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Karla M. Shultz, Esquire
Counsel, Civil Procedural Rules Committee
Pennsylvania Judicial Center
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Suite 6200
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Harrisburg, PA 17106-2635

**Re: Proposed Recommendation No. 241-Rescission of Rule 4014 Governing Request for Admission and Amendment of Rule 4019 Governing Sanctions**

Dear Ms. Shultz:

Please accept this letter as a submission concerning the pending proposal to amend Rule 4014 governing Request for Admission on behalf of the Philadelphia Bar Association State Civil Litigation Section and its Rules and Procedure Committee. In substance these proposed rule changes would eliminate the self-effectuating nature of requests for admission and require a court order upon motion for sanctions pursuant to Rule 4019 for any matter to be deemed admitted.

The proposed Rule changes would substantially undermine the usefulness of requests for admission as a discovery device. The changes also would tend to increase the cost of litigation, the volume of motion practice and the incidence of less than forthright responses to requests for admission because any responding party would be free to await a motion for sanctions before serving truly responsive answers.

It is understandable for some lawyers, particularly those with busy trial practices, to view requests for admission as a burden and a potential minefield because failing to respond in a timely fashion may produce adverse consequences to the client. There are, of course, instances where parties serve requests for admissions that are overbroad or do not represent a good faith recitation of the actual facts that would be adduced in discovery or trial. In such cases, objections or denials are certainly appropriate.

However, the proposed rule change would in essence double the effort associated with employing requests for admission because there would be little or no practical incentive to respond fairly and timely to such requests, when the side propounding the requests would inevitably be obliged to prepare and file a motion to deem the requests admitted no matter how fair and factual the requests may be. This will serve to expand the time, effort and resources devoted to requests for admission and increase motion practice, whereas there may be an expectation underlying the proposal that it will tend to conserve judicial resources.

Under the present Rule 4014, there are already safeguards against unfairness, including the right of an answering party to state that "he or she has made reasonable inquiry and that the information known or readily obtainable by him or her is insufficient to enable him or her to admit or deny." In addition, the trial court, under paragraph (c):

> may determine that an objection is justified, may order an amended answer be served, or may defer any disposition of the issue of the adequacy of the admissions until a pretrial conference or at trial itself.

Moreover, in paragraph (d) of Rule 4014, which the Committee recommendation proposes to delete as "unnecessary," the trial court already has the discretion in appropriate cases to "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 him or her in maintaining the action or defense on the merits." Therefore, there are already multiple safety valves against the draconian enforcement of the rule and any experienced litigator has seen instances where trial courts have not deemed the facts set out in requests for admissions established for any number of reasons.[1]

The Rule changes, if adopted, would also present a number of problems in practice. For example, assume there is no issue that requests for admission were timely served, a party moving for summary judgment and using the requests for admissions as a foundation for the motion will first be required to file a motion for sanctions under Rule 4019 to determine that the requests for admission are really deemed admitted before filing the summary judgment motion. This could easily add another 60 days or more to the timetable for filing the summary judgment motion. Promoting motions for sanctions is not a desirable end product of any proposed rule change. Similarly, if counsel lack confidence that their unanswered requests for admission will later be deemed admitted following a motion for sanctions, then they will out of caution notice and take additional costly and time-consuming depositions simply to authenticate documents or to confirm fundamental facts that may not be subject to reasonable dispute. "The Rule is designed to expedite the production and authentication of evidence that is not controverted by the litigants. By permitting certain matters to be established conclusively prior to trial, the Rule eliminates

[1] *E.g.*, *Thomas v. Flash*, 781 A.2d 170, 177 (Pa. Super. 2001)(Trial court was permitted under Rule 4014(b) to grant attorney extension of time to file answers to requests for admission, even though 30 day period for responses had passed.).

these matters as disputed issues at trial." 9A Goodrich-Amram 2d §4014:1.[2] These salutary objectives will be substantially eroded if the proposed amendments are adopted.

The proposed rule change also is in direct conflict with longstanding federal practice under Federal Rule of Civil Procedure 36[3] governing Requests for Admission.[4] In fact, the failure to admit is sanctionable pursuant to FRCP 37(c)(2). As a policy matter, the Committee and practitioners should be looking for opportunities to produce more alignment and consistency between the state and Federal Rules of Civil Procedure so as to minimize confusion for practitioners, including newly admitted lawyers who are taught civil procedure using the federal rules as the model. The Explanatory Comment has not offered any reason why Pennsylvania should adopt a rule change materially deviating from the general rule traditionally applied to requests for admissions in federal courts and in other neighboring state courts, such as in New Jersey (NJ Rule 4:22-1) and Delaware (DE RCP 36).

If the underlying but unstated concern behind this recommendation is that busy practitioners might overlook a set of requests for admission or might need more time to fairly respond to them, the existing rule language and authority interpreting it grant trial courts considerable discretion in fashioning a fair and appropriate remedy, including an extension of time, as well as the ability to withdraw, amend or supplement responses to conform with the evidence. There is no need to dilute the self-effectuating nature of requests for admission and thereby undermine the usefulness of the discovery device. Unfortunately, some practitioners devote substantial effort issuing baseless objections and non-answers to legitimate discovery requests, which leads to the suggestion that we should be searching for avenues to make written discovery more meaningful and less expensive rather than adopting rule changes that would further convolute the process of establishing pertinent facts through discovery.

The Section has no objection to the Committee's recommendation that Rule 4014 be divided into subdivisions for easier reference, so long as matters properly the subject of requests for admission under subpart (a) of the rule are deemed admitted in the event of a failure to respond within the timeframe prescribed by the rule.

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[2] The related Amram Commentary states: "The Rule is derived from the federal Rule and, like its federal counterpart, serves two vital purposes which are designed to reduce trial time. Admissions are sought to facilitate proof with respect to issues that cannot be eliminated from the case, and to narrow the issues by eliminating those issues that can be."

[3] Rule 36(a)(3) provides as follows:

> *Time to Respond; Effect of Not Responding.* A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under rule 29 or be ordered by the court.

[4] We further suggest that the title of this rule be amended so as to conform with the title of the federal rule and common litigator parlance -- "Requests for Admission".

As always, we appreciate being afforded the opportunity to offer our comments concerning proposed civil rule changes. Thank you for your consideration of this letter and please do not hesitate to contact us should you have any questions.

Respectfully yours,

Thomas G. Wilkinson

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Co-Chair, State Civil Litigation Section

cc: Nadeem A. Bezar, Co-Chair, State Civil Litigation Section
Steven Berk, Co-Chair, Rules and Procedure Committee
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