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New Rules Will Improve Discovery Process: Amendments Change Way in Which Federal Courts Handle Objections

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It is widely accepted that discovery is the most expensive phase of modern business litigation. It is also true that we lawyers have no one to blame but ourselves for at least part of the discovery plight from which we suffer.

In state court personal injury actions, there are form interrogatories and document requests. In business actions, however, discovery requests are individually tailored to each case. But no matter how relevant and plainly stated an interrogatory or document request may be, it is often met with a litany of objections—commonly identified as "general objections"—on the last day of the response period. Sometimes, general objections are retaliatory—the other side "did it first" so we respond in kind. Sometimes, they are cautionary—a catch-all for whatever we don't capture by our specific objections. Rarely, however, do the objections have any real meaning and rarely do we spend any time assessing whether asserting them is the best option. These objections are merely byproducts of the litigation cut-and-paste mentality.

To our credit, many lawyers answer "subject to" or "notwithstanding" their general objections. But the other side is typically still left wondering whether anything has been held back, or, perhaps, whether the objection is limiting the scope of a party's discovery search or otherwise made to conceal information. So, almost invariably, those general objections become the first topic of our meet and confer conference, where both sides usually agree that they will explicitly state whether they are relying upon general objections to withhold information or documents.

Absent objection from Congress, which is not anticipated, the proposed amendments to Rule 34(b)(2) of the Federal Rules of Civil Procedure will become effective on December 1, 2015. These amendments will change the way in which we treat general objections in federal court. The new Rule 34 will require a specific objection to each request, and each objection must state whether materials are being withheld as a result. The Civil Rules Advisory Committee incorporated this change because, as the Honorable John G. Koeltl of the Southern District of New York stated at the April 2014 meeting, responses often "are absurd." He explained that the general objections typically incorporate boilerplate protests, and responses produce materials "subject to these objections" without truly indicating whether anything has been withheld on the basis of the objections. This practice, Judge Koeltl explained, "is true abuse. The response is only an invitation to meet

and confer, not any real indication of what will be produced." The amended rule should end this particular type of abuse of the discovery process.

A second problem we have created for ourselves is the relentless pursuit for the needle in the haystack, modernly known as the electronic message in the gigabyte data forest. Rather than conduct a meaningful discovery conference to decide upon narrowly crafted search terms that will yield the most relevant documents, we often opt for broad terms that exponentially expand the data returned, for fear we might miss something.

We have created a monster. Data dumps are not uncommon. We search Word documents, e-mail communications, text messages, presentations, databases, voicemails, audio and video files, social media, and web sites. We load this information into expensive data search platforms where we construct complicated search terms in an effort to narrow the universe of documents, only to then fight with our adversaries over the propriety of the search terms. We employ armies of contract lawyers to help review what we both produced and received in discovery. The cost is astronomical and often deters companies from litigating in the first place.

But there is an answer. Contemplate and cooperate. Contemplate how much the discovery process is really going to cost and then double your estimate. Once you know that number, and share it with your client, you will think twice about what you ask in discovery and how you respond. Cooperate and conduct a meaningful conference with your adversary, and the parties themselves, if possible, to determine what the real scope of discovery should be. This holds true whether in federal court as part of the Rule 26(f) conference or in state court because it just makes good sense. Finally: decide what search terms are really appropriate, figure out what custodians really need to be pursued, and consider what temporal scope is really necessary. Note that in the District of Connecticut, our Form 26(f) (Report of Parties Planning Meeting) actually requires counsel to discuss "the disclosure and preservation of electronically stored information, including, but not limited to, ...search terms to be applied in connection with the retrieval and production of such information, ... and the allocation of costs of assembling and producing such information."

The new Federal Rule 26(b)(1), moreover, will come to the aid of those who now suffer from an unrealistic adversary, because the Rules Advisory Committee has incorporated a proportionality requirement into the discovery rules. The scope of discovery is now defined not only by the claims and defenses but also that which is "proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the purported discovery outweighs its likely benefit." The Minutes of the April 2014 Civil Rules Advisory Committee meeting stated that the seven words "proportional to the needs of the case" were "added to make proportionality explicit." The Committee noted that although a proportionality requirement currently appears in Rule 26(g)

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and there have been efforts to emphasize and reinforce proportionality since 1983, these efforts have largely been ineffective. The new language, therefore, is “a fourth attempt that seeks to fulfill the purpose that has not yet been fully implemented.”

Both of these rule changes should bring a bit of rationality and reason to the discovery landscape. Of course, these rules will only work if we all honor them.

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