Some Problems of Discovery in an Adversary System

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Pretrial discovery plays a central role in civil litigation. Indeed, so central is that role that some "experienced" litigators have seldom emerged from the tunnel of discovery into the daylight of trial in open court. Small wonder, then, that less than a decade after a major overhaul of the federal discovery rules, another important revision is being proposed and debated.¹

This latest effort at revision is aimed primarily at the curbing of abuses—abuses aptly described by one observer as "pushing" by advocates who burden their adversaries with excessive discovery demands, and "tripping" by advocates who obstruct reasonable discovery requests.² For the most part, discussion of these abuses, whose existence and extent are subject to debate, has focused on the need for increased judicial management of discovery and for more effective use of sanctions. But in a recent article, Professor Brazil has argued that the present adversary character of civil discovery systematically encourages obstruction of the goals of discovery and that substantial changes in the pretrial environment must be made if those goals are to be achieved.³ He would "curtail substantially" the role of the ad-

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³ Brazil, The Adversary Character of Civil Discovery: A Critique and Proposals for Change, 31 VAND. L. REV. 1295 (1978). Professor Brazil catalogs a number of techniques, many of which go beyond the concepts of pushing and tripping, that he claims are used "to limit and distort the flow of information." Id. at 1315-31. The core of his proposed changes includes shifting the lawyer's obligation before trial away from the client's interest and "toward the court"; imposing a duty on counsel to investi-
versary system at the pretrial stage, preserving it in its present form primarily for the "dialectical evaluation of the relevant evidence" at the trial itself.4

He may be right. Surely, there is considerable tension between the apparent duty of the lawyer, in response to discovery requests, to reveal information, opinion, and even belief, and the duty and desire of that same lawyer to represent his client zealously and effectively. Perhaps such tension may be found in every corner of litigation, both civil and criminal. But it may well be more acute in the civil arena, where the client is not entitled to stand mute in the dock, and especially in the realm of discovery, where the lawyer may be asked to act as investigator, counselor, advocate, witness, and officer of the court all at the same time.5

Moreover, there are several possible reasons why, at least until recently, any such tension has been a matter of relatively low visibility. First, discovery issues, at least those not involving questions of privilege, seldom reach the appellate courts and thus seldom attract the attention of commentators.6 Second, many of those who have

4. Id. at 1360.
5. "If it is true that a man in his time must play many parts, it is scarcely given to him to play them all at once." Professional Responsibility: Report of the Joint Conference, 44 A.B.A.J. 1159, 1160 (1958).

Though the problems discussed here are not limited to the federal courts—indeed, the hypothetical situation in the questionnaire set forth below is placed in a state court—the federal discovery rules have been the model for many states, and federal decisions are relied on by many state courts in the interpretation of their own rules. See, e.g., note 15 infra (discussion of Maine and Massachusetts). State decisions have been consulted, however, and some have been quite interesting in their departure from or interpretation of federal precedent. See, e.g., Miller v. Harpster, 392 P.2d 21 (Alaska 1964) (state equivalent of Fed. R. Civ. P. 34 interpreted as not limiting discovery of witnesses' written statements; good cause need not be shown); State ex rel. Mid-America Pipeline Co. v. Rooney, 399 S.W.2d 225 (Mo. Ct. App. 1965) (state equivalent of Fed. R. Civ. P. 33 interpreted as not requiring party to answer interrogatory on knowledge from subcontractor in its control); Fireman's Fund Ins. Co. v. Commercial Standard Ins. Co., 490 S.W.2d 818, 825-26 (Tex. 1972)(state equivalent of Fed. R. Civ. P. 36 used to compel litigant to admit truth or falsity of another's testimony in a separate trial).
played a critical role in the formulation and interpretation of the
discovery rules are not people who spend much time in the trenches
of litigation. Even trial judges are often removed from discovery is-
sues, with increasing responsibility for the management of discovery
in the federal courts being thrust on magistrates. Finally, many
lawyers are apparently reluctant to press for resolution of discovery
disputes. But a drastic change in the nature of litigation of the sort sug-
gested by Professor Brazil would be hard to legislate and even harder
to implement. Is it possible, then, that at least some of the difficulty
may be due not to the inevitability of conflict between the goals of
discovery and the nature of the adversary system, but rather to a gap
between the theory and practice of discovery? Is it also possible that
the present rules, and even the sonorous tones of Hickman v. Taylor, do not speak to practitioners and judges with a sufficiently clear
voice? If so, there may be hope for reducing the conflict without so
thorough an overhaul of the system itself.

I put to one side problems of unduly burdensome discovery de-
mands and excessive delay caused by clearly frivolous objections and
just plain stalling. Such problems are serious but can, I believe, be
dealt with by proper judicial management within the present struc-
ture. Quite apart from these problems, it seemed feasible to probe
the gap between theory and practice, and to test the clarity of the
present rules, by asking practicing lawyers to respond to a hypotheti-
cal case that raises at least some of the hard questions. The case
should be a simple one as far as the parties' underlying legal rights
and duties are concerned, and should focus not on oral depositions


8. A recent study in a related area indicates that there is insufficient resort to the compelling and sanctioning provisions of Fed. R. Civ. P. 37 to make those provisions an adequate deterrent to untimely responses to discovery requests. P. Connelly, F. Holleman & M. Kuhlmans, Judicial Controls and the Civil Litigation Process: Discovery 18-26 (1978). See also W. Glaser, supra note 2, at 154-56.


10. See the significant empirical data supporting this conclusion in P. Connelly, F. Holleman & M. Kuhlmans, supra note 8, especially Chapters V-VII. Professor Brazil would doubtless disagree with this view. See Brazil, supra note 3, at 1303-04.

Sometimes the nature of judicial management may verge on the heavy-handed. For example, Judge Pollack has advised that when, at an initial conference, the judge is told that one counsel or the other has served interrogatories, the best thing for the judge to do is to "vacate them, forthwith, without prejudice." Pollack, Discovery—Its Abuse and Correction, 80 F.R.D. 219, 224 (1979).
but on interrogatories and requests for admissions, where the lawyer is the real target of discovery. The responses sought should relate to an element of the case of the “discoveror,” to evidence that was itself inadmissible, and to whatever beliefs or opinions the “discoveree” or his attorney might hold with respect to that evidence.

With all these strictures in mind, I came up with the following:

1. You represent A, executor of B, in a Superior Court action for negligence arising out of an automobile accident at a highway intersection in the state. The intersection contained a stop sign at all access roads. B died in the accident and C, a passenger in the car B was driving, stated to you in an interview that B did not come to a full stop before entering the intersection. C too has since died, from causes unrelated to the accident, and none of the other witnesses you have spoken to claims to have seen B enter the intersection. You have no reason to doubt the correctness of C’s statement. D, the defendant in the action, has alleged contributory negligence as a defense and has submitted the following interrogatory to A under Rule 33 of the state rules of civil procedure:

   “Did B come to a full stop before entering the intersection where the accident in suit occurred?”

What should be the response to this interrogatory?

2. The facts are as stated in question 1, but the interrogatory submitted by D reads as follows:

   “If you have any information about whether or not B came to a full stop before entering the intersection where the accident in suit occurred, please state: (a) the nature of that information; and (b) your opinion with respect to whether or not B came to a full stop at that time.”

What should be the response to this interrogatory?

3. The facts are as stated in question 1, but instead of an interrogatory under Rule 33, D submits the following request for admission under Rule 36:

   “B did not come to a full stop before entering the intersection where the accident in suit occurred.”

What should be the response to this request?

4. Assume that C’s statement in question 1 was not made in an interview with you but was made to A a few days after the...
accident and before a lawyer was consulted. A has no reason to
doubt the correctness of C's statement.

(a) Would your answer to question 1 be different? If so, how?
(b) Would your answer to question 2 be different? If so, how?
(c) Would your answer to question 3 be different? If so, how?12

This case was examined by several colleagues who differed on the
appropriate responses to the questions13 but who agreed on their in-
trinsic interest. It was then sent to 200 practicing lawyers in Massa-
chusetts and another 200 in Maine with an earnest plea for their
reactions. The lawyers were selected in a manner that was designed
to focus on practitioners with litigation experience. Lists of members
of various trial lawyers' associations and recommendations of some
active trial lawyers were especially relied on.14

Massachusetts and Maine seemed ideal choices not only because
they were close to home but because the governing substantive and
procedural law in both states was well suited to the problem. Both
states have discovery rules similar or identical to the federal rules in
all relevant respects, and federal decisions are relied on in interpret-
ing the state rules.15 Both states have also adopted comparative negli-
gence rules under which the plaintiff's contributory negligence is a
matter for the defendant to plead and prove and is not necessarily a
complete defense.16

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12. The responses to the questionnaire are summarized in the appendix to this
Article.
13. More detail on the responses of these colleagues is found at notes 87-89 infra
and accompanying text.
14. In Massachusetts, the membership list of the Massachusetts Academy of
Trial Attorneys was particularly useful. In Maine, where the bar is much smaller, the
complete list of lawyers admitted to practice was used as a starting point, with selec-
tion of those in the study based on membership in the Maine Trial Lawyers' Associa-
tion and recommendations of practicing lawyers themselves experienced in trial litiga-
tion. The effort was to obtain a group of lawyers familiar with litigation rather than a
representative sample of all lawyers. The opportunity for random selection within this
relatively small group was quite limited. All participants were, of course, assured
anonymity.
15. Rules of procedure patterned on the federal model were adopted in Maine in
1959, see Maine Rules of Civil Procedure, 165 Me. 463-596 (1959), and amendments
since that time have kept pace with amendments to the federal rules. See R. Field,
Federal decisions both before and since 1959 are given weight in interpreting the
state rules. See id. § 1.5.
Rules of procedure patterned on the federal model were adopted in Massachusetts
Maine, federal decisions are given weight in interpreting the state rules. See, e.g.,
Rollins Environmental Servs., Inc. v. Superior Court, 368 Mass. 174, 179-80, 330
The response to the questionnaire, while not as high as hoped for, was substantial. Fifty-nine responses were received from Massachusetts, not including one reporting that the lawyer addressed had recently died. Sixty-three responses were received from Maine, but eleven respondents said that they would not answer the questionnaire because their experience was predominantly or exclusively on the criminal side. And of the fifty-two respondents remaining, one said that he could not answer without doing research on the issues raised.\textsuperscript{17} Considerably more than 110 lawyers were represented by the completed questionnaires, since there were a number who stated or implied that the answers were the product of discussions among several members of a firm.\textsuperscript{18}

The responses showed a good deal of variation among the lawyers involved. These variations were generally more notable within each state than between them. The difficulty of the questions was highlighted not only by the lawyers who explicitly noted their uncertainty but also by the few lawyers who took me to task for asking the questions. Included in this latter group was one lawyer who, in a five-page letter, insisted that a lawyer or even a client should never be called on or permitted to let his opinion or evaluations substitute for those of the trier of fact. "Woe be unto the lawyer," he said, "that tends to prejudice the witness that 'he has no reason to doubt.' I marvel after nearly half a century of practice the lawyer who so comfortably plays God." Yet another lawyer taxed me for even suggesting that a lawsuit could responsibly be brought on these facts, insisting that A's lawyer had a clear ethical obligation to admit B's failure to stop, and wrote a letter to the President of Harvard University suggesting that the questionnaire was designed to determine "how one may avoid the truth in order to reach an unjust result."\textsuperscript{19}

\begin{itemize}
\item not a complete bar to a claimant's recovery, but "[i]f such claimaint is found by the jury to be equally at fault, the claimant shall not recover"; Mass. Ann. Laws ch. 231, § 85 (Michie/Law. Co-op Supp. 1978) (contributory negligence is not a complete bar "if such negligence was not greater than the total amount of negligence attributable to the person or persons against whom recovery is sought").
\item 17. There were, in addition, a small number of lawyers—some three or four—who stated or implied that they would want to do some research if the hypothetical situation were a real case but who were willing to answer the hypothetical questions without that research.
\item 18. The precise number of lawyers participating in this manner cannot be determined. Not unique, however, was the letter from one lawyer who said that because the "questions were intriguing . . . I took this matter up at one of our firm meetings for discussion. There were nine lawyers present and we spent approximately an hour and a half with these questions . . . ."
\item 19. In defending myself against this charge, I should note that even if B's failure to stop establishes his contributory negligence as a proximate cause of the accident,
Despite this unnerving range of reactions, the responses did seem to have a center of gravity which, I believe, may be taken as suggestive of the attitudes of the practicing bar. Against this background, these problems may be explored with the hope of discovering any ambiguities in the governing rules and of narrowing any gap between theory and practice that may exist. The divergent responses just mentioned certainly suggest that imprecise ethical obligations cannot be counted on to save the day.  

I. INTERROGATORIES IN AN ADVERSARY SYSTEM

A. RESPONSES TO THE QUESTIONNAIRE

Questions 1, 2(a), 2(b), 4(a), and 4(b) all raise issues of the appropriate response to interrogatories addressed to a party under such contributory negligence would not necessarily bar recovery in either Massachusetts or Maine. See note 16 supra.

20. Several provisions of the ABA Code of Professional Responsibility may be relevant to the issues discussed here. DR 5-101 and DR 5-102, which deal with the lawyer as witness and which virtually mandate withdrawal as lawyer in many such cases, are ably discussed and criticized in Note, *The Advocate-Witness Rule: If Z, Then X, But Why?*, 52 N.Y.U. L. Rev. 1365 (1977). DR 7-102(A)(3) states that a lawyer shall not “[c]onceal or knowingly fail to disclose that which he is required by law to reveal.” ABA Code of Professional Responsibility DR 7-102(A)(3). This provision, Judge Friendly has said, “does not advance matters greatly.” *Kupferman v. Consolidated Research & Mfg. Corp.*, 459 F.2d 1072, 1081 (2d Cir. 1972). Cf. ABA Code of Professional Responsibility DR 7-109 (suppression of evidence that lawyer or client is legally obligated to reveal).

Other possibly relevant disciplinary rules are DR 7-106(C)(3) (a lawyer shall not “[a]ssert his personal knowledge of the facts in issue, except when testifying as a witness”) and DR 7-106(C)(4) (a lawyer shall not “[a]ssert his personal opinion as to the justness of a cause [or] as to the credibility of a witness”). These rules appear under the heading “Trial Conduct,” but may have some bearing on pretrial conduct before the tribunal as well. See text accompanying note 98 infra.

Judge Frankel, in a provocative article, has made DR 7-102 a focal point of his criticism of the lawyer’s role in the adversary system and has proposed a revision of that disciplinary rule which would radically redefine the lawyer’s role. See Frankel, *The Search for Truth: An Umpireal View*, 123 U. Pa. L. Rev. 1031, 1057-59 (1975).

In a more recent article dealing with the problem of suppression of truth in a criminal trial, Professor Pye argued persuasively that “the most appropriate way of dealing with the problem [that the scales are tilted too much in favor of suppression] is primarily through re-examination and alteration of evidentiary and procedural law, not through ethical proscriptions that would preclude counsel from asserting rights that are available to his client under law.” Pye, *The Role of Counsel in the Suppression of Truth*, 1978 Duke L.J. 921, 925. My starting point is very similar: that it is better, whenever possible, to frame the governing law in such a way that the lawyer is not left with an ethical obligation to refrain from doing something that the client may lawfully do and that is in that client’s best interest.
rule 33.21 Those responses will therefore be summarized before the issues raised by the hypothetical case are discussed.22 Tables giving a detailed breakdown of the responses are contained in the appendix.

Responses to question 1—the interrogatory asking whether B came to a full stop—are reported in Table I of the appendix. Of the 110 responses, only twenty-two (20%) contained a statement or even a hint (through a reference to hearsay, privilege, or work product, for example) that there was a C who had said something on the subject.23 Also, nine of the 110 responses (8%) were explicit refusals in whole or in part to answer on the basis that any information constituted lawyer's work product, or more loosely, was privileged.24

Question 4(a) asked whether the answer to question 1 would be different if C's statement had been made to A before a lawyer was consulted, and the responses to that question are reported in Table II of the appendix. Twenty respondents (18%) said that the answer would change, and ten actually moved in the direction of greater disclosure, from category 5 (other limited answers or refusals to answer) to category 3 (I am informed [by C] that B did not stop). The other changes were within category 5. References to work product or privilege, for example, were dropped, and in some cases other justifications for a limited answer were substituted. In one case the statement "I don't know" was changed to "I don't know of personal knowledge." The number of instances in which there was a statement or at least a hint that there was a C who had said something on the subject rose from twenty-two to thirty-five (32% of the total of 110 responses).

Question 2(a) contained an interrogatory asking for the nature of any information bearing on the question of whether B came to a full stop, and the responses are reported in Table III of the appendix. Here, there were some differences between the two states, the most notable of which is that seventeen of the twenty-two in category 1,

21. Fed. R. Civ. P. 33. The federal discovery rules will be used in this discussion since, as stated at text accompanying note 15 supra, the rules in Maine and Massachusetts match the federal in all relevant respects and federal decisions are frequently relied on in interpreting those rules.

22. Because the questions—in an effort to avoid directed answers—were open-ended, the responses proved difficult to summarize. In categorizing responses in each table, I have tried to include enough categories to reflect the range of replies but not so many as to lose any sense of pattern in those replies. The categories were not formulated until the replies had been thoroughly studied. In any event, most of the replies fit the listed categories quite comfortably.

23. These 22 include the five in category 2 who stated, in answer to the interrogatory, that B did not come to a full stop.

24. These include two in category 5(a) who stated they had no personal knowledge.
involving the highest degree of disclosure, were from Maine. In addition, ten of the fifteen in category 3 (I have no information) were from Maine, while twenty of the twenty-three in category 4 (I have no personal knowledge) and sixteen of the twenty-three in category 6 (refusal to answer) were from Massachusetts. In all, seventy-nine responses (72%) either stated, or hinted through objections or otherwise, that there was a C who had said something relevant; twenty-one responses (19%) gave no such hint, with some of these even expressly stating that there was no information; and ten (9%) were too ambiguous to classify. There were thirty respondents (27%) who expressly relied on the work product doctrine or "privilege," in whole or in part, as a basis for refusal to answer.

Table IV of the appendix reports the responses to the inquiry whether the answer to question 2(a) would be different if C's statement had been made to A before a lawyer had been consulted. Sixty respondents (55%) said that it would, with a virtual disappearance of the work product objection from the answers, and a general shift in the direction of disclosure. Twelve respondents changed their answer but did not move in the direction of greater disclosure, and I concluded that after all the changes, there were only five respondents—down from twenty-one initially responding in this category in answer to question 2(a)—who gave no hint that there was a C who had said something relevant.

Question 2(b) was an interrogatory asking for an opinion about whether B had come to a full stop. It was the most unorthodox of the questions and, as shown by the breakdown of responses in Table V of the appendix, it was treated by many respondents as being naive or even in singularly bad taste. A total of nineteen respondents (17%) relied on the work product doctrine or "privilege" as a basis

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25. As stated in note 15 supra, the Maine discovery rules have been patterned on the federal much longer than have the Massachusetts discovery rules. Prior to 1974, Massachusetts law generally allowed interrogatories to a party only to the extent that a witness could be asked the same questions at trial. See, e.g., Warren v. Decoste, 269 Mass. 415, 417, 169 N.E. 505, 506-07 (1930).

26. There were, in addition, 13 responses in category 2 disclosing only that a statement had been made to A's attorney, and 1 response in category 5, all 14 of which implicitly relied on the work product doctrine for failure to make any further disclosure. A work product claim also appeared to underlie other limited responses.

27. Both Table IV and Table VI suffer from the fact that question 4(b) simply asked whether the response to question 2 would have been different, without specific reference to questions 2(a) and 2(b). While many who said they would change referred specifically to 2(a) or 2(b), or both, not all did, and therefore some subjective judgments about the respondents' awareness of the separate inquiries had to be made in tabulating the responses.

28. In Tables V, VI, VII, and VIII, the number of responses drops from 110 to 109 because one respondent left the relevant questions blank.
for complete or partial refusal to answer or to express an opinion. The principal difference between the two states lay in categories 3-6. In the largest of these, category 5 (I have no opinion), twenty of the twenty-seven were from Maine. Maine also predominated in category 4 (I have no information).

There were twenty-eight respondents (25%) who indicated that the answer to this interrogatory would be different if C's statement had been made to A before a lawyer had been consulted. As shown by Table VI of the appendix,29 these changes did not dramatically affect the totals, in some instances because they were within a category and in some instances because a transfer into a category was balanced by another transfer out of it. Most, but not all, refusals to answer or to state an opinion on the basis of the work product doctrine or privilege were changed in some way.

B. THE WORK PRODUCT ISSUE

It is worth at least passing notice that, with one or two possible exceptions, there were no respondents who indicated that A should be consulted as to the proper response to interrogatories that were directed to A and that A would have to answer under oath. This may have been due in part to the way in which the questions were asked and in part to the fact that the questions were hypothetical ones in which A was not even a name, just a letter.30 But it also may reflect an awareness that, unlike questions asked a witness at trial or on deposition, written interrogatories are, in a significant sense, directed to the lawyer. It is expected that the lawyer, after whatever consultation with the client he deems necessary, will draft the answers for the client to sign and swear to.

Whether or not this assumption of responsibility is appropriate in all instances, it is certainly proper for the lawyer and not the client to decide on the extent to which a work product objection should be made. The work product doctrine, after all, is not one that clients can be expected to know much about. Indeed, it has managed to evade the grasp of lawyers, judges, and commentators ever since the Court in Hickman v. Taylor31 first decided that the discovery rules did not really mean what they seemed to say. Moreover, rule 33 specifically

29. See note 27 supra.
30. For a trenchant criticism of this tendency of teachers and judges to drain the blood out of real and hypothetical cases, see J. NOONAN, PERSONS AND MASKS OF THE LAW viii-xiii, 3-28, 111-51 (1976). It might indeed have changed the responses to the questionnaire had I managed to put more life into A, B, and C and especially into C's oral statement.
DISCOVERY

states that, while answers are to be signed by the party, objections are to be signed by the lawyer.32

In the present problem, a substantial number of lawyers, though far from a consensus, raised an explicit work product objection to the interrogatories, especially in responding to question 2(a).33 And I suspect that many others would defend their failure to disclose more than they did on work product grounds. Thus here, as in many other instances in which discovery is resisted, a close look at the work product objection is required. For reasons canvassed more fully below, there seems little doubt that, in the absence of a valid work product objection, C’s out-of-court statement should be disclosed34—at least it should be if the right question is asked, but that issue too is reserved for later discussion.35

While express or implied work product objections were frequent when C’s statement had been made to the lawyer, they were virtually nonexistent when the statement was made to A, the client. This is somewhat surprising since the protection afforded “trial preparation materials” by rule 26(b)(3) extends to materials prepared in anticipation of litigation “by” a party as well as for him.36 Perhaps the respondents simply assumed that an individual unrepresented by counsel is not acting in anticipation of litigation, or, more likely, that no matter how the rule is worded, its central purpose is to protect lawyers and those acting under their direction.

There is one other possible explanation for the general failure to invoke the work product doctrine to shield from disclosure C’s statement to A: rule 26(b)(3)—the rulemakers’ codification of Hickman—is addressed only to “documents and tangible things,” not to whatever might be inside the head of the party or his lawyer. But of course, this explanation would also eliminate any basis for a work product objection to disclosure of C’s oral statement if made to A’s


33. See Table III. In those instances in which a claim of “privilege” was made, it was generally clear that the real basis of the claim was work product. In a few instances, the respondent did appear to be relying on the lawyer-client privilege, which, under the generally accepted definition of that privilege, is inapplicable on the facts stated in the hypothetical case. See, e.g., 4 Moore’s Federal Practice ¶ 26.57[2], at 26-200 to -201 (2d ed. 1979) (The “interrogated party cannot avoid an answer on the ground that the names were learned by counsel in the course of investigation . . . . Nor may the interrogated party . . . plead personal ignorance of the names on the ground that they were known only to his attorney.” (footnotes omitted)).

34. See text accompanying notes 62-65 infra. In view of the conclusion reached below that the substance of C’s statement to A’s lawyer is not protected by the work product doctrine, I have not considered whether sufficient need can be shown under Fed. R. Civ. P. 26(b)(3) to compel disclosure.

35. See text accompanying notes 66-70 infra.

lawyer. And, as noted, that objection was frequently made.

What is the significance of the limitation of rule 26(b)(3)'s protection to documents and tangible things? *Hickman* itself was not so limited; the lawyer Fortenbaugh and his client resisted both production of documents and disclosure of their recollection of oral statements made by witnesses. The Court not only upheld this resistance but also appeared to bestow a higher degree of immunity on witnesses' oral statements than on their signed, written statements, whether those oral statements were reflected in a lawyer's memorandum or not:

But as to oral statements made by witnesses to Fortenbaugh, whether presently in the form of his mental impressions or memorandum, we do not believe that any showing of necessity can be made under the circumstances of this case so as to justify production. Under ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. No legitimate purpose is served by such production. The practice forces the attorney to testify as to what he remembers or what he saw fit to write down regarding witnesses' remarks. Such testimony could not qualify as evidence; and to use it for impeachment or corroborative purposes would make the attorney much less an officer of the court and much more an ordinary witness. The standards of the profession would thereby suffer.37

The point was underscored by Justice Jackson's concurrence. He would have set a low threshold for production of witnesses' signed statements but a virtually insuperable barrier to disclosure of oral statements: "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."38

But *Hickman* was not simply a vindication of the adversary role of the lawyer. Rather it was an adroit compromise between the felt necessities of that role and the pressures toward candor and disclosure generated by the new discovery rules. Like most compromises, the decision contained ambiguities and unresolved inconsistencies. In addition to delivering a panegyric to the discovery rules as "one of the most significant innovations of the new Federal Rules of Civil Procedure," clearing the way "for the parties to obtain the fullest possible knowledge of the issues and facts before trial,"39 the Court stressed that "[a] party clearly cannot refuse to answer interrogatories on the ground that the information sought is solely within the

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38. *Id.* at 516 (Jackson, J., concurring).
39. *Id.* at 500-01.
The Court also waxed quite specific in describing the application of the discovery rules to the case at hand:

Interrogatories were directed toward all the events prior to, during and subsequent to the sinking of the tug. Full and honest answers to such broad inquiries would necessarily have included all pertinent information gleaned by Fortenbaugh through his interviews with the witnesses. . . .

. . . Searching interrogatories directed to Fortenbaugh and the tug owners, production of written documents and statements upon a proper showing, and direct interviews with the witnesses themselves all serve to reveal the facts in Fortenbaugh's possession to the fullest possible extent consistent with public policy.41

Thus the distinction, however tenuous and unworkable it might be, seemed to lie between information or facts uncovered by the lawyer in investigation, which were unprotected and which could be obtained through interrogatories, and the content of a witness' oral statement, which could not be obtained, at least in the absence of an extraordinary showing. Witnesses' written statements, and presumably their contents, were also given protection, though to a lesser and ill-defined degree. This distinction gave trouble to the lower federal courts, which varied in their interpretation of Hickman, but which in the main made a valiant effort to compel disclosure of "facts" while protecting oral and written statements themselves.42

Was this distinction jettisoned by the 1970 amendments in favor of a distinction protecting only documents and tangible things? Writing before the proposed amendments became final, Professor Cooper

40. Id. at 504.

41. Id. at 508-09, 513 (emphasis added). The opinion at another point, however, equated "written materials" in the lawyer's files with "facts" and indicated that the "facts," like the written materials, could be obtained only on a proper showing:

We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had.

Id. at 511 (emphasis added). Compounding the ambiguity, the opinion went on to suggest that such a showing of necessity could be made even on the rather flimsy ground that a document "might be useful for purposes of impeachment or corroboration." Id.

suggested that the proposals might be at once too broad and too narrow: too broad in that they gave unnecessary protection to written materials, like witness statements, that did not reflect the lawyer's evaluation and trial strategy; too narrow in that they might be read to give no protection to the lawyer's unwritten impressions and intentions. The proper rationale underlying Hickman, he argued, was not founded on a fear that forced disclosure would turn a lawyer into a witness, prevent lawyers from putting things in writing, or deter effective investigation. It was, rather, that insisting on perfect knowledge of the other lawyer's evaluation of the case and trial strategy could encourage dishonesty and would be hard to square with the core of the adversary process.

The final version of the rules did not seem to respond fully to Professor Cooper's criticism, though it did vary from the proposals in some respects. Indeed, the Advisory Committee's Note stressed that the broad protection afforded "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative" was given only to documents:

Rules 33 and 36 have been revised in order to permit discovery calling for opinions, contentions, and admissions relating not only to fact but also to the application of law to fact. Under those rules, a party and his attorney or other representative may be required to disclose, to some extent, mental impressions, opinions, or conclusions. But documents or parts of documents containing these matters are protected against discovery by this subdivision. Even though a party may ultimately have to disclose in response to interrogatories or requests to admit, he is entitled to keep confidential documents containing such matters prepared for internal use.

The ambiguities in Hickman and in the 1970 codification are reflected in the approaches of the leading commentators on the rules. Professors Wright and Miller, for example, approve of the view that if a document is protected from discovery, an interrogatory calling "for such complete information about the document as to be equivalent to furnishing the document itself" would be improper. But their emphasis throughout is upon the limitation of rule 26(b)(3) to documents and things, and upon the discoverability, under Hickman and

44. Id. at 1275-82.
the 1970 amendments, of facts and information obtained in investigation.47 Professor Moore's approach seems quite different. After conceding that "information" in the hands of the lawyer is subject to discovery, he notes that the Hickman rationale applied "with special force to discovery of mental impressions of the attorney, as illustrated by the recollections of oral interviews with witnesses sought by the plaintiff in that case."48 Since rule 26(b)(3) deals only with documents, "it leaves the 'work product' doctrine unchanged in this regard. Discovery of such material by any method is therefore limited to that rare case which Justice Murphy [writing for the Court in Hickman] mentioned but did not describe."49 At another point, Professor Moore states that while it is permissible to get "the facts that have been learned," work product protection extends "to the substance of the matter that has [been] written down."50 Finally, the decisions since the 1970 amendments dealing with this problem are infrequent and inconclusive.51

Much of the difficulty stems from the ambiguity of the distinction between facts and information, on the one hand, and the content of oral or written statements on the other. To return to our hypothetical example, C has told A's lawyer that B did not come to a full stop. Can it be said that the work product doctrine does not give even qualified protection against disclosure of the "fact" of whether or not B stopped but does give virtually absolute protection against disclosure of the lawyer's "mental impression" of C's statement? Or, Professor Moore notwithstanding, is the substance of the statement (though perhaps not its precise language) to be included within the scope of the "fact" that must be disclosed?

Note also that, in many instances, requiring A only to state whether or not B came to a full stop will be of little help to D: A is quite likely to say that he does not know, if his only information is a statement of one now unavailable. The instances will at best be rare in which A is, in effect, willing to stipulate to a damaging and critical

47. See, e.g., id. §§ 2023, 2024; cf. id. § 2026 (mental impressions and legal theories).
49. Id.
50. Id. at 26-413. See also R. Field, V. McKusick & L. Wroth, supra note 15, § 33.7, at 511 ("[T]he policy behind Rule 26(b) would seem to prohibit interrogatories as to the contents of the statements in anticipation of litigation, unless the requisite showing of injustice or undue hardship is made.").
fact on that basis. On the other hand, D may be very interested in knowing of C's statement—its substance as well as its existence—whether or not A is willing to accept the truth of that statement. If C made the statement to A's lawyer, he may have made it to someone else under circumstances that would make it admissible despite the hearsay rule. Or the statement may have contained a lead to other evidence that is admissible.

Even if the work product doctrine gives protection against disclosure of C's statement, D may be able to make a showing sufficient to compel production. But, given that the work product doctrine slows down the process of discovery and sometimes requires judicial intervention to resolve disputes, one may well question whether the doctrine should be applicable at all. As Professor Cooper has pointed out, any apprehension about making A's lawyer a witness could be resolved by not permitting the material discovered to be used at trial "for any purpose." Any legitimate fear about probing the lawyer's mental processes, I submit, relates not to asking a lawyer to recall what a witness told him, but requiring the lawyer to evaluate the accuracy of what he was told in a way that might strain his conscience, or his role as an advocate, to the breaking point. Finally, requiring disclosure of the substance of what the lawyer was told is no more likely to discourage effective investigation than the existing requirement that the "statement" of a party or a witness must be furnished simply on the request of that party or witness.

52. The problem of compelling a stipulation is discussed at text accompanying notes 120-127 infra.

53. It is assumed throughout this discussion that C's statement to A's lawyer, or to A, is inadmissible hearsay, though it might possibly be admissible under a "catch-all" exception of the type contained in Fed. R. Evid. 804(b)(6). See Rossi, Federal Evidence Codification: An End to the Rule Against Hearsay?, 5 CORNELL L.F. 6-11 (Feb. 1979). Maine, which has adopted rules of evidence based on the federal rules, has chosen not to adopt this catch-all exception. See R. FIELD & P. MURRAY, MAINE EVIDENCE 208-09, 232 (1976). A similar statement made by C at another time and place, however, might be admissible under a specific exception, for example, as an excited utterance. See Fed. R. Evid. 803(2).

54. See Cooper, supra note 43, at 1277. See also ABA Code of Professional Responsibility DR 5-101, -102, discussed at note 20 supra. Certainly, these provisions of the ABA Code, dealing with a lawyer as witness, are not intended to require a lawyer's withdrawal whenever there is forced pretrial disclosure of matters obtained by him in investigation.

55. I am not suggesting that the same strain would result from having to answer any interrogatory calling for some exposure of the lawyer's mental processes. Interrogatories about legal theories or contentions of fact or law, for example, can serve valuable purposes at little cost, though even such questions should not be allowed to probe too deeply into trial strategy. See Cooper, supra note 43, at 1284-301.

The idea that the "fact" is not protected but the content of the statement is—if that is the idea—seems to have things upside down. There is little if any reason to give work product production to the substance of the statement itself. And there should, of course, be no prohibition of a party’s acknowledging the occurrence or nonoccurrence of an event on the basis of a statement made by a third person to his lawyer. But it is difficult to see how the lawyer can effectively represent his client and at the same time maintain his integrity if he can be required by an adversary to evaluate the truth of what he has been told and if the client can then be forced to adopt that evaluation in answering an interrogatory.57

There is no clear consensus of either theory or practice on this problem. The theory, as embodied in rule 26(b)(3), seems to lean toward disclosure by limiting work product protection to documents. The practice, if the results of the questionnaire are any indication, seems to lean toward using the work product protection to justify not disclosing oral statements made to a lawyer. One reason for the variation in practice may well be the ambiguity of the rule. Perhaps, then, the soundest way to narrow this gap is to make it more clear that the present work product protection afforded by the rules applies only to documents,58 but to extend the protection of the lawyer’s mental impressions and opinions to any evaluation of witness credibility, whether or not embodied in a document.59 Such evaluations, I be-


58. There is much to be said for abolishing work product protection of witnesses’ written statements altogether, as indicated by the authorities cited in note 56 supra and note 144 infra. But there may be some marginal advantage in giving limited protection to such statements, at least where the discoveror has adequate access to the persons in question. By implication, such protection would apply to an interrogatory calling for the full text of a document, since such an interrogatory would amount to a request for a copy of the document. See Peterson v. United States, 52 F.R.D. 317, 320 (S.D. Ill. 1971). It would not extend, however, to a request for a summary of, or for the substance of, an oral or written statement of a witness.

59. See text accompanying note 141 infra. Such protection, while not preventing a request for a statement of legal theories or contentions, might also extend to the details of the lawyer’s trial strategy. Although these details may be explored at a pretrial conference, they are rarely sought as part of pretrial discovery and the courts have generally made short shrift of such efforts. See, e.g., Bercow v. Kidder, Peabody & Co., 39 F.R.D. 357, 358 (S.D.N.Y. 1965); Wedding v. Tallant Transfer Co., 37 F.R.D. 1964), the Alaska Supreme Court held, in effect, that written statements of witnesses were not entitled to any work product protection. See also Van Alen v. Anchorage Ski Club, Inc., 536 P.2d 784 (Alaska 1975). The Miller Court, however, expressly distinguished the case in which a lawyer is asked to reduce an oral statement of a witness to writing. 392 P.2d at 23.
lieve, should at some level affect the lawyer's decisions, and even his ethical obligations, relating to the manner of handling the case or the question whether he should represent the client at all. This belief finds support both in rule 116o and in the Code of Professional Responsibility. But without entering that thicket, I believe the client should be able to stand mute when asked, in effect, for his lawyer's evaluation of a witness' credibility.

C. Answering the Interrogatories

If the work product doctrine does not shield the substance of C's statement from disclosure, even if made to a lawyer, how should the interrogatories be answered? A few respondents suggested that if C's statement was made to the lawyer, A need not disclose it if the lawyer had kept the statement to himself and never told A of it. Unfortunately, rule 33 is not as clear as it might be on this issue, since the requirement to "furnish such information as is available to the party" could be read to apply only if that party is a corporation, partnership, association, or government agency. But it seems plain, and the authorities agree, that information in the lawyer's sole possession must be revealed in answer to an interrogatory to a party, whether the party is individual or corporate, in the absence of any privilege or work-product shield. Any other conclusion would put a premium on lack of communication between lawyer and client and would thus impede effective planning and preparation.

With this background, I believe the appropriate answer to the interrogatory in question 2(a), regardless of whether C's statement was made to A or to the lawyer, should include a summary of C's statement and an identification of its source. A number of those

8, 10 (N.D. Ohio 1963). See also Cooper, supra note 43, at 1294-301, and cases cited therein.


61. There are several disciplinary rules that, I believe, come into play if a lawyer is convinced that his client, or a third person, is not telling the truth. See, e.g., ABA Code of Professional Responsibility DR 2-109, 2-110(B), 7-102(A)(4), (6). For provocative discussions of the nature of a lawyer's obligations in such circumstances, see M. Freedman, Lawyers' Ethics in an Adversary System 27-77 (1975); G. Hazard, Ethics in the Practice of Law 126-35 (1978); Pye, supra note 20, at 940-59. Professor Pye draws a distinction between knowledge that a witness is lying, based on what the witness admits to the lawyer, and mere belief that a witness is lying. Id. at 950-52. He concedes that the line is a thin one, id. at 958, and, in my view, it often disappears altogether.


responding to the questionnaire did not disclose either fact, even when C's statement was made directly to A. But there were many who referred to the statement (permitting a follow-up question), and an even larger number who revealed its nature and source. It is clear from the rules themselves, and well established in the cases, that the inadmissibility of C's statement is not in itself a bar to its discovery. Furthermore, as suggested above, even if C is unavailable, that does not rule out the possibility that disclosure of C's statement might lead to admissible evidence on a critically relevant issue. Finally, the answer "I have no personal knowledge" is not responsive to the interrogatory, while "I have no information" is simply false.

A more difficult problem is posed by the interrogatory in question 1: Did B come to a full stop? I have already indicated my view that, if C's statement was made to the lawyer, the work product doctrine should preclude any compelled disclosure of the lawyer's evaluation of C's credibility. And assume for the moment that if C's statement had been made to A, A would similarly not be required to evaluate its accuracy. Is it then proper simply to answer "I do not know," or words to that effect, as so many respondents did?

I think not. In the first place, there is substantial authority for the view that if the party interrogated does not know the answer to a question, he must specify in some detail the effort he has made to find out. Such detail in this case should probably include a reference to C's statement and its contents, though it might also add that C is dead and that other witnesses interviewed were unable to corroborate or refute that statement.

Moreover, failure to disclose information relevant to the question is, in my view, a failure to answer the question. Every interrogatory of this type—which asks directly about the fact and not for information relating to the fact—is in substance a two-part question: (1) what information do you have that relates to this fact? and (2) what is your evaluation of that information? Assuming that the discoveree is unable or for some proper reason unwilling to answer the second part of the question with a clear statement, that should not shield him from answering the first. The purpose of an interrogatory is not simply to determine a party's position with respect to a fact, or to extract an

64. See 4 Moore's Federal Practice ¶ 26.56(4) (2d ed. 1979), and cases cited therein. On the question of the admissibility of C's statement, see note 53 supra.
65. See text accompanying note 53 supra.
66. See Table II.
admission, but to get information. Nor should the discoveror be required to break the question down into its components to get that information. The failure to break down into components an interrogatory seeking disclosure of the existence of a fact may result in the discoveror receiving an answer to only the second implicit part when the discoveree is willing to swear to an unqualified "yes" or "no." I do not think it should have this result, however, if the answer falls short of an unqualified response.

The matter was well put in *Riley v. United Air Lines, Inc.*, where the plaintiff served interrogatories asking the defendant to state in detail how the accident in suit occurred. In holding insufficient the defendant's response that it had "no knowledge sufficient to answer the said interrogatories because all the crew members died in the accident," the court said:

It is apparent from the opposing affidavit that the defendant has already obtained certain information from third persons relating to some of the interrogatories . . . . In this situation, defendant should furnish whatever information it now has, regardless of when or from whom it acquired it. . . .

Defendant may state in its answers what the source of the information is, if it so desires, [but when] the information has been obtained by persons under defendant's control solely from [questions they have addressed to] third persons, defendant is not required to admit its accuracy. If no one under defendant's control now has any information from any source as to a particular interrogatory, defendant may so state under oath, and such a statement shall be a sufficient answer. 69

While the suggestion in *Riley* that the discoveree has no duty to investigate is contrary to my own view as well as to respectable authority, the *Riley* court's statement of the obligation to disclose information a party does have, regardless of its reliability or credibility, seems eminently sound. The fact that so many respondents to question 1 took a different and less forthcoming approach can perhaps be explained by the failure of rule 33 to make this obligation sufficiently clear. It may also, as Professor Brazil might argue, 71 be attributable to the bias against disclosure inherent in the adversary system. But before that conclusion is reached and its implications explored, the less drastic remedy of writing a clarifying amendment

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69. 32 F.R.D. at 233 (citations omitted).
70. See note 67 supra and accompanying text.
71. See Brazil, supra note 3, at 1323-24.
to rule 33 should be considered.

Once A has disclosed the content of C's statement and its source, the issue is whether A must go on to state whether he accepts C's statement as correct, either in response to the specific interrogatory in question 2(b) or in answer to the second implicit component of the interrogatory in question 1. Although a few respondents did state A's conclusion on the subject in response to both interrogatories—surprisingly, without any indication that the decision might be left to A—a majority declined to do so in both instances, and many protested that the interrogatory in question 2(b) was improper, irrelevant, or beyond the scope of legitimate discovery because the answer could not constitute evidence or lead to admissible evidence. But is the interrogatory in question 2(b) so plainly improper? Does it do any more than make specific the implication present in any question about a fact: that the person questioned is being asked for his opinion about the fact? It is true that a lay witness ordinarily cannot be asked for an opinion at trial if he is not competent to testify on the basis of personal observation. But there is no reason why that limitation should be imposed at the discovery stage if some legitimate purpose of discovery will be served by compelling an answer. Certainly most of the things we believe to be true, including many which we believe beyond all doubt, involve matters that we would not be competent to testify about at a trial.

Furthermore, the rulemakers in 1970 made an effort, especially with respect to rule 33 interrogatories, to render the fact-opinion distinction irrelevant: "An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact . . . ." The effort is laced with reservations, however. The interrogatory may not be "otherwise proper." And even if it is, the rule, in stating that a request for an opinion is not "necessarily" objectionable "merely" on the basis that it calls for an opinion should be that A had no opinion. How did they know? Twelve of the 27 offered no explanation, while another 12 indicated their view that A could not have an opinion because he lacked personal knowledge or other adequate information. Surely, this view is not correct, although the legal relevance of any opinion under these circumstances is another matter.

Although the interrogatory in question 1 implicitly asked for A's opinion as to whether B came to a full stop, and many responses stated, in effect, that A had no opinion on this question, few objected to the interrogatory on the ground that it was an improper request for an opinion.

72. See text accompanying note 30 supra.
73. See Tables V, VI. Twenty-seven respondents to question 2(b) said the reply should be that A had no opinion. How did they know? Twelve of the 27 offered no explanation, while another 12 indicated their view that A could not have an opinion because he lacked personal knowledge or other adequate information. Surely, this view is not correct, although the legal relevance of any opinion under these circumstances is another matter.
74. Although the interrogatory in question 1 implicitly asked for A's opinion as to whether B came to a full stop, and many responses stated, in effect, that A had no opinion on this question, few objected to the interrogatory on the ground that it was an improper request for an opinion.
75. See Fed. R. Evid. 601, 701.
opinion, uses adverbs that rarely find their way into statutes and rules.

The issue, as Professor Moore suggests, should turn on whether any valid purpose of discovery would be served by requiring an answer. It is true, as a number of respondents pointed out, that given A's incompetence to testify that B did or did not come to a full stop, A's opinion about that fact may be inadmissible in evidence. Moreover, once A has revealed the information available to him, it is difficult to see how A's opinion can in itself lead to any admissible evidence. Despite the language of rule 26(b)(1), however, those two possibilities do not exhaust the purposes of discovery. Another important purpose, though it appears to have been among the least realized in practice, is to narrow the issues. At least if A is willing to admit to an opinion, and perhaps if he can be so compelled, the effect will likely be to narrow the issues when the case comes to trial.

There is a difference, however, between the instance in which C has spoken directly to A and the one in which C has spoken to A's lawyer. Assuming that C's statement is the only available information on the question whether B came to a full stop, any opinion A might have in the latter instance is necessarily based on the report and evaluation of his lawyer. If the statement of an opinion were


78. It is clear that if A's opinion was that B did stop, A could not offer that opinion in evidence, and it is also clear that A's lawyer could object to a question at trial asking A to state his opinion. See Fed. R. Evid. 701. But it would seem that if A makes an out-of-court statement of his opinion that B did not come to a full stop, that opinion, even if based on hearsay, could be introduced by his adversary on the ground that it is an admission by a party. See C. McCormick, Handbook on the Law of Evidence §§ 263-264 (2d ed. 1972).

79. "It is not ground for objection [to discovery] that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1).

80. See W. Glaser, supra note 2, at 114, 234.

81. See 4A Moore's Federal Practice ¶ 33.17, at 33-84 (2d ed. 1979). Subsumed within this purpose is the facilitation of proof on issues remaining in dispute.

82. In our hypothetical case, an admission that B did not stop, even if equivalent to an admission of contributory negligence, presumably could not furnish a basis for summary judgment because of the comparative negligence rule in force in the jurisdictions. It would, however, facilitate proof at the trial by eliminating the need for testimony on the question of whether or not B stopped. In a similar case in a state in which contributory negligence was a complete defense, a late filed answer to a request for admissions was deemed untimely, and the requested facts were taken to be admitted, allowing summary judgment to be granted on the basis of that admission. Morast v. Auble, 164 Mont. 100, 105-06, 519 P.2d 157, 159-60 (1974).
required in this instance, it would more likely be the opinion of the lawyer than that of the client. I have already explained my view that a lawyer's evaluation of the credibility of a witness should constitute protected work product whether recorded in a document or not. For that same reason, I believe a work product objection to the request for an opinion, when C's statement was made to A's lawyer, is appropriate and should be sustained.

Where C has spoken to A directly, protection of the lawyer's evaluation of credibility is not involved. Should A then be required to state an opinion on the ground that doing so may narrow the issues? A's statement of an opinion in answer to an interrogatory, even if adverse to A's interest in the litigation, is not binding on him and would not preclude the introduction of evidence or the resisting of the opponent's case on a motion for summary judgment or at trial. What D, the interrogator, is really seeking, in addition to any information available to A, is an involuntary stipulation that will be binding and that will eliminate the need for evidentiary proof. Under these circumstances, I believe it should be open to a discoveree, if he wishes, to respond to an interrogatory by (1) disclosing the information available to him on the question, (2) declining to state an opinion whether he has one or not, and (3) requiring the discoveror, as a result, to recast the inquiry as a request for an admission under rule 36. With the difficult transition from opinion to request for admission accomplished, I would like to turn to that aspect of the inquiry.

II. REQUESTS FOR ADMISSION IN AN ADVERSARY SYSTEM

A. RESPONSES TO THE QUESTIONNAIRE

The third question in the questionnaire contained a request for an admission that B did not come to a full stop. Although only five of the responses to that question could be construed as an admission,

83. See text accompanying notes 59-61 supra.
84. A, of course, may state his opinion if he chooses to do so.
85. See, e.g., Freed v. Erie L. Ry., 445 F.2d 619, 621 (6th Cir. 1971), cert. denied, 404 U.S. 1017 (1972) (party may use evidence at trial to contradict its answers to interrogatories); RCA Mfg. Co. v. Decca Records, Inc., 1 F.R.D. 433, 435 (S.D.N.Y. 1940) ("[I]f . . . between the time of the answers . . . and the trial defendants obtain further information, they will not be prevented from offering [it].")
86. Fed. R. Civ. P. 36. There are plainly areas of overlap between rule 33 and rule 36, and there are times when either may be used. Once all available information has been furnished, however, rule 36 seems more appropriate to any remaining purpose of the discoveror. There are, it should be noted, significant differences between the form of response under the two rules as well as the available sanctions. See text accompanying notes 120-129 infra.
the range of all responses, as shown in Table VII of the appendix, was suprisingly wide. Most notable of the differences between states were responses in category 4 (unable to admit or deny), where thirty-three of forty-seven were from Massachusetts, and category 5 (objection), where five of the six were from Maine.

The final question asked whether the response to the request for admission would be different if C had spoken to A rather than to A's lawyer; the replies are summarized in Table VIII in the appendix. Eighteen respondents would have changed the response, eleven remaining within the same category and only seven shifting category, with the number who would admit rising from five to ten.

In addition, several knowledgeable colleagues on the Harvard faculty were asked how they would respond to the request. One of them would have flatly denied the request, partly on the ground of the presumption of due care and the burden of proof;[87] one would have responded that A had insufficient information to enable him to admit or deny;[88] and one was unsure of the proper response.[89] The last of these thought the case presented an excruciating question: Must a party make a damaging admission when be believes that the adversary will be unable to sustain his burden of proof? None saw a work product issue in the request, though one viewed work product as a proper basis for objecting to the interrogatory in question 2.

B. Preliminary Issues

The request for admission is among the least used of the principal discovery devices.[90] In fact, since it is singularly ill-suited to the obtaining of information, it is thought by some not to be a discovery device at all.[91] But, as Professor Finman has pointed out in what is still the leading study of the subject, the request for admission has some extraordinary advantages when the requester's objective is to facilitate proof or to narrow the issues.[92] If the request is not objec-

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87. For essentially the same reasons, this colleague would have given an affirmative answer to the interrogatory in question 1. He also expressed the view that an admission need be made under rule 36 only if, on the available evidence, the proponent would be entitled to a directed verdict.

88. This colleague would have responded to the interrogatory in question 1 by saying that A did not have sufficient information to answer, but would have disclosed C's statement in response to the interrogatory in question 2.

89. This colleague would have disclosed C's statement in answer to the interrogatories in both questions 1 and 2.

90. See P. Connolly, F. Holleman & M. Kuhlman, supra note 8, at 28; W. Glaser, supra note 2, at 53 (Table I).

91. See, e.g., S. C. Wright & A. Miller, supra note 46, § 2253.

tionable, there must be an admission, a denial, or an explanation of why the party can do neither. Thus, what Professor Finman calls the "closed-ended" nature of the inquiry makes its purpose clear and equivocation difficult. And its ability to pinpoint a particular matter makes the request to admit more useful than an allegation in a pleading even when a responsive pleading is required. If there is an explanation for the failure of litigants to make more frequent use of this valuable device, perhaps it lies in the inconsistency between a rule compelling an adversary to stipulate to certain propositions and some of the tenets of the adversary system.

In our survey, there were only a very few respondents who made or hinted at a work product objection to the request for admission even when the sole source of information was C's statement to A's lawyer. Perhaps this was because the request did not call for a document, although that did not deter a number of lawyers from expressly or impliedly objecting to the interrogatories in questions 1 and 2 on work product grounds. Perhaps it was because many thought that the request could be readily disposed of, without prejudicing the client, on other grounds. But, as we shall see, this is far from clear. Thus, if there is a work product objection here, it is worth serious consideration.

A work product objection seems soundly based in the instance in which A's lawyer has obtained the statement from C during an investigation in preparation for trial. There are plainly instances when, on the basis of information obtained by a lawyer, it is simply not possible to come to a rational conclusion that a proposition is untrue—when, in other words, a verdict for the proponent would have to be directed on the basis of that information. In our hypothetical example, the questions whether B died in the accident and whether C died from unrelated causes are probably of that character. In such a case, if the information itself must be revealed, there would appear to be no work product objection to a request for admission. But information consisting solely of witness statements rarely fits that description. Subjective evaluations of credibility—of sincerity, perception,

93. Id. at 378.
94. It is, of course, quite possible that many "voluntary" stipulations are entered because the threat of a coerced stipulation under rule 36 looms in the background. It is interesting to compare the requirements of rule 36 with the ability of a defendant to stand mute in a criminal case. "In a fairly recent [criminal] trial involving a United States Senator from Florida, defense counsel refused to stipulate that the defendant was indeed a United States Senator. It was fairly costly to prove this simple fact. . . ." Spears & Crawford, Omnibus Proceedings in Federal Court, 80 F.R.D. 353, 369 (1979).
95. See text accompanying notes 23, 26 supra.
96. See text accompanying notes 34, 54-56 supra.
and memory—are involved in determining the underlying correctness of those statements. To require a response to a request for admission in such a case, when the witness statements have been obtained by the lawyer in anticipation of litigation, calls, in my view, for precisely the kind of inquiry into the lawyer's mental processes that the work product doctrine ought to protect. Work product protection can, of course, be waived, and I am not suggesting that an admission or denial based on the lawyer's evaluation of C's credibility is in any sense improper if it is made in good faith. But, a lawyer cannot be expected to function effectively as an advocate if he can be compelled by the adversary to state his evaluation of a witness' credibility and if the client can be bound and subject to sanctions as a result. There may be instances in which such an evaluation ought to affect the lawyer's willingness to make a claim or defense, or to represent a client at all. But, given that rule 11 and more general ethical constraints confer responsibility on the attorney for complaints, answers, and other papers, I think a reply to a request for an admission is more properly regarded as the response of the client, and he should not have to be bound by the lawyer's evaluation of a third

97. See text accompanying notes 59-61 supra.

98. Indeed, the ABA Code of Professional Responsibility DR 7-106(C)(4) makes it a breach of professional ethics for a lawyer to state his evaluation of a witness's credibility at trial. See note 20 supra. Such a statement, whether favorable to the client or not, is seen as clashing with the lawyer's role as advocate rather than judge.

99. See notes 20, 61 supra. Fed. R. Civ. P. 11 provides that a lawyer's signature on a pleading is a certification that there is good ground to support that pleading. At least in some instances, the determination of "good ground" will turn on an evaluation of witness credibility. These ethical obligations are notoriously underenforced, and one commentator on rule 11 has said that perhaps the most common violation is the "dishonest" denial of an allegation on which the adversary has the burden of proof. Risinger, Honesty in Pleading and its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11, 61 Minn. L. Rev. 1, 56 n.183 (1976). Behind such violations may well be the view that, just as a defendant in a criminal case may always stand mute, so a party in a civil case may always put his adversary to his proof. I see this view as inconsistent with rule 11, rule 36, and the broader ethical concepts on which those rules are based. See text accompanying notes 138-140 infra.

100. It is true that rule 36, especially as amended in 1970, contemplates that the lawyer will play a role in responding, and indeed provides that the response may be signed either by the lawyer or by the client, cf. text accompanying note 32 supra (responses to interrogatories), and the responsibility of the lawyer may well be greater when the requested admission involves the application of law to fact. Yet, the response to a request for admission is not a pleading, see 8 C. Wright & A. Miller, supra note 46, § 2264, at 739, and the alternative provisions for signature seem designed more for convenience than for the allocation of responsibility. In any event, I believe a lawyer should be able to say to his client, in effect, "You don't have to admit a proposition under rule 36 when your only source of information is my report of a witness' oral statement and when the truth of the proposition turns on the witness' credibility."
person's veracity. To confine my point to the case at hand, once the fact of C's statement has been disclosed to the defendant,\textsuperscript{101} the lawyer's belief that C was telling the truth, no matter how soundly based that belief might be, should not preclude A from resisting the defense of contributory negligence by all available legal means. A should not have to find a lawyer who did not speak to C, or who does not believe him, in order to resist defendant's allegations.

The work product issue aside, there seems to be no basis for an objection to the request for admission, and in fact very few lawyers made one in response to the questionnaire. Whatever the propriety of a refusal to admit because any opinion of A or his lawyer is based on hearsay, or for similar reasons, it seems clear, at least since 1970, that an objection based on such grounds would not be sustained.\textsuperscript{102} The request is proper in form and goes to a matter that is a proper subject for admission or denial.\textsuperscript{103}

One further point. A few respondents seemed to think—and Form 25 gives some support on this\textsuperscript{104}—that any admission based on C's hearsay statement would be subject to an objection if sought to be introduced at trial.\textsuperscript{105} The difficulty with this view is that a rule 36 admission is not evidence in the ordinary sense. Unless amended or withdrawn, an admission by A that B did not stop would establish that proposition adversely to A for purposes of the trial, whether or not the admission was based on hearsay and whether or not there was evidence to the contrary.\textsuperscript{106} An admission by A that C said B did not stop would, of course, have more limited value and presumably could not be used at trial to establish B's conduct, but that is not the admission here being sought.

\textsuperscript{101} The fact of C's statement should be disclosed if an interrogatory has been submitted under rule 33. See text accompanying note 64 supra.

\textsuperscript{102} See Fed. R. Civ. P. 26(b)(1).

\textsuperscript{103} There is a difference between a request that is objectionable in form and a request that is in proper form but which, for lack of sufficient information, cannot be admitted or denied. See Finman, supra note 92, at 404-09. This difference is underscored by the provision in the present rule 36 that a request is not objectionable simply because it involves a matter presenting a "genuine issue for trial." See text accompanying note 119 infra. The point made in text here relates only to the unavailability of an objection, not to how the request should be answered on the merits. See Knowlton v. Atchison, T. & S.F. Ry., 11 F.R.D. 62 (W.D. Mo. 1951).

\textsuperscript{104} Form 25 in the Appendix of Forms to the Federal Rules of Civil Procedure states that the admission under rule 36 requested in the form would be made "for purposes of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial."

\textsuperscript{105} See Goldman v. Mooney, 24 F.R.D. 279 (W.D. Pa. 1959); 8 C. Wright & A. Miller, supra note 46, § 2264, at 741.

\textsuperscript{106} See Fed. R. Civ. P. 36(b) ("Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission.").

C. Answering the Request

To obviate any work product objection, assume that C's statement was made to A before any lawyer was consulted and before litigation was more than a speck on the horizon. The problem, then, is how to respond if A has "no reason to doubt" the truth of C's statement—a phrase that is only a feeble attempt to capture in a few words the locus of a state of mind that may range from absolute certainty to total disbelief. ¹⁰⁷

Had the question of the appropriate response arisen before the 1970 amendments to rule 36, a conscientious researcher would have found the rule unhelpful and the cases in considerable disarray. Judges were divided on such questions as whether, when faced with a request for admission, a party had to make some inquiry of third persons,¹⁰⁸ and whether a response based on third-party information could be required if the request related to an issue on which the requesting party had the burden of proof.¹⁰⁹ Faced with this uncer-

¹⁰⁷. There may be special problems presented because, in our hypothetical case, A is not a litigant on his own behalf but on behalf of B's estate. There are cases suggesting that, for purposes of determining the appropriate response in pretrial discovery, one who sues in a representative capacity is chargeable with the knowledge of the person being represented. See, e.g., Lunn v. United Aircraft Corp., 25 F.R.D. 186, 188-89 (D. Del. 1960). But the question here is whether A, as executor, may be less obligated to make an admission on the basis of his own belief than if he were suing in his own behalf. Is his position as a representative, in other words, analogous to that of the lawyer representing him? I am frank to say I do not know, and I have not pursued the matter with zeal because it lies at the outer fringe of my concern. Only a few of the respondents to the questionnaire raised this aspect of the hypothetical example as a problem. Perhaps the issue will disappear altogether if it is assumed that there is no living person other than A who has any interest in, or claim to, B's estate, so that A is both the representative and the represented. A is, in a sense, representing B as well as those having an interest in B's estate, but it is hard to see how that representation can operate to narrow the scope of A's obligation under rule 36.


One interesting effort to reconcile the purpose of rule 36 with the evident balkiness of lawyers was the opinion in Dulansky v. Iowa-Illinois Gas & Elec. Co., 92 F. Supp. 118 (S.D. Iowa 1950). In that case, plaintiff's decedent was involved in an accident with defendant's bus, and defendant served plaintiff with a number of rule 36 requests
tainty in the decisions, Professor Finman in 1962 advocated an expansive approach to rule 36. He argued that one should not be excused from responding on such grounds as lack of personal knowledge, no matter where the burden of proof lay, that one should be required to make reasonable inquiry of others before responding, and that a refusal to admit was improper if the result of that inquiry was to make it clear that the matter was “beyond reasonable dispute.” Professor Finman explained, “The obligation to admit should exist whenever a party is convinced that a proposition is true, regardless, of the factors which led to his conviction. Whether belief is based on personal observation or information furnished by others, a proposition that is not disputed should be conceded.”11 Revision of rule 36 was proposed by Professor Finman to make these duties clear.

The amendments to rule 36 in 1970 were plainly, indeed explicitly, influenced by Professor Finman’s proposals, and language in some respects tracking those proposals was adopted. Thus the rule now appears to provide that if, after the necessary inquiry, a party has arrived at the requisite degree of certainty that a proposition is true, that proposition should be admitted. That the proposition is one relating to an opinion or conclusion, or to a central issue in the case, is no basis for refusal to admit or for objection.

110. Finman, supra note 92, at 404-09. He also argued persuasively that the conflicts among the decisions were not so great as a superficial reading of them might suggest. E.g., id. at 406 n.149.

111. Id. at 378. He went on to say that “even when belief must be based on information furnished by others, a contention can be indisputable.”

112. Id. at 406.

113. The introductory paragraph of the Advisory Committee’s Note to the 1970 amendments to rule 36 states the purposes of the rule and says that the changes are designed to serve these purposes more effectively, to resolve certain disagreements in the courts, to bring the operation of the rule into line with other discovery procedures, and to clarify the binding effect of an admission. The paragraph concludes with a “[s]ee generally” citation to Professor Finman’s article. See Advisory Committee’s Note, supra note 45, at 531-32 (note accompanying amended FED. R. CIV. P. 36).

114. For example, the sentence in amended rule 36(a) imposing a duty of reasonable inquiry on the discoveree is similar to a sentence proposed by Professor Finman for addition to rule 37(c). See Finman, supra note 92, at 436.
Although the statement of the rule may be clear, I am still puzzled about how the necessary degree of certainty is to be defined.\textsuperscript{115} To return to our hypothetical case, C has reported a fact to A, and A evidently believes that C was telling the truth as he saw it. The case is one involving an evaluation of a witness' credibility. If C was basing his statement on probabilities (there is more than a fifty percent chance that B did not stop), and A is basing his belief on probabilities (there is more than a fifty percent chance that C is telling the truth as he saw it), A's "belief" that B did not stop may turn out to be rather flimsy.\textsuperscript{116} How, then, should A's lawyer, trying his best to act in good faith in accordance with rule 36, put the question to A, or try to determine the effect of A's answer? Should he ask whether, on the information he has, A "knows" that B failed to stop? Whether A is satisfied beyond a reasonable doubt, or by a preponderance of the evidence, that B failed to stop? Whether in A's view a reasonable person would have to conclude that B failed to stop? Note that in the hypothetical example, A "has no reason to doubt" the correctness of C's statement. How does this formulation fare under any test that might be suggested for determining whether or not to admit? Note also that when A is forced to look to evidence from others in forming an opinion, his role in responding to a request under rule 36 is strikingly similar to that played by a jury at trial. The difference, of course, is that A is considering evidence that cannot be placed before a jury in view of C's untimely demise.

Whatever the requisite degree of certainty, let us assume that A has arrived at it, and tells his lawyer so. Should the proposition then be admitted, a course followed by only 10 (9\%) of the respondents to the questionnaire?\textsuperscript{117} Does it matter that A's belief is based on inadmissible evidence, that there may be no other credible evidence on the question,\textsuperscript{118} and that the adversary has the burden of proof? Noth-
ing in rule 36 itself expressly states that it does, but there is a cryptic provision that, subject to the provisions of rule 37(c), a matter does not have to be admitted if it "presents a genuine issue for trial." 119

The reference in rule 36 to rule 37(c) suggests that the problem cannot be resolved without looking at the sanctions for failure to admit. Prior to the 1970 amendments, a party who did not either admit or object to a request had to file a denial or an explanation of inability to admit or deny under oath, thereby making the penalties of perjury applicable to a knowingly false statement. The rulemakers in 1970 dropped the requirement of a sworn response, and indeed permitted either the party or the lawyer to sign, for the stated reason that "admissions function very much as pleadings do." A denial is therefore no longer potentially criminal even if the proposition is true and the denier believes it to be true. When the lawyer signs the response, he may be subject to the provision of rule 11 stating that his signature is a certification that "to the best of his knowledge, information, and belief there is good ground to support it." 120 But the attorney is not required to sign, and in any event the "good ground" specified in rule 11 is itself, in all its splendid vagueness, a function of the permissible reasons for refusal to admit.

A possible sanction other than rule 37(c) is to regard a response as not in compliance with the requirements of rule 36 and to order that the matter is deemed admitted. 121 Such action is rare when the response is timely, and in any event seems beyond the power of the court when the response is a timely and specific denial. In the case of an equivocal reply or a statement that the respondent is unable to admit or deny, a court may say that if the answer is not responsive or perhaps if the reasons given are plainly inadequate, the matter will be deemed admitted. 122 But it is surely not within the contemplation

A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why he cannot admit or deny it.

120. Advisory Committee's Note, supra note 45, at 533 (note accompanying amended Fed. R. Civ. P. 36). This change was not one of those suggested by Professor Finman.

121. Fed. R. Civ. P. 11 applies in terms only to pleadings. But Fed. R. Civ. P. 7(b) states that the rules applicable to signing of pleadings "apply to all motions and other papers provided for by these rules."


of the rule for a court to use this method as a way of appraising the reasonableness or good faith of a denial or any other response that is adequate on its face.\textsuperscript{124}

The cost sanction provision in rule 37(c) thus appears to be the only available remedy in such cases involving an unreasonable failure to admit.\textsuperscript{122} Indeed, the rulemakers in 1970 seemed to regard it as not only the exclusive sanction but as quite sufficient to the task,\textsuperscript{124} and Professor Finman saw it as so intimately related to the admissions procedure that, in his view, exempting the United States from the sanction of rule 37(c) gave it "not a mere pecuniary advantage but an exemption from the [admissions] procedure itself."\textsuperscript{127}

This analysis suggests that a great deal of the discussion so far is entirely academic. A party who is convinced that a proposition is "true" may nevertheless deny it with impunity if the other party cannot prove it in court. The cost sanction of rule 37(c) does not even come into play until and unless the proposition is established at trial. The difficulty with this view, however, is that it leaves one feeling that the discoveree has gotten off on a "technicality": there may be nothing that can be done to A for denying, but it is still wrong for A not to admit what he firmly believes to be true. Besides, the proposition may be proved through evidence unknown to A at the time of

\textsuperscript{20} Fed. R. Serv. 36a.52, Case 1 (S.D.N.Y. 1954) (inadequate statement of efforts to obtain information); Kissinger v. School Dist. No. 49, 163 Neb. 33, 77 N.W.2d 767 (1956) (equivocal answers).

\textsuperscript{124} The Advisory Committee's Note to rule 36 gives as examples of cases where a matter may be taken as admitted instances in which "a denial is not 'specific,' or the explanation of inability to admit or deny is not 'in detail.'" Advisory Committee's Note, supra note 45, at 534. Moreover, the Advisory Committee's Note to the 1970 amendment to rule 37(c) states that no action may be taken under rule 36 against a response "in proper form." \textit{Id.} at 541.

\textsuperscript{125} FED. R. Civ. P. 37(c) provides that if a matter not admitted in response to a rule 36 request is proved, the requesting party may apply to the court for an award of the reasonable expenses of proof, including attorney's fees. The rule further states that the award shall be made unless the court finds that

1. the request was held objectionable pursuant to Rule 36(a), or
2. the admission sought was of no substantial importance, or
3. the party failing to admit had reasonable ground to believe that he might prevail on the matter, or
4. there was other good reason for the failure to admit.

\textsuperscript{126} See Advisory Committee's Note, supra note 45, at 533 (note to amended FED. R. Civ. P. 36) ("Rule 36 does not lack a sanction for false answers; Rule 37(c) furnishes an appropriate deterrent.").

\textsuperscript{127} Finman, supra note 92, at 429. \textit{Cf.} 8 C. WRIGHT & A. MILLER, supra note 46, § 2290, at 806 (in view of the exemption of the United States from the sanction of rule 37(c), the "good faith" of the sovereign is the only protection against an unjustified denial). Professor Finman proposed that the exemption of the United States from liability for fees and expenses under rule 37 (provided by FED. R. Civ. P. 37(f)) be repealed with respect to the sanction of rule 37(c), but it was not.
his response. What happens then?

But it turns out that there is more to this argument than a technicality. Rule 37(c), prior to 1970, said that even a prevailing party on an issue was not entitled to recover the costs of proof against one who had denied a requested admission if "there were good reasons for the denial." This rather general language was made more specific in 1970: the costs of proof would be awarded to the prevailing party unless any of four findings were made, the third of which is that "the party failing to admit had reasonable ground to believe that he might prevail on the matter." If this provision is read together with the statement in rule 36 that, subject to rule 37(c), a party does not have to admit a proposition that contains "a genuine issue for trial," it may be that regardless of the degree of conviction in a party's mind, or the reasonableness of that conviction, he need not admit a proposition unless it should be clear to him on the state of the available, admissible evidence that the proponent would be entitled to a directed verdict. Or, if that is putting it too strongly, that evidence must be such that it should satisfy the party that he, as a juror, would find for the proponent on the issue. Under either approach, questions of the allocation of the burden of proof and of the admissibility of evidence are highly relevant to the determination of the obligation to admit as well as to the consequences of failure to do so.

If this analysis is correct, the gap between rhetoric and reality is not quite so wide as is suggested by commentary, on the one hand, and the responses to the questionnaire, on the other. The difficulty is that the commentary seems at first blush to stress the irrelevance of the burden of proof and of the source of information to the dimensions of the obligation to admit, and the rules themselves make these matters relevant, if at all, only on a very close fourth or fifth reading.

Lurking behind the uncertainty may be the view, however naive, that a reasonable person cannot at the same time be certain of a proposition and yet also believe, on all the available evidence, that the proposition will not be established at trial—at least he cannot if

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128. The text of the former rule appears in Fed. R. Civ. P. 37, Advisory Committee's Note, supra note 45, at 537. One defect of the rule prior to amendment was that it made no express provision for an unreasonable refusal to admit that was made in a form other than a denial. This defect was remedied in the 1970 amendment.

129. Fed. R. Civ. P. 37(c) (emphasis added). The other three findings specified in the rule are set forth in note 125 supra. The 1970 change was not based on any suggestion by Professor Finman, and there is no explanation for it in the Advisory Committee's Note except the statement that it "emphasizes that the true test under Rule 37(c) is not whether a party prevailed at trial but whether he acted reasonably in believing he might prevail." Fed. R. Civ. P. 37, Advisory Committee's Note, supra note 45, at 541.

130. The commentary, of course, is not uniform. For criticism of the expansive scope of rule 36, as amended, see Coccia, supra note 77, at 372-73.
he assumes that all witnesses will tell the truth and that no one, including himself, will invoke the privilege against self-incrimination. But the adversary system does not inevitably work that way. The hearsay rule and other rules may reduce the available, admissible evidence below the necessary threshold to convince a juror, or even to get to the jury, and the party with the burden of proof will end up the loser. The discovery rules were undoubtedly designed to modify the adversary system in significant ways, though that purpose may not have been fully achieved. I do not think, however, that in every case a party must admit a proposition when he reasonably believes it to be true, if there is a substantial chance that the party with the burden will be unable to prove it at trial.

There is good reason for this result. While a critical objective of the adversary system is the ascertainment of truth, that is not its sole purpose; if it were, the system would be a tragic illustration of man's irrationality. But the procedures that define the system are not, in general, devices for concealing truth either, though they may sometimes work that way. Those procedures reflect, at least in part, a judgment about how propositions can be decided in a way that seems to be, and is, fairest to the litigants. The hearsay rule, for example, seems designed not simply to ensure the accuracy of fact-finding but to afford litigants the satisfaction of confronting a witness

131. The relevant burden may be the burden of persuasion or the burden of producing evidence. See J. Maguire, Evidence: Common Sense and Common Law 175-77 (1947). In the interest of simplicity, the less accurate phrase “burden of proof” is used here.

132. See W. Glaser, supra note 2, at 114, 234; Brazil, supra note 3.

133. Also significant, for example, is the relationship of the degree of litigant control over process to the parties' perception of the system as fair, to the just distribution of outcomes, and to broader notions of the freedom of the individual and his separateness from the state. See, e.g., G. Hazard, supra note 61, at 120-35; J. Thibaut & L. Walker, Procedural Justice: A Psychological Analysis 1-6 (1975); Damaska, Structures of Authority and Comparative Criminal Procedure, 84 Yale L.J. 480, 529-44 (1975); Thibaut & Walker, A Theory of Procedure, 66 Calif. L. Rev. 541 (1978); cf. Leff, Law and, 87 Yale L.J. 989 (1978) (significance of “judic” or “game” aspects of judicial proceedings).

134. Judge Frankel has argued that “our adversary system rates truth too low among the values that institutions of justice are meant to serve.” Frankel, supra note 20, at 1032. See also Brazil, supra note 3, at 1303-31. And even those who appear more sympathetic to the present goals of the system concede that it is not working as it should. See, e.g., G. Hazard, supra note 61, at 120-35; Pye, supra note 20, at 957-59. As one comparatist has noted in discussing the criminal process, however, we have little or no hard data to indicate whether the adversary system—even if it is less committed “to the pursuit of historic verity”—does a better, or worse, job of ascertaining the truth than do substantially different systems of adjudication practiced elsewhere. Damaska, Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study, 121 U. Pa. L. Rev. 506, 587-89 (1973).
whose story is adverse under all the pressures associated with examination under oath in open court. The rules allocating burden of proof also have objectives beyond simply establishing the rules of the road for orderly conduct of the trial—objectives related to substantive policies and the just distribution of outcomes.\textsuperscript{135} If the rules relating to hearsay and to allocation of the burden of proof, and the requirement of an impartial factfinder who decides on the basis of the evidence of record, represent reasonable judgments about what is fair, then it should not matter that a party who does not have the burden believes something to be true on the basis, for example, of inadmissible hearsay.\textsuperscript{136} If it did, a premium would be awarded to those who were sufficiently skeptical not to believe anything they were told, or sufficiently hypocritical to claim that they did not. The adversary system, whatever its flaws, should extend its safeguards to the trusting and the sincere as well as to the skeptic and the hypocrite.\textsuperscript{137}

Even if A need not admit in our hypothetical case for the reasons I have suggested, rule 36 is far from insignificant and may make some inroads on traditional notions of the adversary process of adjudication. A party who should believe on all the available, admissible evidence—including evidence not then known to his adversary—that the adversary would clearly prevail is obligated to admit, and is sub-

\begin{footnotesize}
\begin{enumerate}
\item The virtually universal rule placing the burden of proving contributory negligence on the defendant, for example, seems based not on the defendant's superior access to evidence, or on other procedural considerations, but on a desire to improve the plaintiff's chance of recovering against a negligent defendant. See 2 F. Harper & F. James, The Law of Torts § 22.11 (1956).
\item The question of the obligation to admit is much harder when the proposition is one on which the discoveree has the burden of proving its nonexistence. Suppose, for example, that the discoveree firmly believes, on the basis of inadmissible evidence, that the proposition whose admission is sought is true, but also reasonably believes he can prove its nonexistence through admissible, circumstantial evidence. This is a problem rarely encountered under rule 36, since the discoveror is generally attempting to lighten his own burden, but when it does arise, there may well be an obligation to admit even if the discoveree has reasonable grounds to believe he might prevail. Indeed, one wonders whether the nonexistence of the proposition can properly be pleaded under these circumstances. Compare the comments of one of my lawyer-critics at text accompanying note 19 supra. Assuming that the discoveree is reasonable in his belief, does it matter that some other person might have come to a different conclusion? Perhaps Professor Pye's distinction between knowing and believing, see note 61 supra, might be of service here, but I have my doubts.
\item Nor do I think it feasible to resolve the problem by saying that a refusal to admit is proper under such circumstances, no matter what the discoveree believed, if a reasonable person under the circumstances might not have believed the proposition to be true. Since C spoke only to A, and cannot speak now, I do not see how such a judgment can be made except on the (to me) impermissible basis that it is always reasonable to disbelieve a person's statement.
\end{enumerate}
\end{footnotesize}
ject to sanctions for not doing so. To avoid any problems that might be raised by the view that the credibility of a witness for the proponent is almost always a jury question, I would read "prevail" in this context to go beyond a directed verdict to the obtaining of a jury verdict. But I would try to make it clearer than the rules do now that a refusal to admit may be proper, in some instances, regardless of the discoveree's belief or the reasonableness of that belief.

III. CONCLUSIONS AND SOME MODEST SUGGESTIONS

One would be hard pressed to deny the tension between the tenets of the adversary system and the goals of pretrial discovery. Certainly it is difficult to square some expansive theories of discovery expressed or implicit in the rules and supported by commentators with the protective attitudes of litigating lawyers.

But tension is not always evil. A system of adjudication single-mindedly dedicated to total pretrial disclosure, or to maximum pretrial secrecy, might be found more wanting than the present uneasy compromise. If things are now more confused than they need to be, it is possible that some clarifying changes in the rules—here in the direction of disclosure and there in the direction of protecting the lawyer in his function as advocate—may improve matters and render unnecessary more drastic remedies.

With the hope of encouraging discussion, I therefore offer the following proposals which, though modest in scope, serve to identify a few sensitive areas. These proposals are presented only in outline form.

138. See also note 136 supra (discussion of the case in which the discoveree has the burden of proof).

The presumptive availability of the cost sanction distinguishes the unwarranted failure to admit from the unwarranted allegation or denial in a pleading, although it appears that the sanction may not be used as often as it should. See C. WRIGHT, supra note 6, § 89, at 438 n.6.

139. For an excellent discussion of the question whether an issue of witness credibility is always one for the jury, and the view that it is not, see Cooper, Directions for Directed Verdicts: A Compass for Federal Courts, 55 MINN. L. REV. 903, 928-55 (1971).

140. And I would do so even if the evidence has not been given under oath or subject to formal cross-examination, though the absence of either or both may be a factor in considering the reasonableness and good faith of a refusal to admit. Compare the views of one of my colleagues set forth at note 87 supra. On the other hand, if the truth of a proposition turned on credibility and if the sole source of a party's information was his lawyer's report of a witness interview, I would allow a work product objection to a request for admission even if a directed verdict would be warranted on the basis of that witness' testimony if offered at trial. See text accompanying note 101 supra.
1. Rule 26 should be revised to make it clear that the protection afforded a lawyer's mental impressions and opinions extends beyond the impressions and opinions recorded in documents and includes, at the least, the lawyer's evaluation of the credibility of witnesses. I recognize that the problem of drafting here is a difficult one, and that there are substantial reasons for requiring the disclosure of a lawyer's contentions, and even of certain opinions, at the pretrial stage. But a party should not be required to answer an interrogatory, or to make an admission, if the answer or admission must be based on the lawyer's assessment of witness credibility. It is no answer for the lawyer simply to hide behind the shield that only the trier of fact is capable of evaluating witnesses; indeed, his ethical obligation in many instances may turn on his evaluation. There are, to be sure, doubtful situations, "but there are also ones that are not doubtful. A thing is not made true or not by a court's pronouncing on it, and a lawyer can reach conclusions about an issue without having a judge tell him what to think." The point here is simply that the lawyer's evaluation should not compel a sworn answer by the client under rule 33, or a binding admission under rule 36.

2. Rule 26 should be further revised to make it clear that work product protection does not extend to the substance of witness statements when sought as an answer to an interrogatory under rule 33. Here, short of abolishing work product protection of written statements altogether, I would resolve the ambiguity in Hickman, and the conflicting signals emanating from the 1970 amendments, in favor of expansive discovery. While it might be pushing too far to allow without hindrance a request for the precise language of a witness' written (or oral) statement, any interrogatory calling for the substance of such a statement ought to be appropriate. For those who are concerned about making the lawyer a witness, it may be necessary to bar any use of the answer except as a lead to other evidence, and to preclude compelling a lawyer to testify at trial about what he was told in a pretrial interview.

141. It may be, however, that any explicit protection of unrecorded mental processes should extend beyond evaluations of credibility to matters relating to trial strategy and tactics. See note 59 supra.

142. See note 20 supra.

143. G. Hazard, supra note 61, at 130.


145. See note 58 supra.

146. See text accompanying note 54 supra.
3. Rule 33 should be revised to make it clear that a party, whether natural or artificial, who is unable after reasonable inquiry to give a complete answer to an interrogatory should furnish any relevant information that is available. Whatever the state of the case law, it appears that there are too many lawyers who will answer the question "Did B stop?" with only an "I don't know," or words to that effect, when they have relevant information that is plainly beyond any protection of privilege or work product.

This proposed change is a critical one. It is quite possible that the present rule speaks with sufficient clarity on this point and that the problem, as Professor Brazil suggests, is a structural one. But I remain guardedly hopeful that the adversary system can accommodate this degree of compelled disclosure, at least when the question asked is not too sweeping.

4. Finally, rule 36 should make it clearer than it now does that, regardless of what a party believes or should believe, he is not required to make an admission if there is reasonable ground for concluding, on the basis of all admissible evidence known to him, that the proponent who is seeking the admission may not prevail at trial.147 This may involve no more than stating in rule 36 what is now said, or almost said, in rule 37(c).148 But if it is felt that making any such provision explicit cuts too deeply against the grain of pretrial discovery, or is too much at odds with proper notions of ethical behavior, then some tenets of the adversary system of adjudication as it is known and practiced may have to be reconsidered.

147. Cf. note 136 supra (where discoveree is the proponent).
148. See text accompanying note 129 supra.
APPENDIX

Table I

Responses to question 1: Interrogatory asking, "Did B come to a full stop . . . ?"

1. B did stop¹ ........................................ 1
2. B did not stop² .................................... 2
3. I am informed [by C] that B did not stop ....... 5

4. I don't know (or I have no personal knowledge) but C said that B did not stop³ ........................ 5

5. Other limited or qualified answers or refusals to answer 97
   (a) I have no personal knowledge⁴ ..................... (37)
   (b) I don't know ........................................ (30)
   (c) I am unable to answer ............................. (13)
   (d) I was not present ..................................... (7)
   (e) I have insufficient knowledge or information .... (5)
   (f) Any information is protected by work product or privilege ........................................ (2)
   (g) The question is one of fact or law for the trier to determine ................................. (1)
   (h) The defendant must overcome the presumption of due care ....................................... (1)
   (i) The witnesses we intend to use did not see whether B came to a full stop ................ (1)

¹ The respondent stated that he was relying on the presumption of due care in such a case.
² One of these respondents said that this answer should not be given if there was any evidence, such as tire marks, indicating that C's statement was not correct.
³ Three of these respondents added language emphasizing that A did not intend to vouch for or be bound by C's statement.
⁴ This and other subheadings in this category represent my best effort to classify the responses, in many of which slightly different language was used. Under this subheading, for example, are included 3 responses of "I have no knowledge" and 34 of "I have no personal knowledge." In each of subheadings (a) through (e), there were respondents who added an explanation and respondents who did not. In subheading (a), for example, 20 gave no explanation; 7 added that A was not present at the accident; 3 added that A's agents, servants, etc. had no personal knowledge; 2 added that any further information was work product; 2 referred to the presumption of due care; and one each said that any further information was hearsay, that A's attorney had interviewed C, and that A's attorney could not be a witness.
Table II

Responses to question whether answer to No. 1 would be changed if C had spoken to A. 5

<table>
<thead>
<tr>
<th>Initial response</th>
<th>To</th>
</tr>
</thead>
<tbody>
<tr>
<td>B did stop</td>
<td>1 1</td>
</tr>
<tr>
<td>B did not stop</td>
<td>5 5</td>
</tr>
<tr>
<td>I am informed [by C] that B did not stop</td>
<td>2 12</td>
</tr>
<tr>
<td>I don't know (or I have no personal knowledge) but C said that B did not stop</td>
<td>5 5</td>
</tr>
<tr>
<td>Other limited or qualified answers or refusals to answer</td>
<td>97 87</td>
</tr>
</tbody>
</table>

5. Twenty respondents stated that the answer would be different. Ten of these, however, remained in their original category although they shifted grounds somewhat. The initial responses to question 1 are presented in Table I.
Table III

Responses to question 2(a): Interrogatory asking for the nature of any information about whether B came to a full stop.

1. A witness said that B did not stop\(^6\) ........................................... 22
2. A statement of a witness\(^7\) .......................................................... 26
3. I have no information\(^8\) ............................................................... 15
4. I have no personal knowledge\(^9\) .................................................. 23
5. My attorney has investigated ......................................................... 1
6. Refusal to answer ................................................................. 23
   (a) Work product or privilege ...................................................... (16)
   (b) Decline on advice of counsel .................................................... (1)
   (c) Irrelevant and immaterial ......................................................... (1)
   (d) The question is too broad, is one for the jury, and is irrelevant and immaterial ......................................................... (1)
   (e) Asks for speculation and should be stricken ................................ (1)
   (f) Other\(^{10}\) ................................................................. (3)

---

6. All but two of these responses identified the witness as C. Four said that the witness was dead; one that this answer should be given only if the attorney had told A of C's statement; one that A does not vouch for the statement; and one that other witnesses do not confirm C's statement.

7. Nine responses did not identify C; thirteen said that the statement had been made to A's attorney but made no reference to work product; three said that the statement had been made to an attorney and the contents were work product; and four noted that the witness was dead.

8. One of these responses stated that A had no information sufficient to form a belief; three expressly excepted information from the attorney described as work product; one qualified the answer by saying that it was assumed that the attorney had not reported the interview with C; and one said A had no information that is admissible or that will lead to admissible evidence.

9. Nine responses gave no explanation; eight added that any other information was work product or privileged; two added that A's agents, servants, etc. had no personal knowledge; and one each excepted inadmissible hearsay, added that A had not spoken to any witness, noted that any opinion or conclusion would be based on hearsay, and stated that any knowledge held by A's attorney would be irrelevant.

10. One response said that, under the circumstances, A's attorney might have to withdraw from the case under the ABA Code of Professional Responsibility DR 7-109, see note 20 supra; another noted that C had not talked to A and that in any event C's statement was inadmissible; and a third simply said that the question was "not applicable."
Table IV

Responses to question whether answer to No. 2(a) would be changed if C had spoken to A.\textsuperscript{11}

<table>
<thead>
<tr>
<th>Response</th>
<th>Initial response\textsuperscript{12}</th>
<th>To</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. A witness said that B did not stop ..................................</td>
<td>22</td>
<td>52</td>
</tr>
<tr>
<td>2. A statement of a witness .............................................</td>
<td>26</td>
<td>32\textsuperscript{13}</td>
</tr>
<tr>
<td>3. I have no information ..................................................</td>
<td>15</td>
<td>2</td>
</tr>
<tr>
<td>4. I have no personal knowledge ..........................................</td>
<td>23</td>
<td>12\textsuperscript{14}</td>
</tr>
<tr>
<td>5. My attorney has investigated ...........................................</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>6. Refusal to answer ..................................................................</td>
<td>23</td>
<td>12\textsuperscript{15}</td>
</tr>
</tbody>
</table>

\textsuperscript{11} Sixty respondents said that the answer would be different.
\textsuperscript{12} The initial responses to question 2(a) are presented in Table III.
\textsuperscript{13} In Maine, three respondents entered this category and three left it.
\textsuperscript{14} All 12 were in Massachusetts.
\textsuperscript{15} None relied on the work product doctrine or privilege.
Table V

Responses to question 2(b): Interrogatory asking for A's opinion as to whether B came to a full stop.

1. I decline to answer/object\(^{16}\) \hspace{1.5cm} 60
   (a) The question asks for information that is irrelevant, immaterial, or inadmissible \hspace{1.5cm} (27)
   (b) It is improper to ask for A's opinion \hspace{1.5cm} (14)
   (c) The question is not calculated to lead to admissible evidence \hspace{1.5cm} (12)
   (d) On grounds of work product or privilege \hspace{1.5cm} (11)
   (e) No reason given, or "advice of counsel" \hspace{1.5cm} (11)

2. I have no personal knowledge \hspace{1.5cm} 5

3. I have no personal knowledge, and anything else is work product or privileged \hspace{1.5cm} 4

4. I have no information\(^{17}\) \hspace{1.5cm} 6

5. I have no opinion \hspace{1.5cm} 27
   (a) without further explanation \hspace{1.5cm} (12)
   (b) because I have no personal knowledge, inadequate information, etc. \hspace{1.5cm} (12)
   (c) accompanied by other explanation\(^{18}\) \hspace{1.5cm} (3)

6. My opinion is that B did stop\(^{19}\) \hspace{1.5cm} 4

7. My opinion is that B did not stop \hspace{1.5cm} 3

---

16. Because many responses gave more than one reason, the subheadings add up to more than 60.

17. Two of these responses excepted information that was protected work product; one added, "I assume B obeyed the law."

18. One response added, "and if I did, it would not be relevant"; one added, "but I have no reason to disbelieve C"; and one said that anything beyond A's personal opinion was work product.

19. One respondent invoked the presumption of due care; one relied on his opinion of B's driving habits (!); and one said, "but I have no personal knowledge."
Table VI

Responses to question whether answer to No. 2(b) would be different if C had spoken to A.\(^{20}\)

<table>
<thead>
<tr>
<th>Initial response(^{21})</th>
<th>To</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. I decline to answer/object</td>
<td>60</td>
</tr>
<tr>
<td>2-3. I have no personal knowledge(^{22})</td>
<td>9</td>
</tr>
<tr>
<td>4. I have no information</td>
<td>6</td>
</tr>
<tr>
<td>5. I have no opinion</td>
<td>27</td>
</tr>
<tr>
<td>6. My opinion is that B did stop</td>
<td>4</td>
</tr>
<tr>
<td>7. My opinion is that B did not stop</td>
<td>3</td>
</tr>
<tr>
<td>8. Unclear</td>
<td>0</td>
</tr>
</tbody>
</table>

---

20. Twenty-eight respondents said that the answer would be different, but not all changed category.

21. The initial responses to question 2(b) are presented in Table V.

22. Categories 2 and 3 in Table V have been combined in Table VI because it was unclear exactly how many remaining in this category were still relying in part on a work product or privilege claim; some clearly were.

23. One new response in this category added, “but I assume B was exercising due care.”

24. One new response in this category said “I assume he did.” Another referred to long experience in driving with B and to C’s reputation for unreliability!
Table VII

Responses to question 3: Request for admission that B did not come to a full stop.

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Admit</td>
<td>5</td>
</tr>
<tr>
<td>2</td>
<td>Deny</td>
<td>37</td>
</tr>
<tr>
<td></td>
<td>(a) Without explanation</td>
<td>(26)</td>
</tr>
<tr>
<td></td>
<td>(b) With explanation</td>
<td>(11)</td>
</tr>
<tr>
<td></td>
<td>(i) Insufficient information after inquiry</td>
<td>(3)</td>
</tr>
<tr>
<td></td>
<td>(ii) No personal knowledge</td>
<td>(3)</td>
</tr>
<tr>
<td></td>
<td>(iii) Other</td>
<td>(5)</td>
</tr>
<tr>
<td>3</td>
<td>Decline to admit</td>
<td>8</td>
</tr>
<tr>
<td></td>
<td>(a) Without explanation</td>
<td>(7)</td>
</tr>
<tr>
<td></td>
<td>(b) No personal knowledge, but I believe he operated in accordance with law</td>
<td>(1)</td>
</tr>
<tr>
<td>4</td>
<td>Unable to admit or deny</td>
<td>47</td>
</tr>
<tr>
<td></td>
<td>(a) Without explanation</td>
<td>(7)</td>
</tr>
<tr>
<td></td>
<td>(b) With explanation</td>
<td>(40)</td>
</tr>
<tr>
<td></td>
<td>(i) No personal knowledge, not present, etc.</td>
<td>(22)</td>
</tr>
<tr>
<td></td>
<td>(ii) Other</td>
<td>(18)</td>
</tr>
<tr>
<td>5</td>
<td>Objection</td>
<td>6</td>
</tr>
<tr>
<td></td>
<td>(a) Work product or privilege</td>
<td>(3)</td>
</tr>
<tr>
<td></td>
<td>(b) Other</td>
<td>(3)</td>
</tr>
<tr>
<td>6</td>
<td>No personal knowledge or no knowledge</td>
<td>2</td>
</tr>
<tr>
<td>7</td>
<td>Let D prove that B did not stop</td>
<td>1</td>
</tr>
<tr>
<td>8</td>
<td>The attorney may have to withdraw</td>
<td>1</td>
</tr>
<tr>
<td>9</td>
<td>&quot;No response&quot;</td>
<td>1</td>
</tr>
<tr>
<td>10</td>
<td>Unsure</td>
<td>1</td>
</tr>
</tbody>
</table>

---

25. Two of the responses placed in this category were somewhat ambiguous.

26. One response referred to work product as protecting any information on which a different answer might be given; one added that neither A nor his agents were present; one added that B was dead; one noted that A's attorney had interviewed a witness who would say otherwise; and one stated that the request was an improper use of rule 36.

27. For example, five added that they had made an inquiry; three that the request asked for protected work product; one that he knew of no admissible evidence on the point; one that he had insufficient information from any available witness who was present; one that he was not present and B said nothing before he died; and one that the question was one for the jury.

28. Two responses said in various ways that the request was improper, and one objection was unaccompanied by any explanation.
Table VIII
Response to question whether answer to No. 3 would be changed if C had spoken to A.\textsuperscript{29}

<table>
<thead>
<tr>
<th>Initial response\textsuperscript{30}</th>
<th>To</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Admit</td>
<td>5</td>
</tr>
<tr>
<td>1a. I have information indicating that the request is correct</td>
<td>0</td>
</tr>
<tr>
<td>1b. C said B did not stop</td>
<td>0</td>
</tr>
<tr>
<td>2. Deny</td>
<td>37</td>
</tr>
<tr>
<td>3. Decline to admit</td>
<td>8</td>
</tr>
<tr>
<td>4. Unable to admit or deny</td>
<td>47</td>
</tr>
<tr>
<td>5. Objection</td>
<td>6</td>
</tr>
<tr>
<td>6. No personal knowledge or no knowledge</td>
<td>2</td>
</tr>
<tr>
<td>7. Let D prove that B did not stop</td>
<td>1</td>
</tr>
<tr>
<td>8. The attorney may have to withdraw</td>
<td>1</td>
</tr>
<tr>
<td>9. &quot;No response&quot;</td>
<td>1</td>
</tr>
<tr>
<td>10. Unsure</td>
<td>1</td>
</tr>
</tbody>
</table>

\textsuperscript{29} Eighteen respondents said the answer would be different.

\textsuperscript{30} The initial responses to question 3 are presented in Table VII.

\textsuperscript{31} One said that he would expressly reserve a hearsay objection; one that A should admit only if there was no reasonable ground to doubt C; and one that there should be an admission "unless you [A? A's lawyer?] think no one other than A knows of C's statement."(!)

\textsuperscript{32} In this and the next category, claims of work product or privilege were dropped.