Judge Randolph M. Hammock
LOS ANGELES SUPERIOR COURT

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It's the RFA in the Winklepicker case. They want us to admit that "you are 100% liable for all of the claims and damages stated in the complaint." How should I answer?

Admit or deny

MOST ATTORNEYS MISUNDERSTAND AND/OR IMPROPERLY USE REQUESTS FOR ADMISSION

As an initial observation, I hope that no one takes personal offense at the title of this article. The cold reality is that most litigators (and even judges) do not understand or truly appreciate the nuances of requests for admission ("RFA"). This article will demonstrate that the correct answer is to "admit" this simple fact and to discuss the reasons why this is true. As to the "nuts and bolts" of RFA, the statute speaks for itself, and it is relatively straightforward in its instructions. Beyond the statutory requirements, however, this article also delves into the uniqueness of RFA and their intended purposes.

Intended purposes for RFA

If asked, the average litigation attorney would confidently opine that RFA are one of several "discovery devices" contained in the Code of Civil Procedure. After all, the RFA chapter itself (Sections 2033.010 to 2033.420) is contained within the Civil Discovery Act. However, upon closer research into the scant published case law discussing RFA, you will be surprised to discover that this is not necessarily so.

Contrary to appearances, RFA are actually not "discovery devices," per se. Rather, RFA are designed to eliminate the need to formally "discover" facts and, instead, to narrow the factual or legal issues at trial.

As Professor Hogan points out [in *Modern California Discovery*], "[t]he request for admission differs fundamentally from the other five discovery tools (depositions, interrogatories, inspection demands, medical examinations, and expert witness exchanges). These other devices have as their main thrust the uncovering of factual data that may be used in proving things at trial. The request for admission looks in the opposite direction. It is a device that

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
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> seeks to eliminate the need for proof in certain areas of the case." [Citation.] The Supreme Court put it in similar terms, "[m]ost of the other discovery procedures are aimed primarily at assisting counsel to prepare for trial. Requests for admissions, on the other hand, are primarily aimed at setting at rest a triable issue so that it will not have to be tried. Thus, such requests, in a most definite manner, are aimed at expediting the trial." [Citation.]

Indeed, one of the more important (yet least utilized) functions of RFA is to have the opposing party admit the "genuineness of documents." In short, a party may serve copies of documents that it may want to use or to admit at trial and have the other side admit or deny that each document is genuine. If that particular request is admitted (which most *should* be), this would eliminate the need to lay a foundation for *authenticity* of that document at the trial (or even in the context of a motion for summary judgment or adjudication). However, an admission that a document is "genuine" does not mean that it is automatically admissible. The admitting party may still object later to the document's admission into evidence based on the standard legal grounds governing admissibility, such as relevance, hearsay, and/or the risk of undue prejudice or undue consumption of trial time, per Evidence Code section 352. Surprisingly, this portion of the RFA statute is rarely used, despite its practical effects, and despite the fact that there is no limitation on the number of documents a party may propound in such a request, "except as justice requires to protect the responding party from unwarranted annoyance, embarrassment, oppression, or undue burden and expense."

Shenanigans with the RFA

So instead of using this unique and helpful procedure, a typical approach by many lawyers is to propound RFA as an offensive weapon. For example: "Admit that the propounding party [the defendant] is not liable at all for any of your claims or damages stated in your Complaint." Or in the converse, "Admit that you [the defendant] are 100% liable for all of the claims and damages stated in the Complaint." Of course, the cynical hope is that the responding party simply fails to timely respond, and that inevitably those RFA may be "deemed admitted," per section 2033.280, subdivisions (b) and (c). This approach has been criticized on several occasions by the courts of appeal: "[T]here remains considerable gamesmanship regarding requests for admission. The [*Brigante*] court employed the metaphor of a wheel of fortune: by sending overreaching admissions requests, a party can 'spin the wheel' and win big if the opponent's attorney fails to respond."

Personally, as a trial judge I would not be inclined to allow such shenanigans. If such "catch-all" RFA are allowed, then litigation discovery can be boiled down to one simple task: A party need only propound these types of overreaching RFA, and either they will be deemed admitted, or they will be timely "denied." (It is highly unlikely that they will be directly "admitted.") In the former situation, you need not do anything else in terms of discovery, as the responding party will not be allowed to introduce any evidence to contradict that admission. In the latter situation, you then need only propound Form Interrogatory No. 17.1. The responding party would then be obligated to state "all facts and identify all witnesses and documents" that support any RFA that was not "unequivocally admitted." This is the literal definition of one-stop shopping. Although one may be initially hard pressed to dispute the propriety of this approach, which appears, on its face, to be a valid use of Form Interrogatory No. 17.1, the trial court still maintains the power and inherent discretion to invalidate any underlying RFA as overreaching.

Use of RFA at trial

In comparison to other types of discovery devices, at trial can you use a responding party's verified responses to RFA that you had propounded? The short answer is perhaps, depending on the response or the purpose of that attempted use. If relevant, one can always introduce an admission. On the other hand, as discussed below, a "denial" cannot be generally used at the trial.

First, remember that the RFA statute itself limits the use of "an admission" to that admitting/responding party only, as opposed to any other party. Surprisingly, the RFA statute is otherwise silent on the use or effect of RFA at trial.

A standard attempt to use a verified response that "denies" any particular RFA at trial is for *impeachment* purposes, to wit, to demonstrate to the trier of fact that the responding party should have admitted an RFA and unreasonably failed to do so. This is done to attack the credibility of the responding party. For example: The defendant propounds an RFA to the plaintiff in an auto accident case that states: "Admit that you did not go to any hospital or any other type of health care provider until at least four months after the INCIDENT." Let us assume that this is true, and the medical records clearly demonstrate same. The plaintiff denies this RFA based upon "lack of sufficient information or knowledge," per section 2033.220, subdivision (b)(3). Naturally, defense counsel would like to confront the plaintiff at trial during cross-examination and have the plaintiff explain to the trier of fact why this simple fact was not just admitted. This would demonstrate that the plaintiff is untrustworthy due to the lack of frankness in that particular RFA response.

On first glance, this would seem like a fair and legitimate use of that particular RFA at trial. Indeed, I can recall using this approach several times myself when I was a lawyer many years ago at trial. I was allowed to do so each time without objection. Surprisingly, however, the published case law generally does *not* allow such an impeachment tactic. For example, in *Gonsalves v. Li* (2015) 232 Cal.App.4th 1406, the court held that

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
July 2021

the trial court abused its discretion by allowing such an impeachment attempt:

> [T]he discovery statutes expressly allow *any part of* a deposition or interrogatory to be introduced at trial (with certain restrictions not relevant here), whereas the statutes provide only that *admissions* in response to RFA's are binding on the party at trial. (Code Civ. Proc., §§ 2025.620 ["*any* part or all of a deposition" (italics added)], 2030.410 ["*any* answer or part of an answer to an interrogatory" (italics added)], 2033.410 ["[a]ny matter *admitted* in response to [RFA's]" (italics added)]; see also Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2013) ¶ 8:828, p. 8C-104.3 (rev. # 1, 2011) ["[*a*]*dmissions* made in response to [RFA's] ... may be received into evidence at trial" (italics added)].)

The *Gonsalves* Court further noted that the RFA statutory scheme provides for *monetary* sanctions (i.e., reasonable expenses including attorney fees) when a party unreasonably fails to admit a matter in response to RFA, but it "does not expressly permit a denial, objection or failure to respond to RFA's to be used against the party at trial." It concluded as follows:

> We find no support for Gonsalves's attempt to make a party's litigation conduct a legitimate subject for inquiry under Evidence Code section 780, subdivision (j), absent truly exceptional circumstances.
>
> We are persuaded, therefore, that denials of RFA's are not admissible evidence in an ordinary case, i.e., a case where a party's litigation conduct is not directly in issue. Thus, the trial court permitted examination of Li that was unfair and prejudicial to him and erred in admitting those responses in evidence.

This, once again, shows the uniqueness of RFA, as compared to the other types of discovery devices, as to which you would be allowed to use such impeachment techniques.

Motions to deem RFA admitted – Mandatory denial and sanctions

It is well understood by most civil litigators (and courts) that so long as a responding party serves a proposed response (albeit "untimely") to a set of RFA *prior to the commencement of a hearing* on a motion to have the RFA to be deemed admitted, then the motion must be denied, and that there is a *mandatory* award of monetary sanctions against the responding party, *with no exceptions*. However, this proposed response must be "in substantial compliance with Section 2033.220." What does "substantial compliance" mean in this context?

The case of *St. Mary v. Superior Court* (2014) 223 Cal.App.4th 762, contains a thorough analysis on this point, as well as an excellent discussion of RFA in general. In *St. Mary*, prior to the motion hearing the responding party served a proposed response to the RFA at issue, in which 64 of the responses were ether a simple "admit" or "deny," while 41 of the responses were deemed by the trial court to be non-code compliant, and hence, not in "substantial compliance" with section 2033.220. As such, the trial court ruled that only these 41 RFA responses to be deemed admitted, while the 64 responses (which were either admitted or denied) were essentially left to stand, as is. On first glance, one can see that 64 is greater than 41, and thus one could conclude that the responses were in "substantial compliance." However, it is not as simple as a mathematical equation.

The *St. Mary* Court reversed the trial court's ruling by concluding that "substantial compliance" in this context must be analyzed in terms of the "meaning and purpose" of the RFA statute. It held that a trial court cannot approach this task in a piecemeal fashion by examining each and every response and determining whether to deem that particular response as code-compliant or not, and thus granting or denying the motion to deem admitted accordingly. It noted that the applicable RFA statute uses the singular term "*response*," as opposed to "responses." Hence, either the proposed response, *in toto*, is in "substantial compliance" or it is not. The court also noted that if some of these proposed responses are somehow not code-compliant, the propounding party still has an adequate remedy by moving to compel a *further* response, per section 2033.290.

This decision seems to suggest that so long as you made a reasonable effort to comply with your duty to adequately respond to the RFA in whole, then you can avoid the doomsday effect of having the RFA at issue to be deemed admitted.

Parting advice

To a propounding party: Rethink and reconfigure your use of RFA. Discard your boilerplate RFA. Focus and consistently use RFA to authenticate important documents for use at trial. Avoid improper "catch-all" RFA. Do not ask the opposing party to formally admit something that is generally in dispute, as it is inevitably a waste of time and effort. Instead, use them in a prudent and thoughtful manner to narrow the trial issues.

To a responding party: Do not be afraid to "admit" something that should reasonably be admitted. It is easy. "Admit." Say it out loud to yourself: "Admit." I promise you that it is going to be okay. It is not going to be the end of the world. Not only will you avoid a potential post-trial monetary sanction motion under section 2033.420, but you also get to avoid the dreaded Form Interrogatory 17.1. The latter reason alone should be enough to simply admit something that is true.

To everyone: The hope is that one day in the future (when the world of litigation finally realizes the actual purpose of RFA and properly utilizes them accordingly), when you are asked the RFA that is the title of this article, you can honestly and proudly respond, "Deny."

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Randolph M. Hammock is a Superior Court Judge, currently assigned to the Torrance Courthouse, in which he presides over traffic and general infraction cases. He graduated from San Diego State University (1980) and the University of San Diego, School of Law (1983). During his almost twenty-five years of practicing law (primarily as a civil trial attorney) Judge Hammock was admitted to and actively practiced law in a total of 15 states, as well as over twenty (20) federal district courts and courts of appeal. As such, he is likely to have passed more bar exams than any other practicing lawyer in the United States. As a trial attorney, he appeared and tried cases 22 separate states, as well as 54 out of the 58 counties in California. He was appointed as a Superior Court Referee in 2008, where he served in the juvenile court until he was elected as a Judge of the Los Angeles Superior Court in 2010. He was a member of CAALA (and its predecessor LATLA) from the mid-1980s to the late 2000s. He has been an active member of the American Board of Trial Advocates (ABOTA) since 2000.

Endnotes

[1] Unless expressly stated otherwise, all statutory references are to the California Code of Civil Procedure.

[2] Sections 2016.010 to 2036.050.

[3] *Demyer v. Costa Mesa Mobile Home Estates* (1995) 36 Cal.App.4th 393, 401 (noting that RFA "differ fundamentally from other discovery devices" and that "[t]heir purpose is not the uncovering of information but the elimination of the need for proof").

[4] *Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659, 672.

[5] Section 2033.030(c). As with special interrogatories and request for production of documents, without a supporting declaration the number of RFAs is limited to thirty-five (35). Section 2033.030(a). However, this limitation does not apply to RFAs that "relate to the genuineness of documents." (*Ibid*.)

[6] *Demyer v. Costa Mesa Mobile Home Estates, supra*, 36 Cal.App.4th at 402.

[7] Section 2033.410.

[8] Section 2033.010 does, in fact, expressly allow an RFA for an "opinion relating to fact, or application of law to fact." Indeed, an RFA "may relate to a matter that is in controversy between the parties." (*Ibid*.) Be that as it may, and despite this rather broad language, an RFA still is required to be reasonable in scope
and nature. (Section 2033.010 [expressly incorporating the limitations of Chapter 2 (commencing with 2017.010) and Chapter 5 (commencing with Section 2019.010)].)

[9] Section 2033.410(b).

[10] See, e.g., *Victaulic Co. v. American Home Assurance Co*. (2018) 20 Cal.App.5th 948, 971-973 (holding that the discovery statutes did not authorize use of RFA denials as evidence at trial, since RFA denials represented legal positions and not statements of fact).

[11] *Gonsalves, supra*, 232 Cal.App.4th at 1414 (italics in original).

[12] (*Ibid*.)

[13] *Id*. at 1417.

[14] Section 2033.280 (c).

[15] *Id*. at 779-780. (italics in original.)