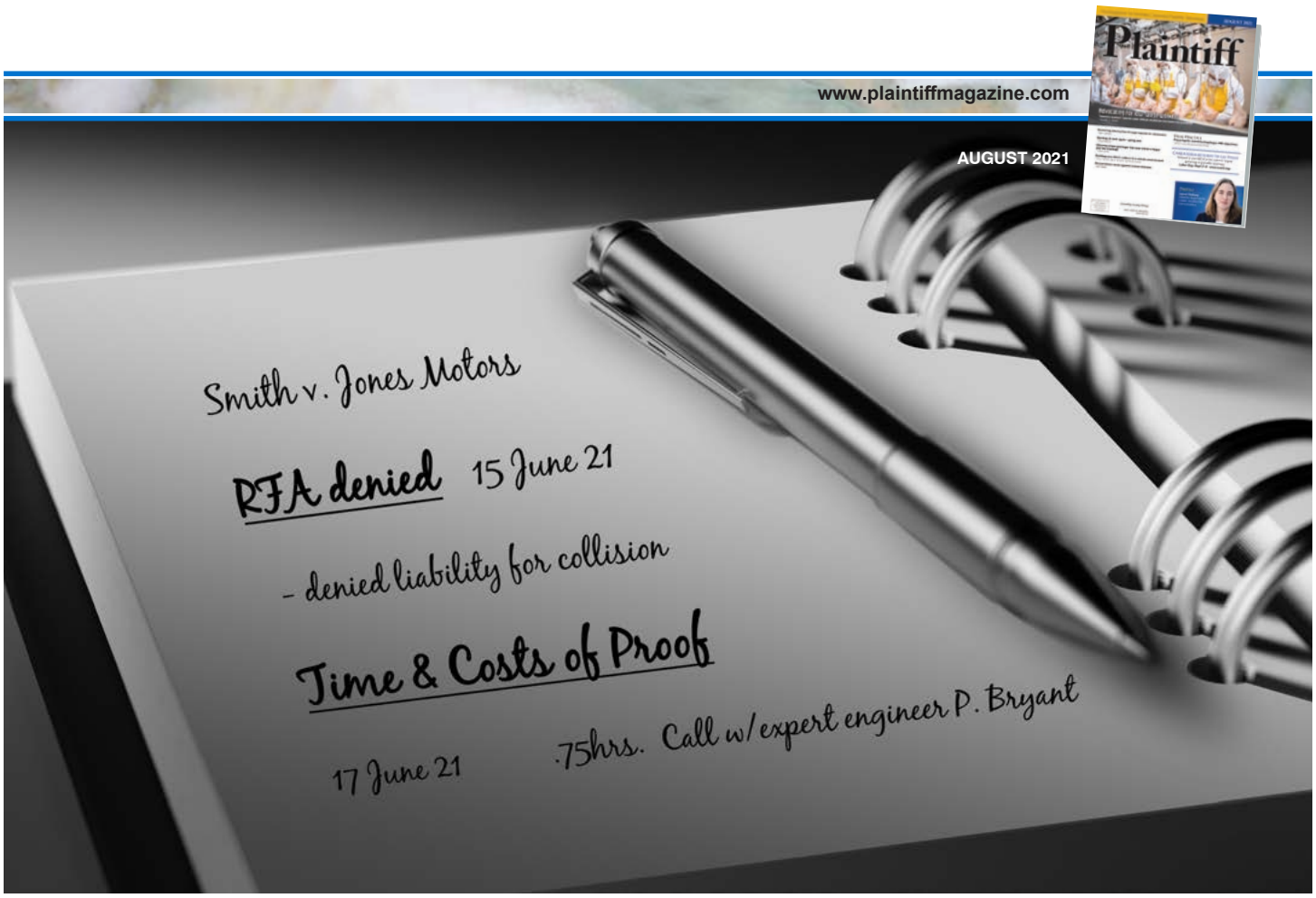


Recovering attorney fees through requests for admissions

Motions for cost-of-proof sanctions are challenging because section 2033.420 includes multiple hurdles and defenses

By Blair J. Berkley

The purpose of requests for admissions ("requests") is to eliminate undisputed factual issues in order to expedite trials and reduce litigation costs. To ensure their effectiveness, California Code of Civil Procedure section 2033.420 authorizes cost-of-proof sanctions against those who unreasonably refuse to admit undisputed facts. Through motions for cost-of-proof sanctions, parties can recover the fees and costs incurred in proving matters that were unreasonably denied.

Motions for cost-of-proof sanctions are challenging as a consequence of the numerous requirements and defenses built into section 2033.420. This article provides suggestions for meeting these requirements and preparing successful motions for cost-of-proof sanctions.

Preparation of requests for admission

Preparing for a successful motion for cost-of-proof sanctions begins with proper requests for admissions and a supporting trial plan. Each request for admission must address a matter of substantial importance because one defense to a motion for cost-of-proof sanctions is that the admissions sought were of no substantial importance. (Code of Civ. Proc., § 2033.420, subd. (b)(2).) Generally, plaintiffs should prepare requests for admissions that address elements of causes of action. When motions for summary judgment are planned, requests for admissions can address the important separate statements of undisputed material facts. The supporting trial plan should specify how the matter in each request for admission (element) will be proved.

Requests for admissions intended to support motions for cost-of-proof sanctions cannot be objectionable because objectionable requests provide another defense to motions for cost-of-proof sanctions. (See Code of Civ. Proc., § 2033.420, subd. (b)(1).) Therefore, the safest course is to write requests that are simple and direct and address historical facts. However, requests for admissions can address conclusions of fact (ultimate

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facts). (See, e.g., *Campbell v. Spectrum Automation Co.* (6th Cir. 1979) 601 F.2d 246, 253 ["That a request seeks admissions on 'ultimate facts,' or is dispositive of the entire case, is irrelevant."].) Requests for admissions addressing a single element are not objectionable as calling for a legal conclusion because the admission of a single element does not establish legal liability. (See, e.g., *Samsky v. State Farm Mut. Auto. Ins. Co.* (2019) 37 Cal.App.5th 517, 521; *Grace v. Mansourian* (2015) 240 Cal.App.4th 523, 526 [approving requests that defendants admit negligence and causation]; *Garcia v. Hyster Co.* (1994) 28 Cal.App.4th 724, 733-735 [same].)

Requests may require an expert opinion. (See, e.g., *Bloxham v. Saldinger* (2014) 228 Cal.App.4th 729, 751.) Requests for admissions are not limited to matters within the personal knowledge of the responding party, but must be answerable based on information that can be obtained through reasonable inquiry. (See, e.g., *Wimberly v. Derby Cycle Corp.* (1997) 56 Cal.App.4th 618, 634.)

Requests should not address the personal feelings (such as pain and suffering), intentions, or motivations of the requesting party because such matters are solely within the knowledge of the requesting party. Requests should not ask the responding party to admit every paragraph in a complaint or that responding party has *no* evidence. (See, e.g., *Perez v. Miami-Dade County* (11th Cir. 2002) 297 F.3d 1255, 1269; *Berkman v. City of Morgan Hill* (Cal.Ct.App., Sept. 28, 2010, No. H032205) 2010 WL 3759799, at *6-7.)

Since cost-of-proof sanctions are recoverable only for the period after requests for admissions are denied, requests should be propounded as soon as possible. Requests should be served concurrently with Judicial Council Form Interrogatory 17.1, which asks responding party to identify the facts, witnesses, and documents supporting each denial of a request for admission. A failure to identify facts, witnesses, and documents shows there was no reasonable grounds for denying requests for admissions.

Motions to compel further responses

Section 2033.420, subdivision (b)(2) provides an exception to the mandatory duty of the courts to award cost-of-proof sanctions when the requirements of section 2033.420, subdivision (a) are satisfied. Section 2033.420, subdivision (b)(2) states: "An objection to the request was sustained or a response to it was waived under Section 2033.290." The first portion of the exception is never used because the procedure of responding party filing its objections with the court and obtaining a hearing thereon was eliminated with the revision of section 2033 in 1961.

Courts, beginning with *Wimberly v. Derby Cycle Corp.* (1997) 56 Cal.App.4th 618, have interpreted the second (waiver) portion of section 2033.420, subdivision (b)(2) as requiring a motion to compel further responses whenever a response is something other than an unqualified denial. (See *Wimberly*, 56 Cal.App.4th at 636; but see *American Federation of State, County and Municipal Employees v. Metropolitan Water Dist.* (2005) 126 Cal.App.4th 247, 268-269 [no motion to compel further responses is required when objections are coupled with unqualified denials].) In other words, parties *waive* the right to cost-of-proof sanctions if the requirements of section 2033.290, subdivision (a)(1) or (a)(2) are satisfied and the response to a request for admission is something other than an unqualified denial. Thus, motions to compel further responses are an absolute prerequisite to a successful motion for cost-of-proof sanctions when responses to requests for admissions couple objections with qualified denials or are evasive or incomplete. (See Code of Civ. Proc., § 2033.290, subd. (a).)

Courts have found responses asserting insufficient information to be "incomplete" within the meaning of section 2033.290, subdivision (a)(1), thus requiring a motion to compel further responses. (See, e.g., *Magco Drilling, Inc. v. Natoma Family Housing, L.P.* (Cal.Ct. App., Jan. 29, 2018, No. A151586) 2018 WL 579772, at *4; *Estate of Silveira* (Cal. Ct.App., Aug. 31, 2015, Nos. A141310, A141421) 2015 WL 5099279, at *5.) Likewise, the response, "unable to admit or deny," is "evasive" within the meaning of section 2033.290, subdivision (a)(1) and requires a motion to compel further responses. (See, e.g., *Choi v. Chan* (Cal. Ct.App., Aug. 22, 2003, Nos. A098614, A100667) 2003 WL 21995592, at *8.)

In *Estate of Silveira* (Cal.Ct.App., Aug. 31, 2015, Nos. A141310, A141421) 2015 WL 5099279, the Court of Appeal denied a motion for cost-of-proof sanctions because the estate failed to move *twice* to compel further responses to its requests for admissions. Petitioner's original responses consisted of objections. The estate moved to compel further responses and the motion was granted. In amended responses, "petitioner claimed that having made reasonable inquiry, based on the information presently known or obtainable, she was unable to admit the matters contained in the relevant requests." (*Id.* at *4.) The estate moved for cost-of-proof sanctions. The trial court ruled that the estate waived its right to cost-of-proof sanctions because it failed to move a second time for further responses and the Court of Appeal affirmed. (*Id.* at *5.)

This requirement of filing multiple motions to compel further responses is completely inconsistent with the "'central precept' of the Civil Discovery Act of 1986 that discovery 'be essentially self-executing.'" (*Obregon v. Superior Court* (1998) 67 Cal.App.4th 424, 434.) Until the waiver provision of 2033.420(b)(1) is removed, parties anticipating motions for cost-of-proof sanctions must continue to file motions to compel further responses until no further motions are authorized by section 2033.290, subdivision (a). Since judges do not welcome multiple motions to compel further responses addressing the same requests for admissions, parties should make clear in their motions to compel further responses that the motions are *required* by section 2033.420, subdivision (b)(1) and *Wimberly v. Derby Cycle Corp.*

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Preparing required fee and cost documentation

Parties moving for cost-of-proof sanctions are required to identify the attorney fees and costs incurred in proving the matters that responding party unreasonably denied. (See *In re Tobacco Cases II* (2015) 240 Cal.App.4th 779, 807-808; *Grace v. Mansourian* (2015) 240 Cal.App.4th 523, 529.) For example, in a negligence case in which defendant denied a request to admit negligence, a plaintiff moving for cost-of-proof sanctions is required to identify the fees and costs incurred in proving that defendant was negligent. Doing this after trial is difficult if attorney time and cost records are not annotated with the requests for admissions or the factual and legal matters to which the attorney hours and costs were directed. Therefore, once a party's requests for admissions are denied, counsel should begin to annotate fee and cost records.

Trial practice

On a motion for cost-of-proof sanctions, the moving party must show that the matters in requests for admissions were proved and the specific fees and costs incurred in proving those matters. (See Code. of Civ. Proc., § 2033.420, subd. (a); *In re Tobacco Cases II*, 240 Cal.App.4th at 807-808; *Grace*, 240 Cal.App.4th at 529.) A good trial plan shows the evidence that will be used to prove each element of each cause of action. If requests for admissions are written to correspond to each element of each cause of action, then the trial plan also shows the evidence used to prove the matters in requests for admissions that are denied. Constructing such a trial plan is a necessary step to a successful motion for cost-of-proof sanctions.

A general verdict for plaintiff establishes all the elements of a cause of action and proves the truth of the matters in requests for admissions that correspond to the elements. However, general verdicts, and even special verdicts, do not necessarily prove all the matters in requests for admissions. (See, e.g., *Conser v. Board of Trustees* (Cal.Ct.App., Nov. 20, 2008, No. A111205) 2008 WL 4950975, at *11 [plaintiff did not seek any special verdict form or jury interrogatory that would have shown whether the jury believed her evidence on the matters of the requests for admissions]; *Holly B. v. Glitch* (Cal.Ct.App., Oct. 27, 2006, No. D047762) 2006 WL 3041890, at *5 [special verdict form did not ask the jury to determine whether defendant slapped plaintiff, but only to determine whether he committed an assault or battery].) Thus, when jury trials are used, parties anticipating post-trial motions for cost-of-proof sanctions must prepare special verdict forms or jury interrogatories to establish the truth of other matters (outside the elements of the causes of action) in denied requests for admissions. When bench trials are used, parties anticipating motions for cost-of-proof sanctions must submit proposed statements of decision that establish the specific matters in denied requests for admissions.

The motion for cost-of-proof sanctions

Section 2033.420, subdivision (a) requires that parties moving for cost-of-proof sanctions show that a request for admission was made, the matter in the request is true, responding party failed to admit the request, and the reasonable fees and costs incurred in proving *that matter*. (See Code. of Civ. Proc., § 2033.420, subd. (a).) Specifically, moving papers should list each request that was not admitted, the response, the evidence used to prove the truth of the matter in the request, the work and time required to assemble that evidence, and the fees and costs incurred as a proximate result of the failure to admit the request. There is no need to show that moving party was the prevailing party in the action because non-prevailing parties can obtain cost-of-proof sanctions. (See *Brooks v. American Broadcasting Co.* (1986) 179 Cal.App.3d 500, 509, fn. 5.)

The truth of matters in requests for admissions can be proved with general verdicts, special verdicts, statements of decision, jury interrogatories, motions for summary judgment. If separate statements in motions for summary judgments are supported with evidence and are undisputed, then the matters in the separate statements are proved. (See, e.g., *Sparks v. Reneau Publishing Inc.* (E.D. Tex. 2007) 245 F.R.D. 583, 587-588.)

Moving parties must point to specific evidence that proved the matters in each request for admission for which cost-of-proof sanctions are sought. (See, e.g., *Eng v. Brown* (Cal.Ct.App., Mar. 21, 2019, No. D072980) 2019 WL 1287896, at *7 ["Defendants did not provide the trial court with trial transcripts, trial exhibits, or even references to testimony or documents that might have established what *evidence* was presented at trial that *proved* any specific matter that Plaintiff had denied."].) This is necessary so that the specific fees and costs incurred in presenting that evidence and proving the matter of the request for admission can be determined.

Courts have imposed the additional requirement that moving parties show that a failure to admit a particular request for admission has *caused* certain costs of proof. (See *Garcia v. Hyster Co.* (1994) 28 Cal.App.4th 724, 736-737 ["[T]he statute authorizes only those expenses 'incurred in making that proof,' i.e., proving the matters denied by the opposing party."].) For example, no causal connection exists if moving party proved the matter in a request with evidence it would have offered regardless of the denial. (See, e.g., *Grotenhuis v. Golden Gate Bridge* (Cal.Ct. App., June 15, 2018, No. A151781) 2018 WL 2998892, at *4; *Villanueva Paramour v. Ruan* (Cal.Ct.App., Nov. 30, 2004, No. A104958) 2004 WL 2713357, at *4.)

Courts have also imposed on moving parties the requirement of submitting an affidavit setting out in detail the hours, fees, and costs incurred in proving each denied fact. (*In re Tobacco Cases II* (2015) 240 Cal.App.4th 779, 807-808; *Grace*, 240

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Cal.App.4th at 529.) This can be done by annotating attorney-time records with the requests for admissions or the factual and legal matters to which the attorney hours were directed. (See, e.g., *Orange County Water Dist. v. Arnold Engineering Co.* (2018) 31 Cal.App.5th 96, 113 ["[A]ttorney invoices included descriptions and a list of applicable RFAs for each time entry."].) Courts need this information so that if a motion is denied as to one request for admission, the court can determine the associated fees and costs to strike.

Exception 1

Section 2033.420, subdivision (b) states that courts *must* award cost-of-proof sanctions if the requirements of section 2033.420, subdivision (a) are met *unless* the court finds one of the exceptions in section 2033.420, subdivision (b). The burden of establishing an exception is on the party opposing the motion for sanctions. (See *Samsky v. State Farm Mut. Auto. Ins. Co.* (2019) 37 Cal.App.5th 517, 523-524.) Although motions for cost-of-proof sanctions need not address the exceptions, moving parties can make it more difficult for opposing parties to establish the exceptions (and to defeat motions for cost-of-proof sanctions).

For instance, the first exception given in section 2033.420, subdivision (b)(1) is that "[a]n objection to the request was sustained or a response to it was waived under Section 2033.290." Failure to assert objections in the original responses to requests for admissions waives the section 2033.420, subdivision (b)(1) defense. (See, e.g., *Zoura v. Burns & Sons Trucking, Inc.* (Cal.Ct.App., Nov. 17, 2014, No. D063469) 2014 WL 6237871, at *7.) Exception 1 can be avoided by writing requests for admissions that are simple and direct and address historical facts. If responses include objections coupled with equivocal denials, or responses are evasive or incomplete, motions to compel further responses must be filed to avoid waiving the right to cost-of-proof sanctions. (*Wimberly v. Derby Cycle Corp.* (1997) 56 Cal.App.4th 618, 636.)

Exception 2

The second exception given in section 2033.420, subdivision (b)(2) is that "[t]he admission sought was of no substantial importance." A request for admission has substantial importance when it has some direct relationship to one of the central issues in the case – an issue which, if not proven, would have altered the results of the case. (See *Brooks v. American Broadcasting Co.* (1986) 179 Cal.App.3d 500, 509.) Exception 2 can be avoided by writing requests that address elements of causes of action.

There is some overlap between the second exception and the requirement of proving a causal relationship between the denial of a request for admission and the claimed fees and costs. For example, a request for admission has no substantial importance if an admission would not have shortened the trial. (See, e.g., *Vogel v. American Amateur Baseball Congress* (Cal. Ct.App., Sept. 21, 2005, Nos. A105405, A106473) 2005 WL 2304485, at *10.) There is no substantial importance if the time and expense in making the proof was trivial. (*Ibid.*)

Exception 3

To establish the third exception given in section 2033.420, subdivision (b)(3), the party failing to make an admission must show that it had reasonable ground to believe that it would prevail on the subject matter of the request for admission. "Whether a party has a reasonable ground to believe he or she will prevail necessarily requires consideration of all the evidence, both for and against the party's position, known or reasonably available to the party at the time the RFA responses are served." (*Orange County Water Dist. v. Arnold Engineering Co.* (2018) 31 Cal.App.5th 96, 118.)

No reasonable grounds exist when the responding party made no reasonable investigation before responding to a request for admission or when responding party had access to information showing the request should be admitted. (See, e.g., *Bloxham v. Saldinger* (2014) 228 Cal.App.4th 729, 752; *Brooks*, 179 Cal.App.3d at 512 [denial was unreasonable because plaintiff had access to CHP report concluding that his truck was over the centerline].) Hence, one way to defeat the 2033.420(b)(3) defense is to disclose to responding party, before responses to requests for admission are served, evidence showing that the matters in the requests for admissions are true. (See, e.g., *Doe v. Dept. of Children & Family Services* (2019) 37 Cal.App.5th 675, 691 [County provided plaintiff logs showing visitation dates]; *In re Estate of Chuang* (Cal.Ct.App., Oct. 28, 2010, No. A126945) 2010 WL 4253632, at *4 [respondent provided evidence of decedent's mental capacity before petitioner responded to second set of requests].)

No reasonable grounds exist to deny a request for admission when responding party's responses to concurrently served interrogatories state no facts supporting the asserted ground for denial. (See, e.g., *Cadle Co. II, Inc. v. Bell* (Cal.Ct.App., Aug. 11, 2011, No. A128685) 2011 WL 3525438, at *1.) Hence, propounding parties should always serve Judicial Council Form Interrogatory No. 17.1 with requests for admissions.

No reasonable grounds exist when responding party failed to dispute the matter in opposition to a motion for summary judgment, presents no evidence at trial supporting its denial, or concedes the matter at trial. (See, e.g., *Nicolosi Distributing, Inc. v. Annex Santa Clara, Inc.* (Cal.Ct.App., Oct. 13, 2016, No. A144736) 2016 WL 5940900, at *8 [plaintiff did not dispute the two requests for admission on summary judgment]; *In re Estate of Trevillian* (Cal.Ct.App., Jan. 22, 2008, Nos. B187871, B188103) 2008 WL 175933, at *14 [appellants conceded issue at trial].) Finally, no reasonable ground exists when the party opposing a motion for cost-of-proof sanctions cannot point to any evidence supporting its denial. (See, e.g., *Estate of Khatri* (Cal.Ct.App., Apr. 28, 2020, No. A150546) 2020 WL 2060343, at *11.)

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Exception 4

The fourth exception available to oppose motions for cost-of-proof sanctions given in section 2033.420, subdivision (b)(4) is to show "other good reason" for the failure to admit a request for admission. This is a catch-all provision allowing courts significant discretion to deny motions for cost-of-proof sanctions. (See, e.g., *St. John-Parisian v. Foster Poultry Farms, Inc.* (Cal.Ct.App., Aug. 31, 2011, No. B221595) 2011 WL 3840524, at *11 [defendant had "good reason" to deny because to have admitted the RFAs would have conceded liability – the crux of the case].)

Most of the "other good reasons" address the form of the request for admission or the information required to respond and, therefore, can be avoided through preparation of proper requests for admissions. For example, good reason exists when the request syntax is overly complicated, confusing, or compound. (See, e.g., *Apex Wholesale, Inc. v. Fry's Electronics, Inc*. (Cal.Ct.App., June 15, 2006, No. D041383) 2006 WL 1644687, at *27.) Good reason exists when a request asks one to admit liability or admit a legal conclusion. (See, e.g., *Susan B. v. Los Angeles Unified School Dist.* (Cal. Ct.App., Mar. 29, 2006, No. B176830) 2006 WL 826089, at *5.) Since objections not asserted in original responses are waived, the fact that a request for admission is objectionable cannot serve as "other good reason" to deny a motion for cost-of-proof sanctions when the original response did not include the objection. (See, e.g., *McGrath v. Botsford* (Ill.App.Ct. 2010) 938 N.E.2d 589, 598.)

Good reason exists to deny a request for admission when one does not have, and could not obtain by reasonable inquiry, information on whether the matter in the request is true. For example, good reason exists when the matter of the request is solely within the knowledge of the requesting party. (See, e.g., *Burke v. Goodfriend* (Cal.Ct.App., Apr. 15, 2003, No. B157704) 2003 WL 1875782, at *3 [plaintiff was the only witness to the incident].) Good reason exists to deny a request that addresses the personal feelings (e.g., pain and suffering), intentions, or motivations of the requesting party. (See, e.g., *Law Offices of Bruce E. Krell, Inc.* (Cal.Ct.App., Dec. 14, 2007, Nos. A116666, A116674, A116812) 2007 WL 4358483, at *7 ["[N]o reasonable investigation could reveal the inner motivations of another party."].)

Other defenses to motions for cost-of-proof sanctions

In addition to showing one or more of the four exceptions, motions for cost-of-proof sanctions can be opposed by showing that moving party did not prove the truth of the matters in the requests (see, e.g., *Eng v. Brown* (Cal.Ct.App., Mar. 21, 2019, No. D072980) 2019 WL 1287896, at *7 ["Defendant did not provide the trial court with trial transcripts, trial exhibits, or even references to testimony or documents that might have established what *evidence* was presented at trial that *proved* any specific matter that Plaintiff had denied."]), moving party filed no motion to compel further responses when responses coupled objections with qualified denials or are evasive or incomplete, there is no causal relation between the failure to admit and the evidence moving party was required to offer (see, e.g., *Harmon v. Safeway, Inc.* (Cal.Ct.App., June 17, 2014, No. A134891) 2014 WL 2738665, at *7 [plaintiff made no showing that he would not have incurred his expenses but for defendant's failure to admit requests for admissions]), moving party failed to pinpoint the expenses it incurred in proving the matter denied (see, e.g., *Downey Real Estate Holding, LLC v. Los Angeles County Metropolitan Transportation Authority* (Cal. Ct.App., June 9, 2015, No. B244647) 2015 WL 3613241, at *12), moving party's affidavit of hours, fees, and costs is inadequate (see, e.g., *In re Tobacco Cases II* (2015) 240 Cal.App.4th 779, 807-808.), or moving party's fees are unreasonable.

Conclusions

Motions for cost-of-proof sanctions are challenging because section 2033.420 includes multiple hurdles and defenses and substantial documentation and evidence is required. On the other hand, such motions can be successful when included in litigation strategy from the very beginning of the discovery process. Requests for admissions must address matters of substantial importance and be simple and direct. To establish that a failure to admit a particular request for admission caused certain fees and costs, attorney-fee and expense statements must be annotated with the factual matters (or RFA numbers) to which the attorney hours and expense statements were directed. Successful motions can be financially rewarding. (See, e.g., *Estate of Khatri* (Cal.Ct.App., Apr. 28, 2020, No. A150546) 2020 WL 2060343, at *13 [fees of $865,599.25 and costs of $138,621.65 awarded].) Successful motions also assist the profession and the courts in ensuring the effectiveness of requests for admission (which, in turn, expedite trials and reduce litigation costs) by sanctioning the unreasonable refusals to admit undisputed facts.


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