Enforcing the New Rule 34

By Bryan Wolin

I. Introduction

Federal Rule of Civil Procedure 34, which concerns documentary and electronic discovery, was substantially revised in 2015. Under the new rule, litigants may no longer rely on the usual boilerplate objections to discovery requests. Instead, they must be more precise, clearly articulating what they plan to produce and when. Many courts, recognizing the burden of this change, declined for some time to strictly enforce the new rule. But that time is drawing to an end, as courts around the country have begun to chastise, and in some cases penalize, litigants for failing to adapt to the new discovery regime.

II. The Rule and Committee Notes

In its pre-2015 incarnation, Rule 34 merely required that objections "must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons"[1] and that "[a]n objection to part of a request must specify the part and permit inspection of the rest."[2]

The revised rule makes several key changes. First, it expands upon the obligation to state "an objection," requiring instead that responding parties must produce documents and things or "state with specificity the grounds for objecting."[3] Second, the rule codifies an alternative practice, allowing "[t]he responding party [to] state that it will produce copies of documents or of electronically stored information instead of permitting inspection."[4] Third, the rule adds a requirement to specify a time for production and provides that 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."[5] Finally, the rule now provides that an objection "must state whether any responsive materials are being withheld on the basis of that objection."[6]

This new language overturned longstanding discovery practice, adding additional burdens and explicitly barring some well-worn formulaic objections. The accompanying Committee Notes make clear the purpose behind the changes and show that they are intended to have real teeth:

- The rule is designed to reduce "the potential to impose unreasonable burdens by objections to requests."[7]
- An objection "*must state whether any responsive materials are being withheld* on the basis of that objection."[8]
- "An objection that states the limits that have controlled the search for responsive and relevant materials *qualifies as a statement that the materials have been 'withheld.'*"[9]
- Objections to Rule 34 requests must be stated "*with specificity.*"[10]
- "The production must be completed either by the time for inspection specified in the request or by another reasonable time *specifically identified in the response*. When it is necessary to make the production in stages, the response should *specify the beginning and end dates* of the production."[11]

The Committee Notes leave no question that these rule revisions are substantive, not merely stylistic, and that they must be followed in order to reduce "unreasonable burdens" arising from imprecise discovery objections.[12]

III. Enforcement of a Revised Rule 34

To examine how courts have construed the new Rule 34 standards, we begin with a 2017 decision in the Southern District of New York, *Fisher v. Forrest*.[13] This was a copyright and trademark dispute in which a licensor brought two related actions against his licensee, asserting that they used his likeness, as well as proprietary text and images, to promote a competing honey harvesting product. The plaintiff served discovery seeking, among other things, communications between the counterparties and product catalogs.[14] In response, the defendants asserted 17 "general objections," incorporated all of those objections into each of its specific responses, asserted a variety of standard-issue boilerplate objections to each of the disputed requests, and failed to explain when documents would be produced. Although not stated in the decision, the plaintiff no doubt took issue with these lackluster responses and moved for an order requiring production of the documents sought in the disputed requests.

The defendants violated Rule 34 in so many ways that the court found it necessary to begin its decision with the statement that it was time to "once again . . . issue a discovery wake-up call to the Bar in this District."[15] Notably, the defendants' violations in *Fischer* were formerly standard practice: they asserted a variety of general objec-

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tions of limited applicability; they objected on the basis of relevance as the "subject matter of the litigation," rather than using the language of revised Fed. R. Civ. P. 26 ("relevant to any party's claim or defense"); they asserted that some requests were "overbroad and unduly burdensome" without further explanation; and they failed to indicate when their documents would be produced.[16]

After chastising the defendants, the court was ultimately merciful, ordering only that they revise their responses by: (i) using general objections "rarely" and only when they apply to all of the requests; (ii) dropping "overbroad and unduly burdensome" objections entirely, as the phrase is "meaningless boilerplate;" and (iii) specifically indicating when documents and electronically stored information would be produced.[17]

A 2019 ruling in *Michael Kors, L.L.C. v. Su Yan Ye*[18] hits many of the same notes. This case arose when plaintiff Michael Kors alleged that that defendant's patterned use of a "WK" mark was confusingly similar to Kors's use of its famous MK mark. The defendant propounded a litany of discovery requests seeking information about Kors's marketing plans, trademark enforcement strategy, and other typical areas of discovery. In response, Kors asserted a variety of objections and refused to specify adequately what documents it would produce or when. The parties attempted to meet and confer to resolve their differences but ultimately failed, leaving the defendant with no alternative but to file a motion to compel.

The court largely agreed with the defendant, finding that Kors's objections were boilerplate, that its description of the documents it would produce vague,[19] and that Kors "did not provide Defendant any information as to when it would produce documents to which it had no objection."[20] The court emphasized that Rule 34 "imposes the responsibility on a responding party to state what it is withholding or describe the scope of the production it is willing to make, including the parameters of the search to be made (i.e., custodians, sources, date ranges and search terms, or search methodology)."[21] Fortunately for Kors, the court found that the requests were *also* improper, overbroad, and unreasonable. As in *Fischer*, the court did not issue any sanctions, instead giving the parties another bite at the apple—although it did suggest that it *could* find that Kors waived all of its objections by failing to adequately explain them pursuant to Rule 34.[22] But the ruling nevertheless illustrates courts' refusal to tolerate outdated, vague, boilerplate discovery objections that do not comport with the revised Rule 34.

Another recent example is *Futreal v. Ringle*—a negligence action in the Eastern District of North Carolina arising from a motor vehicle accident.[23] In *Futreal*, the court addressed the propriety of a general "work product" objection where the objection was relevant to only some of the requests. The court stated that the use of general objections "finds scant support in the Federal Rules, which envision individualized, specific objections to requests for production of documents that inform the requesting party whether any documents have been withheld because of the objection."[24] Ultimately, the court found that an award of attorney's fees was a more appropriate sanction than waiver of the work-product objection.[25]

Similarly, in *Happy Place v. Hofesh*[26]—a trademark dispute in the Central District of California arising from the use of the "HAPPY PLACE®" mark in the "experiential event" business—the court was confronted with objections to the adequacy of responses to a set of requests for documents concerning financial information, to use of the marks at issue, and related subject matter.[27] The court found it necessary to quote the Committee Notes at length, and explained that new Rule 34(b)(2)(C) "was designed 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 basis of the objections.'"[28] That court further explained that "[b]oilerplate and general objections, with an open-ended promise to produce responsive documents if and when they may be found, are no longer allowed."[29]

In *Kilmon v Saulsbury*,[30] a 2018 decision from the Western District of Texas arising from alleged violations of the Fair Labor Standards Act, the court emphasized that "[t]he party resisting discovery must show specifically how each discovery request is not relevant or otherwise objectionable."[31] The court admonished the defendant for "stat[ing] which documents have been produced subject to its objections, but fail[ing] to provide whether it has withheld additional responsive materials."[32] However, going further than the rulings discussed above, the court not only required the additional specificity required by Rule 34 but also ordered that an objection to a discovery request on the ground that was overly broad, burdensome, or oppressive must be supported by affidavits or evidence "revealing the nature of the burden."[33]

Kilmon appears to be an outlier, but such outliers may become more common as courts courts continue to work out how to enforce revised Rule 34.

IV. Conclusion

This sample of decisions applying Rule 34 as revised suggests that practitioners will be well advised to hew carefully to the text of the revised Rule by (1) stating objections with specificity; (2) only using general objections that apply to every request; (3) stating when documents will be produced; and (4) when objecting to part of a request, either clarifying what you intend to produce or identifying what documents are being withheld.

Endnotes

1. Fed. R. Civ. P. 34(b)(2)(B).
2. Fed. R. Civ. P. 34(b)(2)(C).
3. Fed. R. Civ. P. 34(b)(2)(B).
4. *Id.*
5. *Id.*
6. Fed. R. Civ. P. 34(b)(2)(C).
7. Fed. R. Civ. P. 34 (2015 Committee Notes).
8. *Id*. (emphasis added).
9. *Id*. (emphasis added).
10. *Id*. (emphasis added).
11. *Id*. (emphasis added).
12. *Id*.
13. *Fischer v. Forrest*, No. 14CIV1304PAEAJP, 2017 WL 773694 (S.D.N.Y. Feb. 28, 2017).
14. *Id*. at *2.
15. *Id*. at *1.
16. *Id.* [at passim].
17. *Id*.
18. *Michael Kors, L.L.C. v. Su Yan Ye*, No. 1:18-CV-2684 (KHP), 2019 WL 1517552 (S.D.N.Y. Apr. 8, 2019).
19. *Id*. at *3.
20. *Id.*
21. *Id*.
22. *Id*. at *7.
23. *Futreal v. Ringle,* No. 7:18-CV-00029-FL, 2019 WL 137587 (E.D.N.C. Jan. 8, 2019).
24. *Id*. at *3.
25. *Id*. at *8.
26. *Happy Place, Inc. v. Hofesh, LLC*, No. 218CV6915ODWSKX, 2019 WL 4221400 (C.D. Cal. May 17, 2019).
27. *Id.*
28. *Id*. at *1, quoting Fed. R. Civ. P. 34 (2015 Committee Notes).
29. *Id.*
30. *Kilmon v. Saulsbury Indus., Inc*., No. MO:17-CV-99, 2018 WL 5800757 (W.D. Tex. Feb. 28, 2018).
31. *Id*. at *2.
32. *Id*. at *6.
33. *Id*. at *4.

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