

BY MARK R. SEIDEN

While a notice to admit does not enjoy the same high profile as depositions or other discovery devices, it nonetheless is an essential weapon within the litigator's arsenal. For instance, an effective notice to admit can result in the opposing party serving responses that can be used against it either in the context of a summary judgment motion, or as evidence published to a jury at trial.

Given the potential substantive impact responses a notice to admit can have on the outcome of a lawsuit, an attorney preparing responses needs to both carefully review and comply with the applicable rules to avoid inadvertent admissions, and thoughtfully consider the precise proposition their adversary is requesting be admitted. Perhaps due to its lower profile as a discovery device (and notwithstanding its potential importance), the responsibility for preparing draft responses to the notice to admit often will fall to the junior attorney. Following is some general guidance to consider when tasked with drafting responses.

In New York state, Rule 3123 of the Civil Practice Law and Rules governs both the service of the notice to admit and the corresponding response. The notice to admit typically seeks admissions from the opposing party as to matters of fact, and/or the authenticity and admissibility into evidence of papers, documents and photographs. By rule, the requesting party is limited to only seeking admission of matters as to which he "reasonably believes there can be no substantial dispute at the trial and which are within the knowledge of such other party or can be ascertained by him upon reasonable inquiry." See CPLR §3123(a).

Rule 3123 provides that written responses to a notice to admit must be served within 20 days of service of the notice. Failure to serve a timely response to the notice to admit can result in a court deeming that each request is admitted. Depending upon the substance of the notice to admit, having a court deem the requests admitted can have significant impact on the outcome of the lawsuit.

While the express language of Rule 3123 provides that such a consequence is automatic where a response is not timely served, case law suggests that some (but far from all) courts have

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Career Development

ANSWERING A NOTICE TO ADMIT



been more lenient when faced with either minor delays or requests for admissions that go directly to the core of the disputed issues. Nonetheless, the possibility that such a consequence will be imposed for belated service of a response counsels that planning for timely service of a response should be among the first things the responding attorney considers.

If it is likely proper responses will require more than 20 days to prepare, then opposing counsel should be immediately approached for an extension. Should opposing counsel decline to grant an extension, a prompt request to the court for an extension should be filed.

Once the deadline for service of the response has been addressed, attention can shift to an analysis of the requested matter and the written response.

The first step is to determine whether the notice to admit is properly written. Where a good faith basis exists to object to a requested item, an objection may be interposed in lieu of providing a substantive response.

Courts have articulated a number of standards by which a particular request can be evaluated to determine whether it is proper or objectionable. For instance, courts have held that requests must be articulated with clarity and precision, and as a result ambiguous and unclear notices to admit may be objected to in lieu of answering. Further, where a different disclosure device would provide a substantially less burdensome manner for eliciting the information sought, the request may be objected to as unduly burdensome. In addition, the admission sought also must be related to a fact within the knowledge of the party served or ascertainable upon reasonable inquiry.

If it is not, the responding party may object rather than providing a substantive answer. When tasked with drafting a response, case law or New York jurisprudence should be reviewed to provide a complete listing of possible objections.

Once it is determined that particular requests are proper, define the client's position for each point upon which an admission has been requested. Several options are available. First, the client can admit the requested matter. Generally, the preferred method for making such an admission is providing a written response, sworn to by the client, specifically indicating that the request is admitted.

A party may also admit a request by intentionally not responding and having the request deemed admitted by the court. Though this is not the preferred method, there may be particular situations where a non-response is more appropriate than a written admission. For example, a party may prefer to make an admission through inaction rather than service of a sworn statement where his Fifth Amendment right against self-incrimination is at issue.

Beyond pure unqualified admissions, three other substantive responses to a request are contemplated by Rule 3123. First, the client can submit a sworn statement denying specifically the matters upon which admission is requested. Second, the client can submit a sworn statement setting forth in detail the reasons why it cannot truthfully either admit or deny the requested matters. Finally, the client can admit matters with limited qualifications or explanations.

Whichever response is employed, insure that the client is acting in good faith and admitting all (unobjectionable) matter it is reasonably able to admit. Indeed, if it denies matter and the requesting party later proves that the client acted improperly, a court may issue an order requiring the client to pay the requesting party for the reasonable expenses incurred in making such proof (including attorney's fees).

In sum, great care must be taken in responding to notices to admit. The consequences of admitting otherwise contested facts are obvious. So too, should the potential penalties for failing to respond in good faith. Careful planning and thoughtful review of the notice to admit, case law and the relevant facts go a long way toward successfully meeting the challenge.

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