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Heeding the 'Wake Up' Call on **Federal Rule of Civil Procedure 34**

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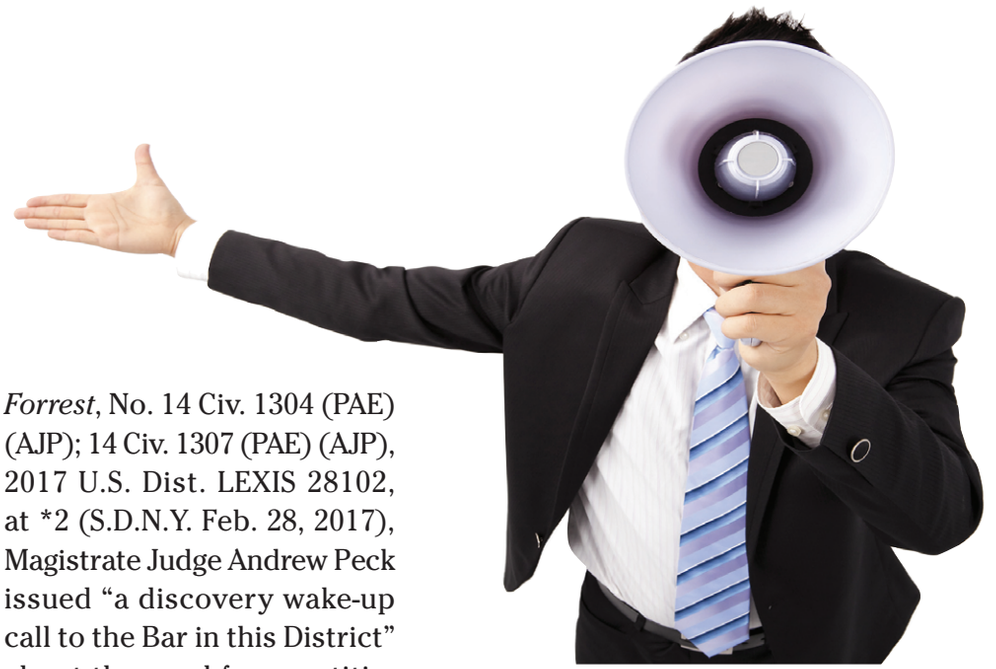
In 2015, the Federal Rules of Civil Procedure were amended to change, among other things, the procedure for responding to document requests under Rule 34(b). Effective as of Dec. 1, 2015, parties may no longer lodge general objections to document requests propounded by their adversaries but must, instead, "state with specificity the grounds for objecting to the request, including the reasons." In addition, Rule 34(b) now requires practitioners to state in their objections whether any responsive materials are being withheld, and, by virtue of a simultaneous amendment to Rule 26, it is no longer permissible to object on the grounds that a request is not reasonably calculated to lead to the discovery of admissible evidence.

Despite the passage of more than two years since these amendments went into effect, many practitioners are still unaware of them. In *Fischer v. Forrest*, No. 14 Civ. 1304 (PAE) (AJP); 14 Civ. 1307 (PAE) (AJP), 2017 U.S. Dist. LEXIS 28102, at *2 (S.D.N.Y. Feb. 28, 2017), Magistrate Judge Andrew Peck issued "a discovery wake-up call to the Bar in this District" about the need for practitioners to change their "form file" to comport with the 2015 amendments to Rules 34 and 26. In particular, Magistrate Judge Peck noted that it was no longer permissible for practitioners to incorporate general objections to discovery responses into their responses to specific requests. Indeed, "General objections should rarely be used after December 1, 2015 unless each such objection applies to each document request (e.g., objecting to produce privileged material)." Id. at *7. Magistrate Judge Peck also noted the need to update the language used in discovery responses to reflect the 2015 amendment's shift toward a new discovery threshold. Id. ("General Objection I also objects that the discovery is not 'likely to lead to the discovery of relevant, admissible evidence.' The 2015 amendments deleted that language from Rule 26(b)(1), and lawyers need to remove it from their jargon") (citation omitted). Magistrate Judge Peck further cautioned against objecting to a request as "overly broad and unduly burdensome,"



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an objection which he characterized as "meaningless boilerplate." Id. at *8.

Notwithstanding the passage of nearly a year since Magistrate Judge Peck issued his "discovery wake-up call" in *Fischer*, the problems outlined in that decision have persisted within the Second Circuit. Indeed, as recently as December 2017, Magistrate Judge Cott reiterated that objections on the basis of "undue burden" are no longer permissible in light of the specificity requirement under Rule 34, as amended in 2015. See *Edwards v. Hearst Commc'ns*, No. 15-CV-9279 (AT) (JLC), 2017 U.S. Dist. LEXIS 207540, at *20 (S.D.N.Y. Dec. 18, 2017) ("Hearst's response to Edwards' Request 34 is unsatisfactory. Its objections do not provide any basis for its assertion that the request is overly burdensome, and run afoul of Rule 34 … .")

Similarly, in November 2017, Magistrate Judge Donna Martinez rejected the plaintiffs' objection to certain discovery requests in *City of Hartford v. Monsanto Co.*, in light of the 2015 amendment to Rule 34. No. 3:15cv1544 (RNC), 2017 U.S. Dist. LEXIS 181651 (D. Conn. Nov. 2, 2017). In particular, Magistrate Judge Martinez found that the plaintiffs' discovery responses, which had been made "[s]ubject to and without waiving" their objections, were improper because: "[a]lthough this is a widespread practice, it leaves the requesting party uncertain as to whether the opposing party has fully answered its request and, importantly, is not contemplated by the Federal Rules of Civil Procedure … ." Id. at *4, n.1. The court reached this conclusion in light of the December 2015 amendment to Rule 34 and the advisory committee notes thereto, which clarified that the amendment was intended 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." Id. (citations omitted).

The failure of practitioners to adhere to the 2015 amendment to Rules 34 and 26, as addressed by Magistrate Judge Peck in *Fischer*, is a problem in numerous other circuits as well. See, e.g., *Team Contrs. v. Waypoint NOLA*, No. 16-1131 Section "E" (2), 2017 U.S. Dist. LEXIS 118653, at *5-6 (E.D. La. July 28, 2017) (rejecting "General Objections" as improper); *Berenson v. Adm'rs of the Tulane Educ. Fund*, No. 17-329 Section "R" (2), 2017 U.S. Dist. LEXIS 118651 (E.D. La. July 28, 2017) (same); *Cratty v. City of Wyandotte*, No. 17-10377, 2017 U.S. Dist. LEXIS 200194, at *5 (E.D. Mich. Nov. 8, 2017) ("the objections that the requested evidence was not relevant to the 'subject matter' and would not 'lead to admissible evidence' refer to an outdated version of Federal Rule of Civil Procedure 26(b)(1)"); *Sobol v. Imprimis Pharms.*, No. 16-14339, 2017 U.S. Dist. LEXIS 184478, at *11 (E.D. Mich. Oct. 26, 2017) ("Imprimis's general objections violated the specificity requirements of Rule 34"); *Caballero v. Bodega Latina Corp.*, No. 2:17-cv-00236-JAD-VCF, 2017 U.S. Dist. LEXIS 116869, at *4-5 (D. Nev. July 24, 2017) ("the 2015 amendments deleted the 'reasonably calculated' language from Rule 26(b)(1), and litigants need to 'remove it from their jargon.' But old habits die hard") (citations omitted); *Terrell v. IRS (In re Terrell)*, 569 B.R. 881, 888 (Bankr. W.D. Okla. 2017) (same); *Sream v. Hassan Hakim & Sarwar*, No. 16-cv-81600-MARRA/MATTHEWMAN, 2017 U.S. Dist. LEXIS 31491, at *4 (S.D. Fla. March 6, 2017) (pursuant to Fed. R. Civ. P. 34, "Plaintiff was required to produce the documents requested 'or state with specificity the grounds for objecting to the request, including the reasons.' Plaintiff did neither") (citation omitted).

It has been more than two years since Rule 34 was amended, and practitioners need to be mindful of this amendment. General objections, objections based on "undue burden," or those predicated on the claim that discovery requests are not reasonably calculated to lead to the discovery of admissible evidence, are no longer permissible under Rules 26 and 34(b), and the cautious practitioner would do well to heed Magistrate Judge Peck's warning and update his or her "form file" accordingly. Going forward, the consequences of *not* doing so could be dire. As Magistrate Judge Peck concluded in *Fischer*, "[f]rom now on in cases before this Court, any discovery response that does not comply with Rule 34's requirement to state objections with specificity (and to clearly indicate whether responsive material is being withheld on the basis of objection) will be deemed a waiver of all objections (except as to privilege)." *Fischer*, 2017 U.S. Dist. LEXIS 28102, at *9.