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Boilerplate objections in discovery—Tread lightly

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Are you addicted to responding to discovery requests with boilerplate objections? Well your cure might be a read of Judge Mark W. Bennett's March 13, 2017 Memorandum Opinion in *Liguria Foods, Inc. v. Griffith Labs., Inc.*, 2017 U.S. Dist. LEXIS 35370. Just flip to the end of the Opinion and you will find the following sentence in all capital letters: "NO MORE WARNINGS. IN THE FUTURE, USING "BOILERPLATE" OBJECTIONS TO DISCOVERY IN ANY CASE BEFORE ME PLACES COUNSEL AND THEIR CLIENTS AT RISK FOR SUBSTANTIAL SANCTIONS." The Opinion characterizes the misuse of boilerplate objections as an "addiction" and conduct that is "obstructionist." "Formal discovery under the Federal Rules of Civil Procedure," said Judge Bennett, "is one of the most abused and obfuscated aspects of our litigation practice." Judge Bennett then reminded us that "[f]ederal discovery rules and the cases interpreting them uniformly finding the 'boilerplate' discovery culture impermissible are not aspirational, they are the law." Got it. Memorize that sentence, for as Judge Bennett's Opinion frames the issue: "This case squarely presents the issue of why excellent, thoughtful, highly professional, and exceptionally civil and courteous lawyers are addicted to 'boilerplate' discovery objections."

Are you reading this Opinion and thinking of your past discovery work? I know that I am. If you think that federal district court judges elsewhere are not aware of this Opinion, I suggest you do a re-think.

Equally significant, is Judge Bennett's new Supplemental Trial Management Order set out at footnote 17 in the Opinion. It warns lawyers not to use form or boilerplate objections and that if they do they may be subject to sanctions. But the Order goes further and imposes an "affirmative duty to notify the court of alleged discovery abuse." Judge Bennett opines that since discovery responses are not filed with the court, judges no longer have access to the responses unless they are brought to the judge's attention in a motion. This circumstance, he finds, exacerbates the addiction to use boilerplate objections since "there is not only no incentive to bring the matter to the court's attention, there is a perverse incentive to bilaterally succumb to the addiction without the need to ever inform the court of the parties 'boilerplate' addiction."

So, assuming you are now getting the message, what does Judge Bennett suggest? He "encourages all lawyers when the receive 'boilerplate' objections, to informally request that opposing counsel withdraw them by citing the significant body of cases that condemn the 'boilerplate' discovery practice." He then suggests that if your opponent does not withdraw those objections, that "the lawyers should go to the court and seek relief in the form of significant sanctions–because the offending lawyers have been warned, given a safe harbor to reform and conform their 'boilerplate' discovery practices to the law, and failed to do so."

By the way, if you think Judge Bennett was not serious, take a quick look at his Opinion in which he provides a lengthy, detailed charting of the objection and the rules possible violated. Take a look at the objections he cites; look familiar in your cases?

In *Liguria Foods*, both parties were candid with the court and admitted that they could cite to no authority that condoned their boilerplate objections and that they conferred in a professional manner to resolve most of their differences in what was a complicated case involving voluminous discovery. Trial counsel also admitted to the court that the objections reflected the way in which they were trained, reflected that opposing counsel would make such objections, and that the litigation culture routinely involved the use of such objections. Judge Bennett noted that one of the involved attorneys "hit the nail squarely on the head when he asserted that such responses arise, at least in part out of 'lawyer paranoia' not to waive inadvertently any objections that might protect the parties they represent."

If you are having trouble remembering the pertinent federal discovery rules, Judge Bennett's Opinion lays them out for us: Rules 26, 33, and 34. His opinion also cites case law that reminds us that inadequate generalized objections are "tantamount to not making any objection at all." He gives us examples of such inadequate objections, including making discovery responses after stating that the response is subject to and without a waiver of the stated boilerplate objections. While Judge Bennett is in the Eighth Circuit, it will not take the practitioner long to compile the parallel Seventh Circuit case law that underlies the well-deserved lecture that Judge Bennett's Opinion gives to us.

Punctuating his concern is Judge Bennett's discussion in his Opinion about the use of sanctions to curb this abuse and how the more frequent abuse of sanctions is warranted. His opinion states that he "has suggested, more than once, in this opinion, that judges should be more involved in trying to eliminate discovery practices that are improper." Judge Bennett notes that he wrote on this topic more than twenty years ago. He also notes that "[o]ne resource available to judges, when they encounter attorneys willing to do so, is to use those attorneys to spread proper practices, rather than improper ones." To that, he was pleased to see that the involved attorneys intended "to take the steps that they have volunteered to take to improve discovery practices at their own firms and to educate their colleagues and law students on proper discovery responses." As Judge Bennett noted: "The legal culture of 'boilerplate' discovery objections will not change overnight. I trust these lawyers to do their part, as I will do mine."

So, it is time for us again to rethink our discovery practices; to re-read our federal practice rules; to heed the wise warnings from the federal judiciary; and to better understand our duties to our client, opposing counsel, and the court when we litigate in federal, as well as state, court. ■

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