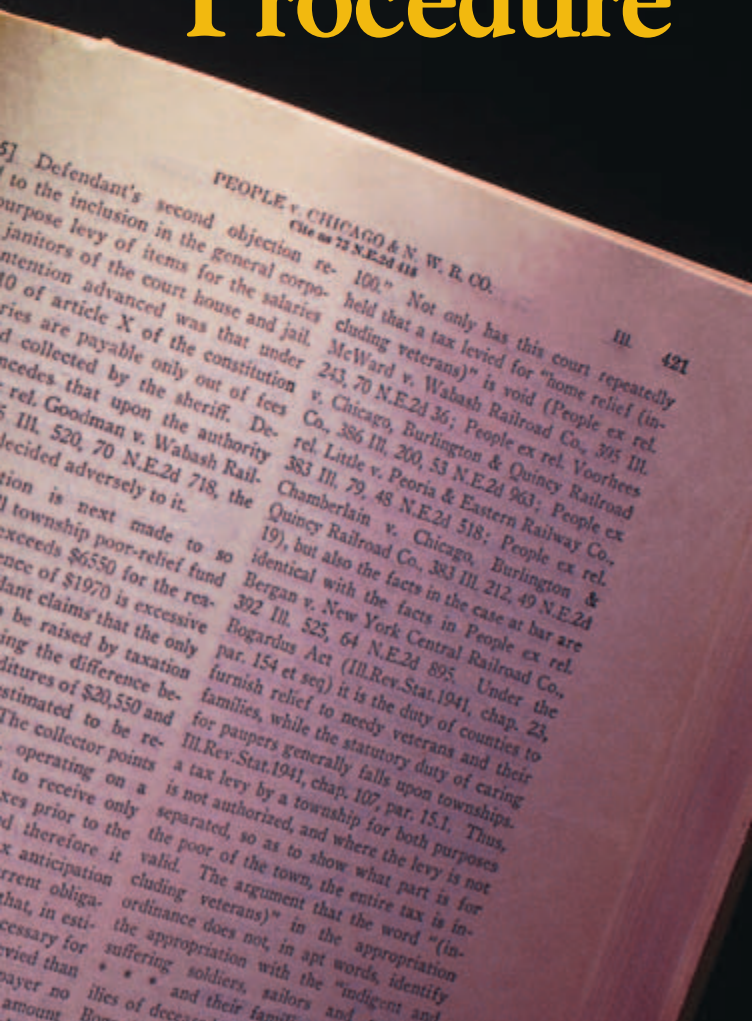
Practice Pointer

Or: How I Learned to Stop Getting Sandbagged in Discovery and Love the Rules of Civil Procedure[1]



Numerous litigation practitioners are stymied by opposing counsel who are not responsive to interrogatories and the related expense of going to court to get an order compelling discovery pursuant to MCR 2.313. What is probably one of the most under-used discovery tools contained in the rules of civil procedure can be joined with interrogatories to obtain prompt discovery responses in a manner that is self-executing.

MCR 2.312 provides for the use of requests for admissions and, if an answer is not provided within 28 days (or any longer period the court allows),[2] the requests are deemed admitted. That, in turn, is an appropriate basis for summary disposition (or, if there are unresolved issues, partial summary disposition) pursuant to MCR 2.116(C).[3]

Once evidence is admitted pursuant to a request for admission, the opposing party may not offer contradictory evidence at trial.[4] MCR 2.313(A)(4) also treats an evasive or incomplete answer as a "failure to answer," which is likewise an appropriate basis for summary disposition. The claim that a request for admission is directed toward a "genuine issue" for trial is also not a legitimate basis for objecting or providing an evasive answer to a request for admission.[5] Moreover, if the opposing party denies a matter in the answer to a request for admission and the matter is later proven factually true at trial, the court has sanctions under MCR 2.313(C) for the inappropriate denial.

You can combine requests for admissions and interrogatories to obtain information about what is actually contested in the case (since costs are imposed for a "frivolous" denial) and also to obtain the factual basis for another party's refusal to admit a particular item. This process is exceptionally helpful in establishing the elements of a claim that are formally necessary to make the prima facie case at trial, but may be difficult or expensive to prove.[6] You can also use requests for admissions to gain acknowledgment regarding the admissibility of exhibits, potentially eliminating the need to compel the preparer of the exhibit to attend the trial for the sole purpose of giving foundational testimony for the exhibit's admission into evidence.

There is no prohibition in the court rules for joining a request for admission with an immediately following interrogatory requesting the specific factual and legal basis for the denial.[7] After receiving the other parties' responsive pleadings, you should carefully analyze the pleadings and then prepare a complete outline of all the factual and legal matters at issue in the case. You should then use that outline to prepare joint requests for admissions and interrogatories, seeking an admission concerning a particular matter with an immediate follow-up interrogatory that seeks appropriate information if the request is denied; for example:

> If the answer to the previous request for admission is anything other than a complete affirmation, identify with particularity the factual and legal basis for your denial, including the name, home and business address, and telephone number of every person having first-hand knowledge of any portion of the facts or law; specify the substance of

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> the facts or law that you or your attorney may seek to elicit from those persons and how those persons gained the information regarding those facts or law; and identify the contents of any written materials or computer data relied on in support of your denial (or attach copies to your answers to these discovery requests). If you are unable to admit or deny the request, identify all the information that you have available in your answer to this discovery request and specify why you cannot admit or deny the previous request for admission.

If the opposing party does not answer the request for admission within the 28 days specified in MCR 2.312(B), the matter is deemed admitted and, consequently, ripe for summary disposition. If the other party subsequently seeks relief from its failure to comply with the court rules, the court can (*if* it permits *any* relief at all) condition that relief on whatever terms it considers appropriate, including the imposition of costs. Courts typically require "good cause" for that relief, and three factors have been suggested for the court to consider before granting leave to the other party to file a late response: (1) whether refusing to permit the late response/withdrawal/amendment will eliminate trial on the merits, (2) whether the requesting party will be prejudiced in its trial preparation by the delay, and (3) the reasons for the delay.[8]

Appellate courts generally have rejected the contention that a trial court abuses its discretion by granting summary disposition to the requesting party and refusing to let the other party file a late answer to a request for admission, even if the defaulting party suggests that the trial court sanction it in order to excuse the late filing.[9]

If the opposing party denies a request for admission, under MCR. 2.312 it must specifically deny the request in a manner that fairly meets the substance of the request and, when there is a qualified answer, the court rules require that the opposing party specify which part of the request is admitted and which part is denied. Similarly, even though a responding party can object to a request for admission or an interrogatory, MCR 2.309 (D)(2) and MCR 2.312(A) also provide that it is not a basis for objection that the request relates to statements of the parties or witnesses, to opinions regarding fact, or even to the application of law to fact. It is also incumbent on the opposing party to make its objection before the 28-day period specified in MCR 2.309(B)(4) and 2.312(B)(1) expires, and the opposing party bears the burden of proof regarding the legitimacy of the objection, although a motion for summary judgment must be filed pursuant to MCR 2.116(C) if there is no answer or a motion must be filed to determine the sufficiency of the answer or objection pursuant to MCR 2.312(C) if there is an evasive answer or objection.

A responding party is also circumscribed by the rules of civil procedure in its efforts to supply an evasive answer because, with an appropriate follow-up interrogatory, the answer must specifically state in detail the reasons why the party cannot truthfully admit or deny your request for admission and itemize the information that it does have available. Another good way of limiting evasive responses (especially since the court rules permit requests for admissions regarding the application of fact to law and, all too frequently, an opposing party tries to evade a request by claiming that it concerns a "legal" matter and that the person responding is "not a lawyer") is to attach copies of the appropriate court rules and request that the answering party acknowledge its obligation to answer the request as required by the court rules, such as:

1. Admit that MCR 2.313(A)(4) (copy attached) specifies that an evasive or incomplete answer is no answer at all (i.e., a failure to answer), and that answering that you are not an attorney constitutes an evasive or incomplete answer.
2. If the answer to the previous request for admission is anything other than a complete affirmation, identify with particularity the factual and legal basis for your denial, including the name, home and business address, and telephone number of every person having first-hand knowledge of any portion of the facts or law; specify the substance of the facts or law that you or your attorney may seek to elicit from those persons and how those persons gained the information regarding those facts or law; and identify the contents of any written materials or computer data relied on in support of your denial (or attach copies to your answers to these discovery requests). If you are unable to admit or deny the request, identify all the information that you have available in your answer to this discovery request and specify why you cannot admit or deny the previous request for admission.
3. Admit that MCR 2.309(D)(2) and 2.312(A) (copies attached) provide that a discovery request is not objectionable because it involves an opinion or a contention that relates to fact or the application of law to fact, and that answering that the matter constitutes a "genuine issue" for trial constitutes an evasive or incomplete answer.
4. [Follow up with the same interrogatory as paragraph 2].
5. Admit that you have a continuing duty under MCR 2.302(E) (copy attached) to supplement your responses to these discovery requests whenever you obtain any additional information related to the matter.

FAST FACTS:

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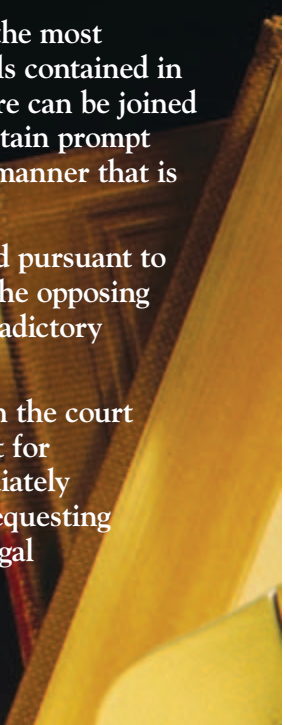

6. [Follow up with the same interrogatory as paragraph 2].
7. Admit that MCR 2.312(B) (copy attached) specifies that you must specifically deny the matters set forth in a request for admission or state in detail the reasons why you cannot truthfully admit or deny the request.
8. [Follow up with same interrogatory as paragraph 2].
9. Admit that any denial must fairly meet the substance of the request for admission, and, when good faith requires you to qualify an answer or deny only part of the matter of which an admission is requested, you must specify which parts are admitted and which parts are denied.
10. [Follow up with same interrogatory as paragraph 2].
11. Admit that you may not give lack of information or knowledge as a reason for failure to admit or deny unless you state that you have made reasonable inquiry (specifying what inquiry you have made) and that the information known or readily obtainable is insufficient to enable you to admit or deny the request (specifying all the information that you have available), and attach copies of any written material or computer data that you do have to your answers to these discovery requests.
12. [Follow up with same interrogatory as paragraph 2].

After the introductory portion of your discovery requests regarding the responding parties' duty to comply with the discovery rules, you should seek to root out the heart of the other parties' assertions in their responsive pleadings with appropriate requests and interrogatories addressing the issues specified in your outline. Following the requests and interrogatories directed at the underlying issues, you may conclude your discovery requests with items needed to adequately prepare for pretrial, summary disposition, mediation, or (ultimately) trial, using this format:

> Identify by name, home and business address, and telephone number, every person you or your attorney may call as a witness at any trial or hearing in this matter (including yourself), together with an itemization of all factual or legal testimony you or your attorney may seek to elicit from those witnesses and how those persons gained the information regarding the facts or law; and identify the contents of any evidence (including written materials or computer data) that you or your attorney may seek to introduce through those witnesses, or attach copies to your answers to these discovery requests.
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> In regard to the previous interrogatory, identify all witnesses you or your attorney may attempt to qualify as experts at any trial or hearing in this matter, as well as any experts you have consulted but do not intend to use, including a specification of their respective areas of expertise, the number of years of experience in their areas of expertise, their educational backgrounds, copies of their résumés or curriculum vitae, and copies of all reports or summaries prepared by those witnesses (including written materials or computer data), as well as any evidence you or your attorney may seek to introduce through those witnesses not disclosed in your prior answers, or attach copies to your answers to these discovery requests.
>
> In regard to the two previous interrogatories, identify with particularity all criminal convictions of those witnesses (especially any crime containing an element of dishonesty, false statement, or theft), and all reprimands or censures by professional organizations, including the name and complete address of the court or professional organization rendering conviction, reprimand, or censure, the specific charge, the date of the conviction, reprimand, or censure, and the docket number of the court file for each conviction, or attach copies to your answers to these discovery requests.
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> Identify the contents of all items you or your attorney will seek to introduce into evidence at any trial or hearing in this matter (including demonstrative evidence) not disclosed in your prior answers, or attach copies to your answers to these discovery requests.

Ordinarily, this type of minimal effort will prevent any surprise issues, witnesses, or exhibits from suddenly appearing at mediation or trial. The use of combined requests for admissions and interrogatories early in the case also shapes the issues for any necessary additional discovery, shapes the issues for mediation and trial, and prepares you for an effective pretrial. However, in all likelihood, a well-drafted set of requests for admissions and interrogatories should eliminate both factual and legal issues so that you can move for summary disposition under MCR 2.116(C). In the long run, that saves you a lot of time and effort and, consequently, saves your client a lot of money. And every litigation practitioner wants a happy client.

So learn to stop getting sandbagged in discovery and love the rules of civil procedure. ◆

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FOOTNOTES

1. With apologies to the late Stanley Kubrick, director of the film *Dr. Strangelove or: How I Learned to Stop Worrying and Love the Bomb.*
2. MCR 2.312(B)(1). The correct practice is to seek a longer response time *before* the 28 days elapse. See MCR 2.309(B)(4) and 2.312(B)(1).
3. *Employers Mut Cas Co v Petroleum Equip, Inc,* 190 Mich App 57, 62; 475 NW2d 418 (1991), and *Medbury v Walsh,* 190 Mich App 554, 556; 475 NW2d 470 (1991).
4. *Woodrow v Johns,* 61 Mich App 255, 259; 232 NW2d 688 (1975). See also 2 Longhofer, Michigan Court Rules Practice (5th ed), § 2312.6, p 388, which specifies that "admissions under MCR 2.312 are 'judicial,' i.e., binding, admissions, as opposed to mere 'evidentiary' admissions, which are subject to counter-proof."
5. MCR 2.312(B)(4) and 2.313(A)(4). See also 2 Longhofer, Michigan Court Rules Practice, § 2312.10, pp 391–392, citing *Dulansky v Iowa-Illinois Gas & Electric Co,* 92 F Supp 118 (SD Iowa, 1950), and *City of Rome v United States,* 450 F Supp 378 (DDC, 1978), aff'd 446 US 156 (1980), and § 2312.12, pp 392–393.
6. 2 Longhofer, Michigan Court Rules Practice, § 2312.3, p 386.
7. MCR 2.302(D). FR Civ P 26 does, however, limit the number of discovery requests in federal cases.
8. 2 Longhofer, Michigan Court Rules Practice, § 2312.15, pp 395–396.
9. *Employers Mut Cas Co,* supra at 62, and *Medbury,* supra at 556 n 3.