Pepper Hamilton LLP
Attorneys at Law

Practice Pointers to Best Utilize or Respond to Document Requests: Sedona Publishes Rule 34 Primer

CLIENT ALERT | September 26, 2017

Matthew J. Hamilton | hamiltonm@pepperlaw.com
Jason Lichter | lichterj@pepperlaw.com

The rules governing how litigants conduct written discovery changed substantially on December 1, 2015, when major amendments to the Federal Rules of Civil Procedure took effect. Adherence to those changes, however, has been sporadic, as counsel struggle to abandon two ingrained practices that may never have been advisable, but were nonetheless commonplace: (1) serving unfocused, overreaching document requests and (2) responding to these requests with nonspecific, generalized boilerplate objections. As we approach the two-year anniversary of the amendments, courts are growing increasingly annoyed with practitioners who behave as if the amendments did not exist. Southern District of New York Magistrate Judge Andrew Peck has been among the most vocal, issuing a strongly worded "wake-up call" to counsel that "[m]ost lawyers who have not changed their 'form files' violate one or more (and often all three)" of the amendments to Rule 34. *Fisher v. Forrest*, No. 1:14-cv-01307, 2017 WL 773694, at *1 (S.D.N.Y. Feb. 28, 2017).

What were those three amendments exactly? *First*, parties responding to a request for documents must now state their objections "with specificity." *Second*, they must indicate whether any responsive materials are being withheld on the basis of that objection (although describing the search conducted may be sufficient). *Third*, they must state when documents will be produced (including the start and end date of a rolling production). Fed. R. Civ. P. 34, Advisory Committee Note, 2015 Amendment.

In recognition of the need for more detailed guidance, the Sedona Conference — an influential e-discovery think tank composed of jurists, lawyers (from both sides of the aisle), experts and academics — has once again stepped in to fill the void, publishing its "Federal Rule of Civil Procedure 34 Primer" for public comment. The Primer provides attorneys with five practice pointers on how to comply with the requirements of amended Rule 34, each of which is summarized below.

Conferences by the Parties

To comply with the amended discovery rules and reduce the likelihood of downstream discovery disputes, the Sedona Primer advises outside counsel to schedule an early, substantive discovery conference. But doing so only works if each side comes prepared to discuss the claims and defenses underlying the matter as well as the types and locations of potentially relevant information in their clients' possession, custody or control. Other topics for negotiation at the conference could include the potential phasing of discovery, the contours of an ESI protocol, and how to reduce the burden of identifying and logging privileged information.

Rule 34 now permits the exchange of document requests much earlier than was previously permitted, just 21 days after service of the complaint. Parties can take advantage of this opportunity to focus the discussion at discovery conferences. Indeed, the Sedona Primer encourages responding counsel to share document requests with their clients before any conference so they can better inform potential objections. Early requests may also narrow the scope of the obligatory preservation discussion. As the parties reach agreements at these conferences, Sedona recommends, as has always been best practice, that they memorialize them in correspondence or by issuing revised requests or responses.

Requests for Production

In drafting requests for production, parties should consider what is actually needed to litigate the operative claims and defenses, and what is proportionate under Rule 26(b)(1).

Sedona recommends that requesting parties do their part to reduce extensive objections by avoiding blanket requests for "any and all documents," omitting overbroad definitions and instructions, and defining reasonable date ranges when possible. Requests for specific documents or for documents "sufficient to show" a particular point are preferable to unbounded requests, which instead should be tied to specific factual allegations or defenses and refined in discovery conferences.

Responses to Requests for Production

Outside counsel should meet with their clients as early as possible to determine (1) what documents exist, (2) what documents are going to be withheld and why, (3) what will be produced, and (4) the timing of production. Doing so will give counsel the information needed to comply with the mandates of Rule 34 within 30 days of service. The Rules do not contemplate that production of documents will be completed within that same time-frame. However, Rule 34(b)(2)(B) does require parties to include a date in their responses by which at least a partial production will have been made, even if certain objections have yet to be resolved.

Given Rule 34's requirement that objections (1) be stated with specificity and (2) indicate whether responsive materials are being withheld on the basis of that objection, general objections will rarely be appropriate. The Sedona Primer sets forth three examples in which general objections may still be appropriate: privilege, confidentiality and over-breadth. Even in those instances, boilerplate objections, included those made out of an abundance of caution, are out of bounds and may lead to sanctions. Using the phrase "to the extent that" in an objection (*e.g.*, objecting to a request "to the extent that it is over-broad") is almost always indicative of boilerplate. Reservation-of-rights-style objections likewise have no effect and are impermissible under the new rubric.

Sedona provides several helpful tips regarding specific objections to individual requests. For instance, the oft-used phrase, "subject to and without waiving these objections, [responding party] will produce responsive, non-privileged documents responsive to this request," should no longer be used. Rather, when a party intends to produce a more limited scope of documents than was requested, it can either state so directly or indirectly — the latter typically by describing the search parameters (*e.g.*, custodians, date ranges and search terms) it **is** willing to use. And when the time of production cannot reasonably be determined yet, a party can provide an estimated date of substantial completion and/or expected starting and ending dates of a rolling production.

Court Involvement

While discovery disputes are best resolved without court intervention, objections should be written in a manner that can withstand judicial scrutiny. The Sedona Primer suggests that, when the parties do seek a court ruling, they should each present the judge with specific, alternative language to consider, rather than asking the court to craft its own language. Sedona also recommends that parties request informal discovery conferences to resolve disputes, ideally after requesting that the judge include that option in the Rule 16(b) scheduling order.

Parties' Obligations Under Rule 26(g)

While rarely invoked, Rule 26(g) authorizes — even mandates — that courts sanction parties and their counsel for seeking disproportionate discovery, attempting to cause needless delay, or increasing the cost of litigation without justification. Before any document request or response is certified, both outside and in-house counsel should heed that warning by ensuring that the content of the discovery document is consistent with the Rules, including the Rule 26(b)(1) proportionality requirement, and has not been interposed for any improper purpose.

* * *

Attorneys by their nature can be resistant to change and are likely to grapple with these amendments for some time. Fortunately, the Sedona Primer goes a long way to giving litigators the guidance they need to avoid incurring the discovery ire of an adversary or court.

Matthew Hamilton is a partner in Pepper Hamilton's Health Sciences Department, a team of 110 attorneys who collaborate across disciplines to solve complex legal challenges confronting clients throughout the health sciences spectrum. Jason Lichter is Pepper's director of discovery services and litigation support.