

Objections to Document Demands Under Amended Rule 34

3/7/2016 by Daniel M. Braude | Wilson Elser

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The approach of objecting to document demands with boilerplate language containing half a dozen or more objections that have no actual nexus to the demands at issue has been used by litigators for decades. However, this approach is no longer acceptable in federal courts. December 1, 2015, marked the enactment of a substantial package of amendments to the Federal Rules of Civil Procedure that was driven in large part by concerns related to e-discovery and the production of electronically stored information (ESI). Although the amendments to **Rule 26(b)(1)** and **Rule 37(e)** have received greater attention, a major revision to Rule 34 will result in a more significant day-to-day change for litigators. Notably, objections to discovery requests must now (1) state with specificity the grounds for objecting and (2) state whether any responsive materials are being withheld on the basis of that objection. Additionally, producing parties must indicate when a document production will be completed.

Rule 34 of the Federal Rules of Civil Procedure (as Amended December 1, 2015)

The relevant sections of amended **Rule 34** provide as follows:

Rule 34(b)(2)(B) Responding to Each Item. For each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.

Rule 34(b)(2)(C) Objections. An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.

Consequently, boilerplate objections are no longer acceptable in federal courts. In fact, general objections by their very nature appear entirely prohibited under amended Rule 34.

Time will tell as to the level of specificity that will be required of parties objecting to document demands (though it is noted that Rule 33(b)(4) has required since 1993 that “the grounds for objecting to an interrogatory must be stated with specificity”). But the drafters have provided clear guidance as to stating whether responsive materials are being withheld on the basis of an objection. As confirmed in the Rule 34 Committee Notes, it is acceptable to indicate whether materials have been withheld by stating “the limits that have controlled the search for responsive and relevant materials.” In other words, by identifying the scope of a search (*i.e.*, search terms, custodians or data locations), the producing party is stating that materials outside of that scope have been withheld.

Considering the nature of the amendment to Rule 34, there is perhaps no longer such a thing in federal courts as form responses to document

demands. That being said, litigators can operate under a general framework while individually tailoring objections to specific document demands. It also must be noted that counsel's success cooperating with plaintiff's counsel and reaching an agreement on the scope of discovery could significantly impact the manner in which objections need to be asserted. Regardless, litigators must develop a new method for objecting to document demands and can no longer rely on the "kitchen sink" approach when asserting objections.

General Framework for Objections under Amended Rule 34

The traditional approach of first asserting objections and then identifying responsive documents should be reversed. Some litigators have been taking this approach for years (though without necessarily complying with the requirements under amended Rule 34) in a desire to indicate a level of cooperation and avoid an appearance of obstructionist tactics. When incorporating the requirements of amended Rule 34, a response to document demands should include three sections: (1) identification of responsive documents, (2) objections and (3) an indication of how a search is limited in scope.

By way of example, a response to an overbroad demand could be structured as follows:

Following a reasonable search, Defendant has identified the following documents responsive to this request.... [*identify documents, indicate Bates numbers, or refer to production media, etc.*]

To the extent Plaintiff's request seeks additional materials, Defendant responds as follows:

This request is overbroad as it places no limitation on relevant time frame despite the subject matter of this litigation occurring from [*indicate date range*]. Defendant has therefore

limited its search to materials from [*indicate date range*]; and,

Materials pertaining to [*indicate the reason why the referenced materials are not relevant*] are not relevant to any party's claim or defense. [*An objection in the product liability context might state "materials pertaining to product lines other than the product line at issue in this litigation are not relevant to any party's claim or defense."*] Defendant has therefore limited its search based upon previously disclosed / agreed upon search terms, document custodians and data locations and/or in accordance with the Discovery Order / Agreement entered on _____. See Appendix ____.

This request is not proportional to the needs of the case considering (1) the marginal importance of the materials to the claims and defenses in this litigation and (2) the substantial cost to identify additional responsive materials balanced against the amount in controversy. Defendant has therefore limited its search based upon previously disclosed / agreed upon search terms, document custodians and data locations and/or in accordance with the Discovery Order / Agreement entered on _____. See Appendix ____.

Upon request by Plaintiff, Defendant is willing to meet and confer regarding its response to this document demand.

Regarding the above objection as to proportionality, this format can be used for any of the proportionality considerations in Rule 26(b)(1), as amended on December 1, 2015. However, it may be necessary to provide additional detail to explain the asserted lack of importance of materials or to support an objection based on cost to comply versus amount in controversy. (When possible, of course, the preferred approach is to cooperate with plaintiff and reach an agreement in advance to avoid a

discovery dispute.) Counsel should also remember to indicate, perhaps within a preliminary statement, when documents are being withheld pursuant to the attorney-client privilege or work product doctrine. The objections otherwise follow the requirements of amended Rule 34; they are specific by articulating a basis for limiting the search while indicating whether responsive materials are being withheld on the basis of the objection in a manner approved within the Committee Notes.

Specifying Time for Production

In addition to requiring that objections be stated with specificity, Rule 34(b)(2)(B) mandates that “the production must ... be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.”

A defendant might specify a time for production as follows:

Defendant anticipates that it will begin producing materials responsive to this request, as limited by the asserted objections, within [*indicate number of days*] following entry of an ESI protocol. Defendant intends to complete its production, including any subsequent rolling productions, within [*indicate number of days*] following entry of an ESI protocol. Defendant will amend this response or otherwise place all parties on notice should additional time be required to complete the production.

Upon request by Plaintiff, Defendant is willing to meet and confer regarding its response to this document demand.

Determining what constitutes a “reasonable time” for purposes of Rule 34(b)(2)(B) will hinge primarily on the volume and complexity of ESI that must be searched and reviewed by a defendant. In many situations, commencing production within 30 days following entry of an ESI protocol and completing a final rolling production within 120 days could be

deemed reasonable.

Final Thoughts

Best practices for responding to document demands under amended Rule 34 will emerge in the coming months. Although the framework set forth above has not been fully tested, it presents a reasonable approach that meets the requirements of Rules 34(b)(2)(B) and (C) while remaining consistent with the critical concepts of cooperation and proportionality in discovery. As always, we are interested in hearing the thoughts and comments of our readers on this subject.

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