

ADMISSIONS, DEPOSITIONS & INTERROGATORIES

THE PRIMA FACIE CASE

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WHY USE WRITTEN DISCOVERY?

- Make concise points with impact
- Bolster a weak witness
- Weed out unnecessary and confusing factual background
- Prove your case on direct with concessions and admissions
- Assist with making a stronger opening statement
- Obtaining a favorable jury reaction
- Show a trail of evidence supporting your claims
- Pre-empt explanations by the defense

ADMISSIONS – RULE 4:22-1

WRITTEN REQUESTS TO ADMIT THE TRUTH OF FACTS

- To establish facts where there is no real controversy
- Eliminates necessity of proving facts not in dispute
- Saves a lot of time and resources in bringing unnecessary witnesses
- Narrows the issues at trial
- Responses are admissible and can be read to a jury

N.J.R.E. 803 (b) (1); Sibinsky v. Smith 206 N.J. Super. 349 (App. Div. 1985);

AREAS TO BE EXPLORED

- Ownership
- Control
- Maintenance & Repair
- Authenticity of Documents
- Dates, times, places
- Notice
- Sorting through multiple corporate entities

LEGAL POINTS

- ⦿ Requests for Admissions may only be used to establish facts, not matters of law.
- ⦿ An admission by a party who settled prior to trial cannot be used as an admission at trial and is not admissible.
- ⦿ An admission by a co-defendant can be used on a motion for summary judgment.
- ⦿ If you intend to use the admission during trial, you must include this in your pretrial submission.

Practice Pointer:

Consider copying and enlarging the Admission to display to the jury.



INTERROGATORIES

N.J.Evid.R. 803(b)(1): Answers to Interrogatories are admissible at trial and can be read to a jury. Skibinski v. Smith, 206 N.J. Super. 349, 353 (App. Div. 1985).

Rule 4:17-8 allows interrogatory answers to be used to the same extent as deposition transcripts.

HOW TO USE INTERROGATORIES

- ⦿ Read an answer that establishes a fact
- ⦿ Set up witnesses for cross-exam
 - Jury hears important evidence twice
 - “Unknown” and “To be supplied”
- ⦿ Avoid need for authenticating documents
- ⦿ Cross-examination – to impeach or contradict the testimony of a witness

The party is bound by inadequate or non-responsive answers.

Zimmerman v. United Services Automobile Ass’n.,
260 N.J. Super. 368 (App. Div. 1992).



ADOPTIVE ADMISSIONS: *BE AWARE!*

- Do not rely on documents to answer a interrogatory or incorporate them as responses to a factual inquiry.
- If you have appended a medical report as an answer to interrogatories requesting a factual response instead of detailing the nature and extent of the party's injuries, you can be found to have created an adoptive admission. Sallo v. Sabatino, 146 N.J. Super. 416 (App. Div. 1976), *certif. den.*, 75 N.J. 24 (1977).

DEPOSITIONS – N.J. Evid. R.801,802 - Hearsay

Deposition testimony is generally inadmissible at trial as hearsay, absent an enumerated exception, i.e., **N.J. Evid. R. 803 (b)**, admissions, **803(c)(25)**, statements against interest.

Rule 4:16-1 governs the use of depositions at trial:

- ⦿ The deposition of a party can be used by an adverse party for any purpose;
- ⦿ “Any” deposition may be used by any party to impeach a witness or for any other purpose permitted by the Rules of Evidence;
- ⦿ The deposition of a witness who is deemed unavailable can be used by any party, provided the parties were on notice of the deposition and had the opportunity to cross-examine the deponent – see rule for definition of “unavailable,” also N.J. Evid. R. 804 –Declarant unavailable

EXPERT DEPOSITIONS

Rule 4:14-9(e)1 The *de benne esse* deposition

- ⦿ Advantages:
 - Cost savings, one appearance, lack of readiness by opponent, no scheduling conflicts at trial
- ⦿ Disadvantages:
 - No live testimony, juror inattention, no questions

Practice Pointers:

- ⦿ Don't forget to advise the judge that questions cannot be allowed as your witness is on tape
- ⦿ Check the doctor's office for brochures, diagrams, and publications
- ⦿ Do not have your doctor's deposition taken in his or her office

LEGAL POINTS

- ⦿ You cannot read your own client's testimony on direct examination – no hearsay or exceptions
- ⦿ If a witness is unavailable, testimony by that person given during another trial or deposition may be used provided the party against whom the testimony is to be used had notice of the deposition and an opportunity to participate. **N.J.Evid. R. 804(b)(1)**;
- ⦿ If a witness is absent but not unavailable, the witness's deposition can be used upon a showing of exceptional circumstances. **Rule 4:16-1(c)**.



DEPOSITION TRANSCRIPTS FOR IMPEACHMENT

- ⦿ Use of depositions for substantive evidence on your direct case are not the same as use for impeachment. *Substantive = Admissible*
- ⦿ The scope of discovery is limited to relevancy, meaning that it is either:
 - Going to be admissible
 - or reasonably calculated to lead to admissible evidence

Rule 4:10-2; N.J. Evid. R. 401;

Payton v. New Jersey Turnpike Authority, 148 N.J. 524 (1997);

DEPOSITION TRANSCRIPTS FOR IMPEACHMENT (2)

- Impeachment materials are not offered for purposes of admissibility and are therefore not discoverable
- **Rule 4:10-2(c)**, the Work Product Privilege, does not permit discovery of materials prepared in anticipation of litigation without a showing of substantial need
- **N.J. Evid. R. 613** – extrinsic evidence of prior inconsistent statements to be used to impeach, not as substantive evidence
- **Rule 4:10-1** and pre-trial discovery rules are stated to be “substantially the same as **Fed. R. Civ. P. 26(a)**, and “generally follow the federal discovery rules, 26-37.”

DEPOSITION TRANSCRIPTS FOR IMPEACHMENT (3)

- ⦿ **Fed. R. Civ. P. 26 (a)(1)(A)** states that a party must, without awaiting a discovery request, provide to the other parties:

...all documents, electronically stored information, and tangible things...in its possession [it] may use to support its claims or defenses, *unless the use would be solely for impeachment*
- ⦿ Potential confusion with criminal law which requires that the State produce all evidence that could be used to impeach defense witnesses at trial. The “Brady” Rule, **Crim. R. 3:13-3.**
- ⦿ Therefore, materials to be used solely for impeachment are NOT discoverable

ANY QUESTIONS?

