LOS ANGELES
Daily Journal
www.dailyjournal.com
TUESDAY, JANUARY 20, 2015
PERSPECTIVE

You can't use denials to requests for admission at trial

By Gregory M. Smith

On Jan. 13, the 1st District Court of Appeal answered an important question for which it could find only a "surprising paucity of relevant authority." It held that the discovery statutes do not permit use of denials to requests for admission at trial, either as evidence themselves, or the basis for questions to the denying party. *Gonsalves v. Li*, 2015 DJDAR 473.

Plaintiff Kenneth Gonsalves was a BMW salesman in Concord. In 2008, he assisted the defendant, Li, and his father in test driving BMW 335 and M3 sedans. Although testimony from the three men was inconsistent regarding the test drives, they agreed that while Li was driving the M3, he engaged the "M button" — which changed the handling characteristics of the vehicle — and subsequently lost control of the car while taking a curve on a freeway on-ramp. The car spun and struck a guardrail. Gonsalves suffered neck and back injuries that necessitated a disk replacement surgery.

While cross-examining Li at trial, plaintiff's counsel questioned him on his refusal to affirmatively answer requests for admission that he was "driving too fast for the conditions." The trial judge admitted the denied requests for admission into evidence over objections from Li's counsel.

After the jury awarded Gonsalves more than $1.2 million, Li appealed on the grounds that the court made a host of reversible errors concerning admitting evidence, and permitting inappropriate examination and argument from plaintiff's counsel. The court agreed with Li and remanded the matter for a new trial. While the court's lengthy opinion delves into a variety of issues of evidence and counsel's conduct, the most relevant issue to litigators is the ruling pertaining to the use of requests for admission.

Requests for admission permit a party to seek a binding admission from its adversary that specific facts are true. The state Supreme Court described the role of requests for admission as being "primarily aimed at setting at rest a triable issue so that it will not have to be tried." *Cembrook v. Superior Court*, 56 Cal. 2d 423, 429 (1961). While discovery statutes state that "any part" of a deposition or interrogatory may be introduced at trial (see Code of Civil Procedure Sections 2025.620 and 2030.410), only a "matter admitted in response to RFAs" is binding on the admitting party and can be used at trial (CCP Section 2033.410). Code of Civil Procedure Section 2033.420 authorizes monetary sanctions against a party that unreasonably refuses to admit to a request for admission, but it does not specifically permit a denial of a request for admission to be read to the jury or otherwise used against a party at trial.

Due to the lack of judicial analysis of the statutes, the court approvingly referred to Li's brief which analogized the use of requests for admission in cross-examination to the use of contention questions in deposition — a tactic condemned in *Rifkind v. Superior Court*, 22 Cal. App. 4th 1255 (1994). *Rifkind* disallowed deposition questions that "require the party interrogated to make a law-to-fact application that is beyond the competence of most lay persons. Even if such questions may be characterized as not calling for a legal opinion, or as presenting a mixed question of law and fact, their basic vice when used at a deposition is that they are unfair." *Gonsalves* held that it was improper for Li to have to explain why he took the legal position that he could not admit certain requests for admission while "on the spot" and without the ability to consult with counsel. The court noted that Li was in an even worse position than *Rifkind* because he was not in deposition, but was on the stand in front of the jury.

After surveying the authority in other jurisdictions — including Massachusetts, Florida and Texas — that similarly limit the use of denials to requests for admission, the court concluded that "denials of [requests for admission] are not admissible evidence" and that "the trial court permitted examination of Li that was unfair and prejudicial to him, and erred in admitting those responses in evidence."

The lesson to litigators is to make sure to make the most out of denials to requests for admission before they become off limits at trial. Follow-up special interrogatories and Form Interrogatory 17.1 can flush out why a party is denying a request for admission, and can allow counsel to ask specific questions at deposition about the facts underlying the denials.

Gregory M. Smith *is an attorney with Haight Brown & Bonesteel LLP. You can reach him at gsmith@hbblaw.com.*

GREGORY M. SMITH
Haight Brown & Bonesteel