

# **Advisory Committee on Rules of Court**

**April 2009**

## **Burdens or Showings Needed to Withdraw or Amend Admissions under Virginia Rule 4:11**

Rule 4:11 of the Rules of the Supreme Court of Virginia allows a party, via written request, to ask an opposing party to “admit” to the truth of a fact, agree on the application of law to the facts of the case, or stipulate to the authenticity of exhibits. A request for admission can encompass any of the matters within the scope of general discovery as permitted by Rule 4:1(b). Virginia’s Rule 4:11 is substantively similar to Rule 36 of the Federal Rules of Civil Procedure, as are most states’ rules regarding admissions and their effects.

Most states also have provisions similar to Virginia’s Rule 4:11(b), which describes how and when a party that has made an admission – or had an admission entered against it because of failure to respond in a timely fashion – can withdraw or amend that admission before trial. Rule 4:11(b) does not explicitly state what, if anything, a party must show or do in order to withdraw or amend an admission. The rule simply states that

Any matter admitted under this Rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 4:13 governing amendment of a pretrial order, the court may 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 in maintaining his action or defense on the merits.

The Advisory Committee on Rules of Procedure has concluded that, under the present wording of this Rule, existing doctrine makes it too easy for a dilatory non-responder, or cavalier admitter, to come in later and get rescued by withdrawing admissions. Thus, the Committee is seeking to readjust the balance between the policy goal of deciding cases on the merits (which favors allowing withdrawal of admissions) and the goal of allowing the party who obtained the admissions to rely on them (i.e., not making Rule 4:11 a feckless procedure by a de facto rule that you can skip answers and suffer no penalty from that).

The Committee unanimously resolved that it would be important in today's litigation environment to adjust the scales by adding a provision to Rule 4:11 to indicate that a party seeking relief from admissions already made must make a showing that relief is warranted. The Committee reviewed drafts that would have required a showing that to withdraw an admission the party seeking that relief must show that it is needed to avoid manifest injustice (the Rule 4:13 standard right now), or a lesser showing of "excusable neglect" (a federal standard for some purposes) or a showing of "good cause" to be relieved (the all-purpose give-us-a-good-reason test). The Committee unanimously concluded that a good cause standard for making such a motion should be implemented.

## PROPOSAL

The language changes proposed for Rule 4:11(b) are shown here with stricken text for deleted material and underscored text for proposed additional words.

(b) *Effect of Admission.* -- Any matter admitted under this Rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission ~~Subject to the provisions of Rule 4:13 governing amendment of a pretrial order ,~~ upon a showing by the moving party of good cause sufficient to justify withdrawal or amendment of an admission; provided, however, that ~~presentation of the merits of the action will be subserved thereby.~~ no amendment or withdrawal of an admission shall be permitted if the party who obtained the admission is able ~~fails to~~ satisfy the court that such withdrawal or amendment will prejudice that party ~~him~~ in maintaining the ~~his~~ action or defense on the merits. If withdrawal or amendment of an admission is permitted, the court shall consider whether a continuance or other relief should be granted to the party who had obtained and relied upon the admission.

Comments on this Rule, which has been tentatively approved by the Advisory Committee on Rules of Court and has not been presented to or considered by the Judicial Council of Virginia or the Supreme Court of Virginia, should be submitted to Steven Dalle Mura, Office of the Executive Secretary, Supreme Court of Virginia, 100 North Ninth Street, Richmond, VA 23219. The deadline for such comments is September 1, 2009.