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Admit nothing

Practical and tactical use of requests for admissions



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The lawyer read through the defendant's responses to requests for admissions. Surprise, surprise – nary a straight admission nor denial. And a flurry of "calls for a legal conclusion," and "calls for expert opinion," objections. Totally inappropriate, and totally expected. Admissions are frightening – admit it and the answer cannot be changed without leave of court. Deny it and risk cost of proof sanctions, including attorneys' fees. Most lawyers go straight down the middle, "Cannot admit or deny," with an objection smorgasbord. This opponent was no different. Time to meet and confer…

The Rule of 35

Requests for admission need no introduction. Yet, as one of the four central discovery tools – interrogatories, production requests, and depositions being the others – admissions sometimes get short shrift. So, a couple refreshers. Admissions, like special interrogatories, are subject to the Rule of 35. In other words, more than 35 questions require a declaration stating why the unique aspects of the case make the additional questions necessary. Trying to be clever to turn 35 into more (using sub-parts) won't work. The declaration is pro forma and, absent some abusive firms sending out hundreds of requests, we've never heard of a court rejecting reasonable additional admissions. Note that pesky Rule of 35 does not apply to requests regarding the genuineness of documents. (Code Civ. Proc., § 2033.030(c).)

Legal conclusions, expert opinions, and denials

Admissions are commonly used to narrow down matters in dispute. "Admit the COLLISION happened on Mulberry Street at Mulberry Street's intersection with Elm Street in Seussville, California." Pro tip: Consider asking the other side to stipulate to simple matters before firing a bunch of formal discovery over the bow.

Admissions can also be used to ask about legal conclusions, complex matters, and areas requiring expert opinion. (*Grace v. Mansourian* (2015) 240 Cal.App.4th 523.) "Admit that the COLLISION was a substantial factor in causing injuries to JANE DOE," for example. There's strategy in asking these questions, however. That's because a denial forces the other side to identify all facts, witnesses, and documents that support the denial. This additional step requires the service of Form Interrogatories 17.1 with the admissions – an essential step. Historically, lawyers have asked questions expecting denials to force this discovery.

In the denial arena, one would think beating a party up at trial with a ridiculous denial would be part of an effective cross-examination. The appellate courts don't think this is sporting, however. *Victaulic Co. v. American Home Assurance Co.* (2018) 20 Cal.App.5th 948, held that a denial is not admissible. What is the takeaway? Ask the admission two ways – one to get the denial, the other to get the admission. "Admit the COLLISION was caused by YOUR negligence," and "Admit the COLLISION was not caused by YOUR negligence." The second version is likely to be admitted and can then be used at trial. If neither are admitted, one has good grist for demonstrating the other side is unreasonable when moving to compel responses.

Costs of proof sanctions

The court system encourages parties to admit matters that are not disputed. If a party denies an admission and it is then proven at trial, the court "shall" award reasonable costs and attorneys' fees associated with proving that matter. (Code Civ. Proc., § 2033.420(a).) For example, the defense denies legal responsibility in a rear-end collision. The attorney time and expense for witness depositions and associated experts used to prove this are cost of proof sanctions that shall be awarded. The issue must be proven, however. Expect a last-minute defense stipulation to liability at trial, as that then means the matter isn't proven. Courts, unfortunately, have endorsed this maneuver. (*Stull v. Sparrow* (2001) 92 Cal.App.4th 860.) One must be prepared to use Code of Civil Procedure section 128.7, subdivision (b) and Code of Civil Procedure section 2023 sanctions when the defense's bad behavior can be demonstrated.

Forced answers

Denials carry the risk of cost of proof sanctions. Admissions are also problematic. Once admitted, the answer cannot be changed without leave of court. (Code Civ. Proc., § 2033.300.) Because getting pinned down with an actual response, "Admit," or "Deny," carries significant risk, most responses are far more lengthy. People tend to dislike discovery battles, but if it was worth asking, it is worth getting an answer. Side note – don't send out the discovery if there won't be follow-through on evasive answers. The other side reads this as weakness, and it will make the job harder. Do the dance – meet and confer and move to compel. The court will typically require an answer to an admission. Without a real answer, the response either won't be admissible or won't lead to post-trial sanctions.

Outro

Back to our lawyer and the evasive discovery responses. The meet and confer efforts, and ultimately the motion to compel, were done. Actual answers finally came in. With the admissions teed up and the handwriting on the wall, the defense showed up at the Mandatory Settlement Conference with real money. A settlement followed. Not as much fun for the lawyer, but absolutely outstanding for the client.

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