

How to put some bite in your RFAs for personal-injury automobile cases

Done right, the Requests for Admission can box your defendant in and lead to recovery of costs and attorneys' fees

By Eric Gruber

Requests for admission (RFAs) are an effective way to box your opponent in at trial and to recover attorneys' fees. . . . Six figures worth of attorneys' fees. Appellate decisions have upheld some pretty astronomical awards. And to think, you don't even have to be the prevailing party at trial to seek these sanctions. (See *Smith v. Circle P Ranch Co., Inc.* (1978) 87 Cal.App.3d 267, 276.)

Many attorneys are loathe to fully use RFAs to recover cost-of-proof sanctions because the process can often be confusing, involves extensive and predictable motion practice, and requires the plaintiff's attorney to track their "billable" time.

In order to effectively prepare to seek cost-of-proof sanctions, we have to understand what types of responses are and are not permissible. We need concrete responses and properly timed requests so that when it comes time to get post-trial cost-of-proof sanctions, we have responses we can work with.

What are permissible responses?

Each answer to an RFA "shall be as complete and straightforward as the information reasonably available to the responding party permits." (Code Civ. Proc., § 2033.220(a).) I'm not entirely certain I've ever seen a straightforward answer to an RFA, but *generally,* here is the scope of permissible responses governed by Code of Civil Procedure section 2033.220 et seq.:

1) An objection (although not all are valid);
2) Admit;
3) Deny;
4) Inability to admit or deny, along with a declaration stating that a "reasonable inquiry" concerning the matter in the particular request has been made and that the information known or readily obtainable is insufficient to enable that party to admit the matter; or
5) A mixture of all of these with or without clarifications.

Pinning down your defendant

The ultimate goal of your RFAs is twofold 1) get admissions so that you can pin your opponent down before trial and eliminate unnecessary litigation and court costs and 2) be in the strongest position possible to recover litigation costs and attorneys' fees following trial or summary judgment for having to prove the matters contained in the RFAs the defendant failed to admit.

Because this isn't your first rodeo, you have carefully crafted your motor-vehicle personal-injury RFAs. They likely (or should) include requests to admit both discreet facts (e.g., Admit that you owned the Toyota Prius involved in the collision on October 16, 2013) as well as requests that seek application of facts to law which mirror all the relevant jury instructions in your case (e.g., Admit that you were negligent).

Now what? Because a failure to respond allows you to file a motion to have your RFAs deemed admitted, and most attorneys served with a set of RFAs are keen to avoid malpractice claims, we can expect at least something resembling a permissible response. There might be some admissions (good luck), some unequivocal denials, and then some level of terrible, frustrating, confusing, and inadequate mush.

For unequivocal denials, the process is straightforward. If a party "fails to admit" a matter that is subsequently proven to be true at trial, the requesting party may request proof of cost sanctions which includes attorneys' fees. (Code Civ. Proc., § 2033.420 (a).)

The court *shall* make this order unless:
(1) An objection to the request was sustained or a response to it was waived;
(2) The admission sought was of no substantial importance;
(3) There was reasonable ground to believe the party would prevail in the matter; or
(4) There was other good reason for the failure to admit. (Code Civ. Proc., § 2033.420 (b) (emphasis added).)

Reasonable grounds to believe party will prevail at trial

The responding party must show that at the time of denial, it held a *reasonably entertained good-faith belief* that it would prevail on the issue at trial. (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1276.) Even though an issue may have been aggressively contested at trial, the responding party must also show it had a reasonable basis for doing so. (*Brooks v. American Broadcasting Co.,* supra, 179 CA3d at 511.)

This simply means that the denial must be based on admissible evidence which was *actually admitted* at trial. The mere fact that the evidence is theoretically *admissible* may not be enough. (See *Wimberly v. Derby Cycle Corp.* (1997) 56 Cal.App.4th 618. (Defendant's denial based on expert's opinion who was not called to testify at trial resulted in cost of proof sanctions granted to plaintiff).)

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Request of no substantial importance

To be of "substantial importance" an RFA should have a direct relationship to one of the central issues in the case. (*Brooks v. American Broadcasting Co.* (1986) 179 Cal.App.3d 500, 509, 224 (emphasis added); *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1276.)

Other good reasons

Finally, sanctions may be avoided by proving there was some "other good reason" for failing to admit the RFA. In these cases, the court will look at whether the responding party knew or should have known that the matter was of substantial importance and was true at the time the request was denied; whether the party later realized its earlier denial was unwarranted and attempted to change or modify it; and the extent to which the responding party attempted to resolve the matter outside of court (e.g., attempts to stipulate, etc.)

There is no secret sauce to prevailing on a motion for cost-of-proof sanctions in a personal-injury motor vehicle collision, since the determination of these matters, including the amount of any sanctions to be awarded, are all within the sound discretion of the trial court. (*Brooks v. American Broadcasting Co.* (1986) 179 Cal.App.3d 500, 508.) So, the process is simple enough. Success of your motion will be determined on the strength and your ability to craft compelling arguments as to why the defendant was ridiculous with inability to admit that the sky's blue and that water's wet.

Dealing with wishy-washy answers and objections

This is where the work happens. It may come as a surprise, but those "inability to admit or deny," carefully "clarified," and bogus objection-riddled responses are not the escape hatch that many defense attorneys seem to think they are. Of course, you will have to take the time to effectively close that escape route. If you propound a set of RFAs and do not have any intention of following it up with a motion to compel, or two, or three, then you probably wasted your own time in drafting the RFAs to begin with. But given the six-figure possibilities involved and the prospects of an easier trial for you to conduct and for your jury to understand, it's hard to say the time won't be well spent.

Objections must be dealt with

The trial will not award cost-of-proof sanctions where the responding party's "objection to the request was sustained or a response to it was waived" by the propounding party. (Code Civ. Proc., § 2033.420 (b)(1).) Translation: you have to bring a *timely* motion to compel and you *must* move to compel a further response where the responding party lodges an objection. (*Wimberly v. Derby Cycle Corp.* (1997) 56 Cal.App.4th 618, 636.) However, a motion is not necessary if the objection is followed by an unequivocal denial. (*American Federation of State, County and Municipal Employees v. Metropolitan Water Dist. of Southern California* (2005) 126 Cal.App.4th 247, 268-269 (Denial following a "boilerplate" statement "without waiving these objections" was unequivocal.")) Be wary, however, that the denial after such boilerplate objections is a denial to the *entire* RFA. The court in *American Federation* distinguished the *Wimberly* case stating that the defendant's response to the request for admission "was a total objection coupled with a partial denial, leaving the remainder of the request for admission unanswered. Therefore, the objection could have been ruled on by the trial court in response to a motion to compel. By contrast, here after objecting to the entire request for admission, the Local's admissions and/or denials provided complete responses to the requests, thus leaving nothing to address in a motion to compel." (*Id.* at 301.) The best approach? Follow up on any objections with a motion to compel following reasonable attempts to meet and confer.

Inability to admit or deny despite reasonable inquiry

Even though the responding party's simple statement is that he or she has made a "reasonable" inquiry, such a response may not be adequate. In these cases you should also move to compel a further response. The court should grant your motion if the responding party in fact failed to make a reasonable inquiry or should have access to the information that would enable a straight admission or denial. (See *Asea, Inc. v. Southern Pac. Transp. Co.* (9th Cir. 1981) 669 F2d 1242, 1245-1246.)

If following a court order to provide additional responses, the defendant fails to provide adequate answers, another motion to deem responses admitted and for sanctions should be filed pursuant to Code of Civil Procedure section 2033.290 (e).

This should enable you to have either 1) a proper admission or 2) a denial for which you can subsequently seek cost-of-proof sanctions following trial. The defendant who continues with unfounded "inability to admit or deny" responses will soon have a more pressing task: admitting to themselves that they are on the hook for your proof-of-costs sanctions after a court determines there was no "good reason" for the failure to admit the RFA prior to trial. (See *Smith v. Circle P. Ranch Co., Inc.* (1978) 87 Cal.App.3d 267. (Failure to conduct reasonable inquiry resulted in sanctions).)

Timing your RFAs and discovery motions

Timing of your RFAs is an important strategic consideration. There are no "supplemental RFAs" since Code of Civil Procedure section 2033 et seq. provides sufficient incentive for parties to answer requests for admissions fully and accurately on the initial response.

As such, this calls for sound strategic judgment on your part. What is the use of propounding RFAs so early that your opponent has a viable "inability to admit or deny" response? Granted the courts have found some implied duty to supplement

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RFAs when analyzing whether there was some "other good reason" for a party's failure to admit, but do not do yourself a disservice by creating an uphill battle. I personally do not propound RFAs until significant discovery has been completed. If any of your RFAs require an application of law to fact (as they should since a portion of them should parrot the jury instructions applicable to your motor-vehicle case), it is arguable that RFAs should be propounded *after* expert disclosure, so long as you can get your inevitable motions to compel heard before the discovery cutoff. Of course, it is advisable to build in enough time to meet and confer in advance of at least two motions. One to compel further response, and one to have responses deemed admitted if there is a failure to respond adequately, which realistically necessitates you probably need to propound them prior to the exchange of expert witnesses.

Of course, the flip-side of the coin is that the sooner you get your denial, the sooner you can start to run the clock on your cost-of-proof sanctions, since costs incurred prior to the denial of the RFA are not recoverable. Even so, the real costs are going to rack in the final two months before trial and during the trial itself as you begin to retain and pay for experts and fine-tune any elaborate demonstratives, graphics, and animations.

And don't shoot yourself in the foot. I know as plaintiff's attorneys, we like to be free of the billable hour, but if you want enforceable cost-of-proof sanctions, you need to log your hours. A judge who orders you an award for cost sanctions based on your ballpark estimates of the time you spent will get appealed and lose for abuse of discretion. (*Garcia v. Hyster Co.* (1994) 28 Cal.App.4th 724, 737.)

Conclusion

RFAs can be a very effective tool when the process necessary to enforce them and collect sanctions is fully understood. Properly executed, RFAs make our trials easier to prosecute by narrowing the issues and offsetting costs. The prospect of recovering costs post-trial and getting paid even if you lose can allow you to stand firm on "smaller" or "riskier" matters, like minor impact/soft tissue or chiropractic cases. Remember, God (Judges) helps those (attorneys) who help themselves (by using RFAs).


Gruber

Eric R. Gruber is the founder and principal at Gruber Law Group. *He is an experienced trial attorney who frequently contracts with other attorneys in need of litigation assistance. Separately, Mr. Gruber utilizes unique technologies and strategies to provide representation to individuals who cannot afford traditional legal services, yet do not qualify for legal aid. In addition, he acts as an online reputation management consultant for small businesses and other attorneys.*

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