Committee on

# Pretrial Practice & Discovery

Vol. 12, No.1 © 2004 American Bar Association, Section of Litigation Winter 2003-2004

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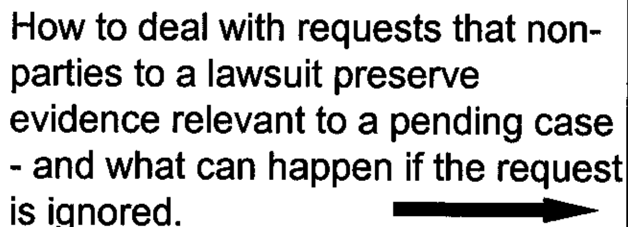

How to deal with requests that non-parties to a lawsuit preserve evidence relevant to a pending case - and what can happen if the request is ignored.

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## Third-Party Spoliation Claims

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How should a client respond if it receives a request to retain records relevant to ongoing litigation, but the litigation does not currently involve the client? No, this is not a tortured law school final exam question, but a real-life situation that can and does arise. To preserve the names of the maybe not-so-innocent, let us imagine Fred Hourly, an employee, is suing his employer, Big Sales Force ("BSF"), in federal court under the Fair Labor Standards Act. Your client, Global Sales ("GS") is the corporate parent of BSF, or possibly a BSF affiliate, or simply a business that has some role in processing BSF's payroll. A letter arrives on your client's desk, with a copy of the complaint Hourly has filed, telling your client to retain any records relevant to the litigation. Even if your corporate client has established document retention policies, and familiar protocols to follow when responding to state and federal subpoenas for records, such policies and procedures do not provide a ready response to an informal document retention request. When faced with such a letter the client's first reaction may be to simply pitch the letter and wait for a subpoena, particularly since the client is not named in the lawsuit. However, a little reflection may be in order to avoid potential pitfalls later on.

Claims of spoliation typically arise between the litigants in a case when one party destroys or somehow alters evidence in the case, to the other party's detriment. That is, one party has "spoiled" the evidence. Federal and state courts have long allowed sanctions for such conduct within the confines of the lawsuit, recognizing a litigant's duty to preserve evidence relevant to the litigation. Typically, courts may sanction a spoliator either by excluding evidence, or by permitting the jury to draw an adverse inference regarding the spoliated evidence. *Glover v. The BIC Corp.*, 6 F.3d 1318 (9th Cir. 1993); *Akoina v. United States*, 938 F.2d 158 (9th Cir. 1991).

However, this article focuses on the third-party spoliator, a somewhat different topic.[1] An initial question is whether a litigant in a particular case can be sanctioned based on the actions of the third-party spoliator. Also, as a logical next step, if sanctions occur or the case otherwise goes awry based on spoliated evi-

*(continued on page 3)*

Third-party spoliation claims are admittedly rare. However, this brief survey of cases and developments shows that pre-subpoena letters or other contacts requesting the retention of documents or other evidence merit a specific response. In formulating that response, one should first consider the relevant federal and state law on the issue of spoliation. Also, the fact that a particular state has not recognized third-party spoliation claims does not ensure that no such claim exists. As with the Alabama court, some jurisdictions may find that such a claim inures within traditional negligence law. Second, one should consider the likelihood that the client may at some point be brought into the litigation, and the potential liabilities. Third, one should consider the cost of compliance. Under the Alabama rule, the requesting party should bear the costs of retaining the requested evidence. If the request is relatively narrow and inexpensive to handle, it may be most prudent for the client to simply retain the requested evidence. However, let us assume that this would not be the case for our beleaguered client, GS. If GS receives an informal request for expensive, wide-ranging document retention, its first response could simply be a letter informing Hourly that it has no duty to retain any evidence. It could also suggest that the cost of such retention would substantial, and that any such retention costs would be borne by Hourly. Hourly can then decide how valuable the evidence is to his case, and make the next overture. While there may be no way to anticipate all of the potential pitfalls during pre-litigation, a timely response should help to minimize the possibility of future liability.

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[1] This article leaves aside the question of whether your client may at some point be brought into the suit and thus no longer a third party. For excellent discussions of spoliation and its many aspects, *see* Wilhoit, SPOILATION OF EVIDENCE: THE VIABILITY OF FOUR EMERGING TORTS, UCLA Law Review (December, 1998); Nolte, THE SPOLIATION TORT: AN APPROACH TO UNDERLYING PRINCIPLES, Saint Mary's Law Journal (1995); Spencer, DO NOT FOLD SPINDLE OR MUTILATE: THE TREND TOWARDS RECOGNITION OF SPOILATION AS A SEPARATE TORT, Idaho Law Review (1993-94)

* * *

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# Rule 36: Making Effective Use of Requests for Admission

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Although frequently overlooked and underused, Federal Rule of Civil Procedure 36[1] Requests for Admission ("RFAs") can be the most cost-effective way to implement case strategy, to reduce the number of material and triable issues, and to achieve successful disposition of the case.[2] Conversely, the impact of a mishandled response to RFAs can be devastating and may lead to the dismissal of a cause of action.

> "Generally, the matters posed by the party seeking an admission should be capable of a yes or no answer."

RFAs ***require*** the responding party to admit the truth of a matter, and failure to respond properly may result in a deemed admission and even a fee award. Most litigators find these effects counter-instinctive when compared to the litany of objections received to well-placed interrogatories, as the party responding to Rule 36 RFAs cannot simply say that discovery is ongoing, that they continue to investigate the facts, or, best yet, that the answer can be gleaned from examination of the responding party's documents housed in a storage facility four States away. For this reason, I prefer a simply phrased RFA to a three-week document review.

Litigators under-utilize RFAs for many other reasons. Of course, interrogatories, week-long document productions, and 7-hour depositions provide a certain comfort that every stone has been unturned and that the client's interests are being served. It is no surprise that we begin to view a five-page document with a dozen innocuous-looking questions prepared in a matter of several hours as something of an anathema to the more thorough, methodical and expensive litigation tasks.

The primary reason litigators should give early consideration to implementing RFAs is to harness Rule 36's powerful effects of well-placed RFAs. A secondary but equally important purpose of RFAs is to focus the discovery issues on the facts that matter most, which also preserves client resources.

This article briefly discusses Rule 36, and the author provides some simple suggestions for making more effective use of RFAs and avoiding the harmful resulting consequences.

## I. Rule 36

Two main concepts dominate Rule 36: (1) the power to demand the other party admit a fact under Rule 36(a), and, (2) the promise of a conclusively established fact under Rule 36(b). Some courts have held that RFAs are neither a pleading nor a discovery device, making their use available up to the time of trial.

Federal Rule of Evidence 36(a) begins:

> A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b)(1) 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. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Without leave of court or written stipulation, requests for admission may not be served before the time specified in Rule 26(d).

FED. R. CIV. P. 36(a).

The Rule contains several important limitations. First, an admission may only be used in the pending action. Second, Rule 36 shares the same scope as Rule 26(b)(1) and must relate to statements of fact, opinions of fact, or the application of law to fact. Third, RFAs may not be served before the time allowed for discovery set forth in Rule 26(d).[3] There is no express cut-off time for their use. Fourth, each matter must be separately set forth in numbered paragraphs, so requesting your opponent to agree with a two-page narrative of your version of the case generally will not suffice.

Rule 36(a) continues with a description of the manner in which the responding party must respond:

> The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow or as the parties may agree to in writing, subject to Rule 29, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an 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. 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. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why the party cannot admit or deny it.
>
> The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

FED R. CIV. P. 36(a).

The RFA presents several distinct advantages over the discovery deposition or other written devices. First, an admission under Rule 36 cannot be contradicted by the party at summary judgment or at trial, whereas "evidentiary admissions"[4] and inconsistent discovery evidence depends on credibility and impeachment for its ultimate resolution. Second, an inadequate response or an improperly denied request may allow recovery of the fees and costs directly related to proof of the requested matter.

Rule 36(b) describes the effect of an admission:

> Any matter admitted under this rule is conclusively established ***unless the court on motion*** permits withdrawal or amendment of the admission. Subject to the provision of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the 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 that party in maintaining the action or defense on the merits. Any admission made by a party under this rule is for the

> purpose of the pending action only and is not an admission for any other purpose nor may it be used against the party in any other proceeding.

FED.R. CIV. P. 36(b) (emphasis supplied).

## II. Suggestions for More Effective Use of Rule 36

In general, the most effective use of Rule 36 requires little more than some careful planning in the early case stages. Effective responses to RFAs require a firm understanding of Rule 36's strict language, which demands that practitioners recognize the severe consequences of failed or inadequate responses.

### A. Drafting RFAs

In preparing a set of RFAs, good practice demands a careful review of all pleadings in order to identify all facts needed to support each element of each claim, each item of damage, and each affirmative defense. Make a list of all "without knowledge" statements from each responsive pleading and determine whether the opposing party should reasonably be expected to have such knowledge. Make a list of each denial from each responsive pleading and include in your RFAs demands to admit facts related to or contingent on the denials. Generally, the matters posed by the party seeking an admission should be capable of a yes or no answer. Statements that are vague or statements susceptible to more than one interpretation defeat the goals of Rule 36 and would be ruled objectionable.[5] Finally, it is recommended that you check your local rules, because some district courts limit the number of individual RFAs that may be served.[6]

Here are some other suggestions and comments to have in mind when drafting a set of requests for admission.

**Timing.** RFAs served at the outset of discovery will narrow the scope of litigated facts, but may tip your hand to your opponent and unintentionally reveal your own case theory or strategy. In addition, Rule 36(a) prevents service of RFAs before the time specified in Rule 26(d). RFAs served at or near the end of discovery will draw the boundaries of disagreement among parties. Resolution of certain issues of fact (at any stage) will allow you to focus on the issues that matter most and will prevent minor issues from falling to the wayside until the close of discovery nears. You know your case best, so determine whether RFAs should be used prior to undertaking significant discovery to avoid fact disputes or near the end of discovery to eliminate fact disputes.

**Pure Facts.** Use RFAs to define the boundaries of the case, including dates of relevant transactions. Where the pleadings contain simple statements of fact that have not been admitted by the responding party, consider drafting plainly worded RFAs to pin down critical facts. Dates, time, places, and witnesses can be pinned down early in the course of a case. Subsequent, contradictory deposition testimony cannot be admissible to disprove any such admission unless the court allows amendment or withdrawal.

**Existence of Evidence.** Courts have affirmed the use of RFAs requesting an admission that the responding party has "no evidence" relating to a particular claim or disputed fact.[7] This type of admission clearly prays for a failure to respond within the time allowed and, occasionally, works.

**Documents.** Rule 36 could yield the greatest cost-savings in a document intensive case. For example, the following RFA:

> That no documents other than XYZ 00001 through XYZ 01023, inclusive and attached hereto as Exhibit 1, support Plaintiff's claim for lost profits.

will narrow your opponent's claims and may eliminate the need to need to depose an opponent's sales force, accounting staff, and records custodian. Similarly, the following RFA:

> That documents XYZ 00001 through XYZ 01023, inclusive and attached hereto as Exhibit 2, are genuine and authentic copies of records maintained by XYZ, Inc. in the course of its regularly conducted business activity.

may remove all factual questions concerning the admissibility or authenticity of those lost profit records. If you request another party to admit the genuineness of a document, an exact copy of the document must be served with the request (unless a copy of the documents has been made available for inspection). Further, in *Henry v. Champlain Enterprises, Inc.*, the district court sustained objections to RFAs querying a complex contract after finding the requested admission did not allow for a reasonable yes or no response.[8] The district court reasoned that forcing a party to admit or deny the meaning of such a complex document tends to defeat the underlying purpose of Rule 36 simplification.

**Application of Law to Fact.** In cases where the actions of a key employee or independent contractor subject your opponent to liability, a request to admit that the employee or independent contractor was acting within the course and scope of employment while committing those actions may eliminate a later unraveling of your case after the employee provides favorable testimony.[9] A further suggestion is to review the pleaded affirmative defenses and request your opponent to admit those matters.

**Questions of Law.** Pure questions of law fall outside Rule 36's permissible scope and should be avoided. Inclusion of such requests may undermine the effect of otherwise well-placed RFAs. For instance, it is not permissible or even necessary to demand that your opponent admit that a witness provided

certain deposition testimony or that the pleadings contain certain averments. Such requests will be objectionable. However, a request applying such testimony to the controlling law will avoid any proper objection.

**Evidentiary Issues.** RFAs can assist in obtaining a favorable evidentiary ruling. For example, suppose a key witness provided deposition testimony against your opponent in a related case on an issue material to your case. The witness, or the "declarant", dies (or is otherwise "unavailable") prior to giving any testimony in your case. Of course, Federal Rule of Evidence 804 allows the testimony under those circumstances, but what is the most efficient method to ensure admissibility? A short Rule 36 RFA eliminates the difficulty of investigating, gathering, and proving the witnesses unavailability and provides a cost-effective result when compared to the hours of associate or paralegal time in locating and obtaining a death certificate, conducting legal research, and potentially preparing a motion in limine to ensure admissibility of a the statement.

**Companion Interrogatories.** Counsel frequently includes a single interrogatory with the RFA, demanding that the responding party identify all facts and documents that caused the responding party to deny the admission. The purpose of the companion interrogatory is to allow the serving party to learn the bases for contention and focus discovery on those issues. Bear this in mind when preparing other interrogatories to avoid a legitimate challenge to the total number of interrogatories served under local rules.

of requested admissions, as a party may not rely on its own answers to a RFA as a basis for summary judgment.[11]

**Standard of Review.** Before dashing off with a set of RFAs thicker than the telephone directory, counsel should be mindful to avoid over-use of RFAs. Indeed, over-use can backfire if the responding party moves for a protective order. For instance, the district court judge could rule that a set of RFAs as a whole are too burdensome for a party to respond to in a careful manner due to the inclusion of impertinent requests. The reviewing court of appeals will apply an abuse of discretion standard to the district court's enforcement of Rule 36. As a result, counsel should eliminate truly unnecessary requests or requests that cannot be answered fairly.

### B. Avoiding Catastrophic Results: Responding to Rule 36 RFAs

The fundamental requirement of providing of a response is to serve the response within 30 days. Better yet, serve the response a few days early to avoid any question of timeliness that might lead to an unintended admission of key facts. Without question, Rule 36 provides among the harshest sanction for both a failure to respond and an improper response.[12]

**Rule One.** File a timely response, obtain a timely written extension, or obtain relief from the court within the time allowed for your response.

> An RFA "requesting that the responding party has 'no evidence' . . . prays for a failure to respond . . . and, occasionally, works."

**Deemed Admissions.** Mark the calendar for thirty days. If no response is received within the allowed time, then the matters set forth in the RFAs are deemed admitted. Many courts hold that Rule 36 is self-performing and does not require the serving party to file a motion to obtain to court's imprimatur on "deemed admissions."[10] I would further suggest that, in most cases, the filing of a motion to confirm the deemed admission should not occur until the summary judgment stage.

**Summary Judgment.** Rule 36 admissions remove all genuine issues of material fact on the matter admitted. There is no need to compare differing versions of an event presented in dozens of depositions. Simply make the legal arguments and attach the RFA to your Rule 56 motion. The opposing party and, more significantly, the court are bound by the admissions (deemed and explicit) in ruling on the summary judgment. Conversely, the parties nor the district court are not bound by the movant's denials

**Extension to Respond.** The parties may agree in writing that a response may be served after 30 days. Not only should the agreement be in writing, but the extension should be filed with the clerk to provide proof on the docket. In addition, a district court has the discretion to allow additional time for a response to a request for admission even after the time fixed by the rule has expired. Thus, the court can permit what would otherwise be an untimely response to the RFAs.[13]

**Objecting to the Request.** The Rule expressly allows objections to a RFA, but what objections are appropriate? Objection may be made if the RFA is served prior to the Rule 26 meeting of the parties. Objections must be made in writing within the time allowed for answering the request. If some requests are answered and others are object to, then the answers and objections should be contained in a single document. Another proper objection is that the request is beyond Rule 26's scope of

discovery or would require the answering party to reveal privileged matters. Naturally, some requests may be so poorly drafted that the answering party may not be able to construe the fair substance of the request.

Improper objections include the following grounds: the request relates to a disputed matter, the request relates to a triable issue of fact, the request requires the application of law to fact, and the responding party lacks personal knowledge. Even if asserted in the response to the RFA, these improper objections provide absolutely no protection from a failure to respond and will certainly lead to the court's conclusion that the matters are deemed admissions.

**Protective Order.** Counsel may obtain some relief and benefit by moving the court for a protective order to allow a response later than 30 days, to strike certain unclear requests, or to strike an entire set of burdensome requests. The district court will be guided by the same considerations as if considering a discovery motion.

**Obtaining Relief from a Deemed Admission.** The district courts have both refused to grant relief and have granted relief from deemed admissions under varying circumstances. Obviously, relief can be obtained when the serving party has not complied fully with Rule 36. Otherwise, the grounds for relief from a deemed admission have been construed quite narrowly. A court may permit withdrawal [14] or amendment of an admission if the merits of the action will be "subserved" and the party who obtained the admission fails to establish prejudice from the withdrawal or amendment.[15] Therefore, it is best to avoid any legitimate claim to the timeliness of your response. Instruct your staff on the importance of marking your calendar early and often as soon as a Rule 36 request for admission arrives.

**Fees.** An improper failure to admit a requested fact enables the district court to impose the fees and costs associated in requiring the demanding party to prove the truth of a request. Query, doesn't it make sense to admit (after a reasonable investigation) that certain documents are authentic instead of saddling your client with the risk of paying for your opponent's fees and travel expenses for the deposition of a records custodian?[16]

### III. Conclusion

Rule 36 Requests for Admission present a powerful opportunity to advance your case strategy, reduce litigation costs, and achieve favorable disposition of claims or defenses. Careful attention to their use and resulting impact should be included in every initial case analysis. Conversely, effective responses require immediate and careful analysis of the requested admission in order to avoid improper admissions (leading to the imposition of costs) and deemed admissions (leading to an adverse decision on the merits). Rule 36's final teaching is to seek prompt leave of court to withdraw or amend inadequate or failed responses, in order to minimize any legitimate claim of prejudice.

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[1] FED. R. CIV. P.. 36 (2003) (as amended in 1993). The reader should note that significant changes to Rule 36 took effect in 1970. As a result, careful scrutiny should be given any case law decided before 1970.

[2] In *Burnham v. Superior Court of California*, 495 U.S. 604, 110 S. Ct. 2105, 109 L. Ed. 2d 631 n.13 (1990), the United States Supreme Court observed that Rule 36 requests provide can economical results when asserting Rule 12 jurisdictional challenges.

[3] Rule 26(d) prohibits the service of discovery until after the Rule 26(f) meeting of the parties.

[4] The Seventh Circuit briefly mentions this distinction in the context of a recent n employment discrimination case. *Johnson v. Cambridge Indus., Inc.*, 325 F.3d 892, 2003 U.S. App. LEXIS 6718 (7th Cir. 2003), *reh'g denied*, 2003 U.S. App. LEXIS 11155, cert. denied, 2003 U.S. LEXIS 8215 (U.S. Nov. 10, 2003). In *Johnson*, the court of appeals discounted an evidentiary admission's impact on the district court's entry of summary judgment, stating "[i]it is immaterial that there might have been other evidence in the record--the P 102 statement, specifically (which incidentally did not take the form of an admission under Rule 36 of the Federal Rules of Civil Procedure, but was only evidentiary in nature)--that would have changed matters." 325 F.3d at 899.

[5] *See Honeycutt v. First Fed. Bank*, 2003 U.S. Dist LEXIS 3629 (W.D. Tn 2003).

[6] *Compare, e.g.*, Local Rule 36.1 (M.D. Pa. 2003) (limits the number of individual requests to 25), with Local Rule 104.1 (D. Md. 2003) (limit of 30 requests).

[7] In *McCann v. Mangialardi*, 337 F.3d 782, 2003 U.S. App. LEXIS 14652 (7th Cir. 2003), *reh'g den.*, 2003 U.S. App. LEXIS 19364, plaintiff raised false arrest and Due Process claims arising from a public corruption probe in Chicago. The defendant served a RFA requesting an admission that plaintiff has "no evidence from any source that Sam Mangialardi or any other Chicago Heights police officer withheld any exculpatory evidence from Plaintiff, the state's attorneys, or Plaintiff's attorney prior to the date when Plaintiff pled guilty on January 31, 1991." The plaintiff failed to respond to this RFA and the court of appeals held that such failure give preclusive effect to the admission.

[8] *Henry v. Champlain Enterprises, Inc.*, 212 F.R.D. 73 (N.D.N.Y. 2003).

[9] *See Morillo v. City of New York*, 1997 U.S. Dist LEXIS 1665 (S.D.N.Y. 1997)

[10] In *McCann*, the Seventh Circuit firmly enforced Rule 36 and provided the following analysis:

> "This default admission is, in and of itself, fatal to McCann's final due process claim. Fed. R. Civ. P. 36(a) (a party who fails to respond to requests for admission within 30 days is deemed to have admitted those requests); *Walsh v. McCain Foods Ltd.*, 81 F.3d 722, 726 (7th Cir. 1996) (same). We also note that McCann made no attempt to withdraw the admission by petitioning the court for such withdrawal under

Fed. R. Civ. P. 36(b), n3 and, therefore, it is "conclusively established" for purposes of this litigation that he has no evidence that Mangialardi withheld exculpatory evidence from him prior to the entry of his guilty plea. *United States v. Kasuboski*, 834 F.2d 1345, 1350 (7th Cir. 1987) (holding that "admissions made under Rule 36, even default admissions, can serve as the factual predicate for summary judgment"). The district court erred by not analyzing this admission and giving it preclusive effect."

*McCann*, 337 F.3d at 788.

[11] *See, e.g., Jorgensen v. EPIC/Sony Records*, 2003 U.S. App. LEXIS (2nd Cir. Dec. 3, 2003) (reversing entry of summary judgment and remanding case with suggestion for limited discovery on issue of access to infringed material). The *Jorgensen* case involved copyright claims relating to the pro se plaintiff's assertion that the Academy Award winning songs "My Heart Will Go On" (sung by Celine Dion and appearing on the *Titanic* soundtrack) and "Amazed" (sung by the country music group Lonestar) infringed a song that plaintiff submitted to various record labels. One of the defendants, Sony, moved for summary judgment alleging, *inter alia*, an absence of evidence of access (an essential element) to the allegedly infringed song and relying on Sony's denials to plaintiff's request for admission. The appeals court also noted that the pro se plaintiff elicited an admission under Rule 36 that one of defendant's business units had access to the infringed song. The moral of this story is that if a pro se plaintiff can utilize Rule 36 effectively, then those who practice law for a living should have the same or better results.

[12] *See Nelson v. Wal-Mart, Inc.*, 2003 U.S. App. LEXIS 7244 (7th Cir. 2003) (affirming district court's order dismissing plaintiff's claim for failure to respond to RFAs requesting plaintiff to admit he was 51% at fault for accident).

[13] *See Smith v. Nat'l Bank of Atlanta*, 837 F.2d 1575 (11th Cir. 1988), cert. denied, 488 U.S. 821 (1989).

[14] *See McCann*, 337 F.3d at 788.

[15] *See Perez v. Miami-Dade County*, 297 F.3d 1255 (11th Cir. 2002).

[16] *But see* Rule 37(c)(2)(C) (providing that expenses cannot be recovered as a result of a failure to admit a request for admissions when the party who fails to admit has "reasonable grounds to believe that the party might prevail on the matter.") *See Rico v. Am. Family Ins. Group*, 2002 U.S. Dist. LEXIS 15749 (E.D. La 2002).

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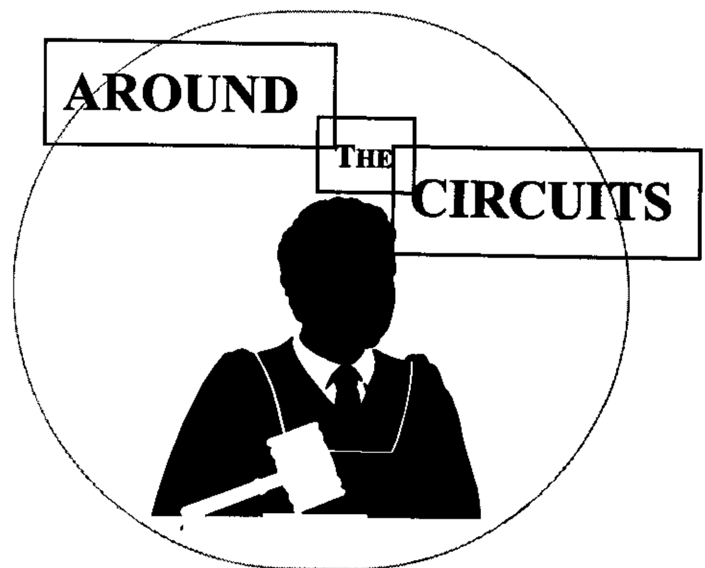


*The following cases were reviewed by two of our Recent Court Decisions and Procedural Developments Subcommittee Co-Chairs,* ***Brian Moffet*** *and* ***Paul Madden****, for which the editors express their gratitude.*

**FIRST CIRCUIT**

***Massachusetts Court Trims Mercoid Exception To Compulsory Counterclaim Rule***

The United States District Court for the District of Massachusetts has sided with the United States Court of Appeals for the Second Circuit in limiting the Supreme Court's *Mercoid* exception to Federal Rule 13(a). In *Mercoid*, the United States Supreme Court carved out an exception to the compulsory counterclaim standards articulated in Federal Rule 13(a) by treating a claim for antitrust damages as a permissive, not compulsory, counterclaim, to a prior claim of patent infringement, although the criteria for treating the claim as a compulsory counterclaim had clearly been met. *See Mercoid Corp. v. Mid-Continent Investment Co.*, 320 U.S. 661 (1944). Since that decision, the *Mercoid* exception has been the subject of extensive criticism. *See, e.g., Burlington Indus. Inc. v. Milliken & Co.*, 690 F.2d 380, 389 (4th Cir. 1982), 6 Wright, Miller & Kane, Federal Practice and Procedure § 1412 (1990).

Notwithstanding subsequent criticism of the *Mercoid* exception, the Court of Appeals for the First Circuit sided fully with the Supreme Court, observing that "the Supreme Court has clearly stated that a counterclaim for treble damages is permissive in nature so that failure by a defendant to plead it in a prior patent suit does not bar a subsequent suit by him under the anti-trust laws." *Fowler v. Sponge Products Corp.*, 246 F.2d 223, 227 (1st Cir. 1957). Other circuits have also recognized the continuing validity of the *Mercoid* exception. *Tank Insulation Int'l, Inc. v. Insultherm, Inc.*, 104 F.3d 83, 87-88 (5th Cir. 1997); *Hydranautics v. FilmTec Corp.*, 70 F.3d 533, 536 (9th Cir. 1995).