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BREAKING THE BOILERPLATE HABIT IN CIVIL DISCOVERY

*Steven S. Gensler**
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I.	Introduction	683
II.	What do the 2015 Amendments Say About the Use of Boilerplate in Discovery?.....	686
	A. Boilerplate Objections	687
	B. Boilerplate Requests	693
	C. “Patterns” Can Be Good! Using Discovery Protocols to Promote Fairness and Proportionality.	696
III.	What <i>Can</i> Judges Do When Faced with Boilerplate Discovery?	699
	A. The Landmark Cases.....	699
	B. A Few Additional Observations.....	707
IV.	What Will It Take to Break the Boilerplate Habit? ...	711
	A. Understanding the Boilerplate Problem.....	711
	B. Are Sanctions the Answer? Or at Least an Answer?	716

I. INTRODUCTION

Boilerplate. The word elicits cringes from judges and lawyers alike. To see it is to understand the reaction. Stock, one-size-fits-all blocks of print inserted with little thought as to whether any, much less all, of the verbiage is warranted. Boilerplate has no place in civil discovery. It is the antithesis of what lawyers are supposed to do in making or responding to discovery requests. Boilerplate isn’t just empty content; it is the enemy of content. Each word of boilerplate reduces the clarity, value, and usefulness of the interrogatories, requests, responses, and objections it accompanies.

Some judges have been saying for a long time that boilerplate is improper and will be ignored.¹ Yet boilerplate is found in almost all discovery requests and responses. If anything, lawyers seem to use it even more today than in the past.² Modern word-processing programs make cutting and pasting boilerplate virtually effortless. Fear (also known as “CYA”) makes it even more attractive. Boilerplate, it seems, has a

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** Chief Judge, United States District Court, Southern District of Texas. We want to thank the University of Akron School of Law for hosting this symposium and for inviting us to participate. Throughout this Article, we make many unfootnoted assertions from our combined decades of observation and experience. Some are based on Judge Rosenthal’s 25-plus years of experience on the bench. Some are based on what we heard and learned from lawyers and judges across the country as co-moderators of the 17-city “Rules Amendment Roadshow,” sponsored by the American Bar Association Section of Litigation and the Duke Center for Judicial Studies. *See* Lee H. Rosenthal & Steven Gensler, *A Report from the Proportionality Roadshow*, 100 JUDICATURE 14 (2016) (describing the roadshow and summarizing key findings). Some are based on our experiences as rulemakers. Judge Rosenthal served as Chair of the Standing Committee on Rules of Practice and Procedure from 2007 to 2011 and served as a member of and later Chair of the Advisory Committee on Civil Rules from 1996 to 2007. Professor Gensler served as a member of the Advisory Committee on Civil Rules from 2005 to 2011. The opinions and conclusions stated in this Article are our own and should not be attributed to any of the committees on which we have served.

1. *See, e.g.*, *St. Paul Reinsurance Co., LTD. v. Commercial Fin. Corp.*, 198 F.R.D. 508, 511-13 (N.D. Iowa 2000) (extended criticism of boilerplate objections); *Walker v. Lakewood Condo. Owners Ass’n*, 186 F.R.D. 584, 587 (C.D. Cal. 1999) (“Boilerplate, generalized objections are inadequate and tantamount to not making any objection at all.”); *Athridge v. Aetna Cas. and Sur. Co.*, 184 F.R.D. 181, 190 (D.D.C. 1998) (“Aetna includes the standard, boilerplate ‘general objections’ section in its responses to plaintiffs’ request for production which includes blanket objections as to relevance, burdensomeness and attorney-client privilege and work product privilege. Such general objections do not comply with Fed. R. Civ. P. 34(b) and courts disfavor them.”); *In re Aircraft Disaster Near Roselawn, Ind.*, Oct. 31, 1994, 172 F.R.D. 295, 306-07 (N.D. Ill. 1997) (“The aircraft defendants have alleged pat, generic, non-specific objections to each document request, repeating the familiar boilerplate phrase that each and every request is ‘vague, overly broad, unduly burdensome, and seeks information that is not relevant . . .’ The[se] objections are inconsistent with both the letter and the spirit of the Federal Rules of Civil Procedure.”); *Obiajulu v. City of Rochester, Dep’t of Law*, 166 F.R.D. 293, 295 (W.D. N.Y. 1996) (“Such pat, generic, non-specific objections, intoning the same boilerplate language, are inconsistent with both the letter and spirit of the Federal Rules of Civil Procedure.”); *Roseberg v. Johns-Manville Corp.*, 85 F.R.D. 292, 296 (E.D. Pa. 1980) (“To voice a successful objection to an interrogatory, GAF cannot simply intone this familiar litany. Rather, GAF must show specifically how . . . each interrogatory is not relevant or how each question is overly broad, burdensome or oppressive.”).

2. We are not aware of empirical studies on the incidence of boilerplate in discovery. We base this assertion on our own experiences and what we have heard and learned from talking with judges and lawyers around the country. We are certainly not alone in the belief that the boilerplate problem seems to be getting worse. *See* Chief Justice Menis E. Ketchum II, *Impeding Discovery: Eliminating Worthless Interrogatory Instructions and Objections*, W.VA. LAW. 18, 20 (June 2012) (“More and more, I see interrogatory answers that assert some vague or gratuitous objection and then say ‘without waiving the objection, we will state the following. . . .’”).

toughness and resilience worthy of the steel plate from which it takes its name.³

In the last several years, more judges have put down their proverbial feet, warning lawyers of sanctions if they persist in their boilerplate practices.⁴ The judicial pushback received a boost from the 2015 amendments to the Civil Rules. Several judges have cited the amendments as signaling and supporting the need for renewed efforts to combat boilerplate discovery practices, as part of the larger effort to achieve proportionate, sensible discovery.⁵

This Article explores the resurgent anti-boilerplate movement. We begin with a look at the 2015 amendments to see why they have spurred some judges to take a stronger stand against the use of boilerplate in discovery. We then turn to recent decisions that have taken the strongest stance against boilerplate, examining the claim that boilerplate is not just an annoying bad habit but a serious form of discovery misconduct that exposes the lawyers who use it (and their clients) to significant sanctions. We then consider what more can or needs to be done. Boilerplate has persisted despite decades of near-universal disapproval. Why? Will the threat—or reality—of sanctions be enough to get lawyers to break their addiction to boilerplate? And will judges be willing to engage in the fight to end it?

In the pages that follow, we develop the following conclusions. First, the 2015 amendments very much speak to, and take aim at, boilerplate in discovery. The amendments to Rule 34 specifically target boilerplate objections. What is often overlooked is that the 2015 amendments also take aim at the equally pernicious practice of boilerplate requests. Second, the resurgent judicial condemnation of boilerplate discovery practices is real, well-founded, and broader than many realize. Boilerplate objections are insufficient under Rules 33 and 34, expose the user to expense shifting

3. The term “boilerplate” was coined to describe the rolled steel used to make the industrial water boilers that helped fuel the industrial revolution. In the early 1900s, however, people started using the term to describe the curved metal plates pre-stamped with generic, ready-to-print stories sent to multiple small local newspapers. The term became pejorative because the stories had no relevance or connection to the local readers. Their main value was to the newspaper, which could expand—perhaps “pad” is a better word—content with minimal effort and cost simply by adding the pre-stamped plates to the printing-press run. *See generally Boilerplate*, WIKIPEDIA, https://en.wikipedia.org/wiki/Boilerplate_text [<https://perma.cc/S6XH-HZ2E>] (last visited Feb. 21, 2018); *Boilerplate*, DICTIONARY.COM, <http://www.dictionary.com/browse/boilerplate> (last visited Feb. 21, 2018); *Boilerplate*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/boilerplate> (last visited Feb. 21, 2018).

4. *See infra* Section I.A.

5. *See, e.g., Fischer v. Forrest*, No. 14 Civ. 1304, 2017 WL 773694, at *1 (S.D. N.Y. Feb. 28, 2017).

under Rule 37(a)(5), and presumptively violate Rule 26(g). That much seems universally understood. But the boilerplate problem often begins earlier. Stock discovery requests—the questions a lawyer has included in each case since the Carter administration without thinking about whether the requests fit the needs of that case—almost by definition run afoul of Rule 26(b)'s proportionality requirement. The problem compounds when boilerplate requests are met with boilerplate objections. The circle must be broken at both ends.

That doesn't mean, however, that discovery must be hand-crafted from scratch in every case. To the contrary, standardized discovery mechanisms can be affirmatively helpful—so long as they are designed and used to foster efficient and proportional discovery, not to frustrate it. "Pattern" is not synonymous with boilerplate. The discovery protocols developed for adverse-employment and Fair Labor Standards Act (FLSA) actions, and being developed for other categories of cases, provide a roadmap for how discovery can be both tailored and routine at the same time.

So what can be done? Many of the factors that contributed to the spread of boilerplate are structural features of our discovery system that are not realistic candidates for change. What can be changed is the culture of acceptance. It is up to the judiciary—both individually, with each judge managing his or her docket, and as a group—to take a loud and visible stand against boilerplate. Judges must make it clear to lawyers that boilerplate requests and objections are no longer "business as usual," will not be tolerated, and will instead result in sanctions. Lawyers have been conditioned over the years to believe that they can use boilerplate without adverse consequence. Lawyers will continue to use boilerplate in discovery as long as judges let them. A few judges making examples of a few unlucky lawyers will not turn the tide. It needs to be a predictable consequence. If enough judges communicate the message, lawyers will get it. Then, but only then, will the practice change to achieve what the rules already require.

II. WHAT DO THE 2015 AMENDMENTS SAY ABOUT THE USE OF BOILERPLATE IN DISCOVERY?

When people think about the 2015 amendments to the Federal Rules of Civil Procedure,⁶ the word "boilerplate" probably doesn't come to

6. See SUPREME COURT OF THE UNITED STATES, PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE (2015). For a full discussion of the 2015 amendments and the accompanying Committee Notes, see STEVEN S. GENSLER, MOORE'S FEDERAL PRACTICE, THE 2015

mind. The “proportionality” amendments, or perhaps the “spoliation” amendment, is usually used to describe the 2015 rule changes, not the “anti-boilerplate” amendments. But several of the 2015 rule changes are, by design or effect, anti-boilerplate amendments. The 2015 amendments most visibly target boilerplate in the Rule 34 amendments, which directly address objections to document requests. The 2015 amendments’ emphasis on tailored discovery and proportionality is also part of the effort, directed at the problems caused by boilerplate discovery requests.

A. *Boilerplate Objections*

The 2015 amendments address the longstanding problem of boilerplate objections in two ways. One change to Rule 34 directly and obviously targets boilerplate objections. Another change to Rule 34 is, on the surface, not directed at boilerplate objections, but it operates to discourage them indirectly by stripping away a seeming tactical advantage parties often used boilerplate objections to attain.

The obvious and direct attack on boilerplate is the Rule 34(b) amendment requiring parties to state their objections “with specificity.”⁷ This requirement is new to the rule’s text but not to practice. In 1993, Rule 33 was amended to (among other things) require interrogatory objections to be “stated with specificity.”⁸ No similar specificity language was added to Rule 34 at that time. Nonetheless, judges had read a specificity requirement into both Rule 33 and Rule 34 long before 1993,⁹ and they continued to do so for Rule 34 after 1993.¹⁰ Indeed, many lawyers—and even many judges—were surprised to learn that the text of Rule 34 didn’t have a specificity requirement before 2015. But while lawyers and judges may have assumed a specificity requirement in Rule 34, few lawyers invoked it and few judges enforced it. The 2015 amendments to Rule 34 tried to change this by making the specificity requirement in Rule 34 clear. As the accompanying Committee Note explains, “[t]his provision adopts

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE, § 1.21(1) (Matt Bender, 3d ed. 2015) [hereinafter GENSLE, MOORE’S FEDERAL PRACTICE].

7. FED. R. CIV. P. 34 advisory committee’s note to 2015 amendment.

8. FED. R. CIV. P. 33 advisory committee’s note to 1993 amendment.

9. *See, e.g.,* *Roseberg v. Johns-Manville Corp.*, 85 F.R.D. 292, 296 (E.D. Pa. 1980) (“To voice a successful objection to an interrogatory, GAF cannot simply intone this familiar litany. Rather, GAF must show specifically how . . . each interrogatory is not relevant or how each question is overly broad, burdensome or oppressive.”).

10. *See, e.g.,* *Athridge v. Aetna Cas. and Sur. Co.*, 184 F.R.D. 181, 191 (D.D.C. 1998); *Pulsecard, Inc. v. Discover Card Services, Inc.*, 168 F.R.D. 295, 303 (D. Kan. 1996) (“Although Fed. R. Civ. P. 34 . . . provides no similar language with respect to specificity and waiver of objections, no reason exists to distinguish between interrogatories and requests for production.”).

the language of Rule 33(b)(4), eliminating any doubt that less specific objections might be suitable under Rule 34.”¹¹

The 2015 amendments also include an indirect and less obvious attack on boilerplate objections. The amendment to Rule 34(c) requires parties to state whether they are actually withholding responsive documents on the basis of their stated objections. On the surface, this appears targeted at a slightly different problem than boilerplate. During the 2010 Duke Conference on Civil Litigation, one of the participants, Daniel Girard, called attention to a problem that he routinely encountered in his practice as a plaintiff-side complex litigation lawyer and that he had written about in an article submitted in conjunction with the Conference.¹² Girard described often receiving Rule 34 responses that began with a long list of generalized objections and ended with the statement that some documents would be produced “subject to” those objections.¹³ The problem, he explained, is that there was no way for a lawyer receiving that response to know whether any responsive materials were actually being withheld; if so, what was produced and what was not; and the specific reason for not producing what was withheld.¹⁴ His proposed solution was to amend Rule 34 to require responding parties to state whether any responsive documents were being withheld on the basis of a specific objection.¹⁵ The Advisory Committee agreed, leading to the 2015 amendment requiring that “[a]n objection must state whether any responsive materials are being withheld on the basis of that objection.”¹⁶

This amendment is intended in part to provide clarity about the effect of the objections that are made. The Advisory Committee hoped 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.”¹⁷ But the amendment is also an attack on the use of boilerplate objections. If a lawyer is allowed to state generalized and nonspecific boilerplate objections to a discovery request

11. FED. R. CIV. P. 34 advisory committee’s note to 2015 amendment.

12. See Daniel C. Girard & Todd I. Espinosa, *Limiting Evasive Discovery: A Proposal for Three Cost-Saving Amendments to the Federal Rules*, 87 DEN. U. L. REV. 473 (2010). Dan Girard was a member of the Civil Rules Advisory Committee at the time and participated as a panelist at the Duke Conference. See 2010 CIVIL LITIGATION CONFERENCE, <http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/special-projects-rules-committees/2010-civil> [<http://perma.cc/96DW-9CN4>] (last visited Feb. 15, 2018).

13. Girard & Espinosa, *supra* note 12, at 482.

14. *Id.* at 482-83.

15. *Id.* at 483.

16. FED. R. CIV. P. 34(c).

17. FED. R. CIV. P. 34 advisory committee’s note to 2015 amendment.

and is allowed to respond “subject to” those boilerplate objections, that lawyer and client get a significant tactical advantage. They appear to be fulfilling the rule obligation to respond, but it is an illusion. The responding party has effectively concealed both its views on the propriety of the request and the actions taken in response. Was the entire request objectionable, or just part? If only a part was objectionable, which part, and why? Was the information called for by the not-objectionable part produced? If not, why not? In effect, the hedge language of “subject to” or “to the extent that” is a mask. The boilerplate makes the nonresponse look like a legitimate response. Obfuscation is itself obscured. If the mask is removed by making parties say what they did (or didn’t do) on the basis of the boilerplate objections they assert, one advantage of using the boilerplate objections is removed. As Girard correctly observed, “[r]equiring that the responding party specify whether documents have been withheld in response to a request would discourage the use of boilerplate objections.”¹⁸

While the word “boilerplate” doesn’t appear in the text of the amendments to Rule 34 or the accompanying Committee Note,¹⁹ the Advisory Committee understood this change as part of its attack on using boilerplate objections. During the rulemaking process, the connection between “subject to” responses and boilerplate objections was repeatedly recognized.²⁰ In his memorandum forwarding the 2015 proposed amendments to the Standing Committee on Rules of Practice and Procedure, Judge David Campbell, then Chair of the Civil Rules Advisory Committee and later Chair of the Standing Committee on the Rules of Practice and Procedure, explained that one purpose of the Rule 34 amendments was to address “the use of broad, boilerplate objections that provide little information about the true reason a party is objecting.”²¹

18. Girard & Espinosa, *supra* note 12, at 482-83.

19. Ironically, it does appear in the Committee Note accompanying the amendments to Rule 26, which warns lawyers against making boilerplate “proportionality” objections. *See* FED. R. CIV. P. 26 advisory committee’s note to 2015 amendment.

20. *See Duke Conf. Subcomm. Menu: Rule Proposals*, at 9, in ADVISORY COMMITTEE ON CIVIL RULES 357 (2010), http://www.uscourts.gov/sites/default/files/fr_import/CV2010-11.pdf [<https://perma.cc/G3KP-XFZE>]; *Conf. Subcomm. March Agenda*, at 4, in ADVISORY COMMITTEE ON CIVIL RULES 275 (2011), http://www.uscourts.gov/sites/default/files/fr_import/CV2011-04.pdf [<https://perma.cc/C9N4-BHUY>]; *Duke Conf. Subcomm. Rule Sketches*, at 30-31, in ADVISORY COMMITTEE ON CIVIL RULES 404-05 (2012), http://www.uscourts.gov/sites/default/files/fr_import/CV2012-03.pdf [<https://perma.cc/39BN-XKAH>].

21. SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 85 (2014), http://www.uscourts.gov/sites/default/files/fr_import/ST09-2014.pdf [<https://perma.cc/537S-B3LH>]. *See also* Judge David G. Campbell, *New Rules, New Opportunities*, 99 JUDICATURE 19, 22 (Winter 2015) (“These amendments should eliminate . . . the

To be clear, the boilerplate objections the Advisory Committee targeted with the 2015 amendments—and the objections addressed in this Article—are the broad, vague, and unsupported objections asserting burden, relevance, or other scope-related grounds. The Advisory Committee was not targeting—and we are not addressing—boilerplate objections based on privilege or work-product protection. There have been problems with boilerplate privilege and work-product objections, but the rules were amended in 1991 and 1993 to provide a mechanism to address them.

Until 1991, the rules did not specifically address how to raise claims of privilege or work-product protection.²² Many, but not all, courts filled that void with an ad hoc solution that required parties to make privilege and work-product objections specifically and to provide a log listing the items being withheld and why. This solution adopted the requirement known as a “Vaughn Index,” developed in the context of FOIA requests, and applied it to discovery.²³ But complaints about “general” and “blanket” assertions of privilege and work-product objections continued. In response, the Advisory Committee developed proposals that would require both parties responding to discovery requests and nonparties responding to subpoenas to expressly assert claims of privilege and work-product and to provide enough information for the requesting party to assess the sufficiency of the claims.

The Committee first adopted an amendment for subpoenas in 1991 with the addition of Rule 45(d)(2),²⁴ and in 1993 extended it to party discovery responses with the addition of Rule 26(b)(5).²⁵ That section currently provides:

When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-

use of broad, boilerplate objections that provide little information about the true reason a party is objecting to a document request.”).

22. See 8 WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2016.1, at 320 (2010). See also Hon. John M. Facciola & Jonathan M. Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, 4 FED. CTS. L. REV. 19, 24-27 (2009) (discussing districts that implemented a privilege log requirement by local rule).

23. See, e.g., *Harper v. Auto-Owners Ins. Co.*, 138 F.R.D. 655, 664 (S.D. Ind. 1991); *Snowden v. Connaught Labs., Inc.*, 137 F.R.D. 325, 334 (D. Kan. 1991); *United States v. Exxon Corp.*, 87 F.R.D. 624, 637-38 (D.D.C. 1980).

24. See FED. R. CIV. P. 45 advisory committee’s note to 1991 amendment.

25. See FED. R. CIV. P. 26 advisory committee’s note to 1993 amendment. The Rule 45 and Rule 26 provisions were developed simultaneously by the Advisory Committee with the intent that they would be implemented at the same time, but the Rule 26 provision was delayed by two years when the Supreme Court withdrew it from the package of proposals it forwarded to Congress in 1991. See FED. R. CIV. P. 45 advisory committee’s note to 1991 amendment.

preparation material, the party must: (i) expressly make the claim; and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.²⁶

When parties are responding to document requests, they customarily satisfy Rule 26(b)(5)(A) by providing a privilege log.²⁷

Nothing in the 2015 amendments disturbed practice under Rule 26(b)(5)(A), which continued to govern how parties assert objections based on privilege and work-product protection. There was no need in 2015 for the rulemakers to impose a “specificity” requirement for privilege or work-product objections, or to enact a new requirement for parties to state whether they were withholding anything on the basis of privilege or work-product objections. Rule 26(b)(5) already imposed those obligations in ways that are at least as demanding as what Rule 34 now requires for burden and scope-based objections. Indeed, the Advisory Committee was careful to make clear that the Rule 34 requirement that parties state whether they are withholding any responsive materials on the basis of an objection is not as demanding as the obligation imposed by Rule 26(b)(5)(A) when privilege or work-product objections are raised. As the Committee Note explains:

The producing party does not need to provide a detailed description or log of all documents withheld, but does need to alert other parties to the fact that documents have been withheld and thereby facilitate an informed discussion of the objection. An objection that states the limits that have controlled the search for responsive and relevant materials qualifies as a statement that the materials have been ‘withheld.’²⁸

26. FED. R. CIV. P. 26(b)(5)(A).

27. See STEVEN S. GENSLER, FEDERAL RULES OF CIVIL PROCEDURE: RULES AND COMMENTARY 766 (West 2018) [hereinafter GENSLER, RULES AND COMMENTARY] (“In the context of document discovery, it has become customary for the party claiming privilege or work-product protection to produce a privilege log that contains the facts and circumstances sufficient to establish each element of the claimed privilege for each document.”).

28. FED. R. CIV. P. 34 advisory committee’s note to 2015 amendment. Ironically, the rulemakers seem to have anticipated this mechanism in the Committee Notes to the 1993 amendment adding Rule 26(b)(5). The Committee Note describes a situation where a request seeks documents for a twenty-year period, but the responding party believes it should have to go back only three years. FED. R. CIV. P. 26 advisory committee’s note to 1993 amendment. The question at issue was whether the party would waive any claim of privilege as to the documents it did not intend to review at that time because they were outside the three-year period. The Committee Note explains that the responding party “should make its objection to the breadth of the request and, with respect to the documents generated in that three-year period, produce the unprivileged documents and describe those withheld under the claim of privilege. If the court later rules that documents for a seven-year

The 2015 amendment tries to avoid requiring an onerous, expensive, detailed privilege log, opting instead for a more functional and practical approach.

That is not to say that parties invariably *meet* their obligations under Rule 26(b)(5). To the frustration of judges and opposing counsel, lawyers still sometimes make insufficient “boilerplate” privilege and work-product objections.²⁹ Though neither Rule 26(b)(5) nor Rule 34 specify the consequences of failing to make proper privilege or work-product objections, the courts consistently hold that a possible consequence is waiver of the privilege or work-product protection.³⁰ As discussed later, waiver can be a problematic sanction for insufficiently-stated burden or scope-based objections because, if the request was in fact too broad or too burdensome, then waiver of the objections results in discovery extending to matters and materials outside the boundaries of relevance and proportionality.³¹ That problem does not exist when claims of privilege or work-production protection are waived, however, since the effect of this waiver is not to expand discovery beyond the proper scope, but rather to require the production of materials within the scope of discovery that otherwise could have been held back. This is yet another reason to keep practice under Rule 26(b)(5) separate from practice involving burden or scope-based objections.

period are properly discoverable, the documents for the additional four years should then be either produced (if not privileged) or described (if claimed to be privileged).” *Id.* Viewing this scenario through the lens of the 2015 amendments, it is clear that what the Committee Note is describing is a scope objection that satisfies what is now Rule 34(b)(2)(C) by making clear that the response goes back only three years, joined with a privilege objection that must independently satisfy Rule 26(b)(5)(A) for the three-year period for which a response is being made, subject to having to expand the response and provide a privilege log for any additional periods the court later determines to be within the proper scope of discovery.

29. In our experience, the biggest problem with privilege and work-product objections isn’t that they are made in boilerplate fashion but that they are made too broadly, sometimes out of a fear of waiver should something slip through the cracks. *See* GENSLER, RULES AND COMMENTARY, *supra* note 27, at 732 (discussing how fear of waiver can lead to extravagant privilege review efforts). The 2008 enactment of Federal Rule of Evidence 502 represented a major effort to combat that problem by limiting the circumstances in which waiver may be found and by providing a mechanism for the court to enter a non-waiver order. *See* FED. R. EVID. 502; *see also* Explanatory Note on Evidence Rule 502 Prepared by the Advisory Committee on Evidence Rules.

30. *See, e.g.,* Burlington Northern & Santa Fe Ry. Co. v. U.S. Dist. Court for Dist. of Mont., 408 F.3d 1142, 1149 (9th Cir. 2005); United States v. British American Tobacco (Investments) Ltd., 387 F.3d 884, 890-91 (D.C. Cir. 2004). *See generally* GENSLER, RULES AND COMMENTARY, *supra* note 27, at 771-73 (discussing case law on privilege waiver). The Committee Note to the 1993 amendment to Rule 26 states that withholding materials without giving the notice required by subsection (b)(5) “may be viewed as a waiver of the privilege or protection.” FED. R. CIV. P. 26 advisory committee’s note to 1993 amendment.

31. *See infra* text accompanying notes 125-127.

In summary, the 2015 amendments to Rule 34 target boilerplate burden and scope-based objections in two ways. First, they enshrine in rule text the requirement that objections to document requests be made with specificity. Second, they require parties to state whether they are actually withholding materials on the basis of their objections, so responding parties cannot hide behind evasive “subject to” objections. So far, so good. But more is needed to help alleviate the costs, burden, and delays of discovery. Fortunately, more is provided.

B. *Boilerplate Requests*

Most of the case law and commentary on boilerplate discovery focuses on objections.³² But the problem often starts earlier, with the discovery requests themselves. Too often, lawyers endlessly recycle their stock interrogatories and document requests—the ones that almost always have the dreaded words “any and all” repeated over and over—sometimes doing nothing more than changing the names of the parties and the dates

32. See, e.g., *St. Paul Reinsurance Co., LTD. v. Commercial Financial Corp.*, 198 F.R.D. 508 (N.D. Iowa 2000), *Athridge v. Aetna Cas. and Sur. Co.*, 184 F.R.D. 181 (D.D.C. 1998), *In re Aircrash Disaster Near Roselawn, Ind.* Oct. 31, 1994, 172 F.R.D. 295 (N.D. Ill. 1997), *Obiajulu v. City of Rochester, Dep’t of Law*, 166 F.R.D. 293 (W.D. N.Y. 1996), and *Roseberg v. Johns-Manville Corp.*, 85 F.R.D. 292 (E.D. Pa. 1980). For a sampling of the recent commentary from lawyers about the problem of boilerplate objections and the recent judicial pushback, see Andrew Pepper, *The Death of Boilerplate Discovery Objections in Federal Court*, CASE TEXT (Mar. 21, 2017), <https://casetext.com/posts/bench-slapped-the-death-of-boilerplate-discovery-objections> [<https://perma.cc/FQP9-QMFS>]; Shannon McClure & Kristen Ashe, *No More General Objections? How Two Words Changed the Discovery Landscape*, THE LEGAL INTELLIGENCER (Aug. 24, 2017), <https://www.law.com/thelegalintelligencer/almID/1202796379681/No-More-General-Objections-How-Two-Words-Changed-the-Discovery-Landscape/?sreturn=20180117113503> [<https://perma.cc/DP52-VBXW>]; Jeffery Kruse, *Federal Judges Blow Their Stacks Over Boilerplate Objections*, MONDAQ (May 19, 2017), <http://www.mondaq.com/unitedstates/x/591010/Civil+Law/Federal+Judges+Blow+Their+Stacks+Over+Boilerplate+Objections> [<https://perma.cc/4DZU-DSHM>]; Michael Lowry, *Seriously, Boilerplate Objections Are a Bad Idea*, COMPELLING DISCOVERY (Mar. 20, 2017), <https://www.compellingdiscovery.com/?p=4366> [<https://perma.cc/8RTT-53HX>]; Nicholas J. Brannick, *Courts Make Clear that General Objections are Generally Inappropriate*, COLE SHOTZ P.C. BANKRUPTCY AND RESTRUCTURING LAW (Apr. 24, 2017), <https://www.csbankruptcyblog.com/2017/04/articles/bankruptcy-litigation/courts-make-clear-general-objections-generally-inappropriate/> [<https://perma.cc/BS72-6HST>]; Erin Louise Palmer, *Boilerplate Discovery Objections May Result in Waiver*, AM. BAR ASS’N LITIG. NEWS (June 14, 2017), <https://www.americanbar.org/publications/litigation-news/top-stories/2017/boilerplate-discovery-objections-may-result-in-waiver.html> [<https://perma.cc/3T4D-PTTT>]; David Goldhaber & David Ross, *Federal Judges Are Tired of “Stock” Discovery Objections*, LAW360 (May 3, 2017), <https://www.law360.com/articles/919639/federal-judges-are-tired-of-stock-discovery-objections> [<https://perma.cc/VZ8J-9YQB>]; Tracy DiFillippo, *Specific Objections Succeed under Discovery Rule Amendments*, 42 NO. 2 ABA SECTION OF LITIGATION 28 (Winter 2017); Stanley P. Santire, *Discovery Objections Abuse in Federal Courts*, 54-AUG. HOUS. LAW. 24 (July/Aug. 2016).

(and sometimes not even doing that). That too is a form of boilerplate, a form that the 2015 amendments seek to end.

The 2015 amendments are, in large part, the culmination of work undertaken after the 2010 conference at the Duke University Law School to assess whether the existing rules scheme was meeting the goals set forth in Rule 1—the “just, speedy, and inexpensive determination of every action.”³³ In their report to the Chief Justice following the Duke Conference, the Advisory Committee on the Civil Rules and the Standing Committee stated that those attending the Conference—plaintiff and defense lawyers from public and private practice; judges, state and federal, trial and appellate; and academics—found much to disagree about. But a strong consensus emerged on a few central points. As the Advisory Committee put it in its Report to the Chief Justice: “What is needed can be described, in two words—cooperation and proportionality—and one phrase—sustained, active, hands-on judicial case management.”³⁴ Over the next several years, the Advisory Committee explored specific rule amendment proposals designed to further these goals.

Boilerplate discovery requests and responses are at odds with three of the 2015 amendments’ major reform efforts: (1) making proportionality an explicit limit on the scope of discovery; (2) requiring lawyers to take the Rule 26(f) discovery planning conference seriously; and (3) encouraging judges to engage in more active and earlier case—and discovery—management.³⁵ Stock sets of discovery requests, sent in every case without thought to whether the information and documents sought are in fact needed for the particular case, let alone worth the cost of getting for that case, are inherently at odds with proportional discovery and with the rule changes designed to achieve it. (As we will see later, they also invite expense shifting under Rule 37(a)(5) and sanctions under Rule 26(g).)

It is understandable that lawyers find comfort and efficiency in forms and routines. Departing from past practices is riskier than simply repeating the practices that seemed to work just fine before. Lawyers are hardly immune from the pull of “CYA” thinking. That pull is especially

33. See GENSLER, MOORE’S FEDERAL PRACTICE, *supra* note 6.

34. JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES AND COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010 CONFERENCE ON CIVIL LITIGATION 4 (2010), http://www.uscourts.gov/sites/default/files/report_to_the_chief_justice.pdf [<https://perma.cc/R83F-YNRM>] [hereinafter REPORT ON 2010 CONFERENCE ON CIVIL LITIGATION].

35. See Campbell, *supra* note 21 (discussing the major goals of the 2015 amendments).

strong when junior lawyers mimic the behavior of their senior-lawyer supervisors. And there is certainly no reason that lawyers should reinvent the wheel in every case, drafting every interrogatory and every document request from scratch. (More on that in a moment.) But too often lawyers serve the same set of cookie-cutter-cover-the-landscape-scorched-earth discovery requests in every case, making no effort to tailor the requests to fit the needs of the individual case. Making no effort, in the terms of the 2015 amendments, to be proportional. Making no effort, in plain English terms, to be reasonable. The response, predictably, is boilerplate objections. The predictable result of boilerplate requests and objections are the lawyers' and litigants'—and judges' and legislators'—complaints about discovery abuse and the costs and delays it imposes.

Sometimes lawyers crank out their “standard” sets of discovery requests because they are unsure at the start of the lawsuit of what they will actually need or how best to get it. But there is a better way to achieve individual-case-tailored (and therefore proportional) discovery. That is for the parties to communicate with each other, early, to identify the issues about which they most need information and to use that information to establish discovery priorities. The Advisory Committee Notes to the 2015 amendments to Rule 26 emphasize how important it is for parties to use the Rule 26(f) discovery-planning conference to communicate with each other about what discovery they need, why they need it, and the burdens of providing it.³⁶ The amendment to Rule 1 to promote party cooperation during the discovery process makes clear that this type of candid exchange is an important part of making the discovery process work effectively for all.³⁷

The amendments also encourage judges to get involved in managing discovery early, to try to address problems before they reach full bloom.³⁸ The amendments underscore this by encouraging judges to hold “live” Rule 16 initial pretrial conferences and using them to tailor discovery to the particular case. In his 2015 Year-End Report, Chief Justice Roberts highlighted the benefits that accrue when judges “take on a stewardship role” and actively manage their cases from the outset, including the

36. FED. R. CIV. P. 26 advisory committee's note to 2015 amendment.

37. See FED. R. CIV. P. 1 advisory committee's note to 2015 amendment (“Effective advocacy is consistent with—and indeed depends upon—cooperative and proportional use of procedure.”).

38. See FED. R. CIV. P. 26 advisory committee's note to 2015 amendment.

enhanced ability to “determine the appropriate breadth of discovery, and curtail dilatory tactics, gamesmanship, and procedural posturing.”³⁹

Those three themes—cooperation, proportionality, and active case management—combine to provide practical solutions to the boilerplate discovery problem. Lawyers act differently when they know they are being watched. Lawyers prepare differently when they know they will be before judges willing to work—indeed, insistent on working—with lawyers who have thought about their cases and the discovery they need and want, to craft case-specific proportional discovery plans. Lawyers are less likely to churn out boilerplate discovery requests or assert boilerplate objections when they know they will have to explain them to the judge at a live Rule 16 initial case-management conference.

C. “Patterns” Can Be Good! Using Discovery Protocols to Promote Fairness and Proportionality.

Long experience has taught the rulemakers that there are limits to what changing rule text can accomplish. In their Report to the Chief Justice on the 2010 Duke Conference, the Advisory Committee and the Standing Committee outlined a three-pronged plan to address the problems identified during the Conference.⁴⁰ One prong, of course, was to follow up on ideas for possible rule changes; that work led directly to the 2015 amendments.⁴¹ A second prong focused on identifying more and better opportunities to educate judges and lawyers about the benefits of cooperation, proportionality, and active case-management.⁴² A third prong entailed working with stakeholders of all types—including judges, bar organizations, legal reform groups, and academics—to develop specific techniques and mechanisms that would complement the Advisory Committee’s reform efforts.⁴³ One of the ideas mentioned favorably in the report was a project already underway to develop “pattern” discovery requests for specific categories of litigation. As the Report explained, “[s]uch pattern discovery requests would be presumptively unobjectionable and could save both sides time and money, and spare the court some of the skirmishing that now occurs.”⁴⁴

39. 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 10-11 (2015), <https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf> [<https://perma.cc/R6ZV-C9KL>].

40. REPORT ON 2010 CONFERENCE ON CIVIL LITIGATION, *supra* note 34, at 4.

41. *Id.* at 5-10.

42. *Id.* at 10-11.

43. *Id.* at 11-12.

44. *Id.* at 10-11.

During the following year, a nationwide committee of experienced employment law attorneys, balanced between plaintiff and defense attorneys, worked with Judge John Koeltl and Judge Lee Rosenthal to draft the *Initial Discovery Protocols for Employment Cases Alleging Adverse Action* (Employment Case Protocols).⁴⁵ The lawyers negotiated to identify categories of information and documents that lie at the core of discoverable information in any adverse action case. Under the Employment Case Protocols, the parties must provide the specified information and documents to the other side at the start of the case without waiting for a formal request and without interposing objections.⁴⁶ There is no need to wait because requests for such core material are inevitable, and there is no need for objections because the categories were identified and drawn to ensure that the information and documents would be relevant and proportional. The Employment Case Protocols were endorsed by the Civil Rules Advisory Committee but the choice whether to use them was left to individual judges and districts.⁴⁷

The Federal Judicial Center (FJC) reported on the success of the Employment Case Protocols in October 2015.⁴⁸ At that time, the Employment Case Protocols had been adopted by about 75 federal judges across the country. The FJC found that the incidence of discovery motions—either motions to compel or motions for protective orders—had been cut nearly in half.⁴⁹ This finding was “consistent with the hypothesis that the pattern discovery required under the pilot was effective in reducing discovery disputes and perhaps reducing costs—assuming, that is, that fewer motions correspond with lower costs overall.”⁵⁰ In other words, as predicted, requiring lawyers to turn over the obviously relevant and proportional discovery materials without delay and without a fight

45. See PILOT PROJECT REGARDING INITIAL DISCOVERY PROTOCOLS FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION 1 (2011), <https://www.fjc.gov/sites/default/files/2012/DiscEmpl.pdf> [<https://perma.cc/7F3W-49R8>].

46. *Id.* at 6-9.

47. *Id.* at 4 (“The Initial Discovery Protocols for Employment Cases Alleging Adverse Action is a proposal designed to be implemented as a pilot project by individual judges throughout the United States District Courts. The project and the product are endorsed by the Civil Rules Advisory Committee.”).

48. See Emery G. Lee III & Jason A. Cantone, *Report of Pilot Project Regarding Initial Discovery Protocols for Employment Cases Alleging Adverse Action* (2015), <https://www.fjc.gov/content/309827/report-pilot-project-regarding-initial-discovery-protocols-employment-cases-alleging> [<https://perma.cc/MU7G-PWRY>].

49. *Id.* at 1.

50. *Id.* at 4.

streamlined the discovery process and avoided opportunities for gamesmanship.⁵¹

The success of the Employment Case Protocols has led to the development of protocols designed for other types of cases. In January 2018, the FJC made available on its website the *Initial Discovery Protocols for Fair Labor Standards Act Cases Not Pleaded as Collective Actions* (FLSA Protocols).⁵² Like the Employment Case Protocols, the FLSA Protocols were the product of lengthy discussions involving experienced lawyers from both sides of the “v.” The model is the same. The FLSA Protocols identify categories of information and documents that the parties must produce at the start of the lawsuit without waiting for a formal discovery request, and generally prohibit objections other than for attorney-client privilege or work-product protection.⁵³ And the goal is the same. By having the parties produce the core discovery information up front and without a fight, the parties can bypass the typical wasteful early posturing and skirmishing. The parties instead can focus on the merits, including determining what, if any, additional discovery might be needed. Efforts are underway to expand the set of available Protocols to other areas, including insurance cases.

For an article in which the prevailing theme is “boilerplate” is “bad,” it may seem odd to encounter a section promoting the use of “pattern” discovery practices. Not to us. Something becomes boilerplate not because it is used repeatedly but because it is used thoughtlessly. As Judge Grimm once put it, boilerplate discovery is discovery that is conducted “reflexively but not reflectively.”⁵⁴ By this measure, the Protocols should not be viewed as a form of “good” boilerplate because they should not be viewed as boilerplate at all.

The Protocols show that lawyers do not need to reinvent the wheel in every case to achieve thoughtful and proportional discovery. The defining characteristics of boilerplate are lack of thought and lack of effort to make sure that the words in question are used for a reason and not just out of habit or for CYA. The Protocols work precisely because of all the good thought and effort that went into their making. They are “pattern” but not boilerplate because they are tailored in advance to meet the specific needs of those cases. The cases in the categories covered by the

51. *Id.* at 2.

52. *See* INITIAL DISCOVERY PROTOCOLS FOR FAIR LABOR STANDARDS ACT CASES NOT PLEADED AS COLLECTIVE ACTIONS (Jan. 8, 2018), <https://www.fjc.gov/content/327796/initial-discovery-protocols-flsa-2018> [<https://perma.cc/36HL-55A2>].

53. *Id.* at 6-9.

54. *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 358 (D. Md. 2008).

Protocols assert similar legal theories and involve similar fact patterns. The lawyers that developed them used their experience to identify the basic information that parties need to exchange in every case. The Protocols are the result of an enormous amount of reflection on the discovery needs of those types of cases, resulting in a discovery process that is more tailored and more focused, not less.

III. WHAT CAN JUDGES DO WHEN FACED WITH BOILERPLATE DISCOVERY?

Recently, a small but growing cadre of judges has taken a firm stand against boilerplate, making clear that they will no longer look the other way and warning of consequences ranging from automatic waiver to significant sanctions. Some of the landmark cases and other unpublished cases of note from the last ten years have much to teach. We add to those lessons a few observations and recommendations of our own.

A. *The Landmark Cases*

Perhaps the most prominent and influential of the modern anti-boilerplate cases is Judge Paul Grimm's decision in *Mancia v. Mayflower Textile Services Co.*⁵⁵ Judge Grimm, then a magistrate judge, had been referred motions to compel to resolve on memorandum and recommendation. While reading the briefs and accompanying materials, Judge Grimm concluded that both parties had likely violated their discovery obligations.⁵⁶ The plaintiffs had sought excessive boilerplate discovery and the defendants had responded with boilerplate objections. Rather than rule on the briefs, Judge Grimm held a live hearing on the motions.⁵⁷ He used the hearing to explain how the lawyer cows ate the discovery cabbage and violated the discovery rules. Judge Grimm neither ignored the violations, nor promptly issued sanctions. Instead, he told the parties that their best option would be to start genuinely communicating with each other and cooperating to get the discovery they needed done fairly, efficiently, and cost-effectively.⁵⁸ As Judge Grimm would elaborate in his written opinion following the hearing, cooperating did not mean giving in on legitimate differences over the boundaries of relevance, or privilege, or proportionality. Cooperating meant giving up posturing, inflexibility, and an insistence on getting everything at the outset or on

55. *Id.* at 358.

56. *Id.* at 356.

57. *Id.*

58. *Id.*

providing nothing, ever. The opinion memorialized Judge Grimm's guidance for the bar (and bench) generally.

Judge Grimm's *Mancia* opinion brought to center stage an all-but-forgotten part of Rule 26 introduced 25 years earlier in 1983: Rule 26(g). Under Rule 26(g), the attorneys who sign discovery papers certify that the contents—whether they are requests, responses, or objections—are warranted by the circumstances, not interposed for an improper purpose, and proportional to the needs of the case.⁵⁹ Rule 26(g) was intended to be the discovery equivalent of Rule 11, requiring lawyers to “stop and think” before serving or responding to discovery requests.⁶⁰ If applied as intended, Rule 26(g) might be enough to prevent lawyers from churning out the same old discovery requests and boilerplate objections in every case, regardless of need, cost, or burden. Under Rule 26(g), if applied as intended, parties would look at each case individually and determine whether their requests and objections were warranted and appropriate. The plaintiffs in *Mancia*, Judge Grimm wrote, likely had violated Rule 26(g) by sending “kneejerk discovery requests.”⁶¹ The defendants had almost certainly violated Rule 26(g) by responding with kneejerk objections. As Judge Grimm explained, making boilerplate objections constitutes “prima facie evidence of a Rule 26(g) violation” because they show that the lawyer did not take the time to determine whether any particularized grounds for objecting in fact existed.⁶²

Judge Grimm noted that technically the defendants had waived their right to object to the plaintiffs' discovery requests, permitting the court to order responses to the requests as written “regardless of cost or burden.”⁶³ But Judge Grimm recognized the tension between doing that and the court's duty to limit excessive discovery.⁶⁴ He did neither, electing instead to send the parties off to try again in light of his instructions and guidance. In doing so, he provided two final lessons. First, he examined the claimed justification of adversarial zeal and refuted the suggestion that a lawyer's duty to his client excuses lawyers (or the parties) from complying with their discovery obligations and limits.⁶⁵ Second, he predicted that if the lawyers simply spent some time talking and *listening to* each other, they

59. FED. R. CIV. P. 26(g).

60. FED. R. CIV. P. 26 advisory committee's note to 1983 amendment. *See also* Richard L. Marcus, *Reducing Court Costs and Delay: The Potential Impact of the Proposed Amendments to the Federal Rules of Civil Procedure*, 66 JUDICATURE 363, 364-65 (1983).

61. *Mancia*, 253 F.R.D. at 358.

62. *Id.* at 359.

63. *Id.* at 364.

64. *Id.*

65. *Id.* at 360-62.

could avoid many expensive, time-consuming discovery battles and better serve their clients.⁶⁶

Boilerplate objections were also at the center of Judge David Horan's decision in *Heller v. City of Dallas*.⁶⁷ In that case, Judge Horan tackled a series of motions to compel filed against the City of Dallas. The City's discovery responses contained the trifecta of boilerplate: (1) they began with a long list of blanket general objections that appeared in every discovery response spit out by the lawyers' word processor; (2) the responses to individual requests contained boilerplate objections with a similar provenance; and (3) these responses stated that answers would be given or documents produced "subject to" the boilerplate objections stated at the beginning and in the response to every question.⁶⁸ This time it was the plaintiffs who invoked Rule 26(g), moving to compel and for sanctions.⁶⁹

Following Judge Grimm's lead in *Mancia*, Judge Horan began his analysis in *Heller* with a lengthy discussion of the Rule 26(g) requirements and purpose. With that foundation, Judge Horan turned to the City's responses. Judge Horan first held the blanket "General Objections" to be a form of improper boilerplate because the City did not even try to link them to any particular discovery request.⁷⁰ Judge Horan characterized the City's boilerplate general objections as "worthless," "meaningless," and "a waste of time for opposing counsel and the court."⁷¹ He instructed the City to "cease and desist" from similar responses in the future.⁷² But he declined to impose Rule 26(g) sanctions because "the existing legal authority is not entirely consistent across the federal courts and has not always been clear as to the propriety of raising these kinds of general objections."⁷³

Judge Horan then turned to the City's repeated statement that its every response was "subject to" and "without waiving" its boilerplate objections.⁷⁴ Judge Horan characterized this as a "confusing" and "misleading" way to prevent the other side from knowing whether anything was in fact withheld based on any objection.⁷⁵ But here too he

66. *Id.* at 361-62, 365.

67. 303 F.R.D. 466 (N.D. Tex. 2014).

68. *Id.* at 482-93.

69. *Id.* at 469.

70. *Id.* at 483.

71. *Id.*

72. *Id.* at 484.

73. *Id.*

74. *Id.* at 486.

75. *Id.* at 487.

declined to impose Rule 26(g) sanctions, because he did not think the case law condemning the practice was sufficiently clear to warn lawyers. The practice appeared to have been passed along from lawyer to lawyer and had acquired undeserved legitimacy, raising fairness concerns if he tried to deter future misconduct by punishing the past behavior.⁷⁶

Judge Horan did impose Rule 26(g) sanctions for the City's third type of boilerplate violation. In its responses to individual requests, the City repeated—as if chanting a mantra—generalized and unsupported assertions of overbreadth, undue burden, and vagueness. Judge Horan found that the City's refusal to answer any part of the discovery requests on the basis of these boilerplate objections violated Rule 26(g). The absence of any effort to tie the objections to specific flaws in particular requests showed that the City had failed to take any steps to make sure the objections were warranted before asserting them.⁷⁷ Judge Horan found that the case law made abundantly clear that this type of patently boilerplate objection was wrong, wrong, and wrong. Judge Horan ordered the City to pay the plaintiffs the attorney's fees they incurred in obtaining discovery over those objections.⁷⁸ In doing so, Judge Horan rejected the argument that the lawyers shouldn't be sanctioned for conduct that has become common in practice, instead stating “that simply highlights the need to call this conduct out when it is presented and to provide a deterrent through a sanction, as the Federal Rule mandates here.”⁷⁹

Judge Mark Bennett also made headlines in the national legal press when he took on boilerplate objections. Judge Bennett asked in *Liguria Foods, Inc. v. Griffith Laboratories, Inc.*, why good lawyers seemed to be “addicted to ‘boilerplate’ discovery objections.”⁸⁰ The question arose as Judge Bennett was preparing for a hearing on a discovery motion. He looked at responses attached to the motion. Seeing what appeared to be violations from all sides, he ordered the parties to submit their discovery requests and responses, under seal.⁸¹ His suspicions were confirmed. Judge Bennett made a helpful chart showing the apparent violations and ordered the parties to show cause why they should not be sanctioned, setting a hearing on the discovery motion and the show-cause order and

76. *Id.* at 486-90.

77. *Id.* at 490-92.

78. *Id.* at 494-95.

79. *Id.* at 494.

80. 320 F.R.D. 168, 170 (N.D. Iowa 2017). This case is actually Judge Bennett's second significant decision condemning boilerplate objections and imposing sanctions under Rule 26(g). *See St. Paul Reinsurance Co., LTD. v. Commercial Financial Corp.*, 198 F.R.D. 508 (N.D. Iowa 2000).

81. *Liguria Foods*, 320 F.R.D. at 172.

requiring the lawyers who had signed the discovery responses to appear in person to explain their conduct.⁸²

The lawyers for both sides tried to argue—unsuccessfully—that their use of boilerplate was proper because they had been acting in good faith and had not specifically intended to cause undue expense, burden, or delay.⁸³ But when pressed, they had to admit that they did not actually believe that their boilerplate objections were acceptable.⁸⁴ When asked why they engaged in behavior they knew was improper, their candid answers revealed the problem. They did it because that was how they were trained, both by their own mentors and by what they saw other lawyers do.⁸⁵ They did it out of the CYA fear—the lawyers’ paranoia about waiving any objection that might be available, in some universe or set of possibilities, however remote.⁸⁶ And they did it because they anticipated—with reason—that the other side would do it to them. Both sides feared that obeying the discovery rules would put them at a competitive disadvantage.⁸⁷ A perverse golden rule applied. The lawyers argued that they did what they acknowledge the rules prohibited because that was what everyone else did and what everyone expected would be done. Boilerplate objections were accepted as “the culture” of discovery, and judges had helped by letting this culture develop to the point of entrenchment.

Judge Bennett then said what he thought about what the lawyers had done. He began with an overview of the rules, starting with the general requirements of Rule 26 and then turning to the fact that both Rule 33 and Rule 34 require lawyers to state discovery objections “with specificity.”⁸⁸ Failing to make a proper objection, he added, waived any unspecified ground for objecting, both under the language of Rule 33 and, by judge-made extension, under Rule 34.⁸⁹

Turning to the content of the parties’ objections, Judge Bennett quickly concluded that generalized objections about relevance and burden, without any explanation, failed the specificity requirement and constituted impermissible boilerplate.⁹⁰ Judge Bennett added that

82. *Id.* at 173-79.

83. *Id.* at 180.

84. *Id.* at 181.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 182-85. Judge Bennett was writing in 2017, so the 2015 amendment adding the explicit specificity requirement to Rule 34 had taken effect.

89. *Id.* at 185.

90. *Id.* at 185-86.

responding to interrogatories or production requests “subject to” generalized boilerplate objections compounded the violations.⁹¹ The responses made it unclear whether any information or documents were withheld on the basis of the boilerplate objections and, if so, what was withheld, and why.

Finally, Judge Bennett squarely rejected the argument that using boilerplate objections was justified to avoid waiver. To the contrary, the judge ruled boilerplate objections and responses made “subject to” those objections were no response at all.⁹² Boilerplate objections were waivers. No objection was preserved. A reflexive effort to preserve all possible objections waived every objection.⁹³

Because boilerplate objections were so clearly improper under Rules 33 and 34 and established case law, Judge Bennett did not doubt his authority to impose sanctions under Rule 26(g).⁹⁴ He was hesitant to do so, however, because the lawyers had acted professionally in all other respects and had acknowledged the error of their ways.⁹⁵ He was also unwilling to punish the lawyers for following the “‘culture’ of protectionist discovery responses.”⁹⁶ While he strongly encouraged the lawyers to follow through on their promises to become agents for changing the culture, Judge Bennett declined to impose sanctions under Rule 26(g) for the past rule violations that the culture had produced.⁹⁷

Enough, however, was enough. Going forward, Judge Bennett declared, things would be different. They would have to be different because that would be the only way to change the “‘culture of ‘boilerplate.’”⁹⁸ Lawyers would have to break their addiction to boilerplate objections. Those who kicked the habit would have to call other lawyers on it and go to the judge if needed. And the judges needed to “push back, get our judicial heads out of the sand, stop turning a blind eye to the ‘boilerplate’ discovery culture and do our part to solve this cultural discovery ‘boilerplate’ plague.”⁹⁹ To do his part, Judge Bennett announced that he was amending his standing case-management order to ban the use of boilerplate objections. He ended the opinion with this message: “NO MORE WARNINGS. IN THE FUTURE, USING

91. *Id.* at 186.

92. *Id.* at 187.

93. *Id.*

94. *Id.* at 188-89.

95. *Id.* at 189-90.

96. *Id.* at 190.

97. *Id.*

98. *Id.*

99. *Id.* at 191.

‘BOILERPLATE’ OBJECTIONS TO DISCOVERY IN ANY CASE BEFORE ME PLACES COUNSEL AND THEIR CLIENTS AT RISK FOR SUBSTANTIAL SANCTIONS.”¹⁰⁰

Other judges have also taken a stand. In *Fischer v. Forrest*, Judge Andrew Peck found it necessary to “issue a discovery wake-up call” to the lawyers practicing in his court, because a year after the 2015 amendments took effect, he still was seeing boilerplate objections and statements that discovery responses were made “subject to” general objections.¹⁰¹ Describing the changes made by the 2015 amendments to Rule 34, Judge Peck issued this warning:

The December 1, 2015 amendments to the Federal Rules of Civil Procedure are now 15 months old. It is time for all counsel to learn the now-current Rules and update their ‘form’ files. From 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 the objection) will be deemed a waiver of all objections (except as to privilege).¹⁰²

In *Blemaster v. Sabo*, Judge John Sedwick encountered an especially egregious example of boilerplate nonsense. The discovery response stated just about every imaginable generic objection, all made “insofar as” or “to the extent” they applied, and all while purportedly preserving the right to provide actual answers later and subject to the “objections.”¹⁰³ Judge Sedwick struck the objections and ordered the offending party to serve amended responses specific to the discovery requests. Citing *Liguria Foods*, Judge Sedwick ordered the offending party to pay the other side the attorney’s fees incurred in challenging the boilerplate objections as a sanction for violating Rule 26(g).¹⁰⁴

In *BankDirect Capital Finance, LLC v. Capital Premium Financing, Inc.*, Judge Jeffrey Cole called out the defendant for making “virtually identical, boilerplate objections” to several of the plaintiff’s discovery requests.¹⁰⁵ Judge Cole lamented the continued “unabated” use of boilerplate objections, despite “courts’ repeated admonitions that these sorts of ‘boilerplate’ objections are ineffectual.”¹⁰⁶ Like Judge Bennett,

100. *Id.* at 192.

101. No. 14 Civ. 1304, 2017 WL 773694, at *1 (S.D.N.Y. Feb. 28, 2017).

102. *Id.* at *3.

103. No. 2:16-cv-04557, 2017 WL 4843241, at *3 (D. Ariz. Oct. 25, 2017).

104. *Id.* at *4 (citing *Liguria Foods*, 320 F.R.D. at 172).

105. No. 15 C 10340, 2017 WL 5890923, at *1 (N.D. Ill. Nov. 29, 2017).

106. *Id.* at *2.

Judge Cole acknowledged the complicity of the judiciary: “[n]eedless judicial tolerance of the rote, boilerplate answers that have been employed here will engender their continued use to the detriment of the goals sought by the discovery rules.”¹⁰⁷ Like Judge Bennett, Judge Cole drew on the lesson of “[l]ong and bitter experience . . . that only a refusal to accept”¹⁰⁸ boilerplate responses to discovery requests will lessen their use and overcome this obstacle to proportionality and reasonableness in discovery.

Some judges address the problem in advance, in an order sent out when a civil case is filed, setting out what the judge expects of the lawyers. These orders typically include something like the following instruction:

All parties are expected to frame their interrogatories, document requests, deposition notices, and requests for admission to meet the relevance and proportionality requirements of Rule 26(b)(1). Parties may not ask for more than what is needed for the case, or object and refuse to produce what is needed for the case, for strategic or tactical reasons.¹⁰⁹

These orders typically emphasize the rules’ prohibition on boilerplate requests and objections.

An example order follows:

Boilerplate objections in response to discovery requests are prohibited. Parties may not simply raise or list rote or general objections. Parties may not include a “Preamble” or a “General Objections” section stating that the party objects to the discovery request “to the extent that” it is vague, ambiguous, overly broad, or unduly burdensome. Instead, as the 2015 Civil Rule amendments make clear, objections to discovery requests must be specific and tied to particular discovery requests. The objections must clearly state the objections that actually apply to that request.

A party who objects to a discovery request and also responds “subject to the objections” must also indicate whether the response is complete, that is, whether additional information or documents would have been provided but for the objections. A party may not object and state, “Subject to these objections and without waiving them, the response is as follows. . . .” Instead, the response must also specifically identify

107. *Id.* at *3.

108. *Id.*

109. PROCEDURE FOR CASES ASSIGNED TO THE HONORABLE LEE ROSENTHAL 7 (2018), http://www.txs.uscourts.gov/sites/txs/files/lhr_procedures.pdf [https://perma.cc/RS8T-LQAB].

whether any information is withheld based on the objections and, if so, provide enough information about what is not produced to enable further inquiry if appropriate.

Similarly, a party may not merely state that some of the information is produced and more will be provided later. Instead, the party must state whether more information will be produced later, and when—either by the requested date or by another specified reasonable date.¹¹⁰

These requirements, repeated in the court's procedures order, trace back to the 2015 amendments to Rule 34(b)(2)(C).¹¹¹ This ban on boilerplate or general objections is so useful for proportional discovery that it applies to all forms of discovery requests, not only to Rule 34 requests for production.¹¹²

B. A Few Additional Observations

We are tempted to say “ditto” and move on. The decisions discussed above say it well. The 2015 rule changes, orders setting out the judges' expectations for party compliance, and a few opinions warning of the sanctions and waiver consequences of future violations are necessary steps. But they are not sufficient. Parties must take heed. Judges must pay attention to what the parties do. And judges must enforce the rules and case-law requirements if violations persist.

To state again what is both obvious and obviously often ignored—boilerplate requests and objections violate Rules 26(g), 33, and 34. Rules 33 and 34 require that parties respond except to the extent a specific objection is made. When a request is objectionable only in part, the responding party must respond to any parts not specifically objected to. Because boilerplate objections are not specific, they do not relieve the party of any duty to respond to any part of the request. A lawyer who signs a discovery response with boilerplate objections in lieu of answers knows—and should be held to knowing—that this violates the discovery rules.

The theme of Rule 26(g) is that lawyers must “stop and think” about what they are doing. A lawyer cannot mindlessly dump boilerplate objections into discovery responses because “that’s how I was trained” or because “that’s what everyone does.” If there are genuine grounds for

110. *Id.* at 8.

111. FED. R. CIV. P. 34(b)(2)(C); *see also* FED. R. CIV. P. 34 advisory committee's note to 2015 amendment.

112. *See* PROCEDURE FOR CASES ASSIGNED TO THE HONORABLE LEE ROSENTHAL 7 (2018), *supra* note 109, at 8.

objections, they must be stated specifically. If no specific grounds can be identified, the objection cannot be made. If a specific objection is made to part of a request, the lawyer must provide the information not covered by the objection. Lawyers can't have it both ways by stating that their general objections are stated only "to the extent" they apply, or that they are responding "subject to" them. That practice—now officially disapproved by the 2015 amendment to Rule 34—makes the objection even less specific, less clear, and less meaningful, not more. Lawyers practicing in federal court must be held to knowing that "subject to" responses are just as invalid under the rules as the boilerplate objections that spawned them.

The use of boilerplate objections also warrants sanctions under Rule 37(a)(5). When a court grants a motion to compel, Rule 37 requires the court to award expenses (including attorney's fees) to the prevailing party unless the losing party's conduct was "substantially justified."¹¹³ While this may seem like a "loser pays" mechanism, it was not intended to operate that way, and judges don't use it that way. The mechanism was intended to make judges "stop and think" about the parties' conduct that led to the dispute and to determine whether that dispute arose because of a legitimate disagreement or because one or both of the parties took an indefensible position.¹¹⁴ Under this standard, boilerplate objections should also lead to expense shifting under Rule 37(a)(5). A party cannot defensibly claim that its boilerplate objections justified not making a substantive response to any part of the request. In short, parties that stand on boilerplate objections should, at the least, expect to pay the other side's expenses when they are called out in front of the court.

The Rule 37(a)(5) expense-shifting scheme raises an interesting question about overlapping remedies. If boilerplate objections lead to an attorney's fee award under Rule 37(a)(5), is that an effective response to the problem, making the additional use of Rule 26(g) an act of judicial overkill? The answer, sadly, is no.

To start, Rule 26(g) makes it a separate remedy that can be raised either by party motion or by the court on its own.¹¹⁵ In *Heller*, the plaintiff invoked Rule 26(g).¹¹⁶ But in *Liguria* and *Mancia*, it was the judge who first raised Rule 26(g) in addressing a motion to compel.¹¹⁷ A second look

113. FED. R. CIV. P. 37(a)(5).

114. FED. R. CIV. P. 37(a) advisory committee's note to 1970 amendment. See GENSLER, RULES AND COMMENTARY, *supra* note 6, at 1047.

115. FED. R. CIV. P. 26(g) (stating that a court may act "on motion or on its own").

116. See *Heller v. City of Dallas*, 303 F.R.D. 466, 469 (N.D. Tex. 2014).

117. See *Liguria Foods, Inc. v. Griffith Labs., Inc.*, 320 F.R.D. 168, 172 (N.D. Iowa 2017); *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 364-65 (D. Md. 2008).

at those cases suggests some reasons why Rule 26(g) deserves its place as a freestanding remedy and why judges should not leave the punishment and deterrence task to Rule 37(a)(5) expense-shifting alone.

First, judges should be (and are) free to examine the entirety of the parties' discovery conduct, not just those acts or events that precipitated a motion to compel or for sanctions, or both. In *Liguria*, for example, Judge Bennett saw the first signs of a problem when he examined the materials attached to motions to compel.¹¹⁸ But it was only when he ordered the parties to submit all of their discovery requests and responses for his review that he could see how pervasive the boilerplate usage was on both sides.¹¹⁹

Second, judges should be (and are) free to respond to abusive discovery practices in ways not limited to ruling on specific discovery motions. In *Mancia*, for example, Judge Grimm ordered the parties to go back to the discovery drawing board and try again, this time actually talking and listening to each other.¹²⁰ Though Judge Grimm did not impose sanctions under Rule 26(g), it would have been appropriate for him to do so if the motion to compel that brought the matter to his attention in the first place was instead moot.

Third, the range of sanctions available under Rule 26(g) is broader than the expense shifting Rule 37(a)(5) authorizes. Rule 37(a)(5) speaks only of expense shifting, but Rule 26(g)(3) states that the judge may impose any "appropriate sanction."¹²¹ This "may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation."¹²² We might expect judges to select expense shifting in most Rule 26(g) situations, but other sanctions may be more appropriate instead of, or in addition to, expense shifting. In *Heller*, for example, in addition to requiring the objecting lawyers, who were with the City's legal department, to pay the other side's attorney's fees, Judge Horan ordered the City itself to circulate the order he issued to all of its attorneys who litigate in federal court.¹²³

Fourth, limiting judges to expense shifting when granting motions challenging discovery responses would empower parties to use boilerplate

118. *Liguria Foods, Inc.*, 320 F.R.D. at 172.

119. *Id.* at 173-80.

120. *Mancia*, 253 F.R.D. at 364-65.

121. FED. R. CIV. P. 26(g)(3).

122. *Id.*

123. *Heller*, 303 F.R.D. at 495. Judge Bennett did something similar in a Rule 26(g) case from 2000 when he ordered the offending lawyer to write a bar journal article condemning the use of boilerplate objections. *See St. Paul Reinsurance Co., LTD. v. Commercial Fin. Corp.*, 198 F.R.D. 508, 518 (N.D. Iowa 2000).

objections as an obstructionist tactic, knowing they might well avoid paying the other side's fees—and any other consequence—so long as they changed their tune if the other side brought it up before filing a motion to compel.¹²⁴ Parties must know that their boilerplate tactics can be sanctioned even if they withdraw the objections or particularize them later. Otherwise, the rule will be a one-free-bite rule, allowing lawyers to start with boilerplate objections to see if they can get away with it. At a minimum, delay and some added cost will result.

Finally, sanctions under Rule 26(g) are just that—sanctions. Expense shifting is different. It makes the other side whole and only incidentally punishes the offender. As judges have observed, solving the boilerplate problem requires culture change. Sanctions carry consequences for lawyers that expense-shifting orders alone do not. While judges must exercise care in sanctioning—a heavy-handed approach is neither needed nor desired—the path to culture change requires a strong message. Sanctions cannot be off limits.

There is one last issue to consider. The rules and the case law make it clear that a party responding to discovery requests with boilerplate requests or objections forfeits the right to make legitimate, specific objections. The question is whether judges should rely on waiver as their default mechanism to break lawyers of their boilerplate habits. We think waiver has an important role to play but should be viewed as an option rather than an automatic consequence.

Automatic waiver as a first-line response has at least two problems. First, waiver is no punishment when the party who interposed boilerplate objections had no valid objections to begin with.¹²⁵ Second, if the discovery requests were at all objectionable, then finding that improper responses waived the right to object means that the resulting discovery will exceed the Rule 26(b)(1) boundaries. If the “extra” discovery extends only a little beyond what would ordinarily be tolerated, it is hard to get too exercised. But what if the information sought would clearly exceed relevance or proportionality, or both?¹²⁶ As Judge Grimm observed in *Mancia*,¹²⁷ judges have an independent duty to keep discovery in check. There is a third reason as well. The remedy for one party's discovery-rules

124. FED. R. CIV. P. 37(a)(1).

125. The sting might come, however, if the problem was raised by a motion to compel and the judge, in addition to finding waiver, ordered expense shifting under Rule 37(a)(5).

126. See *Ashford v. City of Milwaukee*, 304 F.R.D. 547, 549 (E.D. Wis. 2015) (declining to read an automatic waiver penalty into Rule 34 because it could lead to a party being punished by having to spend a lot of money to engage in disproportionate document production).

127. See *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 364 (D. Md. 2008).

violation should not be to allow the other party to operate outside the rules. The proverb that two wrongs don't necessarily make a right applies. Perversely, finding waiver can reward the offending lawyer, who now gets to conduct discovery—and bill the client for conducting discovery—that otherwise would not have been allowed.

Courts should enforce the waiver rule that is stated in Rule 33 and that courts properly read into Rule 34. But courts should consider waiver as one option, along with expense shifting under Rule 37(a)(5) and other sanctions under Rule 26(g), and carefully choose the best option for the circumstances. Expense shifting may be most likely to send the right message and, because it is tied to the misconduct, the most likely to be calibrated to the offense. Judges will learn, with lawyers, the least onerous sanction required to be effective. What it means to be “effective” here is explored next.

IV. WHAT WILL IT TAKE TO BREAK THE BOILERPLATE HABIT?

The Federal Rules are now clear, if they weren't before, and more emphatic than they were before: no more boilerplate requests or objections. A few judges have made it clear that they will enforce the Rules. No more looking the other way. No more warnings. Keep it up, lawyers, and you will be facing sanctions, including waiver (or, more precisely, forfeiture). Will this be enough to purge boilerplate from modern pretrial practice? If not, what will?

These questions require a deeper look at some of the forces that have combined to make boilerplate discovery so addictive. Some of those forces are structural and can be traced back to larger policy choices that are unlikely to be revisited in the name of eradicating boilerplate. But other forces are cultural. They can be changed. The key to changing them is the judiciary. No matter how strident their opinions, no matter how dire their warnings, and no matter how severely they sanction the lawyers who appear before them, three, or six, or a dozen vocal federal judges scattered across the country will not change the culture that keeps lawyers addicted to boilerplate. But 60 might. Two hundred would help. The more judges joining the less the burden on any one of them, and the faster the tipping point is reached.

A. *Understanding the Boilerplate Problem*

The habit—the culture—of boilerplate requests and objections did not happen overnight. It developed over time, growing and gaining force until it became routine and then expected. We have already discussed the

tools that judges have to fight back against the culture of boilerplate. But what conditions led these boilerplate practices to develop in the first place? Perhaps the answer to the boilerplate problem lies in changing the conditions that gave rise to it, rather than punishing those who succumb to its siren call.

Structurally, the most significant factor behind the rise of boilerplate culture has been the policy choice embedded in the discovery rules to have written discovery operate extrajudicially. Interrogatory practice under Rule 33 was always designed to operate extrajudicially, presumptively without judges' involvement. Parties ordinarily do not need a judge's permission to serve interrogatories.¹²⁸ That reflects a belief that most interrogatories will be within the proper boundaries of discovery, making it inefficient to have judges scrutinize all interrogatories in advance. When interrogatories go beyond those boundaries in a particular case, parties are deputized to protect themselves by the power to object. To make the power of self-protection meaningful, the rules provide that the objection suspends the duty to respond to the objectionable request, unless and until a court says otherwise.¹²⁹ The result, however, is that the scheme gives responding parties the power to put the brakes on written discovery—at least for the time being—simply by saying “no.”

Document discovery practice under Rule 34 has operated on the same extrajudicial principle since 1970, but it wasn't always that way. From its adoption in 1938 until 1970, Rule 34 did not permit parties to serve document requests unilaterally.¹³⁰ For 32 years, the rule required parties to seek leave of court and show good cause to serve their proposed

128. See FED. R. CIV. P. 33(a)(1) (stating that leave of court is required only if the number of interrogatories exceeds the default limit of 25).

129. In the written discovery context, the objection must suffice as the answer if a party is to be able to protect itself from harms like lack of relevance and undue burden. The objection would be pointless if a party had to incur the expense of investigating and responding to overbroad or disproportionate interrogatories or document requests despite the objection. But it must be understood that it is a policy choice; there is no immutable law that says that objections must suspend the duty to respond. Compare deposition practice under Rule 30, for example, where most non-privilege objections are for the record and do not justify a refusal to answer the question. See FED. R. CIV. P. 30(c)(2) (stating that “the testimony is taken subject to any objection” and restricting instructions not to answer to three situations).

130. See 8B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, § 2205 (3d ed. 2010) (discussing deletion of the good cause requirement). As originally enacted, Rule 34 provided in pertinent part: “Upon motion of any party showing good cause therefore and upon notice to all other parties, the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody, or control.” 7 MOORE'S FEDERAL PRACTICE, 34 App.01 (3d ed. 2017).

document requests. If the putative recipient thought the proposed request was improper, the recipient could object before the request was issued. The judge had to determine whether the requesting party showed good cause before granting leave. In 1970, however, Rule 34 was amended to eliminate the preclearance requirement. The extrajudicial model of Rule 33 was applied to Rule 34.¹³¹ Starting in 1970, Rule 34 became subject to the same self-protection model that governed Rule 33, giving birth to a whole new set of opportunities to make boilerplate requests and objections.¹³²

The current scheme has virtues. It operates well in many cases.¹³³ But it comes with an inherent and probably unavoidable risk that parties

131. That change was precipitated by the first major empirical study conducted on behalf of the Advisory Committee. In the early 1960s, the Advisory Committee enlisted the help of the Columbia University Project for Effective Justice to gather empirical data on the functioning of the pretrial discovery scheme. See William A. Glaser, *Pretrial Discovery and the Adversarial System*, 45 IND. L. REV. 435 (1968) (discussing the history and design of the study). The report was submitted in February 1965 and was used by the Advisory Committee when it developed the 1970 amendments. See Advisory Committee's Explanatory Statement Concerning Amendments of the Discovery Rules, Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 48 F.R.D. 487, 489 (1970). The Study showed that document discovery under Rule 34 had been relatively problem free, leading the Advisory Committee to conclude that judicial involvement was not needed. See FED. R. CIV. P. 34 advisory committee's note to 1970 amendment. The irony is that the Study showed that interrogatory practice under Rule 33 was rife with problems. See FIELD SURVEY OF FEDERAL PRETRIAL DISCOVERY: REPORT TO THE ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE 12 (1965) ("[T]he research findings show that [interrogatories] generated far more litigant complaints than any other discovery device."). Even then, concerns were raised that perhaps the reason there was less discord under Rule 34 was that parties, knowing the judge had to sign off, didn't overreach, and that removing the judge from the picture would lead to the same problems that had been plaguing interrogatory practice under Rule 33. See Glaser, *supra*, at 222.

132. See Paul W. Grimm & David S. Yellin, *A Pragmatic Approach to Discovery Reform: How Small Changes Can Make a Big Difference in Civil Discovery*, 64 S. C. L. REV. 495, 509-10 (2013) ("[T]he 1970 amendments . . . led directly to the current environment, in which discovery is carried out, in the first instance, entirely free from any judicial oversight and is limited, in a practical sense, only by the attorneys carrying it out.").

133. According to a 2009 survey conducted by the FJC, lawyers reported that the amount of discovery conducted in their cases was "just right" in about 60% of their cases. See Emery G. Lee III & Thomas E. Willging, FED. JUD. CTR. NAT'L, CASE-BASED CIVIL RULES SURVEY 27 (2009). That's certainly good news. Some, however, have cited those statistics as proof that the 2015 amendments were not needed. We have always disagreed with that contention and still do. The fact that the scheme was working reasonably well in most cases led the Advisory Committee to reject the idea that the scheme needed to be "blown up" and replaced with something much different. But even under the FJC study's data (and there were other surveys at the time that painted a less favorable picture), the lawyers reported disproportionate discovery costs in about 25% of their cases. *Id.* at 28. Moreover, the FJC's study also reported that approximately 25% of the lawyers believed that "discovery is abused in almost every case in federal court." *Id.* at 71. The Advisory Committee's objective after the 2010 Duke Conference was to identify possible changes that would help to cure the problems in the cases where they existed without disturbing what was working well overall. That philosophy of always striving for improvement traces back to Charles E. Clark, who advocated making marginal improvements where possible and who championed the creation of a standing Advisory Committee

will abuse the opportunities to ask for overbroad discovery and to forestall responding to any discovery by objecting. That's not new news to the Advisory Committee on Civil Rules or to the Standing Committee. They know. In 1946, the Advisory Committee amended Rule 33 to provide that objecting to one interrogatory did not suspend the need to answer other interrogatories.¹³⁴ The Advisory Committee explained that “[u]nder the original wording, answers to all interrogatories may be withheld until objections, sometimes to but a few interrogatories, are determined.”¹³⁵ The amendment expedited interrogatory procedure and helped eliminate the strike value of objections to minor interrogatories.¹³⁶ The Advisory Committee faced a similar incentive problem with Rule 33 in 1970. At that time, interrogatory answers were due within 15 days, but objections had to be made within 10 days (i.e., 5 days before the answers would have been due).¹³⁷ The rulemakers found that this timing scheme “seem[ed] calculated to encourage objections.”¹³⁸ Faced with a mere 15 days to investigate and prepare meaningful responses, lawyers began making objections during the earlier 10-day period “as a means of gaining time to answer.”¹³⁹ And because “Rule 33 imposes no sanction of expenses on a party whose objections are clearly unjustified,” it was “easier to object than to seek an extension of time.”¹⁴⁰ To address the problem, the rulemakers changed the due date for both answers and objections to 30 days, expecting that allowing 30 days to investigate and respond would at least reduce the practice of making unjustified objections to buy time.¹⁴¹ Thirteen years later, the Advisory Committee added Rule 26(g) in yet another effort to cut back on the tactical advantage too many lawyers tried to gain by making reflexive and unjustified objections.¹⁴² The more things changed, the more they stayed the same.

Second, discovery practice under Rules 33 and 34 is influenced by the commitment to another foundational policy—the American Rule. Parties presumptively bear their own discovery expenses.¹⁴³ The point is

precisely because he believed that the rules would be in need of constant tending and adjustment to keep up with changes in the law and legal practice. See Steven S. Gensler, *Ed Cooper, Rule 56, and Charles E. Clark's Fountain of Youth*, 46 U. MICH. J. L. REF. 593, 601-10 (Winter 2013).

134. FED. R. CIV. P. 33 advisory committee's note to 1946 amendment.

135. *Id.*

136. *Id.*

137. FED. R. CIV. P. 33(a) advisory committee's note to 1970 amendment.

138. *Id.*

139. *Id.*

140. *Id.*

141. FED. R. CIV. P. 33(b)(2).

142. FED. R. CIV. P. 26(g) advisory committee's note to 1983 amendment.

143. See *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978).

as important as it is obvious. The party requesting discovery isn't paying to get it. The cost of serving boilerplate requests is almost nil. Responding parties spend their own money, time, and other resources to research interrogatories and document requests and to find and formulate answers, or to locate, review, and produce responsive documents, all for the "benefit" of the other side. In cases in which one side has little to discover and the other side has much, the cost disparity is commensurately larger. Objections, particularly prefabricated objections stored in the computer, cost nothing. They provide no information that can come back to haunt. The illusion of warding off waiver adds to the temptation to use boilerplate first and think later. The lure of responding with a fast and cheap "no" and worrying about the consequences tomorrow is hard to resist. As Scarlett O'Hara learned, over and over again, it seems much easier to think about the hard stuff tomorrow. Both the rules and the judges applying them must be strong enough to counteract the seeming tactical advantages of stonewalling.

Any effort to break lawyers of their boilerplate addiction must take account of the factors that have fueled the problem (or at least provided cover for opportunistic offenders). Consider again the candid answers the lawyers gave to Judge Bennett when he asked them why they consistently made boilerplate requests and objections that nobody could defend.¹⁴⁴ Boilerplate is engrained in the practice by decades of ubiquitous, uncorrected use. As new lawyers, what did they see in the work of the lawyers they worked with and learned from? Boilerplate. What did they see in the work of opposing counsel? Boilerplate. If a new attorney in a litigation practice, schooled only in the classroom and eager to learn how to practice "in the real world," had drafted discovery responses for a senior attorney and omitted the boilerplate, isn't it likely that the draft would have come back to the new attorney with instructions to add in the "protective," "standard," general objections? New lawyers, already fearful of making a mistake, are afraid not to climb on board the boilerplate bandwagon when they view it as an essential form of CYA.

The ubiquitous, uncorrected use of boilerplate feeds on itself. Lawyers who might otherwise follow the rules may feel that doing so will put them at a competitive disadvantage. As one of the lawyers in *Liguria* put it, nobody wants to engage in "unilateral disarmament."¹⁴⁵ If everyone is doing it, then nobody is in a position to challenge it. In *Liguria*, it was

144. See *supra* notes 81-87 and accompanying text.

145. *Liguria Foods, Inc. v. Griffith Labs., Inc.*, 320 F.R.D. 168, 181 (N.D. Iowa 2017).

the judge who ended up throwing the flag on both sides.¹⁴⁶ All the lawyers, and often their clients, had become acculturated into thinking that boilerplate objections were standard operating procedure.

Finally, judges must acknowledge—as some have—their role in letting the boilerplate habit become engrained. Looking the other way is, to use an overused term, a form of enablement. When judges make it clear that they dislike resolving discovery disputes and expect the lawyers to “work it out among themselves,” they all but invite—or at least sorely tempt—lawyers to misbehave, knowing that the other side will think long and hard before making an issue of it. In that environment, what lawyer would risk the judge’s ire by taking a hard stand against the other side’s use of boilerplate? And when boilerplate requests or objections are brought to the judges’ attention in discovery motions, too often judges err on the side of leniency and do not impose expense shifting or any sanction at all. Perhaps judges feel a sense that, having figured out what discovery to allow or require, the problem has been solved. But if that is the worst-case scenario, then that leaves the party who sought overly aggressive discovery, and the party who interposed the boilerplate objections, no worse off than they would have been had they asked for what they really needed and objected only to what was legitimately objectionable in the first place. In that environment, lawyers might predictably feel as though they have nothing to lose by requesting more than they need or can justify, or responding with boilerplate objections, and seeing if the other side lets it slide.

B. Are Sanctions the Answer? Or at Least an Answer?

When looking for solutions to a problem, sanctions are not usually a good place to start. Other options usually hold greater promise.¹⁴⁷ But sometimes sanctions are at least an essential part of an effective solution, if not the only solution. This is one of those situations. Without a meaningful message and deterrent, the cultural factors that promote boilerplate that can be changed are unlikely to change.

146. *Id.* at 180.

147. The most significant practical problem with using sanctions to change behavior is that doing so relies on enforcement. The perceived threat of sanctions must be great enough to overcome the perceived benefit of the behavior to be deterred. That requires not just that the available sanctions be sufficiently severe, but that sanctions are in fact consistently and sufficiently imposed lest would-be offenders discount the threat as unlikely to actually happen to them. In general, it is preferable to find a way to eliminate the incentive to break the rule than to rely on costly enforcement to overcome the incentive.

Written discovery will continue to follow the extrajudicial model.¹⁴⁸ The party-managed discovery approach and the American Rule aren't going anywhere. There is likely not much more that can be done by tweaking the rules. The rules already require requests to be proportional and objections to be stated with specificity. The rules already give lawyers ample tools to call out offenders and give judges ample authority to deal with them.¹⁴⁹ The problem isn't one of rule content. It is one of fidelity and enforcement, and, here, enforcement begets fidelity.

The problem of boilerplate discovery practices set in over time. Indeed, it set in during our lifetimes. First it became grudgingly tolerated; it was frustrating, but often not worth the effort to fight. Then it became acceptable; why resist the urge when everybody else seemed to be doing it. Then it became expected; if you didn't do it, you were fighting with one hand tied behind your back. And with that, the vicious circle was complete. Everyone was doing it because . . . everyone was doing it.

What will it take to break the cycle? The occasional opinion or order—however pointed and scathing—is unlikely to change the boilerplate culture. The lawyers on the receiving end may be chastened and may reform, at least in front of that court or judge. But other lawyers, or the lawyer who got the lecture who is in front of a different court, may calculate the odds of that happening to them as exceedingly small and continue with business as usual.¹⁵⁰ Law schools can't solve the problem by lecturing students about the evils of boilerplate and “proper” discovery practices. That's not to discourage law schools from teaching students civility, cooperation, proportional behavior, and the rules themselves. But law school is not where lawyers learn litigation practices. And whatever good lessons students learn in law school will be soon forgotten if what they see in practice—both from the lawyers on the other side and the lawyers they practice with—is more and more boilerplate.¹⁵¹

148. While there have been occasional calls to return to pre-clearance for document requests, we do not believe the rulemakers are seriously entertaining that type of reform at this time.

149. Indeed, the two most applicable rules—Rule 26(g) and Rule 37(a)(5)—presumptively require judges to take action by requiring the imposition of sanctions and expense-shifting respectively unless the judge finds that the violation was substantially justified.

150. For example, one wonders whether the lawyers in *Liguria* were unaware that Judge Bennett had previously written a scathing condemnation of boilerplate objections and imposed sanctions on the offending lawyer under Rule 26(g), see *St. Paul Reinsurance Co., LTD. v. Commercial Fin. Corp.*, 198 F.R.D. 508, 518 (N.D. Iowa 2000), or whether they were aware but calculated that the odds of a similar fate befalling them were sufficiently small to take the risk.

151. To the point, most schools have cut their first-year, and only required, Civil Procedure class from six to four or even three credit hours. Yes, Civil Procedure is now on the multistate bar exam, but day-one lawyers surely don't learn discovery practices in bar review courses. It is the “practical” topics like discovery that get cut from the syllabus to make things fit. Perhaps the movement toward

What is needed is a response by *the judicial community*. Not one judge. Not ten. Hundreds. A response by the many, not the few. A critical mass. *That* would put things in motion.

Lawyers will stop making boilerplate requests and objections when they start to believe that judges won't let them get away with it.¹⁵² Imagine what would happen if lawyers came to realize that the judicial responses they read about in the legal press—the ones that were newsworthy precisely because they seemed like outliers—had become the norm. Law firms and in-house corporate and government legal departments would change their approaches, both in terms of what they consider acceptable practice for their lawyers and, most importantly, in how they train and instruct their new lawyers. Individual lawyers would heed Rule 26(g) and “stop and think” rather than reflexively recycling past discovery requests or dumping their boilerplate objections into their responses. At the same time, individual lawyers would feel empowered to break their own boilerplate habits without the fear of unilaterally disarming. The power comes from a realistic hope that opposing counsel will do the same and secure in the knowledge that judges will deal appropriately with those who have not. Finally, lawyers who have broken the boilerplate habit will be able to challenge those who have not, no longer forced into silence by their own unclean hands.

Judges can do three things to avoid relying solely on sanctions to make this happen. First, judges can make clear to lawyers from the outset what is expected. One way is in an order sent in every case, at the outset, making the judges' expectations clear. Second, judges must make themselves available, when needed, to promptly and effectively resolve discovery disputes when they arise. And third, judges must apply and enforce the rules, responding to or raising violations and addressing them. What judges can do includes sanctioning when the behavior warrants it and deterrence demands it.

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It is not hard to imagine a day in the not-too-distant future when boilerplate discovery stands out like a sore thumb because it is the outlier, not the norm. Culture change is hard, but it often occurs with remarkable

experiential learning will provide opportunities for students to learn proper discovery practice, but only for those students who elect to take those upper-level classes.

152. See Chief Justice Menis E. Ketchum II, *supra* note 2 (“Stiff sanctions by judges for each violation would have a dramatic effect on these unauthorized boilerplate objections. The word would spread quickly, and the practice would suddenly stop.”); Matthew L. Jarvey, *Boilerplate Discovery Objections: How They Are Used, Why They Are Wrong, and What We Can Do About Them*, 61 *DRAKE L. REV.* 913, 932 (2013) (“In order to curb boilerplate objections, judges should be more willing to dole out sanctions against lawyers who abuse the discovery process by issuing these objections.”).

speed when it does happen. Culture change occurs when tipping points are reached. Here, we are talking about two culture changes. The first is the culture of acceptance, or perhaps indifference, among too many judges who have turned a blind eye. The second is the boilerplate culture that exists among lawyers, the belief that everybody does it, so you must do the same. If we can get to the tipping point for the first change, we will get to the tipping point for the second faster than your device can cut, paste, and save yet another set of abusive discovery requests or objections.