Articles + Publications | July 11, 2023

Remove Boilerplate From Your Discovery Responses; A Modest Proposal on a Path Forward

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All the way back in December 2015, the Federal Rules of Civil Procedure were amended after what U.S. Supreme Court Chief Justice John Roberts described in the 2015 Year-End Report on the Federal Judiciary as "the product of five years of intense study, debate and drafting to address the most serious impediments to just, speedy, and efficient resolution of civil disputes."

Despite these noble intentions and efforts, at least some of the amendments—including those to Rule 34—were not quickly adopted by practitioners. This prompted influential Magistrate Judge Andrew Peck to issue a "wake-up call" to the bar in 2017 (*Fischer v. Forrest*). The issue prompting the wakeup call?

Discovery responses that were noncompliant because they lacked the requisite level of specificity required under amended Rule 34. Unfortunately, Peck's wakeup call only traveled so far, and here in 2023, discovery responses continue to suffer from impermissible boilerplate objections and a lack of particularity. There is, however, a much better path forward: follow the rules.

This column is intended to remind practitioners of the relevant rules and suggests the right direction of ditching boilerplate objections, responding with the required specificity and avoiding the risk of waiving objections.

Yes, that's right. By failing to follow these rules, parties have waived their objections. In *Weatherspoon v. 739 Iberville, LLC* (2022), the judge's order said, "The Court finds that [the objections] are stricken except for objections regarding attorney client privilege if lodged." *Arrow Enter. Computing Sols., Inc. v. BlueAlly, LLC* (2016) had a similar outcome. This column also briefly covers the flip side: how to draft discovery requests that are less objectionable in the first place.

Federal Rule of Civil Procedure 34(b)(2) covers responses and objections. Subpart (B) is notable in its requirement that the responding party "state with specificity the grounds for objecting to the request." And subpart (C) is notable in its requirement that the responding party indicate when objecting "whether any responsive materials are being withheld on the basis of that objection."

These parts of the rules mean that general objections must be avoided at all costs when they do not actually apply. For example, a typically appropriate general objection would be to producing anything that is privileged or

otherwise protected.

A typically inappropriate general objection would be something like “we object to each of the requests to the extent that they are overboard, unduly burdensome, repetitive, ambiguous, oppressive, vague …” In other words, object on specifically describable grounds and not to reserve some vague potential objection that could apply.

To comply with 34(b)(2)(C) the advisory committee notes make clear there are two options: (1) explicitly state what is being withheld on the basis of the objection, or (2) describe what the party is willing to do in response to the request.

When going with option two, it is appropriate to describe the intended search methodology if it is not yet known what documents exist in response to the request. Under either option, the responding party must be sure to understand and comply with the relevant part of the rules (including any local guidance from judge or court).

Crafting discovery requests that are not objectionable may be practically impossible—opposing counsel does have a job after all. That said, it is possible to draft requests that are specific and targeted, yet broad enough to encompass relevant information. Start with the basics (if known): the timeframe in which the documents were created or modified and the custodian or location of the documents.

Some additional suggestions to consider for improving your next set of document requests:

1. Always be as specific as possible.

2. Consider requests that ask for “documents sufficient to show …” as opposed to requests for “all documents related to …”

3. Consider requests that are tailored to specific custodians, issues or time periods.

4. Limit requests to information that informs a specific argument or assertion by the opposing party.

5. Start from the jury instructions or other relevant legal standard and work backwards—is the discovery you are seeking actually relevant to what you must prove at trial?

6. Is a document request actually the best way to get needed information—would an interrogatory, request for admission or even a deposition be a more efficient way?

While it can be tempting to handle discovery requests and responses as “everyone always has,” and not heed the advice of this column—particularly when the opposing party behaves in the same way—there is what should be an obvious risk (beyond waiving objections as highlighted above):

Judges have little patience for discovery disputes where one party is requesting every imaginable document and the other party is responding with every imaginable objection. And if the other side is not producing what you view as key evidence, your motion to compel may come before an unsympathetic court if your own discovery house

isn’t in order.

This article is merely a starting point. The Sedona Conference has two fantastic publications on this topic that provide extensive advice on how to navigate the rules for those who want to learn more: The Sedona Conference, Federal Rule of Civil Procedure 34(b)(2) Primer: Practice Pointers for Responding to Discovery Requests (https://thesedonaconference.org/publication/Federal_Rule_of_Civil_Procedure_34_Primer) and The Sedona Conference, Primer on Crafting eDiscovery Requests with “Reasonable Particularity” (https://thesedonaconference.org/publication/Primer_on_Crafting_eDiscovery_Requests_with_Reasonable_Particularity).

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