



# TRIAL BRIEFS

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## Say goodbye to boilerplate objections and responses to discovery requests

By [George S. Bellas](#) and [Misty J. Cygan](#)

**Once again the federal courts are taking the lead** in changing the discovery paradigm. Fueled by the 2105 amendments to Rule 34 of the Federal Rules of Civil Procedure, courts are targeting the practice of boilerplate objections and vague responses to discovery requests.

For many attorneys and law firms it is standard practice to object to most, if not all, discovery requests with the boilerplate language that a request is overly broad or unduly burdensome. This practice necessitates more meet and confer conferences and motions to compel resulting additional costs to litigate. The 2015 amendments to Rule 34 were intended to curtail this type of practice. However, up until recently judges have been dillydallying in enforcing the new rule.

Effective December 1, 2015, responses to discovery requests must: (1) state the grounds for objections with specificity; (2) an objection must state whether any responsive materials are being withheld on the basis of that objection; and (3) specify the time for production and, if a rolling production, when production will begin and when it will be concluded. Fed. R. Civ. P. 34(b)(2). As one judge recently remarked that violations of this rule are common practice.

A recent ruling obliterated counsel for the defendant's objections to requests received by plaintiff. *Fisher v. Forrest*, opinion dated February 28, 2017 (S.D.N.Y., 2017). This case involved claims of trademark violations, among others. Defendants response included 17 "general objections," including stating that "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. Defendant went on to state that, "subject to and without waiver of the foregoing general objections which are hereby incorporated by reference into each responses, Defendant's Response to Plaintiff's Request for Production of Documents are as follows..."

Defendant then raised specific objections. The first request sought “all emails, correspondence, letters and other written communications between any employee, agent, officer, director, or member of Defendant and Plaintiff from 2008 to present.” This is a typical request that is utilized in almost every type of commercial litigation case. The response was also pretty typical: “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.”

The second request sought, “all drafts, revisions, amendments and final versions of Defendant’s catalog(s) from 2008 to present.” This request garnered the following objection: “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. Subject to and without waiving said objections, Defendant has provided Plaintiff with the cover page and page advertising either Bee-Quick or Natural Honey Harvester.”

All litigators have been on the giving or receiving end of these objections and responses and have probably argued that these are valid objections! *Au contraire*, counsel!

For starters, it is a violation to incorporate all of the general objections into each response. The judge in *Fisher* noted that general objections should be used sparingly unless each objection actual applies to each specific document request.

It is also a violation to object to any request being non-relevant to the “subject matter of this litigation.” The 2015 amendment to Rule 26(b)(1) limits discovery to material “relevant to any party’s claim or defense.” Thus, “subject matter” discovery is no longer allowed. The amendments also deleted “likely to lead to the discovery of relevant, admissible evidence.” This language is no longer acceptable and should be removed from every practitioner’s forms. But old habits die hard and attorneys and courts continue to use the phrase. The replacement test for “reasonably calculated to lead to admissible evidence,” is whether evidence is “relevant to any party’s claim or defense.”

Finally, stating that a request is “overly broad and unduly burdensome” is meaningless on its own. It literally tells the court nothing—how is it overly broad, why is it unduly burdensome?

It is time to ditch the old boilerplate language that so many of us rely on and start putting the 2015 amendments into practice. If we don’t, the consequences could be dire as the judge in *Fisher* ruled that discovery responses not in compliance with Rule 34’s requirements will be deemed a waiver to all objections! It’s time to recognize that the litigation paradigm is changing and we need to adapt to the changes. □

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## Member Comments

What about the Illinois State Court and specifically Rule 213. The rule states that you either object or answer but not both. Defendants routinely ignore the rule and engage in the same conduct described in your article. Enough is enough.

— Richard J. Grossman on May 3, 2017

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