Rule 36: In Praise of Requests to Admit

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Litigators file interrogatories in most substantial lawsuits. Few routinely file requests to admit. Yet answers to interrogatories are rarely as useful as the responses that must be made to well-framed requests to admit.

Requests are not useful tools for discovering the unknown. They are best used to establish the undisputed, relieving the parties of the need to prove such matters and shortening the trial. Formulating the request helps structure the case because the lawyer must think through the basic elements and how he will prove them. The request to admit can also be used as the basis for a summary judgment motion. Here are ten reasons why a litigator should consider using requests to admit.

First, the request to admit can cover almost any issue, simple or complex. Anything discoverable pursuant to Rule 26(b) of the Federal Rules of Civil Procedure can be the subject of a request to admit under Rule 36. The requests can go beyond the "facts" of a case. They can relate "to statements or opinions of fact or of the application of the law to fact, including the genuineness of any documents described in the request."

Requests to admit can reach those legal theories that are at the heart of a dispute. Although you cannot ask an admission to an abstract proposition of law, if your request applies the law to the facts of your case it is permissible. Only privileged matters that are immune from discovery under Rule 26(b) are improper subjects for requests to admit.

Second, the recipient of the request to admit cannot avoid answering because he personally does not know the answer if the needed information is reasonably within his possession. Under Rule 36, the answering party can only avoid the admission if he "has made reasonable inquiry

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and . . . the information known *or readily obtainable by him* is insufficient to enable him to admit or deny" (emphasis added).

For example, the answering party need not prepare an elaborate computer program to answer a request. But if the facts sought to be established are available in an existing form, such as a computer tape, the information is "readily available." And the answering party cannot object that the request asks about a matter within the knowledge of the proponent of the request or a matter of public knowledge. The request is not a device to discover information, but to eliminate issues otherwise to be proven at trial.

Successive Sets

Third, whereas many jurisdictions stringently limit the number of interrogatories a party can pose without leave of court, no similar limitation exists for requests to admit. Indeed, in one patent case the court approved 704 separate requests to admit that took 114 legal-sized pages. *Photon, Inc. v. Harris Intertype, Inc.*, 28 F.R.D. 327 (D. Mass. 1961).

The rules recognize the value of requests to admit by not limiting their number. A party can serve multiple requests to admit as he learns more about his case and the facts. Courts do not treat successive sets of requests to admit as burdensome or oppressive in complex litigation. *United States v. Watchmakers of Switzerland Information Center, Inc.*, 2 Fed. R. Serv. 2d 605 (S.D.N.Y. 1959).

Fourth, a court and the parties can readily determine proper requests to admit. Rule 36 states that "(e)ach matter of which an admission is requested shall be separately set forth." Requests to admit should be simple and direct statements of single propositions. Most judges can determine at a glance whether requests to admit are well-formulated and focus on the facts in dispute. Although well-drafted requests to admit are likely to withstand objections, poorly drafted requests that are verbose, lengthy, and compound will be struck. *Baldwin v. Hartford Accident & Idemnity Co.*, 15 F.R.D. 84 (D. Neb. 1953).

Fifth, requests to admit can be served upon the plaintiff *at any time* after the commencement of the lawsuit and upon any other party with or after the service of the summons and complaint upon that party. Nothing expedites discovery and brings the litigation to a head faster than filing requests to admit at the beginning of a lawsuit. You may not have to depose a witness at all if the facts that he knows are not in dispute. The recipient of the request must answer or object within 30 days, or within 45 days if the requests are served with the complaint. The court may lengthen or shorten the time allowed for answer.

Sixth, delaying answers to requests to admit without court approval is useless. The matter requested is deemed admitted if the recipient remains silent or does not deny the requested matter within the time

allotted by the rule. If more time is needed, the recipient must ask the court for it.

Seventh, sweeping denials or evasive answers are ineffective if the proponent of the request presses the matter. Rule 36 provides:

> A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder.

You can make evasion more difficult if you append an interrogatory to the request: "If you deny the request, set forth each fact upon which you base your denial." Answering the interrogatory may be more burdensome than admitting the request. This technique eliminates frivolous denials.

Eighth, although requests to admit are not self-enforcing, Rule 36 provides for court enforcement if the recipient of the request seeks to avoid answering by forbidden means. The proponent of the request may ask the court to rule on the sufficiency of an objection. If the reasons for not admitting the request are frivolous or inadequate, the court has several options: (1) the answers can be struck or taken to be admissions; (2) new answers can be ordered; (3) the answers can be taken as denials, permitting Rule 37(c) sanctions if the proponent is put to the burden of proving the matter requested to be admitted. *Bertha Building Corp. v. National Theatres Corp.*, 15 F.R.D. 339 (E.D.N.Y. 1954).

Evasive Answers

Indeed, courts have treated evasive answers or equivocal responses as admissions that will support motions for summary judgment and dismissals of the suit. *United States v. Jefferson Trust & Savings Bank*, 31 F.R.D. 137 (S.D. Ill. 1962). Courts have also said that no good reason exists to tolerate "straddling statements," such as a refusal to admit or deny, in response to requests to admit. *Princess Pat, Ltd. v. National Carloading Corp.*, 223 F.2d 916 (7th Cir. 1955).

Ninth, an admission conclusively establishes for the entire action the factual or legal proposition it sets out. It can be used in the pending litigation either in a motion for partial or full summary judgment or at a trial of the matter.

As an example, in one case an insurance company paid a bank on a claim that a bank officer made an illegal investment, although the coverage under the insurance policy was not clear. The insurance company felt confident that it could recoup its payment from the bank's accountants and brought a third-party claim against the accountants. After the insurance company spun elaborate but tenuous theories of liability and deposed 29 witnesses, the accountants served almost 200 requests to

admit covering every factual aspect of the case. The accountants used the answers to these requests as the basis for a successful motion for summary judgment that was sustained upon appeal. *Rock River Savings and Loan Association v. American States Insurance Company*, 594 F.2d 633 (7th Cir. 1979).

Tenth, substantial sanctions are available against the party denying the request if the genuineness of the document or the truth of the matter is proved at trial. In that situation, Rule 37(c) of the Federal Rules of Civil Procedure provides that the court *shall* order the party making the denial to bear the reasonable expenses, including reasonable lawyers' fees, incurred in proving the denied matter. Take the party who denies a simple fact that is costly to prove, such as that delivery was made in many states. The costs of bringing witnesses from those states would be recoupable under Rule 37(c). No similar sanction exists for a recalcitrant failure to stipulate on the same issue.

Improper denials lay the groundwork for shifting the costs of proof. To avoid awarding expenses, the court must expressly find that one of four excuses applied: (1) the court must previously have found the request to admit to have been objectionable under Rule 36(a); (2) the admission must have been of no substantial importance; (3) the party failing to admit must have had reasonable grounds to believe that he might prevail on the matter; or (4) some other good reason must have existed for the failure to admit, such as a good-faith lack of knowledge or that the requested matter was genuinely contested.

Requests to admit are one of the most effective tools for cutting litigation costs and narrowing the matters to be tried. But, they are used infrequently.

At a time when lawyers are criticized for the costly discovery they generate, the request to admit should be used more often.