

March 29, 1996

Thomas C. Vasaly
Assistant Attorney General
525 Park Street, Suite 500
St. Paul, MN 55103-2106

Ronald S. Rosenbaum
Attorney at Law
Tilton & Rosenbaum
101 East Fifth Street, Suite 2220
St. Paul, MN 55101

RE: In the Matter of Gary L. Jacobson, D.D.S., License No. D6977; OAH
Docket No. 11-0902-10027-2

Dear Counsel:

This letter responds to Mr. Rosenbaum's inquiry at the last Prehearing Conference regarding the timing of requests for admissions in the above case, and the parties' subsequent correspondence regarding the issue. Mr. Rosenbaum expressed his view that requests for admissions are not required to be served and answered during the discovery period, and requested that he be allowed to serve requests for admissions after the discovery deadline. Although Mr. Vasaly acknowledged that it is appropriate in some cases to allow for requests for admissions at the close of discovery, he urged that, given the lengthy discovery period allowed in the present case, requests for admissions be required to be served during the discovery period.

Requests for admissions under Rule 36 are helpful in limiting the issues and identifying what facts remain in dispute and must be decided at trial. Although requests for admissions are grouped in the Rules of Civil Procedure under the general heading of "Depositions and Discovery," the better view appears to be that they are not, strictly speaking, a discovery device because they do not bring about the disclosure of information and are based upon the presumption that the party serving the requests is already aware of the facts or possesses the documents in question and merely wishes the opposing party to confirm their accuracy or genuineness. See 8A C. Wright, A. Miller & R. Marcus, Federal Practice and Procedure § 2253 (2d ed. 1994); 2 D. Herr & R. Haydock, Minnesota Practice §36.1 (2d ed. 1985). Such requests "may be used at any time during the pendency of the action, although requests served within 30 days of trial may serve little purpose since they need not be responded to before trial." Id. at § 36.3; see also Hurt v. Coyne Cylinder Co., 124 F.R.D. 614, 615 (D. Tenn. 1989) (since Rule 36 is not a discovery device, a request for admissions is not subject to a discovery cut-off contained in a scheduling order). Even courts that view requests for admissions as forms of discovery that are generally subject to established discovery deadlines have emphasized the utility of such requests in narrowing the issues for trial and have permitted such requests to be served or answered after the discovery deadline. See,

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e.g., Kershner v. Beloit Corporation, 106 F.R.D. 498 (D. Maine 1985) (defendant served requests for admissions as to 55 items of fact after the deadline for completion of discovery had passed; although court believed that defendant technically should have filed a motion seeking an enlargement of the discovery deadline for purposes of serving the requests, court required plaintiffs to respond to the requests due to the absence of prejudice to plaintiffs and the beneficial effect of the admissions in identifying disputed factual issues for trial and saving time and expense to parties); Leach v. Quality Health Services, Inc., 162 F.R.D. 40 (E.D. Pa. 1995) (defendant served requests for admissions thirteen days before the deadline established by the court for serving, noticing, and completing discovery; court found that requests for admissions sought relevant information and were useful, and amended scheduling order so that all discovery requests made on or before the deadline were deemed timely).

This case is complex and the hearing is expected to be lengthy. Requests for admissions may be particularly helpful in narrowing the issues for trial and enabling the parties to focus on actual facts in dispute. Accordingly, requests for admissions will not be strictly governed by the discovery period established in this case and will be permitted to be served after the discovery deadline.

Very truly yours,

BARBARA L. NEILSON
Administrative Law Judge

Telephone: 612/341-7604