

PRODUCT LIABILITY

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This article discusses the practical effect of the amendments to Rule 34 of the Federal Rules of Civil Procedure. The authors suggest appropriate discovery objections to requests seeking “any and all” documents without regard to a relevant time frame or issue – so that you can avoid sanctions.

Updating Objections Under Revised FRCP 34

ABOUT THE AUTHORS



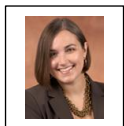
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Although the 2015 amendments to the Federal Rules of Civil Procedure sparked a flurry of general legal articles, less attention was given to the practical effect of amendments to Rule 34. As a consequence of the amendments, however, familiar discovery objections long relied upon by litigators and in-house counsel are no longer valid.

Under amended Rule 34, objections to requests for documents must state with specificity the grounds for objecting and state whether any responsive materials are being withheld on the basis of that objection. Practitioners should take care to prepare objections complying with this rule, as reliance on old boilerplate language can have adverse consequences. In-house counsel, too, should analyze their model discovery objections provided to outside counsel since the old model may be unacceptable.

Discovery objections can no longer invoke the phrase “not reasonably calculated to lead to the discovery of admissible evidence.” The 2015 amendments eliminated this language from Rule 26. Instead, parties may discover any non-privileged matter that is relevant to the claim or defense and *proportional to the needs of the case*. Practitioners must balance the burden and expense of a discovery request with the relative import of the requested discovery in light of the

particular issues in the case and the amount in controversy.

Federal courts are rejecting boilerplate and blanket objections, and entertaining motions for sanctions, for failing to follow the amended rules. One federal judge recently made known that any discovery responses failing to comply with Rule 34’s requirement to state objections with specificity, and indicating whether responsive materials are being withheld on the basis of the objection, would be deemed a waiver of all objections.¹ When objections are not particularized as to how that objection relates to the documents being demanded, courts may strike the objections entirely.

So, what is an appropriate discovery objection to those all-too-familiar document requests seeking “any and all” documents without regard to a relevant time frame or issues? Courts reviewing discovery responses under amended Rule 34 are adamant that a party can no longer simply object that discovery is overly broad and unduly burdensome. These tried and true such objections used for decades lack the specificity required by the amended rule. Blanket model discovery responses and objections that refuse to provide any documents will violate the requirements of amended Rule 34.

For those faced with true “overly broad” discovery requests, objections to the

¹ *Fischer v. Forrest*, 2017 U.S. Dist. LEXIS 28102 (S.D.N.Y. Feb. 28, 2017).

breadth of such requests are still appropriate. But now the objections must go a step further and define a scope of discovery the party *will* accept. For instance, the party may respond that it will limit its search to documents or electronically stored information created within a given period of time or from specified sources. Such a response not only provides the requisite specificity but also addresses Rule 34's requirement that a party identify documents withheld on the basis of the objection. The responding party should then produce or make available documents in response to that part of the discovery request that is not overbroad.²

Although Rule 34 requires a responding party to state whether documents are being withheld, the rule does not require a detailed log of withheld documents. Instead, it is sufficient to simply state documents were withheld or, alternatively, describe the limits that controlled the search for and collection of responsive documents. A statement of what is not being produced can identify as "withheld" anything beyond the scope of the search specified in the objection. Fed. Rules Civ. P. 34, advisory committee notes (2015). Thus, it would be sufficient to respond that a party limited its search for responsive documents to the subject of the case and to a narrowed time frame, with the response further identifying that the responding party produced all

nonprivileged documents responsive to those defined areas.

Keep in mind that, since the federal rules were "not intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional," the specific objections required by Rule 34 should include only the proportionality factors of Rule 26. Fed. R. Civ. P. 26, advisory committee notes (2015). For example, an objection may read: This discovery request is not proportional to the needs of the case considering that the burden and expense of the requested discovery outweighs its likely benefit, and, as such, the producing party has limited its search to [*a specified time frame*] as maintained by [*the appropriate custodians or department*].

The responding party will often bear the burden of demonstrating disproportionality. Fed. R. Civ. P. 26, advisory committee notes (2015). Even before drafting specific objections required by Rule 34, corporate defendants trying to manage discovery and document review costs may be able to offer proportional alternatives at the outset of the case based on institutional knowledge of past litigation. These discovery parameters should be discussed in the parties' Rule 26(f) conference. Addressing potential issues early will help minimize (or eliminate) later discovery disputes and the expense associated with unneeded document

² See Fed. R. Civ. P. 34(b)(2)(C) ("An objection to part of a request must specify the part and permit inspection of the rest.").

review. Discovery costs can be further reduced by investing the time to draft flexible model discovery objections in compliance with the amended rules.

A party should begin to discuss substantive discovery issues during the Rule 26(f) conference to identify custodians of relevant information, likely sources of documents, and categories of documents that are agreed to be relevant. These cooperative efforts are intended to result in more carefully tailored discovery requests.

With the addition of proportionality as a discovery principle, it benefits us all to eliminate old boilerplate objections. We hope that compliance with the amended federal rules will help achieve a just, speedy, and less expensive resolution of disputes.

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