BOILERPLATE DISCOVERY OBJECTIONS: HOW THEY ARE USED, WHY THEY ARE WRONG, AND WHAT WE CAN DO ABOUT THEM

ABSTRACT

Boilerplate discovery objections infect pretrial documents in most modern civil litigation. Responses to requests for production and interrogatories are often littered with trite objections like "Objection: overbroad, irrelevant, privileged"—objections low on detail and high on obstruction. The law repudiates these objections, courts despise them, and litigants pay (literally and figuratively) for them. Yet these objections persist. Why? At what cost? And most importantly, what can we do to curb their use? This Note addresses these questions—and more—analyzing federal law regarding boilerplate objections. It also proposes creative solutions to remedy the rampant use of boilerplate objections, including a modern twist on a nineteenth century literary punishment.

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"If there is a hell to which disputatious, uncivil, vituperative lawyers go, let it be one in which the damned are eternally locked in discovery disputes with other lawyers of equally repugnant attributes."[1]

I. INTRODUCTION

"Formal discovery under the Federal Rules of Civil Procedure is one of the most abused and obfuscated aspects of our litigation practice."[2] One of the most rampant abuses of the discovery process is the use of boilerplate objections to discovery requests.[3] Usually, boilerplate objections are found in responses to interrogatories under Federal Rule of Civil Procedure 33,[4] or in requests for production of documents under Federal Rule of Civil Procedure 34.[5] But they can be found in nearly any pretrial document that might contain an objection.[6]

The hallmark of a boilerplate objection is its generality. The word "boilerplate" refers to "trite, hackneyed writing"[7]—an appropriate definition in light of how boilerplate objections are used. An objection to a discovery request is boilerplate when it merely states the legal grounds for the objection without (1) specifying *how* the discovery request is deficient and (2) specifying how the objecting party would be harmed if it were forced to respond to the request.[8] For example, a boilerplate objection might state that a discovery request is "irrelevant" or "overly broad"

1. Dahl v. City of Huntington Beach, 84 F.3d 363, 364 (9th Cir. 1996) (quoting Krueger v. Pelican Prod. Corp., No. CIV-87-2385-A (W.D. Okla. Feb. 24, 1989) (order denying motion to dismiss)) (internal quotation marks omitted).

2. Francis E. McGovern & E. Allan Lind, *The Discovery Survey*, 51 LAW & CONTEMP. PROBS. 41, 41 (1988).

3. *See* McLeod, Alexander, Powel & Apffel, P.C. v. Quarles, 894 F.2d 1482, 1486 (5th Cir. 1990) (noting that boilerplate objections are an "all-too-common" practice in the legal profession).

4. FED. R. CIV. P. 33; *see also, e.g.*, Design Basics, L.L.C. v. Strawn, 271 F.R.D. 513, 518–19 (D. Kan. 2010) (recognizing a plaintiff's objections to interrogatories and requests for production were boilerplate objections).

5. FED. R. CIV. P. 34; *see also, e.g.*, St. Paul Reinsurance Co. v. Commercial Fin. Corp., 198 F.R.D. 508, 512 (N.D. Iowa 2000) (sanctioning a lawyer for using boilerplate objections in response to requests for production of documents).

6. *See, e.g.*, Holifield v. United States, 909 F.2d 201, 204 (7th Cir. 1990) (noting that boilerplate, or "blanket," objections raised in a petition to quash an IRS summons "will not suffice").

7. RANDOM HOUSE, WEBSTER'S UNABRIDGED DICTIONARY 234 (2d ed. 2001).

8. *St. Paul Reinsurance Co.*, 198 F.R.D. at 512.

without taking the next step to explain *why*.[9] These objections are taglines, completely "devoid of any individualized factual analysis."[10] Often times they are used repetitively in response to multiple discovery requests.[11] Their repeated use as a method of effecting highly uncooperative, scorched-earth discovery battles has earned them the nicknames "shotgun"-[12] and "Rambo"-style[13] objections. The nicknames are indicative

9. *See, e.g.*, Anderson v. Caldwell Cnty. Sheriff's Office, No. 1:09cv423, 2011 WL 2414140, at *3 (W.D.N.C. June 10, 2011). The following are representative examples of different boilerplate objections:

- "Objected to. Overbroad; irrelevant; privileged. Propounded with the intent to harass, delay and abuse." McLeod, Alexander, Powel & Apffel, P.C. v. Quarles, 894 F.2d 1482, 1484 (5th Cir. 1990) (internal quotation marks omitted).
- "[Plaintiff] objects to this request on the ground that the request is oppressive, burdensome and harassing. [Plaintiff] further objects to this request on the ground that it is vague, ambiguous and unintelligible. [Plaintiff] further objects that the request is overbroad and without reasonable limitation in scope or time frame. [Plaintiff] further objects that the request seeks information that is protected from disclosure by the attorney-client privilege, the attorney work product doctrine and/or the joint interest or joint defense privilege. [Plaintiff] further objects to this request on the ground that the request seeks information and documents equally available to the propounding parties from their own records or from records which are equally available to the propounding parties. [Plaintiff] further objects that this request fails to designate the documents to be produced with reasonable particularity." *St. Paul Reinsurance Co.*, 198 F.R.D. at 512 (footnote omitted).
- "O[bjection]; attorney/client privilege; work product." Pallaske v. Island Cnty., No. C06-1735RSL, 2007 WL 4387452, at *2 (W.D. Wash. Dec. 10, 2007).
- "Overbroad, unduly burdensome, unduly redundant to other discovery, oppressive, calls for narrative. Discovery has only just begun." United States *ex rel.* O'Connell v. Chapman Univ., 245 F.R.D. 646, 649 (C.D. Cal. 2007) (quoting a party's initial objections) (internal quotation marks omitted).

10. Ceroni v. 4Front Engineered Solutions, Inc., 793 F. Supp. 2d 1268, 1278 (D. Colo. 2011).

11. *See, e.g.*, *St. Paul Reinsurance Co.*, 198 F.R.D. at 512 & n.2.

12. *See, e.g.*, Covington v. Sailormen Inc., 274 F.R.D. 692, 693 (N.D. Fla. 2011).

13. *See, e.g.*, *McLeod, Alexander, Powel & Apffel*, 894 F.2d at 1486; *St. Paul Reinsurance Co.*, 198 F.R.D. at 510–11.

of the federal courts' extreme disfavor of these objections.[14]

The problems with using boilerplate objections, however, run deeper than their form or phrasing. Their use obstructs the discovery process, violates numerous rules of civil procedure and ethics, and imposes costs on litigants that frustrate the timely and just resolution of cases. Still, "old habits die hard,"[15] and boilerplate objections remain rampant.[16] In order to combat the problem of boilerplate objections, attorneys and judges alike must commit to increasing their scrutiny of these objections, as well as to imposing new, creative costs on those who abuse discovery by issuing boilerplate objections.

II. THE LAW OF BOILERPLATE OBJECTIONS

Federal courts have long disfavored boilerplate objections.[17] District courts often repeat the warning: "Boilerplate, generalized objections are inadequate and tantamount to not making any objection at all."[18] The warning reflects the resounding sentiment that boilerplate objections are legally improper, regardless of their practical consequence.[19] While the lion's share of the case law condemning boilerplate objections comes from district courts (the courts charged with overseeing discovery), several

14. *See St. Paul Reinsurance Co.*, 198 F.R.D. at 512.

15. MICK JAGGER & DAVE STEWART, OLD HABITS DIE HARD (EMI Records Ltd. 2004).

16. *See McLeod, Alexander, Powel & Apffel*, 894 F.2d at 1486 (noting that boilerplate objections are an "all-too-common" practice in the legal profession).

17. *St. Paul Reinsurance Co.*, 198 F.R.D. at 512 ("[F]ederal courts have routinely deemed [boilerplate objections] to be improper objections.").

18. Walker v. Lakewood Condo. Owners Ass'n, 186 F.R.D. 584, 587 (C.D. Cal. 1999) (citations omitted); *accord* Adelman v. Boy Scouts of Am., 276 F.R.D. 681, 688 (S.D. Fla. 2011) ("[J]udges in this district typically condemn boilerplate objections as legally inadequate or meaningless." (citations omitted) (internal quotation marks omitted)); Nissan N. Am., Inc. v. Johnson Elec. N. Am., Inc., No. 09-CV-11783, 2011 WL 669352, at *2 (E.D. Mich. Feb. 17, 2011) (refusing to consider "[b]oilerplate or generalized objections").

19. Duran v. Cisco Sys., Inc., 258 F.R.D. 375, 379–80 (C.D. Cal. 2009) ("Even if not waived, such unexplained and unsupported boilerplate objections are improper." (citations omitted)); Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 358–59 (D. Md. 2008) ("[B]oilerplate objections . . . persist despite a litany of decisions from courts . . . that such objections are improper unless based on particularized facts." (citations omitted)); A. Farber & Partners, Inc. v. Garber, 234 F.R.D. 186, 188 (C.D. Cal. 2006) ("As an initial matter, general or boilerplate objections such as 'overly burdensome and harassing' are improper—especially when a party fails to submit any evidentiary declarations supporting such objections." (citations omitted)).

circuit courts have also spoken out against the use of these objections.[20]

Rather than merely stating a tagline, objections to discovery requests must be stated with particularity.[21] This is because objecting parties bear the burden of demonstrating why their objections are proper.[22] Objecting parties must "provide sufficient information to enable other parties to evaluate the applicability of [their claims]"[23] and "must show specifically

20. *See* Bess v. Cate, 422 F. App'x 569, 572 (9th Cir. 2011) (noting that it is "well-established law that parties seeking to invoke privileges are not permitted to provide mere blanket objections to discovery requests"); Steed v. EverHome Mortg. Co., 308 F. App'x 364, 371 (11th Cir. 2009) ("We have noted that boilerplate objections may border on a frivolous response to discovery requests." (citing Chudasama v. Mazda Motor Corp., 123 F.3d 1353, 1358 (11th Cir. 1997))); Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Court for the Dist. of Mont., 408 F.3d 1142, 1149 (9th Cir. 2005) ("We hold that boilerplate objections or blanket refusals inserted into a response to a Rule 34 request for production of documents are insufficient to assert a privilege."); Abraham v. Cnty. of Greenville, 237 F.3d 386, 392 (4th Cir. 2001) (finding it was not an abuse of discretion for the district court to hold that boilerplate objections constituted no response under Federal Rule of Civil Procedure 37); *McLeod, Alexander, Powel & Apffel*, 894 F.2d at 1485 (holding that boilerplate objections are not sufficient to voice a successful objection to requests for production); Panola Land Buyers Ass'n v. Shuman, 762 F.2d 1550, 1559 (11th Cir. 1985) ("To be adequate, objections which serve as the basis of a motion for protective order under [Federal Rule of Civil Procedure] 26 should be plain enough and specific enough so that the court can understand in what way the interrogatories are alleged to be objectionable." (quoting Davis v. Fendler, 650 F.2d 1154, 1160 (9th Cir. 1981)) (internal quotation marks omitted) (citing Josephs v. Harris Corp., 677 F.2d 985 (3d Cir. 1982))); *Josephs*, 677 F.2d at 992 ("However, the mere statement by a party that the interrogatory was 'overly broad, burdensome, oppressive and irrelevant' is not adequate to voice a successful objection to an interrogatory. On the contrary, the party resisting discovery must show specifically how . . . each interrogatory is not relevant or how each question is overly broad, burdensome or oppressive." (alteration in original) (quoting Roesberg v. Johns-Manville Corp., 85 F.R.D. 292, 296–97 (E.D. Pa. 1980)) (internal quotation marks omitted)); *cf.* Holifield v. United States, 909 F.2d 201, 204 (7th Cir. 1990) (holding that it is insufficient to use general privilege assertions in attempting to quash an IRS summons). *But see* Grider v. Keystone Health Plan Cent., Inc., 580 F.3d 119, 139 (3d Cir. 2009) (holding that "the legitimacy of a general objection" depends on its context, and general objections are only improper under the Federal Rules if "interposed in an attempt to insulate from discovery a large quantity of material that includes otherwise discoverable material when only some of the material may be protectible").

21. *Josephs*, 677 F.2d at 992; *see* FED. R. CIV. P. 26(b)(5); FED. R. CIV. P. 33(b)(4); FED. R. CIV. P. 34(b)(2); *see also St. Paul Reinsurance Co.*, 198 F.R.D. at 512 (noting that the boilerplate objections offered failed to articulate any particular harm).

22. *See, e.g.*, *St. Paul Reinsurance Co.*, 198 F.R.D. at 511 (citing Oleson v. Kmart Corp., 175 F.R.D. 560, 565 (D. Kan. 1997)).

23. *Burlington N. & Santa Fe Ry. Co.*, 408 F.3d at 1148 (quoting FED. R. CIV. P. 26 advisory committee's notes (1993), subdiv. (b)(5)) (internal quotation marks

how . . . each interrogatory is not relevant or how each question is overly broad, burdensome or oppressive."[24] A responsive objection is one that states (1) *how* a discovery request is deficient and (2) how the objecting party would be harmed if they were forced to respond to the request.[25] This requires lawyers to forgo the "familiar litany" of general objections in favor of specifically supporting each objection individually.[26]

There are several reasons why general boilerplate objections are so strongly disfavored. First, they unnecessarily obfuscate the discovery process, distracting from the real issues in a case.[27] Second, boilerplate objections prevent courts from properly evaluating the objections' underlying merits.[28] Objections do not exist in isolation. They are contextual, and the veracity of an objection depends on the underlying facts of a particular discovery request.[29] It is impossible for courts to properly evaluate an objection on its merits when the objection is devoid of sufficient specificity.[30]

Finally, boilerplate objections are fundamentally unfair to the requesting party.[31] Boilerplate objections fail to inform the requesting party why its request is specifically objectionable.[32] If an objection fails to provide an appropriate factual basis, it is relatively difficult for the parties to informally discuss any alleged defects in a discovery request in hope of fixing the defects.[33] This inhibits the parties' abilities to resolve discovery

omitted).

24. *Josephs*, 677 F.2d at 992 (alteration in original) (quoting *Roesberg*, 85 F.R.D. at 296–97) (internal quotation marks omitted); *see also Panola Land Buyers Ass'n*, 762 F.2d at 1559 ("To be adequate, objections which serve as the basis of a motion for protective order under [Federal Rule of Civil Procedure] 26 should be plain enough and specific enough so that the court can understand in what way the interrogatories are alleged to be objectionable." (quoting *Davis*, 650 F.2d at 1160) (internal quotation marks omitted) (citing *Josephs*, 677 F.2d at 985)).

25. *St. Paul Reinsurance Co.*, 198 F.R.D. at 512.

26. *See* Design Basics, L.L.C. v. Strawn, 271 F.R.D. 513, 519 (D. Kan. 2010) (quoting Allianz Ins. Co. v. Surface Specialties, Inc., No. Civ. A. 03-2470-CM-DJW, 2005 WL 44534, at *2 (D. Kan. Jan. 7, 2005)) (internal quotation marks omitted).

27. Watts v. Allstate Indem. Co., No. 2:08-cv-01877 LKK KJN, 2010 WL 4225561, at *4 n.4 (E.D. Cal. Oct. 20, 2010).

28. DL v. Dist. of Columbia, 251 F.R.D. 38, 43 (D.D.C. 2008).

29. *See id.*

30. *Id.*

31. *See In re* Ingersoll, 238 B.R. 202, 204–05 (Bankr. D. Colo. 1999).

32. *Id.*

33. *Id.* at 205.

disputes on their own, and often requires the requesting party to draft additional, unnecessary motions before receiving a meaningful response.[34]

Federal courts' disfavor for boilerplate objections stems from more than the practical obstacles posed by these objections. Boilerplate objections also violate numerous rules of civil procedure and ethics, making their use unlawful as opposed to merely inconvenient.[35]

A. *Boilerplate Objections Violate Rules of Civil Procedure and Ethics*

1. *The Spirit of the Federal Rules of Civil Procedure*

Generally, boilerplate objections do not serve the goals of the Federal Rules of Civil Procedure, which are aimed at "secur[ing] the just, speedy, and inexpensive determination of every action and proceeding."[36] Federal discovery is intended to be a liberal process, encouraging the free flow of information between parties.[37] Under this framework, federal courts envision ideal discovery as relatively collegial, timely, and productive:

> It would be reasonable to expect, in light of all the applicable rules and governing precedents, that experienced attorneys, especially those who have handled major litigation, would be able to proceed through the discovery and pretrial stages with a conciliatory attitude and a minimum of obstruction, and that, under the guiding hand of the district court, the path to ultimate disposition would be a relatively smooth one.[38]

Stonewalling a requesting party with boilerplate objections is inconsistent with this vision.[39]

34. *Id.*

35. *See* discussion *infra* Part II.A.

36. FED. R. CIV. P. 1.

37. *See* FED. R. CIV. P. 26 advisory committee's notes (1983); United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958); Hickman v. Taylor, 329 U.S. 495, 501, 507 (1947) ("Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.").

38. Grider v. Keystone Health Plan Cent., Inc., 580 F.3d 119, 123 (3d Cir. 2009).

39. *See* FED. R. CIV. P. 26 advisory committee's notes (1983) ("Thus the spirit of the rules is violated when advocates attempt to use . . . evasive responses."); Covington v. Sailormen Inc., 274 F.R.D. 692, 693 (N.D. Fla. 2011).

2. Rule 26

Boilerplate objections commonly violate either of two subdivisions of Federal Rule of Civil Procedure 26: Rules 26(b)(5)[40] and 26(g).[41]

Rule 26(b)(5) governs privilege objections.[42] The rule allows parties to withhold otherwise discoverable information from discovery if the information is privileged or protected as trial-preparation material.[43] If a party wishes to assert a privilege objection, Rule 26(b)(5) requires the objecting party to describe its objection with sufficient particularity to allow others to assess its privilege claims:[44]

> When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-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.[45]

Under Rule 26(b), "[t]he party who resists discovery has the burden to show discovery should not be allowed, and has the burden of clarifying, explaining, and supporting its objections."[46] This burden leaves little room for boilerplate objections.[47] Instead, the rule is intended "to permit wide-ranging discovery of information even though the information may not be

40. *See, e.g.*, Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Court for the Dist. of Mont., 408 F.3d 1142, 1147–48 (9th Cir. 2005) (noting that boilerplate objections violate Rule 26(b)(5) by failing to "provide sufficient information to enable other parties to evaluate the applicability of the claimed privilege or protection" (citations omitted) (internal quotation marks omitted)).

41. *See, e.g.*, Steed v. EverHome Mortg. Co., 308 F. App'x 364, 371 (11th Cir. 2009) (noting that "boilerplate objections may border on a frivolous response to discovery requests" in violation of Rule 26(g)).

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

43. *Id.*

44. *See* FED. R. CIV. P. 26 advisory committee's notes (1993), subdiv. (b).

45. FED. R. CIV. P. 26(b)(5)(A)(i)–(ii).

46. United States *ex rel.* O'Connell v. Chapman Univ., 245 F.R.D. 646, 648 (C.D. Cal. 2007) (citations omitted); *see* FED. R. CIV. P. 26(b)(1), (5).

47. *See* Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Court for the Dist. of Mont., 408 F.3d 1142, 1147 (9th Cir. 2005) ("Rule 26[(b)(5)] clarifies that a proper assertion of privilege must be more specific than a generalized, boilerplate objection.").

admissible at the trial."[48]

In addition to Rule 26(b)(5), Rule 26(g) imposes a signature requirement on discovery objections.[49] Every discovery objection must be signed by an attorney.[50] By signing each discovery objection, the attorney certifies a number of things about the objection:

> (A) [W]ith respect to a disclosure, it is complete and correct as of the time it is made; and
>
> (B) with respect to a discovery request, response, or objection, it is:
>
> > (i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;
> >
> > (ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and
> >
> > (iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.[51]

When an attorney signs a discovery response containing boilerplate objections, that attorney has failed to live up to Rule 26(g)'s requirement that attorneys reflect on the legitimacy of any objections they make.[52]

Rule 26(g)(3) specifically gives courts the power to sanction lawyers whose discovery objections do not comport with Rule 26(g)(1)'s requirements.[53] A court may impose sanctions on motion by one of the parties, but may also impose sanctions on its own, without any motion before it.[54] The ability of courts to impose Rule 26(g) sanctions on their own will likely prove significant in combating the rampant use of

48. *United States ex rel. O'Connell*, 245 F.R.D. at 648 (citing Jones v. Commander, Kan. Army Ammunitions Plant, 147 F.R.D. 248, 250 (D. Kan. 1993)).

49. FED. R. CIV. P. 26(g)(1).

50. *Id.*

51. *Id.* at R. 26(g)(1)(A)–(B).

52. *See* Anderson v. Caldwell Cnty. Sheriff's Office, No. 1:09cv423, 2011 WL 2414140, at *4 (W.D.N.C. June 10, 2011).

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

54. *See id.*

boilerplate objections.[55]

3. *Rule 33*

Another set of filings frequented by boilerplate objections are responses to interrogatories, which are governed by Federal Rule of Civil Procedure 33.[56] Like objections under Rule 26, "[t]he grounds for objecting to an interrogatory must be stated with specificity."[57] Boilerplate objections will not do.[58] Instead, the rule is "clear that objections must be specifically justified."[59]

Rule 33(b)(5) also requires lawyers to sign objections to interrogatories.[60] This in turn exposes lawyers to the general requirements and attendant sanctions of Rule 26(g) signatures.[61] While various courts may impose differing sanctions, the consequences of propounding boilerplate objections in responding to interrogatories can include judges striking or completely disregarding the response.[62]

4. *Rule 34*

Rule 34 governs requests for production.[63] A litigant may use this rule to request that an opposing party produce "writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data

55. *See* discussion *infra* Part IV.

56. FED. R. CIV. P. 33.

57. *Id.* at R. 33(b)(4).

58. *See* Covington v. Sailormen Inc., 274 F.R.D. 692, 693–94 (N.D. Fla. 2011) ("Common sense should have been enough for [d]efendant to know that boilerplate, shotgun-style 'General Objections,' incorporated without discrimination into every answer, were not consistent with Fed.R.Civ.P. 33(b)(4)'s directive . . . ."); Hodgdon v. Nw. Univ., 245 F.R.D. 337, 340 n.4 (N.D. Ill. 2007) ("These sorts of boilerplate objections are meaningless and insufficient under Rule 33(b)(1) and (4)." (citing Josephs v. Harris Corp., 677 F.2d 985, 992 (3d. Cir. 1982))).

59. FED. R. CIV. P. 33 advisory committee's notes (1993), subdiv. (b).

60. *Id.* at R. 33(b)(5).

61. *See id.* at R. 26(g)(3); R. 33 advisory committee's notes (1993), subdiv. (b) ("These provisions should be read in light of Rule 26(g), authorizing the court to impose sanctions on a party and attorney making an unfounded objection to an interrogatory.").

62. *See, e.g.*, Wolk v. Green, No. C06-5025 BZ, 2007 WL 3203050, at *1 (N.D. Cal. Oct. 29, 2007) (disregarding the defendant's boilerplate objections as "insufficient to assert privilege").

63. FED. R. CIV. P. 34.

compilations" for inspection.[64] Like interrogatory responses, a party served with a request for production may object to the request, but must state the "objection to the request, including the reasons."[65] Notably, Rule 34(b) does not contain any language requiring objections to be stated with "specificity" like Rule 33(b)(4).[66] Yet, courts interpret objections under Rule 34(b) to require the same level of care and particularity that precludes the use of boilerplate objections.[67]

5. *Ethics Rules*

While many courts respond to the problem of boilerplate objections by imposing sanctions under the Federal Rules of Civil Procedure,[68]

64. *Id.* at R. 34(a)(1)(A).

65. *Id.* at R. 34(b)(2)(B).

66. *Compare id.* ("For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons."), *with id.* at R. 33(b)(4) ("The grounds for objecting to an interrogatory must be stated with specificity.").

67. *See* Frontier-Kemper Constructors, Inc. v. Elk Run Coal Co., 246 F.R.D. 522, 528 (S.D.W. Va. 2007) ("There is abundant caselaw to the effect that boilerplate objections to Rule 34 document requests are inappropriate. In the first instance, specific objections are required in responding to a Rule 34 request, even though the language of Rule 34 is less explicit than Rule 33(b)(4) as to the nature of an acceptable objection."); *see also* Mills v. E. Gulf Coal Preparation Co., 259 F.R.D. 118, 132 (S.D.W. Va. 2009) ("Objections to Rule 34 requests must be stated specifically, and boilerplate objections regurgitating words and phrases from Rule 26 are completely unacceptable." (citing *Frontier-Kemper Constructors, Inc.*, 246 F.R.D. at 528–29)); Martin v. Zale Del., Inc., No. 8:08-CV-47-T-27EAJ, 2008 WL 5255555, at *1 (M.D. Fla. Dec. 15, 2008) ("Parties are not permitted to assert these types of conclusory, boilerplate objections that fail to explain the precise grounds that make the request objectionable."); Sabol v. Brooks, 469 F. Supp. 2d 324, 329 (D. Md. 2006) ("Unfortunately, [the party] did not particularize its objections to these [Rule 34] requests, and instead used the boilerplate objections that this Court repeatedly has warned against, thereby waiving its objections."); St. Paul Reinsurance Co. v. Commercial Fin. Corp., 198 F.R.D. 508, 514 (N.D. Iowa 2000) ("As demonstrated, the litany of plaintiffs' boilerplate objections [to Rule 34 requests] are unsubstantiated because they fail to show specifically how each discovery request is burdensome, oppressive or any of the other grounds upon which they base their objections by submitting affidavits or offering evidence revealing the nature of the objections.").

68. *See, e.g.*, Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 360 (D. Md. 2008) (noting that federal trial judges are "expected to impose sanctions to punish and deter" any discovery process that does not seek "to achieve a proper purpose"); *In re* Spoonemore, 370 B.R. 833, 843–45 (Bankr. D. Kan. 2007) (sanctioning party for obstructing discovery process with boilerplate objections by punishment of more than $10,000 in attorney's fees); *St. Paul Reinsurance Co.*, 198 F.R.D. 508, 517–18.

relatively little attention has been paid to the ethical implications of boilerplate objections.[69] Boilerplate objections are unethical under numerous ethics standards[70] as well as subject to sanctions under the Federal Rules of Civil Procedure.[71]

First, boilerplate objections violate Model Rules of Professional Conduct Rule 3.4(d).[72] This rule provides: "A lawyer shall not . . . in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party."[73] The purpose of this rule is to safeguard the "important procedural right" of an opposing party to obtain evidence during the discovery process.[74]

Second, boilerplate objections implicate the Restatement (Third) of the Law Governing Lawyers: Frivolous Advocacy section 110(3).[75] This section echoes the requirements of Model Rule 3.4(d): "A lawyer may not make a frivolous discovery request, fail to make a reasonably diligent effort to comply with a proper discovery request of another party, or intentionally fail otherwise to comply with applicable procedural requirements concerning discovery."[76] The Restatement goes on to describe the role of attorneys:

> Advocates are guided primarily by the goal of advancing their individual clients' interests. They are expected to marshal evidence and legal argument in support of the positions of their respective

69. *See, e.g.*, *Mancia*, 253 F.R.D. at 362–63, 362 n.6 (noting the possible ethical implications of boilerplate objections).

70. *See* MODEL RULES OF PROF'L CONDUCT R. 3.4(d) & cmt. 1 (2007); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS ch. 7, topic 2, intro. note (2000); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS: FRIVOLOUS ADVOCACY § 110(3) (2000).

71. *See supra* text accompanying notes 49–55 (discussing how boilerplate objections violate and subject counsel to sanctions under Rule 26(g)).

72. *See Mancia*, 253 F.R.D. at 362–63 & n.6.

73. MODEL RULES OF PROF'L CONDUCT R. 3.4(d).

74. MODEL RULES OF PROF'L CONDUCT R. 3.4 cmt. 2; *see also id.* cmt. 1 ("The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.").

75. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS: FRIVOLOUS ADVOCACY § 110(3).

76. *Id.*

> clients and to cross-examine and otherwise test the evidence and positions of opposing parties, without personal responsibility for the outcome of the proceeding.
>
> However, there are limitations on an advocate's forensic freedom. In addition to the general requirement of complying with legal requirements and rulings of tribunals, a lawyer is subject to the constraints described in this Topic concerning frivolous litigation [which includes prohibitions against frivolous advocacy and conduct during discovery]. [77]

These provisions make it clear that attorneys do not have unfettered licenses to engage in frivolous discovery tactics, even if such tactics arise out of attorneys' desire to zealously advocate for their clients.[78]

B. *Some Common Misconceptions*

Despite the fact that boilerplate objections violate these procedural and ethical rules, many lawyers continue to use them for various reasons. Some lawyers issue boilerplate objections in hopes of preserving those objections in the future.[79] But this hope is misplaced for two reasons. First, "there is no provision in the [f]ederal [r]ules that allows a party to assert objections simply to preserve them."[80] Second, issuing a boilerplate objection often results in the opposite of preservation: waiver of the objection.[81] Thus, the "urban legend" that boilerplate objections protect a client is unfounded:

> It is somewhat of an urban legend that good lawyering always requires an introductory, general assertion that information/materials subject to a privilege (whatever that unidentified information or those materials may be) are not being utilized or produced. Counsel then believe they have protected their client by making the response unclearly based

77. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS ch. 7, topic 2, intro. note (citations omitted).

78. *See id.*; MODEL RULES OF PROF'L CONDUCT R. 3.4 & cmts. 1–2; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS: FRIVOLOUS ADVOCACY § 110(3).

79. *See, e.g.*, Anderson v. Caldwell Cnty. Sheriff's Office, No. 1:09cv423, 2011 WL 2414140, at *3 (W.D.N.C. June 10, 2011).

80. *Id.*

81. *See, e.g.*, Mills v. E. Gulf Coal Preparation Co., LLC, 259 F.R.D. 118, 132 (S.D.W. Va. 2009) ("Failure to state objections specifically in conformity with the Rules will be regarded as a waiver of those objections." (citing Sabol v. Brooks, 469 F. Supp. 2d 324, 328 (D. Md. 2006))).

> such that additional information can later be produced, or have protected their client from having to produce privileged information/material. In fact, and in law, the opposite is true.[82]

Similarly, many lawyers regularly use the "notwithstanding the above" tactic in discovery responses.[83] They respond to a discovery request with a slew of boilerplate objections followed by the phrase "notwithstanding the above" or "subject to or without waiving the objection," after which they proceed to answer the request.[84] This, too, fails to preserve the boilerplate objections "and constitutes only a waste of effort and the resources of both the parties and the court."[85]

Instead, a correct objection to a discovery request will likely have several specific components:

> In most if not all cases, an objection to a discovery request in conformity with the Rules will contain (1) a recital of the parties[']claims and defenses, (2) a summary of the applicable statutory and/ or case law upon which the parties claims and defenses are predicated including the elements of each claim or defense, (3) a discussion of Court decisions considering the breadth or scope of discovery and any limitations upon discovery in the same or a similar type of case and (4) a statement respecting how and/or why the request seeks information which is irrelevant or will not likely lead to the discovery of relevant information or is vague, overly broad, burdensome or interposed for an improper purpose.[86]

These are the requirements contemplated by the Federal Rules of Civil Procedure, and failing to adhere to them can—or, in the case of some judges, *will*—be regarded as an objection waiver.[87]

Finally, the fact that discovery occurs within an adversarial process and that lawyers are to devotedly advocate for clients, are not justifications

82. Carmichael Lodge No. 2103, Benevolent & Protective Order of Elks of U.S. of Am. v. Leonard, No. CIV S-07-2665 LKK GGH, 2009 WL 1118896, at *4 (E.D. Cal. Apr. 23, 2009).

83. *See e.g.*, Martin v. Zale Del., Inc., No. 8:08-CV-47-T-27EAJ, 2008 WL 5255555, at *2 (M.D. Fla. Dec. 15, 2008); Guzman v. Irmadan, Inc., 249 F.R.D. 399, 401 (S.D. Fla. 2008) (noting the tactic is "common practice").

84. *See Guzman*, 249 F.R.D. at 401.

85. *Id.*

86. *Mills*, 259 F.R.D. at 132.

87. *See id.*

for boilerplate objections.[88] "[D]evotion does not require stridency . . . ."[89] A lawyer's duty to zealously advocate for a client does not conflict with the duty to engage in candid discovery.[90] Lawyers have "twin duties" when it comes to discovery: (1) zealously advocate for their clients' interests, and (2) conduct discovery in a diligent and professional manner.[91] These duties are not at odds with one another.[92] Lawyers must be careful not to "confuse *advocacy* with *adversarial conduct*" in determining whether to engage in abusive discovery tactics.[93]

III. THE COSTS OF BOILERPLATE OBJECTIONS

It is no secret that discovery costs money.[94] Larger cases often come with more discovery abuse.[95] The practice of using boilerplate objections imposes monetary costs on clients and the litigation process.[96] The major cost is time. Evasive discovery responses, such as boilerplate objections, "result[] in excessively costly and time-consuming activities that are [usually] disproportionate to the nature of [a] case, the amount involved, or the issues or values at stake."[97]

In July 2008, the Sedona Conference, an institution devoted to legal research and education,[98] published a report examining the costs of pretrial

88. Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1162, 1216 (1958).

89. Grider v. Keystone Health Plan Cent., Inc., 580 F.3d 119, 147 (3d Cir. 2009).

90. THE SEDONA CONFERENCE, THE SEDONA CONFERENCE COOPERATION PROCLAMATION 1 (2008), *available at* http://www.thesedonaconference.org/content/tsc_cooperation_proclamation/proclamation.pdf.

91. *Id.*

92. *Id.*

93. *Id.*

94. *See* AM. COLL. OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., INTERIM REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 3 (2008) [hereinafter AM. COLL. OF TRIAL LAWYERS].

95. *Id.*

96. *See id.* at 3–4.

97. FED. R. CIV. P. 26 advisory committee's notes (1983).

98. *Frequently Asked Questions*, THE SEDONA CONF. (2013), https://thesedonaconference.org/faq ("The Sedona Conference (TSC) is a charitable, . . . non-partisan research and educational institute dedicated to the advancement of law and policy in the areas of antitrust law, complex litigation and intellectual property rights.").

discovery abuses.[99] The report discussed the history of discovery practices.[100] The first uniform civil procedure rules were adopted in the 1930s.[101] At that time, discovery was "an essentially cooperative, rule-based, party-driven process, designed to exchange relevant information."[102] "The goal was to avoid gamesmanship and surprise at trial."[103] But over time discovery became "a complicated, lengthy procedure requiring tremendous expenditures of client funds, along with legal and judicial resources. These costs often overshadow efforts to resolve the matter itself."[104]

Among the overshadowing costs are those related to abusive conduct during pretrial discovery.[105] This conduct includes "escalating motion practice[s], overreaching, obstruction, and extensive, but unproductive discovery disputes."[106] Boilerplate objections certainly fit the description of these less-than-ideal tactics.[107] These adversarial tactics—prevalent in modern pretrial discovery—impose a "serious burden [on] the American judicial system."[108]

These costs add to an already expensive process of discovery in federal courts.[109] Many items sought in discovery—especially electronically stored information—are expensive to obtain as is the entire process of federal discovery.[110] It is partly the high cost of engaging in the discovery process that makes federal litigation "procedurally more complex, risky to prosecute, and very expensive"[111]—"to the point of pricing litigants out of [federal] court."[112] The cost of engaging in burdensome discovery can be so

99. *See* THE SEDONA CONFERENCE, *supra* note 90. As of October 31, 2012, 135 federal judges signed on in support of the vision outlined in the Sedona Conference report. *See id.* at 4–12.

100. *Id.* at 2.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 1–2.

106. *Id.* at 1.

107. *See id.*

108. *Id.*

109. Gregory P. Joseph, *Trial Balloon: Federal Litigation—Where Did It Go Off Track?*, 34 LITIG. 5, 62 (2008).

110. *See id.*; AM. COLL. OF TRIAL LAWYERS, *supra* note 94, at A-4.

111. Joseph, *supra* note 109, at 62.

112. Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 359 (D. Md. 2008).

great that litigants might forgo pursuing a claim in federal court.[113] Thus, the very process that is supposed to encourage the free flow of information[114] might actually be turning people away in the first place.[115]

A survey analyzed by the American College of Trial Lawyers Task Force on Discovery confirms what is suggested above: Discovery is becoming simply too costly[116] for some litigants.[117] Specifically, the survey's respondents paint a grim picture about their faith in the discovery process, stating the following:

> - Nearly 86% of [respondents] say discovery sanctions are seldom imposed;
> - Nearly 71% of [respondents] believe counsel use discovery as a tool to force settlement;
> - Only 34% of [respondents] think that the cumulative effect of changes to the discovery rules since 1976 has significantly reduced discovery abuse, and 45% of [respondents] still think discovery is abused in every case;
> - Less than 44% of [respondents] believe current discovery mechanisms work well; and
> - Only 11% of [respondents] think that clients, rather than attorneys, drive excessive discovery.[118]

While the monetary costs of boilerplate objections are high, there are other, less visible costs that can still have a substantial impact on a lawyer's case. Although "[m]uch ink has been spilled on the costs of abuse of the discovery process,"[119] relatively little attention has been paid to the nonmonetary costs of boilerplate objections. For example, boilerplate

113. *See* Joseph, *supra* note 109, at 62.

114. *See* FED. R. CIV. P. 26 advisory committee's notes (1983).

115. *See Mancia*, 253 F.R.D. at 359; Joseph, *supra* note 109, at 62.

116. Interestingly, information received by the Task Force implicated the economic structure of some law firms as one cause of discovery abuse. AM. COLL. OF TRIAL LAWYERS, *supra* note 94, at 4. This Note will not discuss the economic models on which firms are built, but such structures may very well factor into a complete analysis of why discovery is so often abused. *See id.*

117. *Id.* at 1 & n.1.

118. *Id.* at A-4.

119. Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Court for the Dist. of Mont., 408 F.3d 1142, 1148 (9th Cir. 2005).

objections inject uncertainty into the discovery process by "needlessly sowing doubt about the exhaustiveness of [the objecting party's] production and responses."[120] Cultivating uncertainty and mistrust during discovery only hinders the timely and effective resolution of discovery issues.[121]

Additionally, there is a cost associated with alienating or angering the presiding judge. "[T]here's nothing worse than a federal judge who thinks the discovery process is being screwed around with."[122] This is because it is much more difficult to preside over an uncooperative, boilerplate-objection-laden discovery process than a cooperative one.[123] A judge should not have to wade through a sea of boilerplate objections only to discover that the objections did not represent the party's actual position, but were merely used to make the discovery process more difficult.[124] Not surprisingly, lawyers who use boilerplate objections often find themselves on the receiving end of a perturbed judge.[125] This cost might also be thought of as a lost opportunity. By failing to answer discovery requests adequately, a lawyer misses out on the chance to be a refreshingly helpful alternative to opposing counsel's obstructionist tactics.[126]

Finally, boilerplate objections impose a cost on the legal profession.

120. Williams v. Taser Int'l, Inc., No. 1:06-CV-0051-RWS, 2007 WL 1630875, at *3 (N.D. Ga. June 4, 2007).

121. *See, e.g.*, *id.* at *3 & n.3.

122. Grange Mut. Cas. Co. v. Mack, 270 F. App'x 372, 375 (6th Cir. 2008) (quoting the district court's November 2004 warning to the parties blocking discovery) (internal quotation marks omitted).

123. *See* Grider v. Keystone Health Plan Cent., Inc., 580 F.3d 119, 123 (3d Cir. 2009) ("[I]f given more cooperation, [the judge] would undoubtedly have been able to preside more effectively."); Chubb Integrated Sys. Ltd. v. Nat'l Bank of Wash., 103 F.R.D. 52, 58 (D.D.C. 1984) ("General objections are not useful to the court ruling on a discovery motion.").

124. *See* Hobley v. Burge, No. 03 C 3678, 2003 WL 22682362, at *5 (N.D. Ill. Nov. 12, 2003).

125. *See, e.g.*, Miles Davis, *One Judge's Approach to the Problem of Discovery Abuse in Civil Cases*, THE SUMMATION (Escambia-Santa Rosa Bar Ass'n, Pensacola, Fla.), Oct. 2007, at 7, 13. For example, one federal district judge threatened to subject a lawyer's law firm to "eye-popping sanctions" for the lawyer's use of boilerplate objections. Excerpt of Transcript of Trial at 3–4, Arizona v. Asarco, LLC, 798 F. Supp. 2d 1023 (D. Ariz. 2011) (No. CV 08-441), *available at* http://www.karenkoehlerblog.com/excerpt%204-13-11.pdf.

126. *See* St. Paul Reinsurance Co. v. Commercial Fin. Corp., 198 F.R.D. 508, 517 (N.D. Iowa 2000) (refusing to excuse counsel's use of boilerplate objections despite the fact that the adverse party's discovery requests were also obstructionist).

Their use, as with other abusive discovery practices, "lack[s] the civility and professionalism one expects from . . . experienced attorneys."[127] It is that lack of civility that repeatedly brings disrepute upon lawyers and the legal system.[128] While it is unlikely that any individual lawyer considers this cost when responding to discovery requests, the "all-too-common" practice of using boilerplate objections has an effect on the profession far beyond any particular case.[129]

IV. PROPOSED SOLUTIONS

There is likely no silver bullet solution to the problem of boilerplate objections. In order to curb their use, the legal community's passive acceptance of boilerplate objections needs to change. Ideally, this change would self-execute by lawyers personally choosing to comply with the rules against boilerplate objections. Realistically, however, external costs imposed by judges and other lawyers will probably be a necessary component of any viable solution.

One suggested solution is to amend the Federal Rules of Civil Procedure to more clearly prohibit boilerplate objection tactics.[130] But that solution raises the question: If boilerplate objection tactics continue to be used despite the fact that the Federal Rules of Civil Procedure already require specificity and federal courts universally disapprove of boilerplate objections, will simply adding more rules change these already pervasive tactics? Given the current response to the rules and the case law governing boilerplate objections, simply bolstering the language of the current rules will likely be ineffective. Instead, judges and other lawyers must find ways to impose practical costs on attorneys who issue boilerplate objections.

A. *Increased Scrutiny by Judges*

Although the Federal Rules of Civil Procedure contemplate a

127. *Grider*, 580 F.3d at 125.

128. McLeod, Alexander, Powel & Apffel, P.C. v. Quarles, 894 F.2d 1482, 1486 (5th Cir. 1990).

129. *See id.*

130. *See* Daniel C. Girard & Todd I. Espinosa, *Limiting Evasive Discovery: A Proposal for Three Cost-Saving Amendments to the Federal Rules*, 87 DENV. U. L. REV. 473, 483 (2010) ("The rules should be amended to conform to the judicial consensus against generalized and boilerplate objections by adding the following provision to Rule 34(b)(2)(C): Each objection to a request or part thereof must specify whether any responsive documents are being withheld on the basis of that objection." (internal quotation marks omitted)).

minimal role for judges in the discovery process, the rules do not eliminate the need for judicial supervision.[131] In fact, discovery abuse "is partly caused by the failure of busy courts to properly monitor the use of discovery procedures."[132] Thus, responding to abusive discovery practices will require increasingly aggressive judicial supervision.[133] While this supervision can be initiated upon a motion to the court, it can also be initiated by a court sua sponte.[134] Even attorneys recognize that the discovery process is most satisfactory when judges actively supervise the parties.[135] In fact, some have suggested that increased judicial scrutiny is the only solution that can begin to remedy a broken discovery system.[136]

Judges are in a unique position to deter the use of unethical boilerplate discovery objections. Unlike attorneys, judges may rely on their authority to issue sanctions under Federal Rule of Civil Procedure 26[137] and on the inherent power of the court.[138] 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.[139] These sanctions may include, but are not limited to: holding the objections to be waived,[140] overruling the objections,[141] awarding attorney's fees and

131. Chudasama v. Mazda Motor Corp., 123 F.3d 1353, 1370 (11th Cir. 1997).

132. Malautea v. Suzuki Motor Co., 987 F.2d 1536, 1547 (11th Cir. 1993) (Roney, J., concurring).

133. *See* ACF Indus., Inc. v. EEOC, 439 U.S. 1081, 1087 (1979) (Powell, J., dissenting from denial of certiorari) (recognizing that "there is a pressing need for judicial supervision" regarding abuse during pretrial discovery); *Malautea*, 987 F.2d at 1547 (Roney, J., concurring) (noting that courts should "hold all parties and lawyers to a higher standard of good faith in the discovery process").

134. *See* FED. R. CIV. P. 26(g)(3) (permitting a court to issue a sanction "on motion or on its own"); St. Paul Reinsurance Co. v. Commercial Fin. Corp., 198 F.R.D. 508, 515 (N.D. Iowa 2000); *cf.* Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 364 (D. Md. 2008) (ordering pursuant to Rule 26(b)(2)(c) that parties limit discovery that is likely to be overly burdensome).

135. AM. COLL. OF TRIAL LAWYERS, *supra* note 94, at 5.

136. *Id.* at 3.

137. FED. R. CIV. P. 26(g)(3) (stating that absent a substantial justification, a court "must impose an appropriate sanction on the signer" of a discovery request that fails to comply with Rule 26(g)).

138. *See* Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980).

139. *See St. Paul Reinsurance Co.*, 198 F.R.D. at 517 ("Rambo style obstructionist discovery tactics . . . , if not stopped dead in their tracks by appropriate sanctions, have a virus like potential to corrupt the fairness of our civil justice system." (internal quotation marks omitted)).

140. *See, e.g.*, Mezu v. Morgan State Univ., 269 F.R.D. 565, 580 (D. Md. 2010); PML N. Am., L.L.C. v. World Wide Pers. Servs. of Va., Inc., No. 06-CV-14447-DT,

costs to the abused party,[142] or imposing another "appropriate" sanction.[143] In addition to increasing their willingness to issue discovery sanctions, judges should consider heightening the severity of the sanctions, such that the costs of issuing boilerplate objections appropriately grab the attention of lawyers and their firms.[144] These sanctions function as a cost on would-be

2008 WL 1809133, at *1 (E.D. Mich. Apr. 21, 2008); Cumberland Truck Equip. Co. v. Detroit Diesel Corp., Nos. 05-CV-74594-DT, 05-CV-74930-DT, 2007 WL 4098727, at *1 (E.D. Mich. Nov. 16, 2007).

141. *See, e.g.*, Sunnen Prods. Co. v. Travelers Cas. & Sur. Co. of Am., No. 4:09CV00889 JCH, 2010 WL 743633, at *1 (E.D. Mo. Feb. 25, 2010).

142. *See, e.g.*, Bess v. Cate, 422 F. App'x 569, 572 (9th Cir. 2011).

143. *See* FED. R. CIV. P. 26(g)(3).

144. For a lesson in grabbing a lawyer's attention, consider the following court's promise to impose "eye-popping" sanctions calculated to lower a lawyer's partnership income:

> I'm beyond offended by it, and I'll tell you why. Your general objections are obstructionist, frivolous, lack any basis in law or fact, and are—actually have been barred by every circuit that has ever ruled on the question, including the Ninth Circuit.
>
> So if I ever see general objections, you object because it's attorney-client privilege, you object because it's overbroad and vague and ambiguous, unduly burdensome and oppress—you know, you have every boilerplate objection in these answers to interrogatories. And there's absolutely nothing objectionable about the interrogatories asked in this document.
>
> And every circuit has held that if you make an objection based on the fact that they're vague or overbroad, you have a duty to specifically point out why they're vague or overbroad, and you don't do that.
>
> And so I don't know if it's a cultural practice in this district that allows you to do that, but I know it's contrary to Ninth Circuit law and every other circuit law.
>
> And I guarantee you—you have my personal guarantee—if I ever see anything like this in a case because your firm has had cases before me, there will be eye-popping sanctions that reduce your partnership income. You have my personal guarantee.
>
> So let me ask you this. Is there anything about my comments you don't understand?

Excerpt of Transcript of Trial, *supra* note 125, at 3–4. The attorney responded, "No, sir" and agreed to independently research the veracity of using boilerplate objections and to discuss their use with his firm. *Id.* at 4. It is this type of aggressive attention to abusive discovery tactics that may ultimately be required to curb their use in modern litigation. *See* ACF Indus., Inc. v. EEOC, 439 U.S. 1081, 1087 (1979) (Powell, J.,

discovery abusers, incentivizing them to "stop and think about the legitimacy of the [discovery] response and ensure that it complies with the requirements of the Federal Rules."[145]

Increasing traditional sanctions, however, may not be sufficient to combat boilerplate objections. In addition, creative sanctions beyond those explicitly contemplated by the Federal Rules of Civil Procedure should be considered in the efforts to deter boilerplate objections.[146] Creative sanctions are within a court's discretionary authority to craft appropriate sanctions to particular violations.[147]

For example, in *St. Paul Reinsurance Co. v. Commercial Financial Corp.*, a federal district court issued an unorthodox sanction against an attorney who improperly used boilerplate objections in response to discovery requests.[148] In lieu of imposing a monetary sanction, the court ordered the attorney to write an article detailing the impropriety of using boilerplate objections.[149] The court ordered the attorney to submit the article to a bar journal in two states before a particular date, and to submit the article to the court along with "an affidavit stating that he alone researched, wrote, and submitted the article for publication, indicating which journals he submitted the article to."[150]

B. *Publicizing Discovery Abusers*

Another creative sanction, suggested by a federal district court judge, is for courts to maintain a public list of lawyers who have recently been

dissenting from denial of certiorari); AM. COLL. OF TRIAL LAWYERS, *supra* note 94, at 3.

145. Anderson v. Caldwell Cnty. Sheriff's Office, No. 1:09cv423, 2011 WL 2414140, at *4 (W.D.N.C. June 10, 2011) (discussing how Rule 26 sanctions require attorneys to reflect on what they say in discovery responses).

146. *See* Anderson v. Beatrice Foods Co., 900 F.2d 388, 394 & n.6 (1st Cir. 1990) ("The elasticity of the [Federal Rules of Civil Procedure] is . . . not accidental."). For the purposes of this Note, a "creative sanction" means a sanction not explicitly contemplated by the Federal Rules of Civil Procedure. *See id*.

147. *See* FED. R. CIV. P. 26 advisory committee's notes (1983), subdiv. (g) ("The nature of the sanction is a matter of judicial discretion to be exercised in light of the particular circumstances."). The text of Rule 26(g)(3) imposes no restriction on the type of sanction a court may impose, requiring only that the sanction be "appropriate." FED. R. CIV. P. 26(g)(3).

148. St. Paul Reinsurance Co., v. Commercial Fin. Corp., 198 F.R.D. 508, 518 (N.D. Iowa 2000).

149. *See id.* at 517–18.

150. *Id.* at 518.

reprimanded or sanctioned for discovery abuses, such as boilerplate objections.[151] The list could be posted on a bar association's or ethics committee's website.[152] This wall-of-shame would function as a legal scarlet letter,[153] placing discovery abusers on a publicly available list for the legal community to see. This would serve a few important functions in the fight against boilerplate objections. First, the embarrassment and cost to the lawyer's reputation would likely be a significant deterrent against issuing boilerplate objections.[154] Second, the list would provide notice to judges who oversee cases involving the lawyer, allowing judges to (1) know when to be extra vigilant against boilerplate objections given the lawyers in a case, and (2) increase the severity of sanctions against a lawyer in light of their prior discovery abuses, should they continue to abuse the discovery process. Finally, the list would provide notice to attorneys that they should be on the lookout for boilerplate objections. These things together would likely call new attention to the seriousness with which courts take the practice of issuing boilerplate objections.

While not common, this type of public embarrassment sanction is not unheard of.[155] In 2010, the Florida Supreme Court suggested a similar public punishment.[156] In *Florida Bar v. Ratiner*, the Florida Supreme Court temporarily suspended an attorney from practicing law after the attorney went on an abusive tirade against his opposing counsel during a deposition.[157] The rant was caught on video and involved the attorney lambasting his opposing counsel, flicking a wadded-up exhibit sticker at opposing counsel, and attempting to run around the table at opposing

151. Telephone Interview with Hon. Mark W. Bennett, Dist. Court Judge, N.D. Iowa (Nov. 20, 2011).

152. *See id.*

153. *See* NATHANIEL HAWTHORNE, THE SCARLET LETTER 57–58 (Ross C. Murfin ed., Bedford Books 1991) (1962) ("But the point which drew all eyes, and, as it were, transfigured the wearer, . . . was that SCARLET LETTER, . . . illuminated upon her bosom.").

154. *See id.* at 59 ("There can be no outrage, methinks, against our common nature,—whatever be the delinquencies of the individual,—no outrage more flagrant than to *forbid the culprit to hide his face for shame*; as it was the essence of this punishment to do." (emphasis added)); *id.* at 64 ("Thus she will be a living sermon against sin, until the ignominious letter be engraved upon her tombstone." (internal quotation marks omitted)).

155. *See, e.g.*, Fla. Bar v. Ratiner, 46 So. 3d 35, 41 n.4 (Fla. 2010), *as revised on reh'g* (Fla. 2010) (coupling an attorney's suspension with a public reprimand).

156. *See id.*

157. *Id.* at 41–42.

counsel.[158] The court suggested that, as a punishment for counsel's behavior, "law students could view the video recording of the . . . incident in the context of a course on professionalism as a glaring example of how not to conduct oneself in a legal proceeding."[159] Though the court did not explicitly require the attorney to be made an example of as part of the punishment,[160] *Ratiner* describes another possible creative sanction designed to call the legal community's attention to a particular attorney's abusive discovery practices.[161] It is this type of out-of-the-box thinking that will help quell abusive discovery practices, including boilerplate objections.

V. CONCLUSION

Though boilerplate objections are relatively common in modern civil litigation, the legal community can take steps to curb their use. Attorneys and judges alike must recognize the costs these objections impose on the efficient administration of justice and on the legal profession. Only with such an understanding, and an attendant willingness to effectively penalize those who issue boilerplate objections, can their use be reduced. Hopefully, with an increased focus on preventing abusive discovery practices, including boilerplate objections, the legal profession can move toward fairer, more effective discovery practices.

*Matthew L. Jarvey**

158. *Id.* at 37.

159. *Id.* at 41 n.4.

160. *Id.* at 41–42. In addition to a suspension and probation, the court directed the attorney to appear before the state bar board of governors for a public reprimand. *Id.* at 42. This minor public reprimand is not the type of public embarrassment sanction or legal scarlet letter suggested by this Note. *See supra* text accompanying notes 151–54.

161. *See Ratiner*, 46 So. 3d at 41–42.

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