

NEW APPROACHES TO DISCOVERY

“An expert is someone who knows some of the worst mistakes that can be made in his subject and how to avoid them.” -- Werner Heisenberg.

“Nothing will ever be attempted, if all possible objections must first be overcome.”
-- Samuel Johnson

GENERAL PLEADING STRATEGY

After taking the time and trouble to determine what the case is about, ask, “What is the defense? What ambushes have been set by the defense? What is the fuss about? How does one define the issues of the lawsuit? How can the proof be streamlined for the jury? How does one avoid the tricks and traps sprung by the defense in the past? ” The under-used tool of requests for admissions can help.

The purpose of this paper is to outline how to structure pleadings, discovery strategy, and trial strategy with an emphasis on requests to admit, and to outline the law on requests to admit. The main points are:

- 1) to use **JURY INSTRUCTIONS** to draft pleadings and to focus one’s attention on the statement of the case instruction;
- 2) to compare the **COMPLAINT** to the answer; ask the opposing party to admit everything denied in the answer in simple **“YES/NO”** format (with follow up interrogatories and production);
- 3) to file a **MOTION FOR SUMMARY JUDGMENT** when the defendant does not disclose evidence in discovery

necessary to defeat such a motion;

- 4) to have the court **RULE** when necessary **ON OBJECTIONS**;
- 5) to use a **"YES/NO"** format to lock in admissions in depositions; and
- 6) to use the admissions or denials of bad conduct (especially when ruled on in one's favor by the court at summary judgment or directed verdict), to show to the jury the **DEFENDANT'S CHOICES**, personal responsibility, lack of candor, and how the defendant has challenged the plaintiff to prove what the defendant should have admitted.

The above will save counsel stress, time, and money.

I have to admit that I never understood pleadings as anything more than an annoyance until an older attorney told me to start with the jury instructions in drafting petitions and complaints. I had practiced for five years; I was still clueless. The only slightly good news is that the older lawyer also told me that he had only recently started doing what he had suggested himself. By using the jury instructions to outline the elements as the starting point, the chances of having a Rule 12(b)(6) motion sustained become nil. If one focuses on the elements of proof prior to filing suit, one knows what has to be proven, the focus is on how to prove it, and the chances of losing on a motion for summary judgment or directed verdict also

approach zero. This approach makes drafting the statement of the case instruction much easier. Some jury instructions, such as for Colorado or Nebraska, are online in Westlaw, for easy searching and downloading. Unfortunately, Wyoming was not yet online on either Westlaw or at the Wyoming State Bar site when I checked on February 20, 2005. With the online databases, such as the one on Westlaw, you can search within the annotated Jury instructions for the relevant law as well as for the instructions themselves. The jury instructions should be the starting point for all research prior to filing the petition, and they help to analyze the elements and to counter the defenses. The traps that previously had been set and sprung on foundation for exhibits had left me smarting. Requests to admit make these traps easier to identify and to cure.

A second time for thought and change came after losing three medical malpractice cases and a rear-end accident case where liability was not an issue. Ouch! In the malpractice cases, the defendants sought to obscure the facts, the legal issues, the complexity of the medical issues, made rustling sounds like gerbils with papers or X-rays during key questions and answers, and they succeeded. In the rear-end collision case, the jury hated my client. The old saying is true that if you have a likeable client you are halfway home, if not likeable, stay home. The jury did not even award payment of the medical bills. The focus changed to simplifying the issues, proof, and testimonial conflicts throughout the trial (and to make my client more likeable, or her behavior more

explainable). It worked.

FILE AND ISSUE ORGANIZATION

My typical trial folder has six slots, all with two hole Perma-clips at the top. The first two slots contain the petition or complaint followed by the answer. Thus, when the folder is opened, the petition and answer are there for ready comparison. I pencil in the margins of the petition whether each allegation has been admitted or denied.

The next steps are as follows:

1. Ask the defendant to admit each allegation it has denied in its answer;
2. Include an interrogatory asking the defendant to state the true facts for each request it has denied in whole or in part;
3. Include an interrogatory asking the defendant to state for any request for which it claims a lack of knowledge, what inquiry it has made to determine the true facts;
4. Include an interrogatory asking the defense to state if it has any reason to believe that the damages are not as alleged, and to state those reasons;
5. Ask the defendant to admit that the plaintiff received injuries in the accident or event described in the petition as listed;
6. Ask the defendant to admit that each medical bill is fair, reasonable, and necessary to treat the

plaintiff's injuries;

7. Ask the defendant to admit foundation for any other matter for which foundation is necessary;
8. Ask the defendant to admit any fact crucial to the case (if not already done) to take it out of play;
9. Ask the defendant to produce any evidence used to deny any allegation in the answer, or in response to any request to admit; and
10. Reduce the elements of proof by the use of "yes" or "no" questions.

LACK OF COMPLIANCE AND SUMMARY JUDGMENT

Interrogatories are often ignored; however, if requests to admit are ignored, they may be deemed admitted. This seems to encourage the needed timely disclosure. If the defense does not make the needed disclosures, I file a motion for summary judgment. Although some look upon motions for summary judgment with disfavor, what a discovery tool! When I first started in civil practice, it seemed the defense bar never disclosed anything until right before the discovery deadline, which forced me to scramble. I hated it! If the motion for summary judgment does not smoke out what one suspects has been concealed with regard to evidence or experts, you win (at least in part). The expert disclosures, if any, tend to be more specific since the point has been forced. I sometimes chuckle at the number of

times defense attorneys have listed no experts in answers to interrogatories only to have those experts miraculously and immediately surface a day or two after the filing of a motion for summary judgment.

EFFECT AND USE

An admitted request to admit conclusively establishes that fact. Consider the statement of the case jury instruction where what the opposing side admits is clearly spelled out; the admissions take away any need for proof on that matter. If a party has denied a fact and it has been proven at a motion for summary judgment or by a directed verdict, the instruction should include that the defendant denied the matter and that the court determined, as a matter of law, that the fact was true. The next step in argument is that the defendant has, once again, denied the truth, chose to avoid responsibility, and forced the plaintiff into trial, into embarrassment, expense, and time to prove his or her case. This has encouraged some opposing counsel to admit liability or requests to admit on liability (where they did not before) rather than face that instruction and argument. Consider also how easily the admissions can be blown up into poster size for presentation to the jury.

TACTICAL AND LEGAL CONSIDERATIONS OF REQUESTS TO ADMIT

1. **WHO:**

- a. May be served on another party; (Rule 36(a) A party may

- serve upon any other party);
- b. Not binding against a co-defendant, who denies. **Darnall v. Petersen**, 8 Neb. App. 185, 592 N.W.2d 505 (Neb. App. 1999); **Riberglass v. Techni-Glass Industries, Inc.**, 811 F.2d 565 (11th Cir.1987);
 - c. A party need not be an adverse party: i.e. co-plaintiffs or co-defendants;
 - d. All parties must be served with a copy of the requests for admissions;
 - e. May be relied on by any other party. **Orcutt v. Shober Inv., Inc.**, 69 P.3d 386 (Wyo. 2003).

2. **WHAT:**

- a. Rule 36 is "intended to expedite the trial and to relieve the parties of the cost of proving facts that will not be disputed at trial, the truth of which is known to the parties or can be ascertained by reasonable inquiry." **Wibbels v. Unick**, 229 Neb. 184, 188-89, 426 N.W.2d 244, 247-48 (1988) (quoting 8 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2252 (1970));
- b. "A written request for the pending action only, of the truth of any matters within the scope of Rule 26(b)(1)". Rule 36(a):
 - i. Matters that relate to:

- (1) statements: That you called the plaintiff a drug dealer, **Kaminski v. Bass**, 252 Neb. 760, 567 N.W.2d 118, (1997);
- (2) opinions of fact: In a school desegregation case, the court found any objection to "opinion" was without foundation and ordered the defendant to respond to requested admissions on the validity of a random sampling technique used by the plaintiff's expert, and to the accuracy of the underlying statistics, **Lumpkin v. Meskill**, 64 F.R.D. 673 (D. Conn. 1974); See 1970 Committee notes asking for opinions proper and now resolved by rule changes. See also, West's Federal Civil Rules Handbook 2005, "Rule 36 explicitly states that a request for admission is not objectionable because it involves an opinion or contention that relates to fact or the application of law to fact." (at p. 708). Also citing **Marchand v. Mercy Medical Center**, 22 F.3d 933 (9th Cir. 1994). In **Marchand**, *supra*, the defendant, physician, had no reasonable basis to deny request for admission regarding causation;

and thus award of \$205,798.34 for fees and costs was within discretion of trial court.

(3) application of law to fact: See 1970

Committee notes asking for application of law to fact now resolved by rule changes. See West's above. Rule 36 does not authorize a request that seeks a pure legal conclusion. See West's at p. 708-709, and Committee notes: The court may decide a "pure" issue of law remains for an unanswered request to admit for an unambiguous contract which would otherwise be deemed to have been terminated by the failure to admit. ***Emmett Ranch, Inc., v. Goldmark Engineering, Inc.***, 908 P.2d 941 (Wyo. 1995).

(4) the genuineness of any document copies of which shall be served, unless they have been otherwise furnished or made available.

c. Examples:

- i. Medical testimony; but on medical records and California Worker's Compensation Court records see ***Bailey v. Amisub (Saint Joseph Hosp.), Inc.***, 1 Neb. App. 56, 489 N.W.2d 323, (Neb. App. 1992)
- ii. Medical bills:

- (1) fair;
- (2) reasonable;
- (3) necessary;
- (4) causation;

iii. No eye witness, or no other eye witnesses exist other than John Doe;

iv. No evidence of plaintiff's negligence (go over each element);

v. No evidence of plaintiff's assumption of risk (go over each element);

vi. No evidence of plaintiff's knowledge of the hazard;

vii. No evidence of plaintiff's failure to mitigate damages;

viii. Your vehicle was traveling at 60 m.p.h. immediately before impact;

ix. You told Trooper Smith that you never saw the van until after the crash;

x. At this time, you have no knowledge of any fact to support the allegations of paragraph 7 of your answer;

d. Responses:

i. Admit: (in part or in full); If part true, and part not true, the correct procedure is to admit

the accurate portion and to deny the balance, **ATD Corp. v. Lydall, Inc.**, 159 F.3d 534, 539 (Fed. Cir. 1998);

ii. Deny: (in part or in full); see above;

iii. Set forth reasons why the party cannot admit or deny; The party must describe in detail the reasons why, after reasonable inquiry, it cannot either admit or deny. **Uniden America Corp. v. Ericsson, Inc.**, 181 F.R.D. 302, 303 (M.D.N.C. 1998);

iv. Object:

(1) Specific objections must state reasons;

(a) Privilege - see Rule 26, **and United**

States v. One Tract of Real Property 95

F.3d 422, 428 (6th Cir. 1998); Where a

party served with requests for

admissions refuses to respond, relying

on the 5th Amendment constitutional

privilege, the offering party may

introduce the requested admissions in

evidence and the court must instruct the

jury that it could, but did not have to,

draw adverse inferences from the

responding party's refusal to answer.

Wilson v. Misko, 244 Neb. 526, 508

N.W.2d 238, (Neb. 1993);

(b) Vague or ambiguous, such that a party cannot answer;

(c) Outside the scope of Rule 26;

(d) Validity of objections may determine whether costs are recoverable; contrast

Marchand v. Mercy Medical Center, 22

F.3d 933, 938 (9th Cir. 1994), no motion

to determine the objections filed by

plaintiff necessary with **Russo, v.**

Baxter Healthcare Corporation, 51 F.

Supp.2d 70, 79 (D.C.R.I. 1999), "the

fact that the objection was not

challenged constitutes "other good

reason for failure to admit" under Rule

37(c)(2). See Wright and Miller § 2290,

at p. 710. "

(2) By filing a motion for a protective order;

(3) Admissions still are subject to evidentiary

objections at trial. **Walsh v. McCain Foods**

Ltd., 81 F3d 722, 726, (7th Cir. 1996).

However, my friend, Mike Meister, suggests

making an evidentiary objection with the

answer to the request, so it is not forgotten, and there is no question of waiver by a failure timely to make that objection.

v. Claim of lack of knowledge:

- (1) Must state that the party has made reasonable inquiry; and why the party cannot admit or deny. **Uniden America Corp. v. Ericsson, Inc.**, 181 F.R.D. 302, 303 (M.D.N.C. 1998);
- (2) "Counsel for defendant appears to have a misconception as to the duty imposed when request for admissions is served upon him under the statute. When a request for admissions is made under this section, the party served must answer even though he has no personal knowledge if the means of obtaining the information are available to him. It is not a sufficient answer that he does not know, when it appears that he can obtain the information. The information here sought was in the possession of the secretary of the district or the county treasurer of Clay County." **Wibbels v. Unick**, 229 Neb. 184, 426 N.W.2d 244 (1988);
- (3) That the information known or readily

available is insufficient to enable the party to admit or to deny. Upon motion the court may treat this as an admission or order a further answer. **City of Rome v. U.S.** , 450 F. Supp. 378 (D.D.C. 1978), *affirmed*, 446 U.S. 156, 100 S. Ct. 1548, 64 L. Ed.2d 119 (1980);

vi. Failing to respond is deemed an admission. Rule 36(a) **Walsh v. McCain Foods, Ltd.**, 81 F.3d 722, 726 (7th Cir. 1996); **TZ Land & Cattle Co. v. Conduct**, 795 P.2d 1204 (Wyo.1990).

vii. Insufficient response:

(1) If a party believes a response is insufficient, it may move the court to determine the sufficiency of the answer. The question is whether the answer is sufficient, not the good faith or accuracy of the answer. **Forteich v. Chung**, 151 F.R.D. 3 (D.D.C.

1993);

(2) "We concluded in **Kissinger, supra** at 39, 77 N.W.2d at 771, by saying: 'A bad response is treated as no response at all and hence as an admission.'" See, also, **Mueller v.**

Shacklett, 156 Neb. 881, 58 N.W.2d 344

(1953); **Geyer v. The Walling Co.**, 175 Neb. 456, 122 N.W.2d 230 (1963); **Wibbels v. Unick**, 229 Neb. 184, 426 N.W.2d 244 (1988);

(3) The party losing the motion to determine the sufficiency of an answer pays the winner's expenses and attorney's fees under Rule 37(a)(4);

(4) Expenses on Failure to Admit. "If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he or she may apply to the court for an order requiring the other party to pay him or her the reasonable expenses incurred in making that proof, including reasonable attorney's fees." Rule 37(c);

Kaminski v. Bass, 252 Neb. 760, 567 N.W.2d 118, (Neb. 1997):

(a) The court shall make the order unless it finds that:

(i) The request was held objectionable pursuant to Rule 36(a), or

- (ii) The admission sought was of no substantial importance, or
 - (iii) The party failing to admit had reasonable ground to believe that he or she might prevail on the matter, or
 - (iv) There was other good reason for the failure to admit;
- (b) The moving party in a Rule 37(c) motion carries the burden of proving the truth of a matter previously denied by the non-moving party, and that reasonable expenses were incurred in doing so;
- (c) Once such a showing is made, the burden of proof then shifts to the non-moving party to prove one of the four exceptions to recovery of expenses enumerated in Rule 37(c). **Kaminski v. Bass**, 252 Neb. 760, 567 N.W.2d 118 (Neb. 1997);
- (d) A hearing on a motion for expenses pursuant to Rule 37(c) is a legal proceeding entirely separate from the underlying trial or proceedings

concerning the merits of the case.

Kaminski v. Bass, 252 Neb. 760, 567

N.W.2d 118 (Neb. 1997);

viii. Duty to supplement:

(1) Rule 26(e):

(a) The identity of persons having knowledge of discoverable matters;

(b) The identity of each person expected to be called as an expert witness at trial, the subject matter, and substance of his or her testimony;

(c) The response was incorrect when made;

(d) The response although correct when made is no longer true and circumstances are such that a failure to amend the response is a knowing concealment;

- e. In substance, Rule 36 is the Nebraska counterpart to **Fed. R. Civ. P. 36**. ***Wibbels v. Unick***, 229 Neb. 184, 426 N.W.2d 244 (1988). Therefore, Nebraska turns to federal decisions construing **Fed. R. Civ. P. 36** for guidance. ***Darnall v. Petersen***, 8 Neb. App. 185, 592 N.W.2d 505, 39 UCC Rep.Serv.2d 140, (Neb. App. 1999).
- f. The extent of the admissions reaches no further than the extent of the subject matter recited - failure to

respond to requests to admit was not dispositive of who owed what to whom. The only matters deemed admitted are those stated in the requests. *Reeves v. Boatman*, 769 P.2d 917 (Wyo. 1989).

3. **WHEN:**

a. Nebraska state court:

- i. If served with summons, a defendant shall not be required to answer or to object before 45 days after service;
- ii. Otherwise, 30 days, or for a longer or shorter time as agreed to by the parties or as the court may allow;
- iii. In *Arcadia State Bank v. Nelson*, 222 Neb. 704, 386 N.W.2d 451 (1986), the court held where a defendant that had not requested additional time to answer requests for admissions, but he was nevertheless granted additional time by the district court, the district court had abused its discretion in granting additional time and it should have sustained the plaintiff's motion to have the answers deemed admitted;
- iv. When appellant failed, without just reason, to respond in a timely manner to the requests for admissions, the validity of the agreement was

admitted. *Daulton v. Daulton*, 774 P.2d 635 (Wyo. 1989).

- b. Federal court:
 - i. Rule 26(d): a party may not seek discovery from any source before the parties have met and conferred as required by Rule 26(f);
 - ii. Otherwise, 30 days, or for a longer or shorter time as agreed to by the parties or as the court may allow.

4. **HOW:**

- a. Written requests separately setting forth each request;
- b. Response may be by the party or the party's attorney;
- c. How many?
 - i. No stated limit;
 - ii. Implicitly not an abusive or excessive number.

5. **WHERE TO PICK THE "RIGHT" FACTS:**

- a. From denials in the answer;
- b. From police reports;
- c. From interrogatories;
- d. From depositions;
- e. Authoritative texts, standards, regulations, ordinances;
- f. James W. McElhaney, in his Trial Notebook, 3rd Ed., suggests that what the other party has said be

reshaped and restated and given back to them in the form of admissions (at 48);

- g. Go for punch and instant comprehension:
 - i. Stick to verbs and nouns;
 - ii. Avoid adjectives and adverbs;
 - iii. Keep them short and simple;
 - iv. Use questions which can be answered, "Yes," or "No."
- h. Remain focused on filling the gaps in the proof and securing the admissions.

6. **WHY:**

- a. An admission is deemed conclusively established, unless the court permits withdrawal or amendment of the admission. Rule 36(b); ***NI Indus. v. Husker-Hawkeye Distributing***, 233 Neb. 808, 448 N.W.2d 157 (1989); ***Omega Chemical Co., Inc. v. Rogers***, 246 Neb. 935, 524 N.W.2d 330, (Neb. 1994) (holding that admissions that a party has not sought to withdraw or amend conclusively establish the matter admitted); ***Pedro/Aspen v. Board of County Commissioners***, 94 P.3d 412 (Wyo. 2004); ***Orcutt v. Shober Inv. Inc.***, 69 P.3d 386 (Wyo, 2003).
 - i. Rule 36 is self-enforcing, without the necessity of judicial action to effect an admission which results from a party's failure to answer or object

to a request for admission. **Wibbels v. Unick**, 229 Neb. 184, 426 N.W.2d 244 (1988);

- ii. However, "Rule 36 is not self-executing, but requires that a party, claiming another party's admission by failure to respond properly to a request for admission, must prove service of the request for admission and the served party's failure to answer or object to the request and must subsequently offer the request for admission as evidence...Thus, while not self-executing, Rule 36 is self-enforcing..." **Wibbels v. Unick**, 229 Neb. 184, 426 N.W.2d 244 (1988);
- iii. The court may permit withdrawal or amendment when the presentation of the merits of the action will be served, and
- iv. The party who obtained the admission fails to satisfy the court that the withdrawal or amendment will prejudice the parties action or defense on the merits. Rule 36(b)
- v. Attorney neglect in answering may not be sufficient to allow admissions deemed admitted to be withdrawn. **Thomsen v. Farmers Mut. United Ins. Co., Inc.**, 240 Neb. 886, 485 N.W.2d 179 (Neb. 1992); If anyone must lose because of the neglect

of a lawyer, it should be the party who selected and employed that lawyer as his counsel. **Sargent Feed & Grain Co. v. Anderson**, 216 Neb. 421, 344 N.W.2d 59, (Neb. 1984);

b. Rule 36 is "intended to expedite the trial and to relieve the parties of the cost of proving facts that will not be disputed at trial, the truth of which is known to the parties or can be ascertained by reasonable inquiry." **Wibbels v. Unick**, 229 Neb. at 188-89, 426 N.W.2d at 247-48 (quoting 8 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2252 (1970));

c. Saves time, money, and reduces the needed proof;

d. Wright & Miller contains the following observation concerning a request for admission:

"Through such definition and limitation, admissions promote both efficiency and economy in resolving disputes. If a point is conceded, litigants need not expend effort in investigations concerning it nor incur expense in presenting evidence to prove it. Judicial administration is also aided. Admissions reduce the time required to try a case. Indeed, they often make summary judgment possible. Finally, admissions encourage litigants to evaluate realistically the

hazards of trial, and thus tend to promote settlements." Id. at 704-05 (quoting Finman, The Request for Admissions in Federal Civil Procedure, 71 Yale L. J. 371 (1962)). See, also, 4A J. Moore, J. Lucas & D. Epstein, Moore's Federal Practice ¶ 36.02 (2d ed. 1984) (federal Rule 36 facilitates and expedites a trial by presenting undisputed facts and proof otherwise burdensome in time and expense). Rule 36 promotes an objective of discovery, the reduction of trial time, by (1) facilitating proof concerning issues that cannot be eliminated from the case and (2) narrowing issues and eliminating the necessity of proof on undisputed matters. See 4A J. Moore, J. Lucas & D. Epstein, supra, ¶ 36.01[5]. As cited in **Wibbels v. Unick**, 229 Neb. 184, 426 N.W.2d 244 (1988);

- e. Also, Rule 36 has a significant role and function regarding Neb. Ct. R. on Case Progression Standards (rev. 1986), which prescribes the deadline for a trial on the merits in civil cases. **Wibbels v. Unick**, 229 Neb. 184, 426 N.W.2d 244 (1988).

CONCLUSION

Start with the iury instructions. Think in "Yes/No" format. Use requests to admit to get focused on having as many issues as possible resolved in one's favor, or at the opponent's costs when

the admissions are wrongfully denied. The thought process to state matters clearly for admission helps trial strategy and organization. The "Yes/No" format makes admissions and impeachment easier at trial.

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