Advanced Topics in Written Civil Discovery

By: Robert F. Redmond, Jr.

Bob Redmond focuses his practice on mass tort, product liability and complex commercial litigation. He frequently tries jury cases to verdict in state and federal courts around the country. Bob also defends mass and class action defendants and has served as part of national defense teams for various consumer products and pharmaceutical defendants. In addition, Bob maintains an active appellate practice. He has appeared as lead appellate counsel six times in the Supreme Court of Virginia and has argued in the Texas Supreme Court, the Texas Court of Appeals, and the U.S. Court of Appeals for the Fifth Circuit.

THIS article addresses advanced topics in civil discovery in state and federal courts. It presupposes prior experience in written discovery and oral discovery, as well as pretrial procedure. This article addresses written discovery and offers responses in a Frequently Asked Questions ("FAQ") format that may be more accessible to seasoned practitioners. Because state court rules are frequently based on the Federal Rules of Civil Procedure ("FRCP"),[1] this article generally

[1] *See e.g.* World Mission Soc'y Church of God v. Colon, 85 Va. Cir. 134, 136 (Va. Cir. Ct. 2012) (applying FRCP 26 to interpret the "good cause" standard under Rule 4:1(c)); Staples Corp. v. Washington Hall Corp., 44 Va. Cir. 372, 374 (Va. Cir. Ct. 1998) ("Where the Virginia Supreme Court has not addressed a particular discovery issue, federal case law interpreting the FRCP may be instructive" (citing Transilift Equip., Ltd. v. Cunningham,

relies on federal authority (with occasional references to state court authority).

I. Written Discovery

A. Are "General Objections" Acceptable?

No. "General Objections" are objections that precede substantive written discovery responses and purport to apply to each response. General Objections are meaningless, and they purposely obscure substantive written discovery responses. Those propounding discovery should promptly write to the objecting party and insist that the objecting party withdraw their General Objections. If the party does not do so, the propounding party should include this issue in a Motion to Compel. This unsurprising proposition is recognized by virtually all courts nationwide.[2]

B. Do Parties Responding to Requests for Production Have an Obligation to Identify the Document Requests to Which the Documents Are Responsive?

Parties often produce a tremendous volume of uncategorized documents in response to requests for production. This tactic, known as the "document dump," can stymie the ability of the discovering party to review and analyze the produced documents in a meaningful way. Courts have ordered disclosing parties to organize and categorize large volumes of documents and identify the document requests to which each document corresponds:

> [Disclosing parties] are incorrect in thinking they can haphazardly produce documents without reference to which request

234 Va. 84, 90-91 (1987) and Rakes v. Fulcher, 210 Va. 542, 545 (1970))).

[2] *See* Loudoun Cty. Asphalt, L.L.C. v. Wise Guys Contr., L.L.C., 79 Va. Cir. 605 (Va. Cir. Ct. 2009); Sagness v. Duplechin, No. 4:16-cv-3152, 2017 U.S. Dist. LEXIS 46475 at *4 (D. Neb. Mar. 29, 2017) ("General blanket objections do not meet [the FRCP's] specificity requirements and will be disregarded by this court."); Liguria Foods, Inc. v. Griffith Labs., Inc., 320 F.R.D. 168, 187 (N.D. Iowa 2017) ("Indeed, the idea that such general or 'boilerplate' objections preserve any objections is an 'urban legend.'"); Fischer v. Forrest, No. 14-cv-1304, 2017 U.S. Dist. LEXIS 28102 at *7 (S.D.N.Y. Feb. 28, 2017) ("General objections should rarely be used… unless each objection applies to each document request."); Cafaro v. Zois, 2016 U.S. Dist. LEXIS 33645 (S.D. Fla. Mar. 9, 2016) ("Boilerplate objections may also border on a frivolous response to discovery requests." (citing Steed v. EverHome Mortg. Co., 308 F. App'x 364, 371 (11th Cir. 2009))); *and* Heller v. City of Dallas, 303 F.R.D. 466, 484 (N.D. Tex. 2014) ("Counsel should cease and desist from raising these freestanding and purportedly universally applicable 'general objections' in responding to discovery requests.").

> the documents are produced. To ensure a fair and clear record, [Defendant] will be ordered to Bates Stamp all documents produced to Plaintiff and to indicate which documents correspond to the categories requested.[3]

C. How Do You Count Interrogatory Sub-Parts?

Often, a party will refuse to answer interrogatories by claiming that the interrogatories served exceed the federal limit (25 interrogatories) or a state limit (30 interrogatories). The Rules count "discrete sub-parts" as interrogatories: "Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts."[4] But how does one determine if a clause, phrase or adjective is a "discrete subpart" that counts as an additional interrogatory? There are three schools of thought.

1. The "Related Question" Test

A slight majority of courts seem to follow the "related question" test. If the clause, phrase, or adjective is logically and factually related to the overall interrogatory, then it is not "discrete" and does not count as a separate interrogatory:

> District courts in the Eleventh Circuit, like most district courts in other circuits, have adopted and applied 'the "related question" test to determine whether the subparts are discrete, asking whether the particular subparts are "logically or factually subsumed within and necessarily related to the primary question."[5]

---

[3] Gregg v. Local 305 IBEW, 2009 U.S. Dist. LEXIS 40761 at *30-31 (N.D. Ind. 2009) citing Glover v. Bd. of Educ., No. 02 C 50143, 2004 U.S. Dist. LEXIS 6358, 2004 WL 785270, at *2 (N.D. Ill. Apr. 9, 2004); *see also* Flentye v. Kathrein, No. 06-c-3492, 2007 U.S. Dist. LEXIS 74260 at *5-6 (N.D. Ill. Oct. 2, 2007) (requiring a party to produce Bates-stamped documents comprising the initial disclosures required under Rule 26).

[4] *See, e.g.,* FED. R. CIV. P. 33(a)(1).

[5] Perez v. Aircom Mgmt. Corp., 2012 U.S. Dist. LEXIS 136140 at *2-3 (S.D. Fla. Sept. 24, 2012); *see also* Mitchell Co. v. Campus, 2008 U.S. Dist. LEXIS 47505 at *19-21 (S.D. Ala. June 16, 2008) (quoting Forum Architects, LLC v. Candela, 2008 U.S. Dist. LEXIS 4705 at *2-3 (N.D. Fla. Jan. 23, 2008)); Powell v. Home Depot USA, Inc., 2008 U.S. Dist. LEXIS 49144 at *6-7 (S.D. Fla. June 16, 2008) ("Courts within the jurisdiction of the Eleventh Circuit have recently followed what is known as the 'related question test' to determine whether a subpart in an interrogatory should be considered discrete."); Oliver v. City of Orlando, 2007 U.S. Dist. LEXIS 80552 at *2 (M.D. Fla. Oct. 31, 2007) ("If the subparts are subsumed and

2. The "Pragmatic Approach" Test

Many courts espouse the "related question" test but really apply the "pragmatic approach" test. The "pragmatic approach" test is akin to Justice Potter's definition of pornography – the judge knows it when she sees it:

> Perhaps a more pragmatic approach, reminiscent of Justice Stewart's memorable "definition" of pornography, would be to look at the way lawyers draft interrogatories and see if their typical approaches threaten the purpose of the rule by putting together in a single question distinct areas of inquiry that should be kept separate. Thus, once a subpart of an interrogatory introduces a line of inquiry that is separate and distinct from the inquiry made by the portion of the interrogatory that precedes it, the subpart must be considered a separate interrogatory no matter how it is designated. Using this analysis, I will now determine which of plaintiff's interrogatories, no matter how they are numbered or otherwise propounded, must be

necessarily related to the primary question, then the subpart is not 'discrete' within the meaning of Rule 33(a)"); Erfindergemeinschaft UroPep GbR v. Eli Lilly & Co., 315 F.R.D. 191, 196 (E.D. Tex. 2016) ("[M]ost courts have followed what is sometimes referred to as the "related question" approach. In an effort to give some specificity to the inquiry, the test applied under the "related question" approach is generally stated as follows: subparts that are logically or factually subsumed within and necessarily related to the primary question" should not be treated as separate interrogatories") citing Kendall v. GES Exposition Servs., Inc., 174 F.R.D. 684, 686 (D. Nev. 1997); Gilmore v. Lockard, No. 1:12-cv-925, 2015 U.S. Dist. LEXIS 118059, 2015 WL 5173170 at *8 (E.D. Cal. Sept. 3, 2015); *In re* Lithium Ion Batteries Antitrust Litig., No. 13-md-2420, 2015 U.S. Dist. LEXIS 45976, 2015 WL 1221924 at *2 (N.D. Cal. Mar. 17, 2015); Klein v. Fed. Ins. Co., 2014 U.S. Dist. LEXIS 95482, 2014 WL 3408355 at *6 (N.D. Tex. July 14, 2014); Makaeff v. Trump Univ., LLC, No. 10-cv-940, 2014 U.S. Dist. LEXIS 94732, 2014 WL 3490356 at *4 (S.D. Cal. July 11, 2014); Thermal Design, Inc. v. Guardian Bldg. Prods., No. 08-C-828, 2011 U.S. Dist. LEXIS 50108, 2011 WL 1527025 at *2 (E.D. Wis. Apr. 20, 2011); Calderon v. Reederei Claus-Peter Offen GmbH & Co., 2008 U.S. Dist. LEXIS 76323, 2008 WL 4194810 at *1 (S.D. Fla. Sept. 11, 2008); State Farm Mut. v. Pain & Injury Rehab. Clinic, Inc., 2008 U.S. Dist. LEXIS 50507, 2008 WL 2605206 at *2 (E.D. Mich. June 30, 2008); Madison v. Nesmith, 2008 U.S. Dist. LEXIS 16130, 2008 WL 619171 at *3 (N.D.N.Y. Mar. 3, 2008); Williams v. Taser Int'l, Inc., 2007 U.S. Dist. LEXIS 40280, 2007 WL 1630875 at *2 (N.D. Ga. June 4, 2007); Trevino v. ACB Am., Inc., 232 F.R.D. 612, 614 (N.D. Cal. 2006); *and* Safeco of Am. v. Rawstron, 181 F.R.D. 441, 445 (C.D. Cal. 1998*)*.

> considered more than one interrogatory.[6]

The *Erfindergemeinschaft* court, although ostensibly using the "related question" approach, really adopted the "pragmatic approach": "It is important to acknowledge at the outset that the issue of 'discreteness' cannot reliably be captured by a verbal formula, and that ultimately the issue turns on a case-by-case assessment of the degree to which the subpart is logically related to the primary question in the interrogatory, as opposed to being separate and distinct."[7]

3. The "Strict Construction" Approach

As the name suggests, the "strict construction" approach simply counts every subpart and separate clause of an interrogatory whether it is logically related to the main interrogatory or not: "The plain meaning of the language in the rule is clear and unambiguous. Local Rule 190-1(c) requires that every part of an interrogatory be counted and subject to the limitation of 40."[8] The "strict construction" is not widely adopted. Most courts apply the "related question" or "pragmatic approach." Courts in the Fourth Circuit tend to apply the "related question" test:

> In that opinion, I examined two divergent methods of counting interrogatories and concluded that even under the more lenient standard, the plaintiffs had exceeded their limit. That lenient standard provides that the court should determine whether "a subpart is logically or factually subsumed within and necessarily related to the primary question."[9]

D. Can You Require a Verified Statement That the Responding Party Has Searched for Responsive Documents Under FRCP 34?

Often, parties answer requests for production by stating that they have "no documents." Because written responses to requests for production are not verified, it is difficult to ensure that the responding party has made a

---

[6] Willingham v. Ashcroft, 226 F.R.D. 57, 59 (D.D.C. 2005) quoting Banks v. Office of Senate Sergeant-at Arms, 222 F.R.D. 7, 10 (D. D.C. 2004).

[7] *Erfindergemeinschaft*, 315 F.R.D at 197 (emphasis added).

[8] Valdez v. Ford Motor Co., 134 F.R.D. 296, 298 (D. Nev. 1991).

[9] Am. Chiropractic Ass'n v. Trigon Healthcare, Inc., 2002 U.S. Dist. LEXIS 14327 at *2-3 (W.D. Va. Aug. 5, 2002) citing Am. Chiropractic Assoc. v. Trigon Healthcare, Inc., 2002 U.S. Dist. LEXIS 6199 (W.D. Va. March 18, 2002).

meaningful search for the requested documents. Some courts will require a responding party to verify, under oath, that they have searched for responsive documents and none have been found. This is particularly true where there is extrinsic evidence that the documents should exist.

> If there is reason to believe that the response is incomplete or incorrect, the court may require a certification that the respondent "ha[s] conducted a search for the information reasonably available to them through their agents, attorneys, or others subject to their control and has determined that the information requested either does not exist or that is has been produced." Ordinarily, a sworn statement that a party has no more documents in its possession, custody or control is sufficient to satisfy the party's obligation to respond to a request for production of documents.[10]

E. Are Objections to Discovery Waived if the Discovery Responses Are Served Late?

Yes. If you serve discovery late, you have waived objections, potentially even objections as to privilege and work product.

> [O]bjections to [written discovery] must be stated with particularity *in a timely answer*, and that a failure to do so may constitute a waiver of grounds not properly raised, including privilege or work product immunity, unless the court excuses this failure for good cause shown.[11]

[10] Eramo v. Rolling Stone LLC, 2016 U.S. Dist. LEXIS 80794 at *5-6 (W.D. Va. June 21, 2016) quoting Meeks v. Parsons, No. 1:03-cv-6700, 2009 U.S. Dist. LEXIS 90283 (E.D. Cal. Sept. 18, 2009) and Gray v. Faulkner, 148 F.R.D. 220, 223 – 24 (N.D. Ind. Apr. 14, 1992).

[11] Precision Fabrics Group, Inc. v. Tietex Int'l, Ltd., 2015 U.S. Dist. LEXIS 104382 at *9 (M.D. N.C. Aug. 10, 2015) (citations omitted; emphasis in original); *see also* Hall v. Sullivan, 231 F.R.D. 468, 474 (D. Md. 2005); Phillips v. Dallas Carriers Corp., 133 F.R.D. 475, 477 (M.D. N.C. 1990) ("It is well settled

II. FRCP 33(d)

A. Specificity of Identification of Records

When a party responds to Interrogatories by referring to documents pursuant to Rule 33(d), a dispute often ensues as to whether the responding party supplied sufficient detail for the discovering party to determine which documents are responsive to specific interrogatory requests. Courts generally require specificity:

> The producing party must show that the named documents contain all of the information requested by the interrogatories. Crucial to this inquiry is that the producing party have adequately and precisely specified for each interrogatory, the actual documents where information will be found. Document dumps or vague references to documents do not suffice. Depending on the number of documents and the number of interrogatories, indices may be required.[12]

Upon the filing of a motion to compel, the propounding party must make a prima facie showing that the use of Rule 33(d) is somehow inadequate to the task of answering the discovery, whether because the information is not fully contained in the documents, is too difficult to extract, or other such means. The burden then shifts to the producing party to justify the use of Rule 33(d).[13] "[T]he producing party must adequately and precisely specify, for each interrogatory, the actual documents where the requested information will be found."[14]

---

that the failure to make a timely objection in response to a Rule 34 request results in waiver.").

[12] SEC v. Elfindepan, 206 F.R.D. 574, 576-577 (M.D. N.C. 2002) (internal citations omitted).

[13] United Oil Co. v. Parts Assocs., 227 F.R.D. 404, 407 (D. Md. 2005).

[14] Hillyard Enters. v. Warren Oil Co., 2003 U.S. Dist. LEXIS 27922 (E.D. N.C.2003) (emphasis added); Brown v. Blue Cross & Blue Shield of Ala., 2014 U.S. Dist. LEXIS 96105 at *8-9 (W.D.N.C. July 15, 2014) ("Relevant here, the producing party must show that a review of the offered documents will, in fact, reveal answers to the interrogatories. Additionally, **the producing party must adequately and precisely specify, for each interrogatory, the actual documents where the**

Finally, the Federal Rules Advisory Committee stated that Rule 33(d) was never intended to be a shortcut to avoid answering an interrogatory:

> The Committee is advised that parties upon whom interrogatories are served have occasionally responded by directing the interrogating party to a mass of business records… justifying the response by the option provided by this subdivision**. Such practices are an abuse of the option.** A party who is permitted by the terms of this subdivision to offer records for inspection in lieu of answering an interrogatory should offer them in a manner that permits the same direct and economical access that is available to the party. If the information sought exists in the form of compilations, abstracts or summaries then available to the responding party, those should be made available to the interrogating party. The final sentence is added to make it clear that a responding party has the duty **to specify, by category and location, the records from which answers to interrogatories can be derived**.[15]

B. Can a Responding Party Cite to Government or Non-Party Records in Answer to Interrogatories under FRCP 33(d)?

Parties often respond to interrogatories by vaguely citing to government documents or third-party data while saying "these documents are equally available to [the interrogating party]." Such a response is inadequate under the Rules. Reference to documents in the possession of government agencies, without also producing the documents, does not justify a refusal to provide a substantive, narrative response under Rule 33.[16] While citing to the responding party's

requested information will be found.") (emphasis added; citations omitted).

[15] FED. R. CIV. P. 33 advisory committee's note (1980 Amendment) (emphasis added).

[16] *See, e.g.* Davis v. Fendler, 650 F.2d 1154, 1158 n.3 (9th Cir. 1981) ("It is apparent that the records of the first four of these places [government entities] do not qualify as appellant's 'business records.' **A party cannot, under the guise of Rule 33(c)[now 33(d)] resort to such tactics.**");

previously produced business records is acceptable under Rule 33(d), it is not acceptable for government records or third-party documents.

III. FRCP 37

A. How Much "Meet and Confer" is Enough?

How much time and effort does a party have to expend to comply with the requirement, under Rule 37(a)(1)? Courts in the Fourth Circuit make clear that Rule 37(a)(1) requires meaningful and good faith efforts to avoid discovery disputes. "There is no need for the Court to reach the merits of Defendant's Motion to Compel because Defendant failed to confer with [Defendant] prior to filing the Motion as required by Federal Rule of Civil Procedure 37."[17]

Rule 37(a)(1) mandates that any motion to compel discovery "must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action." Good faith under Rule 37 "contemplates, among other things, honesty in one's purpose to meaningfully discuss the discovery dispute, freedom from intention to defraud or abuse the discovery process, and faithfulness to one's obligation to secure information without court action... Accordingly, good faith cannot be shown merely through the perfunctory parroting of statutory language on the certificate to secure court intervention; rather it mandates a genuine attempt to resolve the discovery dispute through non-judicial means."[18]

Other federal courts (favorably cited in the Fourth Circuit) have elaborated on the requirements for personal consultation under Rule 37:

> The good faith conferment language incorporated into Rule 37 was based in part due on the successful

In re Savitt/Adler Litig., 176 F.R.D. 44, 49–50 (N.D.N.Y. 1997) (holding invocation of Rule 33(d) improper where documents referenced were not plaintiffs' business records); 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER AND RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2178 (2d ed. 1994) ("Ordinarily it is also required that the information be obtainable from the records of the responding party, not those of somebody else"). *See also* Bujnicki v. American Paving and Excavating, Inc., 2004 U.S. Dist. LEXIS 8869, at *46 (W.D.N.Y. Feb. 25, 2004) (notwithstanding the fact that defendants can obtain the requested documents from third-party source, "plaintiff is required to produce all responsive documents in her possession.").

[17] Patrick v. Teays Valley Trs., L.L.C., 297 F.R.D. 248, 266 (N.D. W.Va. 2013).

[18] *Id.* at 266-267.

> experience of this and other federal districts in resolving discovery disputes. Previously, the District of Nevada local rules required a party moving to compel discovery to initiate sincere, "personal consultation," either in person or by telephone. **The mere sending of a letter demanding supplemental responses to interrogatories was insufficient.**
>
> Moreover, the personal consultation requirement had to be more than just a "formalistic prerequisite" to judicial resolution of a discovery dispute, but **rather a "sincere effort" where both parties presented the merits of their respective positions and meaningfully assessed the relative strengths of each.** Judicial intervention in discovery matters was therefore not appropriate unless (1) informal negotiations reached an impasse on a substantive issue in dispute, or (2) a party acted in bad faith either by refusing to engage in negotiations or by refusing to provide specific support for claims of privilege.[19]

A draft Motion to Compel (along with a terse cover letter) does not meet the standard for a meaningful meet and confer on discovery. Further, discussions must continue until the parties reach an impasse.[20] If the movant has not satisfied this requirement, then its motion to compel should be denied.[21] In conclusion, courts are not satisfied with formalistic,

[19] Shuffle Master v. Progressive Games, 170 F.R.D. 166, 172 (D. Nev. 1996) (citations omitted) (emphasis added).

[20] Hasbro, Inc. v. Serafino, 168 F.R.D. 99, 101 (D. Mass. 1996) ("It is not up to the court to expend its energies when the parties have not sufficiently expended their own."); Burton v. R.J. Reynolds Tobacco Co., 203 F.R.D. 624, 626–627 (D. Kan. 2001) (denying motion to compel because parties had not engaged in meaningful meet and confer).

[21] *Shuffle Master,* 170 F.R.D. at 173; *Hasbro,* 168 F.R.D. at 102; *see also* Doe v. Nat'l Hemophilia Found., 194 F.R.D. 516, 521 (D. Md. 2000) (motion to compel discovery

perfunctory "meet and confer" efforts. The efforts must be meaningful and open.

B. Can A Prevailing Party Obtain Attorney Fees for Preparing Meet and Confer Letters?

Courts sometimes require parties who lose discovery disputes to pay the prevailing party's attorneys' fees and costs related to the dispute. The losing party will often concede that the time spent on the Motion to Compel, and the work subsequent to the Motion to Compel, is an appropriate litigation expense. However, those same parties dispute that any and all time spent before filing the Motion to Compel is an appropriate charge, and instead claim that those activities were "spent in the normal course of litigation." This argument seeks to exclude the often time consuming "meet and confer" process.

This limitation is inconsistent with the Federal Rules. The FRCP requires the movant to have "conferred or attempted to confer" with the opposing party before filing a Motion to Compel.[22] If a party prevails in a Motion to Compel and is awarded attorney's fees, the time spent in the (necessary and mandatory) "meet and confer" process should necessarily be included in the compensable attorney's fees.

IV. Shotgun Complaints

Related to the issue of written discovery is the problem of vague, "shotgun" complaints. Often, particularly in mass tort litigation, plaintiffs will file sweeping complaints against dozens (sometimes hundreds) of defendants alleging sundry facts and not specifying which facts apply to which defendants. In *Magluta v. Samples*,[23] the Eleventh Circuit expressed its vigorous disapproval of shotgun complaints:

> The complaint is a quintessential shotgun pleading of the kind we have condemned repeatedly, beginning at least as early as 1991. It is in no sense the "short and plain statement of the claim" required by Rule 8 of the Federal Rules of Civil Procedure. It is fifty-eight pages long. It names fourteen defendants, and

denied; parties ordered to meet and confer in person).

[22] *See* FED. R. CIV. P. 37(a)(1).

[23] 256 F.3d 1282, 1284 (11th Cir. 2001).

> all defendants are charged in each count. The complaint is replete with allegations that "the defendants" engaged in certain conduct, making no distinction among the fourteen defendants charged, though geographic and temporal realities make plain that all of the defendants could not have participated in every act complained of. Each count incorporates by reference the allegations made in a section entitled "General Factual Allegations" – which comprises 146 numbered paragraphs – while also incorporating the allegations of any count or counts that precede it. The result is that each count is replete with factual allegations that could not possible be material to that specific count, and that any allegations that are material are buried beneath innumerable pages of rambling irrelevancies. This type of pleading completely disregards Rule 10(b)'s requirement that discrete claims should be plead in separate counts, and is the type of complaint that we have criticized time and time again.[24]

In Harold's Auto Parts, Inc., et al. v. Flower Mangialardi,[25] the Mississippi Supreme Court referred to an asbestos shotgun complaint as an "abuse of, and failure to comply with, Rules 8, 9, 10 and 11 [of the Mississippi Rules of Civil Procedure – identical to the FRCP]."[26] The court insisted that each complaint must reflect sufficient information obtained by plaintiffs' counsel to form a "good faith" basis for each plaintiff has a valid cause of action against each defendant in the jurisdiction in which the complaint was filed.[27] The court noted that "to do otherwise is an abuse of the system, and is sanctionable."[28]

In *Aguirre v. Amchem Products*,[29] the federal court dismissed a multi-defendant asbestos wrongful death action because the shotgun complaint filed in that case did not allege any specific facts against any specific defendants:

---

[24] *Id.* at 1284 (internal citations omitted).
[25] 889 So. 2d. 493 (Miss. 2004).
[26] *Id.* at 494.
[27] *Id.*
[28] *Id.*
[29] No. CV 11-01907-PHX-FJM, 2012 U.S. Dist. LEXIS 30004, at *5-6 (D. Ariz. Mar. 7, 2012).

> Plaintiffs argue that their allegations that each defendant placed asbestos products into the stream of commerce and that Griego was exposed to these products, developed cancer, and died render their claims plausible. **Plaintiffs argue that requiring more facts as to "when, where and how" Griego was exposed to asbestos "would improperly impose burdensome and hyper-technical requirements." We disagree.** Although Rule 8, Fed. R. Civ. P. does not require plaintiffs to plead every single factual detail, it nevertheless demands that plaintiffs present enough information to "permit the court to infer more than the mere possibility of misconduct." **Plaintiffs' complaint is factually threadbare**. They allege that their father worked as a laborer "at various locations" in Arizona "for many years." **They do not provide any additional detail, such as what industries he worked in, what types of activities he performed, or even during what decades their father worked.**[30]

The problem with shotgun complaints is that they demand an excessive amount of discovery to clarify plaintiffs' allegations. It is up to the defense to put a stop to the practice of shotgun complaints. When it is brought to their attention, judges often dismiss shotgun complaints and require plaintiffs to file more narrowly tailored complaints (which require less discovery).

V. Waiver Issues

A. Does Failure to Provide a Privilege Log Waive Privilege Claims?

Yes. Before asserting a claim of privilege, a party must provide a privilege log that identifies the factual elements supporting the privilege claim.[31] Furthermore, Virginia courts reject broad-brush

[30] *Id.* at *5-6 (citations omitted) (emphasis added).

[31] *See* VA. SUP. CT. R. 4:1(b)(6)(i); Hirsch v. CSP Nova, LLC, 98 Va. Cir. 286, 294 (Va. Cir. Ct. 2018) (overruling a privilege objection because the party failed to provide a privilege log as required by Rule 4:1(b)(6)(i)); Loudoun Cnty. Asphalt L.L.C. v.

claims of "privilege" and require specific, case-by-case support for each document that is allegedly privileged.[32]

B. Are "Scope of Discovery" Objections Permissible?

In the Commonwealth, the parameters of discovery are broad and liberal. They were aptly summarized by Judge Fleming of the Circuit Court of Loudoun County:

> Virginia law contemplates **a rather liberal application of discovery rules in civil cases,** allowing the discovery of any information that **"is relevant to the subject matter involved in the pending action"** or that is **"reasonably calculated to lead to the discovery of admissible evidence."** *Va. Sup. Ct. R. 4:1(b)(1)*. In Virginia, "[a]ll relevant evidence is admissible except as otherwise" excludable under the law. *Va. R. Evid. 2:402(a).* **It is well established in Virginia that "[e]very fact, however remote or insignificant, that tends to establish the probability or improbability of a fact in issue is relevant."** *Virginia Elec. & Power Co. v. Dungee*, 258 Va. 235, 260, 520 S.E.2d 164 (1999). **"Evidence is relevant if it has any logical tendency, however slight, to establish a fact at issue in the case."** *Ragland v. Commonwealth*, 16 Va. App. 913, 918, 434 S.E.2d 675, 10 Va. Law Rep. 143 (1993); *see also Rule 2:401* ("Relevant evidence means evidence having any tendency to make the existence of any fact in issue more probable or less probable than it would be without the evidence.").[33]

Boilerplate "outside the scope of discovery" objections are improper if they ignore the fact that certain interrogatories and requests are relevant to claims, affirmative defenses, or counterclaims.[34]

Wise Guys Contracting L.L.C., 79 Va. Cir. 605, 605–606 (2009).

[32] *See* Piland v. White, 85 Va. Cir. 45, 47-48 (2012) (collecting cases from Virginia circuit courts).

[33] *Hirsch*, 98 Va. Cir. at 292-293 (emphasis added).

[34] *See* Nizan v. Wells Fargo Bank Minn. Nat'l Ass'n, 274 Va. 481, 501 (Va. 2007) (finding a circuit court abused its discretion in preventing a defendant from conducting discovery related to its defense because doing so "substantially affected [the

Courts have held that evasive answers and boilerplate objections can be deemed "no response at all" which means that any objections are waived as untimely:

> If the responding party objects to an interrogatory, the grounds for objecting "must be stated with specificity." In other words, objections to interrogatories must be specific, non-boilerplate, and supported by particularized facts where necessary to demonstrate the basis for the objection. **The failure to state with specificity the grounds for an objection may result in waiver of the objection, unless the Court excuses the failure for good cause shown.**[35]

C. Are Unverified Interrogatories Timely?

Parties sometimes serve unverified Interrogatory Answers and serve verifications later (if at all). While the propounding party may have reason to accept a late verification, under established law in the Commonwealth, a party's service of unverified responses waives objections:

> [T]he failure to answer the interrogatories under oath constitutes a failure to make any written response to the interrogatories. Thus, the objections are a nullity without a motion for a protective order.[36]

The federal courts follow the same rule and are arguably even stricter in requiring compliance:

---

defendant's] 'ability and right to litigate' his defense"); *Hirsch*, 98 Va. Cir. at 292-293 (noting that "[e]very fact, however remote or insignificant, that tends to establish the probability or improbability of a fact in issue is relevant" in Virginia); Bosworth v. Vornado Realty L.P., 84 Va. Cir. 353, 356-357 (Va. Cir. Ct. 2012) (finding defendants' request for documents that supported Plaintiff's lost income claim was "not overly broad, burdensome, or vague," noting that "[d]iscovery is often a painful and expensive part of litigation, but Plaintiff has not alleged why these requests are *unduly* burdensome on him.").

[35] Lynn v. Monarch Recovery Mgmt., 285 F.R.D. 350, 356 (D. Md. 2012) (internal citations omitted, emphasis added) citing Hall v. Sullivan, 231 F.R.D. 468, 470, 474 (D. Md. 2005); Thompson v. U.S. Dep't of Hous. & Urban Dev., 199 F.R.D. 168, 173 (D. Md. 2001); Marens v. Carrabba's Italian Grill, Inc., 196 F.R.D. 35, 38-39 (D. Md. 2000); and Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 263-267 (D. Md. 2008). *See also Hirsch*, 98 Va. Cir. at 291 ("Under Rule 4:12(a)(3), [which governs motions to compel,] an evasive or incomplete answer is a failure to answer.").

[36] Whalen v. Nelson, 68 Va. Cir. 485, 486 (Va. Cir. Ct. 2001).

> The Rules require that answers to Interrogatories shall be made separately and fully under oath and signed by the party making them with the party's attorney signing any objections. The course taken by Defendant's counsel has undermined the important function and utility of Interrogatories as they have been posed by the Plaintiff in this case. Seeking information through Interrogatories is an efficient and cost-effective method of discovery and marshaling evidence for trial. Indeed, the Rules anticipate that it could lead to the discovery of evidence worthy of admission at trial. Rule 33 (c) provides that Interrogatory answers may be used at trial "to the extent permitted by the rules of evidence." *Deviating from the course prescribed by the Rules in any significant manner or way therefore negates the significant opportunity to introduce evidence through Interrogatories at trial…* **The failure to meet the simple requirement of providing verification can only be seen as a flagrant disregard of these Rules, Advisory Notes, and case precedents.** The bickering between the parties herein as to the number of requests, Plaintiff's "pick-and-choose" approach to answering, and Plaintiff's answers which refer to pleadings rather than articulating responses are hardly examples of a "manner . . . consistent with the spirit and purposes of Rules 26 through 37."[37]
>
> First, the substantive portions of Defendant's Answers to Interrogatories and Request for Production of Documents (as opposed to the attorney-drafted objections) were not verified until approximately September 3, 2019 and **therefore were not technically answered until that date. As the parties know, this**

[37] Saria v. Mass. Mut. Life Ins. Co., 228 F.R.D. 536, 538, 540 (S.D. W. Va. 2005) (internal citations omitted; bold added; italics in original).

> **Court has previously ruled that failure to timely answer discovery results in the waiver of any and all objections**.[38]
>
> Plaintiff's failure to provide answers to interrogatories under oath constitutes a **failure to answer** pursuant to FED. R. CIV. P. 37(a)(3), and gives rise to an award of fees and costs to Compton under FED. R. CIV. P. 37(b) & (d).[39]

D. Can a Party Respond to Requests for Production by Agreeing to Produce Documents "At a Mutually Convenient Time and Place" in the Future?

Parties often respond to requests for production by agreeing to produce responsive documents "at a mutually convenient time and place" without specifying when the time will be and where the place will be. Courts have treated such vague promises as "non-responses" which waive a party's objections:

> It is improper to state, as Defendant did, that production will be made at some unspecified time in the future. *See Jayne H. Lee, Inc. v. Flagstaff Indus. Corp*., 173 F.R.D. 651, 656 (D. Md. 1997) ("[A] response to a request for production of documents which merely promises to produce the requested documents at some unidentified time in the future, without offering a specific time,

[38] Slampak v. Nationwide Ins. Co. of Am., 2019 U.S. Dist. LEXIS 157845 at *12 (N.D. W. Va. Sep. 16, 2019) (emphasis added) citing Tustin v. Motorists Mut. Ins. Co., No. 5:08-cv-111, 2009 U.S. Dist. LEXIS 4853, 2009 WL 10675150 at *10 (N.D. W.Va. January 23, 2009).

[39] Elite Fin. Servs., Inc. v. Adams *(In re* Adams), 2005 Bankr. LEXIS 3551, at *7 (Bankr. D. S.C. Feb. 23, 2005) (emphasis added).

> place and manner… is treated as a failure to answer or respond."). Therefore, when Defendant stated that the documents would be produced, without indicating when or how they would be made available, Defendant failed to respond to Plaintiff's request for production of documents as required by Fed. R. Civ. P. 34(b)(2)(A). *See also* Fed. R. Civ. P. 37(a)(4) ("evasive or incomplete… response must be treated as a failure to… respond").[40]

Requests for production responses that do not also produce documents (or at least promise documents on a date certain) are arguably a failure to respond, which waive objections and invite sanctions.

[40] Mezu v. Morgan State Univ., 269 F.R.D. 565, 574 (D. Md. 2010).