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DTCI: Limiting the use of 'subject to and without waiving' objections

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By Eric McNamar

"Subject to and without waiving these objections" is a common phrase that I am sure most of us have used and encountered in discovery responses. Courts, however, are rejecting the phrase and holding that the responding party has waived any objections that may have been asserted. The reasoning makes sense and should encourage most of us to limit our use of the phrase whether we practice in state or federal court.

What is a proper discovery response?

Whether a case is pending in state or federal court, parties have long been able to obtain discovery regarding any nonprivileged matter that is relevant to the party's claims or defenses. Ind. Trial Rule 26(B)(1); Fed. R. Civ. P. 26(b)(1). While the scope of discovery can sometimes be nearly overwhelming, the rules of procedure allow parties to limit discovery by objecting to discovery requests that are broad, burdensome or seek privileged materials. See T.R. 26(B)(1); F.R.C.P. 26(b)(2)(B). When asserting these objections, however, attorneys frequently fail to provide clear responses to legitimate discovery requests.

A proper discovery response meets two requirements. The first requirement is simple enough: Discovery responses must be timely. See *Novelty, Inc. v. Mountain View Mktg., Inc.*, 265 F.R.D. 370, 375-76 (S.D. Ind. 2009); *Langley v. Union Elec. Co.,* 107 F.3d 510, 513 (7th Cir. 1997) (upholding imposition of sanctions against party that failed to produce requested item for inspection even though no motion to compel had been filed at the time of the failure). The responding party has an obligation to seek an extension of time either by agreement or, if necessary, by motion when the responding attorney cannot prepare complete answers to interrogatories or produce all responsive documents within the specified time. *Novelty, Inc.*, 265 F.R.D. at 376.

The second requirement of a proper response presents two choices to an attorney. The first choice is to state, for each interrogatory and each category of document requested, that the discovery request either was answered "fully in writing and under oath" or that "inspection . . . will be permitted as requested[.]" T.R. 33(B); T.R. 34(B); F.R.C.P. 33(b)(3); see *A. Farber & Partners, Inc. v. Garber,* 234 F.R.D. 186, 189 (C.D. Cal. 2006) ("[A] party has an obligation to conduct a reasonable inquiry into the factual basis of his responses to discovery, and, based on that inquiry, a party responding to a Rule 34 production request is under an affirmative duty to seek that information reasonably available to it from its employees, agents, or others subject to its control." (citations and quotation omitted)). Alternatively, the responding party may object to the discovery request. However, if the responding party objects to the interrogatory or the request for production, the responding party must state the basis for that objection. T.R. 33(B); T.R. 34(B); F.R.C.P. 33(b)(4); F.R.C.P. 34(b)(2)(C).

Valid objections must inform the requesting party and the court about the nature of the otherwise responsive documents that the responding party will not produce. *Novelty, Inc.*, 265 F.R.D. at 375 (citing *Pulsecard, Inc. v. Discover Card Servs.*, 168 F.R.D. 295, 304 (D. Kan. 1996) ("When parties fail to make specific legitimate objections to particular interrogatories within the time allowed, the court may appropriately deem objections to those interrogatories waived. The same can be said of failing to make specific legitimate objections to requests for production." (internal citations omitted))). Because of this requirement, courts increasingly are ignoring objections made without elaboration whether placed in a separate section or repeated by rote in response to each requested category. See, e.g., *Ritacca v. Abbott Laboratories*, 203 F.R.D. 332, 335 n.4 (N.D. Ill. 2001) ("[B]lanket objections are patently improper, . . . [and] we treat [the] general objections as if they were never made."); *Anderson v. Hansen,* 2012 U.S. Dist. LEXIS 131010, at *22 (E.D. Cal. Sept. 13, 2012) ("The grounds for objecting to a request must be stated . . . and as with other forms of discovery, it is well established that boilerplate objections do not suffice.") (internal citations omitted); *Burkybile v. Mitsubishi Motors Corp.*, 2006 U.S. Dist. LEXIS 57892, *20 (N.D. Ill. 2006) (collecting cases rejecting "reflexive invocation[s] of the same baseless, often abused litany that the requested discovery is vague, ambiguous, overly broad, unduly burdensome or that it is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence" (quotation omitted)).

Courts are changing the approach to objections

As noted above, federal courts are unlikely to uphold objections unless "they specifically apprise the opposing party and the Court about the nature of the otherwise responsive documents that the responding party will not produce." *Novelty, Inc.*, 265 F.R.D. at 375. This is because "subject to" and "without waiving" objections are "manifestly confusing (at best) and misleading (at worse), and [have] no basis at all" in the rules of procedure. *Sprint Commc's Co. v. Comcast Cable Commc'ns, LLC,* 2014 U.S. Dist. LEXIS 16938, at *8 (D. Kan. Feb. 11, 2014).

While courts recognize that it has become a common practice for parties to respond to discovery requests by first stating these objections, when a party responds to a discovery request with the phrase "subject to" and "without waiving these objections," the objection and answer leave the requesting party uncertain whether the question has actually been fully answered or only a portion of the question has been answered. *Consumer Electronics Ass'n v. Compras & Buys Magazine, Inc.,* 2008 U.S. Dist. LEXIS 80465, at *7 (S.D. Fla. Sept. 18, 2008). The uncertainty arises because "subject to" and "without waiving" objections typically fail to explain either the nature of the documents withheld or the justification for withholding them. See *Novelty, Inc.*, 265 F.R.D. at 375. Courts confronted with these objections are increasingly holding that the objections and answers preserve nothing and serve only to waste the time and resources of both the parties and the court. *Consumer Electronics Ass'n,* 2008 U.S. Dist. LEXIS 80465, at *7.

In addition to criticizing these conditional responses and the purported reservation of rights, more and more courts also are concluding that these types of responses ultimately have the effect of waiving the objections to the discovery requests. *Sprint Commc'ns Co.,* 2014 U.S. Dist. LEXIS 16938, at *8. Courts even have explained that the practice may violate Rule 26 of the Federal Rules of Civil Procedure. Indeed, Rule 26 imposes an affirmative duty on the parties to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of the discovery rules. *Heller v. City of Dallas*, 303 F.R.D. 466, 476 (N.D. Tex. 2014). But by relying on confusing objections, a responding party fails to engage in pretrial discovery in a responsible manner and fails to meet the standards set out in the discovery rules.

What to do

When criticizing the "subject to and without waiving" approach to discovery responses, some federal courts have explained the way to craft proper discovery responses. Instead of allowing an attorney who is responding to discovery requests to merely state that the attorney objects "to the extent" the discovery

request exceeds the scope of discovery, courts are requiring the responding attorney to state how and why each request exceeds the scope of discovery in addition to requiring the responding party to produce the documents that fall within that acceptable scope. See *Mills v. East Gulf Coal Prep. Co.,* LLC, 259 F.R.D. 118, 132 (S.D.W.Va. 2009) (explaining the elements of a proper objection). Three examples of how to craft proper discovery responses are set out below.

First, in those instances when part or all of an interrogatory may be vague and ambiguous, the responding party must, if possible, explain its understanding of the allegedly vague and ambiguous terms or phrases and explicitly state that its answer is based on that understanding. *Heller,* 303 F.R.D. at 488. If the entire interrogatory or document request is truly so vague and ambiguous that the responding party cannot understand its meaning or determine what information it seeks, the responding party should stand on its objection and provide no answer at all or promise no production of responsive documents on the ground that the responding party simply cannot respond based on the discovery request's wording. Id. If instead the responding party objects to a request as vague and ambiguous, without explanation, before fully answering the interrogatory or producing all documents responsive to the request "subject to" the vagueness and ambiguity objection, the response indicates that the objection was made reflexively and without a factual basis. Id.

Second, if the responding party determines that a discovery request is overly broad or unduly burdensome, to comply with Rule 33 or Rule 34, the responding party must explain the extent to which the request is overbroad, respond to the request to the extent that it is not, and explain the scope of the discovery response. See *Consumer Electronics Ass'n,* 2008 U.S. Dist. LEXIS 80465, at *6 ("If there is an objection based upon an unduly broad scope, such as time frame or geographic location, discovery should be provided as to those matters within the scope which is not disputed."). If responding to a discovery request would impose an undue burden, the responding party should properly substantiate that assertion and then answer or respond only to the extent that doing so would not involve an undue burden. See generally *Cartel Asset Mgmt. v. Ocwen Fin. Corp.,* 2010 U.S. Dist. LEXIS 17857, at *43 (D. Colo. Feb. 8, 2010) ("The discovery process necessarily imposes burdens on a responding party… .The question, however, is whether the discovery unduly burdens[.]." (internal quotation marks and citation omitted)). But if the responding party fully responds to a discovery request without explaining the basis for the "subject to" objections, a court may find a problem with the objections and not with the request itself. See generally *Aikens v. Deluxe Fin. Servs., Inc.*, 217 F.R.D. 533, 538-39 (D. Kan. 2003).

Finally, if a discovery request seeks privileged information, a responding party either can stand on the objection and seek a protective order or note that the response is providing only nonprivileged information and documents.

Conclusion

Courts are increasingly taking a hostile position toward the use of "subject to and without waiving these objections" to the point that attorneys should think twice before using the phrase. As most attorneys know, it is rare for a discovery battle to be worth the time and expense because most of the information and documents sought are neither privileged nor worth fighting about. A telephone call to opposing counsel will likely eliminate many of the objections that might be or have been asserted. If you must assert objections, simplify your objections and identify exactly what you are answering or producing. You will avoid the ire of the court and save many headaches and a lot of money.•

Mr. McNamar *is an associate in the Indianapolis firm of Lewis Wagner and a member of the Defense Trial Counsel of Indiana. The opinions expressed in this article are those of the author.*