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The "No-Longer-New" 2015 FRCP Amendments

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In October 2015, I authored an article for this publication entitled "Significant Amendments to the FRCP Coming in December." Among other things, that article outlined the coming changes to Rule 34 of the FRCP, and the anticipated impact those changes would have upon the discovery process in federal courts. Two years later, however, it appears that litigators remain perplexed as to how exactly they should change their written responses and objections to requests for discovery so as to comply with the amended Rule.

In an opinion issued earlier this year, United States Magistrate Judge Andrew J. Peck stated, in part:

> It is time, once again, to issue a discovery wake-up call to the Bar in this District: the Federal Rules of Civil Procedure were amended effective December 1, 2015, and one change that affects the daily work of every litigator is to Rule 34. Specifically (and I use that term advisedly), responses to discovery requests must:
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> - State grounds for objections with specificity;
> - An objection must state whether any responsive materials are being withheld on the basis of that objection; and
> - Specify the time for production and, if a rolling production, when production will begin and when it will be concluded.
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> Most lawyers who have not changed their "form file" violate one or more (and often all three) of these changes.
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> It is time for all counsel to learn the now-current Rules and update their "form" files. From now on in cases before this Court, any discovery response that does not comply with Rule 34's requirement to state objections with specificity (and to clearly indicate whether responsive material is being withheld on the basis of objection) will be deemed a waiver of all objections (except as to privilege).[1]

Judge Peck's warning is in line with decisions issued by other courts in both the Second Circuit and elsewhere. For example, in *Leibovitz v. City of New York*, United States Magistrate Judge Pitman ruled that because the City's "general, boilerplate objections to each of plaintiff's requests for production . . . violate Fed. R. Civ. P. 34(b)(2)(B), they are stricken."[2]

Now that the warning is clear, one may ask: *how do I comply with the amended Rule 34?* While the plain language of amended Rule 34 is instructive, the 2015 Advisory Committee Notes to the Rule provide further guidance. For example, the 2015 Advisory Committee Notes state, in part:

> An objection may state that a request is overbroad, but if the objection recognizes that some part of the request is appropriate the objection should state the scope that is not overbroad. Examples would be a statement that the responding party will limit the search to documents or electronically stored information created within a given period of time prior to the events in suit, or to specified sources. . . .
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> When it is necessary to make the production in stages the response should specify the beginning and end dates of the production. . . .

The producing party does not need to provide a detailed description or log of all documents withheld, but does need to alert other parties to the fact that documents have been withheld and thereby facilitate an informed discussion of the objection. An objection that states the limits that have controlled the search for responsive and relevant materials qualifies as a statement that the materials have been "withheld."[3]

Several courts also have provided guidance as to how to comply with the amended Rule 34. As an initial matter, "[g]eneral objections should rarely be used [now] unless each such objection applies to each document request (*e.g.*, objecting to produce privileged material)."[4] Further, when appropriate general objections are made, they should not be simply incorporated wholesale into the specific responses and objections.[5] Doing so would violate Rule 34(b)(2)(B)'s specificity requirement as well as Rule 34(b)(2)(C)'s requirement to state whether any responsive materials are being withheld on the basis of the objection.[6]

Additionally, when asserting specific objections, boilerplate objections that a request for production is, for example, overbroad and unduly burdensome, without more, is inappropriate. The objection must include particularized facts as to *why* and *how t*he request is overbroad and burdensome.[7] One court advised that "[a] party resisting discovery must show how the requested discovery was overly broad, burdensome, or oppressive by submitting affidavits or offering evidence revealing the nature of the burden."[8]

Responses also should not include "subject to" or "without waiving" statements, as this practice is "manifestly confusing (at best) and misleading (at worse), and has no basis at all in the Federal Rules of Civil Procedure."[9] Rule 34 does not allow this kind of hedging."[10]

Lastly, a litigator also should take note of the amendments to Rule 26, as those amendments also impact responses and objections to discovery. First, responses and objections should no longer contain the phrase "reasonably calculated," as that phrase was eliminated from Rule 26(b)(1). Amended Rule 26(b) also added a "proportionality" requirement for permissible discovery, and an objection based upon proportionality should be supported with particularized facts. As one court explained:

> The 2015 amendments . . . eliminated the "reasonably calculated" phrase as a definition for the scope of permissible discovery. Despite this clear change, many courts [and lawyers] continue to use the phrase. Old habits die hard . . . The test going forward is whether evidence is "relevant to any party's claim or defense," not whether it is "reasonably calculated to lead to admissible evidence."
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> The 2015 amendments also added proportionality as a requirement for permissible discovery. . . [H]owever, . . . the amendment does not place the burden of proving proportionality on the party seeking discovery. . . Rather, "[t]he parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes." The inquiry to be conducted under the proportionality requirement, therefore, requires input from both sides.[11]

In sum, all litigators should familiarize themselves with the "no-longer-new" amendments to the FRCP and take note of how those amendments are being implemented in practice. As numerous judicial precedents from federal courts across the nation have made clear, litigators who fail to do so should be prepared to be on the receiving end of a ruling that is potentially disastrous to their client's case.

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1. *Fischer v. Forrest*, 2017 WL 773694, at *1, 3 (S.D.N.Y 2017).
2. 2017 WL 462515, at *2 (S.D.N.Y. 2017); *see also Benjamin v. Oxford Health Ins., Inc.*, 2017 WL 772328, at *4 (D. Conn. 2017) (rejecting defendant's unsubstantiated objections "that the requests are unclear, overbroad, unduly burdensome, vague and ambiguous" because they failed to comply with amended Rule 34); *Keycorp v. Holland*, 2016 WL 6277813, at *11 (N.D. Tex. 2016) ("[B]oilerplate objections are improper and result in waiver of the unsupported objections."); *Asphalt Pavings Sys., Inc. v. General Combustion Corp.*, 2016 WL 3167712, at *2 (M.D. Fla. 2016) ("The Court does not consider frivolous, conclusory, general or boilerplate objections."); *Williams v. Rushmore Loan Mgmt. Servs. LLC,* 2016 WL 7374545, at *1 (D. Conn. 2016) (holding that defendant's general objections and production of documents "[w]ithout waiving objections" violated Rule 34(b)(2)(C)).
3. 2015 Adv. Comm. Notes to Rule 34.
4. *Fischer v. Forrest*, 2017 WL 773694, at *3; *see Nerium Skincare, Inc. v. Olson*, 2017 WL 277634, at *1 (N.D. Tex. 2017) ("General and boilerplate objections are invalid . . ."); *Moser v. Holland*, 2016 WL 426670, at *3 (E.D. Cal. 2016) ("general boilerplate objections are inappropriate and unpersuasive").
5. *Id.*
6. *Id.*
7. *See Fischer v. Forrest*, 2017 WL 773694, at *3 ("Why is it burdensome? How is it overbroad?").
8. *Nerium Skincare, Inc. v. Olson*, 2017 WL 277634, at *2 ("[a] party served with written discovery must fully answer each interrogatory or document request to the full extent that it is not objectionable and affirmatively explain what portion of an interrogatory or document request is objectionable and why, affirmatively explain what portion of the interrogatory or document request is not objectionable and the subject of the answer or response, and affirmatively explain whether any responsive information or documents have been withheld.").
9. *Real Page, Inc. v. Enterprise Risk Control, LLC*, 2017 WL 1165688, at *2 (E.D. Tex. 2017) (citing *Keycorp v. Holland*, 2016 WL 6277816, at *11).
10. *Id.*
11. *In re Bard IVC Filters Prod. Liabl. Litig.*, 317 F.R.D. 562, 564 (D. Ariz. 2016); *see Medicinova Inc. v. Genzyme Corp.*, 2017 WL 2829691, at *5 (S.D. Cal. 2017) ("The intent of the recent amendments is to bring about '[a] change in the legal culture that embraces the leave no stone unturned and scorched earth approach to discovery . . .' The 2015 amendments to Rule 26(b)(1) emphasize the need to impose 'reasonable limits on discovery through increased reliance on the common-sense concept of proportionality.'") (internal citations omitted).