Strategies For Opposing Requests For Admission

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With the lack of interrogatories and expert discovery in Oregon, there is an increasing tendency to use requests for admission under ORCP 45 as a "weapon" to harass or "with the wild-eyed hope that the other side will fail to answer and therefore admit essential elements." *Pereź v. Miami-Dade Cty,* 297 F3d 1255, 1268 (11th Cir 2002). This article considers the nature of RFAs and then attempts to catalog objections to them that have been recognized in Oregon and other jurisdictions.

The Purpose of RFAs

An RFA is "not properly speaking a discovery device." *Dubin v. E.F. Hutton Grp., Inc.,* 125 FRD 372, 375 (SDNY 1989). Rather, it is a "procedure for obtaining admissions for the record of facts *already known by the seeker." Id.* (emphasis added).

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RFAs are intended as a "time-saver" to "expedite the trial and relieve the parties of the cost of proving *facts that will not be disputed at trial." Perez,* 297 F3d at 1268 (quoting 8A Wright, Miller & Marcus, *Fed. Prac. & Proc.* § 2252 (2d ed 1994)). "[W]hen a party uses the rule to establish uncontested facts and to narrow the issues for trial, then the rule functions properly." *Id.* In contrast, when RFAs are focused on "dragging out the litigation and wasting valuable resources," rather than facilitating a clear and succinct presentation of the issues for trial, then the purpose behind RFAs is frustrated. *Id.*

Objections to RFAs

In responding to RFAs, ORCP 45 B permits *either* "a written answer or objection addressed to the matter." *Id.* "If objection is made, the reasons therefor shall be stated." *Id.* Here are several notable grounds to object to RFAs:

1) *Irrelevant.* This ground is stated within ORCP 45 A. *See id.* (limiting RFAs to "relevant matters"). Indeed, there is no good reason to seek admissions "unrelated to the facts of the case." Advisory Committee Notes to FRCP 36; *Durrell v. Rogers,* No. 01-1442-ST, 2002 US Dist LEXIS 20328 (D Or Mar 13, 2002) (upholding relevancy objections where plaintiff's RFAs did not "relate to any fact which is of consequence to his claim").

2) *Privileged.* This ground is referenced within ORCP 45 A. *See id.* (limiting RFAs to matters "within the scope of Rule 36 B"); ORCP 36 B (allowing discovery on "any matter, not privileged"). An obvious example is an RFA seeking information on attorney-client communications. *Shawmut, Inc. v. American Viscose Corp.,* 12 FRD 488, 489 (D Mass 1952). Another example is work product, which is protected under ORCP 36 B(3). In Oregon, this objection could also encompass the prohibition on expert discovery.

3) *Argumentative.* Considering their purpose, RFAs should not be stated in a manner that is "argumentative" or that assumes facts "not definitively on the record." *Kasar v. Miller Printing Mach. Co.,* 36 FRD 200, 203 (WD Pa 1964). In other words, the text of an RFA should be free from "spin" or advocacy.

4) *Improper form (vague or compound).* Each RFA must be stated "simply, directly, not vaguely or ambiguously" so it "can be answered with a simple admit or deny without an explanation." *Henry v. Champlain Enters., Inc.,* 212 FRD 73, 77 (NDNY 2003). Thus, "the facts stated within the request must be singularly, specifically, and carefully detailed," not vague or compound. *Id.* These objections are tempered by the requirement to provide a qualified admission where good faith requires it. ORCP 45 B.

5) *Lack of personal knowledge.* Attorneys often seek admissions on facts outside of the personal knowledge of the responding party, which is objectionable. *Durrell, supra, at* *3; *Brust v. Newton,* 70 Wash App 286, 295 (1993) (rejecting RFA that asked defendant to admit facts about the plaintiff's "subjective state of mind"). However, this objection is tempered by the requirement that a party claiming

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"lack of information or knowledge" indicate "that reasonable inquiry has been made and that the information known or readily obtainable by the answering party is insufficient to enable the answering party to admit or deny." ORCP 36 B.

6) *Harassment or undue burden.* Courts have rejected RFAs ranging from "an attempt to harass the opposing party" (*Lantz v. N.Y. Cent. R. Co.*, 37 FRD 69 (ND Ohio 1963)) to "absurdly onerous" (*Sulzbacher v. Travelers Ins. Co.*, 2 FRD 491 (WD Mo 1942)) to "at best, irresponsible" (*Minn. Mining & Mfg. Co. v. Norton Co.*, 36 FRD 1 (ND Ohio 1964)). That said, if the objection arises from the sheer number of RFAs, it may be better raised by a motion for protective order under ORCP 36 C.

7) *Legal conclusions.* This objection is implied by the text of ORCP 45 A, which permits RFAs on "facts or opinions of fact, or the application of law to fact," but is silent on purely legal conclusions. *See id.* Certain examples, such as "Admit that ORS 124.100 provides for treble damages," seem obviously objectionable. The challenge is in defining "application of law to fact" for the purpose of an RFA. The Washington Supreme Court has defined it narrowly, holding that RFAs asking a defendant to admit negligence, causation, and the lack of contributory negligence were objectionable in seeking "legal conclusions...usually reserved for the jury" even if the requests "were phrased arguably to characterize them as relating to the application of law to fact." *Thompson v. King Feed & Nutrition Serv., Inc.*, 152 Wash 2d 447, 474 (2005).

   This objection may lose its strength where the RFA involves less significant legal issues. For example, a later unpublished Washington case upheld RFAs on the reasonableness of the plaintiff's medical expenses as "factual matters that should have been eliminated from controversy," not legal conclusions. *Byers v. Warner*, 2005 Wash App LEXIS 2333 at *6 (Sept 13, 2005). Similarly, ORCP 45 A permits RFAs to establish the "genuineness of any relevant documents or physical objects described in or exhibited with the request." *Id.*

8) *Central factual issues.* While a party may not simply object that the subject matter "presents a genuine issue for trial," *see* ORCP 45 B, there may be a viable objection when the disputed fact is so central that its admission would be dispositive to the litigation. *See Thompson*, 152 Wash 2d at 472 (noting that "[i]t is not a proper use of CR 36 to request an adversary to admit, in effect, the truth of the assertion that he should lose the lawsuit") (quotation omitted).

Final Caveats and Comments

While neither denials nor objections contained within an RFA response are admissible evidence at trial, attorneys remain obliged not to interpose frivolous objections. If only a portion of an RFA is objectionable, the party must admit or deny the remainder of it. ORCP 45 B.

The consequences of improper objections can be severe. If the court deems an RFA response insufficient, it may order an amended response, revisit the issue prior to trial, or deem that "the matter is admitted." ORCP 45 C. Additionally, if a party declines to admit a non-objectionable RFA and then loses on the disputed issue at trial, it may become liable to pay the requesting party's reasonable expenses, including attorney fees, on that issue. ORCP 46 C.

Nevertheless, there is such a thing as an objectionable RFA that does not need to be answered. Attorneys should not be afraid, when acting in good faith, to assert such objections.