Brenda M. Johnson is an attorney at Nurenberg, Paris, Heller & McCarthy Co., LPA. She can be reached at 216.694.5255 or bjohnson@nphm.com.

Nuts and Bolts of Civil Rule 36 – Requests for Admissions

by Brenda M. Johnson

Both Ohio Civil Rule 36 and its Federal counterpart allow a party to serve any other party with written requests to admit certain matters for purposes of the pending action. This can be a powerful tool for narrowing the issues to be decided at trial, but it can also be a trap for the unwary if it is not properly understood. This article is intended to provide guidance, not just as to the basics of framing effective requests and evaluating your opponents' responses, but also as to your options in responding when you are served with Rule 36 requests by opposing counsel. It also addresses when and how an admission can be withdrawn, and the grounds for awarding costs under Rule 37(C) if a matter that is denied later is proven at trial.

How Ohio's Version Of Rule 36 Differs From Its Federal Counterpart.

Ohio Civil Rule 36 and its federal counterpart are essentially similar when it comes to substance, but there are some procedural differences that are worth keeping in mind.

Substantively, Rule 36, both in its state and federal version, provides that a party may serve written requests for admission on any other party once discovery has commenced.[1] Under both the state and federal version, a party may ask for the admission of the truth of any matters falling within the scope of permissible discovery that relate to statements or opinions of fact, or "the application of law to fact," or the genuineness of documents specified in the request.[2] When an admission as to the genuineness of documents is requested, the party making the request must supply copies of the documents with the requests unless they have already been made available.[3]

Both also provide that a failure to respond within the time period specified in the rule operates as an admission; however, the time period provisions in Ohio's rule differ from its federal counterpart. Ohio's Civil Rule 36(A)(1) allows the serving party to designate a response date, "not less than twenty-eight days after service," and also provides that the court may set a different response date as well. The federal version of the rule, in contrast, sets a response date of 30 days that can be altered only by stipulation of the parties or by order of the court.[4]

Finally, unlike its federal counterpart, Ohio's Rule 36(C) requires a party that includes requests for admissions in the same document with other discovery requests to clearly state that there are requests for admission in the caption of the document. If the requesting party does not do so, there is no duty to respond: "A party is not required to respond to requests for admission that are not made in compliance with this division."[5]

What Can You Ask Another Party to Admit?

As noted above, Rule 36 provides that a party may serve another party with "a written request for the admission, for purposes of the pending action

only, of the truth of any matters within the scope of Civ. R. 26(B) set forth in the request, that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request."[6] So what does this permit a party to ask in a request for admission?

First, as the rule clearly states, Rule 36 requests are limited to matters that fall within the scope of discovery as set forth in Rule 26(B) – namely, "any nonprivileged matter that is relevant to the party's claim or defense."[7] And they are not simply limited to issues of fact – they can be directed to "opinions of fact," and "the application of law to fact." To determine what this means in practice, however, it is necessary to look both at the history of the rule, its purpose, and at the case law interpreting its scope.

The advisory committee notes to the version of Fed. R. Civ. P. 36 that forms the basis of Ohio's version of the rule sheds some light on what its drafters intended in permitting requests on these terms:

> Not only is it difficult as a practical matter to separate "fact" from "opinion," but an admission on a matter of opinion may facilitate proof or narrow the issues or both. An admission of a matter involving an application of law to fact may, in a given case, even more clearly narrow the issues. For example, an admission that an employee acted in the scope of his employment may remove a major issue from the trial. In *McSparran v. Hanigan*, [225 F. Supp. 628], plaintiff admitted that "the premises on which said accident occurred, were occupied or under the control" of one of the defendants. This admission, involving law as well as fact, removed one of the issues from the lawsuit and thereby reduced the proof required at trial. [8]

Based on these examples, it's clearly permissible to ask a party to admit combined matters of law and fact, such as whether an employee was acting in the course and scope of his employment, or who had custody or control over relevant premises or instrumentalities.

It is *not* proper, however, to request that another party admit to a pure conclusion of law. For example, federal courts have held that it is improper to ask a defendant driver to admit he had a duty to maintain control of his vehicle, or to exercise ordinary care, or to illuminate his vehicle once it became immobilized, since the existence of a duty is a question of law for the court to decide.[9] Moreover, whether "proper" or not, obtaining an admission of a legal conclusion is unlikely to remove the issue from your case, since the admission of a legal conclusion is not binding on the court, nor is it necessarily binding on the admitting party.[10]

Responding To Requests for Admission.

A party who is served with requests for admission has several options in responding. They may do nothing, they may admit or deny a request in whole or in part, they can state they have insufficient information to admit or deny a request, or they can object to a request.

If the party does nothing – *i.e.*, if the party fails to respond within the time period provided, the requests are deemed admitted without any need for further action by the serving party or the court. As the Eighth District recently noted, "Civ. R. 36 is a self-enforcing rule. Therefore, if the requests are not timely answered, they are automatically admitted and recognized by the trial court unless a party moves to withdraw or amend its admissions under Civ. R. 36(B)."[11]

A party may also formally admit a request, which is a straightforward matter. What is *not* necessarily straightforward is how, and on what basis, a party can deny a request for admission.

Rule 34(A)(2) provides that "[a] denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his or her answer, or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder."[12] Thus, courts will treat a general denial as an effective admission when the request for admission contains several assertion of fact "because it does not meet the substance of the request, i.e., it does not 'specify so much of it as is true and qualify or deny the remainder.'"[13]

A party cannot give lack of information or knowledge as a reason not to admit or deny a request for admission. Rule 34(A)(2) specifically states that "[an] answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny."

On this point, the courts have been clear that "a mere recitation of the rule text will not suffice."[14] If a party does not explain its efforts to make a reasonable inquiry with particularity, a failure to respond constitutes an admission.[15] What constitutes a "reasonable inquiry," in turn, is a fact-dependent question; however, federal courts have held that this does not require the responding party to seek information from third parties unless those parties have given sworn deposition testimony on the issue.[16] Instead, the general rule is that

"a 'reasonable inquiry' is limited to review and inquiry of those persons and documents that are within a responding party's control."[17] Depending on the stage of the litigation, however, this can include an obligation to consult with a party's designated experts.[18]

Objections to Requests – What Counts As Improper?

As noted above, Rule 34 allows requests for admissions to be directed to any nonprivileged matter that falls within the normal scope of discovery. By that token, it is entirely proper to object to requests that seek privileged information, or go outside the bounds of relevance. For the reasons set forth above, it would also be appropriate to object to a request for admission that seeks admission of a pure conclusion of law (such as the existence of a duty of care). But what counts as an improper objection?

Under the express terms of Rule 36, a party may not object to a request simply because it presents a genuine issue for trial – which makes sense, given that the purpose of the rule is to narrow the issues presented for trial where possible.[19] A party also may not object by claiming that the requesting party should obtain the information through discovery, or that the information is within the requesting party's knowledge.[20]

Perhaps most importantly, like denials, objections must be specific. As one court noted, the party responding "bears the burden of explaining the propriety of its objections and boilerplate objections do not accomplish this task."[21] An objection coupled with an answer "subject to" or "without waiving" the objection is improper as well, and courts will overrule them on this basis.[22]

If a requesting party believes a response or objection is improper or insufficient, Rule 36(A)(3) allows the requesting party to file a motion with the court – but the court's options in ruling on the motion are relatively broad. If the challenge is to an objection, the court can order the responding party to respond if the objection is not justified. If the court finds that a response was insufficient, the court can order that the matter is admitted, or it can order the responding party to modify its response. The court also, in lieu of those orders, can decide that final disposition be delayed until a future pretrial conference or some other date set by the court.

A party filing a successful motion under Rule 36(A)(3) can seek expenses as provided under Rule 37(A)(5) – but as with any other motion subject to Rule 37(A)(5), a good faith effort to resolve the issue without court intervention is a necessary prerequisite to any right to an award under the rule.

When (And How) Can A Party Withdraw An Admission?

Rule 36(B) provides that any matter admitted under the terms of the rule is "conclusively established unless the court on motion permits withdrawal or amendment of the admission." So what if a party (whether intentionally or through some oversight) admits a matter that is fatal to its case or its defense, and wants to withdraw or contest the admission?

When it comes to amendment or withdrawal of an admission, "Civ. R. 36 does not specify that a formal motion is required nor does the rule identify a time when the motion must be filed."[23] Ohio courts have held that challenging the truth of admissions for purposes of opposing a motion for summary judgment can constitute a motion to withdraw, as can challenging the truth of admissions in trial proceedings.[24]

The grounds for allowing withdrawal or amendment of an admission, in turn, are relatively broad. The rule itself states that the court's power to permit withdrawal or amendment is subject to the same standards set forth in Rule 16 for amendment of a pretrial order – which simply requires a showing of good cause.[25]

Based on this, courts in Ohio and elsewhere have held that "excusable neglect" is not an element that must be shown in order to permit withdrawal or amendment of an admission.[26] Instead, a trial court may allow withdrawal or amendment "when presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits."[27]

Accordingly, in both Ohio and federal court, whether or not to allow withdrawal or amendment involves a two part test focusing on "the 'effect upon the litigation and prejudice to the resisting party[,] rather than focusing on the moving party's excuses for an erroneous admission."[28]

In both Ohio and federal court, this test puts the burden on the movant to show how allowing withdrawal or amendment would assist in reaching a just resolution on the merits. Both Ohio and Federal courts, however, have held that this burden "is clearly met when the effect of denying a motion to withdraw and amend would 'practically eliminate any presentation of the merits.'"[29] Accordingly, when key issues in the controversy have been admitted (especially when due to inadvertence or neglect), and allowing them to remain admitted would be dispositive of the case, courts tend to find the first prong is satisfied.[30]

Once this burden is met, it falls to the party who initially obtained the admission to show that it would

be prejudiced by the withdrawal of the admission.[31] The prejudice contemplated under the rule "'relates to the difficulty a party may face in proving its case' because of the sudden need to obtain evidence required to prove the matter that had been admitted."[32]

Simply having to present evidence, however, is not sufficient to show prejudice, nor is the fact that a party prepared a summary judgment motion based on the admission or admissions at issue.[33] Instead, the focus is on whether the requesting party has been deprived of the ability to obtain relevant witnesses or other evidence, and on whether the requesting party reasonably relied on the admissions.[34]

Not surprisingly, then, courts tend to allow parties who have inadvertently admitted to key elements in a case (such as liability) to withdraw those admissions when, in light of the nature of the case and the extent to which key elements of the case have been contested, it appears unreasonable for the requesting party to have relied on the admissions instead of developing his or her case. This is especially so when discovery is ongoing, dispositive motion deadlines either have not been set or have not yet passed, or when an inadvertent admission is due to a relatively short delay in responding.

As Ohio courts have noted, however, "there must be a point after which the party who gained the admissions has the right to rely on them."[35] Ohio courts can and do grant summary judgment based on unanswered requests for admission, especially when the party to whom the requests were directed fails to act promptly in asking the court to permit withdrawal or amendment.[36]

When Can A Party Be Awarded Costs For Proving A Matter That Was Denied?

If a party denies a request for admission, or claims to be unable to admit or deny the request after a reasonable inquiry, and the matter must then be proven at trial, Rule 37(C) requires the trial court to award the requesting party reasonable expenses, including attorney's fees, in proving the matter.[37] This expense-shifting rule, however, is not without exception.

As an initial matter, sanctions are not available under the rule if the requesting party did not actually have to present evidence contradicting the denial at trial.[38] Moreover, the Ohio rule and its federal counterpart both provide that sanctions are not available if (1) the request was held objectionable; (2) the issue was not of substantial importance; or (3) "[t]he party failing to admit had a reasonable ground to believe that it might prevail on the matter."[39]

The burden falls on the responding party to establish that it had a reasonable ground for believing it might prevail on the issue.[40] The standard for making this determination is an objective one, meaning that if the responding party had an objectively reasonable basis on which to maintain the matter genuinely was at issue, there is no basis for awarding costs under Rule 37(C).[41]

In other words, as stated in the Advisory Committee's notes to the version of the federal rule on which Ohio's Rule 37(C) is based, "the true test under Rule 37(c) is not whether a party prevailed at trial but whether he acted reasonably in believing that he might prevail."[42] Ohio courts follow this standard, and will not award attorney fees in cases where the denying party had a good faith belief that the issue was one legitimately in dispute.

For instance, Ohio courts have denied costs when the denying party was entitled to doubt the credibility of persons with personal knowledge on an issue.[43] Ohio courts also have denied costs when the denying party offered conflicting evidence on the issue.[44] And Ohio courts have denied costs when the issue ultimately was of little to no importance in the case.[45]

Accordingly, when a party denies matters that could legitimately be disputed, courts are unlikely to impose Rule 37(C) sanctions, even if the matters ultimately are proven at trial.

Final thoughts –

Requests for admissions are an important tool for narrowing the issues for trial – but like any tool, they have to be used properly in order to fulfill their function. They are an effective means by which to dispose of matters that simply ought not to be in dispute. They are not, however, a means by which either a plaintiff *or* defendant can escape the need to prove a disputed case by demanding admissions to matters that can be denied in good faith, nor can they be used to dispose of ultimate legal questions. ■

End Notes

1. Under Ohio's version of the rule, a plaintiff may serve such requests on any defendant once the defendant has been served with the summons and complaint. Civ. R. 36(A). Under the federal version, the timing for such requests is governed by Fed. R. Civ. P. 26(d), which in most cases precludes discovery before the parties have conferred as required under Fed. R. Civ. P. 26(f).
2. Civ. R. 36(A); *compare* Fed. R. Civ. P. 36(a)(1)(a). While Ohio's version of Rule 36 is based on the 1970 version of its federal counterpart, the current federal version of Rule 36(a) has undergone edits that are stylistic in nature, and not intended to change the substance of the rule. *See* Advisory Committee Notes, 2007 Amendment, Fed. R. Civ. P. 36.
3. Civ. R. 36(A); Fed. R. Civ. P. 36(a)(2).
4. Fed. R. Civ. P. 36(a)(3).
5. Civ. R. 36(C).
6. Civ. R. 36(A).
7. Civ. R. 26(B)(1).
8. Advisory Committee Notes, 1970 Amendment, Fed. R. Civ. P. 36 (some citations omitted).

9. *Aprile Horse Transp., Inc. v. Prestige Delivery Sys.*, No. 5:13-CV-15-GNS-LLK, 2015 U.S. Dist. LEXIS 86379, *9-*10, 2015 WL 4068457 (W.D. Ky. July 2, 2015). Other examples of federal courts holding that a request for admission is improper if it seeks a pure legal conclusion include *Rubenstein v. Music Sales Corp.*, No. 19-cv-11187, 2021 U.S. Dist. LEXIS 145106, 2021 WL 3374539 (S.D. N.Y. Aug. 3, 2021) and *Taylor v. County of Calaveras*, No. 1:18-cv-00760-BAM, 2019 U.S. Dist. LEXIS 206485 (E.D. Cal. Nov. 27, 2019).

10. Though it involved admissions in a pleading (as opposed to a response to a request propounded under Rule 36), the Sixth District's opinion in *IBEW Loc. Union No. 8 v. Kingfish Elec., LLC*, 6th Dist. Williams No. WM-11-006, 2012-Ohio-2363 is instructive on this point. In that case, the Sixth District held that an employer's admission that two union members met the regulatory definition of "employee" for purposes of a prevailing wage claim was not binding on the employer or the court, "because to be binding, the admission must be of a material and competent fact, not merely a legal conclusion or statutory definition.").

11. *Caldwell v. Custom Craft Builders, Inc.*, 8th Dist. Cuyahoga No. 110168, 2021-Ohio-4173, ¶ 35 (citations omitted).

12. Civ. R. 36(A)(2); *see also* Fed. R. Civ. P. 36(a)(4).

13. *King Painting & Wallpapering, Inc. v. Aswin Ganapthy Hospitality Assocs., LLC*, 11th Dist. Trumbull No. 2013-T-0076, 2014-Ohio-1372, ¶ 51, quoting Civ. R. 36(A). That said, federal courts have noted that requests for admissions should be "direct, simple, and 'limited to singular relevant facts'" so that they "can be admitted or denied without explanation.'" *Dubin v. E.F. Hutton Group*, 125 F.R.D. 372, 375 (quoting, *inter alia*,8 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE, § 2258 (1970)).

14. *See Aprile Horse Transp., Inc. v. Prestige Delivery Sys.*, No. 5:13-CV-15-GNS-LLK, 2015 U.S. Dist. LEXIS 86379, * 7-* 8, 2015 WL 4068457 (W.D. Ky. July 2, 2015) and cases cited therein.

15. *Fire & Marine Ins. Co. v. Battle*, 44 Ohio App.2d 261, 270 (8th Dist 1975).

16. *See, e.g., Dubin v. E.F. Hutton Group*, 125 F.R.D. 372, 374-75 (S.D. N.Y. 1989).

17. *T. Rowe Price Small-Cap Fund v. Oppenheimer & Co.,* 174 F.R.D. 38, 43 (S.D.N.Y. 1997); *see also Piskura v. Taser Int'l.*, No. 1:10-cv-248, 2011 U.S. Dist. LEXIS 141443, 2011 WL 6130814 (S.D. Ohio Nov. 7, 2011).

18. In *Drutis v. Rand McNally & Co.*, 236 F.R.D. 325 (E.D. Ky. 2006), a magistrate ordered that plaintiffs in litigation involving management of a pension benefit plan were required to submit certain requests for admission to their designated experts in order to properly respond. In *Piskura*, *supra* at note 17, however, the magistrate declined to issue a similar order because the parties had not yet designated their experts or disclosed their opinions. *See Piskura*, 2011 U.S. Dist. LEXIS 141443, *10-*13.

19. Civ. R. 36(A)(2); *see also Salem Med. Arts & Dev. Corp. v. Columbian County Bd. of Revision*, 82 Ohio St.3d 193, 196, 1998-Ohio-248, 694 N.E.2d 1324 ("That a matter 'related to' a genuine issue for trial should not suffice; only those matters actually determined to be 'in issue' meet the standard for 'good reason' to deny.").

20. *Diederich v. Department of Army*, 132 F.R.D. 614, 617 (S.D. N.Y. 1990) ("[W]e reiterate that the purpose of requests for admissions are to seek defendant's agreements as to alleged fact. Whether plaintiff could obtain the information independently or whether certain facts are within plaintiff's knowledge are irrelevant considerations.").

21. *Aprile Horse Transp., Inc. v. Prestige Delivery Sys.*, No. 5:13-CV-15-GNS-LLK, 2015 U.S. Dist. LEXIS 86379, * 4, 2015 WL 4068457 (W.D. Ky. July 2, 2015).

22. *Aprile Horse Transp., Inc. v. Prestige Delivery Sys.*, No. 5:13-CV-15-GNS-LLK, 2015 U.S. Dist. LEXIS 86379, * 4-*6, 2015 WL 4068457 (W.D. Ky. July 2, 2015) ("Rule 36 does not contain language allowing a party to answer a request to the extent not objected to.")

23. *Caldwell v. Custom Craft Builders, Inc.*, 8th Dist. Cuyahoga No. 110168, 2021-Ohio-4173, ¶ 36 (citing *Balson v. Dodds*, 62 Ohio St.2d 287, 290, n. 2, 405 N.E.2d 293 (1980)).

24. *See Balson v. Dodds*, 62 Ohio St.2d 287, 290, n. 2, 405 N.E.2d 293 (1980) ("[T]he trial court could reasonably find that, by contesting the truth of the Civ. R. 36(A) admissions for the purposes of summary judgment, appellee satisfied the requirement of Civ. R. 36(B) that she move the trial court to withdraw or amend these admissions."); *Haskett v. Haskett*, 11th Dist. Lake No. 2011-L-155, 2013-Ohio-145, ¶ 25 ("Mrs. Haskett's challenge to the truth of such admissions during the trial proceedings satisfied the requirements of Civ. R. 36(B) for withdrawal of admissions . . .").

25. *See* Civ. R. 16(B)(4).

26. S*ee Kutscherousky v. Integrated Comm. Solutions, LLC*, 5th Dist. Stark No. 2004 CA 00338, 2005-Ohio-4275, ¶ 17 (citing *Hanchar Ind. Waste Mgmt., Inc. v. Wayne Reclamation & Recycling, Inc.*, 418 N.E.2d 268 (Ind. App. 1981)).

27. *Balson v. Dodds,* 62 Ohio St.2d 287, 405 N.E.2d 293 (1980), syllabus at ¶ 2.

28. *Kutscherousky* at ¶ 17 (quoting *Mid Valley Bank v. North Valley Bank*, 764 F. Supp. 1377, 1391 (E.D. Cal. 1991); other citations omitted).

29. *Kutscherousky* at ¶ 19 (quoting *Westmoreland v. Triumph Motorcycle Corp.*, 71 F.R.D. 192, 193 (D. Conn. 1976)); *see also Riley v. Kurtz*, 194 F.3d 1313, 1999 U.S. App. LEXIS 24341 (6th Cir. 1999) (applying same standard).

30. *Kutscherousky* at ¶ 19; *see also Hadley v. United States*, 45 f.3d 1345, 1348 (9th Cir. 1995) (first prong "is satisfied 'when upholding the admission would practically eliminate any presentation on the merits of the case.'").

31. *Kutscherousky* at ¶ 26.

32. *Id.* at ¶ 25 (citations omitted).

33. *Kutscherousky* at ¶ 25.

34. *Kutscherousky* at ¶¶ 25-29.

35. Corwin v. Kimble, 5th Dist. Licking No. 22CA00002, 2022-Ohio-3395, ¶ 42 (citing *Kutscherousky*).

36. *Corwin* at ¶ 54 (citing *Jade Sterling Steel Co. v Stacey*, 8th Dist. Cuyahoga No. 88283, 2007-Ohio-532 and *Riddick v. Taylor*, 8th Dist. Cuyahoga No. 105603, 2018-Ohio-171)

37. Civ. R. 36(A)(2); Civ. R. 37(C); Fed. R. Civ. P. 37(c)(2).

38. *See Kamhikar v. Fiorita*, 10th Dist. Franklin No. 16AP-736, 2017-Ohio-5606, ¶ 47-48

39. *Altercare of Mayfield Village, Inc. v. Berner*, 8th Dist. Cuyahoga Nos. 104259, 104306, 2017-Ohio-958, ¶ 43 (citations omitted). Both the state and federal rule also include a "catch all" exception for "other good reason for the failure to admit." *See* Civ. R. 37(C); Fed. R. Civ. P. 37(c)(2).

40. *Id.* at ¶ 43.

41. *Salem Med. Arts & Dev. Corp. v. Columbiana County Bd. of Revision*, 82 Ohio St.3d 193, 196, 1998-Ohio-248, 694 N.E.2d 1324.

42. Advisory Committee Notes, 1970 Amendment, Fed. R. Civ. P. 37(c).

43. *See Youssef v. Jones*, 77 Ohio App.3d 500, 509-510, 602 N.E.2d 1176 (6th Dist. 1991) (defendant had good faith basis for denying requests for admissions dealing with plaintiff's injuries); *see also Sinea v. Denman Tire Corp.*, 135 Ohio App.3d 44, 45, 732 N.E.2d 1033 (11th Dist. 1999) (no award when witness credibility was at issue).

44. *See Sinea*, *supra* at 43; *see also Baltimore v. Johnson*, 8th Dist. Cuyahoga No. 42690, 1981 Ohio App. LEXIS 13963 (April 30, 1981) (no award when conflicting evidence was presented).

45. *See Tanio v. Ultimate Wash*, 8th Dist. Cuyahoga No. 98826, 2013-Ohio-939 (no award when fact had no causal relationship to the plaintiff's claims)