

The Consequences Of Failure To Respond To Requests For Admission

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*As much as the rules may vary, one thing is fairly certain:
If you answer requests for admission in the wrong way, they can hurt you.*

ALTHOUGH REFERRED TO as a discovery device, requests for admission are fundamentally different from all other forms of discovery. They do not seek to uncover information. Instead, they are a tool to expedite trial by eliminating the need to prove undisputed matters. In fact, they are more like the summary

adjudication procedure than conventional discovery.

Responding in the affirmative to a request for admission conclusively establishes the matter, so it is very important to consider carefully what you are being asked to admit, and how

that admission might be used against your client. One of the most serious consequences of failing to respond to requests for admission is that the requests are “deemed admitted,” and you will be unable to dispute those matters at trial. Worse yet, you may never get to trial if those admissions warrant the entry of summary judgment in your opponent’s favor.

Responses to requests for admission are generally “Admit,” “Deny,” or “Unable to admit or deny.” Depending on the jurisdiction, additional factual support for responses other than “Admit” may be required. Alternatively, you can assert objections. When objections are asserted, however, the party propounding the requests for admission can move to compel further responses. *American Federation of State, County & Municipal Employees v. Metropolitan Water Dist.*, 24 Cal. Rptr. 3d 285, 300-01 (Cal. Ct. App. 2005).

WHAT CONSTITUTES A FAILURE TO RESPOND? • The most egregious failure to respond to requests for admission is the failure to serve any responsive document at all. The legal effect of that omission can be that each of your opponent’s requests is deemed admitted. There are other ways you might fail to respond, however:

- Failing to serve a timely response. California Code of Civil Procedure section 2033.280; *Wilcox v. Birtwhistle*, 987 P.2d 727, 730-31 (Cal. 1999); New York Civil Practice Law and Rules section 3123(a);
- Failing to provide a client’s verification of the response. New York Civil Practice Law and Rules 3123; *ELRAC, Inc. v. McDonald*, 720 N.Y.S. 2d 912 (N.Y. Sup. Ct., 2001); California Code of Civil Procedure section 2033.210 and section 2033.240; *Thomas v. Makita, U.S.A., Inc.*, 226 Cal. Rptr. 413, 415 (Cal. Ct. App. 1986);
- Failing to provide the response in the proper format is a ground for deemed admissions

only if the response is substantively defective. For example, in New York, it is insufficient to respond informally in a letter, but only because such correspondence would lack the required client verification. New York Civil Practice Law and Rules section 3123; *ELRAC*, supra. Similarly, in California, the statute provides a detailed description regarding the format for the response, California Code of Civil Procedure section 2033.210. However, the response is actionable only if the deficiency is a failure to respond fully and accurately to each request. *American Federation*, supra, 24 Cal. Rptr. 3d at 300-01;

- Finally, failing to explain the factual basis for a denial or the reason you cannot admit or deny a request when that information is required also constitutes a failure to respond. New York Civil Practice Law and Rules section 3123(a). You must be judicious in responding that you are unable to admit or deny a request based on a lack of information. Although it is true that one party is not required at his or her expense to prepare the opponent’s case, the responding party is required to conduct a reasonable investigation of the facts to provide an adequate response. *Lindgren v. Superior Court of Los Angeles County*, 47 Cal. Rptr. 298, 301-02 (Cal. Ct. App. 1965).

The statute governing requests for admission should specify the extent to which an explanation for responses is required. In New York, the governing statute requires an explanation for all responses that are not an unqualified admission, including a statement setting forth in detail the reasons why the matter could not be admitted or denied. New York Civil Practice Law and Rules section 3123(a). By contrast, in California, only the short answers and objections are to be included in the response to requests for admission. California Code of Civil Procedure section 2033.210(b). An explanation of any response that was not

an unqualified admission is required only if form interrogatory number 17.1 is propounded with the requests for admission. This means that the explanatory statements will appear as part of the response to form interrogatories rather than as part of the response to requests for admission.

This can, but need not, be a trap for the unwary attorney propounding requests for admission. The practical effect of failing to serve form interrogatory 17.1 with the requests for admission is that you delay the time your opponent has to provide an explanation for why your requests have not been admitted (which can be very useful information). In jurisdictions like California, the time does not begin to run against your opponent until you properly serve a request for that information.

THE CONSEQUENCES • The trial court has at its disposal punitive measures of varying degree, depending on the egregiousness of the failure to respond. Of course, there may be no consequences at all if the requests for admission were not properly asserted. For example, at one time in California, no negative consequences would be enforced unless the requests contained a proper warning. *Thomas*, supra, 226 Cal. Rptr. at 415; *Janetsky v. Avis*, 222 Cal. Rptr. 342, 345-46 (Cal. Ct. App. 1986); *Hernandez v. Temple*, 142 Cal.App. 3d 286, 289 (1983). The requesting party had to place “at the end” (not buried in the middle) a warning that failure to comply with the provisions of the request for admission statute would immediately result in the matters being deemed admitted. New York does not require a warning, and the warning requirement has been dropped from California’s statutory scheme. *Wilcox*, supra, 987 P.2d at 731-32. The manner in which requests are deemed admitted in California has also been modified, as discussed below.

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Assuming the requests for admission were properly asserted, and the time within which responses are required to be served has passed (30 days in California, and 20 days in New York), one faces both immediate and potential consequences. In California, for example, failing to serve a timely response automatically waives your objections to the requests for admission, including those based on privilege and work product. California Code of Civil Procedure section 2033.280.

In New York, however, failure to serve a timely response means that each of the matters is immediately and automatically deemed admitted. New York Civil Practice Law and Rules section 3123(a). It is true that the court can always relieve a party from the effect of its failure to respond, but absent the court’s willingness to provide that relief, the consequences can be significant.

In California, when a party fails to respond to requests for admission, the matters are not automatically deemed admitted. Instead, the responding party still has an opportunity to serve responses (without objections) up to the time of the hearing on a motion for an order that “matters specified in the requests” are deemed admitted. California Code of Civil Procedure section 2033.280(c); *Wilcox*, supra, 987 P.2d at 730-31. If such a motion is filed, however, a monetary sanction will be imposed

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on the party who failed to serve a timely response. California Code of Civil Procedure section 2033.280(c).

Although it may seem that the penalty of immediately deeming a matter admitted as occurs in New York is an overly harsh penalty, it should be noted that there is another significant difference between the two jurisdictions that softens the effects of New York's approach. In California, unlike New York, a request for admission "may relate to a matter that is in controversy between the parties." California Code of Civil Procedure section 2033.010. In fact, a request for admission in California can include matters at the very heart of the case, including ultimate facts, such as whether a party was negligent. *Garcia v. Hyster Company*, 34 Cal. Rptr. 2d 283, 288-89 (Cal. Ct. App. 1994).

By contrast, in New York, a request that the court finds to be "unreasonable" is not automatically deemed admitted. *Katon v. Maskord Management Corp.*, 73 N.Y.S.2d 174 (N.Y. City Ct. 1947). Unreasonable or "palpably improper" requests are those that go to the very essence of the dispute. *Burnside v. Foglia*, 617 N.Y.S. 2d 921 (N.Y. App. Div., 1994). In fact, the purpose of a "notice to admit" (New York's version of requests for admission) is "to eliminate from dispute those matters about which there can be no controversy," and they may not be used to request admission of material issues, or ultimate or conclusory facts that can only be resolved after a full trial. *Taylor v. Blair*,

500 N.Y.S. 2d. 133 (N.Y. App. Div., 1986); *Webb v. Tire & Brake Distrib.*, 786 N.Y.S. 2d 636, 639 (N.Y. App. Div., 2004); *Howlan v. Rosol*, 526 N.Y.S.2d 674, 676 (1988).

In both jurisdictions, the matters are deemed admitted only in that action, and may not be used against the defaulting party in any other proceeding. California Code of Civil Procedure section 2033.410; New York Civil Practice Law and Rules section 3123(b). The consequences of deemed admissions, nevertheless, can be devastating. If the matters deemed admitted were the only material factual issues, the opponent can move for summary judgment and immediately prevail against your client. See discussion in *Zapanta v. Universal Care, Inc.*, 132 Cal. Rptr. 842, 846 (Cal. Ct. App. 2003); *Midland Bank, N.A. v. Custer*, 465 N.E.2d 358 (N.Y. 1984). If other factual issues remain, your opponent can move for summary adjudication to resolve one or more causes of action against your client. And your opponent will have an advantage at trial, because you will be unable to contest any of the matters that have been deemed admitted.

OBTAINING RELIEF FROM CONSEQUENCES • Failing to respond to requests for admission can result in irreparable harm to your client's case, and that is why, in California at least, the statute governing requests for admission is strictly construed. *Enfantino v. Superior Court*, 208 Cal. Rptr. 829, 831 (Cal. Ct. App. 1984); *Hansen v. Superior Court*, 197 Cal. Rptr. 177-178 (Cal. Ct. App. 1983). On the other hand, in both jurisdictions, the statutes that provide relief from those consequences are to be liberally construed so that cases can be tried on the merits. *Carli v. Superior Court*, 199 Cal. Rptr. 583, 585 (Cal. Ct. App. 1984); *Campbell v. Starre Realty Co.*, 724 N.Y.S. 2d 584, 587 (N.Y. App. Div. 2001). Especially where severe negative consequences are immediately imposed, as was the case at one time in California, any

doubts in applying relief statutes must be resolved in favor of the party seeking relief from default. *Elston v. City of Turlock*, 695 P.2d 713, 716-17 (Cal. 1985), superseded by statute as stated in *Tackett v. City of Huntington Beach*, 27 Cal. Rptr. 2d 133, 135-36 (Cal. Ct. App. 1994); *Waite v. Southern Pacific Co.*, 221 P. 204, 206 (Cal. 1923).

In New York, relief will be granted “on such terms as may be just.” New York Civil Practice Law and Rules section 3123(b). In California, however, obtaining relief from deemed admissions often requires an attorney to “fall on his sword.” In fact, a literal enforcement of the statutes requiring the attorney to show mistake, inadvertence, or excusable neglect can affect both attorneys and their malpractice carriers. *Barnett v. American-Cal Medical Services*, 202 Cal. Rptr. 735, 738-39 (Cal. Ct. App. 1984). The party seeking relief from default must also show that there will be no substantial prejudice to the other party. California Code of Civil Procedure section 473; section 2033.300(b); *Berri v. Rogero*, 145 P. 95 (Cal. 1914). Relief should be granted, for example, when there is ambiguity in, or miscommunication regarding, opposing counsel’s agreement to extend the time to respond to the requests. *Dolin Roofing & Insulation Co. v. Superior Court*, 199 Cal. Rptr. 40 (Cal. Ct. App. 1984) .

If the court is inclined to grant relief from deemed admissions, it can impose conditions on that relief, such as allowing additional discovery for the party who obtained the admission, and ordering that the party withdrawing or amending the admission bear, in whole or in part, the costs of any additional discovery. California Code of Civil Procedure section 2033.300(c).

If the court is not inclined to grant relief from the consequence of a deemed admission, all is not necessarily lost. The court can still be your ally. It is often true that the manner in which a request for admission is framed by the opposing attorney may lead to an admission that is misleading because it is susceptible of different meanings. In those cases, the court must use its discretion to determine the scope and effect of the admission so that it accurately reflects what facts are admitted in light of other evidence. *Fredericks v. Kontos Industries, Inc.*, 234 Cal. Rptr. 395, 396 (Cal. Ct. App. 1987); *Milton v. Montgomery Ward & Co., Inc.*, 108 Cal. Rptr. 726, 728 (Cal. Ct. App. 1973).

CONCLUSION • Depending on the jurisdiction, the consequences of failing to respond to requests for admission can range from the deemed admission of an inconsequential fact you did not intend to dispute anyway, to the deemed admission of the ultimate question in the lawsuit, such as whether your client is legally responsible for the plaintiff’s injuries. Somewhere between those extremes are deemed admissions of critical facts that can severely limit or completely eviscerate your claim or defense. Obtaining relief from those consequences can be expensive for your client. And even though the law abhors a forfeiture and prefers that disputes be tried on the merits, there is always the possibility that failing to respond to requests for admission will adversely affect your client’s case, and in turn, expose you to malpractice liability. Therefore, you should always take this form of “discovery” very seriously and provide a thoughtful and timely response.

PRACTICE CHECKLIST FOR The Consequences Of Failure To Respond To Requests For Admission

The idea behind requests for admission is that they can effectively narrow down the number and scope of factual issues that need proof at trial. But if they are not answered correctly, they can have the effect of admitting issues that need to be explored by the factfinder.

- What constitutes a failure to respond varies from jurisdiction to jurisdiction. Here are some typical examples:
 - ___ Failing to serve a timely response;
 - ___ Failing to provide a client's verification of the response;
 - ___ Failing to provide the response in the proper format, but usually only if the response is substantively defective;
 - ___ Failing to explain the factual basis for a denial or the reason you cannot admit or deny a request when required.
- Depending on the jurisdiction, the consequences of a failure to respond can include:
 - ___ Waiver of all objections to the requests for admission, including those based on privilege and work product;
 - ___ Each of the matters requested to be admitted is immediately and automatically deemed admitted;
 - ___ If the matters deemed admitted were the only material factual issues, the opponent can move for summary judgment and immediately prevail.
- The statute governing requests for admission might be strictly construed or liberally construed, and this can affect whether you can get relief from the effects of an admission. Especially when severe negative consequences are immediately imposed, doubts in applying relief statutes are frequently resolved in favor of the party seeking relief from default.
- Relief requiring the attorney to show mistake, inadvertence, or excusable neglect can expose the attorney to a potential malpractice claim. The party seeking relief from default must usually also show that there will be no substantial prejudice to the other party. Relief should be granted, for example, when there was ambiguity in, or miscommunication regarding, opposing counsel's agreement to extend the time to respond to the requests.
- If the court is inclined to grant relief from deemed admissions, it can impose conditions on that relief, such as allowing additional discovery for the party who obtained the admission, and ordering that the party withdrawing or amending the admission bear, in whole or in part, the costs of any additional discovery.

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