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The Notice to Admit and Medical Malpractice Defense

Medical Malpractice Defense columnist John L.A. Lyddane writes: The notice to admit will remain as a tool among others to be used in preparing the defense as cases approach resolution. The trial courts will be faced with issues resulting from its use, however infrequently.

By **John L.A. Lyddane** | UPDATED Mar 16, 2018 at 02:48 PM

The space constraints on this column do not allow for a full recitation of the elements of §3123 of the Civil Practice Law and Rules, which govern the Notice to Admit. However, the full text may be found in CPLR Article 31, included as a disclosure device. A close look reveals characteristics which take the Notice to Admit well beyond the devices familiar to practicing attorneys and trial judges.

On its face, this device should be more popular than it has been in defending medical malpractice claims. Often it becomes apparent that a particular case will need to be tried and attention then turns to how the defense will be presented before a jury. Evidentiary foundation issues with photographs, diagrams, or copies of medical records from out-of-state medical facilities no longer in operation, are not uncommon. Why then is this device so infrequently used?

The statutory framework seems clear enough. The device is not permitted to be used to secure admissions on the central issues of the case, but may be useful to assure that the complete evidentiary basis for the defense is able to be placed before the jury with minimal uncertainty, expenditure of time, and associated cost. However, the device is fairly unique, attorneys and judges do not appear to be comfortable with it in use, and the relatively few decisions that address its use do little to help promote its use.

A Unique Device

There are several unique factors about the notice to admit that seem to contribute to its unpopularity. First of all, discovery devices in general are oriented toward the securing of evidence but the notice to admit is oriented toward the use of evidence at trial. In most medical malpractice cases, the experienced defense attorney knows upon reading the bill of particulars what the universe of necessary discovery should be and her initial discovery demands will be sufficient to obtain most of what will be needed.

The notice to admit does not produce evidence helping to define the liability claim or evaluate the scope of recoverable damages at the initial phase of discovery. In fact, the notice to admit is

not meant to be used until the importance of a particular piece of evidence has been established and there is a “reasonable belief” that the matters as to which admissions are sought are free from

substantial dispute. *Marguess v. City of New York*, 30 A.D.2d 782, aff'd 28 N.Y.2d 527 (1971). That point will usually come well after the court has outlined the scope of discovery at the preliminary conference.

The notice to admit is not a discovery device which is even appropriate at the earlier juncture. It may take other devices to secure the document or photograph in issue, and depositions to establish their importance to the defense and whether there is a dispute as to their authenticity or admissibility. *Falkowitz v. Kings Highway Hospital*, 43 A.D.2d 696 (2d Dept. 1973). Whether there is a possible dispute worthy of a notice to admit may not be apparent during discovery. Uniquely, this device is available up to 20 days before trial, long after the filing of the certificate of readiness has limited the use of other discovery devices. *Hodes v. City of N.Y.*, 165 A.D.2d 168 (1st Dept. 1991).

The utility of the notice to admit after discovery is nominally closed is statutory and unconditional. The courts have defined the notice to admit as a device whose sole function is to expedite the trial by eliminating the need for a party to prove what is easily provable and should not be in dispute. *Taylor v. Blair*, 116 A.D.2d 204 (1st Dept. 1986). Counsel is free to wait until the close of discovery and it is apparent that the case will be tried before even considering where this "discovery" device will be employed.

Another unique feature of this device is its ability to resolve an issue, even a minor issue, for the purposes of the particular case. The issue is not considered to be resolved outside the case itself (see CPLR §3123(b) and *Leveski v. Hydraulic Elevator*, 243 F. Supp. 614 (S.D.N.Y. 1965)) but an admission in response to a notice to admit has more conclusive effect than an arguably equivalent admission secured from a party at deposition (*Groeger v. Col-Les Orthopedic Assoc.*, 136 A.D.2d 952 (4th Dept. 1988)). The trial attorney for the defendant will need to have a backup plan for the admission he believes he has from the depositions, which plan is arguably not needed for the admissions secured pursuant to a notice to admit.

If the recipient does not respond within 20 days of service, the subject matter of the notice to admit may be conclusively admitted, which also renders it unique. *Carlson v. Travelers Ins. Co.*, 35 A.D.2d 351 (2d Dept. 1970). Those who feel that this is a harsh result have company on the bench. Courts have allowed such admissions to be withdrawn or amended. See CPLR §3123(b) and *Cazenovia College v. Patterson*, 45 A.D.2d 501 (3d Dept. 1974). In other cases, courts have held that the notice was not appropriately employed at the outset such that no sanctions were imposed and the notice and lack of response were without any legal consequence. See *Marguess*, 30 A.D.2d 782.

In responding to a notice to admit, the form of the response is also important. Whereas a party may deny knowledge "upon information and belief" in response to a pleading, this has been found to be inappropriate in responding to a notice to admit. *Rosenfeld v. Vorsanger*, 5 A.D.3d

462 (2d Dept. 2004). The responding party is required by CPLR §3213 to make reasonable inquiry into the subject matter before responding and is not permitted to avoid an admission by ignoring

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reasonably accessible information. Definitions of "reasonable inquiry" will of course vary. It is a matter of debate when an attorney for a party may respond to a notice to admit herself in lieu of a direct response by her client, adding to its unique character. *Elrac v. McDonald*, 186 Misc.2d 830 (Sup. Ct. Nassau County, 2001).

The notice to admit is likewise the only discovery device in the CPLR with self-contained sanctions that transcend the usual concepts regarding recovery of costs and legal fees. Where a party has put the adversary to its proof with an unreasonable denial of a requested admission, CPLR 3123(c) requires the Court to assess the costs and reasonable attorneys fees of proving the subject matter. *Belfer v. Dictograph Products*, 275 App. Div. 824 (1st Dept. 1949). Regardless of which party has prevailed on which issues at trial, with timely application to the trial court, costs and fees are recoverable.

The Value of the Notice to Admit

The relatively unique, arcane, and uncertain nature of the notice to admit should not inhibit its appropriate use. Its value becomes obvious where a case is moving toward resolution and the defense has to take into account the evidentiary issues which will determine the outcome of specific claims. Clearly matters which will be the subject of expert testimony should not be included in a notice to admit. *Berg v. Flower Fifth Ave. Hosp.*, 102 A.D.2d 760 (1st Dept. 1984). On the other hand, whether a medical artist's rendering, a photograph, or other graphic or demonstrative image is representative of what seeks to be portrayed could best be resolved by notice to admit. This allows the defense attorney to use the image in examining witnesses on the plaintiff's case in chief before she is able to produce the witness or witnesses who could provide a formal foundation for the exhibit. As an alternative, the exhibit could be used "subject to connection" but where subsequent limitations are placed on its use, earlier testimony regarding the image is called into question.

Where treatment of the patient was documented in a medical facility in another jurisdiction and that facility has been merged into obscurity by the relentless appetite of corporate medicine, it may be difficult to produce a copy of the treatment records with the type of certification which will guarantee admissibility. Rather than placing the complicated issue before a trial judge who has other concerns in an ongoing trial, a notice to admit could eliminate any issue and lend predictability to the flow of evidence.

Conclusion

The notice to admit will remain as a tool among others to be used in preparing the defense as cases approach resolution. The trial courts will be faced with issues resulting from its use, however infrequently. The cases on point suggest that this is an area of uncertainty, but where the notice to admit is appropriately used and fair notice is given to the adversary of the need to respond and the consequences of an improper denial, this device should be of value to the defense of the medical malpractice case.

John L.A. Lyddane is a partner and the chair of the medical malpractice defense group at Dorf & Nelson.