New York Law Journal
Technology Today
WWW.NYLJ.COM
An ALM Publication
VOLUME 257—NO. 63
TUESDAY, APRIL 4, 2017

FEDERAL E-DISCOVERY

# Courts Warn of Sanctions For Future FRCP 34 Violations


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The changes to Federal Rule of Civil Procedure 34 that took effect 16 months ago were part of a package of amendments to the Rules fueled by common problems caused or intensified by modern e-discovery and the volume of electronically stored information (ESI). In its memorandum to the Standing Committee on Rules of Practice and Procedure, the Advisory Committee on the Federal Rules of Civil Procedure wrote that the amended language to Rule 34 "should eliminate three relatively frequent problems in the production of documents and ESI: the use of broad, boilerplate objections that provide little information about the true reason a party is objecting; responses that state various objections, produce some information,


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and do not indicate whether anything else has been withheld from discovery on the basis of the objections; and responses which state that responsive documents will be produced in due course, without providing any indication of when production will occur and which often are followed by long delays in production. All three practices lead to discovery disputes and are contrary to Rule 1's goals of speedy and inexpensive litigation."

The changes to Rule 34, however, have not received much attention from practitioners and judges, especially when compared to other changes, such as those to Rules 26 and 37. Recently, though, two judges who have had it with boilerplate responses and objections garnered attention by releasing fiery decisions promising sanctions for any future discovery response that fails to comply with amended Rule 34 or other Federal Rules of Civil Procedure.

## 'Fischer v. Forrest'

Magistrate Judge Andrew Peck of the Southern District of New York, well-known for his prior decisions and commentary on e-discovery matters, recently issued a "discovery wake-up call" to litigators on their responsibilities under Federal Rule of Civil Procedure 34. In *Fischer v. Forrest*, 2017 WL 773694 (S.D.N.Y. Feb. 28, 2017), Judge Peck took defendants to task for failing to comply with the requirements of Rule 34 in their responses to plaintiff's requests for production by using boilerplate, failing to provide specificity in their responses,

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referencing language of the Federal Rules that had been removed, and neglecting to provide any indication of when documents would be produced or whether they had actually withheld any responsive materials due to the objections.

Judge Peck's decision highlights two types and uses of boilerplate—general objections that are incorporated by reference into all responses and the language used in such objections and responses. Defendants' responses included 17 general objections, including one, provided by Judge Peck in his decision, stating, "Defendant objects to the requests to the extent that they call for the disclosure of information that is not relevant to the subject matter of this litigation, nor likely to lead to the discovery of relevant, admissible evidence." Judge Peck notes that after listing these objections, defendants state, "Subject to and without waiver of the foregoing general objections which are hereby incorporated by reference into each response, Defendant's Response to Plaintiff's Request for Production of Documents are as follows … ." Such boilerplate general objections, wrote Judge Peck, violated Rule 34. "General objections should rarely be used after December 1, 2015 unless each such objection applies to each document request (e.g., objecting to produce privileged material)."

Both the general objections and the responses contained language criticized by Judge Peck as boilerplate that violated Rule 34—for referencing text that had been deleted from the Rules and for lack of specificity. The general objection provided as an example by Judge Peck objected on the basis of lack of relevance to the subject matter of the litigation, even though "[t]he December 1, 2015 amendment to Rule 26(b)(1) limits discovery to material 'relevant to any party's claim or defense … .' Discovery about 'subject matter' no longer is permitted." Additionally, the objection also asserted that the requests are not "likely to lead to the discovery of relevant, admissible evidence." On this point, Judge Peck writes that "[t]he 2015 amendments deleted that language from Rule 26(b)(1), and lawyers need to remove it from their jargon." An example of a response provided by Judge Peck was, "Defendant objects to this Request for Production to the extent that it is overly broad and unduly burdensome, and not likely to lead to the discovery of relevant evidence. Defendant further objects to this Request as it requests information already in Plaintiff's possession." Judge Peck found such language to be "meaningless boilerplate. Why is it burdensome? How is it overly broad?" He also noted that the responses violate Rule 34 since they "do not indicate when documents and ESI that defendants are producing will be produced."

Judge Peck ordered the defendants to revise their responses to be in compliance with the Federal Rules. He then provided his wake-up call, putting parties on notice that next time he would not be as lenient, writing, "[i]t is time for all counsel to learn the now-current Rules and update their 'form' files. From now on in cases before this Court, 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)."

### 'Liguria Foods v. Griffith Labs'

Two weeks after Judge Peck's decision in *Fischer*, District Judge Mark Bennett of the Northern District of Iowa issued his own impassioned ruling concerning Rule 34, Liguria Foods, Inc. v. Griffith Labs., Inc., 2017 WL 976626 (N.D. Iowa March 13, 2017). In this decision, Judge Bennett expressed his long-held frustration with boilerplate responses and objections once again, urging his colleagues on the bench to start issuing increasingly harsh sanctions to combat this "'boilerplate' culture."

Judge Bennett entered an order requiring the parties to review responses and objections that he had identified as potentially improper, to note whether they did, in fact, fail to comply with the Federal Rules of Civil Procedure, and, if so, to suggest an appropriate sanction. Both parties had submitted objections with similar boilerplate language, objecting to requests, for example, "to the extent they seek to impose obligations ... beyond those imposed by the Federal Rules of Civil Procedure[.]"

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Conceding to the use of boilerplate language, both parties "admitted that it had a lot to do with the way they were trained, the kinds of responses that they had received from opposing parties, and the 'culture' that routinely involved the use of such 'standardized' responses." Even so, they argued that the court should take note that "they had conferred professionally and cordially" with minimal judicial intervention.

Judge Bennett agreed with the parties' rationale and found that, in this case, "both parties' reliance on improper 'boilerplate' objections is the result of a local 'culture' of protectionist discovery responses, even though such responses are contrary to the decisions of every court to address them." Moreover, Judge Bennett added "that such responses arise, at least in part, out of 'lawyer paranoia' not to waive inadvertently any objections that might protect the parties they represent" even though "such 'boilerplate' objections do not, in fact, preserve any objections."

While declining to impose sanctions, Judge Bennett stated, "Judges need to push back, get our judicial heads out of the sand, stop turning a blind eye to the 'boilerplate' discovery culture and do our part to solve this cultural discovery 'boilerplate' plague." Much like Judge Peck, Judge Bennett closed his decision vowing that future litigants would not be as lucky as those in *Liguria Foods*, stating, "NO MORE WARNINGS. IN THE FUTURE, USING 'BOILERPLATE' OBJECTIONS TO DISCOVERY IN ANY CASE BEFORE ME PLACES COUNSEL AND THEIR CLIENTS AT RISK FOR SUBSTANTIAL SANCTIONS."

## Conclusion

As noted by Judge Peck in *Fischer*, to be compliant with Rule 34, "responses to discovery requests must:

- State grounds for objections with specificity;
- An objection must state whether any responsive materials are being withheld on the basis of that objection; and
- Specify the time for production and, if a rolling production, when production will begin and when it will be concluded."

While the judges in *Fischer* and *Liguria Foods* declined to sanction the parties for being non-compliant with new Rule 34's requirements, other courts have not been as lenient. However, these other decisions have received scant notice, as decisions interpreting amended Rules 26 on scope and proportionality and 37 on sanctions have grabbed e-discovery headlines. Even so, these two new decisions may be catalysts for change on this issue.