LIMITING EVASIVE DISCOVERY: A PROPOSAL FOR THREE COST-SAVING AMENDMENTS TO THE FEDERAL RULES

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INTRODUCTION

Discovery accounts for the majority of the cost of civil litigation—as much as ninety percent in complex cases, according to some estimates.[1] While the simplest and most effective way to control litigation costs would be to restrict or eliminate discovery, any savings would come at a high price. The truth-seeking and fairness values implicit in the American civil justice system depend on the right to develop proof in the hands of one's adversary, particularly in "asymmetrical" cases where individual citizens square off against well-funded corporate adversaries. The challenge remains one of balancing the imperative of controlling costs against the need to preserve the core values underlying our justice system.

Central to the problem of cost efficiency is the adversarial nature of discovery in modern litigation. In an effort to reduce the impact of gamesmanship and promote a more collaborative approach to discovery, civil rule amendments since at least 1993 have emphasized cooperation among parties and counsel. Rule 26(a) initial disclosure requirements, Rule 26(f) discovery conference requirements, the pre-motion conference requirement of Rule 37(a)(1), and, most recently, various aspects of the amendments governing discovery of electronically stored information ("ESI") mandate voluntary exchanges of information and cooperative

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1. Memorandum from Paul V. Niemeyer, Chair, Advisory Comm. on Civil Rules, to Hon. Anthony J. Scirica, Chair, Comm. on Rules of Practice and Procedure (May 11, 1999), 192 F.R.D. 340, 357 (2000) ("[T]he cost of discovery represents approximately 50% of the litigation costs in all cases, and as much as 90% of the litigation costs in the cases where discovery is actively employed."); *see also* Navigant Consulting, The State of Discovery Abuse in Civil Litigation: A Survey of Chief Legal Officers 8 (Oct. 29, 2008), http://law.northwestern.edu/searlecenter/uploads/The%20State%20of%20Discovery%20Abuse%20in%20Civil%20Litigation%20A%20Survey%20of%20Chief%20Legal%20Officers.ppt ("On average, 45–50 percent of respondents' civil litigation costs in 2007 related to discovery activities.").

efforts to identify and resolve the contentious issues that arise during discovery.[2]

Rules that depend on cooperation between opposing counsel function well, to the extent that professionalism or the relative parity of the litigants leads the parties and their counsel to approach their obligations in good faith.[3] As a number of courts have observed, however, a party who elects to obstruct or manipulate the discovery process can impose extraordinary costs on the court system and opposing parties.[4] A determined litigant will exploit every available means of thwarting an adversary's efforts through delay, distraction, confusion, and obfuscation. Discovery in high-stakes litigation appears to be growing ever more contentious, with collateral proceedings over discovery compliance becoming commonplace.

The most contentious and costly battleground in civil discovery surrounds the production of documents in response to requests propounded under Rule 34. To be sure, the problems often begin with overbroad, poorly crafted "kitchen sink" style document requests served by the re-

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2. FED. R. CIV. P. 26(f)(2)–(3). Civil Rule amendments have also addressed a wide range of other issues. The 2000 amendment to Rule 26(b)(1), for example, limited the scope of discovery to matters relevant to parties' claims and defenses, where previously the Rule had permitted discovery into any matter reasonably calculated to lead to admissible evidence without prior leave of court. *See, e.g.*, *In re* Subpoena to Witzel, 531 F.3d 113, 118 (1st Cir. 2008) ("In 2000, Rule 26(b)(1) was amended to distinguish between discovery regarding matters that are relevant to a party's claim or defense and discovery of a broader scope encompassing 'any matter relevant to the subject matter involved in the action.'" (quoting FED. R. CIV. P. 26(b)(1))). Similarly, the 2006 ESI amendments added new provisions for cost shifting and new procedures for the assertion of claims of privilege or work-product protection. *See* FED. R. CIV. P. 16(b)(3)(B)(iv); *id.* 26(b)(2), (b)(5)(B), (f)(3)(D).

3. *See, e.g.*, Bd. of Regents of Univ. of Neb. v. BASF Corp., No. 4:04CV3356, 2007 WL 3342423, at *5 (D. Neb. Nov. 5, 2007):

> The overriding theme of recent amendments to the discovery rules has been open and forthright sharing of information by all parties to a case with the aim of expediting case progress, minimizing burden and expense, and removing contentiousness as much as practicable. If counsel fail in this responsibility—willfully or not—these principles of an open discovery process are undermined, coextensively inhibiting the courts' ability to objectively resolve their clients' disputes and the credibility of its resolution.

(citations omitted); *In re* Sept. 11th Liab. Ins. Coverage Cases, 243 F.R.D. 114, 125 (S.D.N.Y. 2007) ("Discovery is run largely by attorneys, and the court and the judicial process depend upon honesty and fair dealing among attorneys.").

4. *See, e.g.*, Gipson v. Sw. Bell Tel. Co., No. 08-2017, 2009 WL 790203, at *21 (D. Kan. Mar. 24, 2009):

> The costs associated with adversarial conduct in discovery have become a serious burden not only on the parties but on this Court as well. While the Court is well aware of counsel's obligations to act as advocates for their clients and to use the discovery process for the fullest benefit of their clients, those obligations must be balanced against counsel's duty not to abuse legal procedure.

Network Computing Servs. Corp. v. Cisco Sys., Inc., 223 F.R.D. 392, 395 (D.S.C. 2004) ("Hardball discovery . . . is costly to our system and consumes an inordinate amount of judicial resources."); *In re* Spoonemore, 370 B.R. 833, 844 (Bankr. D. Kan. 2007):

> Discovery should not be a sporting contest or a test of wills, particularly in a bankruptcy case where the parties' resources are limited and the dollar value of the stakes is often low. . . . [The parties'] conduct in the discovery phase of this matter ha[s] significantly multiplied its burdens, both on the Trustee and the Court.

questing party. Courts have shown little hesitation in paring back or restricting these overzealous or insufficiently focused discovery requests.[5]

In many cases, however, evasive or incomplete responses leave the requesting party unable to determine whether the responding party has agreed to produce all of the requested documents, when production will be made and, once made, whether the production is complete. The responding party gains an immediate tactical advantage by serving an evasive or incomplete response—the ability to prevent, or at least delay, the production of damaging documents, and to shift to the requesting party the obligation of enforcing the responding party's discovery obligations.

The Federal Rules prohibit evasive responses and provide mechanisms to shift fees to compensate requesting counsel for the cost of enforcing compliance.[6] In practice, however, these rules are not enforced.[7] Service of evasive discovery responses has become a routine—and rewarding—litigation tactic. Litigants who lack the sophistication or the resources to detect evasive behavior and successfully move for relief bear the cost of non-compliance, despite the Rules' express prohibition on evasive conduct.

This essay proposes three amendments to the Federal Rules to promote efficient discovery by dissuading evasive conduct: (1) an express prohibition on evasive responses in Rule 26(g); (2) a clarification of "production" and "inspection" in Rules 34(b) and 37(a)(3); and (3) a requirement in Rule 34(b)(2)(C) for specific disclosure of withheld documents. While the proposed amendments are an admittedly modest step, the cost of implementing them should be equally modest. They

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5. *See, e.g.*, Regan-Touhy v. Walgreen Co., 526 F.3d 641, 650 n.6 (10th Cir. 2008):

> [A]t the end of the day, it is the parties' obligation to frame their own discovery requests and to seek to narrow any disputes with opposing counsel; the district court is obliged only to rule on the requests for enforcement or protection eventually presented to it, not to do the parties' work for them by editing discovery requests until they comply with the Federal Rules of Civil Procedure.

See also Surles v. Greyhound Lines, Inc., 474 F.3d 288, 305 (6th Cir. 2007) (holding that the district court properly narrowed document requests because "district courts have discretion to limit the scope of discovery where the information sought is overly broad or would prove unduly burdensome to produce"); I'mnaedaft, Ltd. v. Intelligent Office Sys., LLC., No. 08-cv-01804-LTB-KLM, 2009 WL 1537975, at *6 (D. Colo. May 29, 2009) (characterizing overbroad discovery requests as "a fishing expedition, or more probably, a search for ammunition to use in this particular war. 'Ammo recon' missions, like fishing expeditions, are rarely appropriate and uniformly discouraged").

6. *See* FED. R. CIV. P. 34(b)(2)(B) ("For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons."); *id.* 37(a)(4) ("For purposes of this subdivision (a) [authorizing a motion to compel], an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond."); *id.* 37(a)(5) (providing for payment of moving party's reasonable costs).

7. According to a recent study by the Institute for the Advancement of the American Legal System, discovery sanctions are sought in only about 3 percent of cases. Of the motions that are filed, only 26 percent are granted in whole or in part. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS 46 (2009), http://www.du.edu/legalinstitute/pubs/PACER%20FINAL%201-21-09.pdf.

should also be non-controversial, as evasive conduct is already prohibited and there is no defensible countervailing interest in encouraging evasive conduct. The remaining Parts of this essay discuss the proposed amendments in detail.

I. THE BARGAINING PROBLEM

Under the current Rules, parties and their counsel are motivated to treat discovery requests and responses as merely their first offers in what will often be a protracted series of bargaining sessions. On their face, the Rules do not suggest that this should be the case. The scope of discovery is well established under Rule 26(b)(1) and it is usually relatively clear whether a document is responsive to a particular request.

The bargaining occurs for two reasons. First, the mechanism by which a propounding party may seek to compel compliance with its discovery requests is typically slow, cumbersome, and costly. A noticed motion or equivalent procedure is often not enough; some courts also require appendices, separate statements, or other lengthy documents in support of the usual motion papers.[8] Second, the pre-motion conference requirement of Rule 37(a)(1) provides incentive to bargain.[9] In practice, this requirement removes nearly any deterrent to evasive or incomplete initial responses to discovery requests. Because of this Rule, the responding party is guaranteed at least one opportunity to cure its responses, no matter how deficient, before the matter is brought to the court's attention.

Without doubt, different cases involve different questions of privilege, relevance, and related issues, some more open to debate than others. In most instances, however, an experienced attorney will recognize an evasive discovery response almost immediately. The tactics are all too familiar, and include: unilaterally narrowing the scope of the discovery request, such as by redefining terms used in the request; agreeing to provide documents "subject to" specified objections without stating whether responsive documents are being withheld on the basis of the objections; agreeing to provide documents without stating when the production will be made; and so forth. With the advent of electronic discovery, a whole new array of possibilities has arisen, ranging from burying the propound-

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8. *See, e.g.*, C.D. CAL. R. 37-2.1 (requiring a joint stipulation that sets forth verbatim all requests and responses in dispute along with argument from both parties as to each request and response); N.D. GA. R. 37.1(A) (requiring a motion to compel to set forth verbatim all requests and responses and provide separate argument for each).

9. Some courts impose special audio-visual or stenographic recording requirements in the pre-motion conference process. *See, e.g.*, Jason Krause, *Rockin' Out the E-Law*, A.B.A. J., July 2008, at 48, 52, *available at* http://www.abajournal.com/magazine/rockin_out_the_e_law (describing videotape practice employed by Magistrate Waxse of the District of Kansas); *see also* Sullivan v. Kelly Servs., No. C07-2784 CW (BZ), slip op. at 1 (N.D. Cal. Jan. 31, 2008) (directing, in an initial discovery order by Magistrate Zimmerman, that for pre-motion conferences, the "parties shall . . . make a contemporaneous record of their meeting using a tape recorder or a court reporter). While these types of requirements may deter some forms of discovery misconduct, they also present a further procedural hurdle to parties seeking relief.

ing party in millions of pages of irrelevant or duplicative documents, to playing games with key word searches, to producing data that is so riddled with technical problems that it is essentially unusable.[10]

In short, the actual operation of the Rules and the incentives they create for parties and their attorneys almost automatically turn what should be a two-step process of discovery requests followed by responses into an iterative, multi-step ordeal, in which responses are followed by conferences, then amended responses, then further conferences, and so on. All of this haggling and negotiation over what should largely be well-settled matters not only drives up costs, it may even encourage propounding parties to serve broader discovery requests than they otherwise would in order to leave themselves room to bargain. Such unnecessarily broad requests encourage similarly broad objections, in turn leading to further bargaining and significantly driving up costs.[11]

II. AMENDING THE FEDERAL RULES TO DISCOURAGE EVASIVE DISCOVERY RESPONSES

Three relatively narrow amendments to the discovery rules would help to clarify parties' discovery obligations and minimize gamesmanship: (1) revising Rule 26(b)(1)(B) to explicitly require the party or attorney to certify that the responses are not evasive; (2) amending Rule 34(b)(2)(B) and Rule 37(a)(3)(B)(iv) to address the now-common practice of producing rather than permitting inspection of documents; and (3) adding a provision to Rule 34(b)(2)(C) that requires the responding party to specify whether documents are being withheld on the basis of any asserted objection.

A. Rule 26(g): Express Prohibition of Evasive Responses

Rule 26(g)(1)(B) provides that a party or attorney who signs a discovery response or objection is certifying that, "to the best of the person's knowledge, information, and belief formed after a reasonable in-

10. *See In re* Seroquel Products Liab. Litig., 244 F.R.D. 650, 665 (M.D. Fla. 2007) (sanctioning party for production that "had load file, metadata, page break and key word search problems, making the 10 million pages of documents inaccessible, unsearchable, and unusable as contemplated under the Rules"); *see also* Capitol Records, Inc. v. MP3tunes, LLC, No. 07 Civ. 9931(WHP)(FM), 2009 WL 2568431, at *2 (S.D.N.Y. Aug. 13, 2009) (relating that, in a music copyright infringement case, counsel directed his client to search emails using "design" as the sole search term); Bray & Gillespie Mgmt. v. Lexington Ins. Co., No. 6:07-cv-222-Orl-35KRS, 2009 WL 546429, at *23-24 (M.D. Fla. Mar. 4, 2009) (sanctioning party and counsel for misrepresentations to court about the gathering and production of ESI and manipulation of ESI to withhold requested information, including metadata); ReedHycalog UK, Ltd. v. United Diamond Drilling Servs., Inc., NO. 6:07 CV 251, 2008 U.S. Dist. LEXIS 93177, at *5, 9 (E.D. Tex. Oct. 3, 2008) (In a patent dispute, a production of 750 gigabytes of data that "allegedly included baby pictures, audio folders, and pornography" amounted to "a data dump with an instruction to 'go fish.' That this fishing is done electronically is of no consequence." (citations omitted)).

11. *See, e.g.*, Network Computing Servs. Corp. v. Cisco Sys., Inc., 223 F.R.D. 392, 395 (D.S.C. 2004) ("Judges often find themselves in a position similar to NFL referees, who have to peel the players off of each other in an effort to find the player in the middle who started the melee.").

quiry," the response or objection is: (i) "consistent with" the Federal Rules of Civil Procedure and other applicable law, (ii) "not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation," and (iii) "neither unreasonable nor unduly burdensome or expensive."[12] This Rule is essentially the discovery counterpart to Rule 11's requirements for representations made to a court, which do not apply in the discovery context.[13]

Rule 26(g) was intended to discourage evasive discovery practices. As the Civil Rules Advisory Committee emphasized in its note to the 1983 amendments, the Rule "provides a deterrent to both excessive discovery *and evasion* by imposing a certification requirement that obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection."[14] While the text of the rule would seem to be sufficient to deter evasive conduct, it has not operated that way, likely because of the general reluctance of courts to impose sanctions for discovery abuse.[15]

A lack of specificity may also be a contributing factor. Evasion of discovery obligations is, of course, an "improper purpose," but it is not one of the three listed in subsection (g)(1)(B)(ii).[16] Similarly, to the extent that subsection (g)(1)(B)(i) requires compliance with the federal rules, it incorporates Rule 37(a)(4)'s provision that "an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond."[17] Nonetheless, Rule 26(g) does not explicitly require a responding party to certify that it is not attempting to evade its obligation to produce non-privileged documents and information that are responsive to the propounding party's discovery requests.

This absence of express language gives responding parties room to maneuver. Only a handful of district court decisions, and no reported

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12. FED R. CIV. P. 26(g)(1)(B).

13. *Id.* 11(d) ("[Rule 11] does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.").

14. FED. R. CIV. P. 26(g) advisory committee notes to 1983 amendment (emphasis added) ("Because of the asserted reluctance to impose sanctions on attorneys who abuse the discovery rules, Rule 26(g) makes explicit the authority judges now have to impose appropriate sanctions and requires them to use it. This authority derives from Rule 37, 28 U.S.C. § 1927, and the court's inherent power." (citations omitted)).

15. *See* Scott A. Moss, *Reluctant Judicial Factfinding: When Minimalism and Judicial Modesty Go Too Far*, 32 SEATTLE U. L. REV. 549, 562-63 (2009). Professor Moss notes that the reasons given by courts for reluctance to impose sanctions for discovery disputes include:

> a distaste for becoming involved in discovery disputes that litigants should be able to resolve themselves; a feeling that litigants should seek sanctions against an adversary only when they have been without fault in complying with discovery; and a feeling that the imposition of a sanction embarrasses or humiliates the attorney or party and should thus be resorted to only in extreme situations.

(internal quotation marks omitted) (quoting Georgene Vairo, *Rule 11 and the Profession*, 67 FORDHAM L. REV. 589, 595 (1998)).

16. FED R. CIV. P. 26(g)(1)(B)(ii).

17. *See id.* 26(g)(1)(B)(i); *id.* 37(a)(4).

appellate decisions, appear to have squarely held that evasiveness itself is a violation of Rule 26(g).[18] Given the lack of established authority, the Rule would benefit from greater clarity on this point. If the purpose of the Rule is to awaken the conscience of attorneys about evasive discovery responses, the Rule should do so with express language. This could be accomplished simply by amending Rule 26(g)(1)(B)(i) to provide that by signing a discovery response or objection the signer is certifying that the response or objection is "not evasive," in addition to being consistent with the federal rules and applicable law. The revised Rule 26(g)(1)(B)(i) would read as follows:

> not evasive, consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

B. Rule 34(b) and 37(a)(3): Clarification of "Production" and "Inspection"

The provisions of the discovery rules governing requests for documents and other records contemplate an arrangement under which the responding party makes the requested documents available to the propounding party for inspection and copying.[19] The rules are largely silent regarding the more common practice today where the responding party's counsel simply produces copies of documents to the propounding party's counsel.

The practice of producing copies rather than permitting inspection has attained quasi-official status, at least for ESI, since 2006. The 2006 ESI amendment to Rule 34(b)(2) refers to "producing electronically stored information."[20] The Advisory Committee's note regarding the

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18. *See, e.g.*, Gibbs v. Union Pac. R.R. Co., No. 08-cv-00355-JPG, 2009 WL 2143772, at *5 (S.D. Ill. July 15, 2009) (finding that the plaintiff's "evasiveness and possible deceit warrant sanctions under Rule 26 because he certified that he was giving specific and complete information"); Kiobel v. Royal Dutch Petroleum Co., No. 02 Civ. 7618(KMW)(HBP), 2009 WL 1810104, at *2 (S.D.N.Y. June 25, 2009) ("Rule 26(g) is intended to deter and curb discovery abuses, including evasive responses, by 'explicitly encouraging the imposition of sanctions.'"); Covad Commc'ns Co. v. Revonet, Inc., 258 F.R.D. 17, 20 (D.D.C. 2009) (noting that an evasive interrogatory response "hardly comports with the obligation imposed by Rule 26(g)(1)(A)"); Aecon Bldgs., Inc. v. Zurich N. Am., No. C07-832MJP, 2008 WL 3927797, at *4 (W.D. Wash. Aug. 21, 2008) ("Rule [26(g)] allows the court to impose sanctions on the signer of a discovery response when the signing of the response is incomplete, evasive or objectively unreasonable under the circumstances." (internal quotation marks omitted) (quoting St. Paul Reinsurance Co. v. Commercial Fin. Corp., 198 F.R.D. 508, 515 (N.D. Iowa 2000))); Wagner v. Dryvit Sys., Inc., 208 F.R.D. 606, 609-10 (D. Neb. 2001):

> The parties have a duty to provide true, explicit, responsive, complete and candid answers to discovery, and their attorneys have a continuing duty to advise their clients of their duty to make honest, complete, non-evasive discovery disclosures, as well as the spectrum of sanctions they face for violating that duty.

(citation omitted); *see also* United States *ex rel.* Sequoia Orange Co. v. Baird-Neece Packing Corp., 182 F.3d 930 (9th Cir. 1999) (unpublished table decision) (noting that *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1545 (11th Cir. 1993), upheld Rule 26(g) sanctions for a "pattern of conduct" that included partial answers to discovery questions that were evasive and misleading).

19. *See, e.g.*, FED. R. CIV. P. 34(a)(1), (b)(1)(B).

20. *Id.* 34(b)(2)(D)–(E).

2006 amendment specifically discourages inspection of ESI storage systems:

> The addition of testing and sampling to Rule 34(a) with regard to documents and electronically stored information is not meant to create a routine right of direct access to a party's electronic information system, although such access might be justified in some circumstances. Courts should guard against undue intrusiveness resulting from inspecting or testing such systems.[21]

The immediate problem that this situation creates is uncertainty about timing requirements. Rule 34's provisions regarding time are all keyed to inspection, not production. Rule 34(b)(1)(B) states that the propounding party is required to "specify a reasonable time, place, and manner for the inspection and for performing the related acts" in its record request.[22] Under Rule 34(b)(2), the responding party must provide a written response within thirty days of the service of the request, in which it must state whether "inspection and related activities will be permitted as requested."[23] Thus, Rule 34 currently contemplates a date by which the propounding party will get its documents, at least if the inspection procedure is used. But where the responding party states that it will produce documents in response to a request, Rule 34 provides no direction as to when the production is to be made and completed.

This disconnect between the language of the rule and current practice also leads to uncertainty in the enforcement of requests. Rule 37(a) contemplates the inspection of documents by a propounding party, not the production of copies by the responding party. The Rule authorizes a propounding party to move to compel a discovery response where the responding party "fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34."[24] Rule 37 does not specifically address the situation where a responding party states that it will produce responsive documents but fails to produce them, fails to complete the production, or fails to state one way or the other whether production is complete. So-called "rolling productions," where a party periodically doles out documents over the course of many months with no set completion date, are now commonplace.[25]

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21. *Id.* 34 advisory committee's notes (2006).
22. *Id.* 34(b)(1)(B).
23. *Id.* 34(b)(2)(A)–(B).
24. *Id.* 37(a)(3)(B)(iv).
25. *See, e.g.*, Tierno v. Rite Aid Corp., No. C 05-02520 TEH, 2008 WL 3287035, at *4 (N.D. Cal. July 31, 2008). In response to plaintiff's motion to compel production of documents Rite Aid had agreed to produce, Rite Aid "protested that it would produce the documents on a rolling basis," but the court ordered production on a date certain. *Id.*; *see also* Race Tires Am., Inc. v. Hoosier Racing Tire Corp., No. 02:07cv1294, 2008 WL 2487835, at *2 (W.D. Pa. June 16, 2008) (observing that the party producing documents on a "rolling basis" refused to specify a date when the production would be complete).

The solution is to bring the provisions of Rules 34 and 37 in line with current discovery practices. First, Rule 37(a)(3)(B)(iv) should be amended to specifically authorize a motion to compel when a responding party "fails to produce documents." Second, a new provision should be added to Rule 34(b)(2)(B) to read:

> If the responding party elects to produce copies of documents or electronically stored information in lieu of permitting inspection, the response must state that copies will be produced and the production must be completed no later than the date for inspection stated in the request.

This proposal is not intended to minimize the burden of producing documents or the very real need for cooperation among parties and their counsel in discovery, as currently provided for in the rules. The collection and pre-production review of documents is unquestionably a difficult and time-consuming logistical feat. A party who seeks to compel compliance with wide-ranging requests without giving the producing party adequate time to search for and produce documents can expect to be met with a motion for a protective order under Rule 26(c). Large-scale review and production of documents has, however, been made somewhat less burdensome by the recent amendment of Federal Rule of Evidence 502(b) strengthening and clarifying protections against inadvertent waiver of attorney-client privilege and work-product protection,[26] as well as the related amendments to Rule 26(b)(5)(B) setting forth procedures for making claims of privilege and protection.[27]

In contrast, a propounding party has very few options when a responding party insists that it is acting in good faith, yet delays document production for months.[28] Without some *specific* timeframe for production—recognizing that current Rule 34(b)(1)(B) already expressly re-

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26. *See* FED. R. EVID. 502(b):
When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

27. *See* FED. R. CIV. P. 26(b)(5)(B):
If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

28. *See, e.g.*, U & I Corp. v. Advanced Med. Design, Inc., 251 F.R.D. 667, 675 (M.D. Fla. 2008) (responding party "repeatedly delayed the production of responsive documents" resulting in a "sporadic and incomplete document production" after four motions to compel); *In re* Seroquel Products Liab. Litig., 244 F.R.D 650, 661 (M.D. Fla. 2007) (noting party's "purposeful sluggishness" in production of electronic documents).

quires that the time specified in an inspection request be "reasonable"—the propounding party's ability to demonstrate that production has been unduly delayed will nearly always be uncertain. As a practical matter, it is difficult to say when delay becomes unreasonable in the absence of a deadline.

C. Rule 34(b)(2)(C): Specific Disclosure of the Withholding of Documents

While courts have repeatedly criticized the routine use of "boilerplate" objections to document requests, the practice remains common.[29] Parties routinely (and seemingly indiscriminately) object to virtually every request on the same grounds, including broad relevancy objections, objections that requests are unduly burdensome, harassing, or assume facts not in evidence, privacy objections, and attorney–client privilege/work-product objections.

A typical set of discovery responses begins with a list of "general objections" that run the gamut from ambiguity, undue burden, overbreadth and irrelevance, to objections that the requests seek confidential, proprietary, or trade secret information, work product, or attorney–client communications. Rarely tailored to the actual requests or the facts of the case, the objections often appear to be the responding law firm's state-of-the-art boilerplate insert.

The responses to specific requests usually incorporate the litany of "general objections" in its entirety, add some additional (or sometimes even duplicative) objections, and then state that "subject to and without waiving the foregoing objections," the responding party will produce documents in response to the request. Alternatively, the response may state that "based upon the foregoing objections" the responding party will not produce documents in response to the request.

It is not unusual for a single discovery request to be met with a dozen or more objections, regardless of whether the responding party agrees to produce responsive documents. The propounding party cannot determine whether any documents are actually being withheld on the basis of any of the objections, or even the specific objections relied upon.[30] Compounding the problem is the common practice of asserting

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29. *See, e.g.*, Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 358 (D. Md. 2008) (collecting cases: "[B]oilerplate objections that a request for discovery is 'overbroad and unduly burdensome, and not reasonably calculated to lead to the discovery of material admissible in evidence,' persist despite a litany of decisions from courts, including this one, that such objections are improper unless based on particularized facts." (citation omitted)); Burkybile v. Mitsubishi Motors Corp., No. 04 C 4932, 2006 WL 2325506, at *6 & n.6 (N.D. Ill. Aug. 2, 2006) (collecting cases: "Despite court[s'] repeated admonitions that these sorts of 'boilerplate' objections are ineffectual, their use continues unabated, with the consequent institutional burdens, and the needless imposition of costs on the opposing party." (citations omitted)).

30. *See, e.g.*, Cason-Merenda v. Detroit Med. Ctr., No. 06-15601, 2008 WL 4901095, at *4 (E.D. Mich. Nov. 12, 2008):

general objections "to the extent" they may apply to a particular request.[31] The upshot is that the propounding party is unable to assess the extent to which the responding party has complied with a discovery request.

The rules should be amended to conform to the judicial consensus against generalized and boilerplate objections by adding the following provision to Rule 34(b)(2)(C): "Each objection to a request or part thereof must specify whether any responsive documents are being withheld on the basis of that objection."

Requiring that the responding party specify whether documents have been withheld in response to a request would discourage the use of boilerplate objections. More importantly, the amendment would help the requesting party and the court determine what objections are actually "in play" for purposes of any motion for relief. Limiting the range of disputed issues should promote efficiency and control discovery costs.

CONCLUSION

The reluctance of courts to impose sanctions under Rule 37 has encouraged the use of evasive and dilatory behavior in response to discovery requests. Such behavior serves no purpose other than to increase the cost and delays of litigation. The amendments proposed in this Essay would discourage evasive and dilatory behavior without materially adding to the burden of discovery on the party producing documents. By requiring the responding party to certify that its responses to discovery requests are not evasive, state when responsive documents will be produced and whether documents will be withheld in response to any of its

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> Plaintiffs could reasonably be uncertain about precisely what information these Defendants would ultimately produce and what would be withheld. Although Defendants' complaints of overbreadth, undue burden, and irrelevance were included among their objections to the specific discovery request at issue, as opposed to in the section of their responses labeled 'general objections,' they presumably would concede that these objections also were 'general,' in the sense that they did not alert Plaintiffs to any specific information that would be withheld.

IO Group, Inc. v. Veoh Networks, Inc., No. C06-03926 HRL, 2007 WL 1113800, at *1 (N.D. Cal. Apr. 13, 2007):

> Here, Veoh asserted a number of General Objections which it, in boilerplate fashion, purported to incorporate into its specific responses—whether or not those objections were actually raised in response to a particular request. This practice obscures the extent to which Veoh is withholding information and does not satisfy the requirement for specificity under Fed. R. Civ. P. 34(b).

31. Swackhammer v. Sprint Corp. PCS, 225 F.R.D. 658, 660–61 (D. Kan. 2004):

> This Court has on several occasions disapproved of the practice of asserting a general objection 'to the extent' it may apply to particular requests for discovery. This Court has characterized these types of objections as worthless for anything beyond delay of the discovery. Such objections are considered mere hypothetical or contingent possibilities, where the objecting party makes no meaningful effort to show the application of any such theoretical objection to any request for discovery. Thus, this Court has deemed such ostensible objections waived or [has] declined to consider them as objections.

(alteration in original) (internal quotation marks omitted) (quoting Sonnino v. Univ. of Kan. Hosp. Auth., 221 F.R.D. 661, 666–67 (D. Kan. 2004)).

objections, the amendments seek to reduce expense and delay while ensuring that meritorious claims that depend on discoverable facts are fairly and promptly adjudicated.