

# LITCHFORD & CHRISTOPHER

PROFESSIONAL ASSOCIATION

*Attorneys and Counselors at Law*

## LEGAL NEWS FOR CLIENTS

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## PLAINTIFFS LOSE BECAUSE THEY LIED TO THE COURT

Lawyers are required to be truthful in their communications and dealings with the courts. Their clients have the same obligation. The judicial system does not and should not tolerate anything less. In the recent case of *Morgan v. Campbell*, the plaintiffs suffered the consequences of their dishonesty.

The Morgans sued the defendants for personal injuries sustained in an automobile accident. The parties engaged in discovery before trial. As part of the discovery process, Kelly Morgan gave her deposition and in response to questions by defense lawyers denied that she had experienced neck or low back pain before the accident. She testified that her chiropractor had given her preventive treatments for scoliosis several times over a two-year period; however, she denied he treated her for neck or low back pain. She also denied she had ever seen any other chiropractor. The defendants required Kelly Morgan to submit to an independent medical examination, and during that examination she again denied that her chiropractor ever treated her neck.

In response to this unequivocal testimony, the defendants filed a motion for sanctions, alleging that Kelly Morgan lied about her health history. During an evidentiary hearing on the motion for sanctions, the facts established that before the automobile accident, Kelly Morgan had seen her chiropractor twice as many times and for longer than she testified, and her visits were based on complaints of both neck and low back pain. Further, contrary to her testimony, she had seen more than one chiropractor prior to the accident.

The trial court granted the defendants' motion and, as a sanction, dismissed the Morgans' complaint with prejudice. In doing so, the trial judge observed that Kelly Morgan's testimony was not based on oversights or failed memory; instead, it consisted of a whole line of blatantly false answers designed to deceive and cover up what the record actually showed.

Florida's Second District Court of Appeal affirmed. It noted that a trial court has inherent authority to dismiss a case as a sanction when the plaintiff has perpetrated a fraud on the court – no litigant has a right to trifle with the courts. It also noted that because of the consequences of a dismissal, the sanction should be imposed only on a clear showing of fraud, pretense, collusion, or similar wrongful conduct. Based on this record, the appellate court held that the sanction imposed by the trial judge was reasonable where he had the opportunity to assess Kelly Morgan's testimony at hearing, the evidence that she lied was overwhelming, her explanations for the discrepancies in her testimony were not credible, and the false testimony was directly related to the central issue in the case. The Second District was unimpressed with Kelly Morgan's lawyer's argument that the sanction of dismissal was unreasonable because she had been truthful about some matters relating to her medical history. Revealing only some facts does not constitute the truthful disclosure of facts upon which the litigation process depends, the court reasoned.

## **THE SUPREME COURT DISCIPLINES A LAWYER FOR MISCONDUCT DURING A DEPOSITION**

Attorney Geneva Forrester represented a construction company as a defendant in a case brought against it by a landscaping company. Attorney Michael Berg represented the plaintiff. Berg deposed the president of the construction company as part of his discovery strategy. During the deposition, Berg showed the witness a two-page subcontract agreement with original signatures, which was printed on green paper. This exhibit was marked as Exhibit 5 to the deposition. During the deposition, the witness and Forrester expressed concern that Exhibit 5 belonged to the witness. Forrester stated they wanted the document.

At some point during the deposition, Forrester asked Berg to locate some other particular documents. When he turned around to find them, the witness removed Exhibit 5 from the table and handed it to Forrester. She then moved it below the table and placed it on the floor near her briefcase. The court reporter observed this event. During a break in the deposition, the reporter told Berg's secretary what she had seen. The secretary advised Berg. In response, Berg tried to schedule an emergency hearing. When he was unable to do so, he asked for a second court reporter to come to the deposition.

Thereafter, Berg resumed the deposition. During his questioning, he attempted to locate Exhibit 5. When Berg asked where the contract was, Forrester replied that she did not know whether she had a copy with her. She also said she "was not seeing it" in her materials she brought to the deposition and suggested Berg look at his complaint to obtain the copy he had attached to it as an exhibit. Berg agreed to retrieve the copy of the contract that was attached to the complaint, but before that occurred, Forrester stated, "Let me look back there. Yeah, that's it, isn't it, a copy of it?"

When the second court reporter arrived, she took over for the first one. Berg then asked Forrester point blank to show him Exhibit 5 that she had with her documents. Forrester initially replied that she had a copy and an original. Berg then asked her to give him the green original Exhibit 5. Forrester agreed. Berg asked where it was. Forrester said, "Right here," and retrieved it from the floor beside her briefcase.

Berg filed a motion for sanctions based in part on Forrester's conduct during the deposition. The trial judge issued an order that found, among other things, that Forrester had not provided a satisfactory explanation for her conduct during the deposition, so he referred the matter to The Florida Bar.

In *The Florida Bar v. Forrester*, the Florida Supreme Court suspended Forrester from the practice of law for sixty days followed by probation for one year for violating two ethics rules. The court also ordered her to pay The Florida Bar's costs in excess of \$1,300. The first ethics rule at issue specifically prohibits the concealment of a document the lawyer knows or should know is relevant to a proceeding. In rendering its decision, the supreme court rejected Forrester's argument that there were multiple copies of the document available so there was no harm. It noted that the ethics rule makes no distinction when multiple copies of documents are available, or when the concealment is only for a brief period of time.

The court also rejected Forrester's argument that the exhibit was not actual evidence because no trial had yet occurred. The ethics rules apply to all phases of the litigation process, including discovery. Accordingly, a trial need not occur before a document is considered relevant evidence for purposes of the rule at issue.

Similarly, the court rejected Forrester's next, technical, argument – that the witness handed her the exhibit, so she did not “remove” it from the table in violation of the rule. Her participation in the removal, and thus her concealment of the document, was sufficient.

The second ethics rule at issue in this case provides that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. The evidence here was sufficient to establish that Forrester intentionally misrepresented her knowledge of the location of Exhibit 5 to the deposition when Berg first asked her about it.

The supreme court did not agree with Forrester's position that her conduct warranted only a public reprimand and not suspension plus probation. Under the Florida Standards for Imposing Lawyer Sanctions, a public reprimand is appropriate only when a lawyer's conduct is merely negligent. Forrester's conduct was much different: She intentionally concealed Exhibit 5 to the deposition and misrepresented its whereabouts when Berg asked her. Moreover, suspension and probation were appropriate as Forrester had three previous disciplinary actions.

### **THE ELEVENTH CIRCUIT EVISCERATES THE REQUEST FOR ADMISSIONS RULE**

Rule 1.370 of the Florida Rules of Civil Procedure, and Rule 36 of the Federal Rules of Civil Procedure, allow one party to a lawsuit to serve on another party a written request for the admission of the truth of any matters stated in the request. The matters may relate to statements or opinions of fact or the application of law to fact. The party receiving a request for admissions must respond within thirty days. The response may consist of objections. In the absence of objections, the response must either admit a matter requested to be admitted, specifically deny the matter, or set forth in detail the reasons why the party cannot truthfully admit or deny the matter.

Unlike the rules governing the use of other discovery devices such as interrogatories and requests for the production of documents, the rules governing a request for admissions contain a built-in remedy if a party fails to respond timely: The matters contained in the request are deemed admitted and conclusively established for purposes of the case. In these instances, the party who served the request seemingly is sitting in the catbird seat. But, the rules also give the court authority to permit withdrawal or amendment of admissions in certain circumstances.

A recent Eleventh Circuit Court of Appeals case considered the test that a federal court must apply when a party seeks to set aside admissions. The pertinent, and somewhat convoluted, procedural facts of *Perez v. Miami-Dade County* are as follows: A car driven by William Allsbury, an officer with the Miami-Dade County Police Department, struck Michael Perez, a

detective with the Department, during Perez' pursuit (on foot) of certain robbery suspects. Perez sued both Allsbury and Miami-Dade County seeking over \$5 million in damages. Perez served the County with a request for admissions along with his complaint. The County answered the complaint either denying or claiming to be without knowledge as to almost all of its allegations. The County failed, however, to answer the request for admissions. Four months later, Perez served the County with a second request for admissions. The County failed to respond to the second request. Some months after that, Perez reserved the second request for admissions, but the County still failed to respond.

Perez filed a motion for summary judgment, which relied in part on the "deemed" admission of the matters set forth in the various requests for admissions he had served. Shortly after the filing, the County finally responded to the first request for admissions denying, or asserting the inability to admit or deny, almost all of the matters. Perez filed a motion to strike the County's response and to order the matters in the first and second requests admitted per Rule 36 because the County failed to respond within the thirty-day time limit. Two days later, the County filed its papers in opposition to Perez' summary judgment motion and its late response to the second request for admissions. Subsequently, the court deemed admitted several items from both sets of requests for admissions, which conclusively established liability on Perez' chief claim. As a result, the court granted Perez' motion for summary judgment as to liability on that claim.

A week later, the County filed a motion to withdraw the deemed admissions, in which its counsel argued that for the pertinent time period, he suffered from a mental health condition that prevented him from carrying out his responsibilities, and there was substantial doubt as to the truth of Perez' contentions set forth in the requests for admissions. The trial court denied the motion, finding that Rule 36 required the matters to be deemed admitted, and the County had not provided an adequate excuse to justify withdrawing the admissions.

The case went to trial. The jury returned a damages verdict against the County and in favor of Perez for \$5.7 million. The County appealed.

On appeal, the issue was whether the trial court abused its discretion in denying the County's motion to withdraw admissions. The Eleventh Circuit began its analysis by reviewing the language of Rule 36 that sets forth a two-part test to determine whether admissions should be withdrawn. As stated in the rule, first, the court should consider whether withdrawal will subserve the presentation of the case on its merits. Second, the court must determine whether the withdrawal will prejudice the party who obtained the admissions in maintaining the action or defense on its merits.

Perez argued that the language of the rule is permissive such that even if the two-part test is met, the trial court still is not required to grant a motion to withdraw the admissions. The appellate court rejected this proposition. It read the rule as granting the trial court discretion but then specifying exactly how that discretion is to be exercised. The court stopped short of holding that movants have an absolute right to have their admissions withdrawn but did hold that a trial court abuses its discretion in denying a motion to withdraw or amend admissions when it applies some other criterion beyond the two-part test or grossly misapplies the two-part test.

Here, the Eleventh Circuit determined that the trial court ignored the two-part test and thus abused its discretion in denying the County's motion to withdraw. The court of appeals did not stop there. It went on to conclude that had the trial court applied the test, it would have concluded withdrawal of the admissions was not only appropriate, but also necessary. The first part of the two-part test was satisfied because the admissions conclusively established the liability of the defendants. Upholding the admissions would eliminate any presentation of the merits of the case; therefore, the court found that granting the motion to withdraw would have aided in the ascertainment of the truth and development of the merits of the case.

As to the second prong of the test, the appellate court observed that the prejudice contemplated by the rule is not simply that the party who initially obtained the admissions will now have more difficulty in proving his or her case. Perez argued that he relied on the admissions to prepare his summary judgment motion and the remainder of his case. That was not enough, in the court's view, because the County had denied the material allegations of the case in its answer to the complaint, so Perez always knew he would have to muster proof of his allegations. To this end, the court found pertinent that he also had been engaging in other forms of discovery on the relevant issues throughout the case. Finally, the Eleventh Circuit determined that any prejudice there may have been could have been cured by the trial court's granting extensions of the discovery deadline to enable Perez to gather additional evidence he did not otherwise seek because of the admissions. In short, the court found that the only prejudice Perez would have suffered was the inconvenience of having to gather evidence to support his claim, but that does not rise to a level of prejudice that justifies denial of a motion to withdraw admissions. The Eleventh Circuit did not provide clear guidance as to the kind of prejudice it would find sufficient to justify denial of a motion to withdraw admissions. Indeed, under its reasoning in this case, there may never be such a situation.

In response to the obvious question raised by its ruling – why use requests for admissions at all if admissions can be set aside at the virtual whim of the party making them – the Eleventh Circuit Court of Appeals concluded its opinion with some comments about the request for admissions rule. In the court's view, the rule functions properly when a party uses it to establish uncontested facts and narrow issues for trial. The rule is abused, though, when it is used to harass an opponent or with the hope that he or she will fail to respond and thus admit key elements of a claim. In this instance, the rule becomes a weapon and not a time-saver as intended. For these reasons, it is inappropriate, in the view of the Eleventh Circuit, for a plaintiff to serve a request for admissions that parrots the allegations in the complaint, especially where the core allegations in the complaint were previously denied in the answer (as is almost always the case). Taking it one step further, the court opined that it would be entirely proper to deny a matter requested to be admitted if the responding party believed it might prevail on the matter at trial. Surely, though, all parties generally believe they will prevail on all matters.

What this case really means is that at least in federal court practice, the rules of civil procedure give parties who seek to take full advantage of the request for admissions discovery device an automatic, but toothless, remedy if their opponents blow off their obligations to respond. The ruling in *Perez* will reward sloth, sloppiness, and failure to comply with discovery obligations, and will promote the very sort of inefficiencies that the request for admissions rules were designed to prevent by incorporating self-executing remedies for non-compliance.

**PAUL DEHART IS NOW A REGISTERED PATENT ATTORNEY**

In August 2002, Paul DeHart was admitted as a patent attorney licensed to practice before the United States Patent and Trademark Office. This admission gives Paul the privilege of prosecuting patent applications with the USPTO. Please be sure to congratulate Paul when you speak with him.