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Florida's Request for Admission Rule: 150 Years on the Road to Inconsistency, Ineffectiveness and Appellate Nullification

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FLORIDA'S REQUEST FOR ADMISSION RULE: 150 YEARS ON THE ROAD TO INCONSISTENCY, INEFFECTIVENESS AND APPELLATE NULLIFICATION

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I. INTRODUCTION

The Florida Rules of Civil Procedure, applicable to most actions of a civil nature, are to "be construed to secure the just, speedy, and inexpensive determination of every action."[1] Achievement of this laudable goal, however, is dependent "in the last analysis ... upon the attitudes of judges and lawyers in approaching legal controversies and in employing and applying the rules."[2] Among these rules, most are designed to generate pleadings or discovery.[3] Far fewer, however, are designed to narrow or dispense with unwarranted litigation.[4] Chief among the latter is Florida Rules of Civil Procedure 1.370, "Requests for Admission":[5]

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[1] FLA. R. CIV. P. 1.010.

[2] FLA. R. CIV. P. 1.010, Author's Comment, 1967.

[3] *See* FLA. R. CIV. P. 1.100, 1.110, 1.120, 1.130, 1.140, 1.170, 1.180 and 1.190 (pleadings); 1.230 (intervention); 1.240 (interpleader); 1.290, 1.300, 1.310 and 1.390 (depositions); 1.340 (interrogatories); 1.350 (production of documents); and 1.360 (examination of persons).

[4] *See* FLA. R. CIV. P. 1.140(c) (judgment on the pleadings); 1.140(f) (striking redundant, immaterial, impertinent or scandalous matter); 1.150 (striking sham pleadings); 1.200 (pretrial procedure); 1.370 (requests for admissions); and 1.510 (summary judgment).

[5] FLA. R. CIV. P. 1.370, as amended effective January 1, 2004 [hereinafter Rule 1.370]; see also *Amendments to the Florida Rules of Civil Procedure (Two Year Cycle) and Florida Rule of Appellate Procedure 9.110*, 858 So. 2d 1013 (Fla. 2003). As part of Florida's

> *(a) Request for Admission.* A party may serve upon any other party a written request for the admission of the truth of any matters within the scope of rule 1.280(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Without leave of court the request may be served upon the plaintiff after commencement of the action and upon any other party with or after service of the process and initial pleading upon that party. The request for admission shall not exceed 30 requests, including all subparts unless the court permits a larger number on motion and notice and for good cause, or the parties propounding and responding the requests stipulate to a larger number. Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter within 30 days after service of the request or such shorter or longer time as the court may allow but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the process and initial pleading upon the defendant. If objection is made, the reasons shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or

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admissions scheme, *see also* FLA. R. CIV. P. 1.380(c) (providing sanctions for failure to admit), discussed *infra* at notes 101, 109-114 and accompanying text, and Part V.

knowledge as a reason for failure to admit or deny unless that party states that that party has made reasonable inquiry and that the information known or readily obtainable by that party is insufficient to enable that party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not object to the request on that ground alone; the party may deny the matter or set forth reasons why the party cannot admit or deny it, subject to rule 1.380(c). The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. Instead of these orders the court may determine that final disposition of the request be made at a pretrial conference or at a designated time before trial. The provisions of rule 1.380(a)(4) apply to the award of expenses incurred in relation to the motion.

(b) Effect of Admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to rule 1.200 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved by it and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining an action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission for any other purpose nor may it be used against that party in any other proceeding.

This rule has been described by one Florida appellate court as providing "a vehicle by which issues are narrowed in a civil case, thus allowing the parties and the court to concentrate upon the various

contentions of the parties after the resolution of the facts which are not in dispute."[6] Its intended operation is to separate the wheat from the chaff.[7] Federal decisions, to which Florida courts look for guidance in interpreting Florida's civil procedure rules generally[8] and Rule 1.370 specifically,[9] are substantially in accord as to its purpose.[10]

As drafted, Rule 1.370 appears to be an important part of the scheme designed to achieve the desired "just, speedy and inexpensive" determinations of actions.[11] However, in the hands of Florida judges and lawyers this powerful tool has been (1) used with relative scarcity, (2) applied inconsistently and often in contravention of its own language, and (3) substantially rendered a nullity by Florida's District Courts of Appeal. It is all the more remarkable that this has occurred while it has been in the interest of all concerned to eliminate unnecessary litigation, and circuit court civil filings have continued to rise dramatically[12] in close relation to the rise in Florida's population.[13]

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[6] Davison v. First Fed. Savings & Loan Ass'n of Orlando, 413 So. 2d 1258 (Fla. 5th Dist. Ct. App. 1982).

[7] *Id.*

[8] Gleneagle Ship Mgt. Co. v. Leondakos, 602 So. 2d 1282, 1283 (Fla. 1992).

[9] Adams v. Freel, 409 So. 2d 1176, 1177 (Fla. 5th Dist. Ct. App. 1982).

[10] *See, e.g.*, Perez v. Miami-Dade County, 297 F.3d 1255, 1264 (11th Cir. 2002) (purpose is "to expedite the trial and to relieve the parties of the cost of proving facts that will not be disputed at trial"); *see also* Gluck v. Ansett Australia, Ltd., 204 F.R.D. 217, 218 (D.D.C. 2001) (purpose is to "allow for the narrowing of issues, to permit facilitation in presenting cases to the fact finder and, at a minimum, to provide notification as to those facts, or opinions, that remain in dispute").

[11] FLA. R. CIV. P. 1.010.

[12] Statewide, circuit court civil filings rose from 130,027 in 1993-94 to 160,901 in 1998-99, and to 184,858 in 2002-03. During the same period, circuit court civil dispositions failed to keep pace. There were 132,934 in 1993-94; 152,845 in 1998-99; and 173,195 in 2002-03. The gap between yearly filings and dispositions has continued to grow, from (-)2,907 in 1993-94, to (+)8,056 in 1998-99 and (+)11,663 in 2002-03. Florida Office of the State Courts Administrator, FY 2002-03 Statistical Reference Guide, *at* http://www.flcourts.org (last visited August 12, 2004). Chief Justice Barbara Pariente of the Florida Supreme Court noted that "Of the 10 most populous states, Florida ranks second highest in filings per judge", that "as of 2002, our general jurisdiction judges handle 46.5 percent more filings than the national average" and "in many instances, their workload is well beyond capacity." *Why So Many Judges?* FLA. BAR NEWS, Dec. 15, 2004, at 13.

[13] Florida's population was 4,951,560 in 1960; 6,791,418 in 1970; 9,746,324 in 1980; 12,937,926 in 1990; 15,982,378 in 2000; and in 2003 was estimated to be 17,019,068.

This contradiction is evidenced initially in the fact that while both Florida and federal decisions may agree as to its purpose,[14] there is disagreement on the basic issue of whether Rule 1.370 or Federal Rule of Civil Procedure 36 are even *discovery* rules.

In its recent decision amending Rule 1.370 to limit requests for admission to thirty absent stipulation or court order, the Florida Supreme Court stated that requests for admissions serve their "discovery purpose" of "narrow[ing] the issues for trial."[15] Though vigorously dissenting as to this limitation, two members of the Court still agreed that requests for admission were "an extremely versatile and efficient discovery method."[16] The Civil Procedure Rules Committee which recommended this change, however, stated in its Committee Note that "Rule 1.370 is not meant to be a discovery tool, but rather to narrow the issues to be resolved at trial ...."[17]

Federal decisions, on which Florida courts rely in an effort to harmonize these two sets of rules,[18] also disagree on this point.[19] This in turn has created additional disharmony in the use of Federal Rule of Civil Procedure 36, particularly as to whether requests for admissions are subject to discovery cutoff dates.[20]

ALLEN MORRIS & JOAN MORRIS, THE FLORIDA HANDBOOK, 2001-2002; *see also* United States Census Bureau, Florida Quick Facts, *at* http://www.quickfacts.census.gov/qfd/states/12000.html (last visited August 12, 2004).

[14] *Adams*, 409 So. 2d at 1177; *Perez*, 297 F.3d at 1264.

[15] *Amendments to the Florida Rules of Civil Procedure (Two Year Cycle) and Florida Rule of Appellate Procedure* 9.110, 858 So. 2d 1013, 1014 (2003).

[16] *Id.* at 1016. (Lewis, J., dissenting) (Anstead, C.J., concurring) (purported justification for the limitation is "illogical and nonsensical").

[17] Civil Procedure Rules Committee, *Minutes of the Civil Procedure Rules Committee Meeting of June 22, 2001*, at 5.

[18] *Gleneagle*, 602 So. 2d at 1283.

[19] O'Neill v. Medad, 166 F.R.D. 19, 21 (E.D. Mich. 1996) (citing Misco, Inc. v. United States Steel Corp., 784 F.2d 198 (6th Cir. 1986) (quoting CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2253, at 706 & n.23 (1970) (holding that "because Rule 36 assumes that the party proceeding under it already knows the fact or has the document and merely seeks the opposing party to authenticate its genuineness", requests for admissions are not discovery*); but see Gluck,* 204 F.R.D. at 218 (finding that requests for admissions are discovery because (1) FED. R. CIV. P. 26(a)(5) specifically lists them as a means of obtaining discovery, and (2) Rule 36 is included in the chapter of the rules governing depositions and discovery).

[20] There is again a split of authority on this point. Because theoretically a party is not seeking to discover anything with the use of requests for admissions, some federal courts

Such disagreement as to its very nature is indicative of the significant problems that exist today in the operation of Rule 1.370. This article will (1) trace the path that has led to the current state of the rule, including an analysis of its creation and evolution in light of its purpose; (2) discuss the problems which currently render the rule dysfunctional; and (3) suggest changes that would better help it fulfill its purpose. As will be shown, the rule in its current form and operation has become a victim of its opposing forces. On the one hand, it seeks to cut through and clarify. On the other, it seeks to place limits on this effort. It is in operation today very much like a car driven with the right foot pressing the gas pedal and, at the same time, the left foot applying the brake.

The unknown author who thirty-seven years ago wrote that the "attitudes of judges and lawyers in employing and applying the rules"[21] would be largely determinative knew whereof he or she spoke. Unfortunately, and never with greater force and effect than during the past several decades, these attitudes have operated to chart a decidedly negative course for the operation of Rule 1.370.

II. PRESENT AT THE CREATION: NARROW IN SCOPE, BUT DETERMINED AS TO PURPOSE

From its earliest beginnings as a state, Florida has sought to provide rules for the practice of law. The First General Assembly, in 1845, enacted the following statute:

> That said Supreme Court shall hold a term or session at the Capitol in Tallahassee to commence on the first Monday of January 1846, at which term the said court shall make and adopt rules for the regulation of the practice in all cases before it, and before said Circuit Courts, which shall be

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have held that they are not subject to discovery cutoff dates. *See, e.g., O'Neill*, 166 F.R.D. at 21; Hurt v. Coyne Cylinder Co., 124 F.R.D. 614, 615 (W.D. Tenn. 1989). Other courts have held that because requests for admissions are discovery they are subject to discovery cutoff dates. *See, e.g., Gluck*, 204 F.R.D. at 219; Kershner v. Beloit Corp., 106 F.R.D. 498, 499 (D. Me. 1985).

[21] FLA. R. CIV. P. 1.010, Author's Comment, 1967.

> published by the Attorney General as the laws are published and be submitted to the General Assembly at its next session and shall be in force till annulled and altered. [22]

The Court did as directed in 1846 and adopted several sets of rules including Rules of Practice for the Government of the Circuit Courts of the State of Florida.[23] It was here in General Rule 23 that requests for admission made their first formal appearance in Florida law:

> Either party, after plea pleaded, and a *reasonable* time before trial, may give notice to the other in the form hereto annexed, marked A. to the like effect, of his intention to adduce in evidence certain written or printed documents, and unless the adverse party shall consent by endorsement on such notice, *within forty-eight hours*, to make the admission specified, the party requiring such admission may call on the party required, by summons, to show cause, before a Judge, why he should not consent to such admission, or, in case of refusal, be subject to pay the costs of proof; and unless the party required shall expressly consent to make such admission, the Judge shall, if he think the application reasonable, make an order, that the costs of proving any document specified in the notice, which shall be proved at the trial to the satisfaction of the Judge, certified by his indorsement thereon, shall be paid by the party so required, whatever may be the result of the cause: Provided, that if the Judge shall think the application unreasonable, he shall indorse the summons accordingly: Provided also, that the Judge may give such time for inquiry or examination of the documents intended to be offered in evidence, and give such directions for inspection and examination, and impose such terms upon the party requiring the admission, as he shall think fit.

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[22] Ch. 5, Laws of Fla. (1845) § 5.

[23] 1 Fla. at VII (1846). The Court also adopted Rules of Practice for the Supreme Court of the State of Florida, Rules for the Government of the Circuit Courts of the State of Florida, and Rules of Practice in Suits in Equity in the Circuit Courts of the United States.

> If the party required shall consent to the admission, the Judge shall order the same to be made.
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> No costs of proving any written or printed document shall be allowed to any party who shall have adduced the same in evidence on any trial, unless he shall have given such notice as aforesaid, and the adverse party shall have refused or neglected to make such admission, or the Judge shall have indorsed upon the summons that he does not think it reasonable to require it.
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> A Judge may make such order as he may think fit respecting the costs of the application, and the costs of the production and inspection and in the absence of a special order, the same shall be costs in the cause. [24]

Although narrow in scope, applying only to admissions regarding documents,[25] this prototypical rule evidenced little judicial tolerance for delay. In its requirement that a party respond "*within forty-eight hours*" (unless given additional time by the trial court) or be subject to costs, one found a far shorter response time than exists today.[26] That this was true when phones, faxes, overnight mail, and automobiles did not exist to assist in rapid client communication serves only to highlight the Court's desire for rapid elimination of non-issues. Its use of italics emphasized it still further.

The form to be used under this Rule[27] allowed counsel to request an opposing party to admit the signature or execution of a document as purportedly had occurred, that it was a true copy, if applicable, and that it had been served, sent, or delivered as stated.[28] All "just exceptions to the admissibility of all such documents as evidence" in the cause were

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[24] *Id.* at XVI (emphasis in original).
[25] *Id.*
[26] *See* FLA. R. CIV. P. 1.370(a) (Thirty days permitted to respond to requests for admissions, or not less than forty-five days after service of process and the initial pleading upon the defendant).
[27] *See supra* note 23, at XVII.
[28] *Id.*

reserved."[29] Failing to respond within forty-eight hours, however, could result in the document being admitted into evidence.[30]

In allowing such a penalty, the Court plainly raised the stakes for the responding party. As the notice to consent could be served once pleadings were made,[31] counsel near the start of suit could have been required within forty-eight hours to divine future trial issues, relevance, objections, potential harm in consenting, and the potential ruling of the court. Such rapidly required omniscience was not consistent with a fair procedural scheme. Nevertheless, it appears that from the dawn of procedural law in Florida its highest court was concerned with promoting a rapid, if narrow scheme for eliminating unnecessary trial issues, at least as to documents, and even to the point of unfairness.

Admissions have been the subject of Florida case law since at least 1850.[32] In *Mitchell v. Cotton,* [33] plaintiff's counsel admitted before the trial court that he could not recover on the note sued upon, while co-counsel maintained the opposite, introduced the note into evidence and argued it to the jury.[34] The issue before the Florida Supreme Court was whether such an admission discharged the defendant as to that claim.[35] As the admission did not concern documents and therefore was outside the ambit of General Rule 23,[36] the Court was entering uncharted waters.

The Court's discussion heralded inconsistencies to come in the use of admissions. Without distinguishing between admissions of fact or law, the Court held generally that "admissions made by counsel of a party, to bind that party, must be made in his presence and without objection."[37] However, the Court then relied on English common law for the proposition that an admission of fact by counsel is presumed to be done with the

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[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] 3 Fla. 134 (1850).
[33] *Id.*
[34] *Id.* at 160.
[35] *Id.*
[36] *See supra* note 24.
[37] *Id.*

client's authority and the client would be bound by it.[38] The Court did not resolve this apparent conflict, likely because it found counsel's admission to be one of law.[39] The Court stated that "it will not be seriously contended that admissions of counsel of the law, where there happens to be an error in the admission, can make the law,"[40] and then held that the facts did not show waiver or abandonment of the claim.[41]

III. THE RULE EVOLVES: EQUITY VS. LAW, THE SCOPE EXPANDS, AND THE PURPOSE – ON ITS FACE – REMAINS CLEAR

In 1873, the Court was once more called upon by the Legislature[42] to adopt practice and procedure rules. In response, it adopted one set for circuit courts in equity and one for common law actions.[43] Requests for admission do not appear in the former,[44] although the powers given circuit courts in equity would have allowed their use.[45] In the latter there appears to have been no change to the rule, even though its text was not re-adopted, as the Court re-adopted its same accompanying form.[46] This continued to include the requirement that a response be made within forty-eight hours.[47]

Despite the Court's continuous application,[48] these rule sets

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[38] *See id.*
[39] *Id.*
[40] *Id.* at 160.
[41] *Id.* at 161.
[42] Ch. 1938, Laws of Fla. (1873).
[43] *Order of the Supreme Court, Adopting the Foregoing Rules of Practice*, 14 Fla. 63 (1873).
[44] *See Rules of Practice for the Government of the Circuit Courts in Suits in Equity*, 14 Fla. 40 (1873).
[45] *Order of the Supreme Court, Adopting the Foregoing Rules of Practice*, 14 Fla. 63 (1873). Rule 91 allowed circuit courts to "make any other and further rules and regulations for the practice, proceeding and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, in their discretion, and from time to time alter and amend the same."
[46] 3 Fla. 18 (1873) (Rule 56).
[47] *Id.*
[48] *See, e.g.*, State of Florida *ex rel.* Lamson v. Baker, 6 So. 445 (Fla. 1889) (Common Law Rules 1 and 2, governing admissions to the Bar); Canon v. Green, 47 So. 935 (Fla. 1908) (Common Law Rule 44, relating to interrogatories); Hainlin v. Budge, 47 So. 825 (Fla. 1908) (Common Law 97, relating to bills of exceptions); Seaboard A. L. Ry v. Rentz, 54

remained almost completely unchanged from 1873[49] until the passage of the 1931 Chancery Act.[50] If it was a goal since requests for admission were created in 1846[51] to have them used extensively, judging by appellate history, the Court and legislature must have been quite disappointed. There are no reported cases involving their use during these eighty-five years.

The 1931 Act has been described as a complete revision of prior chancery practice.[52] As to its history and purpose, one author wrote in 1939:

> The need for such legislation had long been felt due to the often too manifest tendency to procrastination, the confusing multiplicity of unessential details, and the consequent inefficiency in the State's system of administrative justice which prevailed under the former practice. As a result, the 1931 Chancery Act was prepared by the Florida State Bar Association, passed by the legislature without amendment, and approved by the Governor on June 4, 1931.
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> The 1931 Chancery Act is designed to promote the ends of justice. Every opportunity is afforded to present all points involved in a case either in behalf of the plaintiff or defendant, but there is placed upon the solicitors in the

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So. 20 (Fla. 1910) (Common Law Rule 7, governing praecipes); German-American Lumber Co. v. Barrett, 63 So. 661 (Fla. 1913) (Common Law Rule 77, governing pleading denials in tort claims); Florida E. Coast Ry. Co. v. George, 107 So. 266 (Fla. 1926) (Common Law Rule 63, governing computation of time); Oakland Properties Corp. v. Hogan, 117 So. 846 (Fla. 1928) (Equity Rule 62, governing exceptions to an answer).

[49] *Order of the Supreme Court, Adopting the Foregoing Rules of Practice*, 14 Fla. 63 (1873).

[50] Ch. 14658, Laws of Fla., § 79 (1931).

[51] *See supra* note 24.

[52] HAROLD A. KOOMAN, FLORIDA CHANCERY PLEADING AND PRACTICE 35 (1939); *see, e.g.*, Earle v. Detroit & Sec. Trust Co., 138 So. 65, 68 (Fla. 1931).

> case, as the representatives of the parties, the duty of presenting the questions involved speedily and with the least delay to the end that justice may be expeditiously administered. [53]

The goal stated in this Act for the rules of procedure, to promote the speedy and expeditious administration of justice, exists today almost without change.[54] The request for admission rule created by Section 48(6) of this Act[55] furthered this goal and was a response to the long felt "confusing multiplicity of unessential details"[56] in equity practice:

> NOTICE TO ADMIT DOCUMENTS: On ten days written notice, either party may call on the other to admit in writing the execution or genuineness of any document, letter or other writing, saving all just exceptions; and if such admission be not made five days after such service, the cost of proving the document, letter or writing shall be paid by the party refusing or neglecting to make such admission, unless at the trial the court shall find that the refusal or neglect was reasonable.

Although it was adopted to be in harmony[57] with Federal Rule 36,[58] as a response in Florida to a state of confusing and inefficient litigation, it was a significant step backward. First, it narrowed the scope of admissions to "execution or genuineness" of any document.[59] The then still-existing Common Law Rule and Form[60] went further and allowed requests as to the often crucial issue of whether purported service or delivery of a document had in fact occurred, as well as the issue of whether copies were true.[61] Second, under the new rule, the penalty for not responding, or not

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[53] *Id.* (citing Bay View Estates Corp. v. Southerland, 154 So. 894 (Fla. 1934)).
[54] FLA. R. CIV. P. 1.010.
[55] Ch. 14658, laws of Fla., § 79 (1931).
[56] KOOMAN, *supra* note 52, at 35; *see, e.g., Earle*, 138 So. at 68.
[57] *Bay View*, 154 So. at 898 (citing *Earle*, 138 So. at 68).
[58] BRUCE J. BERMAN, FLORIDA CIVIL PROCEDURE § 370.1 (2003 ed.).
[59] *See supra* note 50.
[60] *See supra* note 24.
[61] *Id.*

responding in a timely manner, was limited to liability for costs in proving the requested matter at trial. Non-response under the Common Law Rule resulted in the much stronger penalty of possible admissibility of the document at trial.[62]

Furthermore, the new rule was likely to generate confusion on the part of those who would use it simply because it was so different from the Common Law Rule and Form. In addition to the significant differences in scope and penalty,[63] the rules also differed in response times (forty-eight hours versus five days)[64] and forms (a standard Common Law Form versus none in equity).[65] Practitioners seeking to use the rule and narrow the issues in their law and equity cases were put to using two very different schemes, a fact likely to be a disincentive to their use at all. Again, the Florida judicial system struggled with requests for admissions, and on this occasion not successfully so. The continued use of two rule schemes for one procedural device was both unnecessary and unwarranted.

This limitation in equity practice on the use of admissions for documents only, as opposed to facts or law, remained unchanged in 1950 when the Florida Supreme Court adopted its Florida Equity Rules.[66] At the same time, however, the Court adopted new Common Law Rules to govern actions at law,[67] and the changes there relating to admissions were dramatic.

The title to new Common Law Rule 29, "Admission of Facts and Genuineness of Documents",[68] immediately announced the most important

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[62] BRUCE J. BERMAN, FLORIDA CIVIL PROCEDURE § 370.1 (2003 ed.).

[63] *See supra* notes 59-62 and accompanying text.

[64] *See supra* notes 24 and 55.

[65] Ch. 14658, laws of Fla., § 79 (1931) (the Act contained no form to be used with requests for admissions, whether required or suggested).

[66] *Florida Common Law and Equity Rules,* FLA. STAT. (1951) at 1820.

[67] *Id.* at 1821.

[68] Rule 29 reads:

> a) Request for Admissions. After commencement of an action a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or the truth of any relevant matters of fact set forth in the request. If a plaintiff desires to serve a request (within 10

change. Henceforth, at least in common law cases,[69] admissions would no longer be limited to documents. "Facts" had of course always been the heart of litigated cases; it made little sense that it took more than one-hundred years for them to become an appropriate subject for admissions as well. Given that all cases necessarily involved facts but not documents, this greatly increased both the scope and importance of admissions.

The second significant change was that denials for the first time in Florida had to be sworn.[70] Almost certainly the purpose of this requirement was to encourage warranted admissions, as well as give pause to a party who without good cause might be tempted to deny a requested matter. Neither could counsel give advice to do so, tacitly or otherwise,

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> days after commencement of the action leave of court, granted with or without notice, must be obtained. Copies of the documents shall be served with the request unless copies have already been furnished. Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 10 days after service thereof or within such shorter or longer time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part, together with a notice of hearing the objections at the earliest practicable time. If written objections to a part of the request are made, the remainder of the request shall be answered within the period designated in the request. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party deny only a part or a qualification of a matter of only a part or a qualification of a matter of which an admission is requested, he shall specify so much of it as is true and deny only the remainder.
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> (b) Effect of Admission. Any admission made by a party pursuant to such request is for the purpose of the pending action only and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding.

[69] The Court did not state its reasons here for continuing to maintain the disparity in scope and mechanics of requests for admissions in law and equity. There was no material distinction between the goals to be achieved on either side of the court.

[70] *Id.*

knowing that the client could be subject to significant impeachment both in deposition and at trial via the sworn denial.[71] The Court could have settled for requiring the party to sign but not swear. That it went further reflected its desire that the admissions process be taken seriously.

The Court may have felt that it was continuing to promote speed in the admissions process by allowing the requesting party to demand a response in as few as ten days,[72] and requiring that any objections be served with a notice of hearing of them "at the earliest practicable time."[73] History shows that the Court was trending to the contrary. In 1846, response was required within forty-eight hours;[74] by 1931 five days were allowed.[75] The absence in the rule of a standardized response time would itself cause litigation.[76] On balance, however, Common Law Rule 29 constituted a significant step forward in achieving the potential of admissions, and much of its language is still found today in Florida Rule of Civil Procedure 1.370.[77]

Along with Rule 29, the Court adopted Common Law Rule 30(c).[78]

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[71] *See* FLA. STAT. § 90.09 (1941) (current version at FLA. STAT. § 90.608 (1995)); *see also* Hernandez v. State, 22 So. 2d 781, 784 (Fla. 1945).

[72] *See* Common Law Rule 29.

[73] *Id.*

[74] *See supra* note 24.

[75] Ch. 14658, laws of Fla., § 79 (1931).

[76] *See, e.g.,* Campbell v. Blue, 80 So. 2d 316 (Fla. 1955) (holding that in the absence of plaintiff specifying a response date under Rule 29 defendant had no obligation to respond, and reversing summary judgment where defendant did respond prior to it being granted).

[77] *Compare*, Florida Common Law Rule 29, *with* FLA. R. CIV. P. 1.370.

[78] *See* Rule 30 (entitled "REFUSAL TO MAKE DISCOVERY: CONSEQUENCES"), which states in part :

> (c) Expenses on Refusal to Admit. If a party, after being served with a request under Rule 29 to admit the genuineness of any documents or the truth of any matters of fact, serves a sworn denial thereof and if the party requesting the admissions thereafter proves the genuineness of any such document or the truth of any such matter of fact, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making such proof including reasonable attorney's fees. Unless the court finds that there were good reasons for the denial or that the admissions sought were of no substantial importance, the order shall be made.

For the first time, failure to admit could result in the imposition of not just costs but fees if the requesting party proved the matter.[79] The rule made their award mandatory ("the order *shall* be made") unless the court found "there were good reasons for the denial or that the admissions sought were of no substantial purpose."[80] As drafted, Rule 30(c) appeared to provide a powerful sanction in furtherance of the goal of admissions.

In practice, however, there is great doubt as to whether the rule was significant at all. It is telling that there is not a single reported appellate decision involving its use. This lack of footprints on the appellate landscape is at least *prima facie* evidence that the rule was not often invoked at the trial court level. Certainly, litigating counsel as a group statewide would have had a multitude of occasions to claim fees and costs for improvident denials, and it would have been in their clients' interest (and often their own) for counsel to claim them. It is unlikely that they did so more than sporadically, because if the rule had been regularly employed at least one trial court ruling based on Rule 30(c) should have been the subject of an appellate opinion.

One explanation for its apparent lack of use may be found in the fact that the rule was completely silent not only as to *when* counsel should try to prove the denied matter and claim fees and costs, but also *how* they should do so.[81] In the absence of such guidance, it would have been difficult for counsel and courts, should such sanctions be sought, to know how to proceed. As will be discussed *infra*, it would be another half-century before the Court provided this much-needed guidance.[82]

The wait for consistency in discovery procedures as between law and equity, however, would be far shorter. In 1954, the Court at last eliminated the unnecessary and unwarranted distinction between the discovery schemes in law and equity,[83] and

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[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Amendments to the Florida Rules of Civil Procedure, supra* note 5, at 1028 (adopting amended FLA. R. CIV. P. 1.380(c) effective January 1, 2004).
[83] Consistency was only grudgingly implemented, however, as the Court in 1954 continued to maintain some rules sections applicable respectively only to actions at law or suits in equity. *See* Rules C and D, 1954 Rules of Civil Procedure.

made the discovery rules applicable to both types of actions.[84] In doing so, the Court traveled a much-needed full circle, although it took 108 years for it to do so.

Common Law Rule 29, imperfect but much superior to Equity Rule 48(6), was the sole survivor as between them and emerged intact as Rule 1.30. The more seriously flawed Common Law Rule 30(c),[85] with no counterpart in equity, was adopted *in toto* as Rule 1.31(c).[86] With these actions, the Court, to a meaningful degree, cast the die for admissions for the remainder of the twentieth century. In doing so, however, it embedded serious imperfections.

The history of these rules during the past half-century shows continued changes. In 1965, the Court amended Rule 1.30(a) to increase the minimum response time from ten to twenty days.[87] The goal may have been to encourage counsel to more diligently investigate the truth of requested admissions, or, to promote more admissions by allowing more time to investigate and respond. If so, it was the latest step in a quest of crusade-like length.[88] The Court again failed to specify a standard response time for admissions.[89]

The Court itself may have felt out of touch with how its rules were actually being used in practice, as well as what changes were desirable, because on its *own* motion in 1965, it adopted procedures for the adoption and amendment of court rules following Florida Bar input.[90] The Court henceforth would receive recommendations on rule changes or adoptions

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[84] Rules A and B, 1954 Rules of Civil Procedure.

[85] *See supra* note 78.

[86] *See supra* note 84.

[87] *In re Florida Rules of Civil Procedure 1965 Revision*, 178 So. 2d 15 (Fla. 1965) (additional but minor changes included substitution by "after service of process" for "after commencement of the action", and, deletion of the requirement that service of denial or objections be "upon the party requesting the admissions").

[88] This was the Court's fourth different response time for admissions over 119 years, each an increase over its predecessor since the original response time of forty-eight hours established in 1846.

[89] Campbell v. Blue, 80 So. 2d 316 (Fla. 1955).

[90] Procedure for Adoption and Amendment of Court Rules, May 3, 1965, 1965 FLA. STAT. 3879.

from the Board of Governors after review by the Florida Court Rules Committee, and then conduct biennial hearings to consider them.[91] Formalizing a system for receiving input from Florida practitioners was a needed and positive step.

In 1966, the Court completed the task[92] of eliminating all distinction between rules in equity and common law actions, and entirely renumbered them.[93] Rule 1.30 became Rule 1.370, and Rule 1.31(c) became Rule 1.380(c).[94] The lack of appellate attention to the latter continued during the twelve years prior to renumbering, although with one case briefly mentioning it,[95] the attention can be said to have increased from nil to scant.

In 1968[96] and 1970,[97] the Court made revisions to the rules but left admissions untouched.[98] This changed in 1972[99] when, taking its cue from 1970 amendments to Federal Rule of Civil Procedure 36,[100] it made the last large-scale changes that requests for admission would undergo to date. These included the following in Rule 1.370:[101]

> 1. Broadening the scope of requests for admission to include the truth of any matters within the scope of Florida Rule of Civil Procedure 1.280(b), and, the application of law to fact.
>
> 2. Deleting the requirement that responses be sworn.

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[91] *Id.*

[92] *See* Rules C and D, 1954 Rules of Civil Procedure.

[93] *In re Florida Rules of Civil Procedure 1967 Revision*, 187 So. 2d 598 (Fla. 1966).

[94] *Id.* FLA. R. CIV. P. 1.380(c) [hereinafter Rule 1.380(c)].

[95] State Road Dep't. v. Hufford, 161 So. 2d 35 (Fla. 1st Dist Ct. App. 1964), *cert. denied*, 168 So. 2d 144 (Fla. 1964) (in part reversing an obvious trial court error in awarding fees pursuant to 1.31(c) for failing to respond to interrogatories).

[96] *In re Florida Rules of Civil Procedure*, 211 So. 2d 206 (Fla. 1968).

[97] *In re Florida Rules of Civil Procedure*, 237 So. 2d 151 (Fla. 1970).

[98] *Id.*

[99] *In re The Florida Bar: Rules of Civil Procedure*, 265 So. 2d 21 (Fla. 1972).

[100] *See id.* at 37, Committee Note to Rule 1.370.

[101] *Compare In re The Florida Bar*, 256 So. 2d at 46, *with* current version of FLA. R. CIV. P. 1.370.

3. Standardizing the response time, as well as lengthening it to 30 days (or, if a defendant, 45 days after service of process and initial pleading).

4. Adding the entire second half of current Rule 1.370(a), specifying under what conditions an answering party may give lack of information or knowledge as a reason for failure to admit or deny, that an admission regarding a genuine issue for trial is not objectionable for that reason alone, the procedure by which parties should move to determine the sufficiency of responses, and penalties for non-compliance with the requirements of this rule.

5. Adding the entire first half of current Rule 1.370(b), specifying that any admission under the rule is conclusive unless the court on motion permits withdrawal or amendment, and under what circumstances the court may permit this.

The Court also made its first substantive changes to Rule 1.380(c) since its creation as Common Law Rule 30(c), by allowing trial courts further leeway not to award fees and costs where (1) the request was objectionable, or (2) even if the matter were proven, "the party failing to admit had reasonable ground to believe that it *might* prevail on the matter."[102]

The effect of this latter change was to insure that the sanction of fees and costs would likely *never* be imposed, because counsel could hardly fail to convince a court that his or her party had reasonable ground to believe that it "might" have prevailed on the matter. One can imagine the reactions of counsel statewide upon seeing that the only penalty for improvident denials had been wholly swallowed by an exception. It is much harder to imagine the existence of counsel who from that point forward, even assuming they ever had, would use or take admissions seriously. Since their first appearance 158 years ago, this stands as the most glaring example of how Florida's courts, and here its highest court, have hamstrung them. Twelve years later, the Court recognized its error

[102] *See Florida Bar*, 256 So. 2d at 53 (emphasis added).

and deleted this provision.[103] That it adopted such an obviously and fundamentally flawed rule in the first place, however, is clear evidence that it cared little for the serious use of admissions. Apparently, neither did Florida counsel, as during these twelve years, only one appellate decision discussed whether the Court's improvident test for sanctions had been met.[104] The answer was no.[105]

The Court moved from biennial to quadrennial hearings on proposed rules changes in 1976,[106] but neither then, nor in 1980,[107] were any changes made to Rules 1.370 or 1.380(c). Admissions again went undisturbed through rule revisions in 1988,[108] 1992,[109] 1996,[110] and 2000.[111] In 2004, the Court limited admissions under Rule 1.370 to 30, including subparts.[112] It also ended a half-century lack of direction by amending Rule 1.380(c)[113] to clarify *when* fees and costs should be awarded for proving denied matters. Trial courts henceforth were to order sanctions after motion and once such proof was made,[114] although they could defer ruling in order to hold an evidentiary hearing on the matter at a convenient time.[115] In short, such motions are now mainly to be made before trial. This clarification should assist in discouraging unwarranted denials, as parties will no longer have to wait to claim fees and costs until after trials, which most often will never occur. The opportunity to do so will instead be immediate.

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[103] *In re* Amendments to Rules of Civil Procedure, 458 So. 2d 245 (Fla. 1984).

[104] Stokes v. Clark, 390 So. 2d 489 (Fla. 1st Dist. Ct. App. 1980) (holding that the trial court was correct in denying fees to plaintiff under 1.380(c) where, although the requested admissions were proven at trial, defendant did have a reasonable ground to believe he might prevail on them).

[105] *Id.*

[106] *In re* The Florida Bar, Rules of Civil Procedure, 339 So. 2d 626 (Fla. 1976).

[107] The Florida Bar *in re*: Rules of Civil Procedure, 391 So. 2d 165 (Fla. 1980).

[108] *In re*: Amendments to Rules of Civil Procedure, 536 So. 2d 974 (Fla. 1988).

[109] *In re*: Amendments to the Florida Rules of Civil Procedure, 604 So. 2d 1110 (Fla. 1992).

[110] *In re*: Amendments to Florida Rules of Civil Procedure, 682 So. 2d 105 (Fla. 1996).

[111] Amendments to the Florida Rules of Civil Procedure, 773 So. 2d 1098 (Fla. 2000).

[112] Amendments to the Florida Rules of Civil Procedure, 858 So. 2d 1013 (Fla. 2004).

[113] *Id.* at 1028.

[114] *Id.*

[115] *See id.* (Committee Notes to Fla. R. Civ. P. 1.380(c)).

IV. THE ROAD RARELY TRAVELED

Surveys have repeatedly confirmed that the use of admissions is not a road less traveled; it is a road rarely traveled. The District Court Studies Project, under the aegis of the Federal Judicial Center, gathered discovery data from cases which had terminated in 1975 in six metropolitan courts.[116] Requests for admissions constituted only 5.6% of the total discovery requests, comprised of seven discovery devices,[117] among all 3114 cases.[118] The 399[119] "completed"[120] cases from this sample, however, were felt to provide a better measure of validity of discovery usage because counsel there had done "substantially all the discovery they need[ed]."[121] Among this more targeted sample, only 0.34 requests for admissions were used *per case*.[122] As this included a minimum[123] of two parties to the litigation, this meant that *all parties combined* were serving only *one* request for admissions in every *three* completed cases.

In 1989, the Commercial and Federal Litigation Section of the New York State Bar Association reported on a survey of its general membership regarding the use of requests for admission under Federal Rule 36.[124] While the Section provided no statistical particulars, it found "that the device of requests for admission is the least utilized of the major discovery

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[116] PAUL R. CONNOLLY ET AL., JUDICIAL CONTROLS AND THE CIVIL LITIGATION PROCESS: DISCOVERY (1978).

[117] *Id.* at 30. The seven categories, and their respective portions of the total, were: Oral deposition notices (43.1%), Interrogatories (35.4%), Requests for Production (14.5%), Requests for Admissions (5.6%), Motions for Mental or Physical Examination (0.7%), Subpoenas *Duces Tecum* (0.5%) and Written Questions (0.2%).

[118] *Id.* at 28.

[119] *Id.* at 31.

[120] *Id.* ("those in which a final pretrial conference or a trial was held").

[121] *Id.*

[122] *Id.* at 32.

[123] The survey neither noted nor otherwise quantified the number of parties, or counsel capable of generating discovery, within these 3114 cases. *Id.* at 29, 31 (Tables 9, 11). It seems certain that many of these 399 cases had three, four or even more separate counsel, with each in turn capable of generating discovery on behalf of his or her respective client. *Id.*

[124] *Report on Practice Under Rule 36: Requests for Admission*, 53 ALBANY L. REV. 33 (1988-89).

devices – interrogatories, document requests, depositions, and requests for admission."[125] As to the cause, it found:

> The survey conducted of Section members reflected, among other things, the difficulty apparent from the cases in enforcing compliance with rule 36 through the sanction process. Most respondents found that the procedure for obtaining sanctions was not cost-efficient. Two reasons were repeatedly given: (1) the general reluctance of the courts to grant sanctions; and (2) the difficulty for a court to deal effectively with the denial of requests for admission prior to trial.
>
> The great majority of respondents to the questionnaire expressed frustration in obtaining substantive concessions through the use of requests for admission. Several stated that as to any important matters, the request procedure degenerated into a semantic battle. As a result, most viewed the usefulness of the procedure largely in the authentication of documents and in clearing away evidentiary objections – such as objections to the foundation requirements for the business records exception to the hearsay rule.[126]

In 1997, the Federal Judicial Center again examined the use of discovery in closed federal civil cases, based on responses from nearly 1,200 attorneys nationwide.[127] The Report was prepared "at the request of the Advisory Committee on Civil Rules to provide an empirical context for the Committee's consideration of the need for changes in the discovery rules."[128] It was published at least in part because the Federal Judicial Center "hope(d) and expect(ed) that it will stimulate and enlighten the evolving debate over the future direction of the discovery rules."[129]

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[125] *Id.*

[126] *Id.* at 42.

[127] THOMAS E. WILLGING ET AL., DISCOVERY AND DISCLOSURE PRACTICE, PROBLEMS, AND PROPOSALS FOR CHANGE: A CASE-BASED NATIONAL SURVEY OF COUNSEL IN CLOSED FEDERAL CIVIL CASES (1997).

[128] *Id.*

[129] *Id.*

While its 1975 survey showed that fifty-two percent of the cases had no recorded discovery requests,[130] this survey twenty-two years later reflected a decrease to fifteen percent.[131] This substantial decrease may partially be explained by the fact that this survey sample was drawn from cases "likely to have some discovery," and not from all civil cases,[132] but clearly the use of discovery was on the rise.

The Report was designed to discuss the use of discovery tools, among other things. Yet, notwithstanding the reasons for its preparation and publication, and the dramatic rise in discovery overall, requests for admissions were almost entirely ignored in its seventy-five pages. The Committee candidly recognized this by stating early in its section on Detailed Results and Analysis:

> In subsequent sections, we will explore many of these forms of discovery in greater detail. We will not, however, give further attention to requests for admission or physical and mental examinations. [133]

Notwithstanding the short shrift given admissions, the Report did provide supporting evidence for their lack of use (in addition to their almost complete omission from the survey). Among cases reported to be "very contentious", admissions were not used in nearly half.[134] In cases

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[130] CONNOLLY, *supra* note 116.

[131] WILLGING, *supra* note 127 at 11.

[132] *Id.* at 11 n.4.

[133] *Id.* at 12. The Committee completed this paragraph by noting that (1) requests for admissions were used more frequently in very contentious cases (54%) than in cases reported as not at all or somewhat contentious (36%), (2) they were used more often in cases rated as complex (40%) than in cases rated as somewhat (33%) or not at all complex (24%), and (3) their use was greater when the stakes were more than $150,000 (37%) as opposed to lower stakes cases (25%). This paragraph is the only text in the entire Report mentioning admissions. Among the many tables in the Report, admissions are listed as a category once. *See* Table 2 at 13. Yet, despite the fact that this table showed the categories of Rule 26(a)(2) expert disclosure and general expert discovery receiving less frequent use in overall discovery than requests for admissions (29% and 20% respectively, versus 31% for admissions), they received substantial treatment in the Report.

[134] *Id.*

reported as "complex", they were not used sixty percent of the time.[135] In cases involving some discovery or disclosure, they were not used sixty-nine percent of the time.[136]

Despite the potential that admissions have to play a significant role in civil procedure,[137] the above statistical evidence compels the conclusion that they are substantially ignored and unused. While no survey could be found detailing their use in Florida, there is no reason to believe one would compel a different conclusion.[138]

This lack of use is reflected in the current decades-long silence on admissions by the Florida Supreme Court. It last ruled on them in any substantive manner in *Farish v. Lum's, Inc.*, in 1972.[139] The issue before the Court was the failure to serve the then-required sworn responses, but the Court's deletion of this requirement that same year mooted any precedential value this decision might have had. Since then there has been, in a word, silence. This silence is not explained by the argument that "the Court's jurisdiction is limited." Given the sheer volume of cases over the past thirty-two years, several jurisdictional avenues have long existed by which admissions-centered conflicts should have been accepted.[140]

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[135] *Id.*

[136] *Id.*

[137] Ted Finman, *The Request for Admissions in Federal Civil Procedure*, 71 YALE L.J. 371, 373-82 (1962).

[138] If the author's civil litigation experience of over twenty-five years and 1200 cases in Florida circuit courts is indicative, admissions are not used in two-thirds of all cases. Many of them had more than two counsel generating discovery. This comports with findings in the surveys cited *supra*, and particularly with those found in the 1997 Federal Judicial Center Report.

[139] Farish v. Lum's, Inc., 267 So. 2d 325 (Fla. 1972) (reversing the Third District Court of Appeal and reinstating a summary judgment based on defendant's failure to serve sworn responses to requests for admissions, as being within the discretion of the trial court to determine noncompliance with Rule 1.370). The Court has touched on admissions during this time period, but not in any substantive sense. *See, e.g.*, The Fla. Bar v. Eubanks, 752 So. 2d 540 (1999) (failure to respond to requests for admission resulted in their being admitted).

[140] *See* FLA. R. APP. P. 9.030(a)(2)(A)(iv) (discretionary jurisdiction to accept decisions of the district courts of appeal that expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law); FLA. R. APP. P. 9.030(a)(2)(A)(v) (discretionary jurisdiction to accept district courts of appeal decisions

This silence has echoed through more than just the halls of the Supreme Court. While the five Florida District Courts of Appeal have ruled on such cases, this has been due to their mandatory obligation to review final decisions of trial courts.[141] Where their discretion could have been exercised through any of four areas to certify such cases to the Supreme Court for review,[142] they have done so only once.[143] It was not accepted. [144]

Not all states treat admissions the same way. For example, in Mississippi, the rules governing admissions are substantially similar to those in Florida,[145] and since January, 1995, Mississippi has, like Florida, had an intermediate Court of Appeals.[146] The path to its Supreme Court, however, is far more direct than the path in Florida, because Mississippi's jurisdiction *initially* includes *all* cases appealing final judgments in the

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that pass upon a question certified to be of great public importance); FLA. R. APP. P. 9.030(a)(2)(A)(vi) (discretionary jurisdiction to accept such decisions that are certified to be in direct conflict with decisions of other district courts of appeal); and FLA. R. APP. P. 9.125(a) (discretionary jurisdiction to accept for review any order or judgment of a trial court that has been certified by the district court of appeal to require immediate resolution by the supreme court because the issues pending in the district court are of great public importance or have a great effect on the proper administration of justice throughout the state). Given these various avenues, therefore, it is difficult to argue that jurisdictional barriers explain this silence from Florida's highest court. Moreover, its jurisdiction was even greater before 1980. *See* Committee Notes to FLA. R. APP. P. 9.030.

[141] *See* FLA. R. APP. P. 9.030(b)(1)(A).

[142] *See supra* note 140.

[143] *See* Ruiz v. de Varona, 785 So. 2d 508 (Fla. 3d Dist. Ct. App. 2000), certifying conflict with Morgan v. Thompson, 427 So. 2d 1134 (Fla. 5th Dist. Ct. App. 1983), and *In re* Forfeiture of 1982 Ford Mustang, 725 So. 2d 382 (Fla. 2d Dist. Ct. App. 1998), as to whether a motion is required to withdraw or amend admissions resulting from a party's failure to respond.

[144] *See Ruiz,* 785 So. 2d 508. The reason is unknown, as the Florida Supreme Court did not render a published decision stating its acceptance or rejection. It is possible the case settled prior to that point.

[145] *See* M.R.C.P. Rules 36 and 37(c) (counterparts to Rules 1.370 and 1.380(c), respectively).

[146] *See* Miss. Code Ann. § 9-4-1 (2004); *see also,* Judge Leslie Southwick, *The Mississippi Court of Appeals: History, Procedures, and First Year's Jurisprudence,* 65 MISS. L.J. 593, 623 (1996). Florida has five district courts of appeal while Mississippi has one, but equivalency is enhanced by Florida's greater population.

state's trial courts.[147] Since 1995, however, Mississippi has had the discretion to assign most cases, including any regarding admissions, to the Court of Appeals.[148] Precisely due to such freedom, its decisions to retain or assign away jurisdiction of admissions-related cases speak to its interest in, and the importance it ascribes to such cases.[149] By the same measurement, during this period when both Mississippi and Florida have had courts of appeal, the Mississippi Supreme Court has shown significantly greater interest. In comparison with the complete silence of the Florida Supreme Court, over these nine years, the Mississippi Supreme Court either retained jurisdiction or accepted on certiorari from the Court of Appeals four admissions-centered cases.[150] Its decisions in these cases emphasized not only the importance it ascribed to admissions by virtue of not delegating them to its lower court, but the seriousness with which it viewed Mississippi's admissions rule. As only one example, it held:

> Necessity and practicable leniency, however, appear to have generated an air of benevolent gratuity about the administration of Rule 36. But, of course, there is no gratuity about it. Courts cannot give or withhold at

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[147] *See* MISS. CODE. ANN. § 9-3-9 (2004).

[148] *See* M.R.A.P. Rule 16 (2004) (appeals may not be delegated to the district court of appeal if they involve (1) imposition of the death penalty, (2) utility rates, (3) annexations, (4) bond issues, (5) election contests, or (6) a trial court's holding a statute unconstitutional). *See also* MISS. CODE ANN. § 9-4-3(1) (2004).

[149] Neither was the Mississippi Supreme Court chary in assigning cases. During its first year, the Court of Appeals decided 535 cases, all with written opinions, and all having been assigned to it by the Supreme Court. *See supra* note 146.

[150] *See* Skipworth v. Rabun, 704 So. 2d 1008 (Miss. 1996) (affirming the trial court's decision to allow withdrawal of admissions and consider interrogatory answers in opposition to motion for summary judgment); Earwood v. Reeves, 798 So. 2d 508 (Miss. 2001) (stating in strong terms that Rule 36 is to be enforced despite the fact that harsh consequences may result); DeBlanc v. Stancil, 814 So. 2d 796 (Miss. 2002) (reversing on certiorari the decision of the Court of Appeals after initially assigning the case to it, and holding that in the absence of a proper Rule 36(b) motion to allow untimely responses to requests for admission the summary judgment based on such admissions was proper); Cole v. Buckner, 819 So. 2d 527 (Miss. 2002) (reaffirming the requirement of complying with the particulars of Rule 36(b), as well as the trial court's discretion to deny an extension of time to answer or permit withdrawal or amendment to requests for admission).

> pleasure. *Rule 36 is to be enforced according to its terms.*[151]

Whether one examines statistics regarding the use of admissions by litigating counsel, or the amount of interest given them by the Florida Supreme Court, one comes to the same conclusion. The purpose of the rule is not being fulfilled, initially, because the rule is not being used. The question then arises, why not?

V. THE ROAD ITSELF: DRIVING TOWARD NULLIFICATION

It is reasonable to believe that civil litigation counsel (1) keep current with appellate decisions in the area of civil procedure, (2) will spend their time and their clients' money only on litigation methods they believe are effective, and (3) would use admissions if they found them to be effective. In answering the question of why counsel do not use them,[152] one need look no further than the treatment given admissions by Florida's District Courts of Appeal over the past several decades. Only the most hopeful civil litigator in Florida would find that Rule 1.370 has not been effectively nullified, or at least treated so inconsistently as to make its use in pre-trial practice of little value.

A. No Timely Response? Almost Certainly, No Problem

In its opinion in *Farish v. Lum's,* the Florida Supreme Court noted that the underlying decision of the Third District Court of Appeal[153] "require(d) the trial court to excuse noncompliance with Rule 1.370 on a base allegation of inadvertence."[154] The Court further noted, "It is this holding of the District Court, rather than the trial court's decision, which does violence to the 'spirit of the Rules'."[155] In quashing this decision, the Court did two things. First, it upheld the right of trial courts statewide to

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[151] *DeBlanc,* 814 So. 2d at 799 (emphasis in original) (citing Educ. Placement Servs. v. Wilson, 487 So. 2d 1316, 1318 (Miss. 1986)).

[152] *Report on Practice Under Rule 36: Requests for Admission,* 53 ALBANY L. REV. 33, 42 (1988-89).

[153] *See* Lum's v. Farish, 251 So. 2d 338 (Fla. 3d Dist. Ct. App. 1971).

[154] *Farish,* 267 So. 2d at 327.

[155] *Id.*

exercise their discretion in regard to noncompliance with Rule 1.370 (there, the failure to have sworn responses). Second, using language that alerted counsel to their obligation to comply with Rule 1.370 or potentially face severe consequences, the Court in quashing and remanding for entry of summary judgment held:

> The record before us is devoid of any facts that would require the trial court to excuse defendant's failure to comply with Rule 1.370. It cannot be held that, as a matter of law, inadvertence is sufficient to excuse compliance – it may be in some instances, but in other instances, not. It is the duty of the trial court, and not the appellate courts, to make that determination. [156]

The following portion of Rule 1.370(b), newly adopted that same year, was not applicable to the facts in *Farish*:

> Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to rule 1.200 governing amendment of the pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved by it and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining an action or defense on the merits.

This portion of the rule was not initially interpreted as obviating the *Farish* requirement of showing excusable neglect for failure to comply with the response time in Rule 1.370. In *Salazar v. Valle*,[157] the Third District Court of Appeal cited the text of 1.370(b) in *support* of its holding that remand was required, in part, for the trial court to determine if there was some justification for defendants' untimely responses.

This requirement of showing excusable neglect was swept aside

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[156] *Id.* at 328.

[157] Salazar v. Valle, 360 So. 2d 132 (Fla. 3d Dist. Ct. App. 1978).

several years later, not by the Supreme Court, but rather by the Fifth District Court of Appeal in *Melody Tours, Inc. v. Granville Market Letter, Inc.*[158] There, the trial court used what appeared to be sound judgment and required appellants to show more than mere inadvertence for its service of admissions responses seventy-seven days late. This, the trial court felt, was in accordance with the test for setting aside a default judgment. As appellants apparently did not make such a showing, the court rendered summary judgment based on the untimely responses.

In reversing, the Fifth District Court of Appeal gave counsel almost *carte blanche* to disregard the time requirements of Rule 1.370 and, more importantly, eliminated the penalty of "conclusive admission" for untimely responses. After acknowledging the "sound logic"[159] of the trial judge, the court leaped to the conclusion that it was compelling "but for the fact that the law seems to have developed in another, more liberal, direction."[160] The court found that direction, without daring to comment in so many words, was one where mere inadvertence was *automatically* sufficient, so long as the twin factors of Rule 1.370(b)[161] existed. The fact that presentation on the merits would be served in virtually every case by allowing amendment, the first factor, was not mentioned. Neither did the court discuss the second factor, the almost impossible task of a party opposing amendment

to show prejudice. As to this factor, any doubt as to what would not be sufficient was removed four years later when the same court held:

> Having to prepare for a trial on the merits is not the type of prejudice which the plaintiff can raise to combat the defendant's motion for leave to file late answers because preparing for a trial on the merits was plaintiff's burden

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[158] Melody Tours, Inc. v. Granville Market Letter, Inc., 413 So. 2d 450 (Fla. 5th Dist. Ct. App. 1982).
[159] *Id.* at 451.
[160] *Id.*
[161] These are, first, where withdrawal or amendment of admissions will serve the presentation on the merits, and second, where the party who obtained the admissions fails to satisfy the court that such withdrawal or amendment will prejudice him in maintaining his action or defense on its merits.

> from the beginning. Neither can plaintiff argue that it had released witnesses from subpoena without a showing that these witnesses are material and are no longer available. The trial court has discretion to impose on the appellant the costs of issuing new subpoenas as a condition to permitting the late answers.[162]

The *Farish* requirement of showing excusable neglect still proved enticing, however, as a different panel of the same court in the same year looked not to these two Rule 1.370(b) factors, but to the traditional factors of "clerical error, brief delay or excusable inadvertence" in determining whether late admissions would support summary judgment.[163] The answer was yes, but even after plaintiff was two *years* late in his responses, it was only with "great reluctance."[164]

The Fourth District Court of Appeal has been even more inconsistent in providing guidance on this point. In *Wood v. Fortune Insurance Co.*,[165] decided four years after *Melody Tours*, the court clearly applied the "excusable neglect" test, there finding excusable the fact that defense counsel's tickler system had failed and caused the late responses. However, while all three judges applied excusable neglect as the test, they could not agree on whether it was important.[166] Five years later, the Fourth District Court of Appeal reversed course, relied on *Melody Tours* and abandoned the excusable neglect test, in *Wilson v. Department of Administration.*[167] In 1997, the same court in *Al Hendrickson Toyota, Inc.*

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[162] Durrance v. Thompson, 486 So. 2d 711, 712 (Fla. 5th Dist. Ct. App. 1986).

[163] Whack v. Seminole Mem'l Hosp., 487 So. 2d 1091, 1092 (Fla. 5th Dist. Ct. App. 1986).

[164] *Id.* at 1092.

[165] Wood v. Fortune Ins. Co., 453 So. 2d 451 (Fla. 4th Dist. Ct. App. 1984).

[166] *Id.* at 452. The majority stated that "[w]hether this was or was not excusable neglect is really not so important as the fact that we believe there was truly a judgment call." *Id.* The concurring opinion tersely stated: "However, I do not agree that whether or not excusable neglect is present, is not so important." *Id.*

[167] Wilson v. Dep't of Admin., 538 So. 2d 139 (Fla. 4th Dist. Ct. App. 1989) (holding that the Director of the Division of Retirement erred as a matter of law in determining that excusable neglect had to be shown in order to grant relief from technical admissions).

v. Yampolsky[168] reversed course yet again, relied on *Wood*, ignored *Wilson*, and reversed an admissions-caused summary judgment where excusable neglect was shown.

For its part, the First District Court of Appeal provided the confusing holding in *Kyle v. McFadden*.[169] There, the court found that appellant's failures to respond at all and to timely respond to two sets of requests for admissions were not inadvertent, and that the admissions proved a *prima facie* case of malpractice at trial. In affirming, however, the court stated:

> *Because* the record clearly supports a conclusion that appellant's failure to answer *was not* inadvertent, we find no significance in the contention that appellee *would not have been prejudiced* by *being required to prosecute his action on the merits*.[170]

Whether appellant's failures were inadvertent or not clear had no causal relationship to appellee's obligation to prosecute his case on the merits. In either case, there was a failure, and each appellee was in the same position of intending at trial to admit as conclusive both sets of requested matters. The *reason* for the failure may have (and should have, *see* discussion *supra*) borne on whether appellant would be relieved from these admissions, but that was not the court's holding.

No such uncertainty exists in Mississippi. In construing an almost identical rule on admissions,[171] its Supreme Court has continued to require counsel to show excusable neglect in order to obtain relief from admissions.[172] Failing to do so, in Mississippi at least, does have

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[168] Al Hendrickson Toyota, Inc. v. Yampolsky, 695 So. 2d 948 (Fla. 4th Dist. Ct. App. 1997).

[169] Kyle v. McFadden, 443 So. 2d 497 (Fla. 1st Dist. Ct. App. 1984).

[170] *Id.* at 499 (emphasis added).

[171] *See* M.R.C.P. Rules 36 and 37(c) (counterparts to Rules 1.370 and 1.380(c), respectively).

[172] *See, e.g.*, Earwood v. Reaves, 798 So. 2d 508, 517 (Miss. 2001); Martin v. Simmons, 571 So. 2d 254, 255 (Miss. 1990).

consequences.[173] In Florida, where *Melody Tours* has substantially taken root,[174] the obviation of this requirement has contributed to both the perception and the reality that non-compliance with this rule is free. If even mere inadvertence is sufficient to negate such a failure,[175] and such can almost always be shown, there is little reason to take Rule 1.370 seriously from the start.[176]

B. The Rule Respected, the Rule Ignored

Rule 1.370(b) could not, one would think, be clearer on the point that a motion is required to relieve a party from technical admissions ("... *unless* the court on motion permits withdrawal or amendment of the admission").[177] It is clear enough that the Fifth District Court of Appeal has tersely held, "No motion, no relief, no error."[178] The Second District

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[173] *Id.* In both cases, the Mississippi Supreme Court upheld trial court refusals to allow withdrawal of admissions caused by violations of Rule 36.

[174] *Wilson*, 538 So. 2d 139; *see also* State v. Aravz, 678 So. 2d 464, 465 (Fla. 3d Dist. Ct. App. 1996) (relying on *Melody Tours* in part and holding that dismissal based on failure to timely answer request for admissions is inappropriate where withdrawal of admissions would serve to facilitate the presentation of the case on its merits); DeAtley v. McKinley, 497 So. 2d 962, 963 (Fla. 1st Dist. Ct. App. 1986) (relying on *Melody Tours* in reversing judgment based on admissions, and applying the two Rule 1.370(b) factors but not excusable neglect).

[175] *See Wilson,* 538 So. 2d at 141.

[176] Such rulings obviating the need for showing excusable neglect stand in stark contrast to those interpreting Florida Rule of Civil Procedure 1.500 and 1.540(b), and requiring such a showing, along with a meritorious defense, in order to set aside a default. *See, e.g.,* Perry v. University Cabs, Inc., 344 So. 2d 914, 915 (Fla. 3d Dist. Ct. App. 1977); Hall v. Byington, 421 So. 2d 817 (Fla. 4th Dist. Ct. App. 1982). Neither is this difference explained by language in Rule 1.540(b)(1). Although "mistake, inadvertence, surprise, or excusable neglect" is given as a basis for relief from default, and they are given in the alternative, it is only the last which has been interpreted to be sufficient to obtain such relief. *Id.*

[177] FLA. R. CIV. P. 1.370.

[178] Morgan v. Thompson, 427 So. 2d 1134, 1135 (Fla. 5th Dist. Ct. App. 1983); *see also* West v. West, 436 So. 2d 1010, 1011 (Fla. 5th Dist. Ct. App. 1983) ("... in the absence of a motion it is error to disregard the admissions resulting from the failure to timely respond to the request for admissions."). *But see* Adams v. Freel, 409 So. 2d 1176 (Fla. 5th Dist. Ct. App. 1982) (relying on federal case law in holding that a motion was *not* required).

Court of Appeal followed suit in *In re Forfeiture of 1982 Ford Mustang*,[179] noting the "plain language" of the rule.[180]

Other courts, however, have contributed to neutering the rule by discarding this plainly-worded requirement. In *Pelkey v. Commander Motel*,[181] the Fourth District Court of Appeal noted its disagreement with the Fifth District Court of Appeal's opinion in *West v. West*[182] on this issue and simply stated, "We hold that the absence of a motion does not preclude the trial court from granting relief from admissions resulting from the failure to timely respond to the request for admissions."[183] The court neither discussed nor attempted to distinguish the language of Rule 1.370(b) which it was doing away with so blithely doing away. Only two months later, however, another panel of the same court held that a motion *was* required.[184] For its part, the Third District Court of Appeal in *Ruiz v. de Varona*[185] substantially skirted the issue by appearing to hold that no motion was required where there was record evidence contradicting the admissions. Clearly, Rule 1.370 allows no such exception.

Even in regard to the basic requirement of moving for relief from admissions, clear in the rule on its face, inconsistency reigns. Here, in yet another way, Florida courts have rendered Rule 1.370 at best ambiguous and at worst impotent.

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[179] *In re* Forfeiture of 1982 Ford Mustang, 725 So. 2d 382 (Fla. 2d Dist. Ct. App. 1998).

[180] The court further noted that such a motion could be *ore tenus*, provided that it was brought to the attention of the trial court at the hearing at which the admissions would be considered. *Id.* at 384.

[181] Pelkey v. Commander Motor Corp., 510 So. 2d 965 (Fla. 4th Dist. Ct. App. 1987).

[182] *West*, 436 So. 2d at 1010.

[183] *Pelkey*, 510 So. 2d at 966.

[184] Singer v. Nationwide Mut. Fire Ins. Co., 512 So. 2d 1125 (Fla. 4th Dist. Ct. App. 1987). The court attempted to distinguish its holding in *Pelkey* by noting different times of filing of admissions as between the two cases, as well as the existence of a motion to strike. In terms of the requirement of a motion, the distinctions are immaterial. What plainly appears to have occurred is that this second panel of the Fourth District Court of Appeal wished to respect the clear requirement of the rule.

[185] Ruiz v. de Varona, 785 So. 2d 508 (Fla. 3d Dist. Ct. App. 2000).

C. The Rule Respected, the Rule Ignored, Redux

In one other way, Rule 1.370(b) could not be clearer. Unless withdrawal is permitted by motion, "any matter admitted ... is *conclusively established* ...."[186] The Florida Supreme Court in 1972 or at any time thereafter could have used less final language, such as "any matter admitted ... is rebuttably presumed to be true" or the like. That it chose not to do so indicated its desire that admissions, in a meaningful way, achieve their purpose of narrowing the issues to be resolved. It is axiomatic that, for litigating counsel, anything less than "conclusive" means a fact or an issue is continued fair game for dispute. As the court has held, even the weaker "conclusive *presumption*" standard is still intended to provide "certainty."[187]

Earlier decisions of Florida's appellate courts gave admissions their intended teeth in holding that "conclusively established" meant nothing less. In *Bente v. Nelson*,[188] the Second District Court of Appeal held, even nine years before such language was adopted by the Supreme Court, that a party could not avoid entry of an adverse summary judgment by relying on affidavits contrary to matters admitted on request. The First District Court of Appeal followed suit in 1965 in *McKean v. Kloeppel Hotels, Inc.*[189] In *Lutsch v. Smith*,[190] decided after this language was adopted, the same court made clear that admissions under Rule 1.370 are equivalent to judicial admissions, and these "have the effect of withdrawing a fact from issue and dispensing with the need for proof of the fact."[191] The court therefore concluded that "an admission obtained in a response to admit does not have to be introduced into evidence since the admission would not go to a contested issue of fact."[192]

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[186] FLA. R. CIV. P. 1.370.

[187] *In re* Estate of Gainer v. Doran, 466 So. 2d 1055, 1057 (Fla. 1985).

[188] Bente v. Nelson, 156 So. 2d 17 (Fla. 2d Dist. Ct. App. 1963).

[189] McKean v. Kloeppel Hotels, Inc., 171 So. 2d 552 (Fla. 1st Dist. Ct. App. 1965) (relying heavily on *Bente,* 156 So. 2d 17).

[190] Lutsch v. Smith, 397 So. 2d 337 (Fla. 1st Dist. Ct. App. 1981).

[191] *Id.* at 340 (*citing* C. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 262 (3d ed. 1972)).

[192] *Id.*

Similarly, the Third District Court of Appeal, twice even prior to adoption of the "conclusively established" language, upheld the conclusive nature of admissions. In *Creel v. Government Employees Insurance Co.*,[193] it rejected plaintiff's attempt to controvert admissions by filing an affidavit in opposition to defendant's motion for summary judgment, stating, "the affidavit was legally ineffectual to vary the admissions."[194] In *Hanrahan v. Barry*,[195] the court affirmed the trial court's refusal to accept a tardy affidavit in opposition to plaintiff's motion for summary judgment where admissions "conclusively established"[196] the matter in question.

These decisions gave force and effect to the ultimate purpose of admissions, to help eliminate litigation. That they did this even prior to the formal adoption in 1972 of the "conclusively established" language reflected these courts' determination to enforce the idea that admissions were truly conclusive, and nothing less.

This determination did not last. In *DeAtley v. McKinley*,[197] the First District Court of Appeal, without distinguishing or even mentioning its prior holdings in *McKean* or *Lutsch,* held that the existence of affirmative defenses raised in appellants' "*affidavits*" in opposition to summary judgment warranted reversal, notwithstanding supposedly conclusive technical admissions. That the court italicized the word "affidavit" reflected its change of direction, such that "conclusively established" matters would henceforth bow to sworn record evidence. This was true despite (1) the court apparently failing to consider the reason why the response to request for admissions was late, and (2) the court noting that the affirmative defenses were not properly pled.

For its part, the Third District Court of Appeal abandoned its prior holdings in *Creel* and *Hanrahan,* beginning with *Sher v. Liberty Mutual Insurance Co.*[198] In *Sher*, the court held that admissions were *not*

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[193] Creel v. Gov't. Employees Ins. Co., 313 So. 2d 772 (Fla. 3d Dist. Ct. App. 1975).
[194] *Id.* at 773.
[195] Hanrahan v. Barry, 363 So. 2d 54 (Fla. 3rd Dist. Ct. App. 1978), *cert. denied*, 370 So. 2d 459 (Fla. 1979).
[196] *Id.* at 55. The court reversed the granting of summary judgment, but on other grounds.
[197] DeAtley v. McKinley, 497 So. 2d 962, 963 (Fla. 1st Dist. Ct. App. 1986).
[198] Sher v. Liberty Mut. Ins. Co., 557 So. 2d 638 (Fla. 3d Dist. Ct. App. 1990).

sufficient to support summary judgment where they were contradicted by other pleadings and affidavits. The court therefore reversed, even in the face of the appellant having made no motion for relief at any time, and without discussing the meaning of "conclusively established" as clearly stated in Rule 1.370. In *Stembridge v. Mintz*[199] it again reversed a summary judgment, where admissions were contradicted by interrogatory answers and a sworn answer to the complaint. In doing so it relied on *Sher* and held, in language which effectively rewrote Rule 1.370, "entry of summary judgment based solely on (a) failure to respond to requests for admissions (is) inappropriate."[200] Yet again, in *Florida v. Aravz,*[201] the court reversed where admissions were contradicted by affidavits and unsworn pleadings. That the Third District Court of Appeal would even mention the latter as being sufficient to stand in the way of "conclusively established" matters shows how little regard it had for the intent of Rule 1.370.

Perhaps the clearest example of a Florida court nullifying Rule 1.370 in this respect is found in the Third District Court of Appeal's opinion in *Brown v. Travelers Indemnity Co.*[202] Based on Brown's[203] failure to respond to requests for admission, the trial court granted summary judgment in favor of Travelers. The Third District Court of Appeal reversed, despite there being (1) no motion for leave to file amended responses to the requests for admissions, (2) no excuse for non-compliance, or even a discussion of the reason for it, and (3) no sworn affidavit or other record evidence to dispute the admissions. All that existed was Brown's Answer stating, "Defendant denies each and every

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[199] Stembridge v. Mintz, 652 So. 2d 444 (Fla. 3d Dist. Ct. App. 1995).

[200] *Id.* at 446.

[201] Florida v. Aravz, 678 So. 2d at 465 (Fla. 3d Dist. Ct. App. 1996).

[202] Brown v. Travelers Indem. Co., 755 So. 2d 167 (Fla. 3d Dist. Ct. App. 2000).

[203] That Brown was *pro se* should have had no effect on the decision, as *pro se* individuals "must be held to the rules of procedure even though they lack an understanding of their meaning and purpose." Mahmoud v. King, 824 So. 2d 248, 252 (Fla. 4th Dist. Ct. App. 2002). Moreover, Travelers was entitled to rely on the clear language of Rule 1.370 notwithstanding the status of Brown's representation. Finally, the trial court only granted summary judgment after (1) initially denying it because Brown did not get proper notice of the hearing, and (2) Brown was four and one-half months late with his response to admissions.

paragraph and demands strict proof."[204] It is not surprising that the court failed to discuss that, in almost every case, there would be an unsworn response to the complaint denying most or all material matters, or that this meant that in almost all cases, given the court's reasoning, admissions would *never* be upheld.

In *Miles v. Robinson*,[205] the Fourth District Court of Appeal gleaned from *Stembridge* and *Sher* that "[t]he essence of these cases is that an admission created by a rule of procedure – the failure to respond to a request for admissions – cannot trump contrary record evidence and support a summary judgment."[206] Summary judgment based on his admissions was affirmed only because Miles had filed no answer to the complaint, interrogatory answers, or affidavits. The court also adopted the Third District Court of Appeal's holding in *Brown,* originally stemming from *Stembridge*, that summary judgment based solely on a failure to respond to requests for admissions was not appropriate. The Fourth District Court of Appeal thereby joined the First and Third District Courts of Appeal in disempowering Rule 1.370 by finding that admissions were "trumped" by pleadings or other evidence. In so doing, it also joined its sister courts in failing to discuss or even mention "conclusively established" as part of the rule, or, that if the "trump" card lay anywhere, it lay within the clear language of the rule.

With the decisions by the Fifth District Court of Appeal in *Sullivan v. Nova University*[207] and the Second District Court of Appeal in *In re Forfeiture of 1982 Ford Mustang*[208] this disempowerment of Rule 1.370 was complete. Both relied on *Sher* in holding that summary judgments based on unanswered admissions would be reversed when they were contradicted by other pleadings or portions of the record.

Unless and until the Florida Supreme Court intervenes, Rule 1.370 will remain rewritten by the case law of its lower courts. Currently,

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[204] *Aravz,* 678 So. 2d at 464.
[205] Miles v. Robinson, 803 So. 2d 864 (Fla. 4th Dist. Ct. App. 2002).
[206] *Id.* at 866.
[207] Sullivan v. Nova Univ., 613 So. 2d 597 (Fla. 5th Dist. Ct. App. 1993).
[208] *In re* Forfeiture of 1982 Ford Mustang, 726 So. 2d 382 (Fla. 2d Dist. Ct. App. 1998).

requests for admissions, as a practical matter, can be answered at any time notwithstanding their response time requirements, and almost always without penalty. Counsel need not show excusable neglect for any failure to timely respond. Either mere inadvertence will be sufficient, which will at a minimum always exist, or even that will not be necessary as the desire for presentation on the merits will supercede violation of the rule. When requests are met with even months-long non-response, they will never be deemed "conclusively established," as clearly provided for in the rule, so long as even an unsworn pleading contradicting any of them exists. Finally, in several District Courts of Appeal's untimely responses can be made unilaterally and without the motion clearly required by the rule.

It would be charitable to only say that Rule 1.370 as it has been interpreted is inconsistent with its intended purpose. It is far more accurate to say that in the reality of its application by Florida's appellate courts, the rule has been effectively nullified.

D. "Reasonable Inquiry" on the Road to Denial

Rule 1.370(a) clearly states that "an answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless that party states that it has made reasonable inquiry and that the information known or readily obtainable by that party is insufficient to enable that party to admit or deny."[209] One would presume that if this rule was the subject of great or even moderate use that Florida's appellate courts would have had ample occasion to define, or at least provide dicta for, the requirements of "reasonable inquiry." After all, such a phrase almost invites litigation. One would be wrong, however. In the thirty-two years since this portion of the rule was adopted, not one Florida case has ruled in this area. The closest a court has come is in *Jenkins v. Gillen*,[210] where the Fourth District Court of Appeal noted only in passing that the response to a request stating, "I have no knowledge and therefore deny," was not compliant.

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[209] FLA. R. CIV. P. 1.370.

[210] Jenkins v. Gillen, 450 So. 2d 892 (Fla. 4th Dist. Ct. App. 1984).

Definition and guidance have been provided for this obligation, however, albeit not in Florida. In *Concerned Citizens of Belle Haven v. The Belle Haven Club*,[211] plaintiffs moved to compel responses to their requests.[212] The federal court first held generally that "reasonable inquiry" under Federal Rule of Civil Procedure 36(a), identical to that in Rule 1.370(a), required the responding party "to make a reasonable inquiry, a reasonable effort, to secure information that is readily available from persons and documents within the responding party's relative control."[213] The court further defined this to include "an investigation and inquiry of employees, agents, and others 'who conceivably, but in realistic terms, may have information which may lead to or furnish the necessary and appropriate response.'"[214] This could require, the court noted, "venturing beyond the parties to the litigation and include, under certain limited circumstances, non-parties, but not strangers."[215] Moreover, the court required the defendant, if it was still unable to admit or deny after a reasonable inquiry was made, to "state this . . . (and describe) the efforts undertaken to verify the information."[216]

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[211] Concerned Citizens of Belle Haven v. The Belle Haven Club, 223 F.R.D. 39 (D.C. Conn. 2004); *see also* J. P. Ludington, Annotation, *Party's Duty Under Federal Rule of Civil Procedure 36(a) and Similar State Statutes and Rules, to Respond to Requests for Admissions of Facts Not Within His Personal Knowledge*, 20 A.L.R. 3d 756 (2003).

[212] *Concerned Citizens,* 223 F.R.D. at 39. In this discrimination case, plaintiffs sought admissions corroborating eight categories of information in a database compiled by them and presented in chart form.

[213] *Id.* at 44; (citing Henry v. Champlain Enters., 212 F.R.D. 73, 78 (N.D. N.Y. 2003)); T. Rowe Price Small-Cap Fund v. Oppenheimer & Co., 174 F.R.D. 38, 43 (S.D. N.Y. 1997); MOORE'S FEDERAL PRACTICE, P. 36.11(5)(d).

[214] *Concerned Citizens,* 223 F.R.D. at 44 (citing *Henry,* 212 F.R.D. at 78). The court found "it reasonable to require the Club to inquire of its present members and the present and past members of the Admissions Committee and Board of Directors about their knowledge of the racial and religious identity of present and past members and applicants", while leaving "the means of conducting this inquiry for the Club to determine." *Id.* at 46. No numbers were stated by the court, but given that the database contained information dating back to 1974, the required interviewees in these categories most likely numbered in the hundreds.

[215] *Id.* The court did not further define what such "limited circumstances" would entail. Nevertheless, in most cases this definition of "reasonable inquiry" would clearly require much more than simply asking one's client whether the request "was true or not."

[216] *Id.*

The court quickly rejected defendants' objections that the information sought was "equally available" to plaintiffs, and defendants had no obligation to do their "homework",[217] that the chart containing the information was more appropriately introduced at trial,[218] and that plaintiffs could have sought to corroborate the same information through interrogatories.[219]

This holding, if relied on by even one appellate court in Florida, would well serve as a model to fill in the blank slate that currently marks "reasonable inquiry", provide much-needed guidance to Bench and Bar as to its requirements, and eliminate common objections which obstruct the use of Rule 1.370.

E. The Requesting Party Must File a Motion to Compel a Response, or Rule 1.370 Turned Upside Down

Until recently, and even among those cases that have allowed relief from admissions, albeit with untoward laxity, Florida courts had always upheld the self-executing scheme of Rule 1.370. That is, requests were admitted upon the deadline passing without response, and it was then the burden of the *responding party* to move for "withdrawal or amendment of the admission" as clearly required by Rule 1.370(b).[220]

With its decision in *Thomas v. Chase Manhattan Bank*,[221] however, the Fourth District Court of Appeal has now stood this well-established application of the Rule on its head. There, defendants were five months late in responding to Chase Manhattan's request for admissions. Chase moved for summary judgment based on the technical admissions, which was granted. The Fourth District Court of Appeal reversed, holding that because an affidavit contradicted the technical admissions, this was

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[217] *Id.* at 45. The court noted that "this objection misses the point of requests for admissions, which is to narrow the scope of contested issues at trial."

[218] The court found instead that "waiting until trial to verify the information would likely result in the expenditure of needless time and expense that the requests are intended to eliminate." *Id.* (citing Lumpkin v. Meskill, 64 F.R.D. 673 (D. Conn. 1974)).

[219] *Id.* at 45.

[220] *Id.*

[221] Thomas v. Chase Manh. Bank, 875 So. 2d 758 (Fla. 4th Dist. Ct. App. 2004).

improper, and that it was error to deny the Thomas's motion for relief from untimely admissions. The court then went on to break new and completely unwarranted ground in two respects.

First, it criticized the trial court for granting summary judgment based on the admissions where Chase Manhattan had not first filed a motion *to compel a response*, and no order requiring the same had been rendered. In so doing, the court entirely rewrote Rule 1.370 to require such a motion and order even to initially obtain admissions for untimely responses. That it did so after the response was five *months* late made its holding even less understandable. Yet, the clear effect of this holding is that henceforth, at least in the Fourth District Court of Appeal, a responding party can do nothing, even for six months, and avoid summary judgment if the requesting party had not by motion first provided a "reminder" of the obligation to respond. The de facto effect of this holding is to alter the effective date of an admission, from the first day after the response period to the first day after an order requiring a response.

The court then went yet farther. Again for the first time in Florida, it equated dismissal for failure to timely respond with a "sanction" and analyzed it accordingly.[222] Instead of relying on the particular scheme set forth in Rule 1.370 to determine whether admissions due to late responses

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[222] The court explained:

> [T]he sanction of dismissal was too harsh and legally inappropriate for the failure to timely comply with the request for admissions. An express written finding of a party's willful or deliberate refusal to obey a court order to comply with discovery is necessary to sustain the sanction of dismissal or default against a noncomplying party. *See Commonwealth Fed. Sav. & Loan Ass'n v. Tubero*, 569 So. 2d 1271 (Fla. 1990); *see also Lahti v. Porn*, 624 So. 2d 765 (Fla. 4th Dist. Ct. App. 1993) (reversing dismissal with prejudice where trial court failed to make a specific finding that counsel's failure to comply with an order was willful or that such failure resulted in prejudice to defendants). Where a party has never been instructed by the court to comply with any discovery request, sanctions for noncompliance are inappropriate. *See Stoner v. Verkaden*, 493 So. 2d 1126, 1127 (Fla. 4th Dist. Ct. App. 1986). Here, there was no order compelling compliance.

Id. at 760.

may be avoided,[223] the court looked to general (and inapplicable) case law regarding sanctions. From the start, its stated reliance on *Commonwealth*, *Lahti*, and *Stoner*[224] was misplaced. None of these cases concerned admissions, untimely or otherwise. All three concerned violations of orders, which is never mentioned in Rule 1.370 as a prerequisite to deeming admissions for non-response. Moreover, they are factually inapposite. *Commonwealth* involved violation of an order requiring responses to interrogatories and production of documents; *Lahti* concerned the failure to attend a docket call and comply with a pretrial order; *Stoner* involved a failure to produce bills and invoices, again in violation of an order.

This decision in *Thomas* now requires trial courts under the Fourth District Court of Appeal to analyze such situations not only under a body of law never intended for such purpose, but to the exclusion of the language of Rule 1.370 that plainly is so intended. Moreover, the court has changed what was a self-executing penalty for non-response to a near-impossibility. Under *Thomas*, parties may now without worry fail to respond for as long as six months, and unless (1) the requesting party has made a motion to compel a response, (2) the court has ordered a response, (3) the order has been violated, and (4) the violation is "willful or deliberate,"[225] nothing at all would happen. Taking these requirements together, this decision has truly turned Rule 1.370 upside down. If it was the tacit purpose of the Fourth District Court of Appeal to rewrite the Rule so as to nullify it, as appears clear from the holding, the court could hardly have done so more effectively. If *Thomas* is adopted by other District Courts of Appeal, Rule 1.370 will be even farther down the road to being a nullity.

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[223] *See id.*

[224] Commonwealth v. Fed. Sav. & Loan Ass'n v. Tubero, 569 So. 2d 1271 (Fla. 1990); Lahti v. Porn, 624 So. 2d 765 (Fla. 4th Dist. Ct. App. 1993); Stoner v. Verkaden, 493 So. 2d 1126 (Fla. 4th Dist. Ct. App. 1986).

[225] *Thomas*, 875 So. 2d at 759.

F. Denials Almost Always Rest In Peace

Requests for admissions, as practitioners know, are generally[226] targeted to matters which if admitted would hurt the responding party's case. Perhaps, experience has shown, this is why "denied" is presumptively the word of choice for counsel when beginning to frame responses. The question then arises: at what penalty is this done, other than possibly incurring fees and costs if the denied requests are later proven?[227] The answer is, almost none.

While Rule 1.370 is silent on the use of denials for impeachment or cross-examination generally, current Florida case law bars the former and rarely permits the latter. In *Winn Dixie Stores, Inc. v. Gerringer*,[228] plaintiff's counsel over objection impeached Winn Dixie's store manager with various denials to requests for admission, including one denying that the supermarket was open to the public when plaintiff fell. The trial court ruled that the denials could be used in cross-examination as prior inconsistent statements. The Third District Court of Appeal found this to be error for two reasons. First, it found the purpose to Rule 1.370 was to "define and limit the issues in controversy between the parties."[229] This, the court held, was "accomplished by compelling *admissions* to those matters over which there is no good faith controversy."[230] Second, the court believed that "Rule 1.370 itself establishes the exclusive means for testing the sufficiency of answers or objections to requests for admissions and that denials cannot be used for impeachment purposes."[231] A party

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[226] Exceptions would include, *e.g.*, admitting the foundational bases of a hearsay exception for documents under § 90.803(6)(a), Fla. Stat. (2004) or Fed. R. Evid. 803(6).

[227] Any such penalty and the motion and hearing process which would precede it would, however, never be imposed nor take place in front of a jury. Most attorneys would rather, it is reasonable to conclude, face the court to learn the results of improvident denials instead of seeing their clients cross-examined with them to damaging effect before a jury. Financially, while a portion of overall expended litigation fees or costs imposed as a penalty could hurt, the loss of an entire case due to such cross-examination would be far more costly.

[228] Winn Dixie Stores, Inc. v. Gerringer, 563 So. 2d 814 (Fla. 3d Dist. Ct. App. 1990), *rev. denied*, 576 So. 2d 287 (Fla. 1991).

[229] *Id.* at 816.

[230] *Id.*

[231] *Id.* at 817.

wishing to obtain impeachment material, the court noted, should have submitted appropriate interrogatories with the requests.[232]

The court concluded by finding that Winn-Dixie had been denied a fair trial because the constant references to its denials portrayed it as "being devious and less than truthful."[233] That the court would so conclude was ironic, because it also acknowledged that "it is evident that several of the requests should have been admitted in part and denied in part, as the rule contemplates."[234] Notwithstanding that this fact indeed showed a record basis for plaintiff's portrayal of Winn-Dixie, cross-examination with the denials was still held to be error.[235]

A single narrow factual exception to the rule against use of denials exists, and is found in *Home Insurance Co. v. Owens.*[236] There, plaintiff sued Home in part for bad faith arising out of its post-accident coverage actions. Home initially denied coverage in response to a request for admissions but later admitted it. Plaintiff sought to introduce Home's pleadings as well as its admissions responses, but this was denied. Questioning on these documents, however, was permitted by the trial court for "impeachment purposes."[237]

Home relied on *Winn Dixie* for the proposition[238] that Rule 1.370 did not permit denials to be used for impeachment purposes. The Fourth District Court of Appeal distinguished *Winn Dixie* by noting that it was not a bad faith case and the defendant's litigation conduct was therefore neither relevant nor admissible. The court further noted that the trial court's labeling the questioning permissible for "impeachment purposes" may or may not have been proper. Regardless, the court held, the trial judge was

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[232] *Id.*

[233] *Id.*

[234] *Id.* at 816.

[235] There is nothing inherently improper with portraying a party as "devious" or "less than truthful." To the contrary, with or without inconsistent prior statements, that is generally one of the main purposes of impeachment.

[236] Home Ins. Co. v. Owens, 573 So. 2d 343 (Fla. 4th Dist. Ct. App. 1990), *rev. denied*, 592 So. 2d 680 (Fla. 1991).

[237] *Id.* at 344.

[238] *See Winn Dixie*, 563 So. 2d at 817.

"right for the wrong reason"[239] as, within the context of the bad faith case sub judice, such evidence was both relevant and admissible.

The current state of Florida law appears to be, therefore, that unless counsel is drafting admissions responses in what could ultimately spawn a bad faith suit[240] there is no reason to fear the opponent's use at trial of any denials, no matter how baldly untrue they may be.

G. The Heart of Counsel's Candor Requirement: A Strong Rule, Rarely Applied

Florida Rule of Judicial Administration. 2.060(c) states:

> The signature of an attorney shall constitute a certificate by the attorney that the attorney has read the pleading or other paper; that to the best of the attorney's knowledge, information and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken and the action may proceed as though the pleading or other paper had not been served.

In interpreting this rule,[241] the First District Court of Appeal, in *Metcalf v. Langston,* ruled:

> Pleadings are normally prepared by counsel. He must of necessity generally prepare his pleadings based upon information furnished by others. The rule therefore provides that the signature of the attorney on a pleading shall constitute a certificate by him that he has read the

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[239] *Home Ins.*, 573 So. 2d at 344.

[240] Such denials in litigation, that later results in a suit for malicious prosecution, where malice is an issue, should be admissible under the same reasoning. *See id.*

[241] This text was originally found in FLA. R. CIV. P. 1.030(a), but was retitled and amended in 1979. *In re* Florida Rules of Judicial Administration, 372 So. 2d 449 (Fla. 1979). It was included as Rule 2.060(d) in the newly-created Florida Rules of Judicial Administration. *In re* Florida Rules of Judicial Administration, 360 So. 2d 1076, 1084 (Fla. 1978), and is now found in Rule 2.060(c).

> pleading, that to the best of his knowledge, information and belief there is good ground to support it and that it is not interposed for delay. His signature does not import, indeed it usually cannot import, truthfulness of the facts therein recited. Seldom does the attorney know of his own knowledge the facts which must be recited in his pleadings. It is for that reason that he is not required to make oath that the pleadings are accurate and it is for that reason that the rule does not recite that his signature constitutes a certificate of accuracy, but only that *to the best of his knowledge, information and belief, there is [g]ood ground to support it.* [242]

Notwithstanding that a "certificate of accuracy" is not required, this rule still provides ample support for counsel's duty to respond truthfully to requests for admissions even where such responses would hurt the client's case. The plain and sole permissible remedy for violation of this rule is to strike the "other paper," *e.g.* false responses or denials. [243] Conclusive admissions should then result.[244] However, while this rule has been cited in cases involving defaults,[245] civil conspiracy,[246] and sanctions on appeal,[247] neither Rule 2.060(c) nor any of its predecessors have ever been

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[242] Metcalf v. Langston, 296 So. 2d 81, 85 (Fla. 1st Dist. Ct. App. 1974) (emphasis added). *See also* Bay Convalescent Ctr., Inc. v. Carroll, 352 So. 2d 900, 903 (Fla. 1st Dist. Ct. App. 1977).

[243] Patsy v. Patsy, 666 So. 2d 1045, 1046-47, n.1 (Fla. 4th Dist. Ct. App. 1996).

[244] Under Rule 1.370(a) striking the response should lead to conclusive admission of the requests: "[t]he matter is admitted unless the party ... serves ... a written answer or objection."

[245] *See* Gibraltar Serv. Corp. v. Lone & Assoc., Inc., 488 So. 2d 582, 583 (Fla. 4th Dist. Ct. App. 1986) (citing TRAWICK'S FLORIDA PRACTICE AND PROCEDURE § 8-23 (1984)) (signing a motion for default certifying that a responsive pleading has not been served, prior to five days for extra time for mailing after the response deadline, violates Rule 2.060(d)); Picchi v. Barnett Bank of S. Fla., N.A., 521 So. 2d 1090, 1091 (Fla. 1988) (citing TRAWICK'S FLORIDA PRACTICE AND PROCEDURE § 8-1, *Definitions* (1985)) (filing a notice of appearance instead of a responsive pleading or appropriate motion is a nullity and violates Rule 2.060(d)).

[246] Rushing v. Bosse, 652 So. 2d 869, 875-76 (Fla. 4th Dist. Ct. App. 1995) (violation of "good grounds" requirement of Rule 2.060(d) does not constitute an independent wrong on which one can allege a civil conspiracy claim).

[247] *See* Ferguson v. Ferguson, 504 So. 2d 541, 543 (Fla. 1st Dist. Ct. App. 1987).

cited in regard to admissions responses. Given that this rule is not physically located where civil litigation counsel would generally look, and yet conveys a strong message, an appellate court's reliance on it in the context of admissions would be a welcome reminder of the need for complete candor.

H. Additional Relief is Clear, but Nary a Nibble

It has been thirty-two years[248] since the Florida Supreme Court incorporated into Rule 1.370(a) the following: "If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served."[249]

No Florida appellate court has ever construed or even applied this portion of the rule. With logic suggesting that noncompliant admissions responses are far from rare events statewide, this is at least further anecdotal evidence of (1) a lack of use of requests for admissions generally, (2) a failure of litigation counsel to recognize or press for the relief provided, (3) an unwillingness of trial courts to order admissions due to noncompliant responses, or (4) a combination thereof. Regardless of the specific cause, if this enforcement mechanism were used in practice, it is likely that it would not still exist within an appellate vacuum.

I. The Scope of Admissions: Conclusions of Law, The Heart of the Matter, and Duty

Prior to 1972, the scope of requests under Rule 1.370 was limited to "statements or opinions of fact," in addition to the genuineness of documents. Since then, its scope has included "any matters within the scope of Rule 1.280(b) ... that relate to the operation of law to fact." This language has proved problematic in determining whether conclusions of law or matters that "go to the heart of the case" are permissible subjects for requests.

The pre-1972 language framed a narrower, albeit less powerful,

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[248] *See supra* notes 106-08 and accompanying text.

[249] FLA. R. CIV. P. 1.370(a).

rule which allowed more certain appellate enforcement of the rule's constraints. For example, in *City of Miami v. Bell,* [250] the trial court overruled defendant's objections to certain admissions requests in a property dispute.[251] Among these requests were that:

- Plaintiff had never made any conveyance of all, part or any interest in the subject property and was entitled to, and had been in, possession thereof.
- There were no liens or encumbrances on the subject property.
- The only adverse claimants to the subject property were the defendants.
- In 1894 and for some years thereafter, there were no dedicated thoroughfares in the Cocoanut Grove area.[252]

Bell was subsequently reversed by the Third District Court of Appeal, holding that "admissions are properly objectionable where they seek admissions as to disputed facts lying at the heart of a case, and second, where they seek admissions as to conclusions of law."[253] Of the above, the first request clearly goes to go to the heart of the case. The last three requests, however, do not appear to do so and in fact permissibly concern purely factual matters. The court, therefore, was narrowly construing the already narrow language of the rule.

Since 1972, the reins have loosened. In *Salazar v. Valle*,[254] again

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[250] City of Miami v. Bell, 253 So. 2d 742 (Fla. 3d Dist. Ct. App. 1971).
[251] *Id.* at 743.
[252] *Id.*
[253] *Id.* at 744. *See also* Old Equity Life Ins. Co. v. Suggs, 263 So. 2d 280, 281 (Fla. 2d Dist. Ct. App. 1972) (citing *Bell* and Graham v. Eisele, 245 So. 2d 682 (1971)) (holding that in a case alleging a failure to pay insurance benefits, a request asking defendant insurer to admit that it was "indebted to plaintiff" in the full amount sued for according to the terms of the policy and the claim was improper as requesting a conclusion of legal liability and not a fact).
[254] Salazar v. Valle, 360 So. 2d 132 (Fla. 3d Dist. Ct. App. 1978).

before the Third District Court of Appeal, the plaintiff requested that the defendant admit verbatim the allegations of negligence contained in the complaint. The trial court found that the request was "improper and objectionable on its face, and did not call for a response."[255] The appellate panel, including one judge who had construed the rule narrowly in *Bell*,[256] unanimously reversed. The *Salazar* court easily distinguished *Bell* as being decided on a past version of Rule 1.370, which was "no longer the applicable law."[257] In *Salazar*, the court held that the request in question was permissible both as a "'matter, not privileged, that is relevant to the subject matter of the pending action,'"[258] and as an "'application of law to fact.'"[259] That the request for verbatim admission of the allegations of negligence contained in the complaint undoubtedly went to the heart of the case, and may have constituted conclusions of law as well, went without mention.

In *Shaw v. State ex rel. Butterworth*,[260] the State sued Shaw under Florida's "Son of Sam" law.[261] The State denied Shaw's request that the State admit the ultimate issue in the case, that the videotape, for which the State was seeking to enforce a lien against any sale proceeds, was not an account of the crime for which Shaw had been convicted.[262] Shaw prevailed at trial, and then moved for attorney's fees pursuant to Rule 1.380(c).[263] While holding that there was no entitlement to fees where the request went to the ultimate issue, a subject discussed *infra* in Part V, the

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[255] *Id.* at 133.

[256] *Bell*, 253 So. 2d at 744. Judge Pearson sat on both panels and there was no dissent in either case.

[257] *Salazar*, 360 So. 2d at 134.

[258] *Id.* For this language, the court cites to an unidentified "predecessor to our present Rule 1.370," entitled "Admission of Facts and Genuineness of Documents." *Id.* It appears that it was referring to Common Law Rule 29, adopted in 1950. *See Florida Common Law and Equity Rules, Order Issued November 22, 1949 by Supreme Court of Florida*, Laws of Fla. at 2827 (1950).

[259] *Salazar*, 360 So. 2d at 134.

[260] Shaw v. State *ex rel.* Butterworth, 616 So. 2d 1094 (Fla. 4th Dist. Ct. App. 1993).

[261] FLA. STAT. ch. 944.512 (1989) (providing for a lien in favor of the state on the proceeds of a sale accruing to a convicted felon from any account of the crime for which he was convicted).

[262] *Shaw*, 616 So. 2d at 1095.

[263] *Id.*

court relied on *Salazar* in finding that the instant request was within the scope of Rule 1.370. [264]

In *Arena Parking, Inc. v. Lon Worth Crow Ins. Agency,*[265] the Third District Court of Appeal had the opportunity to revisit its decision in *Salazar.* In *Arena Parking*, the plaintiff requested that the defendant admit it had "promised to obtain the insurance coverage."[266] Since the plaintiff was alleging breach of contract and negligent failure to provide insurance coverage, this request clearly concerned the ultimate issue. Again, the court relied on *Salazar* and held the request to be appropriate.

The law in Florida appears settled on this point. However, federal courts, to the contrary, have held that a request seeking admission of a central fact in dispute is beyond the proper scope of normal discovery.[267]

Recently, the question of whether "duty" is a permissible subject for admissions was answered by the Fifth District Court of Appeal. In *Davis v. Dollar Rent A Car Systems, Inc.*,[268] a case arising out of an intersection collision, the plaintiff was asked to admit that the co-defendant property owner neither had, nor assumed, a duty to keep the property free of vegetation that would obstruct the vision of motorists at the intersection. Based on plaintiff's failure to timely respond, the trial court rendered summary judgment in favor of the property owner.

The Fifth District Court of Appeal first examined the history of Rule 1.370 in the *Davis* case and found that, although its scope had expanded beyond matters of fact, the rule's post-1972 language "continues

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[264] *Id.*

[265] Arena Parking, Inc. v. Lon Worth Crow Ins. Agency, 768 So. 2d 1107 (Fla. 3d Dist. Ct. App. 2000).

[266] *Id.* at 1112.

[267] *See, e.g.*, Olympia Holding Corp. v. Belt Concepts of America, 189 B.R. 846, 853 (Bankr. M.D. Fla. 1995) (citing Pickens v. Equitable Life Assur. Soc'y, 413 F.2d 1390 (5th Cir. 1969); and Kasar v. Miller Printing Machine Co., 36 F.R.D. 200 (W.D. Pa. 1964).

[268] Davis v. Dollar Rent A Car Sys., 29 Fla. L. Weekly D 2627 (Fla. 5th Dist. Ct. App. Nov. 17, 2004), *available at* No. 5D02-599, 2004 Fla. App. LEXIS 17449, at *3.

to make no provision for requests seeking a purely legal conclusion."[269] The court tersely concluded that, because a request regarding whether a duty of care is owed is a "purely legal conclusion," the subject requests were inappropriate and could not support summary judgment.[270] The court neither analyzed nor discussed what a finding of "duty" entailed, or whether it might include the clearly permissible subject of "the application of law to fact" within Rule 1.370(a).

Interestingly, this analysis came in a later, separate portion of the opinion in the court's examination of whether, under the circumstances, the property owner owed a common law duty to passing motorists. The court analyzed the question as required by the Florida Supreme Court's holding in *McCain v. Florida Power Corp.*[271] and found that a duty was owed.[272]

Like the proverbial two ships passing in the night, the court's discussion on the latter issue could well have supported a different result on the former. In discussing and relying on *McCain*, the Fifth District Court of Appeal correctly noted that "the issue of duty is a question of law to be determined by the trial court,"[273] but only after a *factual* analysis is made. As the court also noted, the law will only recognize a legal duty "where a defendant's conduct creates a foreseeable zone of risk,"[274] and after the trial court performs its required examination of "the factual allegations that go to the question of whether a duty was foreseeable."[275] The court's observation, that "the necessary examination of alleged facts, which the Florida Supreme Court recognizes may be essential in determining whether or not a legal duty exists, does not convert the duty analysis into a jury question,"[276] is itself a reasonable definition of the

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[269] *Id.* at 2628.
[270] *Id.*
[271] McCain v. Florida Power Corp., 593 So. 2d 500, 502 (Fla. 1992).
[272] *Davis,* 29 Fla. L. Weekly D. at 2630. The court also certified to the Florida Supreme Court the question of whether such a duty did in fact exist. Should the Supreme Court accept *Davis* to answer this question, it would have the opportunity to rule on whether requests for admissions may permissibly include the subject of "duty."
[273] *Id.* at 2629.
[274] *Id.* (citing *McCain,* 593 So. 2d 500*).*
[275] *Id.* (citing *McCain,* 593 So. 2d 500*).*
[276] *Id.*

permissible "application of law to fact," which would have made the requests in *Davis* quite proper. Furthermore, the court's own conclusion that "the *facts* as alleged would create a duty of care to the decedent under the *particular circumstances* of the instant case"[277] further supports such a result.

In failing to analyze whether the question of duty falls within the post-1972 language of Rule 1.370,[278] as opposed to merely concluding that it does not, the Fifth District Court of Appeal, in yet another way, has contributed to the decline of admissions as an effective procedural device. The irony of this holding will most likely not be lost on practitioners in the civil litigation field who routinely are pressed by trial courts to stipulate as to the applicable duty in a given case.[279]

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[277] *Id.* at 2630 (emphasis added).

[278] Nor was there any discussion of the practical ramifications of finding duty to be a permissible subject under Rule 1.370. If parties can agree through admissions on whether a duty exists, or what that duty may entail, this can only serve to help achieve the main purpose of the rule of reducing litigation, and the secondary purpose of promoting settlement. If requests regarding duty are denied, there is little likelihood that the party doing so will be penalized. *See* FLA. R. CIV. P. 1.380(c) (fees and costs not awardable for denial where "there was other good ground for the failure to admit"). To the extent that courts may be concerned that allowing duties to be stipulated through admissions may take control of such an admittedly important issue out of their hands, there seems little to fear. Rule 1.370(b) makes clear that "Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission for any other purpose nor may it be used against that party in any other proceeding." Even if such a case were appealed, a party admitting to a duty would be hard-pressed to claim error involving that duty. Furthermore, any appellate court rendering an opinion could easily note that the parties had *stipulated* through admissions to a duty *in that case*, and such duty was not endorsed generally by the court. Given the lack of analysis or discussion on this subject by the Fifth District Court of Appeal in *Davis*, it is at least possible if not probable that the court simply and without more wanted to keep the subject of duty unto itself.

[279] In actual practice, attorneys not only are encouraged but are in fact authorized to stipulate to questions involving duty. The former is accomplished by trial judges, who universally in both their pretrial orders and pretrial conferences require stipulations wherever possible to both legal and factual issues to shorten trials (and not excluding issues regarding duty). The latter is found in FLA. R. CIV. P. 1.200(a)(8) and (b)(1), which as part of pretrial procedure authorizes courts to, respectively, "require filing of preliminary stipulations if issues can be narrowed" and "determine ... the simplification of the issues." There is no sound reason to bar admissions to duty under Rule 1.370 when they are not only universally encouraged in practice, but authorized by a separate rule.

J. The Scope of Admissions, Part II: Damages and Prior Testimony

Prior to the 1972 amendments to the rule, requests for admissions as to the amount of damages were held impermissible because they did not fall within the then permitted narrow range of "facts."[280] Even subsequent to 1972, in *Bradford Motor Cars, Inc. v. Frem*,[281] it was held that "[a] plaintiff cannot liquidate damages merely by serving a request for admissions which is not answered."[282] The result has been no different in the United States Court of Appeals for the Eleventh Circuit.[283]

Two cases have carved a narrow exception to this rule, however, holding that damages-related requests pertaining to removal to federal court are appropriate. Thus, in *K Mart Corp. v. Fernandez*,[284] the Second District Court of Appeal held that the trial court erred in upholding plaintiff's objection[285] to K Mart's request that the plaintiff admit she was "claiming damages in the amount of $50,000 or less,"[286] K Mart would have petitioned for removal pursuant to 28 U.S.C. §§ 1332 and 1441 had plaintiff denied it.[287] Although the Second District Court of Appeal denied

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[280] *See, e.g.*, Graham v. Eisele, 245 So. 2d 682, 683 (Fla. 3d Dist. Ct. App. 1971) (holding improper a request that defendants admit that they "owe the plaintiff the sum of $217.00"); Old Equity Life Ins. Co. v. Suggs, 263 So. 2d 280 (Fla. 2d Dist. Ct. App. 1972).

[281] Bradford Motor Cars, Inc. v. Frem, 511 So. 2d 1120 (Fla. 4th Dist. Ct. App. 1987).

[282] *Id.* at 1121 (plaintiff in a property damage dispute asked for an admission that his sports car had a fair market value in excess of $150,000).

[283] *See* Anheuser-Busch, Inc. v. Philpot, 317 F.3d 1264, 1265-66 (11th Cir. 2003) (relying on *Bradford*, and holding in a defamation action that plaintiff's request to admit that he "suffered general damages in an amount not less than $2,000,000 as a result of the facts and circumstances set forth in the Complaint," which went unanswered, could not support the default judgment for such damages).

[284] K Mart Corp. v. Fernandez, 623 So. 2d 846 (Fla. 2d Dist. Ct. App. 1993).

[285] Plaintiff objected that the request did "not seek an admission of fact or law designed to narrow or simplify the issues for trial, nor (is) it ... calculated to lead to the discovery of admissible evidence." She also "purported to be unable at this time to determine the exact amount of damages she might seek at trial." The trial court ruled that "the subject matter of the request is not proper for a request for admissions." *Id.* at 847.

[286] *Id.*

[287] *Id.*

the petition for writ of certiorari *sub judice* because it did not find the requisite prospect of irremediable loss of rights, the court relied on federal case law for the proposition that admissions regarding damages were a proper method to ascertain the amount in controversy for purposes of removal. [288]

In *Sunrise Mills (MLP) Limited Partnership v. Adams*,[289] the trial court sustained plaintiff's objection[290] to defendant's request that the plaintiff admit that she was "seeking damages exclusive of interest and costs in excess of $50,000."[291] The Fourth District Court of Appeal, granting certiorari, found irreparable harm[292] and reversed, holding initially that the requested admission involved the right to removal under federal law which itself was limited by time.[293] Relying on *Steele v. Underwriters Adjusting Co. Inc.*,[294] the court found a clear right to discovery for removal purposes as to the amount in controversy.[295] After noting that, unlike in *K Mart*, the plaintiff had not offered to submit to judgment for less than $50,000, the court rejected the plaintiff's argument "that she had not yet learned whether she can assert damages greater than $50,000."[296] That this was discussed at all was unusual, as the court noted that the argument was

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[288] *Id.* (relying on Steele v. Underwriters Adjusting Co., Inc., 649 F. Supp. 1414 (M.D. Ala. 1986); Bonnell v. Seaboard Air Line R.R. Co., 202 F. Supp. 53 (N.D. Fla. 1962).

[289] Sunrise Mills (MLP) Ltd. P'ship v. Adams, 688 So. 2d 464 (Fla. 4th Dist. Ct. App. 1997).

[290] Plaintiff's sole objection to the request was that it "is not a material evidentiary issue in the case." *Id.* at 465. The Fourth District Court of Appeal strongly disapproved, stating, "Plainly, that objection is legally insufficient, not to mention entirely unfounded. If the amount of damages is not a 'material evidentiary issue' in a personal injury claim, it is hard to imagine what is." *Id.* Obviously, plaintiff's counsel did not wish to be pinned down to conceding either that her damages were less than $50,000, or that her claim should be removed to federal court.

[291] *Id.*

[292] The court certified its disagreement with the decision in *K Mart* "to the extent that it suggests that the kind of order here categorically may not fall within our common law certiorari jurisdiction." *Id.* at n.1.

[293] *Id.*

[294] Steele v. Underwriters Adjusting Co., 649 F. Supp. 1414 (M.D. Ala. 1986).

[295] *Sunrise*, 688 So. 2d at 465.

[296] *Id.*

never made in the trial court, but it did serve to allow the court to express its disapproval of a plaintiff making such an argument.[297]

The propriety of admissions regarding "testimony" is not addressed in Rule 1.370(a), as the word is never used. Logic suggests that "testimony" will often if not always include either "statements of fact" or "opinions of fact," both of which are specified in the Rule as proper subjects for admissions. Despite the fact that "testimony" plays, and has played, a role in virtually every civil case, case law on this subject is sparse.

The Fourth District Court of Appeal in *Curtin v. Deluca*,[298] recognized that "there are valid tactical reasons for obtaining information for use at trial through a request for admissions as opposed to the introduction of deposition testimony."[299] The court cited the fact that using admissions avoids the introduction of other deposition testimony by the opposing party,[300] which, experience shows, is occasionally explanatory but far more often contradictory. The court could have added that a jury hearing such testimony receives no judicial instruction that the facts contained therein have been "conclusively" established, while the jury should be so instructed when receiving admissions.

The language of the requests in *Curtin* was not stated. The court merely mentioned that much of what the requests concerned "had previously been obtained through deposition."[301] This was enough,

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[297] *Id.* The court noted that "the amount of damages suffered by a plaintiff in a personal injury case are uniquely within the knowledge of the claimant," there was no record showing that other discovery was needed from nonparties to make a good faith assertion as to the amount of damages, and plaintiff's complaint alleging damages in excess of $15,000 showed "she obviously has some knowledge as to the amount of the loss she claims." *Id.* In this case, counsel's gamesmanship to avoid removal to federal court did not work.

[298] Curtin v. Deluca, 886 So. 2d 298 (Fla. 4th Dist. Ct. App. 2004).

[299] *Id.* at 301.

[300] *See* FLA. R. CIV. P. 1.330(a)(4) (stating, "[i]f only part of a deposition is offered in evidence by a party, an adverse party may require the party to introduce any other part that in fairness ought to be considered with the part introduced, and any party may introduce any other parts.").

[301] *Curtin*, 886 So. 2d at 301.

however, for the court to hold that the requests constituted record evidence of moving the case forward, sufficient to reverse the lower court's dismissal for lack of prosecution pursuant to Florida Rule of Civil Procedure 1.420(e).[302]

In *Continental Ins. Co. v. Cole*,[303] involving alleged forgery of uninsured motorist coverage rejection forms, the trial court ordered Continental to respond to requests, including the following requests regarding its expert witness's conclusions:

- Admit or deny that Continental's handwriting expert has analyzed the signatures of Phillip H. Cole, June Cole, and J. Lee Cole and has determined that the signature on the application ... is not the signature of Phillip H. Cole.

- Admit or deny that the expert has inspected the ... coverage form with the signatures of Phillip and June Cole and found their purported signatures not to be in their handwriting.

- Admit or deny that the expert found the signature on the uninsured motorist coverage form not to be the signature of J. Lee Cole. [304]

Despite reciting the requests involved, the Fourth District Court of Appeal never reached the issue of whether the requests regarding "testimony" were appropriate. Instead, the court reversed the order on admissions for plaintiff's failure to first serve expert witness

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[302] *Id.*; *see* FLA. R. CIV. P. 1.420(e) (stating that absent good cause, a case in which there has been no record activity for one year or more will be dismissed).

[303] Continental Ins. Co. v. Cole, 467 So. 2d 309 (Fla. 4th Dist. Ct. App. 1985).

[304] *Id.* at 309-10. The opinion does not state how plaintiff obtained the information she asked Continental to admit. It is unlikely that she did so through deposition, as former rule FLA. R. CIV. P. 1.280(b)(3)(A) did not allow depositions of expert witnesses without court order. No such order is mentioned.

interrogatories as required by Florida Rule of Civil Procedure 1.280(b)(3)(A).[305]

In *Richmond v. American Honda Motor Co., Inc.*,[306] however, the Second District Court of Appeal did provide guidance on the issue of whether the requests were appropriate as drafted. There, Richmond sued Honda for damages she sustained while riding a motorcycle she contended was not crashworthy. After serving interrogatories and discovering from Richmond that she intended to call Harry Peterson and Arthur Ezra as expert witnesses at trial, Honda served two sets of requests for admissions. Honda asked Richmond "to admit the substantive testimony" that these witnesses had given in previous cases as well as the instant case.[307] In response, Richmond raised a host of objections and motions for protective order as to the requests.[308] All were denied by the trial court in two orders, causing Richmond to file her petition for writ of certiorari.

The *Richmond* court cited *Continental Insurance* for its holding that interrogatories first had to be served before any other avenues of expert witness discovery could be used.[309] However, once that was done further discovery was possible after motion and order pursuant to Florida Rule of Civil Procedure 1.280(b)(4)(A).[310] Although the motion was by Richmond in opposition to the discovery, and not by Honda to allow it, the

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[305] *Id.* at 311. The court did not foreclose requesting admissions on these testimonial subjects, holding instead that "a request for admissions pursuant to Rule 1.370(a) is an inappropriate method in the *first* instance to obtain discovery regarding another party's expert." *Id.* (emphasis added).

[306] Richmond v. Am. Honda Motor Co., 571 So. 2d 491 (Fla. 2d Dist. Ct. App. 1990).

[307] *Id.* at 492. The court also stated, "Concerning Mr. Peterson, the requests described testimony in depositions or trial transcripts in twelve prior proceedings which were identified by case name and date. Additionally, the requests asked six additional questions concerning Mr. Peterson's opinions in prior testimony or in this case. Honda propounded twenty-three similar requests concerning Mr. Ezra's prior testimony and opinions." *Id.*

[308] *Id.* Richmond raised no objections to individual requests. Instead, she argued that (1) such requests as a whole were not authorized or permitted by the discovery rules, (2) they were nonspecific, (3) they called for an interpretation of the experts' prior testimony, (4) they were unduly burdensome, and (5) if she were required to answer them Honda should pay the cost of preparing the replies. *Id.*

[309] *Id.*

[310] *Id.* "Upon motion, the court may order further discovery by other means . . . ." *Id.* (quoting FLA. R. CIV. P. 1.280(b)(4)(A)).

Second District Court of Appeal implicitly held that the requirement of the rule was satisfied.[311]

In denying the petition by Richmond for failing to demonstrate that she would suffer irreparable injury by complying with the trial court order, the court held:

> At this stage in the proceedings, the trial court has not departed from the essential requirements of the law by denying objections which generally argue that all of these requests are nonspecific or unduly burdensome. The trial court has not compelled the plaintiff to locate transcripts or depositions, which may be difficult for her to find. Since Honda apparently has not provided transcripts of the critical testimony, it is entirely possible that, upon reasonable inquiry, Richmond may be unable to admit one or more of the requests for lack of information. Fla. R. Civ. P. 1.370. Moreover, we do not read the trial court's order as precluding Richmond from seeking costs for the assistance she receives from her experts in answering the requests for admission.[312]

This opinion provides strong support for the ability of counsel to use admissions to "lock in" testimony for use at trial, which under Rule 1.370 would then be "conclusively" established. Most importantly, it is implicit in the *Richmond* holding that prior testimony is clearly an appropriate subject of admissions, notwithstanding the failure of counsel to serve transcripts with the requests.[313] Notably, while *Richmond* factually involved expert witness testimony, nothing therein suggests that admissions regarding non-expert testimony would not also be permitted.

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[311] *Id.*

[312] *Id.* at 492-93.

[313] By far the better litigation strategy would be to serve transcripts with the requests, and thereby avoid the ability of responding counsel to simply reply, because he or she often will not have them, that under Rule 1.370(a) they have "made reasonable inquiry and that the information known or readily obtainable by that party is insufficient to enable that party to admit or deny."

Handed down fifteen years ago, *Richmond* stands as a lonely reminder of how Rule 1.370 can be empowered instead of nullified.[314]

K. Once Requests are Admitted, Upon Whom are They Binding?

Given that the goal of requests for admissions is to eliminate or narrow the issues in a civil lawsuit, one would surmise that admissions served in response are binding on both parties. However, such is not currently true in Florida. Both the Fourth District Court of Appeal, in *Black v. Palm Beach County*, and the First District Court of Appeal, in *Kendrick v. Middlesex Development Corp.*, clearly held that only the responding party will be bound by its admissions.[315] Each court neither discussed nor mentioned the rationale for such a rule, however, and the result has been soundly criticized by one well-known author.[316]

Although the reasons may differ, as a practical matter, there should be no less reliance on an admission by a responding party than by a requesting party. The latter will rely so as to avoid having to prepare and present testimony or other evidence to prove the subject of the request. The responding party will rely, in preparing its opening statement or other portions of the trial, on the fact that an admission read to a jury will be less damaging than live proof for which it could provide no response, and that if the matter truly is admitted, it will not have to face such live proof. Such is often the reason for the admission in the first instance. Moreover, it will

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[314] No other appellate court in Florida has, to any meaningful degree, analyzed admissions in a testimonial context, although *Richmond* was cited in *Syken v. Elkins*, 644 So. 2d 539, 546 n.5 (Fla. 3d Dist. Ct. App. 1994), *aff'd*, 672 So. 2d 517 (Fla. 1996) (citing *Richmond* for its holding that a party through requests for admissions was entitled to discover substantive testimony that experts had given in previous cases).

[315] Black v. Palm Beach County, 342 So. 2d 1034, 1035 (Fla. 4th Dist. Ct. App. 1977); Kendrick v. Middlesex Dev. Corp., 586 So. 2d 436, 437 (Fla. 1st Dist. Ct. App. 1991), *quashed on other grounds*, 577 So. 2d 936 (Fla. 1991).

[316] *See* HENRY P. TRAWICK, JR., TRAWICK'S FLORIDA PRACTICE AND PROCEDURE, § 18-4 n.4 (2003 ed.) ("The federal authority cited in the Black opinion was decided before the 1970 amendment to the federal rule that established the binding effect of the admission. Brook Village North Ass'n. v. Gen. Elec. Co., 686 F.2d 66 (1st Cir. 1982), contains an unimpressive discussion of the reason for adhering to the earlier decision. If admissions are to serve their intended purpose, they must be binding on the parties to avoid unnecessary proof.").

often be better at trial to face a simple conclusive admission, taking seconds to tell the jury, than to endure live testimony followed by resounding silence on cross-examination because the matter truly should have been admitted. Such will rarely if ever serve to promote counsel's candor or overall impression with the finder of fact, be it judge or jury.

Given the holdings in *Black* and *Kendrick,* there is also nothing to keep a requesting party from "sandbagging" his or her opponent by proceeding throughout the litigation with admissions in hand, and then at the last moment, perhaps just before the pre-trial conference, abandoning them. These holdings restricting who is bound by admissions are not only flawed in their basic logic and inconsistent with the purpose of requests for admissions generally; they also provide a fertile ground for unwarranted gamesmanship.

VI. RULE 1.380(C), ALLOWING FEES AND COSTS FOR FAILURE TO ADMIT: THE ENFORCEMENT MECHANISM, RARELY INVOKED

The enforcement mechanism for Rule 1.370 is found in Florida Rule of Civil Procedure 1.380(c):

> Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under rule 1.370 and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may file a motion for an order requiring the other party to pay the requesting party the reasonable expenses incurred in making that proof, which may include attorneys' fees. The court shall issue such an order at the time a party requesting the admissions proves the genuineness of the document or the truth of the matter, upon motion by the requesting party, unless it finds that (1) the request was held objectionable pursuant to rule 1.370(a), (2) the admission sought was of no substantial importance, or (3) there was other good reason for the failure to admit.

Allowing as it does for fees and costs, which counsel have obvious reasons for pursuing, one would surmise that a substantial body of appellate case law exists that is commensurate with broad usage of this rule in the trial courts. As discussed *supra*, such was decidedly not the case before the rule was renumbered to its current form in 1966. Nothing changed from then until 1984, when the Florida Supreme Court deleted the provision allowing a party denying a request to avoid fees and costs where it even believed it "might" have prevailed on the matter. In the twenty-one years since, again, nothing has changed. The appellate landscape of this companion to Rule 1.370 still is not far from barren.

In *Chadwick v. Corbin*[317] in 1985 and *Rabren v. Straigis*[318] in 1986, without mentioning in either case what the requests were or how their subjects were proven, the denials of plaintiffs' motions under Rule 1.380(c) for fees and costs were affirmed where they failed to show an abuse of discretion by the trial court. In *Shaw v. State of Florida ex. rel Butterworth*,[319] discussed *supra*,[320] the Court denied fees claimed by plaintiff under Rule 1.380(c). In explaining that they were not available where the proven matter was a central controverted issue of fact, the Court stated:

> If defendants were correct in their argument that attorney's fees must be assessed, where a party denies a request to admit a fact which is the central issue of fact in the case, prevailing party attorney's fees would become the rule, rather than the exception.[321]

In *Arena Parking, Inc. v. Crow Insurance Agency*,[322] the Third District Court of Appeal acknowledged that Rule 1.380(c) was not clear on whether a party could be assessed fees and costs for denying a matter that

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[317] Chadwick v. Corbin, 476 So. 2d 1366 (Fla. 1st Dist. Ct. App. 1985).
[318] Rabren v. Straigis, 498 So. 2d 1362 (Fla. 2d Dist. Ct. App. 1986).
[319] Shaw v. State of Florida *ex. rel* Butterworth, 616 So. 2d 1094 (Fla. 4th Dist. Ct. App. 1993).
[320] *Id.* and accompanying text.
[321] *See id.* at 1096.
[322] Arena Parking, Inc. v. Crow Ins. Agency, 768 So. 2d 1107 (Fla. 3d Dist. Ct. App. 2000).

went to the heart of the case.[323] Nevertheless, relying on the above cited reasoning in *Shaw*, the court read such a prohibition into the rule and answered in the negative. It did note, however, that "the clear language of Rule 1.380(c) ... contains mandatory language",[324] and in the absence of stated grounds for denying fees the trial court was required to award them for the proving of at least one other request.[325]

The last decision to discuss the availability of sanctions under this rule, as discussed herein one of very few in all, came in 2001 in *Tripp Construction, Inc. v. Verde*.[326] There, several homeowners sued their developer and builder for violation of minimum building codes and breach of contract. Plaintiffs served requests for admission, asking defendants to admit that (1) the plans were not approved prior to construction, in violation of the South Florida Building Code, and (2) when sold, the homes were constructed in violation of the Code. Defendants denied both. At trial, plaintiffs presented uncontroverted evidence that both were true, which likely accounted for the substantial favorable verdict they received.

The trial court granted plaintiffs' motion for fees based on Rule 1.380(c), but awarded them, it appears, for the entire case. The Third District Court of Appeal affirmed this ruling as to entitlement, but reversed as to the amount and directed the trial court on remand to award fees only for the time spent by plaintiffs' counsel in proving the denied requests.

What stands out in this decision is the lack of discussion of whether fees could be awarded in the first instance for these requests, which clearly went to the heart of the case. Only one year earlier, the Third District

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[323] The request for admissions asked defendants to admit, in the case *sub judice* alleging failure to obtain insurance, both that the request had been made and promise given by defendants to obtain it. This, the court held, went to the heart of the case.

[324] *Arena Parking*, 768 So. 2d at 1112.

[325] This request asked defendants to admit that they failed to obtain the additional insurance. By omission, the court apparently left it for the trial court upon remand to decide upon the last two requests. These were (1) that defendants failed to obtain adequate information to advise plaintiff, and (2) that they failed to notify plaintiff that they failed to obtain the additional coverage. These would seem not to go to the heart of the case.

[326] Tripp Constr., Inc. v. Verde, 789 So. 2d 1171 (Fla. 3d Dist. Ct. App. 2001).

Court of Appeal in *Arena Parking*[327] had held that fees could not be awarded for such matters. Possible explanations for these inconsistent holdings are that the three-judge panels in both cases were entirely different, or that defendants in *Tripp* never raised the issue.

These holdings illustrate that Rule 1.380(c) today suffers in its appellate treatment from some of the same problems as Rule 1.370. It is applied with scarcity, thereby indicating some evidence of little use in the trial courts, and, unevenly as well. Such results are not emblematic of a viable and well-functioning admissions scheme. Neither should they contribute to or cause the lack of one, as this article has noted in so many ways.

VII. TOWARD REVIVING AND STRENGTHENING FLORIDA'S ADMISSIONS SCHEME: RECOMMENDED STEPS

When it first created requests for admissions in Florida in 1846, the Florida Supreme Court was clear and determined as to its purpose. Its silence over the past thirty-three years in the face of the numerous District Court of Appeal opinions, discussed in this article, has allowed Florida's admissions scheme to fall into serious disrepair. The Court needs to speak, both clearly and loudly. By rendering an opinion in its appellate capacity, or by adopting rules as part of its biennial review of proposed changes from the Civil Procedure Rules Committee of the Florida Bar,[328] it clearly has both the power and the processes to do so. Whether it has the will, however, is still in question. In the hope that it does, the following are suggested as steps by the Court or the Rules Committee which would decisively revive and strengthen Florida's admissions scheme. Put less formally, these would serve to "put some teeth" into the rule, which was a stated goal of a subcommittee chairman of the Rules Committee as far back as 1998.[329]

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[327] *Arena Parking*, 768 So. 2d at 1112.

[328] *See* FLA. R. JUD. ADMIN. 2.130(c) (providing that beginning in 2002 such reports were to be made on a biennial instead of a quadrennial basis, as had been the case since 1976).

[329] Civil Procedure Rules Committee, *Minutes of the Civil Procedure Rules Committee Meeting of September 4, 1998*, New Business Agenda Item IV ("Ted Babbitt, chairman of the subcommittee, stated the subcommittee would be looking at the request for admissions

A. Require "Excusable Neglect" as Part of Any Motion to Allow Late Filing of Responses to Requests for Admissions

There is no sound reason why a party or its counsel should be required to show "excusable neglect" to set aside a default or default judgment,[330] and to do so in sworn form,[331] but under Rule 1.370 even an unsworn showing may be completely unnecessary.[332] Conclusive admissions due to a failure to respond, if the requests are of sufficient importance, will often have the effect of a default. Second, Florida Rule of Civil Procedure 1.090(b) already requires a showing of excusable neglect by a party seeking an enlargement of time after the expiration of the time specified to do almost any act.[333] Third, the last time the Florida Supreme Court spoke regarding admissions, albeit thirty-three years ago, it held that not requiring a showing of excusable neglect to excuse noncompliance with Rule 1.370 "does violence to the 'spirit of the Rules.'"[334]

As currently worded, Rule 1.370(b) specifically applies to "withdrawal or amendment" of admissions.[335] This more logically means admissions that were in fact served, for which complete or partial withdrawal is sought, than admissions caused by a late response. As a first step toward making counsel and parties more seriously abide by their required response times, and clarifying its meaning in a manner consistent with Rule 1.090(b), the following should be added prior to the last sentence of Rule 1.370(b):[336]

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rule and it wanted to put some teeth into the rule. Anybody wishing to serve on this subcommittee should contact him.")

[330] *See* FLA. R. CIV. P. 1.500(d); 1.540(b). *See also* Hall v. Byington, 421 So. 2d 817 (Fla. 4th Dist. Ct. App. 1982) (requiring that excusable neglect be established by the moving party).

[331] *See Hall,* 421 So. 2d at 817.

[332] *See Melody Tours,* 413 So. 2d at 450.

[333] *See* FLA. R. CIV. P. 1.090(b) ("When an act is required or allowed to be done at or within a specified time by order of court, by these rules, or by notice given thereunder, for cause shown the court at any time in its discretion ... (2) upon motion made and notice after the expiration of the specified period, may permit the act to be done when failure to act was the result of excusable neglect ....).

[334] *See Farish,* 267 So. 2d at 325.

[335] *See* FLA. R. CIV. P. 1.370(b).

[336] *Id.*

> A court may permit a party to serve any untimely response to a request for admission only upon the sworn additional showing that the failure to act was the result of excusable neglect.

B. Florida Rule of Judicial Admininistration 2.060(c) Should be Reinserted into Florida Rule of Civil Procedure. 1.030.

Among other things, Florida Rule of Judical Administration 2.060(c) requires counsel in signing a pleading or other paper to have, to the best of his or her information and belief, "good ground to support it." It has not been physically included in the Rules of Civil Procedure, specifically Florida Rule of Civil Procedure 1.030,[337] since 1978.[338] It should be copied *in toto* and reinserted therein. This would provide the unfortunate, but necessary reminder of counsel's obligation to not serve unwarranted denials to requests for admissions, or any other papers in violation of this rule, and reduce what experience shows is too often the presumptive response of "denied."

C. Responses to Requests for Admission Should be Sworn

From 1950 to 1972 responses had to be sworn, but not since. This requirement should be reimposed by inserting the following sentence in the current text of Rule 1.370(a):

> If objection is made, the reasons shall be stated. *Any response to a request for admission other than an objection shall be sworn to by the responding party.* The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter.[339]

There will be several practical and beneficial effects of doing this.

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[337] *See* FLA. R. CIV. P. 1.030 ("Nonverification of Pleadings").
[338] *Id.*
[339] *See* FLA. R. CIV. P. 1.370(a) (emphasis added).

Most immediately, counsel will be required to communicate, and more than once, with his or her client to determine the accuracy and truthfulness of responses. This already happens when parties respond under oath to interrogatories pursuant to Florida Rule of Civil Procedure 1.340.[340] Counsel either by physically meeting with his or her client or through other means of communication (1) provides the interrogatories, (2) receives information from the client to prepare draft answers, (3) verifies the final answers with the client, and (4) has the client notarize, often in the office of counsel, the answers. Requiring that responses to requests for admissions be sworn will produce the same result.

Second, the nature of the responses will be more serious. While sworn interrogatory answers only state facts, sworn admissions conclusively establish them.

Third, counsel will no longer be able to respond by themselves with unwarranted denials. They will not be able to respond by themselves at all.

Finally, requiring sworn responses will increase even further counsel's efforts to obtain and provide the most accurate responses, as the client will be subject to impeachment in deposition or at trial for anything less. Impeachment with sworn denials, a result no different from a client improvidently and under oath responding "no" to an interrogatory question, will be permitted. This in turn will overrule the holding in *Winn Dixie Stores, Inc. v. Gerringer*[341] barring the use of denials for impeachment.

D. "Conclusively Established" Must Mean What It Says

Perhaps the most prevalent examples of appellate nullification of Rule 1.370 have come in rewriting its requirement that "any matter admitted . . . is conclusively established . . . ." Despite the fact that Rule 1.370(b) requires such a result for untimely or non-response, recent case law has held that where the admissions are caused by untimely or non-

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[340] *See* FLA. R. CIV. P. 1.340 (requiring that "each interrogatory shall be answered separately and fully in writing under oath unless it is objected to.").

[341] *Winn Dixie,* 563 So. 2d at 814.

response, they are anything but conclusive.[342] Affidavits, pleadings and even a general denial in an answer have been held sufficient to eliminate admissions.[343]

The Rule is already both clear and strong, but given the appellate holdings which nullify it, even stronger language is needed. The first sentence of Rule 1.370(b) should be modified to read as follows:

> Any matter admitted under this rule, *including any matter established by a failure to timely respond*, is conclusively established *notwithstanding any other pleadings or record evidence* unless the court on motion permits withdrawal or amendment of the admission.

E. "Unless The Court On Motion" Must Mean What It Says as Well

Rule 1.370(b) is crystalline in requiring a motion to relieve a party from admissions ("*unless* the court on motion permits withdrawal or amendment of the admission.") Nevertheless, at least one court has found otherwise.[344] Another court has turned this requirement upside down by requiring the party requesting the admissions to file a motion to compel a response before admissions can be obtained.[345]

It is difficult to imagine how the current language could be made clearer, but apparently such is necessary. The Florida Supreme Court could accomplish this in one of two ways. It could simply hold that a motion by the party seeking to obtain relief from admissions is absolutely required before any relief can be granted. Alternatively, it could make the following modification to the first sentence of Rule 1.370(b) so as to delineate for any court what the rule plainly requires:

> Any matter admitted under this rule is conclusively established unless the court *first, and only* on motion *made,* permits withdrawal or amendment of the admission.

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[342] *See* discussion *supra* at Part V(C).
[343] *Id.*
[344] *See Pelkey,* 510 So. 2d at 965.
[345] *See Thomas,* 875 So. 2d 758.

F. Admissions Should Be Binding on Both the Requesting and the Responding Party

There is no sound reason to allow, as currently is the case, admissions to be binding only on the responding party. Moreover, such a scheme may encourage "sandbagging." The following modification to the first sentence of Rule 1.370(b) should correct this situation:

> Any matter admitted under this rule is conclusively established *and binding on both the requesting and the responding party,* unless the court on motion . . .

G. The Requirement of "Reasonable Inquiry" in Responding to Requests for Admission Needs Definition

No Florida appellate opinion has ever defined or even discussed the requirements of the "reasonable inquiry" requirement of Rule 1.370(a). Such guidance is long overdue. It most practically can be provided by the Florida Supreme Court in an opinion, as opposed to what would be a necessarily lengthy rules amendment. Whether the Court wishes to adopt for Florida the "reasonable inquiry" requirements as stated in *Concerned Citizens of Belle Haven,*[346] which appear appropriate and well-defined, or provide its own requirements, it should act.

H. Form Interrogatories Should be Adopted for Use with Requests for Admission

The Rules already not only provide for but require the use of form interrogatories in general personal injury negligence, automobile negligence, and medical malpractice cases.[347] Requiring them to be used

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[346] *See Concerned Citizens of Belle Haven*, 223 F.R.D. at 39, and discussion generally *supra* Part IV(D).

[347] *See* FLA. R. CIV. P. 1.340(a) ("If the supreme court has approved a form of interrogatories for the type of action, the initial interrogatories shall be in the form approved by the court. Other interrogatories may be added to the approved forms without leave of court, so long as the total or approved and additional interrogatories does not exceed 30."); *see also* Appendix to Forms for Use With Rules, Standard Interrogatory Forms 1 through 6.

with requests for admission, and without their counting toward the maximum number of 30 interrogatories,[348] would, in addition to the changes recommended above,[349] close the door on improvident or unwarranted denials.

In fact, precisely such a recommendation was previously discussed by the Rules Committee. Its minutes of January 20, 1999 reflect a subcommittee proposal to create and require the use of the following:

> *Form 7. Denial of Requests for Admission*
>
> State as to every Request for Admissions to which you have not responded with an unqualified admission the following:
>
> (a) The number and date of the Request for Admissions.
> (b) All facts known to you, your attorneys, your insurers or anyone else on your behalf upon which you based your response to the Request for Admissions.
> (c) The names, addresses and telephone numbers of all persons who have knowledge of those facts.
> (d) The nature or whereabouts of all documents or other tangible things which support your response and the names, addresses and telephone numbers of the person who has custody or control of that document or thing. [350]

An amended motion that any such interrogatories would not count toward the permissible total was made and seconded. The entire matter, however, was tabled and sent back to the subcommittee by a vote of twenty-five to seventeen.[351] No further mention of the proposal is found thereafter.

Such form interrogatories for required use with requests for

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[348] *Id.*
[349] *See* discussion *supra* Part VI(B), (C) and (G).
[350] Civil Procedure Rules Committee, *Minutes of the Civil Procedure Rules Committee Meeting of January 20, 1999.*
[351] *Id.*

admissions, not counting toward the maximum, was an excellent suggestion at the time. It still is. Counsel and parties would find it nearly impossible to deny, whether in whole or in part, without having good grounds to do so. Counsel either will have facts, witnesses or documents to provide in response to it, or he or she will not. If it is the former, then any denials will likely be well-founded. If the latter, then unfounded denials will be quickly exposed by the sworn responses required.

In the case where a party is responding, as allowed by Rule 1.370(a), that it "has made reasonable inquiry and that the information known or readily obtainable by that party is insufficient to enable that party to admit or deny," the following form interrogatory should be promulgated:

> *Form 8. Inability to Admit or Deny Requests for Admission*
>
> State as to every Request for Admissions to which you have responded that you are unable to admit or deny after having made reasonable inquiry the following:
>
> (a) The names, addresses and telephone numbers of all persons whom you, your attorneys, your insurers or anyone else on your behalf have contacted as part of your inquiry.
> (b) The specific descriptions and dates of all documents or other tangible things you, your attorneys, your insurers or anyone else on your behalf have reviewed.
> (c) All other specific steps that have been taken to make reasonable inquiry.

This form interrogatory differs from the committee-proposed form in one important respect. It makes clear, as should be the case in any response to interrogatories, requests for production or requests for admissions that the party is responding with the knowledge of everyone "on that side." To allow a party to respond to interrogatories, for example, with only his or her knowledge, would be to sanction materially incomplete answers. A simple example would be a party defendant truthfully attesting that he or she knew of no eyewitnesses to the accident, and thereby providing no such names or addresses, when his insurer, who was

providing the defense, knew of several. To close such a loophole, it should also be included in any form interrogatory directed to denials.

I. Definition is Needed as to the Scope of Admissions

The continuing decades-long silence on admissions by the Florida Supreme Court regarding admissions has allowed a vacuum to exist as to their proper scope, which has at best been inconsistently filled by lower court opinions. As discussed, this has proven true for conclusions of law, duty, matters that go to the heart of the case, damages and prior testimony.[352] Definition by the Court, whether through case law, rules amendment or both is very much needed. Such definition could fit within the following proposed scheme.

Conclusions of law should be an appropriate subject for admissions. In practice, albeit not within the confines of Rule 1.370, counsel already are encouraged or required as part of pre-trial procedure to stipulate to legal issues wherever possible. Giving parties the opportunity to agree to such issues through admissions, which might occur with greater frequency and far earlier in the case than one might surmise,[353] would serve to narrow the issues, at an earlier time, and promote settlement. Since obtaining conclusions of law through admissions would not involve proving "the truth of the matter" within the language of Rule 1.380(c), there should be no claim for fees and costs for establishing a "conclusion of law" after denial. That fees or costs should not be available, however, is not a reason to not permit parties to request admission of conclusions of law at all.

Questions of duty should fit even more squarely within an appropriate scope of admissions than conclusions of law. Chief among these reasons is that determining duty requires far greater examination of the facts, itself clearly defined as an appropriate subject in Rule 1.370(a),

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[352] *See* discussion *supra* Part IV(I) and (J).

[353] Experience shows that counsel are far more likely to agree to issues of law, which generally are well known and clearly applicable to a given situation, than to issues of fact. Instead of waiting until shortly before trial to have a mechanism to obtain such agreement, admissions would provide it from the inception of discovery.

than conclusions of law. Since establishment of duty in a given cause may itself be determined by proof of facts, it should not be automatically exempted from the scope of Rule 1.380(c). Courts will still have the discretion not to award fees and costs should they find "other good ground for the failure to admit," as also provided by this rule.

Admissions on matters that go to the heart of the case, to be certain, will not often be given. However, for the same reasons discussed above regarding duty, this is not sufficient reason to exempt them *in toto* from the admissions scheme and deny parties the right to admit them if they wish.

Whether such matters would be appropriate subjects for fees and costs under Rule 1.380(c), if proven by a requesting party, is another matter. The rationale given by the court in *Shaw*[354] in saying no, that if such matters qualified then "prevailing party attorney's fees would become the rule, rather than the exception,"[355] is flawed logic. As is true with duty, courts will still, regardless of any verdict on matters going to the heart of the case, have the power to deny fees and costs upon a showing of "other good ground for the failure to admit" as allowed by Rule 1.380(c). A better reason for not allowing them under this rule is that such claims are substantially controlled by the Proposal for Settlement scheme embodied in Florida Rules of Civil Procedure 1.442 and Florida Statutes section 768.79, which already allows them to be claimed based upon the ultimate outcome of the case.[356]

Discovery and proof regarding damages is a necessary and often time-consuming part of most civil cases. As is argued above regarding conclusions of law, duty, and matters that go the heart of the case, there is similarly no sound reason why damage amounts should be automatically exempted from the scope of admissions, or limited to jurisdictional questions. Allowing parties to use admissions to stipulate to damages in a

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[354] *See Shaw*, 616 So. 2d at 1095.

[355] *See generally id.*

[356] Generally, this rule and statute combine to create a comprehensive scheme for the shifting of fees and costs, triggered upon (1) a plaintiff receiving judgment against a defendant for 25% or more in excess of the amount it had proposed to accept in settlement, or a (2) defendant having judgment entered against it for an amount which is 25% or more under the amount it had proposed to pay in settlement.

given case if they wish to do so can serve only to narrow the issues, a recognized goal of admissions,[357] and thereby eliminate unnecessary litigation. Such stipulations will certainly not occur in every case, but they will in some as parties realize there may be much to be gained by eliminating damages as an issue in the case. One advantage will be the saving of significant amounts of cost monies, typically in the form of payments for depositions or testimony at trial of medical experts. A second will be concluding discovery, now concerning only liability, far more quickly, and thereby obtaining much earlier trial dates. This would also help to alleviate crowded court dockets, an advantage for the system as a whole. A third advantage, of many more that will likely appear to litigating counsel statewide should this be permitted, will be that chances of settlement in such cases will be enhanced. Parties that have already settled on damages, leaving only questions of liability or comparative negligence, will be that much closer to reaching full settlement without a trial.

This recommendation is made with two provisos, however. First, for the same reasons stated above, for matters that go to the heart of the case, a denial of requests regarding the amount of damages should not be subject to a claim of fees and costs under Rule 1.380(c). Second, for the same reasons argued above regarding admissions generally, admissions on damages must be binding on both parties.

Facts stated in prior testimony should be permissible subjects of requests for admissions, as is currently the case. Given that such requests concern proof of facts, denials clearly[358] should result in exposure to fees and costs under Rule 1.380(c).

VIII. CONCLUSION

This article has suggested various amendments that can and should be made to these rules. Incorporating them together would produce in pertinent part the following:

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[357] *See* Davison v. First Fed. Savings & Loan Ass'n of Orlando, 413 So. 2d 1258 (Fla. 5th Dist. Ct. App. 1982).

[358] *See* FLA. R. CIV. P. 1.380(c) ("If a party fails to admit . . . the truth of any matter . . .").

Rule 1.370. Requests for Admission

Request for Admission. A party may serve upon any other party a written request for the admission of the truth of any matters within the scope of rule 1.380(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, *conclusions of law, duty, matters that go the heart of the case, the amount of damages or facts obtained through testimony, and* including the genuineness of any documents described in the request.

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... If objection is made, the reasons shall be stated. *Any response to a request for admission other than an objection shall be sworn to by the responding party.* The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. ....

Effect of Admission. Any matter admitted under this rule, *including any matter established by a failure to timely respond,* is conclusively established *and binding on both the requesting and the responding party notwithstanding any other pleadings or record evidence* unless the court *first, and only* on motion *made,* permits withdrawal or amendment of the admission. Subject to rule 1.200 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be served by it and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining an action or defense on the merits. *A court may permit a party to serve any untimely response to a request for admission only upon the sworn additional showing that the failure to act was the result of excusable neglect.* Any admission made by a party under this rule is for the purpose

of the pending action only and is not an admission for any other purpose nor may it be used against that party in any other proceeding.

Form Interrogatories to be used With Requests for Admission. Any party serving requests for admission may also serve those form interrogatories intended for use with admissions found in the Appendix to these Rules. Said interrogatories shall not count toward the total of 30 interrogatories as stated in rule 1.340(a).

Rule 1.380. Failure to Make Discovery: Sanctions

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(c) *Expenses on Failure to Admit.* If a party fails to admit the genuineness of any document or the truth of any matter as requested under rule 1.370, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, *except for matters regarding conclusions of law or the amount of damages,* the requesting party may file a motion for an order requiring the other party to pay the requesting party the reasonable expenses incurred in making that proof, which may include attorneys' fees. The court shall issue such an order at the time a party requesting the admissions proves the genuineness of the document or the truth of the matter, upon motion by the requesting party, unless it finds that (1) the request was held objectionable pursuant to rule 1.370(a), (2) the admission was of no substantial importance, or (3) there was other good reason for the failure to admit.

Contingent upon the Florida Supreme Court revisiting its own admissions scheme and making the necessary corrections, whether through amending Rules 1.370 and 1.380 or through its opinions, or both, not just salvage but reinvigoration is possible. There is no question that such certainly is necessary, as the current scheme is in dire need of repair.