Ethics & PROFESSIONAL RESPONSIBILITY

Some Thoughts on Discovery and Legal Writing

"What we have here is failure to communicate"[1]

By Judge Paul J. Cleary

There is a famous scene at the end of the movie *Blow Up*[2] where mimes face off in a tennis match using an imaginary ball and racquets. It reminds me of too many discovery disputes: I sit as the linesman, watching helplessly as the lawyers roil and argue between intermittent swats at imaginary objects.

The fundamental problems that underlie most discovery disputes might be pulled from the pages of a marriage counselor's handbook: Fear of commitment and inability to communicate. Lawyers won't commit to a definition of the legal dispute: It's not a simple breach of contract; it's a contract, fraud, bad faith, conspiracy, racketeering case. The ill-defined nature of the dispute drives discovery into vast, uncharted territory. By the same token, lawyers responding to discovery requests won't commit to a clear statement of what responsive documents exist and which of those will be produced. The purpose of this article is to examine the problem of inartful/incomprehensible discovery requests and responses and to offer some observations and, perhaps, some solutions.

A TYPICAL DISCOVERY DISPUTE

Assume a lawsuit involving a generic dispute between plaintiff, "POE," and defendant, "DOE," concerning a contract entered into on July 24, 2010. Each side claims the other has breached the contract by failing to perform.

The following is an approximation of a recent discovery dust-up. For simplicity, the discussion is limited to one request for production served by POE, and DOE's response.[3] POE has served a document request on DOE and DOE has offered its response. Dissatisfied with that response, POE demands a Rule 37.1 meeting in an attempt to resolve the matter without court intervention.[4] When that fails, POE files its motion to compel.

A PRELIMINARY MATTER: DISCOVERY DEFINITIONS AND GENERAL OBJECTIONS

Discovery requests generally open with a litany of definitions that are, in theory, designed to make clear what is being sought. Generally, however, this definitional section consists of mere boilerplate that often bears little relevance to the case at hand. For example, this is a fairly standard definition of the word "document" that is being used by numerous lawyers and law firms across the state:

Document shall mean all tangible objects or media conveying, carrying, containing, storing, or otherwise holding spoken, aural, visual,

written, electronic, or machine readable substance, irrespective of the media upon which such substance is contained, produced, reproduced, stored or kept, and whether in graphic form suitable for visual inspection or in machine-readable form. Such media includes, without limitation, paper, phonographic, photographic, film, magnetic (including without limitation hard-drives, floppy disks, compact discs, DVDs, tape, etc.) computer memory, optical media, magneto-optical media, and any other physical media upon which notations or markings of any kind can be affixed. These terms include, but are not limited to, the original and any identical or non-identical copies of the "document," regardless of origin or location, including all correspondence, records, tables, charts, analyses, graphs, maps, schedules, reports, memoranda, journals, notes, logs, diaries, calendars, appointment books, letters, telegrams, telex and other messages (including, but not limited to reports of telephone conversations, and conferences), studies, directives, books, periodicals, magazines, newspapers, booklets, circulars, advertisements, brochures, bulletins, instructions, minutes, inter and intra-office communications, including electronic communications, contracts, books of account, work orders, purchase orders, materials or parts orders, invoices, statements, checks, bills, files, vouchers, bids, proposals, quotations, requests for quotation, notebooks, scrapbooks, data sheets, paper and electronic data files, paper and electronic databases, data processing cards, computer tapes, computer disks, computer programs, computer printouts, electronic information storage medium, photographs, photographic negatives, videotape or film recordings, telephone records, calling card records, cell phone records, internet account records, credit cards records, audiotape recordings, wire recordings, forms, catalogues, manuals, blueprints, tracings, tabulations, and any other writing or document of any kind, regardless of the manner in which produced, reproduced, stored, or kept, and whether in draft or other form. The term "Document" shall also include voice recordings, films, tapes, and other data compilations from which information can be obtained.[5]

> "Never have so many words accomplished so little."

First observation: Unfocused boilerplate is a waste of time. While a well-considered definition can be helpful in discovery matters, this one is decidedly unhelpful. Indeed, not only is it not helpful, it discloses something POE's lawyer should keep hidden: He/she is too lazy to shape the definition to the case at hand.[6] Are magazines, periodicals and cell phone records really what POE is seeking? If not, delete that language. Definitional boilerplate generally holds little usefulness and may actually impede the discovery process by making the discovery request confusing. It also must be noted that this particular definition runs longer than Lincoln's Gettysburg Address — by 34 words. Never have so many words accomplished so little.

Furthermore, there is a better way to deal with a real definitional problem. Rule 34(a) of the Federal Rules of Civil Procedure provides a working definition of "document:"

> Any designated documents or electronically stored information — including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations – stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form…

Fed. R. Civ. P. 34(a)(1)(A). Reference to this rule probably provides a sufficient definition for most discovery requests.

The respondent's equivalent of the long-winded definitional preamble is the statement of general objections. This is a set of stock, generic objections, supposedly applicable to all of the discovery requests. They usually include a general assertion of privilege and work product protection. They may also include such statements as: "Agreement to produce documents is not an admission of the relevance of any such document." Or, "Agreement to produce requested documents is not an admission that any such documents exist."

Like tedious, unfocused discovery definitions, generic general objections are generally a waste of time. The Federal Rules of Civil Procedure require that the grounds for discovery objections be stated with specificity.[7] General objections often fail this test. Unless a general objection is specifically asserted against a particular discovery request and the basis for the objection explained, it generally will be ignored.[8] Without explanation of its specific

application, a general objection does not fulfill the responding party's burden under the federal rules and does not provide sufficient basis for the court to determine whether the objection has merit.

POE'S INITIAL DISCOVERY REQUEST

With the discussion of boilerplate behind us, we return to our mock discovery dispute. POE has served this discovery request:

> *Produce all documents, electronic data and/or other material of whatsoever kind, whether in your possession or under your custody and/or control, that contain, reflect, mention, reference or summarize any statement, written or otherwise, including, but not limited to, any such statement in electronic format, made by you, obtained by you, made by any person or entity on your behalf, or made by any other person or entity whatsoever concerning, relating to, referencing, or mentioning in any manner whatsoever, the Agreement entered into between POE and DOE on or about July 24, 2010, drafts of that agreement, any suggested revisions to the agreement, and the reasons therefor.*

This is hardly a model of communicative clarity. This one sentence contains more than 100 words and is supposed to describe *with particularity* a set of documents. Now let's consider just the basic structure of this single sentence. The structure seems fairly simple: "(DOE) produce X." It is "X" that is the problem; here it includes all materials that:

1) Are in DOE's

   a. possession,
   b. custody, or
   c. control

2) And

   a. contain,
   b. reflect,
   c. mention,
   d. reference or
   e. summarize any statements
      i. Made by DOE
      ii. Obtained by DOE
      iii. Made by any person or entity on DOE's behalf
      iv. Made by any person whatsoever,
         1. That concern,
         2. relate to,
         3. reference, or
         4. mention in any way
            a. The agreement between POE and DOE,
            b. Drafts of the agreement,
            c. Suggested revisions to the agreement, or
            d. The reasons for any revisions to the agreement.

Second Observation: Simplify your writing. The modifiers outlined above put an awful lot of weight on one sentence. Two suggestions for the lawyer drafting a discovery request: First, if your non-lawyer spouse/friend can't understand what you are saying, rewrite it until he/she can. Second, if you can't diagram the sentence you've written, the sentence is objectionable on its face.[9] It must be stricken and the author banished to some harmless activity — like document review.

This document request could — and should — be broken into a half dozen requests. Furthermore, it must be revised to identify with particularity what is being sought. In its present form, it is badly conceived and poorly written. These weaknesses make it impossible for a judge to enforce.

Third observation: Attend to basic writing fundamentals. It would be helpful if lawyers occasionally reviewed the simple principles of composition contained in *The Elements of Style*.[10] There, the authors list 12 Elementary Principles of Composition. A few of them are worth emphasizing here: 1) Use the active voice. 2) Put statements in positive form. 3) Use specific concrete language. 4) Omit needless words. And then this:

> Vigorous writing is concise. A sentence should contain no unnecessary words, a paragraph no unnecessary sentences, for the same reason that a drawing should have no unnecessary lines and a machine no unnecessary parts. This requires not that the writer make all his sentences short, or that he avoid all detail and treat his subjects only in outline, but that every word tell.[11]

If the author of the document request above had reviewed it according to those simple principles, it would never have been released for public consumption. At the very least, it would be shorter and more understandable. Ideally, it would request something specific, something concrete — which means it would comply with Rule 34 of the Federal Rules of Civil Procedure.

Rule 34 requires that a document request describe "with reasonable particularity" what is being sought. However one may interpret the phrase "reasonable particularity," the Request above misses the mark.[12] A Request should be sufficiently concrete so that when the recipient reads it he or she has a clear idea as to what is being requested. The use of so-called "omnibus phrases" — "relating to," "referring to," or "reflecting" — frequently undermines this particularity requirement. One such phrase is bad enough, but piling one upon another destroys meaningful communication and violates the author's obligation under Rule 34. For this reason, some courts have held that the use of omnibus phrases can render a discovery request objectionable on its face.[13]

Such vagueness also means that the court has little ability to enforce the request. How will the judge ever know whether his order to produce has been complied with?

Why not simply request the following:

> *Produce all documents related to the July 24, 2010, agreement, between POE and DOE including any drafts or suggested revisions.*
>
> *Produce any documents that discuss the reasons for the suggested revisions described in the previous Request.*

Both of these requests are "Tweet-sized."[14] While they may not be without flaws they at least describe a comprehensible set of documents. That is the first step in the basic communication that defines a discovery request, but to take that step POE must commit to a theory of the lawsuit. POE cannot try to capture in one request all documents tied to a contract-fraud-conspiracy-racketeering-bad faith case. All-encompassing discovery requests reflect a lawyer's lack of commitment to a theory of the litigation and an unwillingness to take the time to define what documents might be related to a contract claim, what other documents might relate to the elements of a fraud claim, etc. Absent that commitment and initial analysis, the discovery process will be, at best, difficult, and, at worst, an expensive, frustrating waste of time. However, even after the initial analysis is complete, the lawyer must use his/her writing skills to fashion a comprehensible discovery request.

Fourth observation: Listen to Van Morrison. Drafting cogent discovery requests is challenging, but the final product should reflect clarity of thought, not bewilderment. Too often, lawyers who are capable of writing cogent and coherent briefs, turn semi-lingual when drafting discovery requests.[15] Why would the lawyer who crafted the document request above not realize its flaws and set out to revise and edit it until it made sense? Perhaps Van Morrison has said it best: "When I cleaned up my diction I had nothing left to say…."[16] That is, "If I took the time to edit my writing it would be immediately apparent that I haven't a clue what I'm talking about" or "I can't make my discovery request any clearer because I don't know what I'm looking for."[17]

DOE'S OBJECTIONS AND RESPONSE TO THE DOCUMENT REQUEST

In response to the discovery request above, DOE offered this response:

> *DOE objects to this request on the grounds that it is vague, overly broad, unduly burdensome, seeks information that is not relevant to the claims and defenses herein and is not reasonably calculated to lead to discovery of admissible evidence. Subject to these objections and the General Objections asserted above, and without waiving same, DOE states that responsive documents, if any exist, will be produced. See attached documents.*

The problems presented in DOE's discovery response are as severe as those in POE's discovery request. First, the response merely parrots the objection language in Rule 26 without any further explanation. Second, the response both objects *and* responds to the discovery request without defining the line where the objection ends and the response begins. Third, DOE's response indicates that it has not even undertaken a sufficient search to determine if there are *any* documents responsive to the request. Finally, the response attaches documents without explaining what they are and how they relate to the universe of responsive documents.

DOE's discovery response recites typical boilerplate language from Rule 26: vague, overly broad, unduly burdensome, not relevant, not reasonably calculated to lead to admissible evidence…. Unless these objections are supported with specific reference to the request at issue and explain the reason for the objection, they fail the test of Rule 34(b)(2)(B).[18] Furthermore, they do not help the court understand or resolve the underlying discovery dispute.

More troubling, DOE's discovery response makes numerous objections but then states that something will be produced subject to the specific and the general objections and "without waiving same." Rule 34 demands more of a commitment than that. The rule provides that a responding party may 1) state that inspection will be permitted as requested; or, 2) state an objection to the request, including the reasons; or, 3) object to part of the request and permit inspection of the rest.[19] Here, DOE has attempted to object *and* produce without distinguishing between the objectionable and the non-objectionable parts of the request.

Fifth observation: Decide whether you are objecting or producing. Sooner or later, the lawyer has to make a decision: Is the document request so vague that I must object and refuse to answer, or can I reasonably infer what is being sought and respond accordingly. If your objection is reasonable, perhaps the issue can be resolved at the meeting with opposing counsel before a motion to compel is filed.

Sixth observation: Find out if responsive documents exist. Many discovery fights would be avoided if the producing party simply stated: "After a good faith search, there are no documents responsive to this request." Unfortunately, the more common response is, "Responsive documents will be produced, *if any exist*." This last phrase implies that the search for responsive documents has not even begun. If a lawyer responds to a discovery request, at the very least he should know whether or not any responsive documents exist. If he hasn't even made that initial determination, he hasn't fulfilled his responsibility to participate in discovery in good faith.

Seventh observation: If you are producing, identify what is being produced. Further confusing the matter, the response concludes with the admonition: "See attached documents." But what documents are attached? Are they the responsive documents that the author previously told us he didn't know existed? Are they *all* responsive documents? Or just a handful of special favorites? The response does not comply with the requirements of Rule 34.[20]

SUMMARY

Discovery disputes are often the most unpleasant aspect of the practice of law. However, many discovery problems could be avoided if lawyers kept two simple goals in mind. First, Discovery's underlying purpose is "to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. That directive should be in every attorney's mind when drafting discovery requests or responses. Counsel also needs to remember the essential purposes of discovery:

(1) To narrow the issues;
(2) To obtain evidence for use at the trial;
(3) To secure information about the existence of evidence that may be used at the trial and to ascertain how and from whom it may be procured.[21]

The goal is "to remove surprise from trial preparation so that the parties can obtain evidence necessary to evaluate and resolve their dispute."[22] That goal is best satisfied when discovery requests — and the responses — are clear, concise and specific.

Second, the fundamental goal of any written document is communication. If the author doesn't understand what he/she is saying, the reader will be doubly taxed. Meaningful communication — whether in requesting information or responding to the request – requires effective use of grammar and writing skill. Lawyers often fall into the bad habit of boilerplate forms and legalese, trying to "write like a lawyer." This is generally not a worthy goal. As Fordham law Professor John D. Feerick has noted: "When one says, 'You think like a lawyer,' it is taken as a compliment; when one says, 'You write like a lawyer,' it is serious criticism."[23]

1. *Cool Hand Luke* (Jalem Productions 1967).

2. (Bridge Films 1966).

3. The dispute described is a composite of several the author has presided over. The document request, definitions, general objections and discovery response are taken nearly verbatim from actual cases.

4. Rule 37.1 of the Local Rules of the U.S. District Court for the Northern District of Oklahoma provide:

> With respect to all motions or objections relating to discovery … this Court shall refuse to hear any such motion or objection unless counsel for movant first advises the Court in writing that counsel personally have met and conferred in good faith and, after a sincere attempt to resolve differences, have been unable to reach an accord.

LCvR37.1.

5. This definition has appeared in several discovery requests recently submitted to the court.

6. Boilerplate definitions are generally of little assistance because they are rarely tailored to the case at hand; instead, the author drops into his document request a stock definition, such as the example above, without regard to its applicability within the context of the specific litigation. This is also true with boilerplate general objections. Lawyers often attach these to all discovery responses without regard to applicability and without tying them to specific discovery requests. If the objections aren't related to specific document requests, they are generally a waste of time. *See Leisure Hospitality, Inc. v. Hunt Properties, Inc.*, 2010 WL 3522444, at *3 (N.D.Okla. Sept. 8, 2010) ("General objections are of little use if they are not applied specifically to a particular discovery request."). Consequently, some courts have held that general objections are impermissible. *E.g., Herd ex rel. Herd v. Asarco, Inc.*, 2002 WL 34584902, at *3 (N.D.Okla. April 26, 2002) ("General or boiler-

plate objections are not proper."). Others have held that since objections must be stated with specificity, a mere recitation of the familiar litany of overly broad, vague or burdensome, is not sufficient. *Wyatt v. ADT Sec. Services, Inc*., 2011 WL 1990473, at *2 n. 1 (N.D.Okla. May 23, 2011) ("It is not appropriate to expect the court to sift through general objections to determine which ones might apply to a particular topic."); *See also Oklahoma v. Tyson Foods, Inc.*, 262 F.R.D. 617, 621 n.4 (N.D.Okla. 2009); *Adhi Parasakthi Charitable, Medical, Educational, and Cultural Society of North Am. v. Township of West Pikeland*, 2010 WL 157534, at *4 (E.D.Pa. Jan. 13, 2010).

7. Fed. R. Civ. P. 34(b)(2)(B).

8. *E.g., Wyatt*, 2011 WL 1990473, at *2 n.1; *Leisure Hospitality*, 2010 WL 3522444, at *3; *Herd*, 2002 WL 34584902, at *3.

9. For discussion of diagramming sentences, *see* Kitty Burns Florey, *Sister Bernadette's Barking Dog: The Quirky History and Lost Art of Diagramming Sentences* (Melville House, 2006). Ms. Florey was taught diagramming by Sister Bernadette; in my case it was Sister Joseph Catherine, among others.

10. W. Strunk, Jr. and E. B. White, *The Elements of Style* at 23 [3rd ed. 1979]. For a useful guide on constructing a clear sentence, *see* Stanley Fish, *How to Write a Sentence: And How to Read One*, (1st ed. 2011).

11. *Id*.

12. For a description of two approaches to defining "reasonable particularity," *see* 8B Charles Alan Wright, Arthur R. Miller, Mary Kay Kane & Richard L. Marcus, *Federal Practice and Procedure* §2211 (3rd ed. 1998)[hereinafter, Wright & Miller]. For examples of document requests that courts have found to be too broad, *see* 10A Fed. Proc. L. Ed. §26:635 [2010].

13. *E.g., Leisure Hospitality, supra*, 2010 WL 3522444, at *3 (omnibus phrases undermine obligation to describe what is being sought with "reasonable particularity."); *Mackey v. IBP, Inc.*, 167 F.R.D. 186, 197-98 (D.Kan. 1996) (omnibus phrases "often require the answering party to engage in mental gymnastics to determine what information may or may not be remotely responsive."); *Audiotext Communications Network, Inc. v. US Telecom, Inc*., 1995 WL 625962, at *6 (D.Kan. Oct. 5, 1995) (omnibus terms "make arduous the task of deciding which of numerous documents may conceivably fall within its scope.").

14. A "tweet" is a message sent via the social networking service Twitter. Tweets are limited to 140 characters in length.

15. Which brings to mind the story of an Ohio college professor who returned a student's writing assignment with the following note:

> "I am returning this otherwise good paper to you because someone has printed gibberish all over it and put your name at the top."

16. Van Morrison is not a legal scholar. He is a music legend of Irish descent — both notable attributes. The quote is from Van Morrison, "No Religion," on *Days Like This*, Polydor/Umgd Records 1995).

17. Which raises the terrible thought that when counsel informs the court that a document request/response "could not be any clearer," counsel's statement is, sadly, all too accurate.

18. *E.g., Leisure Hospitality, supra*, 2010 WL 3522444, at *3; *Bank of Mongolia v. M & P Global Financial Services, Inc*., 258 F.R.D. 514, 519 (S.D.Fla. 2009); *Etienne v. Wolverine Tube, Inc*., 185 F.R.D. 653, 656 (D.Kan. May 1999) (Objecting party has burden to support its objections.); *Miner v. Kendall*, 1997 WL 695587, at *1 (D.Kan. Sept. 19, 1997) (Conclusory or boilerplate objections are disfavored.). *See* additional cases cited at footnote 6.

19. Fed. R. Civ. P. 34(b)(2)(B) & (C). *See Leisure Hospitality*, 2010 WL 3522444, at *3.

20. Rule 34(b)(2)(E)(i) provides that "A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request." A party must state whether the documents produced are all of the responsive documents.

21. 8 Wright & Miller, *Federal Practice & Procedure* §2001 (quoting *Weinstein v. Ehrenhaus*, 119 F.R.D. 355, 357 (S.D.N.Y. 1988)).

22. *Oakes v. Halvorsen Marine Ltd*., 179 F.R.D. 281, 283 (C.D.Cal. 1998). 8 Wright & Miller, *Federal Practice & Procedure* §2001 (quoting *Weinstein v. Ehrenhaus*, 119 F.R.D. 355, 357 (S.D N.Y. 1988)). The goal is "to remove surprise from trial preparation so that the parties can obtain evidence necessary to evaluate and resolve their dispute."

23. John D. Feerick, "Writing Like a Lawyer," 21 Fordham Urb. L. J. 381 [Winter 1994].

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