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THE SEDONA CONFERENCE FEDERAL RULE OF CIVIL PROCEDURE 34(b)(2) PRIMER: PRACTICE POINTERS FOR RESPONDING TO DISCOVERY REQUESTS

A Project of The Sedona Conference Working Group on Electronic Document Retention and Production (WG1)

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PREFACE

Welcome to the final, March 2018, version of The Sedona Conference *Federal Rule of Civil Procedure 34(b)(2) Primer*, a project of The Sedona Conference Working Group on Electronic Document Retention and Production (WG1). This is one of a series of Working Group commentaries published by The Sedona Conference, a 501(c)(3) research and educational institute dedicated to the advanced study of law and policy in the areas of antitrust law, complex litigation, and intellectual property rights. The mission of The Sedona Conference is to move the law forward in a reasoned and just way.

The public comment version of this Primer was published in September 2017 and stems from the December 2015 changes to Federal Rule of Civil Procedure 34(b)(2) ("Rule 34"), which were intended to address systemic problems in how discovery requests and responses traditionally were handled, and the observation that, over a year later, despite numerous articles, training programs, and conferences about the changes, their implementation had been mixed, at best. After a 60-day public comment period, the editors reviewed the public comments received and, where appropriate, incorporated them into this final version.

On behalf of The Sedona Conference, I want to thank all of the drafting team members for their dedication and contributions to this project. Team members that participated and deserve recognition for their work are: Brian D. Clark, Jennifer S. Coleman, Alison A. Grounds, K. Alex Khoury, Greg M. Kohn, Jenya Moshkovich, and Michael J. Scimone. The Sedona Conference also thanks the Honorable Andrew J. Peck for serving as Judicial Participant, and Annika K. Martin and Martin T. Tully for serving as both the Editors-in-Chief and Steering Committee Liaisons. Finally, The Sedona Conference and the Drafting Team are grateful to Karin Scholz Jenson for her exceptional efforts in developing the initial outline on which this Primer was based.

We encourage your active engagement in the dialogue. Membership in The Sedona Conference Working Group Series is open to all. The Series includes WG1 and several other Working Groups in the areas of international electronic information management, discovery, and disclosure; patent litigation best practices; data security and privacy liability; trade secrets; and other "tipping point" issues in the law. The Sedona Conference hopes and anticipates that the output of its Working Groups will evolve into authoritative statements of law, both as it is and as it should be. Information on membership and a description of current Working Group activities is available at https://thesedonaconference.org/wgs.

Craig Weinlein
Executive Director
The Sedona Conference
March 2018

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I. INTRODUCTION

As Chief Justice John G. Roberts observed, the changes to the Federal Rules of Civil Procedure ("Rule(s)") that became effective December 1, 2015, were intended to address systemic problems in how discovery requests and responses traditionally were handled.[1] "[O]ne change that affects the daily work of every litigator is to Rule 34,"[2] which was revised with the aim of "reducing the potential to impose unreasonable burdens by objections to requests to produce."[3] Thus, the changes to Rule 34 were part of the broader aspiration to reduce the costs and delay in the disposition of civil actions by advancing cooperation among the parties, proportionality in the use of discovery procedural tools, and early and active judicial case management.[4] The drafters of those amendments intended to address certain obstacles to securing "the just, speedy, and inexpensive determination of every action and proceeding," which in the context of Rule 34 included:

- overly broad, non-particularized discovery requests that reflexively sought all documents,[5] regardless of the relevance to the claims and defenses at issue;

1. *See* REPORT OF THE ADVISORY COMMITTEE ON FEDERAL RULES OF CIVIL PROCEDURE (June 14, 2014); 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY.

2. Fischer v. Forrest, Case No. 1:14-cv-01307, 2017 WL 773694, at *1 (S.D.N.Y. Feb. 28, 2017).

3. FED. R. CIV. P. 34 advisory committee's note to 2015 amendment.

4. *See* REPORT OF THE ADVISORY COMMITTEE ON FEDERAL RULES OF CIVIL PROCEDURE (May 2, 2014).

5. Throughout this Primer, the term "documents" is intended to include paper documents as well as electronically stored information (ESI), unless otherwise specified.

- overuse of boilerplate objections that provided insufficient information about why a party was objecting to producing requested documents;
- responses to requests that failed to clarify whether responsive documents were being withheld on the basis of objections; and
- responses that stated requested documents would be produced, without providing any indication of when production would begin, let alone completed, often followed by long delays in production.

Yet, "[d]espite the clarity of the no-longer-new 2015 Amendments," courts are still seeing "too many non-compliant Rule 34 responses" as well as non-compliant requests.[6] Many practitioners continue to rely on their prior practices; templates; boilerplate[7] requests, instructions, definitions, and objections; and forms. This failure to adapt may be caused by a lack of awareness of the changes, but is more likely caused by many practitioners who are in "wait and see" mode, hoping that a clear picture of how to implement the amended Rules emerges from the case law interpreting them. Wait no more: "It is time for all counsel to learn the now-current Rules and update their 'form' files."[8]

The Sedona Conference Working Group 1 has prepared this Rule 34(b)(2) Primer with practice pointers on how to comply with the amended Rules. The amendments to Rule 34(b)(2) en-

6. *Fischer*, 2017 WL 773694, at *3.

7. "Boilerplate" language includes "[r]eadymade or all-purpose language that will fit in a variety of documents." U.S. v. Needham, 718 F.3d 1190, 1199 (9th Cir.) (quoting BLACK'S LAW DICTIONARY (9th ed. 2009)).

8. *Fischer*, 2017 WL 773694, at *6.

courage conversation between requesting and responding parties about what is being sought and what will be produced—this Primer seeks to provide a framework for how those conversations may proceed. This Primer is not intended to be the last word on how to implement the amendments, as there is no "correct" way to do so, and new ideas and best practices are emerging every day. Rather, this Primer gathers advice and observations from: (i) requesting and responding parties who have successfully implemented them; and (ii) legal decisions interpreting the amended Rules. This Primer is focused on amendments to Rule 34(b)(2), relating to responses and objections, but should be considered together with amendments to Rule 26(b)(1), which have changed the standard for the permissible scope of discovery requests, and which are outside the focus of this Primer. Judicial opinions issued to date have given a clearer picture on how the amendments to Rule 34(b)(2) will be interpreted and implemented by the bench, and any practitioner that does not adapt their practice to incorporate these amendments does so at his or her own risk. **Appendix A** summarizes a number of cases that have addressed the specificity of requests for production, and the specificity of responses and objections to requests for production**. Appendix B** lists standing orders, checklists, and pilot programs that address discovery requests, discovery responses, and guidelines for when and how parties should confer regarding requests and responses.

II. 2015 RULES AMENDMENTS THAT IMPACT REQUESTS FOR PRODUCTION AND RESPONSES THERETO

The 2015 Amendments to Rule 34(b)(2) require the following:

- Responding parties must respond to Rule 34 Requests for Production ("RFPs") within 30 days of service or, if the request was delivered prior to the Rule 26(f) conference, within 30 days after the parties' first Rule 26(f) conference.
- Objections to RFPs must be stated with specificity.
- Responses must state whether responsive materials are being withheld on the basis of objections. Advisory Committee Note to Rule 34 states that describing the search to be conducted can satisfy the specificity requirement.
- Responses to RFPs may state that the responding party "will produce documents" but must do so within 30 days "or another reasonable time specified in the response."

III. PRACTICE POINTERS

A. Conferences by the Parties[9]

1. Early Discovery Conference

A substantive conference between the parties early in the case provides an opportunity to comply with the Rules amendments and avoid disputes about requests for productions or responses to those requests. Below are some key topics particularly relevant to Rule 34(b)(2) that should be addressed for an effective conference:[10]

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9. Rule 26(f) specifically requires the parties to litigation to "confer as soon as practicable" for the purpose of planning for discovery and in preparation for a conference with the court under Rule 16(b). The 1993 Advisory Committee Notes to Rule 26(f) provided that "[t]he revised rule directs that in all cases not exempted by local rule or special order the litigants must meet in person and plan for discovery." FED. R. CIV. P. 26 advisory committee's note to 1993 amendment. However, in 2000, Rule 26(f) was "amended to require only a 'conference' of the parties, rather than a 'meeting,' because "geographic conditions in some districts may exact costs far out of proportion to these benefits." *See* FED. R. CIV. P. 26 advisory committee's note to 2000 amendment. The 2000 amendment allowed the court by case-specific order to require a face-to-face meeting, but did not authorize "standing" orders requiring such meetings. *Id*. Throughout this Primer, unless specified otherwise, "conference" generically refers to any occasion on which it is required or advisable for the parties to litigation to confer on discovery issues, regardless of the manner of doing so.

10. Numerous resources exist for more general information on topics to address in an effective conference, beyond those directly related to Rule 34. *See, e.g.*, Ariana J. Tadler, Kevin F. Brady & Karin Scholz Jenson, *The Sedona Conference "Jumpstart Outline": Questions to Ask Your Client & Your Adversary to Prepare for Preservation, Rule 26 Obligations, Court Conferences & Requests for Production*, THE SEDONA CONFERENCE (March 2016), https://thesedonaconference.org/publication/The%20Sedona%20Conference%C2%AE%20%22Jumpstart%20Outline%22; *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1 (2018), https://thesedonaconference.org/publication/The

- Scope of Discovery: By discussing with particularity the types of documents expected to be relevant to the claims and defenses of the parties and proportional to the needs of the case under Rule 26(b)(1), the parties can focus the discussion of discovery issues including those below.
- Location and Types of Relevant Data and Systems: By discussing likely sources of relevant documents in discovery conferences, the parties can reduce overbroad requests that lead to objections, unspecific objections which fail to identify what is being produced, and related discovery disputes.
- Possession, Custody, or Control: Parties may have legitimate bases to claim that certain data is not within their possession, custody, or control. However, it may be advantageous for the party asserting such a position to give notice to the requesting party that such a position is being taken if the data in question is clearly relevant to the claims and defenses.[11] For example, if

%20Sedona%20Principles. Also, a number of District Courts have Standing Orders/General Orders that address these topics. *See* Appendix B. The appropriate topics for discussion, as well as the level of detail required or feasible, may vary depending on the facts and nature of the specific matter.

11. *See* The Sedona Conference, *Commentary on Rule 34 and Rule 45 "Possession, Custody, or Control,"* Principle 5, 17 SEDONA CONF. J. 467 (2016), *available at* https://thesedonaconference.org/publication/The%20Sedona%20Conference%20Commentary%20on%20Rule%2034%20and%20Rule%2045%20%E2%80%9CPossession%2C%20Custody%2C%20or%20Control%E2%80%9D. ("If a party responding to a specifically tailored request for Documents or ESI (either prior to or during litigation) does not have actual possession or the legal right to obtain the Documents or ESI that are specifically requested by their adversary because they are in the 'possession, custody, or control' of a third party, it should, in a reasonably timely manner, so notify the requesting party to enable the requesting party to obtain the Documents or ESI from

the complaint centers around the conduct of a particular individual who is an employee of Defendant A, and Defendant A believes it is not in possession, custody, or control of that employee's cellphone or tablet device, then Defendant A's response to requests for production may wish to provide notice of that legal position to permit the requesting party an opportunity to address that position before relevant electronically stored information (ESI) is lost, even inadvertently. Indeed, whenever a responding party does not possess that which is requested, it should simply say so up front. If the responding party does not timely raise the issue, the parties may be left in the unfortunate position of experiencing the destruction of highly relevant evidence, resulting in otherwise avoidable satellite motion practice concerning claims of spoliation.

- Phasing: The parties should discuss whether producing ESI in phases could result in cost savings or efficiencies.
- ESI Protocol: The parties should consider entering into an ESI stipulation that includes the parties' responsibilities and obligations for Rule 34 requests and responses.[12]

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the third party. If the responding party so notifies the requesting party, absent extraordinary circumstances, the responding party should not be sanctioned or otherwise held liable for the third party's failure to preserve the Documents or ESI.").

12. *See, e.g.,* MODEL STIPULATED ORDER RE: DISCOVERY OF ELECTRONICALLY STORED INFORMATION FOR STANDARD LITIGATION (N.D. Cal. Dec. 2015), *available at* http://www.cand.uscourts.gov/eDiscoveryGuidelines.

- Privilege: The parties should consider whether they can agree on ways to identify documents withheld on the grounds of privilege or work product to reduce the burdens of such identification, such as categorical privilege logs or agreeing that certain categories of documents do not need to be logged (e.g., communications with litigation counsel, or documents created after a certain date). Also, the parties should strongly consider whether they will enter into a Fed. R. Evid. 502(d) stipulation and order to prevent the waiver of privileges and protections.
- Identification of Claims and Defenses: An impediment to a meaningful conference concerning discovery can be the lack of a formal answer to the complaint by the defendant during the pendency of a motion to dismiss, or uncertainty by the defendant as to the nature and bases for the claims asserted. If discovery responses need to be addressed notwithstanding, practical solutions include the defendant informally identifying its defenses so the parties can discuss the scope of relevant discovery, or formally filing a "protective" answer while the motion is pending.

If the parties confer regarding these issues and put an ESI plan in place early in the case, it may assist in achieving the objectives of shaping the scope of Rule 34 requests and minimizing, or even avoiding, the need for judicial involvement in discovery issues.

Of course, advance preparation by all participants is essential to an effective discovery conference. Failure to do so will undermine, if not eliminate, the ability to achieve the foregoing objectives and may breed distrust among the parties.

2. Early Delivery of Rule 34 Requests

The 2015 amendments allow for delivery of Rule 34 requests 21 days after service of the complaint.[13] According to the 2015 Advisory Committee Notes, "[t]his relaxation of the discovery moratorium is designed to facilitate focused discussion during the Rule 26(f) conference."[14] Indeed, the expectation is that "[d]iscussion at the conference may produce changes in the requests."[15] Therefore, parties may benefit from early delivery of Rule 34 requests because it affords an opportunity for the parties to informally discuss any objections before they are due or made in writing. Whether they confer as part of the Rule 26(f) process or through separate discussions, a substantive conference early in the case provides an opportunity to comply with the Rule changes and avoid discovery disputes.

If one or more of the parties exchange Rule 34 requests in advance of the Rule 26(f) conference, the parties can be more specific at the conference about potential objections to the requests, the relevance (or lack thereof) of the documents requested to the claims and defenses, the proportionality of the requests under Rule 26(b)(1), and the search the responding party is willing to conduct. Counsel should share these requests with their clients prior to the conference to help identify potential objections and the efforts necessary to make the requested production. It also will help the responding party identify objections that may be inappropriate, such as a burden objection to a request that appears burdensome on its face but may not be in fact, as well as requests that could be refined or focused to avoid objections. Finally, early requests can help narrow the focus of the preservation discussion, a topic that is now required

13. FED. R. CIV. P. 26(d)(2).

14. FED. R. CIV. P. 26 advisory committee's note to 2015 amendment.

15. *Id*.

as part of a Rule 26(f) conference. It can feel "unnatural" to have a conference about requests prior to responding to them in writing, but it is one way that parties can comply with the Rules.

3. Documentation of Resolutions Concerning Rule 34 Requests and Responses

One challenge in discovery conferences concerning Rule 34 objections and responses is summarizing the requests, objections, and proposed resolutions for numerous different requests. A sample tracking form for such discussions is provided below, and is just one example of how parties might memorialize their progress towards resolution of objections and proposed responses on a request-by-request basis at a conference.

Rule 34 Request Language	Summary of Tentative Objection(s)	Producing Party's Proposed Limitation(s) to Request	Requesting Party Response	Resolution (Describe full or partial resolution)
Request No. 1: Produce all documents relating to the Ballroom contract.	Overbroad because complaint alleges that only conduct beginning 6 years into the 8-year term of the Ballroom contract is relevant to resolving this lawsuit (*i.e., relevant events starting in 2015, but not back to 2009 when the contract was entered into*).[16]	Limit time period for request to 2015 through the present and produce responsive documents contained in the agreed-upon custodians' email and key network shares that hit on the search term "ballroom," as well as the share drive folder containing only documents about this contract, which will be reviewed for responsiveness without application of search terms.	Limit time period for request to June 2014 through the present, as there were a few communications prior to 2015 we believe are relevant. Agree that custodial data may be culled by search terms, but request that the share drive folder specific to this contract be manually reviewed.	*Resolved at 3/9/2017 discovery conference on terms listed in requesting party response.*

If agreements are made at the conference that define the scope of the requests or the production, best practices suggest the parties should memorialize these agreements in writing, such as by: (i) sending correspondence to confirm the agreements made during the conferring process regarding limitations to the scope of the original requests; (ii) serving revised discovery requests reflecting the agreements made through the conferring process regarding the agreed-upon limitations to the scope of the original requests; or (iii) supplementing the discovery responses subsequent to the conferring process by responding to the original requests as limited, as reflected in the following example:

16. This objection is provided as an example. Other objections may be appropriate.

> "Request No. 1: Produce all documents relating to the Ballroom contract."
>
> **Response to Request No. 1:** As discussed at the discovery conference on March 18, 2017, this Request is objectionable because the contract was entered into in 2009, but responding party is not presently aware of any relevant events regarding alleged non-compliance with contract terms prior to 2015. The parties agreed that responding party will review and produce responsive, non-privileged documents that hit on the search term "ballroom" in the agreed-upon custodians' email accounts and key network share folders, but the departmental share folder specific to the Ballroom contract will be manually reviewed, without search terms, for responsive materials. The agreed-upon custodians are Jane Smith, Jean Jones, and Bob Smith, the principal individuals involved in responding party's compliance with the Ballroom contract from January 2014 through the present. The production of the documents described in this response will be completed within 30 days from the date of this response.

By stating its search will be limited to a given period of time or specified sources in response to an overbroad request, the responding party is more likely to meet Rule 34's specificity requirement and is in a better position to comply with the requirement that the production be made by a certain date, because the scope of the production will be identified. This is especially true where, for example, the responding party has had the opportunity to test the search terms and/or other search parameters prior to the written response and ascertain whether the volume of data it implicates is reasonable and proportional.

When determining how to memorialize agreements reached during discovery conferences, consider what documentation is required or accepted in discovery applications before your

court. For example, if your court only allows the text of disputed discovery requests and responses to be pasted into a motion to compel, but does not allow exhibits such as post-conference letters to be attached to the motion, the parties will want to memorialize agreements by revising the affected discovery requests or responses, rather than simply putting the agreements into a letter that cannot be put before the court in the event of a dispute.

B. Requests for Production

1. Definitions and Instructions

In drafting requests for production, requesting parties should determine what is needed relative to the claims alleged or defenses raised. The requests also should be proportional to the needs of the case.[17]

Requesting parties should attempt to minimize the need for objections by avoiding boilerplate requests, instructions that exceed or contradict the requirements of the Federal Rules, definitions that are not actually used in the requests, blanket requests for "any and all documents," and documents that "refer or relate to," in order to encourage substantive responses to the requests from the producing party thereby increasing the chances that documents will be produced sooner. The following may help draft requests that comply with the amended Rules 26(b)(1) and 34:

a) To minimize objections to definitions and instructions, consider using the definitions and instructions in the federal or local rules, without elaboration.

b) Avoid overbroad definitions. For example, do not include in the definition of "You" people or entities that

17. *See* FED. R. CIV. P. 26(b)(1).

are more properly subject to discovery through Rule 45.[18]

c) Avoid overbroad instructions. For example, avoid (unless necessary) an instruction that the responding party must search deleted data, data in slack space, ESI on disaster recovery tapes, and other non-primary sources of ESI which may not be readily accessible in the normal course.[19]

d) Consider using instructions designed to reduce across-the-board objections. For example, consider including an instruction that the requests should not be

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18. *See* The Sedona Conference, *Commentary on Rule 34 and Rule 45 "Possession, Custody, or Control,"* 17 SEDONA CONF. J. 467 (2016), *available at* https://thesedonaconference.org/publication/The%20Sedona%20Conference%20Commentary%20on%20Rule%2034%20and%20Rule%2045%20%E2%80%9CPossession%2C%20Custody%2C%20or%20Control%E2%80%9D.

19. *See, e.g.*, *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1, Principle 8 (2018), https://thesedonaconference.org/publication/The%20Sedona%20Principles; 7TH CIRCUIT ELECTRONIC DISCOVERY COMMITTEE, PRINCIPLES RELATING TO THE DISCOVERY OF ELECTRONICALLY STORED INFORMATION, Principle 2.04(d) (Rev. 8/1/2010), http://www.discoverypilot.com/sites/default/files/Principles8_10.pdf ("The following categories of ESI generally are not discoverable in most cases, and if any party intends to request the preservation or production of these categories, then that intention should be discussed at the meet-and-confer or as soon thereafter as practicable: (1) 'deleted,' 'slack,' 'fragmented,' or 'unallocated' data on hard drives; (2) random access memory (RAM) or other ephemeral data; (3) online access data such as temporary internet files, history, cache, cookies, etc.; (4) data in metadata fields that are frequently updated automatically, such as last-opened dates; (5) backup data that is substantially duplicative of data that is more accessible elsewhere; and (6) other forms of ESI whose preservation requires extraordinary affirmative measures that are not utilized in the ordinary course of business.").

construed to request privileged or work product documents created on or after the filing of the complaint.

e) Be thoughtful in applying across-the-board date ranges for the requests.

2. Individual Requests

Similarly, individual RFPs should be well-tailored, and not overbroad or disproportionate to the needs of the case:

a) Per Rule 26, requests must be limited to ESI that relates to the claims or defenses and be proportional to the needs of the case. Recall that the 2015 amendment to Rule 26 deleted the former language about "discovery of any matter relevant to the subject matter involved in the action" or that is "reasonably calculated to lead to the discovery of admissible evidence."

b) Per Rule 34(b)(1)(A), the requests "must describe with reasonable particularity each item or category of items to be inspected."

c) Determine whether the client has information about specific documents or types of documents in the responding party's possession, custody, or control that relate to the claims or defenses in the case; use that information to narrowly tailor requests that target those specific documents or types of documents.

d) Consider specifying subsets of documents—such as "communications." Identifying categories rather than referring broadly to "all documents" makes it easier in the meet and confer process to identify requests that can be addressed by searching particular sources, such as key custodians' email accounts.

e) Where possible, avoid beginning requests with "any and all documents and communications that refer or relate" to a particular subject (and similar preambles). Any increase in scope gained by such language is likely to be offset by wasted time spent resolving objections or narrowing the scope of the request, or by motion practice in which the request may be viewed as overbroad. Consider replacing "refer or relate" and similar language with requests for specific ESI, or with more specific terminology such as "describing," "reflecting," or "containing." In some instances, local court rules will provide specific definitions applicable to all discovery requests.[20]

f) Consider the scope of each request individually. Requests generally can be put in three categories:

   i. *Requests for specific documents:* These documents are readily identifiable, such as tax returns, a personnel file, bank records, board meeting minutes, etc. A responding party should be able to identify and produce these quickly. Bogging down requests for specific documents with the "any and all" preamble usually serves to draw objections and delay production. Instead, make the request a simple one, such as "Produce plaintiff's work performance evaluations from 2012 to 2015."

   ii. *"Sufficient to show" requests:* These requests seek documents on a topic for which you need information, but you do not need the responding party to find and produce every document

20. *See, e.g.*, S.D.N.Y. L.R. 26.3(c), *available at* http://www.nysd.uscourts.gov/rules/rules.pdf.

that contains or relates to that information. For example, if seeking the locations where the responding party did business, a request for ESI "sufficient to show all locations where Company A did business in 2012 to 2015" would be more appropriate than a request for "all ESI that reflects or relates to the locations where Company A did business." Also, consider whether an interrogatory may be a more efficient way to get the needed information.

iii. *Everything else:* This category often includes subjects on which the requesting party has limited information regarding the existence of responsive documents, but for which a comprehensive response is needed. In most cases, a discovery conference will help target the request, as the responding party has knowledge (or should be able to obtain knowledge) about the types and categories of documents that exist in the case that are in its possession, custody, or control. The amendments to Rule 1 support this type of conference. Either before or after the conference, consider ways to tailor the request or specify the documents sought, such as the following:

   a. Provide examples of document types falling within the general description. This can be a useful starting point to talk about other, related documents, and whether or not they are necessary.

   b. Consider using factual contentions raised by the responding party to define the limits of a request. For example, you

might seek "all documents concerning any disciplinary action that Defendant claims was taken concerning the Plaintiff."

c. Requests seeking "all" documents on a subject are more likely to be reasonable in scope where the documents are of a type maintained by a specific custodian, or relate to a specific topic, for example, "all documents that relate to the decision to classify the Assistant Manager position as exempt from overtime."

d. In contrast, an "any and all" request that covers a general topic, such as "any and all documents that refer or relate to Defendant's customer relationships," is virtually certain to draw objections. Unless the requesting party can articulate what the request covers, it will be difficult to sustain when challenged.

e. If, as a requesting party, you cannot see a way to narrow an "any and all" request, prepare for a conference on the topic with a list of questions that would allow you to narrow the scope of the request.

f. Information learned in a discovery conference can be used to narrow a request like the one in III(B)(2)(f)(iii)(d), *supra*, to something like, "all documents main-

tained on the Business Management Department's shared drive concerning the Acme Widgets account."

g. Consider using interrogatories when they are a more appropriate and less burdensome method to discover necessary information. For example, instead of requesting "all ESI that relates to the ACME Widgets account," consider an interrogatory that asks the responding party to list all products sold to Acme, the dates those products were sold, and prices the products were sold at.

3. Rule 26(g) Certification

Requesting parties should be mindful that the certification requirement of Rule 26(g) applies to all document requests. *See* Section III(E), *infra*, for more on the requirements of Rule 26(g).

C. Responses to Requests for Production

In drafting responses to RFPs, counsel for responding parties should meet with their clients as early as possible to determine what documents exist, what requested documents are going to be withheld and for what reasons, and what requested documents are going to be produced and when that production can be completed. This will allow the responding party to avoid using general objections and boilerplate responses that state only "responsive non-privileged documents will be produced." The following may help draft responses that comply with amended Rule 34:

1. Time to Respond

The responding party must respond in writing within 30 days after being served or, if the request was delivered under Rule 26(d)(2), within 30 days after the parties' first Rule 26(f) conference.[21] A shorter or longer time may be stipulated to or be ordered by the court.[22] However, when altering response deadlines, parties and courts should be cautious about setting a deadline that is triggered by an unfixed event—for example, a deadline that is "30 days after the parties have agreed on keywords [or some other unfixed event or action]" —because this can create an opportunity for taking advantage by slow-rolling or delaying the unfixed event such that the response deadline is never triggered. Instead, discovery response deadlines should be triggered by fixed dates or actions that are themselves subject to firm deadlines, so that parties can accurately anticipate when responses are due and can be held accountable when deadlines are missed.

The 30-day deadline in Rule 34(b)(2)(A) applies to the written response to the request for production—not the date for producing the ESI. The deadline for producing the ESI is in Rule 34(b)(2)(B): "the time specified in the request or another reasonable time specified in the response." To the extent setting dates for production is not possible for a subset of the production universe at the time the response is due (because the scope of production is still being negotiated or because additional information that is unavailable at the time of the response period is necessary to provide a definite date of production), responding parties should state the scope of production that they are willing and able to produce without objection and the specific date of such production. The parties can continue to confer on the final

21. FED. R. CIV. P. 34(b)(1)(A).

22. FED. R. CIV. P. 34(b)(2)(A).

scope of production, including any potential search terms or search methodologies (e.g., technology assisted review) for filtering ESI, and set a date for supplemental productions. These measures should be in addition to, and not in lieu of, completing specific, unobjectionable productions within a specific timeframe, and should not be used to delay or avoid deadlines.

2. General Objections

Amended Rule 34 requires that objections: (i) be stated with specificity, including the reasons for the objections; and (ii) state whether any responsive materials are being withheld on the basis of that objection.[23] Because of these requirements, general objections should be very limited.

a) General objections should be used only if the objections apply to all the document requests or are expressly incorporated by reference in the sub-set of requests to which they are being asserted to avoid repeating the objection. General objections as to form of production, time period/date range, or other global-scope objections may be listed as a general objection, but the reason for the objection still must be specified in order to facilitate a meaningful discovery conference. For example, instead of this typical general objection, "Company A objects to these Requests to the extent they are not limited in time," consider including more specificity in the general objection if it applies to all of the requests, or including the specificity in the individual responses where appropriate: "The Requests do not specify the date range for the requested production. Unless otherwise stated in the

23. *See* FED. R. CIV. P. 34(b)(2)(B)–(C).

response below, Company A will search for responsive documents between January 1, 2014, the date the contract negotiations began, and June 1, 2014, the date the contract was executed." Here are some typical general objections that may be appropriate:

i. *Privilege Objection.* Responding Party will not produce information protected from disclosure by the attorney-client privilege or the attorney work-product doctrine. If any documents are withheld from production on the basis of any such privilege, other than those excluded by the parties pursuant to the Joint Case Management Conference Statement, a privilege log will be served on the requesting party within fourteen (14)[24] days of production of documents from which such protected documents were withheld.

ii. *Confidentiality Objections.* Responding Party has documents in its possession, custody, or control that contain proprietary, trade secret, or other confidential information, which Responding Party is withholding until a Protective Order is in place. Responding Party also has various documents in its possession, custody, or control that are subject to third-party confidentiality provisions. If any documents are withheld from production on the basis of this objection, Responding Party may be able to identify such third party, begin discussions with that third party regarding disclosure of

24. The number of days required for the generation of a privilege log may vary significantly based on the volume of documents at issue.

information, and advise Requesting Party of its efforts relating to same.[25]

iii. *Overbroad*. Responding Party objects to all individual requests herein, as they do not comply with the "reasonable particularity" requirement of Rule 34(b)(1). Responding Party attempted to confer with Requesting Party on multiple occasions regarding this issue and provided case law to support its positions; however, Requesting Party advised that it disagreed and suggested that Responding Party limit the requests as it saw appropriate and respond based on said limitations. While Responding Party does not believe that this is appropriate under Rule 34, unless it does so, Requesting Party will have effectively prevented any type of meaningful response to the Request which could expose Responding Party to sanctions. Based on the foregoing, Responding Party has attempted to appropriately narrow each individual request so that it can comply with the requirements of Rule 34.

b) Boilerplate general objections, even if made out of "an abundance of caution," are not allowed. As Rule 34 makes clear, and as a growing number of courts are holding, such objections may result in a waiver of the objection or even the imposition of sanctions.[26]

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25. Alternatively, the response might specify that Responding Party will redact or anonymize documents that contain confidential information of third parties.

26. *See, e.g.*, Fischer v. Forrest, No. 14 Civ. 01304, 2017 WL 773694 (S.D.N.Y. Feb. 28, 2017) (Any discovery response that does not comply with Rule 34's

c) A commonly used but improper boilerplate general objection includes the caveat "to the extent that" prior to describing the condition, as shown in the following example: "Company A objects to each of the requests to the extent that they are overbroad, unduly burdensome, repetitive, ambiguous, oppressive, vague, improper, and/or seek information or production of documents not relevant to the claims or defenses of any party and not reasonably calculated to lead to the discovery of admissible evidence, including documents which are remote in time and/or subsequent to the operative facts set forth in the parties' pleadings in this action." Instead, the responding party should separately identify which aspects of the RFP are objectionable and for what reasons and, if applicable, indicate which portions of the request are not objectionable. The 2015 Advisory Committee Note to Rule 34 provides examples that illustrate the concept that "[an] objection may state that a request is overbroad, but if the objection recognizes some part of the request is appropriate the objection should state the scope that is not overbroad."[27] Note that in addition to the boil-

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).); Liguria Foods, Inc. v. Griffith Labs, Inc., No. 14 Civ. 3041, 2017 WL 976626 (N.D. Iowa Mar. 14, 2017) (Using "boilerplate" objections to discovery in any case places counsel and their clients at risk for substantial sanctions.) By creating meaningful disincentives to the use of boilerplate objections, courts are using the Rule 34 amendments to strike at the core of the culture of discovery paranoia that has made boilerplate objections so pervasive.

27. "Examples would be a statement that the responding party will limit the search to documents or electronically stored information created within

erplate nature of this general objection, it is also problematic because "reasonably calculated to lead to the discovery of admissible evidence" has been stricken from Rule 26.

d) Another opaque general objection is: "Company A objects to the Requests to the extent they seek documents in the possession of third parties, over which it has no control." To improve this objection, the responding party would object to the specific requests that overtly seek documents from sources that are not in the responding party's possession, custody, or control. As noted earlier, it may be advantageous for the responding party to identify in the response who does have possession, custody, or control, if known to the responding party.[28]

e) Another problematic general objection is one with a "reservation of rights." Either the Rules or case law give a party a right or they do not, but reserving a right in a discovery response is not likely to create a right where none existed previously. For example: "Company A reserves all objections to the compe-

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a given period of time prior to the events in suit, or to specified sources. When there is such an objection, the statement of what has been withheld can properly identify as matters 'withheld' anything beyond the scope of the search specified in the objection." *See* FED. R. CIV. P. 34 advisory committee's note to 2015 amendment.

28. *See* The Sedona Conference, *Commentary on Rule 34 and Rule 45 "Possession, Custody, or Control,"* Principle 5, 17 SEDONA CONF. J. 467 (2016), *available at* https://thesedonaconference.org/publication/The%20Sedona%20Conference%20Commentary%20on%20Rule%2034%20and%20Rule%2045%20%E2%80%9CPossession%2C%20Custody%2C%20or%20Control%E2%80%9D.

tency, relevance, materiality, privilege, and/or admissibility of documents produced in response to the Requests." Or, "Company A's responses to the Request shall not be construed as an admission that any fact or circumstance alleged in any of the requests occurred or existed or that any responsive document exists or does not exist." These kinds of general objections, without more information about how they apply to a specific request, typically do *not* reserve any rights.

f) It would, however, be appropriate to point out and object to general instructions and definitions in RFPs that exceed what is required by the Federal Rules.

Other than the limited exceptions described above, an objection should be provided in an individual response. Either way, the objection should explain the reason it is being made.

3. Specific Responses and Objections

a) One reason that Rule 34 was revised was to address the uncertainty of what is meant by the commonly used phrase, "subject to and without waiving these objections, [responding party] will produce responsive, non-privileged documents responsive to this request."[29] Responding parties should ask themselves the following questions when determining how to respond: Does "subject to and without waiving" mean the party is withholding something? If so, what and why? Although the phrase has been part of the discovery lexicon for decades, Rule 34 and the 2015 Advisory Committee Notes explicitly require a responding party to either state what they are withholding

29. *See* FED. R. CIV. P. 34 advisory committee's note to 2015 amendment.

because of an objection or, alternatively, describe the scope of the production they are willing to make. The amended Rules require a clarification as to whether documents actually are being withheld on the basis of the objection. The Committee Notes further clarify that the withholding party is not required to specifically identify or log withheld documents and may comply with this requirement by stating the scope of what it will produce, as described in III(C)(3)(c), below.

b) When stating what is being withheld, the intention is to "alert the other parties to the fact that documents have been withheld and thereby facilitate an informed discussion of the objection."[30] Taking the direct approach is recommended, if possible: "Because the marketing department had no role in the contract negotiations and therefore its documents are not relevant to the claims or defenses in this case, Company A will not search for, collect, or produce documents from the marketing department."[31]

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30. FED. R. CIV. P. 34 advisory committee's note to 2015 amendment.

31. *See, e.g.*, Wal-Mart Stores, Inc., et al. v. Texas Alcoholic Beverage Commission, et al., No. A-15-CV-134-RP, 2017 WL 1322247 (W.D. Tex. April 10, 2017) (where Wal-Mart found a request too broad to merit a search, but also felt there were likely to be some responsive documents somewhere in its network, and so responded that it was withholding documents on the basis of its objection, the Court found that while that may technically be accurate, it is not what the new Rules were after in adding the requirement in Rule 34(b)(2)(C) that "an objection must state whether any responsive materials are being withheld on the basis of the objection." The court suggested that a "more helpful response would have been something along the lines of 'Based on these objections, Wal-Mart has not conducted a search for responsive documents, and while it is likely that some responsive documents may exist,

c) When a responding party intends to produce a more limited scope of documents than requested, it can meet Rule 34's requirements by describing the scope of what it is willing to produce, which may include the parameters of a search for documents, such as custodians, sources, date ranges, and search terms (or search methodology).

d) Regarding the timing of document productions, a general response that "documents responsive to this request will be produced" is insufficient. Production either must be completed by the time specified in the request or another reasonable time specified in the response.[32] Here, again, responding parties should ask themselves when will responsive documents be produced? If responsive documents will be produced on a "rolling basis," what does that mean? When rolling productions are necessary, the best practice is to provide a schedule as to what will be produced and when; if that is not possible, the response at least should specify the start and end dates of the production.

e) When a responding party is willing to search for some or all of the requested documents but does not yet know if those documents exist and where, it can meet Rule 34's requirements by describing the scope of what it is willing to search for.

f) In instances where the full scope of the potential documents and the estimated time for production is not

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Wal-Mart has not identified any such document, and is not withholding any identified document as a result of these objections.'").

32. FED. R. CIV. P. 34(b)(1)(B).

known at the time of the written responses, the responding party can provide an estimated time for substantial completion and supplement the responses to reflect additional details regarding scope and timing once known.

g) The responding party should include enough detail as necessary to support the objection, and keep in mind that its objection may have to be justified to the court. Objections on the grounds that a request is vague or ambiguous should explain why, and should be based on a logical interpretation of what is being requested. For example, if a request broadly seeks "any and all documents related to policies" and an objection is on the grounds that it is vague, overly broad, and burdensome, explain why each objection applies and carve out what will be produced: "Responding Party objects to producing any and all documents related to policies on the grounds that the term 'policy' is vague and not limited to the specific claims and defenses raised in this dispute. Moreover, as written, the request could be read to seek all drafts and communications about policies, including emails from thousands of the company's employees who routinely receive emails with updated policies and updates. Searching for emails relating to any and all policies of the company would require an extensive search of all employee emails and would not likely generate information relevant to the claims or defenses in this matter. Responding party will produce final copies of its loan origination policies from 2012–2014 from a network drive used by its Compliance

> Department to maintain all historical final policies related to loan originations. Responding Party objects to producing any drafts or emails related to policies."

4. Rule 26(g) Certification

Responding parties should be mindful that the certification requirement of Rule 26(g) applies to all responses and objections to document requests. *See* Section III(E), *infra*, for more on the requirements of Rule 26(g).

D. Court Involvement

While it is best to resolve discovery disputes without court involvement, that cannot always be accomplished. In motion practice regarding the scope of discovery requests, the parties should give the court something to work with. Courts are not likely to engage in a wholesale rewriting of discovery requests and may be hesitant to strike a request in its entirety. If either the requesting or responding party believes that there is an appropriate limitation or structure to a request that makes sense, they should identify that limitation or change in structure for the court. This will allow the court to determine what scope or construction should be considered, and will inform the court with its questions relating to or its ruling on any motion filed. An example is provided below:

> *Original Request:* Produce all documents relating to all contracts entered into by the parties.
>
> *Proposed Limited Request:* Produce any contracts entered into between the parties from 2013 to December 31, 2016.

Although the responding party is not under any affirmative duty to rewrite the requests, it may save significant time and expense if it makes a reasonable proposal for an alternative request, instead of just saying "No." Also, reasonable proposals

inform the court of what information a party believes is appropriate, and begins the discussion between the parties and the court that should inform the at-issue discovery and future discovery regarding scope and time frame. Absent the proposed scope and time limitation, the court may not have the information needed to participate in a substantive discussion regarding the discovery motion, which could result in unsatisfying rulings for all parties involved.

Another consideration for court involvement beyond motion practice is the use of informal discovery conferences to resolve disputes, as suggested by Rule 16(b)(3)(B)(v). Parties should consider requesting that the Court include a provision for such informal conference in the Rule 16(b) scheduling order.

E. Requesting and Responding Parties' Obligations under Rule 26(g)

Attorneys failing to comply with the amended Federal Rules could face sanctions under Rule 26(g). Rule 26(g) requires that the requesting and responding attorneys certify that their requests, responses, and objections are consistent with the Rules and are "not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation" and are "neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action."[33]

33. FED. R. CIV. P. 26(g): SIGNING DISCLOSURES AND DISCOVERY REQUESTS, RESPONSES, AND OBJECTIONS

(1) *Signature Required; Effect of Signature*. Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name—or by the party personally, if unrepresented—and must state the signer's address, e-mail address, and telephone

According to the language of the rule, Courts "must" impose Rule 26(g) sanctions against requesting parties who seek disproportionate discovery or upon responding parties for attempting to cause unreasonable delay or needlessly increase the cost of litigation without substantial justification.

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number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) *Failure to Sign.* Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) *Sanction for Improper Certification.* If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

APPENDIX A:
CASES INTERPRETING THE SPECIFICITY REQUIREMENTS IN RULE 34 AND STATE LAW EQUIVALENTS

Specificity of Requests for Production

1. ***Caves v. Beechcraft Corp.*, Case No. 15-CV-125-CVE-PJC, 2016 WL 355491 (N.D. Okla. Jan. 29, 2016)** (denying motion to compel and sustaining defendant's objections to: (i) document requests seeking "any and all" testimony concerning any "other litigation" as "clearly objectionable" because "[n]either Defendants nor the Court should have to guess what Plaintiff is really seeking. Nor is it the Court's job to redraft Plaintiff's discovery requests;" and (ii) document request for "all correspondence between Defendants and any and all regulatory agencies" because such a request "does not identify with reasonable particularity what is being sought" and was unlimited in temporal scope).

2. ***In re Bard IVC Filters Prod. Liab. Litig.*, 317 F.R.D. 562, 2016 WL 4943393 (D. Ariz. Sept. 16, 2016)** (rejecting request for communications between defendants' foreign affiliates and foreign regulators based on their "marginal relevance" and clarifying that the proper scope of discoverability is whether evidence is "'relevant to any party's claim or defense,' not whether it is 'reasonably calculated to lead to admissible evidence'").

3. ***Loop AI Labs, Inc. v. Gatti*, Case No. 15-cv-00798-HSG (DMR) (No Slip Copy Reported in Westlaw) (N.D. Cal. May 6, 2016) (Re: Dkt. Nos. 592, 594)** (denying plaintiff's motion to compel responses to several RFPs because they were "incurably overbroad").

4. ***Loop AI Labs, Inc. v. Gatti*, Case No. 15-cv-00798-HSG (DMR), 2016 WL 2342128 (N.D. Cal. May 3, 2016) (Re: Dkt.**

Nos. 547, 518) (denying defendant's motion to compel supplemental production to several RFPs because "[w]hile the RFP[s] seek[] documents related to [the parties'] allegations, [they are] overbroad and unbounded by subject matter or temporal scope").

5. ***Morgan Hill Concerned Parents Assoc. v. Cal. Dep't of Ed.*, No. 2:11-cv-3471-KJM-AC, 2016 WL 304564 (E.D. Cal. Jan. 26, 2016)** (denying motion to compel response to document request for documents "constituting, describing or relating to" various categories, including the actual documents sought in discovery, as such requests are too broad and vague to compel production, especially where a large number of documents and a large volume of electronically stored information is involved; and, denying motion to compel document request for "all documents constituting or describing communications between various entities relating to any of the other documents sought," as being "overbroad on its face").

6. ***Vailes v. Rapides Parish School Bd.*, Civil Action No. 15-429, 2016 WL 744559 (W.D. La. Feb. 22, 2016)** (denying motion to compel RFP that asks defendants to provide "[a] copy of all records, reports, writings, notes, documents, memoranda, emails, photographs, videotapes, text messages, tape recordings, or other statements, recordings, or communications in response to Plaintiff's First Set of Interrogatories directed to each and every Defendant," because such a request "does not meet Rule 34's reasonable particularity standard").

7. ***Ye v. Cliff Veissman, Inc.*, No. 14-cv-01531, 2016 WL 950948 (N.D. Ill. Mar. 7, 2016)** (document request for "[a] full archive of any documents, notes, messages, photographs, or any other information from any social media account held

by the decedent [and by any next of kin of the decedent], including an archive from any Facebook account . . . from 2007 until the date of [the decedent's] death [in 2013]" was not reasonably tailored to a reasonable time period before the death of plaintiff's decedent or to content that is relevant to a claim or defense in the case; however, offering defendant opportunity to reformulate their request because "[t]here is no dispute that *some* of the decedent's and her next of kin's social media profiles contain information that is relevant to a claim or defense in this lawsuit") (emphasis in original).

Specificity of Objections

1. ***Arrow Enterprise Computing Solutions, Inc. v. BlueAlly, LLC*, No. 5:15-CV-00037-FL, 2016 WL 4287929 (E.D.N.C. Aug. 15, 2016)** (deeming defendants' objections waived because they "are nothing more than boilerplate objections: they fail to specify why the requested documents are not relevant to a party's claim or defense and not proportional to the needs of the case. Instead, they simply regurgitate the amended version of Rule 26(b)(1) of the Federal Rules of Civil Procedure"; yet applying the incorrect standard for relevancy ("reasonably calculated to lead to the discovery of admissible evidence").

2. ***Brown v. Dobler*, No. 1:15-cv-00132, 2015 WL 9581414 (D. Idaho Dec. 29, 2015)** (noting "[d]efendants utterly failed to answer any question, and instead simply cut and pasted the same or similar objection in response to each discovery request," but also "some of Plaintiff's requests are overly broad, and [the court] will not require Defendants to . . . produce documents seeking clearly irrelevant information or information outside a reasonable period of time," and holding defendants may limit their responses in accordance with ex-

amples given in the Court's Order, and "advising" defendants to review amended Fed. R. Civ. P. 34(b), which requires the objecting party to state whether responsive materials are being withheld on the basis of the objection, and permit inspection of any other documents not subject to the objection).

3. ***Douglas v. Kohl's Department Stores*, Case No: 6:15-cv-1185-Orl-22TBS, 2016 WL 1588651 (M.D. Fla. Apr. 20, 2016)** (overruling defendant's general objections, which "do not explain why the requests are irrelevant, overbroad, or otherwise objectionable" under amended Fed. R. Civ. P. 34(b)(2)(B), and awarding legal expenses, including attorney's fees, to prosecute the motion to compel for, among other reasons, failing to comply with amended Fed. R. Civ. P. 34(b)(2)(C) by stating whether responsive materials are being withheld on the basis of a privilege).

4. ***FDIC, as Receiver for AmTrust Bank Plaintiff, v. Ark-La-Tex Financial Services, LLC d/b/a Benchmark Mortgage*, Case No. 1:15 CV 2470, 2016 WL 3460236 (N.D. Ohio June 24, 2016)** (awarding attorney's fees, in part, because plaintiff's responses to RFPs "are all made subject to its sixteen general objections and do not make clear which specific objection or objections each response relies on," and instructing, "Going forward . . . the parties may not rely on a laundry-list of general objections for withholding documents but may instead only withhold documents based on specific objections," because the purpose of the amendment to Fed. R. Civ. P. 34(b)(2)(c) is to "end the confusion that frequently arises when a producing party states several objections and still produces information, leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the bases of the objections").

5. ***Fischer v. Forrest*, No. 14 Civ. 01304, 2017 WL 773694 (S.D.N.Y. Feb. 28, 2017)** (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).).

6. ***Grodzitsky v. Am. Honda Motor Co.*, No. CV121142SVWPLAX, 2017 WL 2616917, at *4 (C.D. Cal. June 13, 2017)** (Where responding party objected, but despite repeated requests from requesting party refused to indicate whether documents were being withheld on the basis of objections, Court applied amended Rule 34 and ordered responding party to provide, within 14 days, "a declaration signed under penalty of perjury by a corporate officer or director attesting that . . . no documents or information have been withheld on the basis of the objections . . . , if indeed that is the case," or alternatively, if documents have been withheld, "then [responding party] must so state, and specify the withheld documents.").

7. ***In re: Adkins Supply, Inc., Ries v. Ardinger*, Case No. 11-10353-RLJ-7, Adversary No. 14-01000, Civil Action No. 1:14-CV-095-C, 2016 WL 4055013 (U.S. Bankr. Ct., N.D. Tex. Jul. 26, 2016)** (Defendants responded to 41 of 42 RFPs with general objections. In response to a motion to compel, the court overruled the general objections and ordered production within 15 days stating, "Broad-based, non-specific objections are almost impossible to assess on their merits, and fall woefully short of the burden that must be borne by a party making an objection to an interrogatory or document request. . . . Federal courts are quick to express their disdain for such tactics by waiving all general objections.").

8. ***Kissing Camels Surgery Center, LLC v. Centura Health Corp.*, No. 12-cv-03012, 2016 WL 277721 (D. Colo. Jan. 22, 2016)** (noting many of defendants' RFPs "are improper on

their face as omnibus requests," but also "Plaintiffs' boilerplate objections are no better. . . . As far at the court can tell, Plaintiffs fail to provide any specificity to their objections, including their objection that they have already produced responsive documents").

9. ***Liguria Foods, Inc. v. Griffith Labs, Inc.*, No. 14 Civ. 3041, 2017 WL 976626 (N.D. Ia. Mar. 14, 2017) (N.D. Iowa March 14, 2017)** (Using "boilerplate" objections to discovery in any case places counsel and their clients at risk for substantial sanctions.).

10. ***Loop AI Labs, Inc. v. Gatti*, Case No. 15-cv-00798-HSG (DMR) (No Slip Copy Reported in Westlaw) (N.D. Cal. May 6, 2016) (Re: Dkt. Nos. 592, 594)** (RFP responses "which do not state whether any responsive materials are being withheld on the basis of objections" are improper; ordering supplementation within seven days to comply with amended Rule 34(b)(2).).

11. ***Moser v. Holland*, No. 2:14-cv-02188-KJM-AC, 2016 WL 426670 (E.D. Cal. Feb. 3, 2016)** (granting plaintiff's motion to compel because "(1) defendants do not oppose it, and (2) defendants' initial responses included only boilerplate objections barred by Rule 33 and 34," and awarding sanctions of $1,998.00 for the cost to bring the motion stating, "The court sympathizes with defense counsel's difficulties in communicating with [his client], but this does not excuse delaying compliance with discovery obligations until the discovery period is almost over and plaintiff has no choice but to incur the costs of filing a motion to compel").

12. ***Rosalez Funez v. E.M.S.P., LLC*, Civil Action No. 16-1922, 2016 WL 5337981 (E.D. La. Sept. 23, 2016)** (without citing amended Rule 34, striking defendants' general objections to plaintiff's requests for production).

13. ***Rowan v. Sunflower Elec. Power Corp., Case No. 15-cv-9227-JWL-TJJ*, 2016 WL 3743102 (D. Kan. July 13, 2016)** (Defendant's response to plaintiff's RFPs which stated "the limits that controlled its search for responsive documents" complied with amended Rule 34: "[T]he Advisory Committee's note makes clear that [defendant's] response are sufficient to put Plaintiff on notice that [defendant] withheld documents in connection with its objection. Rule 34 does not require [defendant] to provide a detailed description or log of the documents withheld.").

14. ***Vilia Polycarpe v. Seterus, Inc.*, No. 6:16-cv-1606-Orl-37TBS, 2017 WL 2257571 (M.D. Fla. May 23, 2017)** (overruling "general objections" and boilerplate objections that requests were "vague" and "ambiguous" and finding that responding to discovery "subject to" or notwithstanding" objections "preserves nothing and wastes the time and resources of the parties and the court").

15. ***Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Commission*, No. A-15-CV-134-RP, 2017 WL 1322247 (W.D. Tex. April 10, 2017)** (Where Wal-Mart found a request too broad to merit a search, but also felt there were likely to be some responsive documents somewhere in its network, and so responded that it was withholding documents on the basis of its objection, the Court found that while that may technically be accurate, it is not what the new Rules were after in adding the requirement in Rule 34(b)(2)(C) that "an objection must state whether any responsive materials are being withheld on the basis of the objection." A more helpful response would have been something along the lines of, "Based on these objections, Wal-Mart has not conducted a search for responsive documents, and while it is likely that some responsive documents may exist, Wal-Mart has not identified any

such document, and is not withholding any identified document as a result of these objections.").

16. ***Wesley Corp. v. Zoom T.V. Prods., LLC*, 2018 WL 372700, No. 17-100212018 (E.D. Mich. Jan. 11, 2018)** (granting sanctions for boilerplate objections, condemning the use of boilerplate objections, and noting that "an objection that does not explain its grounds (and the harm that would result from responding) is forfeited," but giving responding party the opportunity to amend its responses (citing additional cases)).

APPENDIX B: STANDING ORDERS, GUIDELINES, AND CHECKLISTS REGARDING REQUESTS FOR PRODUCTION AND RESPONSES TO THOSE REQUESTS

Several districts have Standing Orders/General Orders concerning the topics that should be specifically addressed in a discovery conference. Some examples are provided below:

- Northern District of California's Standing Order for all Judges of the Northern District of California; Contents of Joint Case Management Statement; Guidelines for the Discovery of Electronically Stored Information; Checklist for Rule 26(f) Meet and Confer Regarding Electronically Stored Information; and Model Stipulated Order Re: Discovery of Electronically Stored Information for Standard Litigation, *available at* http://www.cand.uscourts.gov/eDiscoveryGuidelines.
- District of Colorado's Checklist for Rule 26(f) Meet-and-Confer Regarding Electronically Stored Information, *available at* http://www.cod.uscourts.gov/CourtOperations/RulesProcedures/ElectronicDiscoveryGuidelinesandChecklist.aspx.
- 7th Circuit Electronic Discovery Pilot Program Principles Relating to the Discovery of Electronically Stored Information and Model Standing Order Relating to the Discovery of Electronically Stored Information, *available at* http://www.discoverypilot.com/.
- Northern District of Georgia Standing Order: Guidelines to Parties and Counsel in Cases Proceeding Before The Honorable Amy Totenberg, *available at* http://www.gand.uscourts.gov/sites/default/files/at_case_guidelines.pdf.

- Local Rules, Forms and Guidelines of United States District Courts Addressing E-Discovery Issues, *available at* https://www.ediscoverylaw.com/local-rules-forms-and-guidelines-of-united-states-district-courts-addressing-e-discovery-issues/.