions*, 72 U. CIN. L. REV. 1353, 1388–90 (2004) ("[A]dversary theory was misapplied to fact-gathering in the first place." (quoting John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 866 (1985))).

57. *See* Dickerson, *supra* note 10, at 275–76 ("[S]elf-regulation can be difficult in a system that expects lawyers to represent their clients' interests zealously while serving as quasi-official judicial officers." (citing MODEL RULES OF PROF'L CONDUCT preamble ¶ 9 (AM. BAR ASS'N 2017))); David R. Hague, *Fraud on the Court and Abusive Discovery*, 16 NEV. L.J. 707, 713 (2016) ("[O]ne reason for [attorney misconduct] is the tension inherent in the discovery process." (alteration in original) (quoting Alex B. Long, *Attorney Deceit Statutes: Promoting Professionalism Through Criminal Prosecutions and Treble Damages*, 44 U.C. DAVIS L. REV. 413, 423 (2010))); Wendel, *supra* note 8, at 899–901 (signifying that the discovery process "impose[s] on lawyers a heavy burden of having to accommodate conflicting expectations" (quoting William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 714 (1989))). *See generally* Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1 (2005) (discussing the different roles and conceptualizations attorneys may take in the discovery process).

58. *See* FED. R. CIV. P. 26(e)(1) ("A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response . . . ."); Wise & Fayne, *supra* note 11, at 747 ("Requests for admission are an extremely effective discovery tool when used and responded to properly.").

59. Lakehead Pipe Line Co. v. Am. Home Assurance Co., 177 F.R.D. 454, 458 (D. Minn. 1997); *accord* Misco, Inc. v. U.S. Steel Corp., 784 F.2d 198, 205–06 (6th Cir. 1986) ("Requests for admissions are not a general discovery device." (citing WRIGHT, *supra* note 48, at § 2253, 706 n.23)); Nguyen v. Winter, 756 F. Supp. 2d 128, 129 (D.D.C. 2010) ("Requests for [a]dmission are not a discovery device but are designed to narrow the issues for trial." (citing McFadden v. Ballard, Spahr, Andrews &

essential function of requests for admission is to establish 'facts,' not to discover them."[60] The Advisory Committee for the 1970 amendments to Federal Rule 36 identified "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."[61] Put another way, "requests for admission are used to establish admission of facts about which there is no real dispute."[62]

Often, litigants will tender all discovery, including request for admission, "'up front,' in a sweeping discovery request that demands full production all at once."[63] Although, perhaps, merely inadvisable for other discovery devices,[64] that approach is flatly antithetical to the purpose of requests for admission, in most cases.[65] In order to serve its intended function, the rule "presupposes that the party proceeding under it knows the facts or has the

Ingersoll, LLP, 243 F.R.D. 1, 7 (D.D.C. 2007))). *Contra* Kinsler, *supra* note 14, at 34–35 (calling it a "misconception" that requests for admission "are not true discovery procedures").

60. Brown v. Dobbs, 691 N.E.2d 907, 909 (Ind. Ct. App. 1998) (citing F.W. Means & Co. v. Carstens, 428 N.E.2d 251, 256 (Ind. Ct. App. 1981)).

61. FED. R. CIV. P. 36 advisory committee's note to 1970 amendment. Of course, requests for admission may also be useful in pretrial motions practice, such as summary judgment. *See* CHARLES B. KORNMANN, STANDARD OPERATING PROCEDURES (N.D. & C.D. S.D. 2013), *available at* http://www.sdd.uscourts.gov/sites/sdd/files/local_rules/northernandcentraldivision_SOP.pdf [https://perma.cc/3GXV-VSNJ] ("Be sure you are not premature in filing a motion for summary judgment without considering the use of requests for admissions and other economical discovery devices designed to reveal whether any material facts are actually and in good faith in dispute.").

62. Claudia Wilken & Robert M. Bloom, *Requests for Admission*, *in* 7 MOORE'S FEDERAL PRACTICE § 36.02[1] (3d ed. 2017).

63. Grimm & Yellin, *supra* note 1, at 518.

64. Judge Grimm and Mr. Yellin assert that early sweeping discovery "necessarily increases the costs and burdens on the producing party." *Id.*

65. HAYDOCK & HERR, *supra* note 9, at § 30.03[A], 30-5 ("It is usually inappropriate for a plaintiff to submit requests shortly after a complaint is answered and demand that the defendant promptly answer them, as the defendant is quite likely unable to perceive what facts should or should not be contested at this early stage." (citing Perez v. Miami-Dade Cty., 297 F.3d 1255 (11th Cir. 2002))). Presumably, Mr. Herr and Professor Haydock's advice is equally applicable to a defendant who seeks admissions that contradict the recently filed complaint.

document and merely wishes its opponent to concede their genuineness."[66] It was "not designed to obtain facts or information."[67]

Generally, requests for admission are the last step in a well-crafted, phased discovery plan.[68] "The conventional wisdom on requests for admission is to use them near the end of discovery to double-check the completeness of your factual investigation."[69] However, some convincingly advocate for structured use throughout the litigation with multiple sets of requests.[70] Whatever the approach, requests should be used as part of a

66. WRIGHT, *supra* note 48, at §§ 2253, 2254, 324–31 (2010) ("Indeed unless the requesting party knows what the fact is it will not be in a position to make a request about it."); *see also* JENNER & BLOCK LLP, MOORE'S ANSWERGUIDE FEDERAL DISCOVERY PRACTICE § 13.03[6], 13-9 (2015 ed.) ("Note that requests for admission under Fed. R. Civ. P. 36 are not intended principally as a discovery device, but rather presuppose that the propounding party knows the facts set forth or possesses the documents about which the party seeks concession of genuineness." (citing Safeco of Am. v. Rawstron, 181 F.R.D. 441, 445 (C.D. Cal. 1998))); Kinsler, *supra* note 14, at 631 (finding underuse of requests for admission is attributable to the misconception regarding their legitimacy as a discovery tool).

67. Wise & Fayne, *supra* note 11, at 659–60.

68. *See* LAURIE E. LEADER, WAGES AND HOURS: LAW & PRACTICE § 14.04[3], 14-27–14-28 (LexisNexis 2017) (discussing the different options available to counsel when preparing a discovery plan, including requests for admission); JAMES W. MCELHANEY, MCELHANEY'S LITIGATION 35–39 (1995) (emphasizing that all discovery tools should be used together, and requests for admission are merely used to "fill in any gaps" left after other methods have been utilized); *see also* WRIGHT, *supra* note 48, at § 2251, 318–20 (tracing the origin of Rule 36 to Equity Rule 58, which permitted a demand for admission to be served ten days before trial). *But see* Schoenholtz v. Doniger, No. 83 Civ. 2740 (IBC), 1984 WL 374, at *8 (S.D.N.Y. May 4, 1984) ("Defendants waited ten months from the institution of this suit and one month prior to the discovery deadline (three and one half weeks after we set the deadline) to file their extensive and frivolous requests for admission. . . . Defendants do not set forth any plausible excuse which would explain their delay in seeking these requests."); WRIGHT, *supra* note 48, at § 2253, 325 n.4 ("When ['admissions are desired upon matters that will probably not be in dispute, it is better to proceed by requesting admissions['] than by serving interrogatories." (quoting Erone Corp. v. Skouras Theatres Corp., 22 F.R.D. 494, 500 (S.D.N.Y. 1958))). An arguable utility to sending early requests for admission is to trigger an obligation for later in the litigation. Rule 26(e)(1) requires supplementation of requests for admission. FED. R. CIV. P. 26(e)(1). Thus, even if a request was properly denied initially, failure to supplement once the denial has become unreasonable may provide a basis for sanctions under Rule 37(c)(2). Longoria v. Cty. of Dallas, No. 3:14-cv-3111-L, 2016 WL 6893625, slip op. at *8 (N.D. Tex. Nov. 22, 2016); Lynn v. Monarch Recovery Mgmt., 285 F.R.D. 350, 364 (D. Md. 2012); *see also* LOCAL RULES OF COURT, LOCAL CIVIL RULES 36.01 (M.D. TENN. 2016), *available at* http://www.tnmd.uscourts.gov/files/LocalRules-20120425.pdf [https://perma.cc/HA99-7KCD] ("[A]dmissions shall be supplemented no later than thirty (30) days before trial . . . ."). *But cf.* WRIGHT, supra note 48, at § 2264, 399–400 (2010) (resolving an apparent conflict between Rule 26(e)(1) duty to supplement and Rule 36(b) which requires a party that experiences changes in circumstance to seasonably seek leave from the court to amend).

69. Kinsler, *supra* note 14, at 638 (citing THEODORE Y. BLUMOFF ET AL., PRETRIAL DISCOVERY: THE DEVELOPMENT OF PROFESSIONAL JUDGMENT § 10.1, 349 (1993)).

70. *Id.* at 637 (citing Mark A. Dombroff, *Requests for Admissions: Weighing the Pros and Cons*, TRIAL, June 1983, at 82, 85).

"party's overall litigation plan,"[71] and should be the product of "considerable thought."[72]

The permissible scope of content for requests varies dramatically across state lines and can be subject to seemingly contradictory interpretations, even among courts applying the exact same rules. Before the 1970 amendments, a majority of courts applying Rule 36 concluded that requests could address neither the ultimate facts of the case nor issues or opinions of law.[73] The 1970 amendments are generally thought to have expanded the scope, allowing requests to admit opinions and ultimate facts.[74] But some debate remains,[75] and some courts view deemed admissions regarding

71. *Id.*

72. *Id.* at 637 n.85 (citing JOHN HARDIN YOUNG & TERRI A ZALL, MASTERING WRITTEN DISCOVERY: INTERROGATORIES, DOCUMENTS, AND ADMISSIONS § 7.26 (2d ed. 1992)).

73. *Id.* at 628 (citing WRIGHT, *supra* note 48, at § 2251, 520–21); *see also* WRIGHT, *supra* note 48, at § 2251, 319 ("Disagreements among the courts about the proper scope of the rule were resolved. These included whether a request was objectionable if it went to a matter of opinion."); Donaldson, *supra* note 11, at 494 ("Until recently, a typical rule governing requests for admission might authorize such requests only as to matters of fact or the genuineness of documents.").

74. Kinsler, *supra* note 14, at 628; Wise & Fayne, *supra* note 11, at 666 (citing TEX. R. CIV. P. 198.1, 198.2(b)); *see also* Carney v. IRS (*In re* Carney), 258 F.3d 415, 419 (5th Cir. 2001) ("Rule 36 allows litigants to request admissions as to a broad range of matters, including ultimate facts, as well as applications of law to fact.").

75. *See* Donaldson, *supra* note 11, at 499 ("[E]ven under such a liberal standard, it would be inappropriate to make a demand for admission of certain matters technically or arguably within the scope of normal discovery."); *see also* Asarco LLC v. Union Pac. R.R. Co., No. 2:12-cv-00283-EJL-REB, 2016 WL 1755241, at *12 (D. Idaho May 2, 2016) ("[R]equests for admission should not be used to establish facts which are obviously in dispute, to demand that the other party admit the truth of a legal conclusion, even if the conclusion is attached to operative facts . . . ." (quoting Tuvalu v. Woodford, No. CIV S-04-1724 DFL KJM P, 2006 WL 3201096, at *7 (E.D. Cal. Nov. 2, 2006))); Lakehead Pipe Line Co. v. Am. Home Assurance Co., 177 F.R.D. 454, 458 (D. Minn. 1997) ("[R]equests for admission are not to be employed as a means 'to establish facts which are obviously in dispute or to answer questions of law.'" (quoting Kosta v. Connolly, 709 F. Supp. 592, 594 (E.D. Pa. 1989))); Whitaker v. Belt Concepts of Am., Inc. (*In re* Olympia Holding Corp.), 189 B.R. 846, 853 (Bankr. M.D. Fla. 1995) ("Three of plaintiff's requests for admission directly request the defendant to admit or deny whether the defendant is not a small business. These requests clearly require the defendant to admit a crucial issue in the dispute. . . . The Court finds that the requests were improperly propounded to force the defendant to concede a highly contested factual issue prior to trial." (citation omitted)); *Kosta*, 709 F. Supp. at 594 ("We should not employ [Fed. R. 36] to establish facts which are obviously in dispute or to answer questions of law." (citing Driver v. Gindy Mfg. Corp., 24 F.R.D. 473, 475 (E.D. Pa. 1959))); Hungerford v. Greate Bay Casino Corp., 517 A.2d 498, 501 (N.J. Super. Ct. App. Div. 1986) (finding admissions of ultimate facts to be patently unfair); Burnside v. Foglia, 617 N.Y.S.2d 921, 921 (App. Div. 1994) ("Requests for admissions with respect to contested facts that go to the very essence of the dispute [are] palpably improper . . . ."); Time Warner, Inc. v. Gonzalez, 441 S.W.3d 661, 668 (Tex. App.—San Antonio 2014, pet. denied) (holding admissions are

ultimate issues as requiring greater scrutiny when considering whether to permit amendment or withdrawal.[76]

Beyond the realm of debate, however, is that requests may not seek pure admissions of law.[77] Because requests may generally seek admissions of application of law to facts,[78] the dividing line can be erratic.[79] An illustrative example is a comparison between two Wisconsin decisions.[80] In *Schmid v. Olsen*,[81] the Wisconsin Supreme Court majority held that a pre-trial request for the defendant to admit it was seventy-percent at fault for the accident was a proper request.[82] The dissent insisted that the decision subverted the purpose of requests for admission, created a perverse incentive for abuse, and required the defendant to presuppose a conclusion properly left for a trier of fact.[83]

improper when used to prove the ultimate issue in the case (citing Cedyco Corp. v. Whitehead, 253 S.W.3d 877, 880 (Tex. App.—Beaumont 2008, pet. denied))); Wise & Fayne, *supra* note 11, at 666–68 (disfavoring the use of admissions for ultimate fact questions).

76. *See*, *e.g.*, Bezi v. Camacho, No. SACV 11-00677-JLS (DTB), 2016 WL 4870469, slip op. at *5 (C.D. Cal. Aug. 8, 2016) ("[T]he [c]ourt must carefully scrutinize the requests at issue and the resulting deemed admissions since the requests at issue here concern ultimate issues to be decided in this case . . . ." (citing Whitsitt v. City of Tracy, No. 2:10–cv–0528 JAM AC PS, 2014 WL 2091363, at *3 (E.D. Cal. May 19, 2014); Jefferson v. Perez, No. CIV S–09–3008 GEB CKD P, 2012 WL 671917, at *1 (E.D. Cal. Feb. 29, 2012))).

77. Wilken & Bloom, *supra* note 62, at § 36.10[8], 36-25 (citing United States v. Petroff-Kline, 557 F.3d 285, 293 (6th Cir. 2009); Thompson v. Beasley, 309 F.R.D. 236, 241 (N.D. Miss. 2015); Currie v. United States, 111 F.R.D. 56, 59 (M.D.N.C. 1986); Williams v. Krieger, 61 F.R.D. 142, 144 (S.D.N.Y. 1973); Benson Tower Condo. Owners Ass'n v. Victaulic Co., 105 F. Supp. 3d 1184, 1196 (D. Or. 2015)); Kinsler, *supra* note 14, at 647; Wise & Fayne, *supra* note 11, at 665 (citing Williams v. Am. First Lloyds Ins., No. 02–12–00318–CV, 2013 WL 2631141, at *3 (Tex. App.—Fort Worth June 13, 2013, pet. denied)); *see also* P.R.S. Int'l, Inc. v. Shred Pax Corp., 703 N.E.2d 71, 76–78 (Ill. 1998) ("[I]n interpreting Rule 36 of the Federal Rules of Civil Procedure, the federal courts have reached the same conclusion: requests to admit ultimate facts are permissible, but requests to admit legal conclusions are impermissible.").

78. FED. R. CIV. P. 36(a)(1)(A).

79. Scott Moïse, *Requests for Admission*, S.C. LAW., Sept. 2006, at 44, 44 (citing *Currie*, 111 F.R.D. at 59; Shaheen v. Cty. of Mathews, 579 S.E.2d 162, 170 (Va. 2003)); Wise & Fayne, *supra* note 11, at 665–66.

80. *See* Kinsler, *supra* note 14, at 644–47 (comparing Schmid v. Olsen, 330 N.W.2d 547 (Wis. 1983), with Bank of Two Rivers v. Zimmer, 334 N.W.2d 230 (Wis. 1983), and Kettner v. Milwaukee Mut. Ins. Co., 431 N.W.2d 737 (Wis. 1988) to emphasize the difficulty involved in drawing the line between admissions entitled to binding effects and admissions that are not).

81. Schmid v. Olsen, 330 N.W.2d 547 (Wis. 1983).

82. *Id.* at 551.

83. *Id.* at 553–55 (Steinmetz, J., dissenting); Kinsler, *supra* note 14, at 644 (citing *Schmid*, 330 N.W.2d at 553 (Steinmetz, J., dissenting)).

Following the footsteps of *Schmid* was *Kettner v. Milwaukee Mutual Ins.*[84] The Wisconsin Court of Appeals postulated that a defendant's request to admit "the value of the plaintiff's claim for injuries in this case, taking into account his own contributory negligence does not exceed $100,000.00," was improper.[85] The opinion distinguished *Schmid* as having addressed a fixed circumstance, not one—like the value of a personal injury claim—which is "inherently variable."[86] The court also found shelter in the distinction between allowing a request for admission to cap the amount recoverable and the use of offers of judgment.[87]

In providing guidance to Texas practitioners,[88] one source advises:

> The distinction between a request for an admission of law and one for the application of law to fact often is not obvious. One way to determine if the request asks for the application of law to fact is to review the pertinent Texas pattern jury charge on the issue. If it is one that the jury would decide, it clearly is not a pure question of law.[89]

Though a pragmatic test, it does not hold true for *Kettner*.

Although carrying the power to easily end a case without any consideration for the underlying merits, Rule 36 has "a distinct preference . . . for ascertaining the truth and deciding the case on its

84. Kettner v. Milwaukee Mut. Ins. Co., 431 N.W.2d 737 (Wis. Ct. App. 1988).

85. *Id.* at 738, 740.

86. *Id.* at 740.

87. *Id.* at 739. In *Kettner*, the court concluded that there was already "a mechanism through which parties can make offers of settlement or judgment and recover costs and interest if the serving party ultimately does better at trial than it would have done had the offer been accepted." *Id.* If such requests were permitted, they "would defeat the policy that favors settlement of claims by providing a means to evade." *Id.* Therefore, the parties were creating a conflict between the settlement procedures and the discovery procedure of requests for admission. *Id.*

88. Texas provides substantively identical language to the scope of requests as Wisconsin. *Compare* WIS. STAT. ANN. § 804.11(1)(a) (West 2017) ("[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 [§] 804.01(2) 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."), *with* TEX. R. CIV. P. 198.1 ("A party may serve on another party . . . written requests that the other party admit the truth of any matter within the scope of discovery, including statements of opinion or fact or of the application of law to fact, or the genuineness of any documents served with the request or otherwise made available for inspection and copying.").

89. Wise & Fayne, *supra* note 11, at 665–66 (footnote omitted).

merits."[90] That preference to adjudicate on the merits of the claim is embodied in subsection (b) of Rule 36, which permits withdrawal of admissions.[91] Accordingly, some courts have gone so far as to consider whether withdrawal was merited even when the admitting party failed to file a motion to withdraw.[92] In deciding whether to permit withdrawal, courts must always strike a balance between the desire for resolution on the merits and recognition that "too liberal sufferance by the court of a litigant's sloth would undermine a valuable policy furthered by Rule 36(a)—the elimination of uncontested issues and expedition of trial."[93] The balance can be extremely difficult due to the need to keep the case moving,[94] which is often

90. Hodges v. Lewis & Lewis, Inc., 2005 WY 134, ¶ 12, 121 P.3d 138, 143 (Wyo. 2005) (citing Perez v. Miami-Dade Cty., 297 F.3d 1255, 1266 (11th Cir. 2002)).

91. FED. R. CIV. P. 36(b); *see also Hodges*, 121 P.3d at 143 (noting that the test requires "the party seeking to have the admission upheld to show it would be prejudiced by withdrawal or amendment of the admission").

92. Wilken & Bloom, *supra* note 62, at § 36.13, 36-45 (citing Chancellor v. Cty. of Detroit, 454 F. Supp. 2d 645, 666 (E.D. Mich. 2006)); *see also* Kennedy v. Nick Corcokius Enters., Inc., No. 9:15-CV-80642-ROSENBERG/BRANNON, 2015 WL 7253049, at *5–6 (S.D. Fla. Nov. 17, 2015) ("The Court construes Defendant's opposition to summary judgment on Item 012 as an attempt to withdraw this admission." (citing FED. R. CIV. P. 36(b); Lamark v. Laiwalla, No. 12–03034 WSB AC, 2013 WL 5703614, at *1 n.1 (E.D. Cal. Oct. 15, 2013); Essex Builders Grp., Inc. v. Amerisure Ins. Co., 230 F.R.D. 683, 686 (M.D. Fla. 2005))); United States *ex rel.* Thomas v. Black & Veatch Special Projects Corp., No. 11-2475-DDC, 2014 WL 2095168, at *4 (D. Kan. May 20, 2014) ("The court agrees with plaintiffs that, technically, a motion to withdraw admissions is what's contemplated by Rule 36 in this situation. But since the parties have briefed and argued the issues at length within the analytical framework of Rule 36, the court has no hesitancy considering the instant motion to strike as a motion to withdraw admissions."); Sunoco, Inc. v. MX Wholesale Fuel Corp., 565 F. Supp. 2d 572, 577 (D.N.J. 2008) ("[W]e recognize that a disposition on the merits is preferred over a decision based upon procedural technicalities." (citing Petrunich v. Sun Bldg. Sys., Inc., No. 3:CV-04-2234, 2006 WL 2788208, at *3 (M.D. Pa. Sept. 26, 2006))). *Contra* Broad. Music, Inc. v. Hub at Cobb's Mill, LLC, No. 3:13–CV–01237 (VLB), 2015 WL 1525936, at *5–6 (D. Conn. Apr. 2, 2015) (finding withdrawal of deemed admissions appropriate only upon motion (citing Atl. Sea Pride, Inc. v. McCarthy, No. 1:13–CV–0670 (LEK), 2013 WL 5652492, at *2 (N.D.N.Y. Oct. 15, 2013))); Atlanta Cas. Co. v. Goodwin, 422 S.E.2d 76, 77 (Ga. Ct. App. 1992) (entering summary judgment against *pro se* defendant who timely answered the complaint but failed to timely respond to requests for admission served with the complaint).

93. Hadra v. Herman Blum Consulting Eng'rs, 74 F.R.D. 113, 114 (N.D. Tex. 1977).

94. Rule 36 is meant to expedite discovery, not just the trial. *See* Adventis, Inc. v. Consol. Prop. Holdings, Inc., 124 F. App'x 169, 172 (4th Cir. 2005) ("The purpose of such admissions is to narrow the array of issues before the court, and thus expedite both the discovery process and the resolution of the litigation." (citing Carney v. IRS (*In re* Carney), 258 F.3d 415, 419 (5th Cir. 2001))); JZ Buckingham Invs., LLC v. United States, 77 Fed. Cl. 37, 44 (2007) (favoring the use of admissions not only to expedite the litigation process but also to save time and money in the discovery process (citing FED. R. CIV. P. 36 advisory committee's note to 1970 amendment)); *see also* United States v. Persaud, 229 F.R.D. 686, 694 (M.D. Fla. 2005) ("To release [a party] from his deemed admissions under these

best accomplished by holding attorneys to rigid deadlines.[95] In striking that balance, often the scales will tip in favor of withdrawal if the court concludes that Rule 36 was abused.[96]

III. IMPROPER USES OF REQUESTS FOR ADMISSION

When used to further the intended purpose of litigation economy, requests for admission are an asset to the legal process.[97] But as beneficial a tool as it may be, when used for improper purposes, requests for admission become a burden on the system.[98] Aside from not allowing requests to

circumstances would reward him for abusing the litigation process, would waste precious judicial resources, and would subject the United States to manifest inequity. Enough is enough.").

95. Some scholars have pointed out the importance of deadlines for many attorneys, noting that many attorneys procrastinate, which suggests cases would move slowly if attorneys were left to their own devices. *See* Mark Powers et al., *Create Balance in Your Life by Becoming Proactive*, S.C. LAW., Sept. 2004, at 32, 34–35 ("[F]or many attorneys, it is the push they rely upon every day to get the job done."). Furthermore, they note that "one of the symptoms of excessive reliance on adrenaline is that without a pending deadline, you are not motivated to lift a finger." *Id.* at 35.

96. *See* Perez v. Miami-Dade Cty., 297 F.3d 1255, 1264–65 (11th Cir. 2002) (holding a court abuses its discretion by denying a motion to withdraw admissions when the court does not follow the intent of Rule 36(b) (first citing Smith v. First Nat'l Bank, 837 F.2d 1575, 1577 (11th Cir. 1988); then citing Asea, Inc. v. S. Pac. Trasp. Co., 669 F.2d 1242, 1248 (9th Cir. 1982); and then citing Gutting v. Falstaff Brewing Corp., 710 F.2d 1309, 1313 (8th Cir. 1983))); *see also* United States v. $23,940.00 in U.S. Currency, No. 3:14-CV-01226 (VLB), 2015 WL 7295430, at *2 (D. Conn. Nov. 18, 2015) ("In exercising its discretion the court should strive to balance the equities, and where the party relying on the admission would not be prejudiced, thereby strive to resolve the issue on the merits."); Costello v. Zavodnik, 55 N.E.3d 348, 352 (Ind. Ct. App. 2016) ("[W]e must conclude that the trial court abused its discretion when it denied part of Castello's motion to withdraw his admissions.").

97. *See Perez*, 297 F.3d at 1268–69 ("[W]hen a party uses [Rule 36] to establish uncontested facts and to narrow the issues for trial, then the rule functions properly."); Wilken & Bloom, *supra* note 62, at § 36.02[1], 36-6–36-7 ("[R]equests for admission can save litigants valuable time and substantial money, which would otherwise have to be spent unnecessarily either to prove certain facts at trial, or to establish certain facts through complex, costly discovery procedures, such as interrogatories, depositions, and requests for the production of documents, when such facts are not contested."); WRIGHT, *supra* note 48, at § 2252, 320–22 (asserting Rule 36 saves time, limits disputed matters at trial, promotes efficiency and economy, aids judicial administrators, and makes summary judgment possible (first citing Holiday Inns Inc. v. Aetna Ins. Co., 571 F. Supp. 1460, 1468 (S.D.N.Y. 1983); then citing FED. R. CIV. P. 36 advisory committee's note to 1970 amendments; and then citing Ted Finman, *The Request for Admissions in Federal Civil Procedure*, 71 YALE L.J. 371, 376 (1962))).

98. *See Perez*, 297 F.3d at 1268–69 (stressing misuse of requests for admission causes Rule 36's time-saving function to cease, by "dragging out the litigation and wasting valuable resources"); Wise & Fayne, *supra* note 11, at 658 ("[R]equests for admission are a double-edged sword. On the one hand, they can streamline the action and reduce its costs, whereas, on the other hand, they can result in virtual ruin when a party fails to timely or properly respond to them.").

admit pure issues of law,[99] the three most common circumstances in which requests for admission are deemed improper are: (1) when a court may ascertain bad faith in sending the requests, (2) the number of requests is unreasonable, and (3) the requesting party could not have reasonably believed that the request would be admitted.[100]

A. *Requests Made in Bad Faith*

Perhaps the most frequently cited case in which the court found bad faith is *Perez v. Miami-Dade County*.[101] Having found ill intent in sending requests for admission alongside the complaint,[102] the Eleventh Circuit commented:

> When a party like Perez . . . uses the rule to harass the other side or . . . with the wild-eyed hope that the other side will fail to answer and therefore admit essential elements (that the party has already denied in its answer), the rule's time-saving function ceases; the rule instead becomes a weapon, dragging out the litigation and wasting valuable resources.[103]

Perez does not stand in isolation. A district court also sent a strong warning to the parties that a continued abuse of Rule 36 would not be tolerated: "Surely, judicial and litigation economy and efficiency, the intended and vital purpose of Requests to Admit, were not promoted by

99. Because the requests must be tied to the facts of the case, they also may not seek admissions to hypotheticals. *See, e.g.*, Buchanan v. Chi. Transit Auth., No. 16-cv-4577, 2016 WL 7116591, slip op. at *5 (N.D. Ill. Dec. 7, 2016) ("Since requests to admit 'must be connected to the facts of the case, courts do not permit "hypothetical" questions within requests for admission.'" (quoting Morley v. Square, Inc., No. 4:14cv172, 2016 WL 123118, at *3 (E.D. Mo. Jan. 1, 2016))).

100. *See* Wise & Fayne, *supra* note 11, at 659 ("Unlike depositions, disclosure requests, interrogatories, and production requests, whose primary purpose is to discover facts or to obtain information and documents, requests for admission were *not* designed for these purposes.").

101. Perez v. Miami-Dade Cty., 297 F.3d 1255 (11th Cir. 2002).

102. Although still allowed in some jurisdictions—following the 1993 amendment to Rule 36—requests for admission could no longer be served with the complaint in federal court. *See* FED. R. CIV. P. 36 advisory committee's note to 1993 amendment (requiring parties first to meet and confer regarding settlement of complaint and resolution prior to commencement of formal discovery procedures under Rule 26(f)); Fleet Credit Card Servs. v. Harden (*In re* Harden), 282 B.R. 543, 545–46 (Bankr. M.D. Ga. 2002) (prohibiting the service of requests for admission before the Rule 26(d) conference (first citing FED. R. CIV. P. 36 advisory committee's note to 1993 amendment; and then citing 10 WILLIAM MILLER COLLIER, COLLIER ON BANKRUPTCY § 7036.02, 7036-3 (5th ed. rev. 1997))).

103. *Perez*, 297 F.3d at 1268; *see also* Conlon v. United States, 474 F.3d 616, 622 (9th Cir. 2007) ("The rule is not to be used in an effort to 'harass the other side' or in the hope that a party's adversary will simply concede essential elements." (quoting *Perez*, 297 F.3d at 1268)).

these parties. A word to the wise to the parties: if this type of conduct persists, sanctions will assuredly be pursued *sua sponte*."[104]

Texas courts have gone a step further. The Texas Supreme Court, in *Wheeler v. Green*[105], "first held that when deemed admissions are not used as intended and 'preclude presentation of the merits of a case, . . . due-process concerns arise.'"[106] Accordingly, in Texas, when requests are used for improper purposes and become merits-preclusive, a presumption in favor of withdrawal attaches.[107]

Ill intent is frequently found in two circumstances. The first is when the requests ask the party to admit what it has already denied in a responsive pleading or has asserted in its complaint. The second is when the requests are sent alongside the complaint and summons. *Perez* addressed each.

As to the first, the court advised,

> Once a defendant has answered . . . it continues to be inappropriate for a plaintiff to re-serve the complaint in the form of a request for admissions in order to "require the defendant to admit or deny nearly every paragraph [of a complaint it has already answered]." This is especially true here, where the defendants had denied [Plaintiff]'s core allegations . . . in the answers and again at the scheduling conference. [Plaintiff]'s continued service of the same request for admissions in the face of these denials was an abuse of Rule 36.[108]

104. Henry v. Champlain Enters., Inc., 212 F.R.D. 73, 81 n.5 (N.D.N.Y. 2003) (citing Thalheim v. Eberheim, 124 F.R.D. 34, 35–36 (D. Conn. 1988)); *see also* Roca Labs, Inc. v. Consumer Op. Corp., 140 F. Supp. 3d 1311, 1317 n.3 (M.D. Fla. 2015) ("The parties were twice placed on notice that advocacy does not include game playing.").

105. Wheeler v. Green, 157 S.W.3d 439 (Tex. 2005) (per curiam).

106. Time Warner, Inc. v. Gonzalez, 441 S.W.3d 661, 665 (Tex. App.—San Antonio 2014, pet. denied) (quoting *Wheeler*, 157 S.W.3d at 443).

107. *Id.* at 665–66 (citing Marino v. King, 355 S.W.3d 629, 634 (Tex. 2011) (per curiam)). The presumption can be overcome by a showing of "flagrant bad faith or callous disregard of the rules" by the party who failed to answer. *Id.* at 666 (quoting *Wheeler*, 157 S.W.3d at 443).

108. *Perez*, 297 F.3d at 1269 (citations omitted). The reference to "continued service" is that the Plaintiff re-served the same requests along with nearly three dozen more later in the case. *Id.* at 1259.

Numerous courts have followed suit.[109] Of course, *Perez* does not set forth a purely defendant-slanted standard. It applies with equal force to counterclaims,[110] and the logic extends to all pleadings.[111]

The second circumstance is when the requests are served with the complaint and summons. Although no longer permitted under Rule 36,[112] "[i]n many state courts, requests may be served at any time, including with pleadings."[113] Professor Kinsler has cautioned that "[o]ne tactic a lawyer should carefully watch out for, no matter which side of the case he or she is on, is the filing of requests for admissions with the initial pleadings. It is

109. Harmon v. Elkins Wrecker Serv., Inc., No. 1:12–cv–758–JEC, 2013 WL 2457957, at *3 (N.D. Ga. June 6, 2013) (quoting *Perez*, 297 F.3d at 1268); Gaines-Hanna v. Farmington Pub. Sch. Dist., No. 04-CV-74910-DT, 2006 WL 891434, at *2 (E.D. Mich. Mar. 31, 2006) (quoting *Perez*, 297 F.3d at 1269); HAYDOCK & HERR, *supra* note 9, at § 30.03[B], 30-6 (citing *Perez*, 297 F.3d at 1268); Wilken & Bloom, *supra* note 62, at § 36.10[7], 36-24–36-25 (quoting *Perez*, 297 F.3d at 1269). *But see* United States v. Persaud, 229 F.R.D. 686, 694 (M.D. Fla. 2005) (concluding the "case present[ed] unusual circumstances warranting departure from the general rule proscribing 're-serving' the complaint in the form of a request for admissions"); *cf.* Jackson v. Geometrica, Inc., No. 3:04CV640J20HTS, 2006 WL 213860, at *5 (M.D. Fla. Jan. 27, 2006) ("A review of the requests alongside the Complaint reveals they are not identical. In any event, the Court is not of the view that three questions would rise to the level contemplated by the court in *Perez*.").

110. Bruggemann v. Amacore Grp., Inc., No. 8:09–cv–2562–T–30MAP, 2011 WL 1899251, at *4 (M.D. Fla. Apr. 1, 2011).

111. *See, e.g.*, Hungerford v. Greate Bay Casino Corp., 517 A.2d 498, 501 (N.J. Super. Ct. App. Div. 1986) ("In addition, through his letter of June 12th and paragraph 2 of his complaint plaintiff had already notified Greate Bay before the requests for admissions were made that in his opinion the $17 per share price was not fair and reasonable."). In explaining the rationale of *Perez*, Professor Haydock and Mr. Herr write, "A plaintiff cannot include as a request the statements made in the complaint and demand that the defendant respond, because the defendant has already done so." HAYDOCK & HERR, *supra* note 9, at § 30.03[B], 30-6 (citing *Perez*, 297 F.3d at 1268). The same rationale applies to a defendant promulgating requests to admit that contradict allegations of the complaint because the allegations of a complaint, like answers, are already binding judicial admissions upon the authoring party. Sovereign Bank v. BJ's Wholesale Club, Inc., 533 F.3d 162, 181 (3d Cir. 2008) (citing Parilla v. IAP Worldwide Servs. VI, Inc., 368 F.3d 269, 275 (3d Cir. 2004)).

112. *See* HAYDOCK & HERR, *supra* note 9, at § 30.03[A], 30-5 (noting the inability of a party to "unilaterally serve requests for admissions with pleadings"); Wilken & Bloom, *supra* note 62, at § 36.10[2], 36-22 ("Service of requests for admission generally must await the parties' Rule 26(f) discovery conference." (citing FED. R. CIV. P. 26(d)(1)); WRIGHT, *supra* note 48, at § 2257, 340 (explaining that requests may not be sent prior to the Rule 26(f) conference absent court permission or written stipulation).

113. HAYDOCK & HERR, *supra* note 9, at § 30.03[A], 30-5; *see also* ARTHUR, *supra* note 27, at § 26.3, 708 ("The plaintiff may serve a request for admission upon another party with or after the service of the summons and complaint upon that party." (citing IND. R. TRIAL P. 36(A)); Kinsler, *supra* note 14, at 636 ("[I]f requests for admission are served with the summons and complaint, the defendant is given forty[-]five days to respond." (citing WIS. STAT. ANN. § 804.11(1)(b) (West 2017))).

easy for the attorney to overlook these early requests, resulting in a late filing."[114]

The advantages of serving requests for admission before an opposing party becomes engaged in the case are clear: either the recipient fails to answer in time, in which case the requests are deemed admitted;[115] or, even if answered, it "has the potential for securing damaging admissions from the answering party before he or she has had a chance to formulate a case strategy."[116]

Perez also addressed the problem of service with the complaint, stating, "[W]e believe that it is inappropriate . . . for a plaintiff to serve a request for admissions along with the complaint. It is simply too early for the defendant, having not yet received the allegations, to perceive what facts should or should not be contested."[117] Perhaps more importantly—a point echoed in *Perez*'s rejection of requests that mirror the pleadings—the complaint already obligates the defendant to admit or deny the allegations therein.[118] Whatever justifiable purpose a request for admission could serve at such an early stage, the same purpose would appear served by an allegation incorporated into the complaint.[119]

114. Kinsler, *supra* note 14, at 637 n.91 (citing MARK A. DOMBROFF, DISCOVERY § 6.14, 275 (1986)).

115. *See, e.g.*, Atlanta Cas. Co. v. Goodwin, 422 S.E.2d 76, 77 (Ga. Ct. App. 1992) ("If a party served with a request for admission does not serve an answer or objection and does not move for an extension of time or to withdraw the admissions resulting from a failure to answer, the matter stands admitted." (quoting Albitus v. Farmers & Merchs. Bank, 283 S.E.2d 632, 634 (Ga. Ct. App. 1981))).

116. Kinsler, *supra* note 14, at 637 n.88 (citing Mark A. Dombroff, *Requests for Admissions: Weighing the Pros and Cons*, TRIAL, June 1983, at 82, 85).

117. Perez v. Miami-Dade Cty., 297 F.3d 1255, 1268–69 (11th Cir. 2002); *accord* HAYDOCK & HERR, *supra* note 9, at § 30.03[A], 30-5 (reiterating a defendant is likely unable to determine which facts to contest at the time of service of the complaint (citing *Perez*, 297 F.3d at 1268–69)).

118. FED. R. CIV. P. 8(b)(1)(B).

119. Of course, complaints are required to be short and plain. FED. R. CIV. P. 8(a). But, as universally recognized, parties routinely add more to complaints than required. *See, e.g.*, Bartholet v. Reishauer A.G., 953 F.2d 1073, 1078 (7th Cir. 1992) (acknowledging parties' tendency to over plea although the rules clearly discourage such a practice). So long as the allegation is not "redundant, immaterial, impertinent, or scandalous," which would merit striking under Federal Rule of Civil Procedure 12, inclusion in the complaint should provide a much more suitable forum. FED. R. CIV. P. 12(f). Of course, plaintiffs must be mindful not to get carried away. *See* United States v. Lockheed-Martin Corp., 328 F.3d 374, 378 (7th Cir. 2003) ("Length may make a complaint unintelligible, by scattering and concealing in a morass of irrelevancies the few allegations that matter. Three other circuits have held that length and complexity may doom a complaint by obfuscating the claim's essence." (citing *In re* Westinghouse Sec. Litig., 90 F.3d 696, 702–03 (3d Cir. 1996))).

A third circumstance in which ill intent is more readily found is when requests for admission are used against unrepresented parties; this is because—failing to grasp the gravity of the requests—many frequently fail to timely respond.[120] One court sternly concluded, "Requests for admissions should not be used as a tactical device to trap unwary *pro se* litigants."[121] In another case, the Court of Appeals of Indiana was quick to overturn a summary judgment obtained by use of baseless requests to a *pro se* party.[122] However, not all courts are as quick to protect *pro se* litigants from the harsh and rigid application of deemed admissions. In one instance, the Court of Appeals of Georgia awarded summary judgment against a *pro se* defendant who answered the complaint but failed to answer the accompanying requests for admission.[123]

B. *Oppressive Volume of Requests*

Another far too common tactic is to propound a wholly unreasonable number of requests for admission—often hundreds and even thousands.[124]

120. Helbig v. Comm'r, No. 8011-06, 2008 WL 4735396, at *2 n.3 (T.C. Oct. 29, 2008); *see also* Costello v. Zavodnik, 55 N.E.3d 348, 350–51 (Ind. Ct. App. 2016) (illustrating an example of a deemed admission where a *pro se* defendant failed to respond to discovery requests).

121. Hungerford v. Greate Bay Casino Corp., 517 A.2d 498, 501 (N.J. Super. Ct. App. Div. 1986); *see also* Diggs v. Keller, 181 F.R.D. 468, 469 (D. Nev. 1998) ("[T]his Court holds that pro se prisoners are entitled to notice that matters found in requests for admission will be deemed admitted unless responded to within 30 days after such requests have been served. Without such notice, pro se prisoners will most likely not be aware that failure to respond to a request for admission would result in the admission of the matters contained in the request." (citing Klingele v. Eikenberry, 849 F.2d 409, 411–12 (9th Cir. 1988))); Mucek v. Nationwide Commc'ns, Inc., 2002 WI App 60, ¶ 84, 643 N.W.2d 98, 122 (Wis. Ct. App. 2002) (Dykman, J., dissenting) ("[I]t is likely that pro se or inexperienced litigants will be the ones who are most often injured by the majority's judicial policy against withdrawing admissions.").

122. *Costello*, 55 N.E.3d at 354. Notably, both parties were without counsel at the time of trial. *Id.* at 349. In *Castello*, the court reasoned that the deemed admissions, if allowed to stand, would completely dispose of the case. *Id.* at 352. Furthermore, the court found particularly significant the fact that the defendant here had already lost in the small-claim's court proceedings. *Id.* And the court suggested that since the requests sought nothing to justify an award of damages, there is a "strong[] indicati[on] that [the] requests . . . had no basis in reality." *Id.*

123. Atlanta Cas. Co. v. Goodwin, 422 S.E.2d 76, 77 (Ga. Ct. App. 1992); *cf.* HAYDOCK & HERR, *supra* note 9, at § 30.07[E], 30-18 (stating courts enforce default admissions against *pro se* parties (citing Moses v. U.S. Steel Corp., 946 F. Supp. 2d 834, 841 (N.D. Ind. 2013))).

124. *See* Misco, Inc. v. U.S. Steel Corp., 784 F.2d 198, 205 (6th Cir. 1986) (recalling plaintiff served 2,028 requests for admission across 343 pages, though many were later found to be interrogatories in disguise); Henry v. Champlain Enters., Inc., 212 F.R.D. 73, 81 n.5 (N.D.N.Y. 2003) (presenting an instance where 148 requests were served); Schoenholtz v. Doniger, No. 83 Civ. 2740 (IBC), 1984 WL 374, at *8 (S.D.N.Y. May 4, 1984) (serving 252 requests for admission under Federal Rule of Civil Procedure 36(a)).

Although Rule 36—and those rules patterned upon it—do not include a limitation on the number of requests, there is an implicit limitation of reasonableness,[125] and local rules may otherwise set a limit.[126] Unless otherwise governed by local rule, the reasonable number of requests will depend upon the facts of a case.[127] "Some cases will justify the use of a lot of requests; others a lot less."[128]

One court held that 177 requests in a discrimination case were not excessive.[129] On the other hand, 182 requests—where "[t]here [we]re only two named Defendants . . . and one Plaintiff and the issues, while notably important, [we]re fairly succinct"—*was* held to be excessive.[130]

125. HAYDOCK & HERR, *supra* note 9, at § 30.03[D], 30-9; Wilken & Bloom, *supra* note 62, at § 36.10[5], 36-22.1 (citing FED. R. CIV. P. 26(b)(2)(C)(i)). The Advisory Committee on the federal rules recently proposed instituting a presumptive limit of twenty-five requests. Tidmarsh, *supra* note 1, at 856 n.2 (citing COMM. ON RULES OF PRAC. AND PROC. OF THE JUD. CONF. OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY AND CIVIL PROCEDURE 291, 310–11 (2013), https://www.ediscoverylaw.com/files/2013/11/Published-Rules-Package-Civil-Rules-Only.pdf [https://perma.cc/TN8L-BWK3]). The proposal did not advance out of committee. *Id.* (citing Memorandum from Hon. David G. Campbell, Advisory Comm. on Civil Rules, on Report of Advisory Comm. on Civ. Rules, to Hon. Jeffrey S. Sutton, Chair Comm. on Rules of Prac. and Proc. (May 2, 2014), http://www.uscourts.gov/sites/default/files/fr_import/CV05-2014.pdf [https://perma.cc/C4JB-TFGZ]).

126. FED. R. CIV. P. 26(b)(2)(A); GRIMM, *supra* note 1, at 165; STEVEN BAICKER-MCKEE ET AL., FEDERAL CIVIL RULES HANDBOOK 915 (2014 ed.); Wilken & Bloom, *supra* note 62, at § 36.10[5], 36-22.1 (citing FED. R. CIV. P. 26(b)(2)(A)).

127. GRIMM, *supra* note 1, at 165; Wise & Fayne, *supra* note 11, at 672 (citing BP Amoco Chem. Co. v. Flint Hills Res., LLC, No. 05 C 5661, 2008 WL 4542738, at *1 (N.D. Ill. June 11, 2008)).

128. HAYDOCK & HERR, *supra* note 9, at § 30.03[D], 30-9. "One method of preempting a claim that the requests are so numerous as to be burdensome is to divide the requests into smaller sets and serve these sets in reasonably timed waves." Kinsler, *supra* note 14, at 636 (citing ROBERT B. CORRIS & MARK M. LEITNER, WISCONSIN DISCOVERY LAW AND PRACTICE § 5.15 (1994)).

129. HAYDOCK & HERR, *supra* note 9, at § 30.03[D], 30-9 (citing Sommerfield v. City of Chicago, 251 F.R.D. 353, 354 (N.D. Ill. 2008)); *see also* Kinsler, *supra* note 14, at 636 ("[C]ourts have . . . [recently] approved requests containing 704 admissions, 244 admissions, and 106 admissions . . . ." (footnotes omitted) (first citing Photon, Inc. v. Harris Intertype, Inc., 28 F.R.D. 327, 328 (D. Mass. 1961); then citing Berry v. Federated Mut. Ins. Co., 110 F.R.D. 441, 442–43 (N.D. Ind. 1986); and then citing Shawmut, Inc. v. Am. Viscose Corp., 12 F.R.D. 488, 489 (D. Mass. 1952))).

130. Murray v. U.S. Dep't of Treasury, No. 08–cv–15147, 2010 WL 3464914, at *2 (E.D. Mich. Sep. 1, 2010); *see also* Stokes v. Interline Brands Inc., No. C-12-05527 JSW (DMR), 2013 WL 6056886, at *2 (N.D. Cal. Nov. 14, 2013) ("In the interest of judicial economy, this court declines to determine the propriety of each of Defendant's 1059 requests for admission in the 162-page submission. Rather, the court finds that the sheer volume of the requests for admission is unduly burdensome and oppressive. This case is straightforward; Plaintiff asserts only three state law causes of action based on Defendant's reimbursement, wage deduction, and wage statement practices. This is not the type of complex lawsuit that warrants voluminous discovery of the type propounded by Defendant.").

In 2010, a district court, in ordering the number of request be capped at twenty-five, stated, "[M]any courts have limited by local rule the number of [r]equests for [a]dmission to [twenty-five]."[131] My review of current[132] local rules for each federal district revealed an average cap of 18.3 for expedited track, 26.6 for standard track, and fifty for complex track, with twenty-five as the most frequently occurring of the standard track at ten of twenty-five rules and thirty as the second most frequent at nine.[133] The majority of federal districts, however, do not have rules setting limitations.

131. *Murray*, 2010 WL 3464914, at *1 (citing Oklahoma *ex rel.* Edmondson v. Tyson Foods, Inc., No. 05-CV-329-TCK-SAJ, 2007 WL 54831, at *2 (N.D. Okla. Jan. 5, 2007); Estate of Manship v. United States, 232 F.R.D. 552, 558 (M.D. La. 2005)).

132. "Local rules change frequently; the practitioner is advised to consult the most recent local rules of the particular district." Wilken & Bloom, *supra* note 62, at § 36.10[5], 36-22.1 n.6.

133. *See* LOCAL RULES, CIVIL RULE 36.1 (S.D. CAL. 2017) (limiting requests for admission to twenty-five requests without leave of court); LOCAL RULES 36 (M.D. GA. 2017) (limiting requests for admission to fifteen); LOCAL RULES FOR CIVIL ACTIONS 36 (S.D. GA.) (limiting requests for admission to twenty-five); BANKRUPTCY LOCAL RULES 7005.1 (D. IDAHO BANKR. 2015) (limiting requests for admission to twenty-five); LOCAL RULES 26-1 (N.D. IND. 2016) (limiting requests for admission to thirty); LOCAL RULES B-7026-1 (N.D. IND. BANKR. 2016) (limiting requests for admission to thirty); LOCAL RULES 36-1 (S.D. IND. 2017) (limiting requests for admission to twenty-five); LOCAL RULES B-7036-1 (S.D. IND. BANKR. 2010) (limiting requests for admission to twenty-five); LOCAL RULES, LOCAL CIVIL RULES 36 (M.D. LA. 2015) (limiting requests for admission to twenty-five); LOCAL RULES, CIVIL RULES 26 (D. ME. 2016) (limiting requests for admission to thirty for standard track); LOCAL RULES, CIVIL 104(1) (D. MD. 2016) (limiting requests for admission to thirty); LOCAL BANKRUPTCY RULES 7026-1 (D. MD. BANKR. 2013) (limiting requests for admission to thirty); LOCAL RULES 26.1(c) (D. MASS. 2008) (limiting requests for admission to twenty-five); RULES OF PRACTICE AND PROCEDURE, LOCAL RULES OF CIVIL PRACTICE 26.1(a)(1) (M.D.N.C. 2017) (limiting requests for admission to fifteen); CIVIL LOCAL RULES 16.2CJ (D.N. MAR. I. 2010) (limiting requests for admission to thirty for standard and fifty for complex track); LOCAL CIVIL RULES 36.1 (S.D. OHIO 2016) (limiting requests for admission to forty); LOCAL CIVIL RULES 36.1 (E.D. OKLA. 2016) (limiting requests for admission to twenty-five); LOCAL CIVIL RULES 36.1 (N.D. OKLA. 2016) (limiting requests for admission to twenty-five); LOCAL COURT RULES, CIVIL RULES 36.1 (W.D. OKLA. 2014) (limiting requests for admission to twenty-five); RULES OF COURT 36.1 (M.D. PA. 2014) (limiting requests for admission to twenty-five); LOCAL RULES, CIVIL 16.2 (W.D. TENN. 2016) (limiting requests for admission to twenty for expedited track); LOCAL COURT RULES, CIVIL RULES 36 (W.D. TEX. 2012) (limiting requests for admission to thirty); LOCAL RULES 36.1 (E.D. WASH. 2015) (limiting requests for admission to fifteen); CIVIL RULES 39.2 (W.D. WASH.) (limiting requests for admission to ten); LOCAL RULES, CIVIL PROCEDURE 26.01 (N.D.W. VA. 2010) (limiting requests for admission to forty); LOCAL BANKRUPTCY RULES AND FORMS 7026-1 (D. WY. BANKR. 2012) (limiting requests for admission to twenty).

Some states have built caps into their procedure rules,[134] and others have left it for local rules.[135]

This form of abuse by numbers is particularly apt to draw judicial ire because it can pose hefty burdens on courts as well as parties. One case provides insight into the laborious process:

> The Plaintiffs have identified a number of the responses as being inadequate, approximately a third of the 148 Requests to Admit. This Court took the time to read the entire 97[-]page Supplemental and Amended Responses to the Requests for Admissions. This Court spent countless hours, too many hours in fact, trying to discern the content of these responses, and would not want this burden visited upon the trial court, no matter how complicated the litigation may be. Even though the requests were more intelligible, the Court senses a trap is laid for the unwary in many of them.[136]

134. *See* ARIZ. R. CIV. P. 36(a)(3) (limiting requests for admission to twenty-five); IOWA R. CIV. P. 1.510(1) (limiting requests for admission to thirty); IOWA R. CIV. P. 1281(2)(c)(3) (capping requests at ten for expedited actions); NEV. R. CIV. P. 36(c) (limiting "requests for admissions that do not relate to the genuineness of documents" to forty); OR. R. CIV. P. 45(F) (limiting requests for admission to thirty); OR. TAX CT. R. 45(F) (limiting requests for admission to thirty); S.C. R. CIV. P. 36(c) (limiting requests for admission to twenty); VA. SUP. CT. R. 4:11(e)(1) (limiting requests for admission to thirty).

135. *See* LOCAL CIVIL RULES 26(F) (SUPER. & CIR. CTS., ALLEN COUNTY, IND. 2015) (limiting requests for admission to thirty); LOCAL COURT RULES 8(B) (CTY. CT., LAKE COUNTY, IND. 2015) (limiting requests for admission to thirty); MASS. UNIF. SUMMARY PROCESS R. 7(a) (limiting requests for admission to thirty); JUV. CT. LOCAL RULES OF PROCEDURE 46 (BUTLER COUNTY, OHIO 2007) (limiting requests for admission to twenty); LOCAL RULES OF PRACTICE AND PROCEDURE 2.11 (C.P. GEN. DIV., GREENE COUNTY, OHIO 2013) (limiting requests for admission to forty); RULES OF COURT 4014 (CTY. CT., CARBON COUNTY, PA. 2016) (limiting requests for admission to forty); RULES OF COURT 4005-1 (DIST. CT., 9TH DIST. CUMBERLAND COUNTY, PA. 2017) (limiting requests for admission to forty); LOCAL RULES OF COURT, CIVIL RULES 4014 (CTY. CT., DAUPHIN COUNTY, PA. 2012) (limiting requests for admission to forty); LOCAL RULES OF CIVIL PROCEDURE 39-4005 (CTY. CT., FRANKLIN & FULTON COUNTY, PA. 2015) (limiting requests for admission to forty); LOCAL RULES, CIVIL LOCAL RULES 4014 (CTY. CT., MONTOUR COUNTY, PA. 2015) (limiting requests for admission to forty); LOCAL RULES OF PRACTICE 8 (CH. CT., KNOX COUNTY, TENN. 2000) (limiting requests for admission to forty); LOCAL RULES OF PRACTICE 14(b) (DIST. CT., 26TH JUDICIAL DISTRICT, TENN. 2000) (limiting requests for admission to thirty); LOCAL RULES, CIVIL RULES 26 (SUPER. CT., KING COUNTY, WASH. 2016) (limiting requests for admission to twenty); WY. R. CIV. P. CIR. CT. 8 (limiting requests for admission to twenty).

136. Henry v. Champlain Enters., Inc., 212 F.R.D. 73, 81 n.5 (N.D.N.Y. 2003).

C. *Requesting Party Could Not Reasonably Have Believed the Request Would Be Admitted*

Consistent with the overarching obligation of good faith in discovery,[137] "[c]ontentions not subject to good faith dispute should be resolved through concession rather than by submission to a judge or jury."[138] Indeed, Federal Rule 37(c)(2) permits a party to recover costs and fees after establishing an important point was denied in response to requests for admission; however, only if there was no reasonable ground to deny the point.[139] Consequently, it is not improper to tender a request for admission expecting it to be denied, so long as there would be no reasonable ground for the denial.

But the converse is also true. When the matter is clearly subject to a good faith dispute—such that no reasonable party would admit—the good-faith obligation dictates that requests not be sought.[140] The New York rule may

137. FED. R. CIV. P. 26(g)(1)(B); Asea, Inc. v. S. Pac. Transp. Co., 669 F.2d 1242, 1246 (9th Cir. 1981).

138. Kinsler, *supra* note 14, at 633 (quoting Ted Finman, *The Request for Admissions in Federal Civil Procedure*, 71 YALE L.J. 371, 376 (1962)).

139. *See* FED. R. CIV. P. 37(c)(2) (allowing the recovery of reasonable expenses unless the request was objectionable under Rule 36(a), the admission was not substantially important, the admitting party had a reasonable belief it would ultimately prevail, or there was some other good cause).

140. *See* McNeese v. Access Midstream, L.P., No. CIV-14-503-D, 2017 WL 972156, slip op. at *1 (W.D. Okla. Mar. 10, 2017) ("[T]he purpose of Rule 36 is to expedite trial by eliminating the necessity of proving undisputed and peripheral issues, and courts should not employ the rule 'to establish facts which are obviously in dispute or to answer questions of law.'" (first citing Keen v. Detroit Diesel Allison, 569 F.2d 547, 554 (10th Cir. 1978); and then quoting Lakehead Pipe Line Co. v. Am. Home Assurance Co., 177 F.R.D. 454, 458 (D. Minn. 1997))); Asarco LLC v. Union Pac. R.R. Co., No. 2:12-cv-00283-EJL-REB, 2016 WL 1755241, at *12 (D. Idaho May 2, 2016) ("[R]equests for admission should not be used to establish facts which are obviously in dispute . . . ." (quoting Tuvalu v. Woodford, No. CIV S-04-1724 DFL KJM P, 2006 WL 3201096, at *7 (E.D. Cal. Nov. 2, 2006))); Ross v. Shah, No. 1:12–CV–1006 (GTS/CFG), 2015 WL 4648002, at *11 (N.D.N.Y. Aug. 5, 2015) (finding requests unenforceable because they "improperly sought the admission of the case's fundamental legal issues" (citing *Lakehead*, 177 F.R.D. at 458)); United States *ex rel.* Dyer v. Raytheon Co., No. 08–10341–DPW, 2013 WL 5348571, at *6 (D. Mass. Sep. 23, 2013) (declaring requests to be improper because they sought admissions of intensely disputed issues (citing *Lakehead*, 177 F.R.D. at 458)); Hill v. Lappin, No. 3:10–CV–1743, 2012 WL 2049570, at *4 (M.D. Pa. June 6, 2012) ("Where . . . issues in dispute are requested to be admitted, a denial is a perfectly reasonable response."); Estate of Bruess v. Blount Int'l, Inc., No. C09–2055, 2011 WL 2133626, at *5 (N.D. Iowa May 26, 2011) (disallowing the amendment to an answer to request because the request involved a contested issue to which the respondent was not required to admit); Keaton v. Prop. & Cas. Ins. Co., No. 4:07-CV-634-BSM, 2008 WL 2519790, at *3 (E.D. Ark. June 20, 2008) ("Requests for admissions are not to be employed as a means ['to establish facts which are obviously in dispute or to answer questions of law.']" (quoting *Lakehead*, 177 F.R.D. at 458)); *Tuvalu*, 2006 WL 3201096, at *7 (reiterating that requests for admission are not intended to establish disputed facts (quoting *Lakehead*,

have articulated the clearest standard: "[A] party may serve upon any other party a written request for admission . . . as to which the party requesting the admission reasonably believes there can be no substantial dispute at the trial . . . ."[141]

Although not stated in the opinion, it is clear from *Perez* that the Eleventh Circuit holds a similar view: the content must be based upon some reasonable expectation that the requests will serve the purpose of Rule 36.[142] The premise of *Perez*'s conclusion that it is impermissible to serve requests that mirror the complaint, is in line with the view that requests for admission are improper when they challenge facts that are obviously in dispute. Indeed, many other courts have been leery toward requests that are "best paraphrased as 'admit that we win the case.'"[143] *Perez* and the courts that follow it are clearly of the same mold.[144]

177 F.R.D. at 458)); *Lakehead*, 177 F.R.D. at 458 (establishing that requests for admission are not to be used to admit "facts which are obviously in dispute" (quoting Kosta v. Connolly, 709 F. Supp. 592, 594 (E.D. Pa. 1989))). *But see* Carney v. IRS (*In re* Carney), 258 F.3d 415, 419 (5th Cir. 2001) (citing authority that 1970 amendment to Rule 36 allowed for requests as to ultimate facts, which would inevitably be disputed facts); Kinsler, *supra* note 14, at 628 ("The 1970 amendment made clear that FRCP 36 encompassed both opinions and disputable matters."); Wise & Fayne, *supra* note 11, at 666 (noting that although a party is free to request an admission to ultimate factual issues, it may be superfluous because they will inevitably be denied (first citing TEX. R. CIV. P. 198.1, 198.2(b); and then citing Hodge v. Parsons (*In re* Hodge), No. 12-02000314-CV, 2002 WL 31769635, at *4 (Tex. App.—Tyler Dec. 11, 2002, orig. proceeding))).

141. N.Y. C.P.L.R. § 3123(a) (McKinney 2009).

142. Perez v. Miami-Dade Cty., 297 F.3d 1255, 1268–69 (11th Cir. 2002).

143. Williams v. Marshall, No. CV 106-037, 2010 WL 3291635, at *6 n.4 (S.D. Ga. Apr. 26, 2010) (quoting *In re Carney*, 258 F.3d at 422 (Duplantier, J., dissenting)), *rejected in part by* Williams v. Durden, No. CV 106–037, 2010 WL 3291803 (S.D. Ga. Aug. 19, 2010); *see also* McConnell v. Canadian Pac. Hills Plaza, No. 4:11–CV–0972, 2014 WL 201102, at *8 (M.D. Pa. Jan. 16, 2014) ("As written, the questions would be impossible for defendant to respond to without conceding liability as to the entire case."); *Lakehead*, 177 F.R.D. at 458 ("[B]y several of their Requests, the Defendants seek to have the Plaintiffs ratify what are, in essence, the legal conclusions that the Defendants have attached to the operative facts of the case."); Stelly v. Papania, 927 S.W.2d 620, 622 (Tex. 1996) (per curiam) (reiterating the primary purpose of requests for admission is not to "demand upon a plaintiff or defendant to admit that he had no cause of action or ground of defense" (quoting Sanders v. Harder, 227 S.W.2d 206, 208 (Tex. 1950))); Time Warner, Inc. v. Gonzalez, 441 S.W.3d 661, 668 (Tex. App.—San Antonio 2014, pet. denied) ("[R]equests for admission are improper and ineffective when used to establish controverted issues that constitute the fundamental legal issues in a case." (citing Cedyco Corp. v. Whitehead, 253 S.W.3d 877, 880 (Tex. App.—Beaumont 2008, pet. denied))); Wise & Fayne, *supra* note 11, at 660 n.9 (asking the respondent to admit matters that are obviously in dispute is contrary to the purposes for requests for admission (citing Marino v. King, 355 S.W.3d 629, 630 (Tex. 2011))).

144. *See Perez*, 297 F.3d at 1268 ("Rule 36 is a time-saver, designed 'to expedite the trial and to relieve the parties of the cost of proving *facts that will not be disputed at trial*.'" (quoting WRIGHT, *supra*

A dissenting opinion from Wisconsin may have best explained the problem with such requests:

> Here, Mucek's attorneys could not have seriously expected an affirmative answer to a request to admit that NCI intentionally files frivolous lawsuits against its customers to maliciously harass and intimidate them into continuing to use NCI's services, and similar requests. The attorneys could have had but one rational expectation: that NCI might not respond to the requests within thirty days, and since the time for trial was at hand, they could assert prejudice and perhaps prevail. This expectation was enhanced by their knowledge that NCI's attorney had withdrawn, and that NCI was, they believed, unrepresented. They expected, if they were lucky, a Turkey shoot, and they got one. This was not a lawsuit, the purpose of which is to find the truth. This was a game, and its name was "Gotcha." NCI was certainly had. Although the trapped party in this case may have been a large corporation with a history of discovery abuse, it is likely that pro se or inexperienced litigants will be the ones who are most often injured by the majority's judicial policy against withdrawing admissions.[145]

Or, as another court colorfully noted, "Seeking an admission which assumes a contested fact is like asking a man to admit that he has stopped beating his wife."[146]

Sending requests that the author does not reasonably expect will be admitted does nothing more than set a trap and increase costs—neither of which is a permissible use of admissions. "There is generally little to be gained from asking such requests because they invariably will be denied."[147]

IV. ETHICAL LIMITATIONS ON REQUESTS FOR ADMISSION

Although a party upon whom requests for admission were improperly used may be able to withdraw the admission,[148] withdrawal is never a

note 48, at § 2252, 322)); *see also* Conlon v. United States, 474 F.3d 616, 622 (9th Cir. 2007) (following *Perez*'s approach for the proposition that requests for admission are not intended to force the party to admit to contested issues or "essential elements" (quoting *Perez*, 297 F.3d at 1268)).

145. Mucek v. Nationwide Commc'ns, Inc., 2002 WI App 60, ¶ 84, 643 N.W.2d 98, 121–22 (Wis. Ct. App. 2002) (Dykman, J., dissenting).

146. Estate of Bruess v. Blount Int'l, Inc., No. C09–2055, 2011 WL 2133626, at *5 n.11 (N.D. Iowa May 26, 2011).

147. Wise & Fayne, *supra* note 11, at 666 (citing Hodge v. Parsons (*In re* Hodge), No. 12-02000314-CV, 2002 WL 31769635, at *4 (Tex. App.—Tyler Dec. 11, 2002, orig. proceeding)).

148. The Federal Rules of Civil Procedure provide a procedure for withdrawing or amending an admission obtained under Rule 36:

certainty.[149] Alternatively, the party who identifies the impropriety, prior to the trap springing, could seek a protective order.[150] Even if accomplished, the costs for doing so—both in time and money—are inescapable.[151] Those problems, however, can be avoided by simply not abusing requests for admission in the first place.

> A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended. Subject to Rule 16(e), the court may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits. An admission under this rule is not an admission for any other purpose and cannot be used against the party in any other proceeding.

FED. R. CIV. P. 36(b). Rule 16(e), however, provides some limitation on the courts discretion: "The court may modify the order issued after a final pretrial conference only to prevent manifest injustice." *Id.* at R. 16(e).

149. *See Conlon*, 474 F.3d at 621 ("Rule 36(b) is permissive, not mandatory, with respect to the withdrawal of admissions." (citing Asea, Inc. v. S. Pac. Transp. Co., 669 F.2d 1242, 1248 (9th Cir. 1981))); DeLong v. Merrill, 310 P.3d 39, 43–44 (Ariz. Ct. App. 2013) (agreeing "that the court may allow withdrawal or amendment of an admission, but is not required to do so" (citing *Conlon*, 474 F.3d at 621, 624–25)); GRIMM, *supra* note 1, at 167 ("There is no absolute right to withdraw admissions once made, however, to warrant amendment, the moving party must show that the facts previously admitted were not true." (citing Branch Banking & Trust Co. v. Dentz-Allis Corp., 120 F.R.D. 655, 660 (E.D.N.C. 1998))).

150. *See, e.g.*, Stokes v. Interline Brands Inc., No. C-12-05527 JSW (DMR), 2013 WL 6056886, at *1 (N.D. Cal. Nov. 14, 2013) (moving for a protective order based on "1059 requests for admissions served by Defendant"). Federal Rule of Civil Procedure 26(c) provides:

> A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending . . . . The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . forbidding the disclosure or discovery . . . .

FED. R. CIV. P. 26(c)(1)(A). Therefore, a party may move for a protective order if (1) the party has attempted to confer to resolve the issue; and (2) the party will face undue burden or expense if the protective order does not issue. *Id.*

151. Perez v. Miami-Dade Cty., 297 F.3d 1255, 1268 (11th Cir. 2002). The court not only spends time in deciding the withdrawal request, but the losing parties may cost the court additional time in malpractice suits against abusive counsel. *See* Mucek v. Nationwide Commn'cs, Inc., 2992 WI App 60, ¶ 83 n.13, 643 N.W.2d 98, 121 n.13 (Wis. Ct. App. 2002) (Dykman, J., dissenting) ("As one commentator has pointed out, a refusal to permit withdrawal of inadvertent admissions of central issues will often ultimately lead to the expenditure of more rather than less court time as the losing party is likely to file a malpractice action against his or her attorney." (citing Engel, *supra* note 14, at 75)).

Under the ABA Model Rules of Professional Conduct, it is the duty of all lawyers to refrain from improper use of legal procedures.[152] Of course, as in all aspects of litigation, the rules of professional conduct apply to discovery. "As one commentator noted, '[D]iscovery abuse is a function of professional ethics.'"[153] Indeed, merely because a procedural rule does not specifically prohibit certain conduct, does not mean that it is not otherwise prohibited as unethical by rules of professional conduct.[154]

In rare instances, some courts have adjudicated or commented on ethical violations stemming from the use of requests for admission. Courts have disciplined lawyers for failing to timely respond to requests,[155] and for submitting false responses.[156] At least one court has also signaled that the use of boilerplate objections constitutes a violation of Model Rule 3.4(d).[157]

152. MODEL RULES OF PROF'L CONDUCT preamble ¶ 5 (AM. BAR. ASS'N 2017).

153. Dickerson, *supra* note 10, at 297 (quoting Robert E. Sarazen, Note, *An Ethical Approach to Discovery Abuse*, 4 GEO. J. LEGAL ETHICS 459, 470 (1990)).

154. *See* Korte v. Hunter's Mfg. Co., No. 3:12-cv-791-MJR-DGW, 2013 U.S. Dist. LEXIS 62058, at *2–4 (S.D. Ill. May 1, 2013) (finding counsel's conduct to "border on unprofessionalism" for generating an unnecessary amount of discovery); Adam Owen Glist, *Enforcing Courtesy: Default Judgments and the Civility Movement*, 69 FORDHAM L. REV. 757, 776–77 (2000) ("Courts . . . have read a requirement of professional courtesy into Rule 8.4(d), however, finding that failing to act with professional courtesy is 'prejudicial to the administration of justice.'" (quoting Smith v. Johnston, 711 N.E.2d 1259, 1264 n.7 (Ind. 1999))). *But see* Grievance Comm. v. Simels, 48 F.3d 640, 645–46 (2d Cir. 1995) (stating ethics rules cannot be used to undermine federal procedure rules, requiring a court to balance the federal interests at stake); Howard M. Erichson, Foreword, *Civil Procedure and the Legal Profession*, 79 FORDHAM L. REV. 1827, 1828–29 (2011) (discussing the danger of treating rules of professional conduct as governing civil litigation in addition to rules of civil procedure (citing Andrew Perlman, *The Parallel Law of Lawyering in Civil Litigation*, 79 FORDHAM L. REV. 1965, 1965, 1973 (2011))).

155. *See In re* Riddle, 857 P.2d 1233, 1235 (Ariz. 1993) (finding violations of the state equivalents of Rules 1.1, 1.3, and 1.4 (citing Disciplinary Comm'n Report, *In re* Riddle, 837 P.2d 1233 (Ariz. 1993) (Comm. No. 89–1589))); Colvin v. Comm. on Prof'l Conduct, 832 S.W.2d 246, 247 (Ark. 1992) (refusing to disturb the committees finding that Rule 1.3 had been violated); *Attorney Discipline*, UTAH B.J., May/June 2012, at 57, 57 (showing violations of Rules 1.3 and 8.4); *Disciplinary Report*, ALA. LAW., Sept. 1994, at 311, 312 (providing an example of a violation of Rule 1.1); Kinsler, *supra* note 14, at 671 (noting that "an attorney was suspended from practice for two years for, *inter alia*, failing to respond to a series of requests for admission" (citing Porter v. State Bar, 801 P.2d 1135, 1136 (Cal. 1990) (in banc) (per curiam))).

156. *See In re* Usher, 987 N.E.2d 1080, 1088 (Ind. 2013) (per curiam) (concluding the respondent violated "Rule 3.3(a)(1) by knowingly submitting false responses" to requests for admission); Feld's Case, 815 A.2d 383, 388 (N.H. 2002) ("[Lawyer]'s assistance with [client]'s responses constituted a violation of Rules 3.4(b), 3.4(c) and 3.4(d)."); *In re* Estrada, 143 P.3d 731, 740–43 (N.M. 2006) (per curiam) (implicating state equivalents of Model Rules 1.1, 1.2, 3.1, 3.3, 3.4 & 8.4).

157. Matthew L. Jarvey, Note, *Boilerplate Discovery Objections: How They Are Used, Why They Are Wrong, and What We Can Do About Them*, 61 DRAKE L. REV. 913, 924–25 (2013) (citing Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 362 (D. Md. 2008)); *see also* Lynn v. Monarch Recovery Mgmt., 285 F.R.D. 350, 364 (D. Md. 2012) (finding boilerplate objections improper in responding to

There appears to be one court, however, that has directly examined whether the content of a request was unethical. In *State Bar v. Rossabi*,[158] the court reversed a determination of the North Carolina Disciplinary Hearing Commission, which found a request for admission that the opposing party had engaged in sexual conduct with her attorney, constituted a violation of Rules 3.4(d), 8.4(c), and 8.4(d).[159] The reversal does not shed much light into analyzing the content of requests, however, because the determination was simply that the requests were neither frivolous nor oppressive.[160]

Due to the dearth of authority, the discussion must turn to prognostication. Although certainly not an exhaustive list, the improper uses of requests for admission discussed above appear to implicate numerous provisions of the Model Rules.[161] The only rule that specifically applies to discovery is Rule 3.4(d),[162] which prohibits frivolous discovery requests. Similarly, and often associated with misdeeds in discovery, is Model Rule 3.2.[163] Rule 3.2 more broadly prohibits conduct that inhibits expedient resolution of discovery.[164] In the same vein is Model Rule 4.4(a), which prohibits lawyers from engaging in conduct that has "no substantial purpose other than to embarrass, delay, or burden a third person."[165]

requests for admission, because such objections fail to provide any description of why the respondent should not have to admit the requested information (citing Hall v. Sullivan, 231 F.R.D. 468, 470 (D. Md. 2005); Thompson v. U.S. Dep't of Hous. & Urban Dev., 199 F.R.D. 168, 173 (D. Md. 2001); Marens v. Carrabba's Italian Grill, Inc., 196 F.R.D. 35, 38–39 (D. Md. 2000))).

158. N.C. State Bar v. Rossabi, 645 S.E.2d 387 (N.C. Ct. App. 2007).

159. *Id.* at 393–94.

160. *Id.*

161. *See, e.g.*, *id.* at 390 ("[D]efendants had violated Rules 3.4(d), 8.4(c), and 8.4(d) of the Rules of Professional Conduct.").

162. Dickerson, *supra* note 10, at 300. "Model Rule 3.4(d) provides that '[a] lawyer shall not . . . in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.'" *Id.* (quoting MODEL RULES OF PROF'L CONDUCT r. 3.4(d) (AM. BAR ASS'N 2017)).

163. *See* GRIMM, *supra* note 1, at 331, 406 ("Rule of Professional Conduct 3.2 . . . may be violated by abuse of the discovery process, causing the court to refer the offending lawyer to the appropriate disciplinary authorities."); HAYDOCK & HERR, *supra* note 9, at § 8.09, 8-21 (emphasizing the effect of Model Rule 3.2, which "attempts to reduce the urge that lawyers have to engage in lengthy and time-consuming discovery").

164. AM. BAR ASS'N, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 303–04 (6th ed. 2007) [hereinafter ANNOTATED MODEL RULES].

165. MODEL RULES OF PROF'L CONDUCT r. 4.4(a) (AM. BAR ASS'N 2017).

Less traditionally associated with discovery is Model Rule 3.1.[166] As one court wrote, "[t]he prohibition by Rule 3.4(d) against frivolous discovery requests is 'akin to the lawyer's duty under Rule 3.1 regarding meritorious claims and contentions.'"[167] Due to the potential for requests to be used to obtain a verdict as the result of gamesmanship, Model Rule 3.1 is also implicated.

Model Rules 3.1 through 3.9 fall under the heading "Advocate" because they govern an attorney's duties to others, including the court, in the adversarial process. But abuse of requests for admission may also implicate an attorney's duties to her client. When her conduct is a clear violation of the law of the jurisdiction, Model Rule 1.1—which dictates that a lawyer must provide competent representation—would be violated.[168] Further, use that serves no justifiable purpose and increases the client's bill runs afoul of Model Rule 1.5.[169]

Finally, the rules themselves are not the totality of the Model Rules of Professional Conduct. The preamble to the rules provide courts with a source to control iniquitous behavior when the actions of counsel run contrary to the underlying spirit of ethical dictates,[170] even if the conduct is not directly in violation of the specific rules.[171]

A. *Model Rule 3.4(d): Frivolous Discovery Requests*

Model Rule 3.4(d) states, "A lawyer shall not . . . make a frivolous discovery request or fail to make reasonably diligent effort to comply with a

166. Model Rule 3.1 provides "[a] lawyer shall not bring or defend a proceeding . . . unless there is a basis in law and fact for doing so that is not frivolous." *Id.* at r. 3.1.

167. Disciplinary Bd. v. Hoffman (*In re* Application for Disciplinary Action Against Hoffman), 2003 ND 161, ¶ 28, 670 N.W.2d 500, 506 (N.D. 2003) (per curiam) (citing ABA/BNA LAWYER'S MANUAL ON PROF. CONDUCT 61:721 (1997)).

168. ANNOTATED MODEL RULES, *supra* note 164, at 21–22 (noting many courts require the attorney to have knowledge of requisite procedures and substantive law, and if not, they require the attorney to conduct adequate research to become familiar).

169. Model Rule 1.5(a) provides: "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses." MODEL RULES OF PROF'L CONDUCT r. 1.5 (AM. BAR ASS'N 2017). "Paragraph (a) [to Model Rule 1.5] requires that lawyers charge fees that are reasonable under the circumstances." *Id.* at r. 1.5 cmt. 1. This also includes a requirement that the expenses a client incurs as a result of the attorney's conduct be reasonable. *Id.*

170. *See id.* at preamble ¶ 10 ("[The] ultimate authority over the legal profession is vested largely in the courts.").

171. *See, e.g.*, Smith v. Johnston, 711 N.E.2d 1259, 1264 (Ind. 1999) (demonstrating that the spirit of the rules, as indicated by the preamble, requires a lawyer to notify opposing counsel of an impending motion for default even if the opposing counsel has not filed an appearance, so long as the attorney seeking default knows the defendant to be represented).

legally proper discovery request by an opposing party . . . ."[172] "This rule is a more specific amplification of the general duties to advance only meritorious claims and to make reasonable efforts to expedite litigation recognized by the Model Rules."[173] It acts to constrain a lawyer's duty of zealous advocacy on behalf of the client and to avoid impermissibly burdening the court and others.[174]

The limitations of Rule 3.4(d) were well summarized by Professor Beckerman:

> In pretrial procedure, Rule 3.4 forbids propounding a frivolous discovery request or failing to try to comply with a discovery request by an opposing party. It notably does not prohibit all obstruction, alteration, destruction and concealment (only that which is unlawful), or limit discovery (except as to that which is "frivolous"), or require prompt compliance with discovery requests (requiring instead, only "reasonably diligent effort[s] to comply with . . . legally proper discovery request[s]").[175]

Neither Rule 3.4 nor Rule 1.0 defines "frivolous."[176] It is, however, defined in the Restatement (Third) of The Law Governing Lawyers: "A frivolous position is one that a lawyer of ordinary competence would recognize as so lacking in merit that there is no substantial possibility that

172. MODEL RULES OF PROF'L CONDUCT r. 3.4(d) (AM. BAR ASS'N 2017). Some states have varied slightly in some circumstances from the dictates of Model Rule 3.4. *See* Am. Bar Ass'n CPR Policy Implementation Comm., *Variations of the ABA Model Rules of Professional Conduct*, AMERICANBAR.ORG (Sept. 29, 2017), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_4.authcheckdam.pdf [https://perma.cc/5VGG-YXCS] (comparing state alternatives to Model Rule 3.4).

173. Wendel, *supra* note 8, at 918–19 (footnotes omitted) (citing MODEL RULES OF PROF'L CONDUCT r. 3.1, 3.2 (AM. BAR ASS'N 2017)).

174. *See* Jarvey, *supra* note 157, at 924–25 (reiterating the notion that "attorneys do not have unfettered licenses to engage in frivolous discovery tactics, even if such tactics arise out of attorneys' desire to zealously advocate for their clients" as noted in the Model Rules of Professional Conduct and the Restatement of the Law Governing Lawyers (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS ch. 7 (AM. LAW INST. 2000))).

175. Beckerman, *supra* note 49, at 529 (alteration in original) (quoting MODEL RULES OF PROF'L CONDUCT r. 3.4 (AM. BAR ASS'N 2017)).

176. Model Rule 1.0 defines the terminology of the Model Rules. *See* MODEL RULES OF PROF'L CONDUCT r. 1.0 (AM. BAR ASS'N 2017) (failing to define "frivolous"); *see also id.* at r. 3.4 (rejecting the lawyer's ability to "make frivolous discovery requests" but failing to explain what would constitute a frivolous request under this standard).

the tribunal would accept it."[177] As Judge Paul Grimm, a frequent author on issues pertaining to discovery,[178] wrote:

> A lawyer who seeks excessive discovery given what is at stake in the litigation, or who makes boilerplate objections to discovery requests without particularizing their basis, or who is evasive or incomplete in responding to discovery, or pursues discovery in order to make the cost for his or her adversary so great that the case settles to avoid the transaction costs, or who delays the completion of discovery to prolong the litigation in order to achieve a tactical advantage, or who engages in any of the myriad forms of discovery abuse that are so commonplace is, as Professor Fuller observes, hindering the adjudication process, and making the task of the "deciding tribunal not easier, but more difficult," and violating his or her duty of loyalty to the "procedures and institutions" the adversary system is intended to serve. Thus, rules of procedure, ethics and even statutes make clear that there are limits to how the adversary system may operate during discovery.[179]

The North Dakota Supreme Court, through *In re Hoffman*,[180] has provided some insight into the application of Rule 3.4(d) to requests for

177. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 110 cmt. d (AM. LAW INST. 2000); *see also* Disciplinary Bd. v. Hoffman (*In re* Application for Disciplinary Action Against Hoffman), 2003 ND 161, ¶ 28, 670 N.W.2d 500, 506 (N.D. 2003) (per curiam) ("A claim is frivolous when there is [']such a complete absence of actual facts or law that a reasonable person could not have['] expected the court to rule in his favor." (quoting Lawrence v. Delkamp, 2003 ND 53, ¶ 13, 658 N.W.2d 758, 766 (N.D. 2003))). In regard to discovery, the Restatement states: "[T]he Section permits a lawyer to assert on behalf of the client any nonfrivolous basis for noncompliance." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 110 cmt. e (AM. LAW INST. 2000). Section 110(3) corresponds to Model Rule 3.4(d). Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 362 n.6 (D. Md. 2008).

178. *See generally* GRIMM, *supra* note 1 (providing a comprehensive guide to issues in discovery); Paul W. Grimm, *The State of Discovery Practice in Civil Cases: Must the Rules Be Changed to Reduce Costs and Burden, or Can Significant Improvements Be Achieved Within the Existing Rules?*, 12 SEDONA CONF. J. 47 (2011) ("[T]he tools already exist to ensure that the civil litigation process is cost-effective, is proportional to what is at issue in the litigation, and affords both sides fair discovery to ensure that essential facts needed to adjudicate or resolve the case are discovered."); Grimm & Yellin, *supra* note 1 ("By shedding light on *why* civil discovery has become so problematic, this Article will attempt to explore how the causes of discovery problems can be addressed.").

179. *Mancia*, 253 F.R.D. at 362–63 (footnotes omitted) (first citing FED. R. CIV. P. 26(f); then citing MODEL RULES OF PROF'L CONDUCT r. 3.4(d) (AM. BAR ASS'N 2017); and then citing 28 U.S.C. § 1927 (2008)).

180. Disciplinary Bd. v. Hoffman (*In re* Application for Disciplinary Action Against Hoffman), 2003 ND 161, 670 N.W.2d 500 (N.D. 2003) (per curiam).

admission.[181] The court held that an attorney violated the rule by serving "112 requests for admissions and 58 interrogatories, each with many subparts."[182] Of those, "[t]he district court sustained objections . . . to all but 23 of the requests for admissions and all but eight of the interrogatories."[183] The court also found the content of the requests and interrogatories, which probed the sexual history of the opposing party, "did [not] serve any substantial purpose other than to burden or harass."[184]

Although *In re Hoffman* does not expound upon the full scope of abusive requests for admission, it provides a clear example of Rule 3.4(d)'s application. It is impossible to say from the text of the opinion whether, standing alone, either the volume or content would have supported a finding of a Rule 3.4(d) violation. But given that the court signaled both aspects to be beyond the scope of acceptable conduct,[185] it seems likely that each would have been found frivolous on their own.

Generally, Rule 3.4(d) will not be violated where counsel acts in good faith.[186] Of the three circumstances which signal an improper request for admission discussed above, only the second—the volume of requests—seems likely to find salvation in the good faith defense; this is because "reasonable volume" can be fact specific and subject to debate, provided that there is no rule already in place to limit the number of requests.[187] The other two circumstances—bad faith use and where the requesting party lacks a reasonable belief that the responding party will admit—squarely fit Rule 3.4(d) without sanctuary in good faith.

181. *See id.* at 506 ("The use of discovery to intimidate, harass, or burden another is prohibited under [Rule] 3.4(d)." (citing Attorney Grievance Comm'n v. Alison, 565 A.2d 660, 668 (Md. 1989))).

182. *Id.* at 506–07.

183. *Id.* at 506.

184. *Id.*

185. *See id.* (signaling discovery requests can violate Rule 3.4(d) for both content and volume).

186. *See* RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 3.4-4, 834 (2013–2014 ed.) ("The mere fact that a legal position is 'creative' or contrary to existing law does not make that position frivolous."). Rotunda and Dzienkowski described an example of this: "The existing law often has ambiguities and always has potential for change. Therefore[,] a lawyer, in seeking to subpoena a document that appears to be protected as privileged, may still make a 'good faith argument for an extension, modification or reversal of existing law.'" *Id.* (footnote omitted) (quoting MODEL RULES OF PROF'L CONDUCT r. 3.1 & cmt. 1 (AM. BAR ASS'N 2017)). Therefore, so long as the attorney can show that the discovery request was made in good faith there may be a safe harbor from the harsh penalties described above.

187. *See, e.g.*, United States *ex rel.* Minge v. TECT Aerospace, Inc., No. 07–1212–MLB, 2012 WL 1631678, at *5 (D. Kan. May 8, 2012) ("Defendants have failed to establish that the number of requests for admissions submitted is, on its face, substantively objectionable given the complexity of the case.").

B. *Model Rule 3.2: Requests That Delay & Burden*

Although the text of Model Rule 3.2 does not mention discovery, it is frequently addressed in the context of discovery tactics used to cause delay.[188] The rule states, "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."[189] "Dilatory discovery tactics violate Rule 3.2."[190] But Rule 3.2 is not limited to temporal delay, it also "prohibits . . . making of litigation unreasonably expensive."[191] As applied to discovery, one source finds that the rule "places current practice in perspective and attempts to reduce the urge that lawyers have to engage in lengthy and time-consuming discovery just because all the top-floor law firms do it."[192]

One commentator provides:

> The official comment explains that the test is "whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay[,]" and notes further that "[r]ealizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client."[193]

Nevertheless, like Model Rule 3.4, Model Rule 3.2 is not an omnibus mandate to engage speedily through discovery. It "does not require unlimited efforts, but only 'reasonable' ones consistent with client interests."[194]

Reminiscent of the reasonableness limitation on volume, one court has signaled that a violation of Model Rule 3.2 occurs where the volume of briefing far exceeded the subject matter at hand:

> [I]t is professional misconduct for an attorney to "engage in conduct that is prejudicial to the administration of justice." Such acts can include obstructing

188. *See, e.g.*, *In re* PRB File No. 2007–003, 2009 VT 82A, ¶ 8, 987 A.2d 273, 275 (Vt. 2009) (per curiam) (finding an attorney who delayed litigation by failing to timely respond to discovery requests had violated Rule 3.2).

189. MODEL RULES OF PROF'L CONDUCT r. 3.2 (AM. BAR ASS'N 2017). States have varied slightly in their use of Model Rule 3.2. *See* Am. Bar Ass'n CPR Policy Implementation Comm., *supra* note 172 (comparing applicable state rules to Model Rule 3.2).

190. ANNOTATED MODEL RULES, *supra* note 164, at 303.

191. GRIMM, *supra* note 1, at 331.

192. HAYDOCK & HERR, *supra* note 9, at § 8.09, 8-21.

193. Beckerman, *supra* note 49, at 529 n.103 (alteration in original) (quoting MODEL RULES OF PROF'L CONDUCT r. 3.2 cmt. 1 (AM. BAR ASS'N 2017)).

194. *Id.* at 529 (quoting MODEL RULES OF PROF'L CONDUCT r. 3.2 (AM. BAR ASS'N 2017)).

> access to evidence, failing to reasonably respond to discovery requests, or other dilatory acts that run counter to "reasonable efforts to expedite litigation." In this particular case, this Court finds counsel's conduct to border on unprofessionalism in the length, tenor, and indignation that was displayed in the filings in this Court. Relatively minor discovery disputes should not generate numerous pages of briefs, especially when this Court has a readily available mechanism to expeditiously resolve discovery disputes.[195]

Building on that decision, it appears Model Rule 3.2 is violated, not only by conduct that has a clear intent to inflate costs or extend litigation, but also is disproportionate to the magnitude of the case.

Specific guidance in the context of requests for admission is wanting.[196] A decision from Colorado found an attorney violated Rule 3.2 by, among other things, failing to respond to requests, resulting in deemed admissions.[197] But the court did not explain what facts applied to the Model Rule 3.2 determination, which suggests that the court may have viewed the failure as part of the Model Rule 1.3 violation.[198]

Even in the absence of substantial authority, it is fairly clear that abuses in requests for admission will often violate Model Rule 3.2. As explained in *Perez*, when requests are abused, "the rule's time-saving function ceases; the rule instead becomes a weapon, dragging out the litigation and wasting valuable resources."[199] Preventing both delay and unnecessary exhaustion of resources is the purpose of Rule 3.2.

C. *Model Rule 4.4(a): Requests That Harass & Burden*

Similar to both Rules 3.2 and 3.4(d), Model Rule 4.4(a) states, "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a

195. Korte v. Hunter's Mfg. Co., No. 3:12-cv-791-MJR-DGW, 2013 U.S. Dist. LEXIS 62058, at *3–4 (S.D. Ill. May 1, 2013) (citations omitted) (first quoting MODEL RULES OF PROF'L CONDUCT r. 8.4(d) (AM. BAR ASS'N 2017); and then quoting *id.* at r. 3.2, 3.4 (AM. BAR ASS'N 2017)).

196. One source appears to discuss Rule 3.2 in requests for admission, but appears to have meant Rule 3.3. Wendel, *supra* note 8, at 914 n.91.

197. People v. Holmes, 921 P.2d 44, 46–47 (Colo. 1996) (en banc) (per curiam).

198. *See id.* (failing to distinguish which factors applied to which rule violation).

199. Perez v. Miami-Dade Cty., 297 F.3d 1255, 1268 (11th Cir. 2002).

person."[200] Perhaps due to its reference to "third persons," which may be mistaken as persons from outside the litigation, Rule 4.4 is very rarely invoked in the context of discovery.[201]

Model Rule 4.4, however, applies to protect parties to the litigation as well as non-parties.[202] Outside the discovery context, "[s]everal courts have applied Model Rule 4.4 to conduct directed at opposing counsel" and "to lawyers' conduct toward opposing parties."[203] Almost universally, Model Rule 4.4 has been reserved for particularly egregious behavior, such as physical threats of harm.[204] Nevertheless, there are at least two examples where Model Rule 4.4, although not mentioned, could have easily been applied to abusive requests for admission.

As discussed above, in *Rossabi,* the North Carolina Disciplinary Hearing Commission ruled that an attorney had violated Model Rules 3.4(d), 8.4(c), and 8.4(d) for submitting requests that probed the sexual relationship between the opposing party and her counsel.[205] Although the court reversed, finding the requests to be meritorious,[206] the finding of the commission could certainly have satisfied Model Rule 4.4, though it too would have been reversed. The commission found: "Request number 5 . . . was not relevant to the issues in the Avery County lawsuit, and was asked *with no substantial purpose other than to embarrass* not only Dr. Lackey, but also Cheuvront."[207]

200. MODEL RULES OF PROF'L CONDUCT r. 4.4(a) (AM. BAR ASS'N 2017). States have also deviated from Rule 4.4. *See* Am. Bar Ass'n CPR Policy Implemtation Comm., *supra* note 172 (comparing state equivalents of Model Rule 4.4).

201. *See* Lath v. Oak Brook Condo. Owners' Ass'n, No. 16–cv–463–LM, 2017 WL 401198, slip op. at *4 (D.N.H. Jan. 30, 2017) (refusing to extend the authority of Rule 4.4 to protect a party within the litigation at hand when violations may have occurred in a separate action); Dickerson, *supra* note 10, at 297 ("Even though the Model Code does not expressly mention discovery or depositions, its Ethical Considerations and Disciplinary Rules apply . . . .").

202. *In re* Oladiran, No. MC–10–0025–PHX–DGC, 2010 WL 3775074, at *3 (D. Ariz. Sep. 21, 2010) ("The comment to Rule 4.4(a) explains that the rule seeks to protect litigants and third-parties from unnecessary embarrassment and undue delays and burdens." (citing ARIZ. RULES OF PROF'L CONDUCT r. 4.4(a) cmt. 1 (STATE BAR OF ARIZ. 2003))).

203. ANNOTATED MODEL RULES, *supra* note 164, at 415.

204. *See id.* at 414–16 (noting a case in which a lawyer was disciplined for threatening to hit an opponent "in the head with a baseball bat" (quoting *In re* Burns, 657 N.E.2d 738, 739 (Ind. 1995) (per curiam))).

205. N.C. State Bar v. Rossabi, 645 S.E.2d 387, 393 (N.C. Ct. App. 2007).

206. *Id.* at 393–94.

207. *Id.* at 393 (emphasis added).

Similarly, *In re Hoffman* found requests regarding the party's sexual history "served no other purpose than to burden or harass."[208] The court held that the requests violated Model Rule 3.4(d), but the finding specifically mimics the language of Model Rule 4.4.[209] Ironically, the court also found a Model Rule 4.4 violation, but for different conduct.[210]

Of course, Model Rule 4.4 is not confined merely to requests that are designed simply to embarrass. It also applies to requests that serve no substantial purpose other than to burden the opposing party.[211] Just like Model Rules 3.4(d) and 3.2, when the requests accomplish nothing more than burden the answering party, Model Rule 4.4 is violated.

D. *Model Rule 3.1: Frivolous Discovery & Litigation Generally*

In many ways Model Rule 3.4(d) "is a more specific amplification of the general duties to advance only meritorious claims" set forth in Model Rule 3.1.[212] Model Rule 3.1 broadly states, "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."[213] It "allows the assertion of issues in a proceeding when there is a basis for doing so that is 'not frivolous.'"[214]

Typically, Model Rule 3.1 is viewed in the context of the litigation as a whole, but it may also apply specifically to discovery.[215] One instance

208. Disciplinary Bd. v. Hoffman (*In re* Application for Disciplinary Action Against Hoffman), 2003 ND 161, ¶ 30, 670 N.W.2d 500, 506–07 (N.D. 2003) (per curiam).

209. *Compare id.* at 505–06 (holding the purpose of the request was to burden or harass), *with* MODEL RULES OF PROF'L CONDUCT r. 4.4 (AM. BAR ASS'N 2017) (prohibiting lawyers from taking actions that have no other purpose other than to burden, harass, or delay litigation).

210. *See In re Hoffman*, 670 N.W.2d at 505–06 (holding that a threat made by a mother's attorney to the father in a custody dispute that the father would not have visitation rights if he did not discuss such rights with the attorney first violated Rule 4.4).

211. MODEL RULES OF PROF'L CONDUCT r. 4.4 (AM. BAR ASS'N 2017).

212. Wendel, *supra* note 8, at 918–19 (citing MODEL RULES OF PROF'L CONDUCT r. 3.1 (AM. BAR ASS'N 2017)).

213. MODEL RULES OF PROF'L CONDUCT r. 3.1 (AM. BAR ASS'N 2017). States have differed in their adoption and application of Model Rule 3.1. *See* Am. Bar Ass'n CPR Policy Implementation Comm., *supra* note 172 (comparing state modifications to Model Rule 3.1).

214. Vt. Comm'n on Ethics & Prof'l Responsibility, Formal Op. 02, at 3 (2004), *available at* https://www.vtbar.org/UserFiles/files/Webpages/Attorney%20Resources/aeopinions/Advisory%20Ethics%20Opinions/Deceit%20Fraud/04-02.pdf [https://perma.cc/Q8KA-6AWC].

215. Maura I. Strassberg, *Privilege Can Be Abused: Exploring the Ethical Obligation to Avoid Frivolous Claims of Attorney-Client Privilege*, 37 SETON HALL L. REV. 413, 428 (2007) ("What is of concern in this

where Model Rule 3.1, although not used as the basis for discipline, likely could have applied was *In re Hoffman*.[216] Although, as already discussed, it was decided on Model Rule 3.4(d) grounds, the court noted, "The prohibition by Rule 3.4(d) against frivolous discovery requests is 'akin to the lawyer's duty under Rule 3.1 regarding meritorious claims and contentions.'"[217] Consequently, it would appear that most, if not all, discovery-based violations of Model Rule 3.4(d) also constitute violations of Model Rule 3.1.

More concerning, however, is the use of requests for admission to render a frivolous claim or defense a winner. With the power of deemed admissions, the real facts can be supplanted by facts that do not faithfully reflect reality. In so doing, it is entirely possible to use requests for admission to succeed on a meritless claim or defense by virtue of procedural gamesmanship.[218] Doing so is in direct conflict with the goal of Model Rule 3.1, which imparts on attorneys "a duty not to abuse legal procedure."[219]

E. *Model Rule 1.5: Goldbricking*

Although the focus up to this point has been on the use of requests for admission as an underhanded tactic against opponents, misuse can also violate an attorney's ethical duties to her client. Model Rule 1.5 governs collection of fees from a client.[220] In relevant part, it states, "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses."[221] Application of Model Rule 1.5 is not merely confined to whether the total amount charged to a client is within the realm of reasonableness; it prohibits charging for services that are

Article, however, is not frivolous claims and defenses, but rather frivolous objections to, or resistances to, compulsory evidentiary processes such as civil or criminal discovery . . . . These are covered both by Model Rule 3.1 . . . and Model Rule 3.4 . . . .").

216. Disciplinary Bd. v. Hoffman (*In re* Application for Disciplinary Action Against Hoffman), 2003 ND 161, ¶ 27, 670 N.W.2d 500, 506 (N.D. 2003) (per curiam).

217. *Id.* (quoting ABA/BNA LAWYER'S MANUAL ON PROF'L CONDUCT 61:721 (1997)).

218. *See, e.g.*, Mucek v. Nationwide Commn'cs, Inc., 2002 WI App 60, ¶ 36, 643 N.W.2d 98, 107–09 (Wis. Ct. App. 2002) (upholding deemed admissions that the admitting party would never have admitted but were outcome determinative).

219. MODEL RULES OF PROF'L CONDUCT r. 3.1 cmt. 1 (AM. BAR ASS'N 2017).

220. Geoffrey C. Hazard, Jr., *Under Shelter of Confidentiality*, 50 CASE W. RES. L. REV. 1, 8 (1999).

221. MODEL RULES OF PROF'L CONDUCT r. 1.5(a) (AM. BAR ASS'N 2017); *cf.* Am. Bar Ass'n CPR Policy Implementation Comm., *supra* note 172 (describing relevant deviations from Model Rule 1.5).

unreasonable.[222] "A lawyer basing the fee on the hours expended obviously may not engage in goldbricking, that is, employing wasteful procedures in an effort to multiply the number of billable hours."[223]

Except where invocation of Federal Rule 37(c)(2) may reasonably be expected, there is no merit to serving requests for admission that the proponent does not reasonably believe will be admitted.[224] Even if the request is used to set a trap, springing the trap may do little more than increase the cost of litigation if the trapped party is able to obtain relief from the admissions.[225] If the admissions are timely and properly denied, then there has been no benefit to the client, only costs.[226]

Professor Kerper and Mr. Stuart have aptly recognized the incentive for lawyers to engage in even meritless discovery against their clients' interests: "In a market-based system of legal representation, it is convenient for lawyers to leave no stone unturned for clients who pay by the stone."[227] As another commentator said, "Discovery is particularly ripe territory for billing fuzziness, especially when the client can't see how his or her money

222. MODEL RULES OF PROF'L CONDUCT r. 1.5 cmt. 1 (AM. BAR ASS'N 2017).

223. ROTUNDA & DZIENKOWSKI, *supra* note 186, at § 1.5-1(b), 161 (citing MODEL RULES OF PROF'L CONDUCT r. 1.5 cmt. 5 (AM. BAR ASS'N 2017)).

224. *See supra* Part III(C) (discussing requests that no reasonable party would admit); *see also* Wise & Fayne, *supra* note 11, at 666 ("There is generally little to be gained from asking such requests because they invariably will be denied." (citing Hodge v. Parsons (*In re* Hodge), No. 12-02000314-CV, 2002 WL 31769635, at *4 (Tex. App.—Tyler Dec. 11, 2002, orig. proceeding))).

225. *See* HAYDOCK & HERR, *supra* note 9, at § 30.02, 30-4 (noting a party's ability to withdraw admissions with permission from the court); *see also* United States *ex rel.* Thomas v. Black & Veatch Special Projects Corp., No. 11–2475–DDC, 2014 WL 2095168, at *7–8 (D. Kan. May 20, 2014) (allowing withdrawal of the admission but criticizing the defendants approach and imposing additional discovery time and costs upon the party).

226. The Model Rules deem "[r]ealizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client." MODEL RULES OF PROF'L CONDUCT r. 3.2 cmt. 1 (AM. BAR ASS'N 2017).

227. Janeen Kerper & Gary L. Stuart, *Rambo Bites the Dust: Current Trends in Deposition Ethics*, 22 J. LEGAL PROF. 103, 111 (1998) (quoting Deborah L. Rhode, *An Adversarial Exchange on Adversarial Ethics: Text, Subtext, and Context*, 41 J. LEGAL EDUC. 29, 38 (1991)); *see also* Wigler v. Elec. Data Sys. Corp., 108 F.R.D. 204, 205 (D. Md. 1985) ("A closer look reveals that the defendant's requests represent an attempt not just to nail down the core facts of the case, but also to pick every nit that a squad of lawyers could possibly see in it."); Beckerman, *supra* note 49, at 578 n.302 (acknowledging even the simplest case can be made to run into infinity, all the while charging the client); Grimm & Yellin, *supra* note 1, at 525–26 (recognizing that misguided discovery tactics often result in a burden on the client).

is actually being spent."[228] Consequently, requests that do nothing more than increase the costs a client must pay for her counsel to litigate the case, violate Model Rule 1.5.[229]

F. *Model Rule 1.1: Competency*

Where a request for admission is used in a manner contrary to well-settled law of a jurisdiction, Model Rule 1.1 comes into play.[230] Included among the obligations of a lawyer to provide competent representation is a "requisite familiarity with well-settled legal" procedures.[231] Violations of procedural rules may also form a basis for discipline under Model Rule 1.1.[232]

A perfect example of an abuse of requests that may violate Model Rule 1.1 is *Perez*.[233] Despite the clear prohibition in Federal Rule 36(a),[234]

228. Robert Hilson, *Five Ways to Avoid Getting Sued for Discovery Malpractice*, FLA. B.J., Jan. 2016, at 40, 40; *see also* Harris, *supra* note 52, at 575 (noting frivolous lawsuits are an unprofessional abuse which may have an adverse impact on clients, adversaries, and the public).

229. Although a clear violation of Rule 1.5, discipline for charging a client to serve unnecessary requests for admission is unlikely. *See* ANNOTATED MODEL RULES, *supra* note 164, at 68 (finding only two cases in which attorneys were disciplined for the size of the fee absent an additional finding of dishonesty or misconduct (citing Gabriel J. Chin & Scott C. Wells, *Can a Reasonable Doubt Have an Unreasonable Price? Limitations on Attorneys' Fees in Criminal Cases*, 41 B.C. L. REV. 1, 2 (1990))); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 34 cmt. a (AM. LAW INST. 2000) ("In many jurisdictions, authorities have been reluctant to discipline lawyers on such grounds. For a variety of reasons, discipline might be withheld for charging a fee that would nevertheless be set aside as unreasonable in a fee-dispute proceeding.").

230. Model Rule 1.1 provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2017). States have varied in their adoption of Rule 1.1 standards. *See* Am. Bar Ass'n CPR Policy Implementation Comm., *supra* note 172 (comparing states' modifications of Model Rule 1.1).

231. ANNOTATED MODEL RULES, *supra* note 164, at 22. Presumably, "well-settled" generally necessitates the existence of procedural rules or caselaw. *Cf.* Wendel, *supra* note 8, at 914 ("[T]he Model Rules of Professional Conduct circumscribe a lawyer's advocacy only by legal norms, which presumably include applicable case law and procedural rules . . . ." (footnote omitted) (citing MODEL RULES OF PROF'L CONDUCT r. 3.1 (AM. BAR ASS'N 2017))).

232. ANNOTATED MODEL RULES, *supra* note 164, at 23–24.

233. *See generally* Perez v. Miami-Dade Cty., 297 F.3d 1255 (11th Cir. 2002) (finding that defendant's motion to withdraw should have been allowed under the proper test of Federal Rule of Civil Procedure 36(b)).

234. At the time of *Perez*, Federal Rule of Civil Procedure 36(a) specifically stated that requests could not be sent prior to the Rule 26(f) conference. That language was added as part of the 1993 amendments. FED. R. CIV. P. 36 advisory committee's note to 1993 amendment. The 2007 amendments removed the language as a redundancy, now unnecessary due to general familiarity with

plaintiff's counsel served requests for admission alongside the complaint.[235] Similarly, in jurisdictions that cap the number of requests,[236] sending requests beyond the express limitation of the rule may also violate Model Rule 1.1.

Model Rule 1.1 has been applied at least twice in disciplinary proceedings arising out of responses to requests for admission.[237] An attorney in Alabama was found to have violated the applicable version of Model Rule 1.1 for, among many other things, failing to respond to requests for admission.[238] Due to the full scope of egregious conduct, which led the "client to lose his home,"[239] it is difficult to glean much in applying Model Rule 1.1 to the requesting party.

More informative is *In re Estrada*.[240] The New Mexico Supreme Court held that a baseless denial of requests for admission constituted incompetent representation in violation of New Mexico's version of Model Rule 1.1.[241] The court wrote, "Generally, this rule addresses whether less experienced attorneys have sufficient knowledge and skill to handle their cases. But failure to respond to discovery has been held to be a failure of competent representation. And, in our view, failure to understand what is required by the discovery rules demonstrates incompetence."[242]

Extrapolating from the general principles of Model Rule 1.1 and *Estrada*, the promulgation of requests that are contrary to the obligations required by the discovery rules can violate the competency requirements of Model Rule 1.1. Of course, whether Model Rule 1.1 has been violated is a fact sensitive inquiry to be resolved on a case-by-case basis.[243]

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the requirement. FED. R. CIV. P. 36 advisory committee's note to 2007 amendment. The language now remains solely in Federal Rule of Civil Procedure 26(d). FED. R. CIV. P. 26(d).

235. *Perez*, 297 F.3d at 1258.

236. *See supra* at nn.133–35 (providing limitations imposed by both local rules and state rules of procedure).

237. *In re* Estrada, 143 P.3d 731 (N.M. 2006) (per curiam); *Disciplinary Report*, *supra* note 155, at 311.

238. *Disciplinary Report*, supra note 155, at 312.

239. *Id.*

240. *In re* Estrada, 143 P.3d 731 (N.M. 2006) (per curiam).

241. *Id.* at 740.

242. *Id.* (citing *In re* Moore, 494 S.E.2d 804, 807 (S.C. 1997) (per curiam)).

243. *See* ROTUNDA & DZIENKOWSKI, *supra* note 186, at § 1.1-1, 90 ("Reasonable lawyers can make reasonable mistakes. The lawyer is not competent when the mistake is not reasonable, and she is competent if the mistake is reasonable.").

G. *Preamble to the Model Rules*

Even if none of the enumerated Model Rules specifically apply, attorneys are still bound by the spirit of the Rules generally.[244] The Indiana Supreme Court explained:

> The Rules are guidelines for lawyers and do not spell out every duty a lawyer owes to clients, the court, other members of the bar and the public. The preamble to the Rules is clear that "[t]he Rules, do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules." Thus[,] lawyers' duties are found not only in the specific rules of conduct and rules of procedure, but also in courtesy, common sense and the constraints of our judicial system. As an officer of the Court, every lawyer must avoid compromising the integrity of his or her own reputation and that of the legal process itself.[245]

By its nature, the preamble is a nebulous source for ethics guidelines and is without easily definable lines.[246] Invocation is reminiscent of Justice Stewart's famous approach to "define what may be indefinable[:] . . . . I know it when I see it."[247] But descriptors such as "nebulous" and "ill-

244. MODEL RULES OF PROF'L CONDUCT preamble ¶ 7 (AM. BAR ASS'N 2017). One commentator has gone as far to say,

> The professional [legal ethics] rules are merely the basement level, the lowest common denominator, of acceptable lawyer conduct. Lawyers who consider compliance with them to be complete fulfillment of legal ethics are the equivalent of the cave dwellers in Plato's *The Republic* who sincerely and contentedly believe that mere shadows are reality. But believing it so does not make it so.

Harris, *supra* note 52, at 550 (alteration in original) (quoting Barrie Althoff, *Big Brother is Watching: Discipline for "Private" Conduct*, in 2000 Symposium Issue of the Professional Lawyer 81, 87).

245. Smith v. Johnston, 711 N.E.2d 1259, 1263–64 (Ind. 1999) (quoting MODEL RULES OF PROF'L CONDUCT preamble ¶ 16 (AM. BAR ASS'N 2017)). *But cf.* GEICO Gen. Ins. Co. v. Coyne, 7 N.E.3d 300, 311 (Ind. Ct. App. 2014) (concluding rules of professional conduct do not create broad discovery obligations to disclose in the absence of corresponding discovery requests).

246. *See, e.g.*, Fink v. Neal, 945 S.W.2d 916, 922 (Ark. 1997) ("The Preamble to our Model Rules of Professional Conduct states that a 'lawyer should use the law's procedures only for legitimate purposes and not to harass and intimidate others.' At some point, a series of errors . . . moves beyond mere negligence and enters the realm of harassment and intimidation, whether intentional or not. We do not mean to suggest that every Rule 11 violation equates to a violation of the Model Rules of Professional Conduct. And yet we have no doubt that James was harassed by counsel's actions, and that this conduct qualifies as conduct prejudicial to the administration of justice." (quoting MODEL RULES OF PROF'L CONDUCT preamble ¶ 5 (AM. BAR ASS'N 2017))).

247. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

defined" are common-place in discovery practice and do not prevent litigation sanctions.[248]

Despite its failings, the broad dictates of the preamble may be precisely the answer for resolving the fundamental problem of using requests for admission as a trap or club with which to beat an opponent into submission or a client into paying a higher charge. As already discussed, courts frequently find requests for admission tendered in bad faith to be improper.[249] It is that spirit of ill will and bad faith that runs contrary to the goals and spirit of the Model Rules as a whole,[250] which may make resort to the preamble appropriate.

V. DISCIPLINE & SANCTIONS: THE NEED FOR STRONG OVERSIGHT

Even if litigation conduct constitutes a violation of ethics rules, it does not necessarily merit professional discipline.[251] Comment 1 to Model Rule 8.4 indicates, "Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct . . . ."[252] As one commentator observed, "[A]n attorney who violates any other ethics rule automatically violates Rule 8.4 . . . ."[253] Courts, however, are loath to impose discipline for mere technical violations.[254] Ultimately, whether

248. *See* Jack T. Camp, *Thoughts on Professionalism in the Twenty-First Century*, 81 TUL. L. REV. 1377, 1389 (2007) ("A number of recent court decisions have recognized the obligation that attorneys have to comply with the spirit of the discovery process, even when the attorney has not violated a specific rule. The courts often refer to the obligation as one of good faith or as an obligation to comply with the spirit as well as the letter of the rules." (footnote omitted) (citing Judith A. McMorrow et al., *Judicial Attitudes Toward Confronting Attorney Misconduct: A View from the Reported Decisions*, 32 HOFSTRA L. REV. 1425, 1445 (2004))); Wendel, *supra* note 8, at 908–18 (discussing the amorphous landscape of judicial authority to sanction abusive discovery conduct).

249. *See supra* Part III(A) (discussing bad faith in depth).

250. Douglas R. Richmond, *Class Actions and Ex Parte Communications: Can We Talk?*, 68 MO. L. REV. 813, 816 n.17 (2003) ("Of course, 'the abuse or misuse of any rule of civil procedure is a violation of the spirit of the rules of professional ethics on the most basic level.'" (quoting Blanchard v. EdgeMark Fin. Corp., 175 F.R.D. 293, 304 (N.D. Ill. 1997))).

251. Barbara L. Margolis, *Ten Things to Do If You Receive a Disciplinary Complaint*, R.I. B.J., Jan./Feb. 2006, at 21, 21 ("Remember, not all violations of the Rules of Professional Conduct result in formal discipline.").

252. MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. 1 (AM. BAR ASS'N 2017).

253. Dickerson, *supra* note 10, at 300 (citing MODEL RULES OF PROF'L CONDUCT r. 8.4 (AM. BAR ASS'N 2017)).

254. *See* Freeman v. Mayer, 95 F.3d 569, 575 (7th Cir. 1996) (determining a technical violation of a rule does not necessarily give rise to a cause of action for breach of a legal duty (citing Schornick v. Butler, 185 N.E. 111, 112–13 (Ind. 1993))); *see also In re* Dean, 2003-2478 (La. 1/21/04), 864 So. 2d

discipline is appropriate will depend upon the surrounding facts and circumstances.[255]

Doubtlessly viewed as fortunate by some and unfortunate by others, even conduct that would appear to merit formal discipline often goes overlooked by disciplinary bodies. That is particularly true in the case of abusive discovery, because "disciplinary authorities often defer to the trial courts [for] policing."[256] To an extent, yielding control over litigation conduct may work, due to the overlap between courts' powers to sanction and the prohibitions of the professional rules.[257] However, "while there is substantial overlap with rules of procedure and evidence, the Model [Rules] stand . . . as 'a separate source of applicable substantive law.'"[258]

Perhaps the biggest problem with disciplinary authorities ceding responsibility for overseeing abusive litigation to courts is that litigation sanctions and professional discipline are intended to serve different purposes.

When a lawyer is disciplined, the objective "is not to punish the lawyer but to deter similar conduct by other lawyers. Other lawyers and the public need to know that failure to pursue a client's case and failure to inform a client of the outcome of a case will not be tolerated."[259] Discovery sanctions, however, are broader, encompassing both a deterrence and punitive function, along with seeking to provide compensation to the court and parties for abusive conduct.[260]

Viewed through the lens of protecting the public at large, disciplinary authorities may prove less reluctant to tolerate abusive behavior. Trial courts, however, "are reluctant to impose sanctions that may adversely affect the professional reputations and livelihoods of lawyers who practice

152, 156 n.4 (La. 2004) (per curiam) ("[W]e find a technical violation of Rule 8.4(c) based on respondent's stipulation, but do not find this violation is egregious.").

255. ABA COMPENDIUM OF PROFESSIONAL RESPONSIBILITY: RULES AND STANDARDS 443 (2013–2014 ed.).

256. Schneyer, *supra* note 6, at 42.

257. *Id.*

258. Glist, *supra* note 154, at 777 (quoting *In re* Porter, 890 P.2d 1377, 1382 (Or. 1995) (en banc) (per curiam)).

259. *In re* Riddle, 857 P.2d 1233, 1236 (Ariz. 1993) (citation omitted); *see also* STANDARDS FOR IMPOSING LAWYER SANCTIONS 1.1 (1986) (AM. BAR. ASS'N, amended 1992) ("The purpose of lawyer discipline proceedings is to protect the public and the administration of justice . . . .").

260. Carlucci v. Piper Aircraft Corp., 775 F.2d 1440, 1453 (11th Cir. 1985) (citing Roadway Express, Inc. v. Piper, 447 U.S. 752, 763–64 (1980); Nat'l Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 643 (1976) (per curiam); Aztec Steel Co. v. Fla. Steel Corp., 691 F.2d 480, 482 (11th Cir. 1982) (per curiam)).

before them."[261] Though a problem in civil litigation generally, it is exacerbated in the realm of discovery.

Despite courts often decrying abusive discovery practices, the perception among litigants, merited or not, is that judges are extremely reluctant to engage in and police discovery disputes.[262] Further resulting in reluctance to seek court intervention is the belief that courts tend to "split the baby" in resolving disputes.[263] Because discovery is governed primarily by the litigants,[264] perception is reality. As Judge Easterbrook recognized, "Judges can do little about impositional discovery when parties control the legal claims to be presented and conduct the discovery themselves."[265]

In the realm of requests for admission, there is some dispute about what, if any, sanctions can be obtained for abusive conduct. Federal Rules 36 and 37 make clear that failure to respond and improper denials carry with them the sanctions of deemed admissions and awarded costs respectively for establishing the facts.[266] One court, however, deeming that it would otherwise render Federal Rule 37(c) redundant and that requests for admission are not a discovery device, ruled that the broader power to sanction discovery abuses of Federal Rule 26 does not extend to requests

261. Beckerman, *supra* note 49, at 511.

262. *Id.* at 518; Ronit Dinovitzer & Jeffrey S. Leon, *When Long Becomes Too Long: Legal Culture and Litigators' Views on Long Civil Trials*, 19 WINDSOR Y.B. ACCESS JUST. 106, 121–22 (2001); David A. Green, *The Fallacy of Liberal Discovery: Litigating Employment Discrimination Cases in the E-Discovery Age*, 44 CAP. U. L. REV. 693, 719 (2016); Jeffrey W. Stempel, *Ulysses Tied to the Generic Whipping Post: The Continuing Odyssey of Discovery "Reform"*, 64 L. & CONTEMP. PROBS. 197, 238–39 (2001).

263. Adam Babich, *The Wages of Sin: The Violator-Pays Rule for Environmental Citizen Suits*, 10 WIDENER L. REV. 219, 275–76 (2003) (citing Robert L. Nelson, *The Discovery Process as a Circle of Blame: Institutional, Professional, and Socio-Economic Factors That Contribute to Unreasonable, Inefficient, and Amoral Behavior in Corporate Litigation*, 67 FORDHAM L. REV. 773, 797–98 (1998)); Lindsey D. Blanchard, *Rule 37(a)'s Loser-Pays "Mandate": More Bark Than Bite*, 42 U. MEM. L. REV. 109, 125 (2011) (citing ROBERT E. KEETON, KEETON ON JUDGING IN THE AMERICAN LEGAL SYSTEM 167 (1999)). "Of course, the wisdom of King Solomon's decision was that it only threatened to divide the baby . . . ." Schaffer v. Comm'r, 779 F.2d 849, 852 n.2 (2d Cir. 1985). "His wisdom would have been called into question, however, if he had gone through with the act." W. Va. Dep't of Corr. v. Lemasters, 313 S.E.2d 436, 440 (W. Va. 1984).

264. Beckerman, *supra* note 49, at 515.

265. Easterbrook, *supra* note 3, at 638.

266. *See* FED. R. CIV. P. 36(a)(3) (asserting a matter is deemed admitted unless the party who receives the request returns a written answer or objection to the requesting party); *id.* at R. 37(c)(2) (explaining failure to admit a properly requested document or information may result in penalty of payment for reasonable expenses upon whom the request was made).

for admission.[267] On the contrary, in a non-precedential decision, the Ninth Circuit affirmed an award of sanctions against a *pro se* litigant for propounding requests that had "no relevance to the underlying action and could only be intended to harass defendant."[268]

Assuming that litigation sanctions may be imposed for abusive conduct in using requests for admission, the benefit of seeking a protective order is often outweighed by the cost and uncertainty. Undoubtedly, the cost-benefit ratio is a factor in requests for admission being "less litigated" than other discovery disputes.[269] Only on rare occasions may the sheer volume of requests or probing content merit seeking court involvement.[270]

Because the opportunities are rare, courts must be diligent in acting firmly to curb abusive tactics.[271] Courts have many options for addressing the problems with abusive conduct such as, "a warm friendly discussion on the record, a hard-nosed reprimand in open court, compulsory legal education, monetary sanctions, or other measures appropriate to the circumstances."[272] Additionally, because disciplinary authorities have largely ceded responsibility for governing litigation abuse to trial courts, when conduct runs afoul of both procedural and ethics rules, courts must be cognizant to recognize and address the ethical violation as well.[273]

Of course, caselaw is an imperfect vehicle for educating the bar.[274] Nevertheless, through strict adherence to case law, some inroads can be

267. Point Blank Sols., Inc. v. Toyobo Am., Inc., No. 09–61166–CIV, 2011 WL 742657, at *3 n.2 (S.D. Fla. Feb. 24, 2011).

268. Wiideman v. Bayer, No. 93-15140, 996 F.2d 1230 (Table), 1993 WL 217065, at *1 (9th Cir. June 18, 1993). It was far from the only time that particular litigant was sanctioned. *See, e.g.*, Wiideman v. Del Papa, 5 F. App'x 496, 496 n.1 (7th Cir. 2001) (collecting history of reported cases for that litigant, many of which included sanctions).

269. HAYDOCK & HERR, *supra* note 9, at § 30.03[B], 30-6.

270. *See, e.g.*, Stokes v. Interline Brands Inc., No. C–12–05527 JSW (DMR), 2013 WL 6056886, at *2–3 (N.D. Cal. Nov. 14, 2013) ("[T]he court finds that the sheer volume of the requests for admission is unduly burdensome and oppressive.").

271. *See* Beckerman, *supra* note 49, at 571–87 (arguing failure to deter discovery misbehavior through the effective use of sanctions may "fundamentally undermine our system's policy of deciding controversies on their merits"); Camp, *supra* note 248, at 1388 ("If professionalism [amongst lawyers] is to be improved, sanctions for unprofessional conduct by the courts will be necessary."); Moskowitz, *supra* note 23, at 645 ("In this climate, rules are not likely to be complied with unless they are vigorously enforced.").

272. Kerper & Stewart, *supra* note 227, at 117 (quoting Dondi Props. Corp. v. Commerce Sav. Loan Ass'n, 121 F.R.D. 284, 288 (N.D. Tex. 1988) (per curiam)).

273. ANNOTATED MODEL RULES, *supra* note 164, at 322 (recognizing that courts may look to ethics rules when imposing litigation sanctions).

274. Mordesovitch v. Westfield Ins. Co., 235 F. Supp. 2d 512, 521 (S.D.W. Va. 2002).

made.[275] Ultimately, the end to discovery abuse must be found in a change of the legal culture, which must start somewhere.[276]

Of course, even if this all-too-common conduct never leads to formal discipline or even sanction, it inevitably strikes against a lawyer's esteem in the profession.[277] As Chief Justice Charles Evans Hughes astutely remarked:

> The highest reward that can come to a lawyer is the esteem of his professional brethren. That esteem is won in unique conditions and proceeds from an impartial judgment of professional rivals. It cannot be purchased. It cannot be artificially created. It cannot be gained by artifice or contrivance to attract public attention. It is not measured by pecuniary gains. It is an esteem which is born in sharp contests and thrives despite conflicting interests. It is an esteem commanded solely by integrity of character and by brains and skill in the honorable performance of professional duty. . . . In a world of imperfect humans, the faults of human clay are always manifest. The special temptations and tests of lawyers are obvious enough. But, considering trial and error, success and defeat, the bar slowly makes its estimate and the memory of the careers which it approves are at once its most precious heritage and an important safeguard of the interests of society so largely in the keeping of the profession of the law in its manifold services.[278]

It is left for speculation why so very many attorneys are willing to routinely place their reputations on the line for nothing more than bating a trap that will likely never spring, and even more likely will never yield positive results for the client.[279] Were I to speculate, I would suggest that

275. Frontier-Kemper Constructors, Inc. v. Elk Run Coal Co., 246 F.R.D. 522, 530 (S.D.W. Va. 2007).

276. Easterbrook, *supra* note 3, at 647–48.

277. UNITED STATES DISTRICT OF NORTH DAKOTA, THIRD ANNUAL ASSESSMENT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP (1997), *republished in* 73 N.D. L. REV. 805, 816 (1997) ("A lawyer who obstructs, who breaks or bends the rules, who treats his opponent uncivilly, is sending a message to the judge's subconscious: 'Rule against me when you can.'" (quoting Wendel, *supra* note 8, at 943)); *see also Frontier-Kemper*, 246 F.R.D. at 530 ("Because civil actions are more frequently settled as opposed to tried, a lawyer's reputation is made in discovery and motion practice and it is in those areas that the court expects full compliance with the applicable rules and case law.").

278. RAGBAG OF LEGAL QUOTATIONS 236 (reprint 1992) (M.F. McNamara ed. 1960) (quoting Charles Evan Hughes, *Remarks in Reference to the Late George Wickersham*, 13 PROC. AM. L. INST. 61 (1936)).

279. One commentator has attributed the growth in the size of law firms and "the rarity in large cities of litigators encountering the same adversary repeatedly" as a reason for litigators' willingness to

requests for admission that serve no defensible purpose are the product of a lack of understanding of the purpose and utility of requests for admission, conditioning,[280] and simply never having thought of unfounded requests in ethical terms.[281]

VI. CONCLUSION

Requests for admission can be one of the most effective and powerful tools in shaping a case ahead of trial.[282] But when used as a shortcut to prevent a determination upon the actual merits of the case, they can prove to be a "double-edged sword[,]"[283] inviting their users to engage in counterproductive, unethical behavior. For, as Cicero instructed his son, "[I]t is only by moral character and righteousness, not by dishonesty and craftiness, that they may attain to the objects of their desires."[284] The truly

risk reputation because "[o]ne-time encounters lessen the force of reputation as a restraining influence on adversarial behavior and do nothing to foster cooperation." Beckerman, *supra* note 49, at 520.

280. As Magistrate Judge Peggy Leen has noted in the context of boilerplate objections to discovery, which courts have uniformly rejected as improper, lawyers do so merely because they have been "conditioned" to do so. Kristensen v. Credit Payment Servs., Inc., No. 2:12-cv-0528-APG-PAL, 2014 WL 6675748, at *4–5 (D. Nev. Nov. 24, 2014). However, a compelling argument is made by Professor Beckerman that the legal system incentivizes abusive litigation tactics simply by allowing courts to reward the user. *See* Beckerman, *supra* note 49, at 579–83 (providing a compelling example of a wealthy attorney who has found great success in uncivil tactics).

281. Of course, failure to recognize ethical obligations is not a defense, and, indeed, is often a factor ruling against attorneys in discipline matters. *See* Sorensen v. State Bar, 804 P.2d 44 (Cal. 1991) (en banc) (per curiam) (asserting a lack of insight with regard to ethical obligations is not a mitigating factor when determining sanctions for improper conduct); *see also In re* Gumaer, 867 P.2d 850, 852–53 (Ariz. 1994) (explaining neither unfamiliarity "nor the exigencies of a busy court" excuse a failure to observe ethical obligations); Peter A. Joy & Kevin C. McMunigal, *Teaching Ethics in Evidence,* 21 QUINNIPIAC L. REV. 961, 961 (2003) ("A significant source of unethical behavior by lawyers is a failure to recognize ethical issues."); Howard T. Markey, *A Need for Continuing Education in Judicial Ethics*, 28 VAL. U. L. REV. 647, 650 (1994) ("Obviously inadvertence or ignorance of the rules is not an excuse." (citations omitted)); Jennifer K. Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107, 1153–56 (2013) (discussing why lawyers fall into ethical traps).

282. Kinsler, *supra* note 14, at 625.

283. *Id.* at 625–26.

284. MARCUS TULLIUS CICERO, DE OFFICIIS 179 (Walter Miller trans., Harvard Univ. Press 1913) (44 B.C.); *see also id.* at 303 ("Now when we meet with expediency in some specious form or other, we cannot help being influenced by it. But if upon closer inspection one sees that there is immorality connected with what presents the appearance of expediency, then one is not necessarily to sacrifice expediency but to recognize that there can be no expediency where there is immorality."); Nelson P. Miller, *The Nobility of the American Lawyer: The Ennobling History, Philosophy, and Morality of a Maligned Profession*, 22 T.M. COOLEY L. REV. 209, 238–45 (2005) (analyzing Cicero's impact on legal ethics).

expedient litigator will avoid the ethical pitfalls of using requests as a trap or a tool for inflating litigation costs.