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BEST PRACTICES

Bryan Cave attorneys Alec W. Farr and Brenda A. González explain why traditional approaches to answering discovery requests are no longer effective.

Conditioning Attorneys to Avoid Conditional Responses: How to Navigate the Changing Landscape of Discovery Responses

BY ALEC W. FARR AND BRENDA A. GONZÁLEZ

Imagine that you are an associate who has been tasked with handling discovery for a large firm client. You are served with requests for the production of documents and it is your responsibility to draft responses and serve the other side.

As you sit down to respond to the document requests, you copy-and-paste the form response you have come across in every other template in your firm's document system: ''Party objects on the grounds that the request is overly broad and requires documents covered by the attorney-client privilege. Subject to and without waiving any objections. . .such documents will be produced.''

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You serve your responses on opposing counsel, and the following Monday you are served with a motion to compel. The motion claims that your cut-and-paste response from the firm template has waived your client's objections and subjected your client to producing otherwise privileged information.

Thinking that there must be no authority to support such a wild proposition, you open the brief with scorn, only to have your heart sink as you see citations to several cases, including two 2014 cases, *Sprint Comm. Co., L.P. v. Comcast Cable Comm., LLC*, No. 11–2684–JWL, 2014 BL 37036 (D.Kan. Feb. 11, 2014) and *Fay Ave. Props., LLC v. Travelers Prop. Cas. Co. of Am.*, No. 11-2389-GPC (S.D.Cal. July 1, 2014), that say exactly that.

Case Law

The *Sprint* and *Fay Avenue* decisions are only the latest in a string of opinions that highlight a growing trend among district courts of overruling objections where counsel provides a conditional response. Magistrate Judge James O'Hara's decision in *Sprint* and Magistrate Judge William Gallo's decision in *Fay Avenue* joined federal judges in Arizona, Florida and Kansas in holding that ''whenever an answer accompanies an objection, the objection is deemed waived and the answer, if responsive, stands.''[1]

Sprint. In *Sprint*, Plaintiff Sprint objected to three discovery requests on the basis of attorney-client privilege and work product doctrine, but stated in its response, ''subject to and without waiver of the foregoing objections. . . [plaintiff] will produce nonprivileged responsive documents within its custody and control after a reasonably diligent search.''

[1] *Id.* at *3.

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Defendant Comcast filed a motion to compel the production of documents, which the United States District Court for the District of Kansas granted, on the basis that the purported ''reservation of rights'' was improper under the Federal Rules of Civil Procedure, and effectively waived Sprint's objections to those specific requests.[2] In its reasoning, the Court looked to the language of Fed. R. Civ. P. 34(b)(2), which permits only three responses to a request for the production of documents:

(1) produce the documents as requested;

(2) state an objection to the request as a whole; or

(3) state an objection to part of the request, provided that the response specifies the part objected to and responds to the non-objectionable portion.

Therefore, no objections may be ''reserved'' under the rules; ''they are either raised or they are waived.''[3]

The court held that objecting but answering ''subject to objection'' is not a choice under the Federal Rules, and compelled Sprint to produce documents relating to assessments made by Sprint's legal department regarding the patentability of certain inventions, and documents relating to the preparation or prosecution of patent applications for such inventions.

Sprint filed a motion for reconsideration, which Comcast joined and argued that such a drastic remedy—albeit, granted in Comcast's favor—lacked ''precedent in the relevant case law'' and was ''particularly problematic inasmuch as Sprint's responses followed a *widespread and commonly accepted practice*.''[4]

Based on the unusual set of circumstances before the court, Judge O'Hara granted Sprint's motion for reconsideration of its holding that Sprint waived its objections through unconditional responses.[5] The court, however, made clear that it was upholding its *ruling* that when a party objects to discovery but nonetheless answers ''subject to'' the objection, the objection will be deemed waived.[6]

The court cautioned that the practice of responding to discovery requests by asserting objections and then answering ''subject to'' or ''without waiving'' the objections is ''confusing, unproductive, and in violation of the federal discovery rules.''[7]

Fay Avenue. Following suit, Judge Gallo in *Fay Avenue* recognized that although it is common practice for attorneys to respond to discovery requests by asserting objections and then responding ''subject to'' and/or ''without waiving,'' the response is improper, the language is ''confusing and misleading'' and furthermore has ''no basis in the Federal Rules of Civil Procedure.''[8]

Judge Gallo ruled that Fay Avenue's objections were waived, but to the extent that they withheld documents on the basis of privilege or privacy, Fay Avenue was ordered to produce a privilege log and supplement its discovery responses to locate and identify which responsive documents were produced.[9]

A Growing Trend. [10] In so holding, Judges O'Hara and Gallo joined United States Magistrate Judge David J. Waxse, who authored the opinion three years prior in *Pro Fit Management, Inc. v. Lady of America Franchise Corp.*, Civil Action No. 08-CV-2662, 2011 BL 49738 (D.Kan. Feb. 25, 2011).

Pro Fit. In *Pro Fit*, the defendant asserted objections to plaintiff's discovery requests including objections on the basis of attorney-client privilege and/or work product, but then stated, subject to its objections, it would produce responsive, non-privileged documents.

The plaintiff filed a motion to compel, arguing that such conditional responses ''obscure[ ] potentially discoverable information'' and leave the requesting party ''with reason to believe that important documents have not been produced without a mechanism to compel production.''[11]

Judge Waxse agreed and ruled that when a party responds that it is producing documents ''subject to and without waiving its objections,'' the requesting party ''is left guessing as to whether [the producing party] has produced all documents, or only produced some documents and withheld others on the basis of privilege.''[12]

Although ruling that conditional responses were improper under the Federal Rules, Judge Waxse did not require defendants to produce the otherwise privileged materials, a step Judge O'Hara seemed inclined to take three years later. Rather, Judge Waxse required the defendant to amend their responses and ''make it clear whether [d]efendant is withholding any documents on the grounds of privilege and to specifically identify those responsive documents by Bates number on the privilege log referred to by the parties.''[13]

Haeger. The District of Arizona has also expressed its concerns regarding conditional discovery responses in *Haeger v. Goodyear Tire and Rubber Co.*, [14] where United States District Judge Roslyn O. Silver concluded that ''discovery would break down in practically every case''[15] if Rule 34 allowed litigants to make undisclosed partial document productions. The court found that absent an indication of what the responding party was objecting to, courts would have no way of assessing the propriety of the objections.[16]

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[2] *Id.* at *2.
[3] *Id.* at *3.
[4] Defs. Resp. to Sprint's Mot. for Recons. of the Ct.'s Holding that Sprint Waived Privileged Through Conditional Discovery Responses at 2, ECF No. 195 (emphasis added).
[5] Order at 8, Apr. 18, 2014, ECF No. 228.
[6] *Id.*
[7] *Id.* at 6.
[8] *Fay Avenue* at *1 .
[9] *Id.* at *1-2. It should be noted that the *Fay Avenue* court dealt with responses to interrogatories, requests for the production of documents and requests for admission, and applied the *Sprint* court's reasoning to each set of requests with full and equal force.
[10] Although not discussed in this article, other cases of note include: *Consumer Elecs. Assn. v. Compras And Buys Magazine, Inc.*, No. 08-21085-CIV, 2008 BL 210336 (S.D.Fl. Sept. 18, 2008), *Estridge v. Target Corp.*, No. 11–61490–CIV, 2012 WL 527051 at *1–2 (S.D.Fl. Feb. 16, 2012); *Pepperwood of Naples Condominium Assn. v. Nationwide Mutual Fire Ins. Co.*, No. 2:10–cv–753, 2011 BL 240238 (M.D.Fl. Sept. 20, 2011)
[11] 2011 BL 49738 at *8.
[12] *Id.* at *9.
[13] *Id.*
[14] 906 F. Supp. 2d 938 (D.Ariz. 2012).
[15] 906 F. Supp. 2d at 977.
[16] *Id.*

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Interrogatories and Requests for Admission

Federal district courts in Florida have reached the same conclusion regarding responses to interrogatories and requests for admission, as Judge Gallo did in *Fay Avenue*.

Tardif. In *Tardif v. People for the Ethical Treatment of Animals*,[17] the defendant moved to compel answers to its request for admission and interrogatories. The plaintiff began each admission and answer to the interrogatories with an objection, specifically stating ''[o]bjection, vague, ambiguous and not reasonably calculated to lead to the discovery of admissible evidence'' and then proceeded to answer the discovery.[18]

In reaching its ruling in *Tardif*, the court gave deference to *Mann v. Island Resorts Development, Inc.*, 20009 BL 44497 at *2-3 (N.D.Fla. Feb. 27, 2009), which held objections to interrogatories were waived where the party filed an objection and then answered the question in spite of the objection. In holding that certain requests for admission had been deemed admitted, the *Tardif* court held that ''answering subject to an objection lacks any rational basis. There is either a sustainable objection to a question or request or there is not.''[19]

These opinions should give litigants pause as to how certain districts may treat conditional responses under the discovery rules, and attorneys should always be mindful of particular nuances in the districts in which they practice.

Out of an abundance of caution, attorneys should err on the side of avoiding general objections, lodging specific objections, clearly identifying the basis for withholding documents and identifying which documents are being withheld. As demonstrated in *Sprint*, the potential ramifications could be enormous, particularly if a moving party pushes for waiver in a manner that Comcast did not.

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eDiscovery

Aside from the general cautionary guidance these rulings provide, a further issue is how they might affect the production of electronically stored information (''ESI'').

Use Agreements. Typical ESI practice should in theory make discovery responses like the ones at issue here easier to avoid. Prior to responding to written discovery demands, parties can come to a mutual agreement on the custodians that will be searched and the search terms to be used. Counsel for the parties can agree that the parties will produce responsive, non-privileged documents that are found based on the parties agreed search terms and custodian list, which give the requesting party an ability to object to the search terms or custodians used, or in the alternative, puts them on notice as to what exactly will be produced.

By having these discussions with opposing counsel prior to responding, both parties have a basic understanding of the types of documents that will be produced, and what might be withheld, which can guide discussion prior to the filing of a motion to compel.

Limit Dates, Custodians. Furthermore, parties can limit which documents will be produced in responding to discovery by clearly identifying whether they have limited a date range or a certain set of custodians. Informing the other side, for example, that they will only produce responsive, non-privileged documents from 2010 to the present, with a limited range of custodians, should alleviate judge's concerns about leaving other parties ''in the dark'' about what documents are being produced.

Potential Benefits. Although perhaps too early to tell, these rulings may have the added benefit of expediting discovery and helping litigation move at a reasonable pace.

Lawyers may be more inclined to lodge specific objections and have more meaningful discussions with opposing counsel regarding what documents they plan to produce, what documents they think may not be relevant or responsive, and what documents will be withheld.

Conversely, lawyers may be more amenable to revising overly broad and burdensome discovery requests which may draw objections, prolong discovery, create a more adversarial atmosphere between the parties and draw ire from judges.

Privilege Logs. Regarding privilege, *Sprint*, *Fay Avenue* and the prior cases reaffirm that counsel should always produce a privilege log that clearly identifies documents being withheld on the basis of attorney-client privilege and/or work-product doctrine, as required by Fed. R. Civ. P. 26(b)(5).

As Judge Waxse cautioned, the documents should be easily identifiable by Bates number and should be provided when a production has been completed, or within a reasonable time thereafter, otherwise a party risks waiving its objections and subjects itself to producing otherwise privileged information.

Producing a privilege log along with discovery responses may alleviate concerns that lawyers are seeking to hide the ball from opposing counsel, and instead may demonstrate a forthright effort to identify which documents are being withheld and a willingness to comply with discovery rules.

Taking these measures to comply with counsel's obligations under the Federal Rules of Civil Procedure and putting opposing counsel on notice as to what a party objects to or seeks to withhold should quell concerns raised by *Tardif, Pro Fit* and their progeny.

[17] No. 2:09-cv-537-FtM-29SPC, 2011 BL 115082 at *2 (M.D. Fla. Apr. 29, 2011).
[18] *Id*. at *1.
[19] *Id*. at *2.