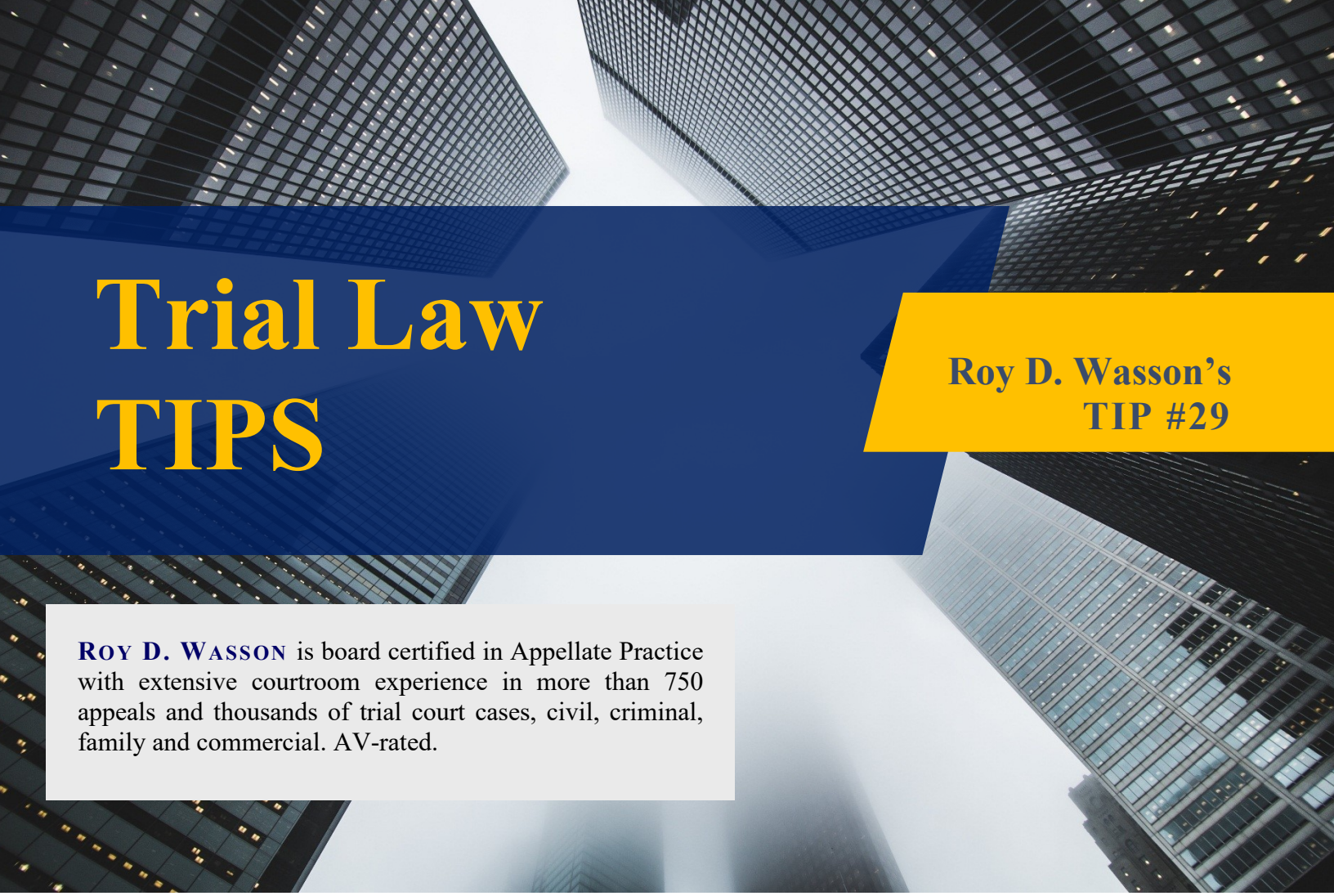

Trial Law TIPS

Roy D. Wasson's TIP #29

Roy D. Wasson is board certified in Appellate Practice with extensive courtroom experience in more than 750 appeals and thousands of trial court cases, civil, criminal, family and commercial. AV-rated.

Requests for Admissions— Maximizing the Benefits

Introduction

The defense is two days late in responding to your requests for admissions, which included requests to admit that the defendant was negligent and proximately caused your client's injuries. Can you get a summary judgment based on such an admission? Would your answer be the same, even if there is a deposition by the defendant in the court file in which he testified that he did not do anything wrong to cause the accident?

One week later you receive in the mail some denials of the requests for admission, which contain some lame excuse that the defense attorney only recently received the copy of the

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requests that you mailed him or her more than a month ago. Can you strike those untimely denials?

In another case, the defendant timely denied requests for admissions seeking the same sort of thing—that the defendant was negligent and proximately caused the accident—but you have now gone to trial and proven that defendant's negligence. Can you get attorney's fees for having to prove the fact of the defendant's negligence, when that should have been admitted before trial? What about your fees for having to prove up other aspects of the case, such as who had the red light at the intersection and who was the owner of the defendant's car?

Wouldn't it be nice to get your attorneys' fees for trying the case you just won, even if the lawsuit is not against an insurance company and there was no contract, proposal for settlement, or other usual basis for fees? Here are some ideas for maximizing the utility of requests for admissions, and some cautions so you do not build error into your record.

Propriety of Seeking Admissions on Ultimate Issues

Like a hundred times before (or a thousand times if you are as old as some of us), you are cooling your heels in the hallway of the local courthouse, waiting for a defense attorney who is getting paid by the hour to take his or her time to show up for the motion calendar. Pending before the judge is the defendant's motion to strike one of your requests for admission. Defense counsel has stated in her motion that your request should be stricken because it seeks admissions on the ultimate issues that her client was negligent, and that such negligence was the proximate cause of the injuries and damages you are seeking.

You argue to the judge that your request is proper because Fla. R. Civ. P. 1.370(a) provides that "[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." However, defense counsel

argues that his or her objection is not just that the requested matter "presents a genuine issue for trial." Instead, she argues, your request is objectionable because it does not seek a factual admission at all; but that you are seeking resolution of the ultimate issues in the case, which involves an application of law to disputed facts. Who wins? You do.

Rule 1.370 used to be more limited and only provided a basis for a request that the other side admit "the truth of any relevant ***matters of fact*** set forth in the request." *See City of Miami v. Bell*, 253 So. 2d 742, 744 (Fla. 3d DCA 1971)(emphasis added). However, the rule was later amended to permit requests for admissions "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." Fla. R. Civ. P. 1.370(a)(1972 amendment)(emphasis added).

At least one appellate case has squarely held that the amendment to Rule 1.370 permits plaintiffs to request that the defendant admit his or her own negligence: *Salazar v. Valle*, 360 So. 2d 132 (Fla. 3d DCA 1978). However, you may decide that it is better for you to request the defendant to admit the various underlying factual elements of negligence, or to combine such requests with the request on the ultimate issue, rather than simply seeking an admission on the ultimate issue.

Attorneys' Fees on Failure to Admit

Let's see a show of hands on this one: How many of you out there in Litigation Land have ever had the defendant admit each and every one of the request for admission which you served upon defense counsel? [No hands are raised.] Next question: How many have gone to trial and taken the time to prove facts which the defense should have admitted? [Everyone's hands are raised.]

Last question: Who among you have recovered attorneys' fees for your trial time spent establishing those facts which should have been admitted? [only a few hands are

raised.] What happened to the rest of you out there, did you forget that you are entitled to fees for your time in such a situation? Sometimes we are so overjoyed at winning the trial that we forget to tie up loose ends such as attorneys' fees motions. Another reason that these motions may be so infrequent is that the rule authorizing fee awards under these circumstances is not part of Rule 1.370, but is within the rule on discovery sanctions, Rule 1.380.

Subsection(c) of Rule 1.380 provides as follows:

> Expenses on Failure Admit. If a party fails to admit the genuineness of any document or the truth or 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 apply to the court for an order requiring the other party to pay the requesting party the reasonable expenses incurred in making that proof, ***which may include attorney fees***. The court shall make the order 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.

(Emphasis added).

[Ripple of excitement begins to swell as readers remember recent trials in which they proved negligence, after defendant had denied liability.] Not so fast, lodestar-breath, you cannot get fees for successfully litigating the ultimate issue proved at trial, based simply on a denial of that ultimate issue. (No fees if you asked the defense to admit that it was negligent, and that was denied.)

"Wait a minute!" you exclaim. "Didn't you just say that a request for admission is not objectionable simply because it asks the defendant to admit that it was negligent or otherwise goes to the ultimate issue for trial? So why can't I get my fees

for proving negligence then?" The answer is that you might well be able to get your fees, but you need to lay the groundwork with some more basic requests for admission first.

In *Shaw v. State of Florida*, 616 So. 2d 1094 (Fla. 4th DCA 1993), the court held that a request to admit that the defendant was negligent was not objectionable, but the denial of such a request would not necessitate an award of attorneys' fees, holding as follows: "If defendants were correct in their argument that attorneys' 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." *Id.* at 1096.

One other case following the holding of the *Shaw* decision and reversing an award of attorneys' fees based upon denial of an admission directed to the ultimate issue is *Arena Parking, Inc. v. Lon Worth Crow Ins. Agency*, 768 So. 2d 1107 (Fla. 3d DCA 2000). However, that case provides a ray of hope to the successful litigant who has proven the basic facts at trial which comprise the ultimate issue, where the defendant had denied those basic facts in addition to denying the ultimate fact in the case.

The *Arena Parking* case was a lawsuit against an insurance agency based upon its negligent failure to procure insurance requested by the insured in which the defendant had refused to admit requests including the following: "that the president of Arena Parking, Gonzalez and the vice-president of Ambassador Events had a three-way conference call at which time plaintiff requested that it and FEC be named as additional insureds on Ambassador's policy of insurance and that the Agency and Gonzalez promised to obtain the insurance coverage." 768 So. 2d at 1111-12. Finding that the subject request went to the ultimate issue in the case, and citing the Fourth District's decision in *Shaw supra*, the Third District held: "We agree with that reasoning and hold that expenses incurred by a successful litigant as a result of the opposing party's failure to admit requests for admissions may not be

assessed against the opposing party for denying a request to admit a hotly-contested central issue to the case." *Id.* at 1113.

However, the court in the *Arena Parking* case made it clear that attorneys' fees are recoverable for the time expended in proving the basic facts of the case, where requests for admissions of those ***basic facts*** were denied. The Third District remanded the case to the trial court for determination whether fees should have been awarded based upon the insurance agency's denial of a request to admit that it "failed to obtain adequate information to advise Arena Parking" and one which asked it to admit it "failed to notify Arena Parking that they failed to obtain additional insurance coverage."

If a request for admission had been served concerning the simple fact that a telephone call had occurred between the insured and the agency, that request would not have involved one of those ultimate facts which cannot support an award of fees, but would be almost as important as the request No. 1 in the *Arena Parking* case. Usually in cases involving the failure to procure insurance, the agent denies that the call took place at all, as opposed to admitting the call but denying the content. Had the plaintiff asked the defense to admit that the call had been placed, she could recover fees for establishing the fact of the call, which seemingly would be same amount as would be incurred in proving the ultimate issue of the agency's failure to act on the request for insurance.

The message here is simple. Don't just ask the defendant to admit the ultimate issue, say of negligence. In addition, ask the defense to admit basic facts such as the "traffic signal was red when defendant's vehicle entered the intersection," and so on. While the fees normally thought of as being recoverable for proving matters which should have been admitted are those fees ***for attending trial*** and establishing those facts before the jury, the question arises whether the expense of ***discovery*** pertaining to those facts should also be recoverable. For example, if the defense admits that it ran the red light, you may decide not to take the

deposition of a listed witness on liability. If that request is denied by the defendant, and you are entitled to your fees for establishing at trial the color of the traffic signal, then it would stand to reason that you should get your fees for deposing the fact witness as well.

The message here is one of timing. You obviously will encounter the argument that fees for taking depositions should not be recovered if those depos were taken before the request for admissions involving that issue were served. You may want to think about sending out your request for admissions before taking other discovery, to smooth the road for getting fees for taking depositions necessitated by denials after winning at trial.

Crafting Useful Requests for Admissions on Contested Basic Facts

Once in a while you can actually get an admission on something important enough to read it to the jury and save some headaches in getting witnesses to trial. But you need to make the requests short and sweet and pose them in a variety of ways to box-in the defense.

Where the defense has denied liability, it can be very useful to create a detailed set of requests for admissions on every aspect of liability. For example, if the speed limit was 30 m.p.h. and your client's car has crush damage consistent with a 55 m.p.h. impact, you really cannot expect most defendants to admit a single request, such as "You were driving in excess of 50 m.p.h. at the time of the impact." If that is the only way you ask the question, the defendant could rationalize a denial by convincing herself that she was only going 49 m.p.h.

If instead you had several separate requests pertaining to speed (i.e., one that asks "You were driving in excess of 50 m.p.h., " and others that ask "in excess of 45 m.p.h./40 m.p.h./ 35 m.p.h."), the chances are greater that the defense will come

clean and admit one or more of them, and establish a statutory violation for you to use at trial.

Along those lines concerning other liability issues, you could create a few requests of basic fact which you might use to good advantage before the jury, no matter which one or ones were admitted. How about asking the defense to admit these:

–Your vehicle's brakes were in proper working order at the time of impact.

–Your vehicle's brakes were not in proper working order at the time of impact.

–You do not know one way or the other about whether your vehicle's brakes were in proper working order at the time of impact.

–Your vehicle was accelerating at the time of impact. [If yes, the defendant was recklessly making her car go even faster when she broadsided plaintiff.]

–Your vehicle was decelerating at the time of impact. [If yes, and your expert extrapolates impact speed at 50 m.p.h.-plus, the defendant was flying just prior to that at even greater speed.]

–Your vehicle was traveling at a constant speed at the time of impact. [If yes, the defendant has admitted that he was not trying to slow down, but was just blindly ignoring your client in the path of danger.]

–The traffic signal for your vehicle displayed red when you entered the intersection.

–The traffic signal for your vehicle displayed red when your vehicle was still more than ten [or twenty or thirty or forty, etc.] feet from entering the intersection.

With a little imagination, you could design dozens of applicable requests. Hey, why not give the defense some of their own usual medicine with a thorough set of requests, attacking every issue from every angle? Note that there is ***no limit to the number*** of such requests like there is for interrogatories.

Why bother with taking the time to create such a set? The more choices you give the defense, the greater the chance that one or more will be admitted, as compared to asking for an admission like "you negligently entered the intersection at a rate of speed far in excess of the speed limit against the red light." If the defendant tells the truth and admits some of those which establish violations of traffic statutes, you have a leg up in proving negligence at trial. If the defense denies them all, you have a good basis for a fee award for your entire time in establishing liability at trial. Imagine how much better it would be to get ***all of your fees*** for trial awarded—in an ordinary car crash (or other tort) case—on top of a decent verdict.

One final thought on a reason to ask numerous questions on each subject of the contested issue or event, boxing-in the defense to one position or the other ("you were/ you were not; you did/you did not; you know/ you do not know; you turned/did not turn"). Rule 1.370 does not allow a party to claim inability to admit or deny "unless that party states that the 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." If the defendant claims inability to admit or deny any and all of your requests in a given area, that might support a motion in limine to prevent the defendant from testifying about the facts of the collision/incident or limiting the areas of trial testimony. [I have never seen this attempted, much less succeed, but there is a first time for everything, right?]

I can hear your argument at the pretrial hearing now: "How could the defense have come in here six months ago,

judge, and claimed such a total lack of information about the facts of the accident that they could not admit any of my requests about speed/distance/braking/signal color, and now they want the defendant to come into this courtroom and swear under oath that the light was green/the brakes failed/she was driving under the speed limit [etc.]?"

Or maybe at the hearing on your motion to compel admissions or denials—where such "unable to admit or deny" responses have been raised— you can get the defense to admit some basic facts establishing negligence by planting the seed: "Well I guess then, judge, that the defendant will not be trying to take the witness stand and tell us how the accident occurred, because today she is telling us that she has made reasonable inquiry, yet still does not know what happened."

Useful Roles for Admissions on Seemingly-Uncontested Issues

Very rarely do I see requests for admissions being put to their most promising use, which is establishing non-controversial matters that you still need to be able to establish at trial. For example, who needs the headache of calling the medical examiner as a witness to establish that the cause of a decedent's death was the traffic accident you have sued upon, when no one could really argue any other cause of death? Where defense counsel is someone you know and can trust, you either will work out a stipulation on that fact, or otherwise dispense with the issue without worry. A stranger just might move for a directed verdict one day, arguing that you have not proved that his client caused the death. That is the sort of routine matter that you can and should be able to establish at trial with a request for admission.

For the greatest chance that the defense will admit anything, keep the request short, sweet, to the point, and non-argumentative. For example, you are much more like to get an admission from a request to admit "that the plaintiff's decedent's death was caused by the traffic collision which is

the subject of the complaint in this lawsuit," than if you seek an admission "that the grieving widow's loving husband horribly perished in a fiery tragedy resulting from a collision with the defendant's poorly maintained vehicle." Make it easy for the other side to simply provide you with a one-word response. [This also is a good strategy for drafting complaints.]

There are lots of non-controversial—but still very important—facts which you need to be ready to establish at trial, should your expectation of a stipulation be wrong. Just some of those areas are as follows: Ownership of vehicles; parental relationship; and the fact of notice to state agencies.

Be ready with responses to requests for admission on those points and pull them out just in case the defense tries to blindside you with a motion for directed verdict on something you thought was a non-issue. It sure will be easier than trying to track down a witness who already has been discharged from a subpoena and left town.

Admissions to Lay Foundation for Documents in Evidence

Another very useful role for requests for admissions at trial is in laying the foundation for documents without the need to call records custodians, corporate representatives or other witnesses to lay the foundation. I'm sure that there are those among the readers of this Tip who believe that there is no reason to waste your time with preparing requests for admission on the foundation for such documents, thinking to yourself "well, if the defense attorney is going to admit the admissibility of these medical records then he is going to do it anyway at trial without me having to file this pleading." Many of you would just be comfortable with a letter confirming your agreement that records custodians need not be called to establish authenticity of documents.

Maybe I am the only one that this has happened to, but I have faced objections to the admissibility of medical records and other non-controversial documents on the ground that they

were "hearsay," the opposing counsel arguing (with a straight face) that his stipulation to "authenticity" and dispensing with the need to call records custodians somehow preserved his objection that given documents were inadmissible under the business records exception to the hearsay rule. I could have slugged that guy, when the trial judge made us go through several stacks of medical records page-by-page to get them into evidence, when I thought I had an agreement.

Even if you plan to call witnesses to authenticate important documents, you should send requests for admissions as a fallback. As with the example of admissions concerning facts such as the cause of the decedent's death, requests for admissions concerning admissibility of documents should be very short and to the point. You should consider serving both a general request summarizing the grounds for admissibility, as well as specific requests in case the general one is denied. For example, if the key document in a case was a copy of a letter from your client to the defendant which was found in the defendant's files, you could structure requests for admission along the following lines:

> Admit that the document attached as Exhibit A is a true copy of a letter written by the Plaintiff to the Defendant dated [date] which was received by the Defendant, placed in its file at its place of business, and is admissible in evidence at the trial of this action.
>
> Admit that Exhibit A is a letter dated [date] bearing the Plaintiffs signature.
>
> Admit that Exhibit A was received by the Defendant.
>
> Admit that Exhibit A was maintained in the ordinary course of business in the Defendant's files.

[You get the picture.]

Withdrawal of Admissions

Although it is a a lot of fun when the time passes for the defense to respond to your request for admissions and nothing is filed by the defense attorney, the practical effect of a defendant's failure to timely file responses is minimal. There are many cases which reverse summary judgments and other trial-level results which are based upon admissions which the defendant claims were the result of excusable neglect. One of the more recent cases reversing a summary judgment based upon the failure to timely deny requests for admissions—where there was evidence in the record apart from the admissions sufficient to create a fact issue—is *Mahmoud v. King*, 824 So. 2d 248 (Fla. 4th DCA 2002). The Fourth District in that decision cites many of the other cases from around the state on that point and summarizes their holdings as follows:

> Simply stated, we deem it an abuse of discretion to refuse to relieve defendants of the effect of the admissions under the circumstances and that summary judgment should not have been entered where the papers filed by defendants clearly denied liability and alleged instead that (in substance) any injury resulted from plaintiff Henry's own conduct. In *Love v. Allis-Chalmers Corp.*, 362 So. 2d 1037 (Fla. 4th DCA 1978), where the circumstances are functionally indistinguishable, Judge Downey explained the construction this district places on rule 1.370 as well as the entry of summary judgment based on a failure to make a timely response to requests for admissions:
>
> > "the rule...has been liberalized...to allow the rectification of an improper response to a request for admissions by allowing withdrawals 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 him

> in maintaining his action or defense on the merits.' . . .
>
> 362 So. 2d at 1039; *see also Habib v. Maison du Vin Francais, Inc.*, 528 So. 2d 553, 553 (Fla. 4th DCA 1988) ("Clearly, the courts have expressed a preference for reaching the merits of a case as evidenced by the holding[] in the *Love* case[]."); *Sterling v. City of West Palm Beach*, 595 So. 2d 284, 285 (Fla. 4th DCA 1992) ("The use of admissions obtained through a technicality should not form a basis to preclude adjudication of a legitimate claim."); and *Magula v. Gossett*, 620 So. 2d 249 (Fla. 4th DCA 1993)(following *Sterling*). . . . *See Sher v. Liberty Mut. Ins. Co.*, 557 So. 2d 638 (Fla. 3d DCA 1990) (" 'the withdrawal of the technical admissions and acceptance of the belated response would serve to facilitate the presentation of the case on its evidentiary merits.' ***Trial courts are required to look beyond the pleadings to determine the propriety of entering summary judgment. Here, the record is replete with evidence contradicting the admissions created by Sher's failure to file a timely response***."); *Stembridge v. Mintz*, 652 So. 2d 444 (Fla. 3d DCA 1995)("entry of summary judgment based solely on Stembridge's failure to respond to requests for admissions was inappropriate."); *Brown v. Travelers Indemnity Co.*, 755 So. 2d 167 (Fla. 3rd DCA 2000) (entry of summary judgment based solely on failure to respond to requests for admissions is inappropriate); and *Ruiz v. De Varona*, 785 So. 2d 508 (Fla. 3d DCA 2000) ("dismissal based solely on the failure to timely answer a request for admissions would be inappropriate when the pleadings make clear the opposing party's position and the existence of disputed facts.").

824 So. 2d at 250-51(emphasis added). It would appear that you would be leading the trial court into error to oppose a motion for relief from admissions where the other side has

filed an affidavit of non-receipt and you have no hard evidence to refute that claim.

Necessity of Motion to Withdraw Admissions

One angle you may try to utilize if the other side fails to timely respond to your request for admissions is to hope that your opposing counsel simply tries to belatedly deny the request, or argue against their effectiveness, without filing a motion for relief from the effects of the admissions. While the cases are in conflict on this point, there are some cases holding that a party should not be relieved of its admissions in the absence of a proper motion seeking to withdraw the admission. While other cases have held that a trial judge should consider arguments inconsistent with the admissions — where grounds are presented why the failure to deny was excusable— the court seemed to be about evenly split on this point.

In one of the most recent cases on this topic, the Second District cited the conflict on this issue and joined the courts which have held that a motion is required before relief from admissions may be granted. *See In Re Forfeiture of One 1982 Ford Mustang*, 725 So. 2d 382 (Fla. 2d DCA 1998). The court in that case held as follows:

> Under the Florida Rules of Civil Procedure, failure to supply a written answer to a party's request for admissions results in an admission. See Fla. R. Civ. P. 1.370(a). However, the rules also authorize the courts "on motion" to permit amendment of the admission if the presentation of the merits will be served and the party who obtained the admission fails to prove it will prejudice their case. See Fla. R. Civ. P. 1.370(b). Our sister courts disagree as to whether rule 1.370(b) requires a motion before a court can permit amendment of an admission.
>
> The Third District Court has concluded that a party does not have to file a motion before a court can allow a belated response to a request for admissions

> to be filed. *See Sher v. Liberty Mut. Ins. Co.*, 557 So. 2d 638, 639 (Fla. 3d DCA 1990). The Fifth District Court has chosen the other extreme, refusing to allow a filing without a motion. *See Morgan v. Thomson*, 427 So. 2d 1134, 1135 (Fla. 5th DCA 1983)("No motion, no relief, no error."). The Fourth District Court follows the Fifth District Court's bright-line rule denying amendment without a motion unless the error which resulted in the untimely filing resulted from a technical error. *See Sterling v. City of West Palm Beach*, 595 So. 2d 284, 285 (Fla. 4th DCA 1992) (reversing denial of a late response when lateness was due to a diary error); Wood v. Fortune Ins. Co., 453 So. 2d 451, 452 (Fla. 4th DCA 1984) (a trial court can allow a belated response without a motion if the error is due to a tickler system failure). The First District Court has not expressly addressed the issue, but appears to follow the reasoning of the Fourth District Court. See DeAtley v. McKinley, 497 So. 2d 962 (Fla. 1st DCA 1986); Florida Aviation Academy v. Charter Air Ctr., Inc., 449 So. 2d 350 (Fla. 1st DCA 1984).
>
> We adopt the position taken by the Fifth District Court to the extent that rule 1.370(b) requires a motion before an admission may be withdrawn. This interpretation is consistent with the plain language of rule 1.370(b) that "any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the motion." (Emphasis added).

725 So. 2d at 384.

A defendant in the Second District or the Fifth District at least should not be required to simply show up at a hearing and argue facts which contradict matters which have been admitted, but should be required to file a motion containing grounds for relief from the admission. Use this body of law as you see fit.

Requests for Admissions Not Discovery

Anyone would think I was crazy for suggesting that requests for admissions are not "discovery," for a variety of reasons. Even those of you with an open mind on the subject might wonder why I would care, one way or another, whether a request to admit was or was not "discovery." While the authorities on the subject are conflicting, it may interest you somewhat that there are federal cases which state that requests for admissions are ***not*** discovery, which might help you in situation including your desire to seek admissions after the discovery cutoff has expired in a case. I do not recommend that you make a habit of sending our requests for admissions after discovery has been closed, but in case you need to pull a rabbit out of your hat someday, here is the best I can do for you on the subject.

For example, in *Phillips Petroleum Co. v. Northern Petrochemical Co*., No. 84 C. 2028 (N.D. Ill. Sept. 29, 1986), the court held that "a request to admit 'is not a discovery procedure at all, since it presupposes that the party [propounding] it knows the facts or has the document and merely wishes his opponent to concede their genuineness'" (citing 8 C. Wright and A. Miller *Federal Practice and Procedure* § 2253 at 706 (1970). That holding was followed by the court in *C & F Packing Co. v. IBP, Inc.*, 1994 U.S. Dist. LEXIS 1210 (N.D. Ill. 1994).

Another one of these obscure cases is *In Re: Carousel Candy Co.*, 38 B.R. 927 (E.D.N.Y. 1984), in which the court required requests for admissions to be answered after the close of discovery.

As stated above, however, there are cases going the other way too. *See e.g. Bieganek v. Wilson*, 110 F.R.D. 77 (N.D. Ill. 1986), which cites Fed. R. Civ. P. 26, which lists requests for admissions as one of the forms of "discovery." Similarly, requests for admissions are identified as one of the "discovery methods" under Fla. R. Civ. P. 1.280(a). Good luck

if you decide to take a shot at arguing that you can use requests for admissions without being bound by the ordinary restrictions on discovery in your case. I am staying out of that one.

Effect of Denial of Requests for Admission

If the request for admission is denied, that denial does not establish the converse of the fact which the proponent requested the admitted, nor is it evidence of that opposite fact. For example, in *Barber v. Albertson's, Inc.*, 935 F. Supp. 1188 (N.D. Oak. 1996), the defendant removed a case to federal court, arguing that the $50,000 amount in controversy had been established by the plaintiff's denial of a request to "admit that the amount in controversy in this action . . . does not exceed the sum or value of $50,000." *Id.* at 1191. The court remanded the case, holding: "The effect of this denial is that Plaintiff has refused to admit the amount in controversy does not exceed $50,000. The court concludes that this response by Plaintiff, standing alone, does not affirmatively establish that the amount in controversy exceeds $50,000 for purposes of diversity jurisdiction." *Id*.

Nor may a party use the denial of a request for admission to impeach another party who testifies at trial in a manner which is consistent with the requested admission. *See Winn Dixie Stores, Inc. v. Gerringer*, 563 So. 2d 814 (Fla. 3d DCA 1990). Instead of trying to use the denial, when you prepare requests for admission, also ask the opposing party to admit the converse of the fact as well. While the defendant may deny both requests, you are more likely to get something you can use than trying to use the denial.

Conclusion

Requests for admissions can be useful at trial, especially to lock down those non-controversial facts which may well be agreed, but which you cannot forget about establishing at trial. You probably will not have much luck in enforcing admissions

resulting from untimely responses, but should require the opposing party to file a motion to be relieved of the admission, rather than simply arguing the point at the hearing. You may well recover some attorneys fees for proving up matters which should have been admitted, so phrase your admissions in the form of basic facts, rather than ultimate issues. And send those requests out early, so you can try to get fees for discovery you conduct to establish facts which have been denied.

Keep Tryin!

Roy

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