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Policing Boilerplate: Reckoning and Reforming Rule 34's Popular—yet Problematic—Construction

AMIR SHACHMUROVE*

“[F]undamental change can be accomplished by the addition of new systems on top of old ones.”¹

At the beginning, the Federal Rules of Civil Procedure created a most liberal regime for the discovery of facts and winnowing of issues, awarding parties such essential tools as interrogatories, as set forth in Rule 33, and requests for production, governed by Rule 34. In the last two decades, in response to the seeming failure of this construct to achieve an efficient and just determination of every action, courts have begun to police the use of boilerplate objections to requests for production. Recognizing no distinction between types of boilerplate and acknowledging neither the textual differences within the rules nor the asymmetries too often implicated, judge after judge has found waiver to be the proper penalty for boilerplate's utilization. Unfortunately, in so doing, an apparent juridical majority has run afoul of those well-established principles of construction from which no court may deviate. As a result, the existing jurisprudence is quite a muddle, a perpetual and indeterminate clash of prose and precept, rife with both laudatory notions and cloaked defects.

This article not only traces the history and details the provisions involved in this hushed yet weighty controversy, including Rules 1, 26, 33, 34, and 37, but also delineates precisely where and how so many have erred. Having pinpointed their mistakes, this article then goes farther. In its final

* Amir Shachmurove is a lawyer currently living and working in New York City. This article is dedicated to the people who made a certain dream come true—the Honorable John W. deGravelles, a rare judge but a rarer man; Jan deGravelles, his remarkable wife; and Mrs. Lisa Warm Bonfanti, a warm and crazy blonde—and the friends who imparted an unrivaled sense of home to very different places: Mr. David P. Borghardt, a brother in spirit; Ms. Yolanda Collins, Mr. John P. Mulvey, and Mr. Tro Peltekian, watchful guardians and pleasant company; and Mrs. Gina Delatte-Richard, Mrs. Jodi H. Fryoux, and Mrs. Kristie D. Causey, three sprightly women of exceptional caliber and infectious laughter. As always, a heartfelt and loving thanks to Ms. Lindsey L. Dunn is due. Finally, while any errors made and any views expressed herein are the author's, this article's genesis lies in a conversation between him and an old friend, the Honorable (and much wiser) William V. Gallo.

1. CARL SAGAN, DRAGON OF EDEN: SPECULATIONS ON THE EVOLUTION OF HUMAN INTELLIGENCE 59 (2012).

section, it tentatively proposes emendations to certain rules that would permit waiver's finding upon boilerplate's use in responses to requests for production.

A historical account, a snapshot of every relevant rule, an explanation of those few controlling principles of construction, and a theory of law and policy—all these things appear within, a guide to more than just Rule 34.

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I. INTRODUCTION

When the pretrial discovery mechanism eventually encapsulated in the Federal Rules of Civil Procedure² was first conceived, a promise and a vision lay behind its overhaul of a more stubborn and disordered infrastructure.³ Unfettered to this stultifying past, the rules codified the law's newest excavatory tools, each shaped so as to facilitate the proof and filtering of inconsequential facts and irrelevant issues. Yet, as their authors conceded, the ultimate effectiveness of these devices, including the interrogatory, deposition, request for admission, and demand for production, would depend upon the advent and preservation of a certain level of cooperation seemingly inconstant with the adversarial ideal.⁴ Cognizant of this detail, modern discovery's inventors nonetheless banked upon the realization of this collaborative ethic.

With each passing decade, however, reality deeded otherwise. As cases grew in quantity and complexity, rust crept into a once elegantly simple apparatus, and the rules' fifth machine⁵ began to groan. Costs and delays mounted until the likelihood of any single matter's efficient adjudication struck many as chimerical. Bemoaning this actuality and stirred by hopes both base and lofty, many clamored for something to be done to alleviate uncontrolled discovery, so often a rancorous morass, and unrestrained attorney latitude, so often this quagmire's apparent catalyst.⁶ So changes, rule-by-rule and case-by-case, ensued, all at odds with the wide-open system so optimistically welded in 1938.

2. For convenience and simplicity, this Article uses the words "rules" to refer to two or more Federal Rules of Civil Procedure, "Rule" to a specific one of these rules, and "advisory committee" or "standing committee" to those committees involved with the rules' drafting and review. See Fabio Arcila, Jr., *Discoverymania: Plausibility Pleading as Misprescription*, 80 BROOK. L. REV. 1487, 1487 n.5 (2015) (doing the same). An additional typographical note: many cases cited in this Article predate December 1, 2015, the amended rules' effective date. As such, when the substantive language did not alter, a case quoting those words may be cited, but because it references a prior iteration, it may appear incorrect. However, where a relevant change did take place, such fact will be noted, and no pre-amendment case cited.

3. See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 922, 973 (1987) [hereinafter Subrin, *Equity*].

4. William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 714 (1989); see also John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 517 (2000).

5. Rules 26 through 37 appear in the Title V of the rules.

6. See, e.g., The Sedona Conference, *The Sedona Conference Cooperation Proclamation*, 10 SEDONA CONF. J. 331, 331 (2009) ("[C]ourts have seen escalating motion practice, overreaching, obstruction, and extensive, but unproductive discovery disputes—in some cases precluding adjudication on the merits altogether—when parties treat the discovery process in an adversarial manner."); Brian Morris, *The 2015 Proposals to the Federal Rules of Civil Procedure: Preparing for the Future of Discovery*, 41 N. KY. L. REV. 133, 133–34 (2014).

In the course of this evolution, one problem—the use of boilerplate responses, broadly defined as “[r]eady-made or all-purpose language that will fit in a variety of documents,”⁷ to requests for production made in accordance with Rule 34—has elicited an almost unanimous rejoinder. Presented with such objections, courts have proceeded to find any valid protestation to have been waived. In proponents’ views, Rules 26, 33, and 34 compel such an order, as does the rules’ overarching purpose and discovery’s hoary aims. With only a few discordant notes sounded, prose, policy, and purpose are thereby marshalled to a certain hallowed end. Unfortunately, in the process, a grave error has been made, as this estimable approach cannot be wholly squared with the relevant provisions, properly construed, or their pivotal peculiarities, accurately appraised. As a result, an interpretation intended to ensure the rules’ more perfect state has interjected another kind of incoherence into an already creaking interpretive structure, and a decree that only drafters may issue has been fabricated, with the latest amendments to Rule 34 falling tantalizingly short.⁸

In four substantive parts, this Article elucidates this unwieldy body of law, reveals its weaknesses, and proposes a partial solution. So as to properly set the parameters of any procedural analysis, Part II defines four pertinent terms—absolute, conditional, administrative, and substantive boilerplate—and wades through every provision and doctrine relevant to boilerplate’s policing. Having set forth this debate’s governing laws, Part III first tells three tales and then summarizes present precedent, differentiating among the courts’ disparate yet confusingly intermingled ratiocinations. Thereafter, Part IV challenges this body of law’s foundations in two sections. Necessarily, Part IV.A präzises the interpretive principles which govern any rule’s construction. Applying these tenets, Part IV.B pinpoints the six major oversights pervasive (but obscured) within this jurisprudential and scholarly debate. To rectify this surprising tenuousness, Part V recommends tentative changes to Rules 26, 34, and 37. Without these or similar changes, today’s nearly reflexive judicial approach to boilerplate cannot survive thorough dissection; without them, it must be discarded by the most belabored of courts, even if a “hell[ish]”⁹ flood lingers still.

7. *Boilerplate*, BLACK’S LAW DICTIONARY (10th ed. 2014); *United States v. Needham*, 718 F.3d 1190, 1199 (9th Cir. 2013) (Berzon, J., concurring) (citing definition).

8. On December 1, 2015, new versions of Rules 1, 26, 34, and 27 went into effect. See Daniel M. Braude & Marianna Codisotti, *Will Changes to Federal Rules Reduce Scope of Discovery?*, LAW360 (Dec. 11, 2015), <https://www.law360.com/articles/736030/will-changes-to-federal-rules-reduce-scope-of-discovery> (summarizing these changes).

9. *In re Chicago Invs., LLC*, 470 B.R. 32, 84 n.352 (Bankr. D. Mass. 2012) (quoting *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))).

II. TERMS AND LAWS

A. DEFINITIONS

The term *boilerplate* refers to a response which states the legal grounds for an objection without specifying how the request is particularly deficient and how the objecting party would be harmed if it were forced to comply.¹⁰ Even novice lawyers are familiar with the most common forms of boilerplate, including: (1) “overbroad” or “overly broad”; (2) “irrelevant”; (3) “vague,” “ambiguous,” “unclear,” “undefined,” or not stated with “particularity”; (4) “oppressive,” “harassing,” or likely to impose a burden “unfair” or “undue”; (5) “propounded with the intent to harass, delay, and abuse”; (6) “redundant”; (7) “equally available to the propounding party” from either their own records or sources under their own control; and (8) not subject to disclosure due to sundry protections, most often the work product doctrine and the attorney-client privilege.¹¹ At their worst, particularly when deployed with outward abandon, these objections appear “designed to evade, obfuscate, and obstruct discovery.”¹²

Though frequently damned by the catch-all phrase “boilerplate,” not all eight of these familiar demurrals are alike in character. The first seven implicate issues of convenience; the assumed difficulty and expensiveness of obtaining the requested information lies behind their assertions. For purposes of this Article, this heptad, as well as their infinite analogues, will be categorized as *administrative boilerplate*.¹³ In contrast, the eighth objection flaunts

10. *St. Paul Reinsurance Co. v. Commercial Fin. Corp.*, 198 F.R.D. 508, 511–12 (N.D. Iowa 2000); *see also, e.g., Sanchez-Medina v. UNICCO Serv. Co.*, 265 F.R.D. 24, 27 (D.P.R. 2009) (adopting the same definition of boilerplate articulated in *St. Paul Reinsurance Co.*, 198 F.R.D. at 511–12); *Guzman v. Irmadan, Inc.*, 249 F.R.D. 399, 400 (S.D. Fla. 2008) (emphasizing that a party objecting that a request is vague, overly broad, or unduly burdensome “must explain the specific and particular ways in which a request is vague, overly broad, or unduly burdensome”); *Kooima v. Zacklift Int’l*, 209 F.R.D. 444, 446 (D.S.D. 2002) (same).

11. *See, e.g., United States ex rel. O’Connell v. Chapman Univ.*, 245 F.R.D. 646, 649 (C.D. Cal. 2007); *Klesch & Co. v. Liberty Media Corp.*, 217 F.R.D. 517, 524 (D. Colo. 2003); *McLeod, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1485 (5th Cir. 1990); *City Consumer Servs. v. Horne*, 100 F.R.D. 740, 747 (D. Utah 1983).

12. *Kristensen v. Credit Payment Servs., Inc.*, No. 2:12-cv-0528-APG-PAL, 2014 U.S. Dist. LEXIS 165489, at *12, 2014 WL 6675748, at *4 (D. Nev. Nov. 25, 2014).

13. A full count of such synonyms would be impossible to faithfully reproduce; the English language is too pliable a tool. *Cf. DANIEL KAHNEMAN, THINKING, FAST AND SLOW* 82 (2011) (describing the concept of suppressed ambiguity as follows: “[L]ike the word *bank*, the adjective *stubborn* is ambiguous and will be interpreted in a way that makes it coherent with the context.” (emphasis in original)); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 230 (1988) (“Words are only meaningless marks on paper or random sounds in the air until we posit an intelligence which selected and arranged them.”); Amir Shachmurove, *Purchasing*

a unique quiddity.¹⁴ Often consecrated by history,¹⁵ the protestations it encompasses implicate substantive, even venerable, entitlements bestowed by common or statutory law and not assumed inconveniences, whether temporal or financial. Recognizing this fundamental divide in underlying justification, this Article sets this species apart by use of the almost paradoxical term *substantive boilerplate*.

Whether *substantive* or *administrative*, lawyers tend to employ these types of boilerplate in a handful of common ways. Often, a response begins with an introductory section that enumerates every conceivable boilerplate, and every subsequent response expressly incorporates this prelude.¹⁶ In other cases, no introduction greets the reader, and identical boilerplate is retyped in each answer. Wherever placed, such indiscriminate boilerplate will be dubbed *absolute boilerplate* throughout this Article. In contrast, possibly just as often, a series of “prophylactic, boilerplate objections,” followed by clauses like “subject to and without waiving” the objections, grace each and

Claims and Changing Votes: Establishing “Cause” under Rule 3018(a), 89 AM. BANKR. L.J. 511, 530 n.142 (2015) [hereinafter Shachmurove, *Claims*].

14. While the most well-known privileges arose under the common law, *In re Grand Jury Proceedings*, 103 F.3d 1140, 1149 (3d Cir. 1997), many have been reduced to statutes, see example *Ombudsman Servs. of N. Ca. v. Superior Court*, 65 Cal. Rptr. 3d 456, 462 (Cal. Ct. App. 2007) (noting that by adopting CAL. EVID. CODE 911 “the Legislature clearly intended to abolish common law privileges and to keep the courts from creating new nonstatutory privileges as a matter of judicial policy” (internal quotation marks omitted)). There is, moreover, an evolving federal common law of privilege whose relevance depends upon Federal Rule of Evidence 501. *FED. R. EVID.* 501; *Nw. Mem’l Hosp. v. Ashcroft*, 362 F.3d 923, 926 (7th Cir. 2004); *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 979-81 (6th Cir. 2003). Nonetheless, the federal courts’ power to concoct new privileges is highly circumscribed. See *Aramburu v. Boeing Co.*, No. 93-4064-SAC, 1994 U.S. Dist. LEXIS 20681, at *8-9, 1994 WL 810246, at *3 (D. Kan. Sept. 22, 1994) (analyzing *Univ. of Pa. v. EEOC*, 493 U.S. 182 (1990)). Still, while Federal Rule of Evidence 501 “manifested . . . [Congress’s] affirmative intention not to freeze the law of privilege,” the creation of new exemptions is “generally disfavored.” *In re Grand Jury Proceedings*, 103 F.3d at 1149; see also, e.g., *Carmen v. McDonnell Douglas Corp.*, 114 F.3d 790, 794 (8th Cir. 1997). This calculus changes, however, “where the information sought is protected by a state privilege.” *Pearson v. Miller*, 211 F.3d 57, 67 (3d Cir. 2000). In such cases, “[a] strong policy of comity between state and federal sovereignties impels federal courts to recognize state privileges where this can be accomplished at no substantial cost to federal substantive and procedural policy.” *United States v. King*, 73 F.R.D. 103, 105 (E.D.N.Y. 1976); see also, e.g., *In re Admin. Subpoena Blue Cross Blue Shield of Mass., Inc.*, 400 F. Supp. 2d 386, 390 (D. Mass. 2005) (“When the forum state has recognized a particular privilege, a court may take that into account when deciding whether to recognize that privilege as part of federal law.”).

15. See 8 JOHN WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 87 (John McNaughton ed., rev. ed. 1961).

16. Robert K. Wise, *Ending Evasive Responses to Written Discovery: A Guide for Properly Responding (and Objecting) to Interrogatories and Document Requests Under the Texas Discovery Rules*, 65 BAYLOR L. REV. 510, 567-68 (2013).

every rejoinder.¹⁷ Throughout this piece, such responses, which may be either substantive or administrative, will be referred to as *conditional boilerplate*. Sometimes, if not more often than not, lawyers sprinkle conditional and absolute boilerplate in a single document, a preamble littered with the latter appended (or not).

To summarize, four distinct types of boilerplate regularly appear in responses to requests for production: (1) absolute and administrative; (2) absolute and substantive; (3) conditional and administrative; and (4) conditional and substantive.¹⁸

B. SOURCES OF AUTHORITY

Revolutionary when adopted in 1938,¹⁹ reflecting the decidedly equitable predilections of Roscoe Pound,²⁰ Edson Sunderland,²¹ and Charles E. Clark,²² the rules engendered a whole new and far more liberal regime in regard to nearly every facet of federal procedure.²³ Among the many transformations thereby effected, “[t]he pre-trial deposition-discovery mechanism” set forth in Rules 26 to 37 was seen as a most significant “innovation[,],” “invest[ed] . . . with a vital role in the preparation for trial.”²⁴ The assumption “that discovery would be lawyer-directed with minimal judicial involvement” girded (and still underlies) this system,²⁵ as did the belief that

17. *Id.* at 568.

18. Obviously, they appear elsewhere, including responses to interrogatories.

19. The rules’ formulation was authorized in 1934 by An Act to Give the Supreme Court of the United States the Authority to Make and Publish Rules in Actions at Law, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072); *see also* Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure—The Background*, 44 YALE L.J. 387, 387 (1935). The drafted rules became effective on September 16, 1938 by virtue of congressional inaction. CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 37–38 (2d ed. 1947).

20. Jay Tidmarsh, *Pound’s Century, and Ours*, 81 NOTRE DAME L. REV. 513, 526–29 (2006).

21. Charles E. Clark, *Edson Sunderland and the Federal Rules of Civil Procedure*, 58 MICH. L. REV. 6, 10–12 (1959).

22. Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L. Q. 297, 316 (1938).

23. Subrin, *Equity*, *supra* note 3, at 924–25; *see also, e.g.*, Frederic M. Bloom, *Information Lost and Found*, 100 CAL. L. REV. 635, 647 (2012); Diane P. Wood, *Summary Judgment and the Law of Unintended Consequences*, 36 OKLA. CITY U. L. REV. 231, 231 (2011); Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?*, 7 TUL. J. INT’L & COMP. L. 153, 158–61 (1999).

24. *Hickman v. Taylor*, 329 U.S. 495, 500–01 (1947).

25. Craig B. Shaffer & Ryan T. Shaffer, *Looking Past the Debate: Proposed Revisions to the Federal Rules of Civil Procedure*, 7 FED. CTS. L. REV. 178, 187 (2013).

“wide-ranging discovery would help ensure a just determination in all matters and remedy the imbalance of power between the wealthy and the poor”²⁶ by accomplishing the expeditious “location and disclosure of all the unprivileged evidentiary data that might prove useful in resolving a given dispute.”²⁷ The rules’ drafters did recognize multiple dangers, from the problems likely to be posed by unwieldy documentary evidence to the possibility that some would use discovery to “blackmail others and to force settlement more related to the costs of discovery than to the merits of the case.”²⁸ Nonetheless, these men again and again elected to reject their own proposals for restricting the rules’ “panoply of [discovery] devices.”²⁹ Instead, unlike a much older code,³⁰ their compendium afforded litigators “every type of discovery that was known in the United States and probably England up to that time.”³¹ In original conception and practical effect, discovery’s principal instruments totaled four: “depositions [pursuant to Rules 27 through 32], interrogatories to parties [under Rule 33], production and inspection of documents [per Rule 34], and requests for admissions [in accordance with Rule 36].”³² Upon their geneses, this foursome became the “keystone of the new Federal

26. John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 556 (2010).

27. Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1298–99 (1978).

28. Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 720, 730 (1998) [hereinafter Subrin, *Fishing*].

29. See, e.g., Subrin, *Fishing*, *supra* note 28, at 719, 720–30; Subrin, *Equity*, *supra* note 3, at 975–82; Edson E. Sunderland, *Foreword to GEORGE RAGLAND, JR., DISCOVERY BEFORE TRIAL*, iii. (Callaghan & Co., 1932) (“Hostility to ‘fishing expeditions’ before trial is a traditional and powerful taboo.”). This cry was a familiar one. *Laverett v. Cont’l Briar Pipe Co.*, 25 F. Supp. 80, 82 (S.D.N.Y. 1938).

30. David Dudley Field II created the famed code from which the rules seemed to so sharply depart. See, e.g., Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 L. & HIST. REV. 311, 327–38 (1988); Paul M. Hebert, *Institute on Federal Rules of Civil Procedure*, 1 LA. L. REV. 413, 414 (1939).

31. Subrin, *Fishing*, *supra* note 28, at 718–19.

32. Alexander Holtzoff, *Instruments of Discovery Under Federal Rules of Civil Procedure*, 41 MICH. L. REV. 205, 206 (1942); cf. Will Rhee, *Evidence-Based Federal Civil Rule-making: A New Contemporaneous Case Coding Rule*, 33 PACE L. REV. 60, 83 (2013) (quoting additional authorities asserting that the “‘lionized’ Founding Fathers [of the Rules] created a ‘Big Bang’ by completely remaking ‘the civil justice system in America’” and did so “based upon ‘little empirical evidence’”).

practice,” indispensable to “the delineation of issues and the revelation of facts,”³³ then hemmed in by Rules 1, 26, and 37.³⁴

Assertively exploited, this arsenal’s reach would later be expanded to promote these original goals and then be constricted in response to old concerns’ materialization. In 1946, the Court made discovery subject to Rule 26’s new closing sentence: “It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.”³⁵ Originally, only on a motion by the requesting party showing good cause and upon notice to all other parties, Rule 34 empowered a court to order any party to produce and permit the inspection and copying of any designated documents, books, accounts, objects, or tangible things that constituted or contained material evidence if not privileged.³⁶ In 1946, Rule 34 was retailored so as to “correlate the scope of inquiry permitted under Rule 34 with that provided in Rule 26(b),” and the advisory committee took the opportunity to voice its displeasure at those few decisions that had “require[d] great and impracticable specificity in the description of documents, papers, books, etc., sought to be inspected,” in apparent contravention of two early Court opinions.³⁷ In 1970, Rule 34 endured further revisal when its “good cause” requirement³⁸ was de-

33. James A. Pike, *The New Federal Deposition-Discovery Procedure and the Rules of Evidence*, 34 ILL. L. REV. 1, 1 (1939); accord, e.g., James A. Pike & John W. Willis, *Federal Discovery in Operation*, 7 U. CHI. L. REV. 297, 298 (1940); James A. Pike & John W. Willis, *The New Federal Deposition-Discovery Procedure: I*, 38 COLUM. L. REV. 1179, 1179 (1938).

34. FED. R. CIV. P. 1, 26, 37; 83 CONG. REC. 8480-81 (1938). Later amendments shifted the contents of these original provisions. FED. R. CIV. P. 26 advisory committee’s note to 1970 amendment.

35. *Roth v. Bird*, 239 F.2d 257, 259 (5th Cir. 1956) (quoting the 1946 version of Rule 26). As originally envisioned, “[t]he purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case.” FED. R. CIV. P. 26 advisory committee’s note to 1946 amendment.

36. Holtzoff, *supra* note 32, at 219.

37. FED. R. CIV. P. 34 advisory committee’s note to 1946 amendment (citing *Brown v. United States*, 276 U.S. 134, 143 (1928), and *Consol. Rendering Co. v. Vermont*, 207 U.S. 541, 543-44 (1908)).

38. The old standard has not been wholly extirpated. Today, to obtain discovery as to the “subject matter” of an action rather than just a “claim” or “defense,” “good cause” must be shown. *Baron Servs. v. Media Weather Innovations L.L.C.*, 717 F.3d 907, 913 n.9 (Fed. Cir. 2013) (“But ‘good cause’ is required to be shown under Rule 26(b)(1) only if seeking broad discovery of ‘matter[s] relevant to the *subject matter* involved in the action.” (alteration and emphasis in original)); *In re Subpoena to Witzel*, 531 F.3d 113, 118 (1st Cir. 2008) (discussing Rule 26(b)(1)’s 2000 amendment).

leted, and its invocation was now permitted without the need for first obtaining judicial authorization.³⁹ Restrictive emendations to the rules' entirety followed in 1980, 1983, 1992, 2000, and 2015 in reaction to a variety of abuses,⁴⁰ real⁴¹ or perceived.⁴²

1. *Law's Overarching Obligations: Rules 1, 16, 26, and 29*

Other sources indirectly govern the interpretation of Rules 33 and 34 by endorsing a particular standard, vague but discernible, of appropriate behavior for lawyers and parties alike.⁴³ Interlaced, these precepts serve to make

39. FED. R. CIV. P. 34 advisory committee's note to 1970 amendment; see also Paul W. Grimm & David S. Yellin, *A Pragmatic Approach to Discovery Reform: How Small Changes Can Make a Big Difference in Civil Discovery*, 64 S.C. L. REV. 495, 509 (2013) (discussing changes).

40. Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 542–49 (2001); see also, e.g., Carl Tobias, *The 2000 Federal Civil Rules Revisions*, 38 SAN DIEGO L. REV. 875, 884 (2001) (“The rule revisors’ apparent purposes in devising the change [to Rule 26 in 2000] are to restrict discovery and fishing expeditions by limiting parties to discovery that involves matters which they raise in the pleadings.”).

41. James S. Kaklik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613, 624–25 (1998); see also Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 527 (1998).

42. See, e.g., Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. REV. 683, 683 (1998) [hereinafter *Sequel*] (“[S]tudies reaffirm our common sense notions about discovery -- that complex, high-stakes litigation, handled by big firms with corporate clients, are the cases most likely to involve the problematic discovery that skews the discovery debate.”); Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1432 (1994) [hereinafter *Myth*] (faulting “surveys, materials, anecdotes, and war stories supporting the initiatives for discovery reform [for] ignor[ing] existing empirical evidence indicating that discovery was not a problem in the majority of federal civil case”); cf. Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1850 (2014) (“Contrary to the popular narrative, the problem with excessive discovery is—and has always been—more pervasive with respect to a particular slice of mega cases, approximately five to fifteen percent of the civil caseload. In the majority of cases there is very little or no discovery and, in the other cases, the amount of discovery is, by any reasonable measure, proportionate to the stakes.” (footnote omitted)); John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 553 (2012) (“Although cases of abuse are thought to be infrequent, when they occur, they transform discovery from a truth-serving to a truth-impairing device.” (footnote omitted)).

43. Cf. *Louisiana Crawfish Producers Ass’n - W. v. Mallard Basin, Inc.*, Nos. 6:10-1085, 6:11-0461, 2015 U.S. Dist. LEXIS 163230, at *10, 2015 WL 8074260, at *2 (W.D. La. Dec. 4, 2015) (“Rule 34 must be applied in connection with Rule 26(b)” and in light of its “policy of broad and liberal discovery.”); *Barnhardt v. Meridian Mun. Separate Sch. Dist.*, No. 4:65-cv-1300 HTW-LRA, 2012 U.S. Dist. LEXIS 42460, at *9, 2012 WL 1067105, at *3 (S.D. Miss. Mar. 28, 2012) (“Rule 34 must be applied in connection with Rule 26(b).”).

discovery subject to “[an] overriding limitation of good faith,”⁴⁴ distinguishable from “the manner in which litigation is [‘frequently’] conducted.”⁴⁵ While the rules allow for the adjudication of discovery disputes through two types of motions—to compel per Rule 37(a)⁴⁶ or for a protective order under Rule 26(c),⁴⁷ neither of which automatically stays discovery upon its filing⁴⁸—a certain hope animates these provisions: that only most intractable of disputes, with both parties able to mount a plausible defense, will lead to the expenditure of judicial resources.⁴⁹ With informal resolution so obviously preferred,⁵⁰ the edicts explored below demarcate the contours of the cooperative ethic regarded as essential to pretrial practice and oft-invoked in boilerplate’s regulation under Title V and its local analogues.⁵¹

44. *Asea, Inc. v. S. Pac. Transp. Co.*, 669 F.2d 1242, 1246 (9th Cir. 1981); *cf. Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 27 (9th Cir. 1980) (“[D]istrict court is vested with broad discretion to make discovery and evidentiary rulings conducive to the conduct of a fair and orderly trial.”); Jeffrey W. Stempel, *Ulysses Tied to the Generic Whipping Post: The Continuing Odyssey of Discovery “Reform”*, 64 LAW & CONTEMP. PROBS. 197, 198 (2001) (“Historically, trial judges in the United States have been vested with great discretion over almost all aspects of litigation—in particular, discovery.”).

45. Schwarzer, *supra* note 4, at 705; *see also* Amir Shachmurove, *Disruptions’ Function: A Defense of (Some) Form Objections under the Federal Rules of Civil Procedure*, 12 SETON HALL CIR. REV. 161, 208–11 (2016) [hereinafter Shachmurove, *Disruptions*].

46. FED. R. CIV. P. 37(a); *SEC v. Goldstone*, 301 F.R.D. 593, 644 (D.N.M. 2014) (citing Fed. R. Civ. P. 37(a)).

47. FED. R. CIV. P. 26(c); *Father M. v. Various Tort Claimants (In re Roman Catholic Archbishop of Portland)*, 661 F.3d 417, 422 n.3 (9th Cir. 2011) (citing Fed. R. Civ. P. 26(c)).

48. *See Enron Corp. Sav. Plan v. Hewitt Assocs., L.L.C.*, 258 F.R.D. 149, 154 (S.D. Tex. 2009) (discussing when a stay of discovery may be appropriate).

49. *See, e.g., Cunningham v. Hamilton Cty.*, 527 U.S. 198, 208 (1999) (“[Rule 37(a) was] designed to protect courts and opposing parties from delaying or harassing tactics during the discovery process.”); *In re Grand Jury Subpoena*, 836 F.2d 1468, 1481 (4th Cir. 1988) (Sprouse, J., dissenting) (“[T]he very purpose of Rule 26(c) is to foster wide-ranging, successful discovery that will often forestall a public trial.”); Kevin J. Lynch, *When Staying Discovery Stays Justice: Analyzing Motions to Stay Discovery When a Motion to Dismiss is Pending*, 47 WAKE FOREST L. REV. 71, 72 (2012) (“The current discovery system is also designed to proceed without the direct involvement of judges unless a dispute arises.”); Donald E. Campbell, *Raise Your Right Hand and Swear to Be Civil: Defining Civility as an Obligation of Professional Responsibility*, 47 GONZ. L. REV. 99, 124–26 (2011) (proposing codes of civility for pre-trial proceedings).

50. *See Witt v. GC Servs. Ltd. P’ship*, 307 F.R.D. 554, 555 (D. Colo. 2014) (“Civil discovery in the federal courts should, presumptively, be ‘a self-managed process.’”); *Selectica, Inc. v. Novatus, Inc.*, No. 6:13-cv-1708-Orl-36TBS, 2014 U.S. Dist. LEXIS 66335, at *5, 2014 WL 1930426, at *2 (M.D. Fla. May 14, 2014) (“Discovery is intended to be extrajudicial and self-executing. It should require at most, infrequent court involvement.”); *Sanyo Laser Prods. v. Arista Records, Inc.*, 214 F.R.D. 496, 499 (S.D. Ind. 2003) (“In the event the parties cannot informally resolve a discovery dispute, Rule 37 provides a vehicle for the aggrieved party to request an order from the Court compelling discovery.”).

51. *Kinetic Concepts, Inc. v. ConvaTec Inc.*, 268 F.R.D. 226, 242–43 (M.D.N.C. 2010) (citing to both the “spirit of the rules” and the language of a local one).

Fittingly, the rules' interpretive lodestar appears in their first paragraph.⁵² In its present form, Rule 1 establishes a single principle: "[The rules] should be construed, administered, and employed by the courts and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."⁵³ It then thrusts the responsibility for its realization on three discrete entities: the court, the parties, and the attorneys.⁵⁴ That is to say, just as a court has "[an] affirmative duty . . . to exercise the authority conferred by [the] rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay. . . . [Attorneys, a]s officers of the court [, have] share[d in] this responsibility" since 1983;⁵⁵ parties have been so bound since December 1, 2015.⁵⁶ Any dilatory tactic which endangers a matter's efficient adjudication, including evasive discovery responses, almost surely breaches this paragraph.⁵⁷

More obliquely, Rule 16 reinforces the iniquity of such prorogation. Per its first sentence, a judge is expected to "establish[] early and continuing control so that the case will not be protracted because of lack of management," "discourage wasteful pretrial activities," promote "thorough preparations,"

52. *The Scotch Whiskey Ass'n v. U.S. Distilled Prods. Co.*, 952 F.2d 1317, 1319 (Fed. Cir. 1991) ("Rule 1 sets the policy for construing all of the [discovery] rules.").

53. FED. R. CIV. P. 1.

54. In fact, the Sedona Conference has seen fit to codify Rule 1's mandate in the so-called "Cooperation Proclamation," meant to launch "a coordinated effort to promote cooperation by all parties to the discovery process to achieve the goal of a 'just, speedy, and inexpensive determination of every action.'" The Sedona Conference, *supra* note 6, at 331; *see also* Ralph C. Losey, *Mancia v. Mayflower Begins a Pilgrimage to the New World of Cooperation*, 10 SEDONA CONF. J. 377, 380 (2009) ("[T]he Federal Rules are a mandate that counsel act cooperatively in resolving discovery issues.").

55. FED. R. CIV. P. 1 advisory committee's note to 1993 amendment; *Atlas Res., Inc. v. Liberty Mut. Ins. Co.*, 297 F.R.D. 482, 485 (D.N.M. 2011) (citing note); *Gipson v. Sw. Bell Tel. Co.*, No. 08-2017-EFM-DJW, 2008 U.S. Dist. LEXIS 103822, at *4 (D. Kan. Dec. 23, 2008) ("This Court's goal, in accordance with Rule 1[,] . . . is to administer the [Rules] in a 'just, speedy and inexpensive' manner. To assist the Court in accomplishing this goal, the parties are encouraged to resolve discovery and other pretrial issues without the Court's involvement."); David J. Waxse, *Cooperation—What Is It and Why Do It?*, 18 RICH. J.L. & TECH. 8, 15 (2012) ("There are now numerous opinions making the same point about cooperation, yet it appears that cooperation is not being used enough as a method of obtaining the 'just, speedy, and inexpensive determination of the action.'").

56. FED. R. CIV. P. 1 advisory committee note to 2015 amendment; *Hyatt v. Rock*, No. 9:15-CV-0089 (DNH/DJS), 2016 U.S. Dist. LEXIS 159831, at *7, 2016 WL 6820378, at *2 (N.D.N.Y. Nov. 18, 2016).

57. *See, e.g., Covington v. Sailormen Inc.*, 274 F.R.D. 692, 693 (N.D. Fla. 2011) ("[B]oilerplate, shotgun-style objections are not consistent with the Federal Rules of Civil Procedures' goal of securing 'the just, speedy, and inexpensive determination of every action.'").

and act so as “to facilitat[e] settlement.”⁵⁸ Not amended for forty-five years,⁵⁹ Rule 16(b) embodies its drafters’ intent to avoid delay and excessive cost in litigation.⁶⁰ In fact, its reference to “wasteful pretrial activities” was directed at “the problem of procrastination and delay by attorneys in a context in which scheduling is especially important—discovery,” and its allusion to “lack of management” was intended to police “various motions that otherwise might be used as stalling techniques.”⁶¹ Arguably, any evasive response to an apposite interrogatory or request for production runs afoul of Rule 16.⁶²

Announcing discovery’s negligible relevancy standard—“[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense” and, as of December 1, 2015, “proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit,” and, “[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable”⁶³—Rule 26 prescribes

58. FED. R. CIV. P. 16(a); *Ohio Nat’l Life Assurance Corp. v. Langkau*, 353 F. App’x 244, 255 (11th Cir. 2009). Some argue for more active involvement by judges in a case’s management. *See generally* Steven Baicker-McKee, *Reconceptualizing Managerial Judges*, 65 AM. U. L. REV. 353 (2015).

59. FED. R. CIV. P. 16 advisory committee’s note to 1983 amendment.

60. *See* FED. R. CIV. P. 16 advisory committee’s note to 2006 amendment (“An order that includes the parties’ agreement may be helpful in avoiding delay and excessive cost in discovery.”).

61. FED. R. CIV. P. 16 advisory committee’s note to 1983 amendment; *see also* *Marcum v. Zimmer*, 163 F.R.D. 250, 253 (S.D. W. Va. 1995) (discussing the significance of scheduling orders issued pursuant to Rule 16).

62. *See, e.g.*, *Russell v. Daiichi-Sankyo, Inc.*, No. 11-34-BLG-CSO, 2012 U.S. Dist. LEXIS 49161, at *3–4, 2012 WL 1161435, at *1 (D. Mont. Apr. 6, 2012) (first quoting *Covington*, 274 F.R.D. at 693; then *Lurensky v. Wellinghoff*, 258 F.R.D. 27, 30 (D.D.C. 2009)). Unsurprisingly, “courts have shown no reticence in openly and vocally expressing their displeasure with parties who fail to communicate and cooperate with one another on e-discovery issues.” Brian C. Vick & Neil C. Magnuson, *The Promise of a Cooperative and Proportional Discovery Process in North Carolina: House Bill 380 and the New State Electronic Discovery Rules*, 34 CAMPBELL L. REV. 233, 253–54 (2012).

63. FED. R. CIV. P. 26(b)(1); *see also, e.g.*, *U.S. Commodity Futures Trading Comm’n v. Parnon Energy, Inc.*, 593 F. App’x 32, 36 (2d Cir. 2014) (quoting *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 351 (1978)) (“Relevance to the subject matter under Rule 26 is construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.” (internal quotation marks omitted)); *Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389, 402 (6th Cir. 1998) (“The scope of discovery under the [rules] is traditionally quite broad.”); *Teichgraeber v. Mem’l Union Corp. of Emporia State Univ.*, 932 F. Supp. 1263, 1265 (D. Kan. 1996) (“Discovery relevance is minimal relevance, which means it is possible and reasonably calculated that the request will lead to the discovery of admissible evidence.” (citation omitted) (internal quotation marks omitted)). Notably, although Rule 26(b)’s relevance standard was ostensibly heightened in

a party's proper comportment during discovery in two distinct subsections. First, Rule 26(b)(5), relevant if the protesting party asserts a privilege or withholds a document as attorney work-product, compels this selfsame party to (1) "expressly make th[is kind of] claim" and (2) "describe the nature of the documents, communications, or tangible things not produced or disclosed . . . in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim."⁶⁴ The required log must, therefore, be sufficiently detailed so as to allow court and party to determine whether the essentials of the asserted privilege or protection have been satisfied.⁶⁵ For example, while "a [party asserting] the attorney-client privilege must make at least a minimal showing that the communication involved legal matters," that showing need not be "onerous and may be satisfied by as little as a statement in the privilege log explaining the nature of the legal issue for which advice was sought."⁶⁶ In another panel's words, minimally sufficient logs are not required to be "precise to the point of pedantry" or to contain "infinitely detailed information."⁶⁷ The disclosures made pursuant to Rule

2000 by the replacement of the phrase "the subject matter of the action" with "claim or defense of any party," FED. R. CIV. P. 26 advisory committee's note to 2000 amendment, this alteration has apparently had little practical effect, Beisner, *supra* note 26, at 578–79, though it was somewhat feared, Thomas D. Rowe, Jr., *A Square Peg in a Round Hole? The 2000 Limitation on the Scope of Federal Civil Discovery*, 69 TENN. L. REV. 13, 18–22 (2001). Rule 26(b)(1) still allows a court to order discovery as to "any matter relevant to the subject matter involved in the action" upon a showing of "good cause." FED. R. CIV. P. 26(b)(1); *cf. In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 188–90 (10th Cir. 2009). In addition, despite the addition of the proportional language to Rule 26(b)(1) in 2015, that requirement had been lodged in Rule 26(b)(2)(C) since 1983. ADVISORY COMM. ON CIVIL RULES, REPORT TO COMM. ON RULES OF PRACTICE & PROCEDURE 7 (May 2, 2014); *United States ex rel. Carter v. Bridgepoint Educ., Inc.*, 305 F.R.D. 225, 237–40 (S.D. Cal. 2015) (applying these factors to limit discovery prior to this amendment).

64. FED. R. CIV. P. 26(b)(5)(A); *In re Santa Fe Int'l Corp.*, 272 F.3d 705, 710 (5th Cir. 2001) (citing rule).

65. *E.g.*, *Avgoustis v. Shinseki*, 639 F.3d 1340, 1345–46 (Fed. Cir. 2011) (finding that the disclosure of specific subject matter in a privilege log would not itself implicate attorney-client privilege); *United States v. Constr. Prods. Research*, 73 F.3d 464, 473–74 (2d Cir. 1996) (finding privilege logs inefficiently detailed when they merely stated "Fax: Whistleblower Article" or "Summary of Enclosures" and characterized the documents as "attorney-client communication[s]" without explanation).

66. *In re Search Warrant Executed at Law Offices of Stephen Garea, Suite 422, City Centre One, 100 Federal Plaza East, Youngstown, Ohio*, No. 97-4112, 1999 U.S. App. LEXIS 3861, at *6, 1999 WL 13749900, at *1–2 (6th Cir. Mar. 5, 1999), *cited in* *Cooey v. Strickland*, 269 F.R.D. 643, 649 (S.D. Ohio 2010). One court has summarized the recurrent essentials, stating that the privilege log should "identify each document and the individuals who were parties to the communications, providing sufficient detail to permit a judgment as to whether the document is at least potentially protected from disclosure." *Bowne of N.Y.C., Inc. v. Am-Base Corp.*, 150 F.R.D. 465, 474 (S.D.N.Y. 1993).

67. *In re Grand Jury Subpoena*, 274 F.3d 563, 576 (1st Cir. 2001). True, this case discussed Rule 45(d)(2) and not Rule 26(b)(5)(A). *Id.* But "the substantive requirements of

26(a), “[u]nless the court orders otherwise[,] must be made at least 30 days before trial.”⁶⁸

Second, per Rule 26(g)(1), to “every discovery request, response, or objection,” an attorney must sign, signifying his or her adherence to a singular behavioral code.⁶⁹ By so doing, the signature’s owner certifies “that to the best of the person’s knowledge, information, and belief formed after a reasonable inquiry,” that request, response, or objection is “consistent with the[] rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for established new law,” “not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation,” and “neither unreasonable nor unduly burdensome or expensive”⁷⁰ As the advisory committee’s official comment explains, Rule 26(g)(1) “imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37,” serving as “a deterrent to both excessive discovery and evasion.”⁷¹ Caveats, however, are in order. Though it thereby encodes an objective standard “similar to the one imposed by Rule 11,” but distinct from the certification requirement mandated by Rules 30 and 33, Rule 26(g) does not compel an attorney “to certify the truthfulness of the client’s factual responses to a discovery request” or “to disclose privileged communications or work product in order to show that a discovery request, response, or objection is substantially justified.”⁷² Only a reasonable investigation, as adjudged by weighing a case’s particular circumstances, is

the two rules are the same.” *Neelon v. Krueger*, No. 12-cv-11198-IT, 2015 U.S. Dist. LEXIS 29146, at *7 n.3, 2015 WL 1037992, at *2 n.3 (D. Mass. Mar. 10, 2015).

68. FED. R. CIV. P. 26(a)(3)(B); *see also* *Smith v. Pfizer, Inc.*, 265 F.R.D. 278, 282 (M.D. Tenn. 2010) (listing the pretrial disclosures required by Rule 26(a)(3)(B)).

69. FED. R. CIV. P. 26(g)(1)(B)(i)–(iii); *see also* *Younes v. 7-Eleven, Inc.*, 312 F.R.D. 692, 704 (D.N.J. 2015) (“Rule 26(g) by its terms applies to objections to discovery.”).

70. FED. R. CIV. P. 26(g)(1)(B)(i)–(iii). “[W]ith respect to a disclosure,” the attorney must certify it to be “complete and correct as of the time it is made” only. FED. R. CIV. P. 26(g)(1)(A); *see also* *Moore v. Publicis Groupe*, 287 F.R.D. 182, 188 (S.D.N.Y. 2012) (explaining that Rule 26(g)(1)(A) does not require an attorney, in large-data cases, to certify that its “discovery response is ‘complete,’ but rather incorporates the Rule 26(b)(2)(C) proportionality principle”).

71. FED. R. CIV. P. 26(g) advisory committee’s note to 1983 amendment; *see also*, *e.g.*, *Heller v. City of Dallas*, 303 F.R.D. 466, 476 (N.D. Tex. 2014) (quoting note).

72. FED. R. CIV. P. 26(g) advisory committee’s note to 1983 amendment; *Apex Oil Co. v. Belcher Co. of N.Y.*, 855 F.2d 1009, 1017 (2d Cir. 1988) (quoting note).

impelled.⁷³ Judiciously understood, Rules 26(b)(5) and (g) can be construed as banning outright evasion in the course of discovery.⁷⁴

One final provision buttresses these paragraphs' themes. In accordance with Rule 29, unless "[a] court orders otherwise," the parties may by mutual stipulation modify the "procedures governing or limiting discovery."⁷⁵ Rule 29(b) adjoins a clear limitation to this franchise: "[A] stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial,"⁷⁶ impliedly requiring that any such agreement be committed to writing.⁷⁷ Nonetheless, Rule 29(b) was "revised to give greater opportunity for litigants to agree upon modifications to the procedures governing discovery or to limitations upon discovery."⁷⁸ As such, approbation of a particular manner—"[c]ounsel are encouraged to agree on less expensive and time-consuming methods to obtain information, as through voluntary exchange of documents"⁷⁹—is Rule 29's unmistakable purpose.⁸⁰

73. FED. R. CIV. P. 26(g)(1)(i)-(iii); *see also* Jones v. Tauber & Balsler, P.C., 503 B.R. 162, 202–03 (N.D. Ga. 2013) (concluding that the failure to conduct "a reasonable investigation" under Rule 26(g)(1) justified the imposition of sanctions under Rule 37).

74. *See* Symposium, *E-Discovery: Where We've Been, Where We Are, Where We're Going*, 12 AVE MARIA L. REV. 1, 20 (2014) (explicating *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354 (D. Md. 2008), in which Rule 26(g) was construed as certifying the request's compliance with the proportionality touchstones presently encoded in Rule 26(b)(2)(C)).

75. FED. R. CIV. P. 29(b); *Owen v. Angst (In re Angst)*, 428 B.R. 776, 781 (Bankr. N.D. Ohio 2010).

76. FED. R. CIV. P. 29(b); *see also* Banks v. City of Phila., 309 F.R.D. 287, 292–93 (E.D. Pa. 2015) ("Rule 29(b) requires that informal agreements extending discovery be approved by the court," rendering "informal discovery agreements . . . unenforceable").

77. *See* *Marfolk Coal Co. v. Smith*, No. 5:10-0069, 2011 U.S. Dist. LEXIS 4085, at *15 n.8, 2011 WL 111880, at *4 n.8 (S.D. W. Va. Jan. 13, 2011); Henry S. Noyes, *If You (Re)Build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration's Image*, 30 HARV. J.L. & PUB. POL'Y. 579, 609–10 (2007).

78. FED. R. CIV. P. 29 advisory committee's note to 1993 amendment; *see also* David H. Taylor & Sara M. Cliffe, *Civil Procedure by Contract: A Convoluted Confluence of Private Contract and Public Procedure in Need of Congressional Control*, 35 U. RICH. L. REV. 1085, 1108–10 (2002) (dissecting Rule 29).

79. FED. R. CIV. P. 29 advisory committee's note to 1993 amendment.

80. Daniel B. Winslow & Alexandra Bedell-Healy, *Economical Litigation Agreements: The "Civil Litigation Prenup" Need, Basis, and Enforceability*, 11 PEPP. DISP. RESOL. L.J. 125, 131 (2010) ("The provisions allowing agreements were adopted to further the purpose of the FRCP to ensure speedy, just, and inexpensive proceedings.").

2. *Extrinsic Source's Mandate: The Model Rules of Professional Conduct*

Albeit lacking in statutory force, the Model Rules of Professional Conduct too play a starring role in boilerplate's regulation. Model Rule 3.4 declares: "[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."⁸¹ Indeed, as commentary adverts, "[f]air 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."⁸² Yet, for all the force of these proclamations, "the Code essentially licenses pure partisanship except in the most extreme cases," effectively offering "little or no guidance for an attorney who is concerned to balance her competing obligations in discovery practice,"⁸³ and it stands forth, like other model codes, as essentially hortatory.⁸⁴ Under the Model Rules, "frivolous" conduct during discovery is thus punishable,⁸⁵ but that term's precise definition remains elusive, stymieing their utility.

3. *Rule 33*

Although "[t]he flexibility and potency of oral depositions is in large part lacking in written interrogatories," this old tool "fulfill[s] important

81. MODEL RULES OF PROF'L CONDUCT r. 3.4(d) (AM. BAR ASS'N 2007); Jayne H. Lee, Inc. v. Flagstaff Indus. Corp., 173 F.R.D. 651, 654 n.9 (D. Md. 1997) (citing rule). In this article, any reference to "Model Rule" or "Model Rules" is to one or more of the Model Rules of Professional Conduct.

82. MODEL RULES OF PROF'L CONDUCT r. 3.4(d); *In re Nicole Energy Servs., Inc.*, 385 B.R. 201, 222 n.18 (Bankr. S.D. Ohio 2008) (quoting comment).

83. W. Bradley Wendel, *Rediscovering Discovery Ethics*, 79 MARQ. L. REV. 895, 919 (1996).

84. *Cf.*, e.g., *United States v. Apel*, 134 S. Ct. 1144, 1151 (2014) ("[O]pinions [in United States' Attorney's Manual, among other executive branch documents] are not intended to be binding."); *United States v. Jones*, No. 10-CR-60, 2011 U.S. Dist. LEXIS 8724, at *11–12, *12 n.36, 2011 WL 320917, at *4 & n.36 (M.D. La. Jan. 28, 2011) (collecting cases standing for the "well-established" principle that "Department of Justice guidelines and policies do not create enforceable rights for criminal defendants").

85. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS: FRIVOLOUS ADVOCACY § 110(3) (2000).

functions.”⁸⁶ Capped at “no more than 25[,] . . . including all discrete subparts” and unless a court allows otherwise,⁸⁷ written interrogatories posed pursuant to Rule 33 may relate to any matter that may be inquired under Rule 26(b)(1)’s minimal relevance standard.⁸⁸ Additional interrogatories may be sought, but only if the propounding party can satisfy the proportionality criteria set forth in Rule 26(b)(1) and (2).⁸⁹ Unlike an objection to a request for an admission, “[a]n interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact.”⁹⁰ A court may nonetheless order that such interrogatories “need not be answered until designated discovery is complete, or until a pretrial conference or some other time.”⁹¹ In such cases, upon the moving party lies the burden of showing that “securing early answers to its contention questions will materially advance the goals of the Federal Rules of Civil Procedure.”⁹²

Under Rule 33, interrogatories “must be answered” either “by the party to whom they are directed” or “if that party is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who must furnish the information available to the party.”⁹³ An answer is valid if the question was itself “separately and fully” answered, “to the extent it is not objected to, . . . in writing under oath”⁹⁴ and if the ground for

86. Holtzoff, *supra* note 32, at 214; *see also* Edson R. Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863, 875–76 (1933) (summarizing the comparative weaknesses of interrogatories as to oral depositions).

87. FED. R. CIV. P. 33(a)(1); *Superior Commc’ns v. Earhugger, Inc.*, 257 F.R.D. 215, 217–18 (C.D. Cal. 2009) (quoting Rule 33(a)(1)). Admittedly, the term “discrete subparts” has no certain meaning, but “courts generally agree that ‘interrogatory subparts are to be counted as one interrogatory . . . if they are logically or factually subsumed within and necessarily related to the primary question.’” *Trevino v. ACB Am., Inc.*, 232 F.R.D. 612, 614 (N.D. Cal. 2006) (alteration in original) (citing *Safeco of Am. v. Rawston*, 181 F.R.D. 441, 445 (C.D. Cal. 1998)).

88. FED. R. CIV. P. 33(a)(2); *Nimkoff v. Dollhausen*, 262 F.R.D. 191, 195 (E.D.N.Y. 2009) (quoting Rule 33(a)(2)).

89. FED. R. CIV. P. 33(a)(1). Like the transfer of the proportionality language moved from Rule 26(b)(2)(C) into Rule 26(b)(1), this change made explicit what had already been implicit. *See* FED. R. CIV. P. 33 advisory committee’s note to 2015 amendment (“Rule 33 is amended in parallel with Rules 30 and 31 to reflect the recognition of proportionality in Rule 26(b)(1).”).

90. *Compare* FED. R. CIV. P. 36(a)(1)(A), *with* FED. R. CIV. P. 33(a)(2).

91. FED. R. CIV. P. 33(a)(2); *In re Domestic Drywall Antitrust Litig.*, 300 F.R.D. 228, 229 (E.D. Pa. 2014) (quoting Rule 33(a)(2)).

92. *Fischer & Porter Co. v. Tolson*, 143 F.R.D. 93, 96 (E.D. Pa. 1992) (quoting *In re Convergent Techs. Sec. Litig.*, 108 F.R.D. 328, 339 (N.D. Cal. 1985)).

93. FED. R. CIV. P. 33(b)(1)(A)–(B); *Abrams v. Ciba Specialty Chems. Corp.*, 265 F.R.D. 585, 587 (S.D. Ala. 2010) (quoting Rule 33(b)(1)).

94. FED. R. CIV. P. 33(b)(3); *Pederson v. Preston*, 250 F.R.D. 61, 64 (D.D.C. 2008) (citing Rule 33(b)(3)).

objecting was stated “with specificity.”⁹⁵ As this provision has been widely construed, answers must be “true, explicit, responsive, complete, and candid,”⁹⁶ for this paragraph was “added to make clear that objections must be specifically justified, and that unstated or untimely grounds for objection ordinarily are waived” and ought to be “read in light of Rule 26(g).”⁹⁷ At present, therefore, “incomplete or evasive” answers are forbidden, the proper punishment limned in Rule 37(a).⁹⁸ Any ground for objection not timely stated is “waived unless the court, for good cause, excuses the failure.”⁹⁹ Malleable, the term “good cause” ostensibly encompasses legitimate reliance on the traditional objections,¹⁰⁰ assuming their grounds are specifically stated and assiduously defended.¹⁰¹

4. *Rule 34*

Rule 34 allows a party to demand another to “produce and permit the requesting party or its representative to inspect, copy, test, or sample” a number of “documents” and “any designated tangible things” or “permit entry onto designated land or other property possessed or controlled by the responding party.”¹⁰² For the request to be binding and effective, it “must describe with reasonable particularity each item or category of items to be inspected” and “specify a reasonable time, place, and manner for the inspection and for performing the related acts.”¹⁰³ It may also “specify the form or forms

95. FED. R. CIV. P. 33(b)(4); *United States v. All Assets Held at Bank Julius Baer & Co., Ltd.*, 276 F.R.D. 396, 399 (D.D.C. 2011) (quoting Rule 33(b)(4)).

96. *Walls v. Paulson*, 250 F.R.D. 48, 50 (D.D.C. 2008) (quoting *Equal Rights Ctr. v. Post Props., Inc.*, 246 F.R.D. 29, 32 (D.D.C. 2007)); *accord Hansel v. Shell Oil Corp.*, 169 F.R.D. 303, 305 (E.D. Pa. 1996).

97. FED. R. CIV. P. 33 advisory committee’s note to 1993 amendment; *Saria v. Mass. Mut. Life Ins. Co.*, 228 F.R.D. 536, 539 n.1 (S.D. W. Va. 2005) (citing note).

98. FED. R. CIV. P. 33 advisory committee’s note to 1970 amendment.

99. FED. R. CIV. P. 33(b)(4); *McKissick v. Three Deer Ass’n L.P.*, 265 F.R.D. 55, 57 (D. Conn. 2010) (quoting Rule 33(b)(4)).

100. *Safeco Ins. Co. of Am. v. Rawstrom*, 183 F.R.D. 668, 671 n.2 (C.D. Cal. 1998) (“There might be circumstances in which stating all objections in the initial response to an interrogatory would vitiate some of the other objections interposed or so impair the rights of the responding party that good cause would exist.”); *cf.* FED. R. CIV. P. 33 advisory committee’s note to 1993 amendment (implying that Rules 26(b)(5) and 33(b)(4) should to be construed concurrently).

101. When so supported, these objections are not truly boilerplate. It is the existence of such support that removes the brand of boilerplate from an objection. Context, as in much of law, matters greatly.

102. FED. R. CIV. P. 34(a)(1)–(2); *United States v. 2121 Celeste Rd. SW*, 307 F.R.D. 572, 582 (D.N.M. 2015) (quoting Rule 34(a)).

103. FED. R. CIV. P. 34(b)(1)(A)–(B); *U.S. Bancorp Equip. Fin., Inc. v. Babylon Transit, Inc.*, 270 F.R.D. 136, 140 (E.D.N.Y. 2010) (quoting Rule 34(b)(1)).

in which electronically stored information is to be produced.”¹⁰⁴ The test for the kind of reasonable particularity mandated by Rule 34(b)(1)(A) is “whether the request places the party upon ‘reasonable notice of what is called for and what is not.’”¹⁰⁵ Inspired by electronically stored information’s modern proliferation, paragraphs (D) and (E) center on the production of these inimitable documents.¹⁰⁶

For every item or category, a response can take one of two forms, either “stat[ing] that inspection and related activities will be permitted as requested” or “stat[ing] with specificity the grounds for objecting to the request, including the reasons.”¹⁰⁷ In language intended to be redolent of Rule 33(b)(4), as of December 1, 2015, Rule 34 requires both that an objection “state whether any responsive materials are being withheld on the basis of that objection” and that an objection “to part of a request . . . specify the part and permit inspection of the rest.”¹⁰⁸ In 1993, the advisory committee elucidated the duty imposed by the former sentence: “[I]f a request for production is objectionable only in part, production should be afforded with respect to the unobjectionable portions.”¹⁰⁹ Seemingly, to object properly under Rule 34, a respondent must unambiguously “identify the particular portion which is not being responded to on the basis of the [stated] objection,”¹¹⁰ Rule 34(b) regarded as providing for procedures “essentially the same as that in Rule

104. FED. R. CIV. P. 34(b)(1)(C); *In re Porsche Cars N. Am., Inc. Plastic Coolant Tubes Prods. Liab. Litig.*, 279 F.R.D. 447, 449 (S.D. Ohio 2012) (quoting Rule 34(b)(1)(c)).

105. *Kidwiler v. Progressive Paloverde Ins. Co.*, 192 F.R.D. 193, 202 (N.D. W. Va. 2000); *see also, e.g., Haeger v. Graham*, 267 F.R.D. 486, 493 (N.D. W. Va. 2010) (quoting *Kidwiler*, 192 F.R.D. at 202); *Lopez v. Chertoff*, No. CV 07-1566-LEW, 2009 U.S. Dist. LEXIS 50419, at *5, 2009 WL 1575214, at *2 (E.D. Cal. June 2, 2009) (same); *Bruggeman ex rel. Bruggeman v. Blagojevich*, 219 F.R.D. 430, 436 (N.D. Ill. 2004) (quoting *Parsons v. Jefferson-Pilot Corp.*, 141 F.R.D. 408, 412 (M.D.N.C. 1992)) (“The test for reasonable particularity is whether the request places a party upon ‘reasonable notice of what is called for and what is not.’”).

106. FED. R. CIV. P. 34(b)(2)(D)–(E). The advisory committee divulged as much: “[T]he growth in electronically stored information and in the variety of systems for creating and sorting such information has been dramatic.” FED. R. CIV. P. 34 advisory committee’s note to 2000 amendment.

107. FED. R. CIV. P. 34(b)(2)(B); *Heller v. City of Dallas*, 303 F.R.D. 466, 483 (N.D. Tex. 2014) (quoting pre-2015 version of Rule 34(b)(2)(B)).

108. FED. R. CIV. P. 34(b)(2)(C); *Patrick v. PHH Mortg. Corp.*, 298 F.R.D. 333, 336 (N.D. W. Va. 2014) (quoting Rules 33(b)(4) and 34(b)(2)(C)).

109. FED. R. CIV. P. 34 advisory committee’s note to 1993 amendment.

110. *Aheger v. Goodyear Tire & Rubber Co.*, 906 F. Supp. 2d 938, 976 (D. Ariz. 2012).

33”;¹¹¹ in point of fact, Rule 34’s latest incarnation appears to ratify this formerly conjectured congruence.¹¹² Accordingly, although it has never included an automatic waiver provision like Rule 33(b)(4),¹¹³ courts have repeatedly imported the latter’s language into Rule 34,¹¹⁴ a penchant roundly praised by scholars and practitioners.¹¹⁵

5. Rule 36

With antecedents in equity and state procedures,¹¹⁶ Rule 36 allows a party to serve on another “a written request to admit . . . the truth of any matters within the scope of Rule 26(b)(1) relating to (A) facts, the application of law to fact, or opinions about either; and (B) the genuineness of any described documents.”¹¹⁷ So phrased, Rule 36 cannot be used to compel “an admission of a conclusion of law.”¹¹⁸ “If a matter is not admitted,” Rule

111. FED. R. CIV. P. 34 advisory committee’s note to 1970 amendment; *Mainstreet Collection, Inc. v. Kirkland’s, Inc.*, 270 F.R.D. 238, 240 (E.D.N.C. 2010) (quoting the advisory committee note).

112. See FED. R. CIV. P. 34 advisory committee’s note to 2015 amendment (stating that Rule 34(b)(2)(B), as amended, “adopts the language of Rule 33(b)(4)” in order to “eliminat[e] any doubt that less specific objections might be suitable under Rule 34”); *Ries v. Ardinger (In re Adkins Supply, Inc.)*, 555 B.R. 579, 587 n.8 (Bankr. N.D. Tex. 2016) (quoting comment).

113. FED. R. CIV. P. 33(b)(4).

114. *Lynn v. Monarch Recovery Mgmt., Inc.*, 285 F.R.D. 350, 360 (D. Md. 2012) (“All objections to document production requests must be stated with particularity and specificity; objections may not be ‘boilerplate.’”); *Autotech Techs. L.P. v. Automationdirect.com, Inc.*, 236 F.R.D. 396, 398 n.2 (N.D. Ill. 2006) (stating that, although Rule 34(b) does not include an automatic waiver provision, “courts are uniform in their interpretation of the rules as permitting a finding of waiver where objections are not timely made and the objector cannot show good cause for the delay”); *Wagner v. St. Paul Fire & Marine Ins. Co.*, 238 F.R.D. 418, 423 (N.D. W. Va. 2006) (finding it “well settled” that “the failure to timely object under Rule 34” results in a waiver of that objection); *Hall v. Sullivan*, 231 F.R.D. 468, 473–74 (D. Md. 2005) (citing case law showing that “other courts addressing this issue long have ruled that a failure to raise an objection in an answer to a Rule 34 document production request may constitute waiver”); *Rivera v. Kmart Corp.*, 190 F.R.D. 298, 300 (D.P.R. 2000) (“[T]he objecting party must be specific enough in its objections to support its privilege, but not too specific as to divulge privileged information.”); *Pulsecard, Inc. v. Discovery Card Servs., Inc.*, 168 F.R.D. 295, 303 (D. Kan. 1996) (“Although Fed. R. Civ. P. 34, governing production of documents and things, provides no similar language with respect to specificity and waiver of objections, no reason exists to distinguish between interrogatories and requests for production.”).

115. See generally 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 (2010).

116. FED. R. CIV. P. 36 advisory committee’s note to 1937 adoption.

117. FED. R. CIV. P. 36(a)(1); *Huon Le v. Krepps (In re Krepps)*, 476 B.R. 646, 649 n.4 (Bankr. S.D. Ga. 2012) (citing Rule 36(a)(1)); *Buzz Off Insect Shield, LLC v. S.C. Johnson & Son, Inc.*, 606 F. Supp. 2d 571, 593 (M.D.N.C. 2009) (same).

118. *Playboy Enters., Inc. v. Welles*, 60 F. Supp. 2d 1050, 1057 (S.D. Cal. 1999); see also, e.g., *Tobkin v. Fla. Bar (In re Tobkin)*, 578 F. App’x 962, 964 (11th Cir. 2014) (finding

36(a)(4) continues, “the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it.”¹¹⁹ On the nature of an objection, the Rule is clear: “The grounds for objecting . . . must be stated.”¹²⁰ A party, however, may not object “solely on the ground that the request presents a genuine issue for trial.”¹²¹ “[A]ny denial must fairly respond to the substance of the matter,” and the answer must specify the objectionable party “when good faith requires that . . . [it] qualify an answer or deny only a part of a matter.”¹²² A “lack of knowledge or information as a reason for failing to admit or deny” suffices if the objecting party “has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.”¹²³ Rule 36 “serves two vital purposes, both of which are designed to reduce trial time” first, “to facilitate proof with respect to issues that cannot be eliminated from the case,” and second, “to narrow the issues by eliminating those that can be.”¹²⁴ A proper request for admission must be “simple, direct, and concise so [it] may be admitted or denied with little or no explanation or qualification.”¹²⁵

reliance on an admission misplaced for this reason); *Newby v. Enron Corp. (In re Enron Corp. Secs., Derivative & ERISA Litig.)*, 762 F. Supp. 2d 942, 959 (S.D. Tex. 2010) (“Rule 36 cannot be used to compel an admission of a conclusion of law.”).

119. FED. R. CIV. P. 36(a)(4); *McMahan v. Adept Process Servs.*, 279 F.R.D. 356, 363 n.8 (E.D. Va. 2011) (quoting Rule 36(a)(4)).

120. FED. R. CIV. P. 36(a)(5); *Lynn v. Monarch Recovery Mgmt., Inc.*, 285 F.R.D. 350, 363 (D. Md. 2012) (applying Rule 36(a)(5)).

121. FED. R. CIV. P. 36(a)(5); *Cutino v. Untch*, 303 F.R.D. 413, 414 (S.D. Fla. 2014) (quoting Rule 36(a)(5)).

122. FED. R. CIV. P. 36(a)(4); *Tequila Centinela, S.A. de C.V. v. Bacardi & Co.*, 247 F.R.D. 198, 202 (D.D.C. 2008) (quoting Rule 36(a)(4)).

123. FED. R. CIV. P. 36(a)(4); *Yoder & Frey Auctioneers, Inc. v. EquipmentFacts, L.L.C.*, 774 F.3d 1065, 1076 (6th Cir. 2014) (quoting Rule 36(a)(4)).

124. FED. R. CIV. P. 36 advisory committee’s note to 1970 amendment; *see also, e.g.*, *Adventis, Inc. v. Consol. Prop. Holdings, Inc.*, 124 F. App’x 169, 172 (4th Cir. 2005) (“The purpose of . . . [Rule 36] admissions is to narrow the array of issues before the court, and thus expedite both the discovery process and the resolution of the litigation.”); *Carney v. IRS (In re Carney)*, 258 F.3d 415, 419 (5th Cir. 2001) (“[Rule 36’s] breadth allows litigants to winnow down issues prior to trial and thus focus their energy and resources on disputed matter.”).

125. *Sommerfield v. City of Chi.*, 251 F.R.D. 353, 355 (N.D. Ill. 2008) (citing *United Coal Co. v. Powell Constr. Co.*, 839 F.2d 958, 967–68 (3d Cir. 1988)); *accord, e.g.*, *Hill v. Lappin*, No. 3:10-CV-1743, 2012 U.S. Dist. LEXIS 78396, at *14, 2012 WL 2049570, at *4 (M.D. Pa. June 6, 2012) (“Rule 36 should not be used unless the statement of fact sought to be admitted is phrased so that it can be admitted or denied without explanation.”) (quoting *United Coal Co. v. Powell Constr. Co.*, 839 F.2d 958, 967–68 (3d Cir. 1988)).

6. Rule 37

“Provid[ing] generally for sanctions against parties or persons unjustifiably resisting discovery,”¹²⁶ Rule 37 authorizes punishment for various misdeeds. Pursuant to Rule 37(a)(3)(B), “[a] party seeking discovery may move for an order compelling an answer, designation, production, or inspection.”¹²⁷ Justification for such a motion arises whenever “a deponent fails to answer a question asked under Rule 30,” “a corporation fails to make a designation under Rule 30(b)(6) or 31(a)(4),” if “a party fails to answer an interrogatory submitted under Rule 33,” or if “a party fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34.”¹²⁸ Crucially, the moving party must prove the other’s answers run afoul of these encoded standards.¹²⁹ If either the motion is granted or disclosure is ordered, the court “must . . . require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant’s reasonable expenses incurred in making the motion, including attorney’s fees.”¹³⁰ But such payment must not be ordered if “the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action”; “the opposing party’s nondisclosure, response, or objection was substantially justified”; or “other circumstances make an award of expenses unjust.”¹³¹ The latter two exceptions, but not the first, apply when the motion is denied.¹³² For both subsections’ purposes, “[s]ubstan-

126. FED. R. CIV. P. 37 advisory committee’s note to 1970 amendment; *Hawkins v. Fulton Cty.*, 96 F.R.D. 416, 419 (N.D. Ga. 1982) (quoting the advisory committee’s note); *see also Roadway Express, Inc. v. Piper*, 447 U.S. 752, 763 (1980) (discussing possible sanctions for failure to comply with discovery orders).

127. FED. R. CIV. P. 37(a)(3)(B); *Hill v. Emory Univ.*, 346 F. App’x 390, 392 (11th Cir. 2009) (quoting Rule 37(a)(3)(B)). Subsection (A) of Rule 27(a)(3) applies “[i]f a party fails to make a disclosure required by Rule 26(a).” FED. R. CIV. P. 37(a)(3)(A).

128. FED. R. CIV. P. 37(a)(3)(B)(i)–(iv); *Scruggs v. Int’l Paper Co.*, 278 F.R.D. 698, 701 (S.D. Ga. 2012) (quoting Rule 37(a)(3)(B)(iv)); *Huthnance v. Dist. of Columbia*, 268 F.R.D. 120, 121 (D.D.C. 2010) (quoting Rule 37(a)(3)(B)(i)–(iv)).

129. *E.g.*, *Equal Rights Ctr. v. Post Props.*, 246 F.R.D. 29, 32 (D.D.C. 2007); *Daiflon Inc. v. Allied Chem. Corp.*, 534 F.2d 221, 227 (10th Cir. 1976).

130. FED. R. CIV. P. 37(a)(5)(A); *Lorillard Tobacco Co. v. Elston Self Serv. Wholesale Groceries, Inc.*, 259 F.R.D. 323, 326 (N.D. Ill. 2009) (quoting Rule 37(a)(5)(A)).

131. FED. R. CIV. P. 37(a)(5)(A)(i)–(iii); *Drouin v. Symetra Life Ins. Co.*, 242 F.R.D. 167, 168 (D. Mass. 2007) (quoting Rules 37(a)(5)(A)(i)–(iii)).

132. FED. R. CIV. P. 37(a)(5)(B); *Carolina First Bank v. Stambaugh*, 275 F.R.D. 463, 465 (W.D.N.C. 2011) (quoting Rule 37(a)(5)(B)).

tially justified means that reasonable people could differ as to the appropriateness of the contested action.”¹³³ For all its potential bite, Rule 37(a) has rarely been aggressively employed to regulate discovery abuse.¹³⁴

Populated with the discretionary “may,”¹³⁵ Rule 37(c) is directed at failures to disclose, supplement, or admit.¹³⁶ If a party “fails to provide information or identify a witness as required by Rule 26(a) or (e),” a court may prohibit the use of that witness or information “on a motion, at a hearing, or at trial, unless the failure was substantially justified or is harmless.”¹³⁷ Rather than or as a supplement to this specified remedy, “on motion and after giving an opportunity to be heard,” a court “may order payment of the reasonable expenses . . . caused by the failure, inform the jury of the party’s failure[,] and may impose other appropriate sanctions” specified in Rule 37(b)(2)(A).¹³⁸ A failure to admit as required by Rule 36 may also lead, upon the requesting party’s movement, to responsibility for the propounding

133. *Maddow v. Procter & Gamble Co.*, 107 F.3d 846, 853 (11th Cir. 1997) (citing *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)); *see also, e.g., Parsi v. Daiouleslam*, 778 F.3d 116, 127 (D.C. Cir. 2015) (quoting *Pierce*, 487 U.S. at 565) (“A party is substantially justified in opposing discovery or disobeying an order if there is a genuine dispute, or if reasonable people could differ as to the appropriateness of the contested action.” (internal quotation marks omitted)); *Council for Tribal Emp’t Rights v. United States*, 110 Fed. Cl. 244, 250 (Fed. Cl. 2013) (citing case law defining “substantially justified”); *Ray v. Univ. of Tulsa (In re Ray)*, 283 B.R. 70, 81 (Bankr. N.D. Okla. 2002) (quoting *Pierce*, 487 U.S. at 564–65).

134. *See Lindsey D. Blanchard, Rule 37(a)’s Loser-Pays “Mandate”: More Bark than Bite*, 42 U. MEM. L. REV. 109, 122–26 (2011); *see also, e.g., Grimm & Yellin, supra* note 39, at 506 (noting that “there does appear to be a reluctance to impose sanctions for discovery violations throughout the courts”); *Beckerman, supra* note 4, at 554 (“[D]espite their theoretical availability, serious sanctions for violations of the discovery rules are awarded rarely under Rule 37 . . .”).

135. BRYAN A. GARNER & ANTONIN SCALIA, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 112–15 (2012). However, the advisory committee described this Rule as both “automatic” and “self-executing.” FED. R. CIV. P. 37 advisory committee’s note to 1993 amendment; *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001) (citing the advisory committee note). “To the extent that the Advisory Committee Note calls Rule 37(c)’s exclusion of evidence ‘automatic’ . . . that characterization cannot be squared with the plain language of Rule 37(c)(1) itself.” *Design Strategy, Inc. v. Davis*, 469 F.3d 284, 298 (2d Cir. 2006).

136. FED. R. CIV. P. 37(c); *Amtrak v. Catalina Enters.*, 147 F. App’x 378, 383 (4th Cir. 2005) (“Rule 37(c)(1) expressly provides a district court with discretion to penalize a party who fails—‘without substantial justification’—to comply with procedural rules and court orders.”). Rule 37 was amended in 2000 to include a party’s failure to supplement discovery as required by Rule 26(e). FED. R. CIV. P. 37(c) advisory committee’s note to 2000 amendment.

137. FED. R. CIV. P. 37(c)(1); *Cruz v. Bristol Myers Squibb Co. PR*, 777 F. Supp. 2d 321, 326 (D.P.R. 2011), *aff’d*, 699 F.3d 563 (1st Cir. 2012) (“Failure to make appropriate discovery disclosures as required by Rule 26 results in the failing party’s inability ‘to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.’”).

138. FED. R. CIV. P. 37(c)(1)(A)–(C); *Asher v. Colgate-Palmolive Co.*, 278 F.R.D. 608, 611 (D. Colo. 2011) (citing Rule 37(c)(1)(A)–(C)).

party's "reasonable expenses, including attorney's fees."¹³⁹ In fact, a court must so mandate unless "the request was held objectionable under Rule 36(a)[,] the admission sought was of no substantial importance[,], the party failing to admit had a reasonable ground to believe that it might prevail on the matter[,], or there was other good reason for the failure to admit."¹⁴⁰ "Bad faith," that hobgoblin so favored in vast swathes of modern and ancient jurisprudence,¹⁴¹ has no place in the assessment of sanctions under Rule 37.¹⁴²

Rule 37(d) addresses failures to attend a deposition, serve answers to interrogatories, or respond to a request for inspection.¹⁴³ Rule 37(d)(1) authorizes a court to order sanctions "on motion" if "a party or a party's officer,

139. FED. R. CIV. P. 37(c)(2); *Kelly v. McGraw-Hill Cos., Inc.*, 279 F.R.D. 470, 472 (N.D. Ill. 2012) (explaining the shifting of fees and expenses for a party's failure to admit what is requested under Rule 36). Before 2000, this provision constituted (c)(1). *Sun River Energy, Inc. v. Nelson*, 800 F.3d 1219, 1226 n.5 (5th Cir. 2015) (citing FED. R. CIV. P. 37 advisory committee's note to 2000 amendment).

140. FED. R. CIV. P. 37(c)(2)(A)–(D); *Benson Tower Condo. Owners Ass'n v. Victaulic Co.*, 105 F. Supp. 3d 1184, 1193–94 (D. Or. 2015) (acknowledging the exceptions found in Rule 37(c)(2)(A)–(D) and explaining the purpose of Rule 37(c)(2)).

141. *See, e.g.*, *United States v. Gilbert*, 198 F.3d 1293, 1298–99 (11th Cir. 1999) (explaining bad faith within the context of the Hyde Amendment); *Steele v. Hartford Fire Ins. Co.*, 788 F.2d 441, 442 (7th Cir. 1986) ("The common law of Illinois makes it a civil wrong for a liability insurer to refuse, in bad faith, to settle litigation against the insured . . ."). The devil may be more in the doctrine's application than its existence. *See Cox v. Cox (In re Cox)*, 247 B.R. 556, 564 (Bankr. D. Mass. 2000) ("The meaning of good faith is simple honesty of purpose.' The meaning of bad faith is presumably the opposite." (quoting *Keach v. Boyajian (In re Keach)*, 243 B.R. 851, 868 (B.A.P. 1st Cir. 2000))).

142. *See, e.g.*, *Design Strategy, Inc. v. Davis*, 469 F.3d 284, 296 (2d Cir. 2006) ("Since Rule 37(c)(1) by its terms does not require a showing of bad faith, we now hold that such a requirement should not be read into the Rule."); *S. States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 596 (4th Cir. 2003) ("Rule 37(c)(1) does not require a finding of bad faith or callous disregard of the discovery rules. While Rule 37(c)(1) requires the nondisclosure to be 'without substantial justification' and harmful, neither of these requirements suggests that the non-disclosing party must act in bad faith or otherwise culpably."); *Youn v. Track, Inc.*, 421 (6th Cir. 2003) ("Rule 37 has no bad faith requirement."); *DeVaney v. Cont'l Am. Ins. Co.*, 989 F.2d 1154, 1162 (11th Cir. 1993) ("[T]he 1970 amendments were specifically enacted to eliminate the possibility that a bad faith requirement would be read into the rule, and they contain no suggestion that bad faith should remain a prerequisite when an attorney, as opposed to a client, is subjected to sanctions." (citation omitted)). Even so, "bad faith" has maintained its place as a prominent factor. *See, e.g.*, *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 953–54 (10th Cir. 2002) (incorporating bad faith into the set of factors to consider when determining a Rule 26(g) violation); *DiPirro v. United States*, 43 F. Supp. 2d 327, 340 (W.D.N.Y. 1999) ("Precluding expert testimony under . . . [Rule 37(c)(1)] is a drastic remedy and should only be applied in cases where the party's conduct represents flagrant bad faith and callous disregard for the requirements of Rule 26(a)(2)(B)." (citation omitted)).

143. FED. R. CIV. P. 37(d); *Keepers, Inc. v. City of Milford*, 807 F.3d 24, 32 (2d Cir. 2015) (quoting *Reilly v. Natwest Mkts. Grp., Inc.*, 181 F.3d 253, 268 (2d Cir. 1999)) ("If the organizational deponent fails to comply by mak[ing] available such number of persons as will

director, or managing agent . . . fails, after being served with proper notice, to appear for that person's deposition[,] or a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response."¹⁴⁴ That "the discovery sought was objectionable" is not an acceptable excuse "unless the party failing to act has a pending motion for a protective order under Rule 26(c)."¹⁴⁵ As under Rule 37(c), Rule 37(d)(3) allows for the levying of the sanctions enumerated in Rule 37(b)(2)(A) in addition to or in lieu of "the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust."¹⁴⁶ While Rule 37(a)(4) classifies an "evasive response" as a failure to respond, it does so only "for purposes of . . . subdivision (a)," which governs motions for an order compelling discovery.¹⁴⁷ No similar statement is made in Rule 37(d)(1)(A)(ii), the lone paragraph authorizing sanctions for "fail[ing] to serve . . . answers, objections, or written response[s]" to another's request for production under Rule 34.¹⁴⁸

7. *Other Powers*¹⁴⁹

i. Statutory

Per statute, any attorney or other person admitted to conduct cases in a federal court "who so multiplies the proceedings in any case unreasonably

be able to give complete, knowledgeable and binding answers on its behalf, a court may impose sanctions under Rule 37[,] . . . including the preclusion of evidence." (internal quotation marks omitted).

144. FED. R. CIV. P. 37(d)(1)(A)(i)–(ii); *Baker v. St. Paul Travelers Ins. Co.*, 670 F.3d 119, 124 (1st Cir. 2012) (citing rule).

145. FED. R. CIV. P. 37(d)(2); *Societe Civile Succession Guino v. Renoir*, 305 F. App'x 334, 338 (9th Cir. 2008) (citing Rule 37(d)(2) and the exception).

146. FED. R. CIV. P. 37(d)(3); *Cont'l Cas. Co. v. St. Paul Surplus Lines Ins. Co.*, 265 F.R.D. 510, 531 (E.D. Cal. 2010) (discussing sanctions within Rule 37(d)).

147. FED. R. CIV. P. 37(a)(4); *Emerman v. Fin. Commodity Invs., L.L.C.*, No. 1:13cv2546, 2015 U.S. Dist. LEXIS 148223, at *21, 2015 WL 6742077, at *7 (N.D. Ohio Nov. 2, 2015) (citing Rule 37(a)(4)).

148. FED. R. CIV. P. 37(d)(1)(A)(ii); *see also* *Wang v. Bear Stearns Cos. (In re Bear Stearns Cos. Sec., Deriv. & ERISA Litig.)*, 308 F.R.D. 113, 123 (S.D.N.Y. 2015) (citing rule and distinguishing it from paragraph (d)(1)(A)(iii)).

149. Other inapposite sanctions provisions do exist. For example, though it constitutes "the apex of sanctions law," Douglas J. Pepe, *Persuading Courts to Impose Sanctions on Your Adversary*, 36 LITIG. 1, 1 (Winter 2010), Rule 11 has nothing to do with discovery, FED. R. CIV. P. 11(d); *see* *Hilburn v. Bayonne Parking Auth.*, 562 F. App'x 82, 85 (3d Cir. 2014) (citing Rule 11(d)). Rule 41 allows only for dismissal, FED. R. CIV. P. 41(b); *see* *Chandler v. Daly*, No. 06-2742-STA-tmp, 2008 U.S. Dist. LEXIS 54857, at *8–9, 2008 WL 2783178, at *3 (W.D. Tenn. July 17, 2008) (dismissing for discovery abuse pursuant to Rules 37 and

and vexatious may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees incurred because of such conduct."¹⁵⁰ Broken into its discrete elements, so as to impose sanctions pursuant to § 1927, a court must find that an attorney (1) multiplied proceedings, (2) in an unreasonable and vexatious manner, that (3) increased the cost of the proceedings.¹⁵¹ Like "the various sanctioning provisions in the . . . [r]ules," § 1927 does punish "bad-faith conduct in litigation,"¹⁵² and its remedy's "principal purpose" is "the deterrence of intentional and unnecessary delay in the proceedings."¹⁵³ Castigated as one "paradigm of discovery abuse,"¹⁵⁴ boilerplate objections can be described as so intended, their very use prolonging a particular litigation.¹⁵⁵ Consequently, in spite of § 1927's infrequent utilization in the boilerplate cases, evasive answers to interrogatories, as well as any other course of conduct inimical to a matter's smooth determination, can fall within its clutches.¹⁵⁶

Yet, several features of § 1927 blunt its usefulness in the judicial efforts to curtail boilerplate. First, in unambiguously written text, it authorizes but one punishment—the imposition of "excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct"¹⁵⁷—and must be invoked "to compensate the victims of dilatory practices" and not as "a means of punishment."¹⁵⁸ Second, sanctions under § 1927 are only available against an individual attorney and neither that adversary's law firm¹⁵⁹ nor the party that he or she represents.¹⁶⁰ Third, the standard under § 1927—"unreasonably and

41(b)), and Rule 56(h) applies only to bad faith affidavits submitted in support of a motion for summary judgment, FED. R. CIV. P. 56(h)).

150. 28 U.S.C. § 1927 (2012). In this Article, any references to "§ 1927" or "Section 1927" are to this statute unless otherwise noted.

151. *In re Schaefer Salt Recovery, Inc.*, 542 F.3d 90, 101 (3d Cir. 2008).

152. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 42 (1981).

153. *Zuk v. E. Pa. Psychiatric Inst. of the Med. Coll. of Pa.*, 103 F.3d 294, 297 (3d Cir. 1996) (quoting *Beatrice Foods v. New Eng. Printing*, 899 F.2d 1171, 1177 (Fed. Cir. 1990)).

154. *Freydl v. Meringolo*, No. 09 CIV. 07196 BSJ, 2011 U.S. Dist. LEXIS 67742, at *7, 2011 WL 2566087, at *3 (S.D.N.Y. June 16, 2011).

155. *See, e.g., Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 358 (D. Md. 2008); *Piotrowski v. City of Hous.*, No. 95-4046, 1998 U.S. Dist. LEXIS 10097, at *8 n.4, 1998 WL 268827, at *3 n.4 (S.D. Tex. May 5, 1998).

156. *See Bates v. Firestone Tire & Rubber Co.*, 83 F.R.D. 535, 539 (D.S.C. 1979) (holding so, but declining to invoke § 1927).

157. 28 U.S.C. § 1927 (2012) (emphasis added).

158. *Hamilton v. Boise Cascade Express*, 519 F.3d 1197, 1203 (10th Cir. 2008); *see also Kiefel v. Las Vegas Hacienda, Inc.*, 404 F.2d 1163, 1167 (7th Cir. 1968) (observing that the power bestowed by § 1927 should be "exercise[d] only in instances of a serious and studied disregard for the orderly processes of justice").

159. *Rentz v. Dynasty Apparel Indus., Inc.*, 556 F.3d 389, 396 n.6 (6th Cir. 2009); *Claiborne v. Wisdom*, 414 F.3d 715, 722–24 (7th Cir. 2005).

160. *Procter & Gamble Co. v. Amway Corp.*, 280 F.3d 519, 525 (5th Cir. 2002).

vexatiously”¹⁶¹—is high and murky.¹⁶² As a case in point, in some circuits, “bad faith or . . . intentional misconduct” must be conclusively shown.¹⁶³ The Sixth Circuit, meanwhile, has directed its focus to whether “an attorney knows or reasonably should know that a claim pursued is frivolous, or that his or her litigation tactics will needlessly obstruct the litigation of nonfrivolous claims.”¹⁶⁴ For these reasons, § 1927, already “relative[ly] disuse[d],”¹⁶⁵ affords little succor to boilerplate’s opponents.¹⁶⁶

ii. *Inherent*

Historically, courts have always been empowered to discipline an attorney who has “acted in bad faith, vexatiously, wantonly, or for oppressive reasons.”¹⁶⁷ Unquestionably, litigation abuse qualifies.¹⁶⁸ More debatably,

161. 28 U.S.C. § 1927; *see also* *FDIC v. Conner*, 20 F.3d 1376, 1384 (5th Cir. 1994) (“Before a sanction under § 1927 is appropriate, the offending attorney’s multiplication of the proceedings must be both ‘unreasonable’ and ‘vexatious.’”).

162. *Cf.* *Red Carpet Studios Div. of Source Advantage, Ltd. v. Sater*, 465 F.3d 642, 646 (6th Cir. 2006) (“§ 1927 sanctions require a showing of something less than subjective bad faith, but something more than negligence or incompetence.”); *Browning v. Kramer*, 931 F.2d 340, 345 (5th Cir. 1991) (holding that Section 1927 only authorizes shifting fees that are associated with “the persistent prosecution of a meritless claim”); *Dreiling v. Peugeot Motors of Am., Inc.*, 768 F.2d 1159, 1165 (10th Cir. 1985).

163. *Compare In re Schaefer Salt Recovery, Inc.*, 542 F.3d 90, 101 (3d Cir. 2008), with *Cruz v. Savage*, 896 F.2d 626, 631–32 (1st Cir. 1990) (“[W]hile an attorney’s bad faith will always justify sanctions under [S]ection 1927, we do not require a finding of subjective bad faith as a predicate to the imposition of sanctions.”).

164. *Hall v. Liberty Life Assurance Co.*, 595 F.3d 270, 275–76 (6th Cir. 2010) (quoting *Rentz*, 556 F.3d at 396).

165. *Pepe*, *supra* note 149, at 4.

166. As with the rules, depending on a lawyer’s misdeeds, other statutes may be relevant. *See, e.g.*, 35 U.S.C. § 285 (2012); 28 U.S.C. § 1447(c) (2012).

167. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45–46 (1992) (citation omitted); *see also, e.g.*, *Charbono v. Sumski (In re Charbono)*, 790 F.3d 80, 85 (1st Cir. 2015) (“[T]he contempt power is merely one of many inherent powers that a court possesses; it is not the only type of inherent power that can be deployed.” (citing *Chambers v. Sumski*, 501 U.S. at 43–44)); *Terra v. Rabo Agrifinance, Inc.*, 504 F. App’x 288, 290–91 (5th Cir. 2012) (quoting *Scaife v. Associated Air Ctr., Inc.*, 100 F.3d 406, 411 (5th Cir. 1996)) (“Federal courts have an inherent power ‘to sanction a party or attorney when necessary to achieve the orderly and expeditious disposition of their dockets.’”); Jean M. Cary, *Rambo Depositions: Controlling an Ethical Cancer in Civil Litigation*, 25 HOFSTRA L. REV. 561, 592–94 (1996) (discussing the courts’ inherent judicial power to regulate attorney misconduct). In the exercise of this license, courts enjoy much flexibility in formulating appropriate sanctions. *Johnson v. SmithKline Beecham Corp.*, No. 11-5782, 2015 U.S. Dist. LEXIS 28210, at *35, 2015 WL 1004308, at *13 (E.D. Pa. Mar. 9, 2015) (relying on *First Bank of Marietta v. Hartford Underwriters Ins. Co.*, 307 F.3d 501, 515 (6th Cir. 2002) and *Fellheimer, Eichen & Braverman, P.C. v. Charter Tech., Inc.*, 57 F.3d 1215, 1228 (3d Cir. 1995), to support the notion that courts have greater flexibility in formulating inherent authority sanctions).

168. *Wendel*, *supra* note 83, at 908, 908–10; *Chambers*, 501 U.S. at 46.

half-hearted compliance with the rules' discovery obligations, as the use of boilerplate reasonably signals, does so as well.¹⁶⁹ Along with Rule 37, this inherent power is the predominant method for managing and deterring non-compliance with the rules' manifold obligations.¹⁷⁰

As regards to policing boilerplate in particular, however, a problem arises from two limitations upon this prerogative. First, courts disfavor reliance on such authority whenever an extant provision green-lights one or more sanctions for the misconduct at issue.¹⁷¹ As one court observed, the inherent power to penalize should only be used (1) "where no sanction established by the Federal Rules or a pertinent statute is 'up to the task' of remedying the damage done by a litigant's malfeasance," and (2) "when the sanction is tailored to address the harm identified."¹⁷² As another adjoined, this power should be exercised with "restraint and discretion"¹⁷³ to manage those situations "in which the conduct of a party or an attorney is egregious and no other basis for sanctions exists,"¹⁷⁴ "reach[ing] individuals and conduct not directly addressed by other mechanisms."¹⁷⁵ Based on this paradigm, as the standard set in Rule 37 is considered lower,¹⁷⁶ conduct not awful enough to trigger a

169. Beckerman, *supra* note 4, at 571; *see also* Connecticut Gen. Life Ins. Co. v. New Images of Beverly Hills, 482 F.3d 1091, 1097 (9th Cir. 2007) ("Where a party so damages the integrity of the discovery process that there can never be assurance of proceeding on the true facts, a case dispositive sanction may be appropriate." (quoting Valley Eng'rs v. Elec. Eng'g Co., 158 F.3d 1051, 1058 (9th Cir. 1998))).

170. *See, e.g.*, Degen v. United States, 517 U.S. 820, 826–27 (1996); *Chambers*, 501 U.S. at 44; Tom v. S.B., Inc., 280 F.R.D. 603, 610 (D.N.M. 2012).

171. *See* Ferguson v. Valero Energy Corp., 114 (3d Cir. 2011) ("[I]nherent-authority sanctions are generally disfavored where another provision . . . authorizes sanctions . . .").

172. Klein v. Stahl GMBH & Co., 185 F.3d 98, 108 (3d Cir. 1999) (citing *Chambers*, 501 U.S. at 44, and Republic of Phil. v. Westinghouse Elec. Corp., 43 F.3d 65, 73 (3d Cir. 1995)); *see also, e.g.*, Nat. Gas Pipeline Co. of Am. v. Energy Gathering, 2 F.3d 1397, 1410 (5th Cir. 1993) (citing *Chambers*, 501 U.S. at 50–51) ("When parties or their attorneys engage in bad faith conduct, a court should ordinarily rely on the Federal Rules as the basis for sanctions.").

173. *Chambers*, 501 U.S. at 44; Mullane v. Chambers, 333 F.3d 322, 338 (1st Cir. 2003).

174. Martin v. Brown, 63 F.3d 1252, 1265 (3d Cir. 1995) (citing Gillette Foods, Inc. v. Bayernwald-Fruchteverwertung, GmbH, 977 F.2d 809, 813 (3d Cir. 1992)).

175. *Nat. Gas Pipeline Co.*, 2 F.3d at 1411 (citing *Chambers*, 501 U.S. at 46–47); *see also* Flaksa v. Little River Marine Constr. Co., 389 F.2d 885, 888 (5th Cir. 1968) ("The inherent power of a court to manage its affairs necessarily includes the authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it.") (footnote omitted).

176. Sun River Energy, Inc. v. Nelson, 800 F.3d 1219, 1227 (10th Cir. 2015) (quoting Pierce v. Underwood, 487 U.S. 552, 565 (1988)) ("Rule 37(c)(1) requires only the absence of substantial justification—a less stringent standard characterized as 'not justified to a high degree, but . . . justified to a degree that could satisfy a reasonable person.'" (alteration in original)); DeVaney v. Cont'l Am. Ins. Co., 989 F.2d 1154, 1162 (11th Cir. 1993) ("The language 'advising such conduct' in Rule 37 does not incorporate either heightened procedural requirements or a bad faith test into [Rule 37].").

court's dormant authority in the midst of discovery should be punished under Rule 37, a prescription with a lighter burden. To wit, on such situations, Rule 37—and it alone—contains the relevant adjudicative touchstones and the sole panoply of possible penalties. Second, in proving that a lawyer's conduct was "egregious" or "in bad faith," a "particularized showing" is often required.¹⁷⁷ To make this demonstration, evidence must usually be presented that "the conduct at issue is (1) entirely without color and (2) motivated by improper purposes,"¹⁷⁸ an impossibly high evidentiary bar. In the worst of cases, a court's inherent power will allow it to levy "a sanction for abuse of the judicial process, or, in other words, for bad faith conduct in litigation."¹⁷⁹ But, whatever form it may take, boilerplate cannot be readily classified as an example of such extreme maleficence—and, consequently, as the proper target of a court's inherent resources.

III. CASE LAW¹⁸⁰

A. PRELUDE

Three tales, and a variegated problem crystalized.

Sometime in January 2015, in a coastal district, a plaintiff served eighteen special interrogatories on a defendant's counsel. More than fifty-two days later, with the plaintiff's consent, defendant's counsel tendered a thirteen-page response. It began with a section entitled "General Objections," which contained an objection to each interrogatory "to the extent that it is overbroad and subjects . . . [it] to unreasonable and undue annoyance, oppression, burden, and expense, and seeks information which is neither relevant to the subject matter of this lawsuit nor reasonably calculated to lead to the discovery of admissible evidence," "seeks information . . . protected from discovery by virtue of the attorney-client privilege, the joint defense privilege, or any other recognized privilege or immunity" or that is itself "propriety information, trade secret information, information to subject to any protective orders," and far more. Having stated these objections, ones incorporated into every specific interrogatory response thereafter, one defendant's counsel repeated the same boilerplate in nearly every response—"vague and ambiguous," "overbroad," and the like—and added a qualifier to six: "Subject to and without waiving the foregoing, defendant responds as follows"

177. *United States v. Int'l Bhd. of Teamsters*, 948 F.2d 1338, 1345 (2d Cir. 1991).

178. *Wolters Kluwer Fin. Servs., Inc. v. Scivantage*, 564 F.3d 110, 114 (2d Cir. 2009) (citing *Schlafer Nance & Co. v. Estate of Warhol*, 194 F.3d 323, 337 (2d Cir. 1999)).

179. *Farmer v. Banco Popular of N. Am.*, 791 F.3d 1246, 1256 (10th Cir. 2015) (quoting *Scottsdale Ins. Co. v. Tolliver*, 636 F.3d 1273, 1279 (10th Cir. 2011)).

180. These facts are drawn from three litigated cases; dates, names, and other identifying data have been omitted or changed.

It began earlier, in November 2014, within the borders of marshier land. There, a governmental plaintiff requested a number of documents pursuant to Rule 34. To the response, the plaintiff objected, for the defendant had not produced the requested documents as they are kept in the usual course of business or organized and labeled them to correspond to the categories actually set forth in the plaintiff's request. While the magistrate judge would disagree with the plaintiff as to this issue, he would find the defendant's privilege log to be wholly inadequate to support this shield's invocation under Rule 26(b)(5)(A). The descriptions of the withheld documents' character and subject matter struck him as absent or vague, leaving the opposing party unable to assess the validity of the privilege. (Indeed, too many examples could be found for the final order to tally all with precision.) The defendant's failings convinced the magistrate judge to find that any privilege had been waived and that all documents within the original request's broad scope must be produced. The district court judge disagreed with this harsh remedy, though he did not contest the log's inadequacy. Having won this reprieve, the defendant proceeded to submit a new privileged log to a certain agency that purported to identify all documents withheld as privileged in detail. Although the defendants had affirmatively waived privilege across a significant number of subjects by asserting the advice of counsel affirmative defense, the plaintiff observed, the privilege logs failed to correctly identify the subject matters of items withheld as required by the rules. Two documents, inadvertently disclosed by a third-party vendor, revealed this discrepancy, though neither court nor party wandered through the thousands of documents at issue. This time the magistrate judge's finding of waiver was affirmed.

Years before, in a district more pluvial, a doctor requested "copies of any and all . . . materials, regardless of their source, in . . . [defendant's] possession on or before" a certain date. The defendant, naturally, "object[ed] to this discovery request as overbroad, burdensome, and not reasonably calculated to lead to the discovery of admissible evidence." But its response continued: "Without waiving these objections . . . [defendant] answers as follows: . . . [It] has no documents . . . responsive to this discovery request."

B. ABSOLUTE BOILERPLATE

For decades, absolute boilerplate has provoked federal courts' ire.¹⁸¹ In a relatively unbroken chain of decisions,¹⁸² this boilerplate has been deplored

181. Matthew L. Jarvey, Note, *Boilerplate Discovery Objections: How They Are Used, Why They Are Wrong, and What We Can Do About Them*, 61 DRAKE L. REV. 913, 916 (2013) ("Federal courts have long disfavored boilerplate objections.") (citing *St. Paul Reinsurance Co. v. Commercial Fin. Corp.*, 198 F.R.D. 508, 512 (N.D. Iowa 2000)).

182. *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 358–59 (D. Md. 2008) (detailing these decisions).

as abusive and improper, incompatible with discovery's "cooperative, anti-obstructive norms,"¹⁸³ and as "border[ing] on being frivolous."¹⁸⁴ To reach this conclusion that absolute boilerplate amounts to unacceptable "shotgun"¹⁸⁵ and "Rambo"¹⁸⁶ style opposition, examples of a lawyerly penchant for "[h]ardball discovery,"¹⁸⁷ courts and scholars have relied on two strands of thought.¹⁸⁸

First, courts have broadly construed and conjoined the language of Rules 33 and 34, a tactic notably endorsed by the advisory committee in its most current annotation to Rule 34.¹⁸⁹ More precisely, in confronting the administrative variant of absolute boilerplate, multiple jurists have linked the

183. Beckerman, *supra* note 4, at 527; *see also* Mills v. E. Gulf Coal Preparation Co., 259 F.R.D. 118, 130 (S.D. W. Va. 2009) ("[Rules] contemplate that in conjunction with disclosure, civil discovery is a process of elucidation and clarification of facts and circumstances The civil discovery process is to be engaged in cooperatively."); Wagner v. St. Paul Fire & Marine Ins. Co., 238 F.R.D. 418, 422 (N.D. W. Va. 2006) ("Parties must respond truthfully, fully and completely to discovery or explain truthfully, fully and completely why they cannot respond." (citing Hansel v. Shell Oil Corp., 169 F.R.D. 303, 305 (E.D. Pa. 1996))).

184. Chudasama v. Mazda Motor Corp., 123 F.3d 1353, 1358 (11th Cir. 1997); *see also, e.g.*, Kaufman v. United States, No. 1:12-0237, 2013 U.S. Dist. LEXIS 88875, at *13, 2013 WL 3237864, at *5 (S.D. W. Va. June 25, 2013) ("[B]oilerplate objections regurgitating words and phrases from Rule 26 are completely unacceptable [responses to Rule 34 requests]." (citing Frontier-Kemper Constructors, Inc., v. Elk Run Coal Co., 246 F.R.D. 522, 528–29 (S.D. W. Va. 2007))); Steed v. EverHome Mortg. Co., 308 F. App'x 364, 371 (11th Cir. 2009) (observing that a party would have been entitled to file a motion to compel based on another's boilerplate objections to certain discovery requests).

185. Covington v. Sailormen, Inc., 274 F.R.D. 692, 693 (N.D. Fla. 2011); Russell v. Daiichi-Sankyo, Inc., 2012 U.S. Dist. LEXIS 49161, at *3, 2012 WL 1161435, at *1 (D. Mont. Apr. 6, 2012) ("The recitation of 'boilerplate, shotgun-style objections' are not consistent with the requirements of discovery rules.").

186. McLeod, Alexander, Powel & Apffel, P.C. v. Quarles, 894 F.2d 1482, 1486 (5th Cir. 1990); *see also* Hall v. Louisiana, No. 12-657-BAJ-RLB, 2014 U.S. Dist. LEXIS 77179, at *5–6, 2014 WL 2560715, at *2 (M.D. La. June 6, 2014) ("This prohibition against general objections to discovery requests has been long established." (citing *Quarles*, 894 F.2d at 1845–46)); Wurlitzer Co. (Holly Springs Div.) v. E.E.O.C., 50 F.R.D. 421, 424 (N.D. Miss. 1970) ("[I]n conventional lawsuits in federal court, objections to interrogatories had to be specific, and general objections that the information sought was irrelevant, immaterial, oppressive, conclusory or already in possession of the requesting party were insufficient.").

187. Network Computing Servs. Corp. v. Cisco Sys., Inc., 223 F.R.D. 392, 395 (D.S.C. 2004).

188. Kelly v. FedEx Ground Package Sys., Inc., No. 3:10-cv-01265, 2011 U.S. Dist. LEXIS 45180, at *4, 2011 WL 1584764, at *1–2 (S.D. W. Va. Apr. 26, 2011) (outlining these twin strands).

189. *See* FED. R. CIV. P. 34 advisory committee's note to 2015 amendment ("Rule 34(b)(2)(B) is amended to require that objections to Rule 34 requests be stated with specificity. This provision adopts the language of Rule 33(b)(4), eliminating any doubt that less specific objections might be suitable under Rule 34.").

specificity requirements in Rules 33(b)(4)¹⁹⁰ and Rule 34(b)(2)(C)¹⁹¹ and thereupon asserted that the party resisting discovery must “specifically” show how either an interrogatory or a request for production is “not relevant” or “overly broad, burdensome, or oppressive.”¹⁹² With Rule 34 thusly amalgamated with Rule 33, courts have maintained that a party that responds with such boilerplate necessarily fails to substantiate how an exact demand is arguably vague, ambiguous, unintelligible, or privileged.¹⁹³ Having been insufficiently specific to allow either a court or a party “to ascertain the claimed

190. FED. R. CIV. P. 33(b)(4) (“The grounds for objecting to an interrogatory must be stated with *specificity*.” (emphasis added)); *Mulero-Abreu v. P.R. Police Dep’t*, 675 F.3d 88, 93 (1st Cir. 2012) (explaining requirement).

191. FED. R. CIV. P. 34(b)(2)(C) (“An objection to part of a request must *specify* the part and permit inspection of the rest.” (emphasis added)).

192. *St. Paul Reinsurance Co. v. Commercial Fin. Corp.*, 198 F.R.D. 508, 513 (N.D. Iowa 2000) (collecting cases); *see also, e.g., Mills v. East Gulf 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. v. Elk Run Coal Co.*, 246 F.R.D. 522, 528–29 (S.D. W. Va. 2007))); *Frontier-Kemper Constructors, Inc.*, 246 F.R.D. at 528 (“There is abundant case law to the effect that boilerplate objections to Rule 34 document requests are inappropriate.”); *Athridge v. Aetna Cas. & Surety Co.*, 184 F.R.D. 181, 190 (D.D.C. 1998) (“Although Rule 34 governing production of documents does not contain identical language [as Rule 33], ‘no reason exists to distinguish between interrogatories and requests for production’ as to the requirement for specificity and the risk of waiver.” (quoting *Pulsecard, Inc. v. Discover Card Servs.*, 168 F.R.D. 295, 303 (D. Kan. 1996))); *Redland Soccer Club, Inc. v. U.S. Dep’t of the Army*, 55 F.3d 827, 856 (3d Cir. 1995) (“[T]he party resisting discovery must show specifically how each interrogatory is not relevant or how each question is overly broad, burdensome or oppressive.” (quoting *Josephs v. Harris Corp.*, 677 F.2d 985, 992 (3d Cir. 1982))); *McLeod, Alexander, Powel & Paffel, P.C v. Quarles*, 894 F.2d 1482, 1485 (5th Cir. 1990) (“‘An interrogatory was ‘overly broad, burdensome, oppressive and irrelevant’ was ‘not adequate to voice a successful objection to an interrogatory.’ [The court] see[s] no reason to distinguish the standards governing responses to interrogatories from those that govern responses to production requests.” (internal quotations omitted) (quoting *Josephs*, 677 F.2d at 992)).

193. *See e.g., Paulsen v. Case Corp.*, 168 F.R.D. 285, 289 (C.D. Cal. 1996); *see also, e.g., Pegoraro v. Marrero et al*, 281 F.R.D. 122, 128–29 (S.D.N.Y. 2011) (“‘[B]oilerplate objections that include unsubstantiated claims of undue burden, overbreadth and lack of relevancy,’ while producing ‘no documents and answer[ing] no interrogatories . . . are a paradigm of discovery abuse.’” (alterations in original) (quoting *Jacoby v. Hartford Life & Accident Ins. Co.*, 254 F.R.D. 477, 478 (S.D.N.Y. 2009))); *Compagnie Francaise d’Assurance pour le Commerce Exterieur v. Phillips Petrol. Co.*, 105 F.R.D. 16, 42 (S.D.N.Y. 1984) (“Defendant cannot evade its discovery responsibilities by simply inton[ing] this familiar litany that the interrogatories are burdensome, oppressive or overly broad.” (alteration in original) (citation omitted)); *Roesberg v. Johns-Manville Corp. et al*, 85 F.R.D. 292, 296–97 (E.D. Pa. 1980) (“To voice a successful objection to an interrogatory, . . . must show specifically how, despite the broad and liberal construction afforded the federal discovery rules, each interrogatory is not relevant or how each question is overly broad, burdensome or oppressive . . . by submitting affidavits or offering evidence revealing the nature of the burden.” (internal citations omitted)).

objectionable character of the [d]iscovery [r]equest,”¹⁹⁴ the response neither supports nor explains the bases of its objections, as required by Rules 33 and 34,¹⁹⁵ unless the veracity of its absolute boilerplate is obvious on its face.¹⁹⁶ So as to penalize respondent’s failure to articulate particular deficiencies,¹⁹⁷ courts have proceeded to invoke Rule 33’s waiver provision,¹⁹⁸ one still absent from the text of Rule 34 after December 1, 2015, upon encountering absolute boilerplate in a Rule 34 response.¹⁹⁹ This reasoning has been applied to absolute administrative and substantive boilerplate without distinction, Rule 34 remodeled to help ensure this outcome—“[f]or each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons”²⁰⁰—as of the winter of 2015.

In striking at substantive boilerplate, courts have further rested on the language of Rule 26(b)(5). Per this section, a log populated with sufficient

194. *Burns v. Imagine Films Entm’t Inc.*, 164 F.R.D. 589, 593 (W.D.N.Y. 1996).

195. *Paulsen*, 168 F.R.D. at 289; *see also, e.g., Nissan N.A. v. Johnson Elec. N.A.*, No. 09-CV-11783, 2011 U.S. Dist. LEXIS 16006, at *4, 2011 WL 669352, at *2 (E.D. Mich. Feb. 17, 2011); *Adelman v. Boy Scouts of Am.*, 276 F.R.D. 681, 688 (S.D. Fla. 2011); *Hy-Ko Prods. Co. v. Hillman Grp., Inc.*, No. 5:09MC32, 2009 U.S. Dist. LEXIS 94713, at *4, 2009 WL 3258603, at *2 (E.D.N.C. Oct. 8, 2009); *Guzman v. Irmadan, Inc.*, 249 F.R.D. 399, 401 (S.D. Fla. 2008); *Mitchell v. Nat’l R.R. Passenger Corp.*, 208 F.R.D. 455, 458 n.4 (D.D.C. 2002); *Nagele v. Elec. Data Sys. Corp.*, 193 F.R.D. 94, 109 (W.D.N.Y. 2000); *Walker v. Lakewood Condo. Owners Ass’n*, 186 F.R.D. 584, 586–87 (C.D. Cal. 1999); *Panola Land Buyers Ass’n v. Shuman*, 762 F.2d 1550, 1559 (11th Cir. 1985); *Chubb Integrated Sys. Ltd. v. Nat’l Bank of Wash.*, 103 F.R.D. 52, 58 (D.D.C. 1984).

196. *E.g., Etienne v. Wolverine Tube, Inc.*, 185 F.R.D. 653, 656 (D. Kan. 1999); *Hilt v. SFC Inc.*, 170 F.R.D. 182, 188 (D. Kan. 1997).

197. *Thermoset Corp. v. Bldg. Materials Corp. of Am.*, No. 14-60268-CIV-COHN/SELTZER, 2014 U.S. Dist. LEXIS 161343, at *4, 2014 WL 6473232, at *2 (S.D. Fla. Nov. 18, 2014) (collecting cases striking absolute boilerplate for this reason).

198. FED. R. CIV. P. 33(b)(4) (“Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure.”); *see also, e.g., Shahzad v. Cty. of Nassau*, No. 13-CV-2268 (SJF) (SIL), 2014 U.S. Dist. LEXIS 136575, at *7–8, 2014 WL 4805022, at *3 (E.D.N.Y. Sept. 26, 2014) (citing Rule 33(b)(4)); *Na’im v. Sophie’s Arms Fine Residences, L.L.C.*, No. 13cv2515-JAH (BLM), 2014 U.S. Dist. LEXIS 100700, at *11 n.3, 2014 WL 3537807, at *4 n.3 (S.D. Cal. July 2, 2014) (same).

199. *Cargill Inc. v. Ron Burge Trucking Inc.*, 284 F.R.D. 421, 424 (D. Minn. 2012) (“Although Rule 34 does not contain an automatic waiver provision for untimely objections as does Rule 33(b)(4), ‘courts have reasoned that Rule 33(b)(4) type waiver should be implied into all rules involving the use of the various discovery mechanisms.’” (quoting *Horace Mann Ins. Co. v. Nationwide Mut. Ins. Co.*, 238 F.R.D. 536, 538 (D. Conn. 2006))); *see also, e.g., Horace Mann Ins. Co.*, 238 F.R.D. at 538 (citing *Byrd v. Reno*, No. 96-2375 (CKK)(JMF), 1998 U.S. Dist. LEXIS 11855, at *16–17 (D.D.C. Feb. 12, 1998); *Pham v. Hartford Fire Ins. Co.*, 193 F.R.D. 659, 661 (D. Colo. 2000); *Deal v. Lutheran Hosp. & Homes*, 127 F.R.D. 166, 168 (D. Alaska 1989)).

200. FED. R. CIV. P. 34(b)(2)(B); *Louisiana Crawfish Producers Ass’n–W. v. Mallard Basin Inc.*, Nos. 6:10-1085, 6:11-0461, 2015 U.S. Dist. LEXIS 163230, at *9–10 (W.D. La. Dec. 4, 2015) (quoting Rule 34(b)(2)(B) as amended).

detail to identify the privilege's applicability must be provided by the party asserting a privilege or work-product protection.²⁰¹ To be adequate, of course, the log itself must indicate that the several components of the relevant privilege have been satisfied, possessing such limited but clear utility.²⁰² By definition, absolute substantive boilerplate cannot satisfy this flexible standard, as such generalized objections of the attorney-client privilege, for example, invariably "fails to identify the lawyers . . . involved in the conversations, the people present during the conversation, and a description of the nature of the communication sufficient to enable [others] to assess the applicability of the claimed privilege."²⁰³ Unlike administrative and absolute boilerplate, absolute and substantive boilerplate therefore blunders twice: first, it is too non-

201. FED. R. CIV. P. 26(b)(5); *Sandra T.E. v. S. Berwyn Sch. Dist.* 100, 600 F.3d 612, 623 (7th Cir. 2009) (noting that defendant had not waived any right to rely on the attorney-client privilege or the work-product doctrine because they had provided a detailed privilege log regarding those documents within their possession and withheld).

202. See *King v. Univ. Healthcare Sys.*, 645 F.3d 713, 721 (5th Cir. 2011) (affirming a district court decision not to review individual emails for privilege purposes when the privilege log listed the authors and recipients of the e-mails, a brief description of each withheld communication, the amount of each document withheld, and the type of privilege asserted); *Avgoustis v. Shinseki*, 639 F.3d 1340, 1346 (Fed. Cir. 2011) (quoting Rule 25(b)(5)(A)(ii)) ("It would be strange if this requirement to disclose general subject matter in a privilege log invalidated the attorney-client privilege when the purpose of the rule is to determine whether the document is privileged 'without revealing information itself privileged or protected.'"). "Limited utility" is, of course, "very different from no utility." *Al Haramain Islamic Found., Inc. v. U.S. Dep't of the Treasury*, 686 F.3d 965, 983 n.10 (9th Cir. 2012).

203. *Pham*, 193 F.R.D. at 662; accord, e.g., *Bess v. Cate*, 422 F. App'x 569, 572 (9th Cir. 2011) (finding that well-established law supported a magistrate judge's order to sanction parties who lodged blanket objections and thereby failed to provide sufficient information to enable others to evaluate the applicability of the claimed privilege or protection); *Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Court for Dist. of Mont.*, 408 F.3d 1142, 1147-48 (9th Cir. 2005) (quoting FED. R. CIV. P. 26(b)(5) advisory committee's note to 1993 amendments); *MMAR Grp. Inc. v. Dow Jones & Co.*, 187 F.R.D. 282, 290 n.6 (S.D. Tex. 1999) (concluding that a party's five general objections, including the attorney-client, work-product, and investigative privileges, were pure boilerplate that impermissibly hampered its opponent's ability to prosecute its own case); *Athridge v. Aetna Cas. & Surety Co.*, 184 F.R.D. 181, 194 (D.D.C. 1998) (finding that assertions of the attorney-client privilege and work-product doctrine were too general to satisfy Rules 33 and 34); *Miller v. Pancucci*, 141 F.R.D. 292, 302 (C.D. Cal. 1992) (quoting *Int'l Paper Co. v. Fireboard Corp.*, 63 F.R.D. 88, 94 (D. Del. 1974)) ("Objections, in such boilerplate terms as those stated by [d]efendants, are improper and therefore 'no claim of privilege at all.'").

specific,²⁰⁴ and second, it is often unaccompanied by a marginally satisfactory privilege log.²⁰⁵ So convinced, more than a handful of courts have characterized such boilerplate as “unexplained and unsupported.”²⁰⁶ The responding party having thereby failed to painstakingly explicate its objections, as the rules demand,²⁰⁷ such boilerplate is “treat[ed] as if . . . [a viable objection was] never made.”²⁰⁸

Whatever their textual mooring, the foregoing courts have simultaneously stressed these objections’ inconsistency with discovery’s core policies,

204. See, e.g., *Peat, Marwick, Mitchell & Co. v. West*, 748 F.2d 540, 542 (10th Cir. 1984) (“A party seeking to assert the privilege must make a clear showing that it applies.”); *Davis v. Fendler*, 650 F.2d 1154, 1160 (9th Cir. 1981) (“Appellant’s blanket claim of privilege is simply not sufficient [for purposes of Rule 33].”); *Kan.-Neb. Nat. Gas Co. v. Marathon Oil Co.*, 109 F.R.D. 12, 23–24 (D. Neb. 1983) (“A general objection of work product is insufficient under this definition where it does not designate which documents allegedly enjoyed that privilege.”).

205. *Morris*, *supra* note 6, at 149; see also *Jarvey*, *supra* note 181, at 914–16.

206. *Duran v. Cisco Sys.*, 258 F.R.D. 375, 379–80 (C.D. Cal. 2009); see also, e.g., *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 358–59 (D. Md. 2008) (collecting decisions showing that generalized boilerplate “are improper unless based on particularized facts”); *A. Farber & Partners, Inc. v. Garber*, 234 F.R.D. 186, 190–91, 194 (C.D. Cal. 2006) (“[G]eneral or boilerplate objections such as overly burdensome and harassing are improper—especially when a party fails to submit any evidentiary declarations supporting such objections.” (citation omitted) (collecting cases)). Indeed, one court observed:

[T]he very act of making such boilerplate objections is *prima facie* evidence of a Rule 26(g) violation, because if the lawyer had paused, made a reasonable inquiry, and discovered facts that demonstrated the burdensomeness or excessive cost of the discovery request, he or she should have disclosed them in the objection, as both Rule 33 and 34 responses must state objections with particularity, on pain of waiver.

Mancia, 253 F.R.D. at 359 (citations omitted).

207. See *El-Shaddai v. Wheeler*, No. CIV S-06-1898 FCD EFB P, 2009 U.S. Dist. LEXIS 12131, at *4, 2009 WL 301824, at *2 (E.D. Cal. Feb. 5, 2009) (citing *DirectTV, Inc. v. Trone*, 209 F.R.D. 455, 458 (C.D. Cal. 2002) (in regards to administrative boilerplate); see also *Anderson v. Hansen*, No. 1:09-cv-01924-LJO-MJS (PC), 2012 U.S. Dist. LEXIS 131010, at *9, 2012 WL 4049979, at *8 (E.D. Cal. Sept. 13, 2012) (citing *El-Shaddai* and others in overruling “in their entirety” administrative boilerplate adduced in response to a plaintiff’s second interrogatory).

208. *Ritacca v. Abbott Labs.*, 203 F.R.D. 332, 335 n.4 (N.D. Ill. 2001); see also, e.g., *Bible v. Rio Props., Inc.*, 246 F.R.D. 614, 619–20 (C.D. Cal. 2007) (overruling a defendant’s general or boilerplate objections, namely overly broad, vague and ambiguous, and proprietary); *Momah v. Albert Einstein Med. Ctr.*, 164 F.R.D. 412, 417 (E.D. Pa. 1996) (“Mere recitation of the familiar litany that an interrogatory or a document production request is ‘overly broad, burdensome, oppressive and irrelevant’ will not suffice.” (citing *Josephs v. Harris Corp.*, 677 F.2d 985, 992 (3d Cir. 1982), and *Roesberg v. Johns-Manville Corp.*, 85 F.R.D. 292, 295 (E.D. Pa. 1980))); *In re Shopping Carts Antitrust Litig.*, 95 F.R.D. 299, 305 (S.D.N.Y. 1982) (acknowledging that a blanket claim of privilege is improper).

as canonized in Rules 1 and 26 and the Model Rules.²⁰⁹ Because “the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues,”²¹⁰ either “boilerplate objections or blanket refusals inserted into a response to a Rule 34 request for production of documents are insufficient to assert a privilege.”²¹¹ For precisely the same cause—“boilerplate, shotgun-style objections are not consistent with the . . . [r]ules['] . . . goal of securing ‘the just, speedy, and inexpensive determination of every action,’”²¹² so that “the spirit of the rules” cannot but be “violated when advocates attempt to use . . . [such] evasive responses”²¹³—the mere repetition of absolute boilerplate has often effectuated an automatic waiver of any legitimate objection,²¹⁴ “tantamount

209. See *supra* Part II.B.

210. FED. R. CIV. P. 26 advisory committee’s note to 1983 amendment; *cf.* *Zoumana Bakayoko v. Panera Bread*, No. 1:14CV993, 2015 U.S. Dist. LEXIS 124174, at *3–4, 2015 WL 5511068, at *1 (M.D.N.C. Sept. 17, 2015) (concluding that “[i]n applying the foregoing principles, district judges and magistrate judges in the Fourth Circuit (including members of this Court) have repeatedly ruled that the party or person resisting discovery, not the party moving to compel discovery, bears the burden of persuasion”).

211. *Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Court for Dist. of Mont.*, 408 F.3d 1142, 1149 (9th Cir. 2005); *see also, e.g., Gluc v. Prudential Life Ins. Co. of Am.*, 309 F.R.D. 406, 415 (W.D. Ky. 2015) (citing *Burlington N.*, 408 F.3d at 1149; *In re Heparin Products Liab. Litig.*, 273 F.R.D. 399, 410–11 (N.D. Ohio 2011); and *Duran v. Cisco Sys., Inc.*, 258 F.R.D. 375, 379–80 (C.D. Cal. 2009)); *Valvoline Instant Oil Change Franchising v. RFG Oil, Inc.*, No. 12-cv-2079-GPC (KSC), 2014 U.S. Dist. LEXIS 88235, at *16 n.1, 2014 WL 2919518, at *6 n.1 (S.D. Cal. June 27, 2014)). For more on the significance of this jurisprudence, *see infra* Part IV.B.1.a.

212. *Covington v. Sailormen, Inc.*, 274 F.R.D. 692, 693 (N.D. Fla. 2011) (citing FED. R. CIV. P. 1); *see also, e.g., Hickman v. Taylor*, 329 U.S. 495, 500–01 (1947) (“[U]nder the rules, t]he way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial.”); *Asarco, L.L.C. v. Union Pac. R.R. Co.*, 765 F.3d 999, 1006 (9th Cir. 2014) (quoting 6 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1471 (3d ed. 1998)); *Klonoski v. Mahlab*, 156 F.3d 255, 267 (1st Cir. 1998) (quoting *Hickman*, 329 U.S. at 500–01). Moved by similar concerns, one court once wrote: “[I]t is appalling that attorneys, like defense counsel in this case, routinely twist the discovery rules into some of ‘the most powerful weapons in the arsenal of those who abuse the adversary system for the sole benefit of their clients.’” *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1546 & n.9 (11th Cir. 1993) (quoting Tommy Prud’homme, *The Need for Responsibility Within the Adversary System*, 26 GONZ. L. REV. 443, 460 (1990–91)).

213. FED. R. CIV. P. 26 advisory committee’s note to 1983 amendment; *see also Hug-gins v. Fed. Express Corp.*, 250 F.R.D. 404, 405 (E.D. Mo. 2008) (reminding the parties of this “well-established principle”).

214. *Kinetic Concepts, Inc. v. ConvaTec Inc.*, 268 F.R.D. 226, 241, 247 (M.D.N.C. 2010) (first summarizing much case law—“magistrate judges in at least five district courts in the Fourth Circuit have declared boilerplate objections to discovery requests, including for documents, invalid”—and then finding an effective waiver); *see also, e.g., Frontier-Kemper Constructors, Inc. v. Elk Run Coal Co.*, 246 F.R.D. 522, 528 (S.D. W. Va. 2007) (detailing authority for the proposition that valid objections are waived when a party first relies on mere boilerplate in responding to document requests); *Sabol v. Brooks*, 469 F. Supp. 2d 324, 329

to not making any objection at all.”²¹⁵ Thusly portrayed, these responses desecrate a broader vision by warping a free-flowing exchange, as once purportedly existed and is still fervently envisaged, into a “hell” populated by “disputatious, uncivil, and vituperative lawyers.”²¹⁶ In using them, counsel betray themselves, courts, and clients by “treating the discovery process as a forum for game[s]manship, spiteful rhetoric, and the proliferation of unnecessary paper.”²¹⁷ Beginning on December 1, 2015, this popular line of reasoning will derive greater strength from an amended Rule 1.²¹⁸

(D. Md. 2006) (“[The non-party served with a subpoena containing document requests] did not particularize its objections . . . , and instead used the boilerplate objections that this Court repeatedly has warned against, thereby waiving its objections.”).

215. *Walker v. Lakewood Condo. Owners Ass’n*, 186 F.R.D. 584, 587 (C.D. Cal. 1999) (citing *Cipollone v. Liggett Grp., Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986); and *Josephs v. Harris Corp.*, 677 F.2d 985, 992 (3d Cir. 1982)).

216. *In re Chicago Invs., LLC*, 470 B.R. 32, 84 n.352 (Bankr. D. Mass. 2012) (quoting *Dahl v. City of Huntington Beach*, 84 F.3d 363, 364 (9th Cir. 1996)). This purpose animates the various states’ discovery statutes as well. *See, e.g.*, *First Nat’l Bank v. Newport Hosp. & Clinic, Inc.*, 663 S.W.2d 742, 743 (Ark. 1984) (“The Arkansas Rules of Civil Procedure, patterned after the federal rules, are to be given a broad and liberal interpretation in the implementation of discovery procedures.”). California’s system, for one, was intended

(1) to give greater assistance to the parties in ascertaining the truth and in checking and preventing perjury; (2) to provide an effective means of detecting and exposing false, fraudulent and sham claims and defenses; (3) to make available, in a simple, convenient and inexpensive way, facts which otherwise could not be proved except with great difficulty; (4) to educate the parties in advance of trial as to the real value of their claims and defenses, thereby encouraging settlements; (5) to expedite litigation; (6) to safeguard against surprise; (7) to prevent delay; (8) to simplify and narrow the issues; and, (9) to expedite and facilitate both preparation and trial.

Davies v. Superior Court, 682 P.2d 349, 354 (Cal. 1984) (internal quotation marks omitted); *see also Greyhound Corp. v. Superior Court*, 364 P.2d 266, 275 (Cal. 1961).

217. *Carl Zeiss Vision Int’l GMBH v. Signet Armorlite Inc.*, No. 07-cv-0894-DMS (POR), 2010 U.S. Dist. LEXIS 145164, at *51, 2010 WL 743792, at *18 (S.D. Cal. Jan. 21, 2010).

218. FED. R. CIV. P. 1 advisory committee’s note to 2015 amendment (“Rule 1 is amended to emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, so the parties share the responsibility to employ the rules in the same way.”); *Navico, Inc. v. Garmin Int’l Inc.*, No. 14-cv-303-CVE-TLW, 2015 U.S. Dist. LEXIS 160036, at *15, 2015 WL 7721218, at *5 (N.D. Okla. Nov. 30, 2015) (“The new language of Rule 1 does not impose a new duty, rather, as the comments state, it merely emphasizes a duty that already exists.”). The Advisory Committee on Civil Rules explained the reasoning behind its tinkering with an “iconic” rule in these terms: “Cooperation among the parties was a theme heavily and frequently emphasized.” ADVISORY COMM. ON CIVIL RULES, *supra* note 63, at 16. Still, the committee left only a “hint.” ADVISORY COMM. ON CIVIL RULES, *supra* note 63, at 16.

Overall, a certain inclination can be discerned within this mass—absolute boilerplate reckoned most offensive to discovery’s very essence.²¹⁹

C. CONDITIONAL BOILERPLATE

As with its kin, conditional boilerplate has been derided as inconsistent with “the spirit or letter of the discovery rules,”²²⁰ and its manifest impropriety has been repeatedly maintained.²²¹ Even so, for all this fervor, conditional boilerplate in response to a Rule 34 request for production, one scholar observed, did “comply technically with the letter of the discovery rules” through at least November 30, 2015.²²² Perhaps due to this recognition, a slightly modified analytical approach to conditional boilerplate has been formulated.

One path of attack has fastened on Rule 34’s unadorned language. Having read Rule 34(b) in conjunction with Rule 26’s relevance and privilege requirements,²²³ one court insisted: “[A] party served with a document request has four options: (1) respond to the document request by agreeing to produce documents as requested . . . (2) respond to the document request by objecting . . . (3) move for a protective order [. . .]; or (4) ignore the request.”²²⁴ Construing Rule 34 more narrowly, other courts have counted three options:

Rule 34(b)(2) permits only three responses to a request for production of documents: [(1)] produce the documents as requested, [(2)] ‘state an objection to the request’ as a whole, [(3)] or state an ‘objec-

219. *Resendez v. Smith’s Food & Drug Ctrs., Inc.*, No. 2:15-cv-00061-JAD-PAL, 2015 U.S. Dist. LEXIS 34038, at *5–6, 2015 WL 1186684, at *2 (D. Nev. Mar. 16, 2015) (citing *Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Court for Dist. of Mont.*, 408 F.3d 1142, 1149 (9th Cir. 2005); *St. Paul Reinsurance Co. v. Commercial Fin. Corp.*, 198 F.R.D. 508, 513 (N.D. Iowa 2000); and *Walker v. Lakewood Condo. Owners Ass’n*, 186 F.R.D. 584, 587 (C.D. Cal. 1999)).

220. *Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 858 P.2d 1054, 1083 (Wash. 1993) (interpreting “essentially identical” state equivalents).

221. *Beckerman*, *supra* note 4, at 554.

222. *Beckerman*, *supra* note 4, at 553.

223. FED. R. CIV. P. 26(b)(1), (5).

224. *Badalamenti v. Dunham’s Inc.*, 896 F.2d 1359, 1362 (Fed. Cir. 1999); *see also*, e.g., *Enron Corp. Sav. Plan v. Hewitt Assocs., L.L.C.*, 258 F.R.D. 149, 155 (S.D. Tex. 2009) (citing *Badalamenti*, 896 F.2d at 1362); *Johnson-Hines v. Freeman*, No. CV 2005-5173 (SJ) (MDG), 2006 U.S. Dist. LEXIS 59145, at *2, 2006 WL 2443553, at *1 (E.D.N.Y. Aug. 22, 2006) (same).

tion to part of [the] request' *provided* that the response specifies the part objected to and responds to the non-objectionable portion.²²⁵

Regardless, "[o]bjecting but answering subject to the objection is not one of the allowed choices under the . . . [r]ules."²²⁶ This construal is the "natural corollary" of Rule 34(b)(2)(C),²²⁷ which requires that "[a]n objection to part of a request must specify the part and permit inspection of the rest"²²⁸ and was intended to "make clear that, if a request for production is objectionable only in part, production should be afforded with respect to the unobjectionable portions."²²⁹ For this subparagraph to be satisfied, any valid objection "must identify the particular portion which is not being responded to on the basis of the objection," and "[t]he plain language of Rule 34 requires a partial response be identified as such."²³⁰ But, in intent and assembly, conditional objections fail "to specify exactly what part of [a] document request[] is [objectionable],"²³¹ therefore violating the respondent's obligation under Rule

225. *Sprint Commc'ns Co. v. Comcast Cable Commc'ns, L.L.C.*, Nos. 11-2684-JWL, 11-2685-JWL, 11-2686-JWL, 2014 U.S. Dist. LEXIS 16938, at *10, 2014 WL 545544, at *3 (D. Kan. Feb. 11, 2014) (emphasis in original) (quoting FED. R. CIV. P. 34(b)(2)(B)); *accord* *Fay Ave. Props., L.L.C. v. Travelers Prop. Cas. Co. of Am.*, No. 11-2389-GPC(WVG), 2014 U.S. Dist. LEXIS 89614, at *5, 2014 WL 2965316, at *2 (S.D. Cal. July 1, 2014).

226. *Tardif v. People for Ethical Treatment of Animals*, No. 2:09-cv-537-FtM-29SPC, 2011 U.S. Dist. LEXIS 47132, at *3-4, 2011 WL 1627165, at *1 (M.D. Fla. Apr. 29, 2011) (citing *Mann v. Island Resorts Dev., Inc.*, No. 3:08cv297/RS/EMT, 2009 U.S. Dist. LEXIS 130436, at *9-11, 2009 WL 6409113, *2-3 (N.D. Fla. Feb. 27, 2009)); *see also e.g.*, *C.T. v. Liberal Sch. Dist.*, Nos. 06-2093-JWL, 06-2360-JWL, 06-2359-JWL, 2008 U.S. Dist. LEXIS 10348, at *18, 2008 WL 394217, at *5 (D. Kan. Feb. 11, 2008) (describing conditional boilerplate as "neither an objection, nor an adequate identification of the responsive documents."); *Meese v. Eaton Mfg. Co.*, 35 F.R.D. 162, 166 (N.D. Ohio 1964) ("Whenever an answer accompanies an objection, the objection is deemed waived and the answer, if responsive, stands."); R. Jason Richards, *Answering Discovery "Subject to" Objections: Lessons from Florida's District Courts*, 35 S. ILL. U. L.J. 127, 133 (2010).

227. *Haeger v. Goodyear Tire & Rubber Co.*, 906 F. Supp. 2d 938, 976 (D. Ariz. 2012).

228. FED. R. CIV. P. 34(c)(2)(C).

229. FED. R. CIV. P. 34 advisory committee's note to 1993 amendment.

230. *Haeger*, 906 F. Supp. 2d at 977; *see also* *Lurensky v. Wellinghoff*, 258 F.R.D. 27, 30 (D.D.C. 2009) ("Rule 34 plainly states that objections to requests for production must be made on an individual basis.").

231. *Pro Fit Mgmt., Inc. v. Lady of Am. Franchise Corp.*, No. 08-CV-2662 JAR/DJW, 2011 U.S. Dist. LEXIS 19151, at *28, 2011 WL 939226, at *9 (D. Kan. Feb. 25, 2011); *see also* *GMAC Real Estate, L.L.C. v. Joseph Carl Sec., Inc.*, No. CV 10-192-PHX-JAT, 2010 U.S. Dist. LEXIS 14732, at *4, 2010 WL 432318, at *1 (D. Ariz. Feb. 3, 2010) ("Objections must be in writing and identify the particular portions of the request subject to the objection; all other portions should be made available for inspection."); *Johnson v. Kraft Foods N.A., Inc.*, 238 F.R.D. 648, 660 (D. Kan. 2006) (ordering defendants to respond to a request after extirpating a phrase that they had attacked as "vague and ambiguous," for "[d]efendants have a duty under the federal rules to respond to the extent that discovery requests are not objectionable").

34(b)(2) to “clearly state that responsive documents do not exist, have already been produced, or exist *but* are being withheld [based on an objection].”²³² Under this straightforward analysis, conditional boilerplate is viewed as so imprecise and equivocal in definitively delineating the precise nature of a relevant objection that waiver must be presumed,²³³ since a proper objection for purposes of Rule 34 must be “specific, non-boilerplate, and supported by particularized facts where necessary to demonstrate . . . [its basis].”²³⁴ In short, to this choir, the rules’ unvarnished verse allots “no authority . . . for reserving objections” by means of conditional boilerplate.²³⁵ Ergo,

232. *Rodriguez v. Simmons*, No. 2:09-cv-02195 KJN, 2011 U.S. Dist. LEXIS 39836, at *24–25, 2011 WL 1322003, at *7 (E.D. Cal. Apr. 4, 2011) (emphasis in original).

233. *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 359 (D. Md. 2008) (collecting cases); *see also* *Sonnino v. Univ. of Kan. Hosp. Auth.*, 221 F.R.D. 661, 666–67, 666 n.13 (D. Kan. 2004) (reminding the parties that the court has “disapproved [of] the practice of asserting a general objection ‘to the extent’ it may apply to particular requests for discovery”).

234. *See* *Mezu v. Morgan State Univ.*, 269 F.R.D. 565, 573 (D. Md. 2010) (stating the standard as to Rule 33); *Mancia*, 253 F.R.D. at 359 (holding that “both Rule 33 and 34 responses must state objections with particularity, on pain of waiver”); *Hall v. Sullivan*, 231 F.R.D. 468, 473 (D. Md. 2005) (opining that “[i]f one looks at the commentary to Rule 34, however, it is clear that the procedures under Rule 34 were intended to be governed by the same procedures applied under Rule 33”). This result is not uncommon when parties attempt to conceal data in other contexts. *See* Caren Myers Morrison, *Privacy, Accountability, and the Cooperating Defendant: Towards a New Role for Internet Access to Court Records*, 62 VAND. L. REV. 921, 923–25 (2009) (focusing on cooperation agreements between prosecutors and defendants).

235. *Jones v. Forrest City Grocery, Inc.*, No. 4:06CV00944-WRW, 2007 U.S. Dist. LEXIS 19482, at *3, 2007 WL 841676, at *1 (E.D. Ark. Mar. 16, 2007); *accord, e.g.*, *Sherwin-Williams Co. v. JB Collision Servs.*, Nos. 13-CV-1946-LAB (WVG), 13-CV-1947-LAB (WVG), 2014 U.S. Dist. LEXIS 93368, at *6–7, 2014 WL 3388871, at *2–3 (S.D. Cal. July 9, 2014) (“Providing conditional responses to discovery requests is improper.”); *Fay Ave. Props., L.L.C. v. Travelers Prop. Cas. Co. of Am.*, No. 11-2389-GPC (WVG), 2014 U.S. Dist. LEXIS 89614, at *4–5, 2014 WL 2965316, at *2 (S.D. Cal. July 1, 2014) (stating that a party responding to a discovery request “cannot . . . combine its objections into a partial response without any indication that the response was actually a partial response”); *Leisure Hospitality, Inc. v. Hunt Props., Inc.*, No. 09-CV-272-GKF-PJC, 2010 U.S. Dist. LEXIS 93680, at *9–10, 2010 WL 3522444, at *3 (N.D. Okla. Sept. 8, 2010) (“Rule 34 makes no provision for [a] response” that “attempt[s] to both object *and* produce, but produce only ‘subject to and without waiving’ its objections.” (emphasis in original)); *Medmarc Cas. Ins. Co. v. Ventura*, No. 07-23300-CIV-UNGARO/SIMONTON, 2008 U.S. Dist. LEXIS 100114, at *11, 2008 WL 5101800, at *4 (S.D. Fla. Dec. 1, 2008) (A conditional objection “preserves nothing and serves only to waste the time and resources of both the Parties and the Court”; “[f]urther, such practice leaves the requesting Party uncertain as to whether the question has actually been fully answered or whether only a portion of the question has been answered.” (citing A.B.A. SEC. ON LITIG., CIVIL DISCOVERY STANDARDS 18 (2004))); *see also, e.g.*, *VNA Plus, Inc. v. Apria Healthcare Grp., Inc.*, No. 98-2138-KHV, 1999 U.S. Dist. LEXIS 8908, at *15, 1999 WL 386949, at *5 (D. Kan. June 8, 1999) (as to interrogatories under Rule 33); *Moses v. State Farm Mut. Auto. Ins. Co.*, 104 F.R.D. 55, 58 (N.D. Ga. 1984) (same); *Casson Constr. Co., Inc. v. Artmco Steel Corp.*, 91 F.R.D. 376, 378–79 (D. Kan. 1980) (same).

such boilerplate has led courts both to deem any objection waived and to leave any answer, if responsive, to stand on its own merits.²³⁶ Before December 1, 2015, few could reasonably believe differently;²³⁷ today, any such opposition is only more likely to fail.²³⁸

Moving beyond Rule 34's text, these opinions accentuate policy rationales implicit in the rules as a whole.²³⁹ Conditional boilerplate invariably "leaves the opposing party in the dark as to whether something unidentified has been withheld."²⁴⁰ As a result, their employment "serves only to waste the time and resources of both parties and the court."²⁴¹ Now, opposing counsel must do the impossible: "reasonably determine beyond speculation what objection, if any, [the responding parties] intend to assert against any specific [discovery request]."²⁴² Now, if unsatisfied, he or she must meet and confer

236. *Tardif v. People for the Ethical Treatment of Animals*, No. 2:09-cv-537-FtM-29SPC, 2011 U.S. Dist. LEXIS 47132, at *3–4, 2011 WL 1627165, at *2 (M.D. Fla. Apr. 29, 2011) (citing *Pepperwood of Naples Condo. Ass'n v. Nationwide Mut. Fire Ins. Co.*, No. 2:10-cv-753-FtM-36SPC, 2011 U.S. Dist. LEXIS 106624, at *13, 2011 WL 4382104, at *5 (M.D. Fla. Sept. 20, 2011), and *Mann v. Island Resorts Dev., Inc.*, No. 3:08cv297/RS/EMT, at *11, 2009 U.S. Dist. LEXIS 130436, 2009 WL 6409113, at *3 (N.D. Fla. Feb. 27, 2009)); *see also* *Estridge v. Target Corp.*, No. 11-61490-CIV-WILLIAMS/SELTZER, 2012 U.S. Dist. LEXIS 21593, at *3–4, 2012 WL 527051, at *2 (S.D. Fla. Feb. 16, 2012) (internal quotation marks omitted) (quoting *Tardiff*, 2011 U.S. Dist. LEXIS 47132, at *3–4, 2011 WL 1627165, at *2); *Leisure Hospitality*, 2010 U.S. Dist. LEXIS 93680, at *9–10, 2010 WL 3522444, at *3) (noting that "Rule 34 makes no provision" for a party "produc[ing] only 'subject to and without waiving' its objections").

237. *See Mullins v. Encore Senior Living II, L.L.C.*, No. 3:07cv325/WS/EMT, 2007 U.S. Dist. LEXIS 84867, at *2 n.1, 2007 WL 4098851, at *1 n.1 (N.D. Fla. Nov. 16, 2007) (so maintaining as to absolute and conditional boilerplate and collecting many of the sources collected in this section).

238. *See* ADVISORY COMM. ON CIVIL RULES, *supra* note 63, at 29.

239. *See, e.g., Tiedman v. Am. Pigment Corp.*, 253 F.2d 803, 808 (4th Cir. 1958) ("[D]iscovery is founded on the policy that the search for truth should be aided."); 8A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 2204 (2d ed. 1994).

240. *Myers v. Goldco, Inc.*, No. 4:08cv8-RH/WCS, 2008 U.S. Dist. LEXIS 37089, at *3, 2008 WL 1995131, at *1 (N.D. Fla. May 6, 2008) (so concluding as to interrogatories); *see also, e.g., Consumer Elecs. Ass'n v. Compras & Buys Magazine, Inc.*, No. 08-21085-CIV, 2008 U.S. Dist. LEXIS 80465, at *7, 2008 WL 4327253, at *3 (S.D. Fla. Sept. 18, 2008) (deploring conditional boilerplate for "leav[ing] the requesting Party uncertain as to whether the question has actually been fully answered or whether only a portion of the question has been answered"); *Girard & Espinosa, supra* note 115, at 483 ("The upshot [of such objections] is that the propounding party is unable to assess the extent to which the responding party has complied with a discovery request."); *Richards, supra* note 226, at 128 (canvassing Florida federal cases so holding).

241. *Curtis v. Time Warner Entm't-Advance/Newhouse P'ship*, No. 3:12-cv-2370-JFA, 2013 U.S. Dist. LEXIS 68115, at *7, 2013 WL 2099496, at *3 (D.S.C. May 14, 2013).

242. *Thermoset Corp. v. Bldg. Materials Corp. of Am.*, No. 14-60268-CIV-COHN/SELTZER, 2014 U.S. Dist. LEXIS 161343, at *6, 2014 WL 6473232, at *2–3 (S.D. Fla. Nov. 18, 2014) (alterations in original) (quoting *Cotracom Commodity Trading Co. v.*

with the other's attorney, and only then file a motion to compel in order to ascertain whether a production request was fully answered.²⁴³ Now, upon such a motion's tendering, a busy court must spend its time and resources attempting to establish the propriety of a particular objection or compel a more faithful and accurate response.²⁴⁴ Frustration follows, as "[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."²⁴⁵ Of course, the propounding lawyer may choose to avoid endless postponement by not objecting, but he or she invites disaster if surprised with new information not provided at a later proceeding.²⁴⁶ To any lawyer remotely attuned to this hazard to his or her case's success (and livelihood), the only reasonable response is a motion to compel, propagating the delays endemic to such practice²⁴⁷ and antithetical to Rule 1's three virtues.²⁴⁸ In this telling, conditional boilerplate is denounced as "unfair to the requesting party" and as "prevent[ing] courts from properly evaluating the objections' underlying merits,"²⁴⁹ "calculated to mislead"²⁵⁰

Seaboard Corp., No. CIV. A. 97-2391-GTV, 1998 U.S. Dist. LEXIS 6726, at *4-5, 1998 WL 231135, at *1 (D. Kan. May 6, 1998)).

243. *Marti v. Baires*, No. 1:08-cv-00653-AWI-SKO PC, 2012 U.S. Dist. LEXIS 77962, at *5-9, 2012 WL 2029720, at *2-3 (E.D. Cal. June 5, 2012) (outlining the cumbersome process of adjudicating a motion to compel); Menis E. Ketchum, *Impeding Discovery: Eliminating Worthless Interrogatory Instructions and Objections*, W. VA. LAW., Apr.-June 2012, at 19.

244. *See* *Rogers v. Brauer Law Offices., P.L.C.*, No. CV-10-1693-PHX-LOA, 2011 U.S. Dist. LEXIS 93905, at *16, 2011 WL 3665346, at *5 (D. Ariz. Aug. 22, 2011) (bemoaning the fact that "[r]ather than the parties focusing on dispositive motions, if any, that might reduce or eliminate the issues in dispute, the Court is required to impose one of two disfavored choices: order an expedited briefing schedule on the untimely discovery motion or extend the dispositive motion deadline"); *Mezu v. Morgan State Univ.*, 269 F.R.D. 565, 573 (D. Md. 2010) (holding that defendant waived any legitimate objection due to its use of absolute boilerplate but adding: "Rather than burden the Court with this dispute, what counsel should have done is meet face to face and discuss each disputed interrogatory and challenged response. Interrogatories that contained excessive subparts should have been redrafted").

245. *Chevron Midstream Pipelines L.L.C. v. Settoon Towing L.L.C.*, Nos. 13-2809, 13-3197, 2015 U.S. Dist. LEXIS 6931, at *32, 2015 WL 269051, at *3 (E.D. La. Jan. 21, 2015).

246. *See* *Ketchum*, *supra* note 243, at 18-19.

247. *Beckerman*, *supra* note 4, at 550-52; *DCP Midstream, LP v. Anadarko Petroleum Corp.*, 303 P.3d 1187, 1196 (Colo. 2013).

248. *FED. R. CIV. P. 1*; *cf.* *Trask v. Olin Corp.*, 298 F.R.D. 244, 269 (W.D. Pa. 2014) (finding "good cause" to reopen discovery under Rule 16 and in light of the "import" of Rule 1 when "diligent discovery was hampered by both misleading statements from . . . counsel and the practical difficulties obtaining the information outside of discovery").

249. *Jarvey*, *supra* note 181, at 918.

250. *Kosher Sports, Inc. v. Queens Ballpark Co.*, No. 10-CV-2618 (JBW), 2011 U.S. Dist. LEXIS 86651, at *20, 2011 WL 3471508, at *7 (E.D.N.Y. Aug. 5, 2011).

A critical inference rests on these probabilities and assumptions. Once Rule 34 is “read to allow parties to combine objections with a partial response that does not specify whether other potentially responsive material is being withheld, ‘discovery would break down in practically every case.’”²⁵¹ Dealing with only “hypothetical or contingent possibilities,” conditional boilerplate cannot but “delay discovery” as courts and litigants pore over vague language and demand compliance with the rules’ longstanding mandates.²⁵² Because “[s]erving discovery responses and objections on time is critically important to maintaining a steady pace of discovery,”²⁵³ such artificial dilatoriness offends the rules’ very structure, most assuredly Rule 1. Furthermore, by so “hinder[ing] the adjudication process, and making the task of the deciding tribunal not easier, but more difficult,” the use of conditional boilerplate appears to infringe upon a lawyer’s “duty of loyalty to the procedures and institutions the adversary system is intended to serve.”²⁵⁴ Bereft of “any rational basis”²⁵⁵ and irreconcilable with the directives encoded in Rules 26 and 34,²⁵⁶ conditional boilerplate impedes attainment of the rules’ august purpose: “the just, speedy and inexpensive determination of every action, and proceeding.”²⁵⁷

251. *Sprint Commc’ns Co. v. Comcast Cable Commc’ns, L.L.C.*, Nos. 11-2684-JWL, 11-2685-JWL, 11-2686-JWL, 2014 U.S. Dist. LEXIS 16938, at *10, 2014 WL 545544, at *3 (D. Kan. Feb. 11, 2014) (quoting *Haeger v. Goodyear Tire & Rubber Co.*, 906 F. Supp. 2d 938, 977 (D. Ariz. 2012)).

252. *Starlight Int’l, Inc. v. Herlihy*, 181 F.R.D. 494, 497 (D. Kan. 1998) (quoting *Co-tracom Commodity Trading Co., v. Seaboard Corp.*, No. Civ. A. 97-2391-GTV, 1998 U.S. Dist. LEXIS 6726, at *4, 1998 WL 231135, at *1 (D. Kan. May 6, 1998)).

253. *Frontier-Kemper Constructors, Inc. v. Elk Run Coal Co.*, 246 F.R.D. 522, 526 (S.D. W. Va. 2007). If so, the rules themselves may be to blame. See generally Patrick E. Higginbotham, *Judge Robert A. Ainsworth, Jr. Memorial Lecture, Loyola University School Of Law: So Why Do We Call Them Trial Courts?*, 55 S.M.U. L. REV. 1405 (2002).

254. *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 362 (D. Md. 2008) (internal quotation marks omitted).

255. *Tardif v. People for Ethical Treatment of Animals*, No. 2:09-cv-537-FtM-29SPC, 2011 U.S. Dist. LEXIS 47132, at *4, 2011 WL 1627165, at *2 (M.D. Fla. Apr. 29, 2011); see also *hibu Inc. v. Peck*, No. 16-cv-1055-JTM-TJJ, 2016 U.S. Dist. LEXIS 121770, at *9, 2016 WL 4702422, at *4 (D. Kan. Sept. 8, 2016) (as to Rule 33 responses).

256. *Hall v. Sullivan*, 231 F.R.D. 468, 472–74 (D. Md. 2005) (finding conditional boilerplate to violate these rules’ interlocking framework).

257. FED. R. CIV. P. 1; see also, e.g., *Sec. Nat’l Bank of Sioux City v. Abbott Labs.*, 299 F.R.D. 595, 596–97 (N.D. Iowa 2014) (so concluding); *Covington v. Sailormen Inc.*, 274 F.R.D. 692, 693 (N.D. Fla. 2011) (same); *Tomlinson v. Combined Underwriters Life Ins. Co.*, No. 08-CV-259-TCK-FHM, 2008 U.S. Dist. LEXIS 82192, at *2–3, 2008 WL 4601578, at *1 (N.D. Okla. Oct. 16, 2008) (same).

IV. COHERENCY'S IMPOSSIBILITY: THE RULES' IRRESOLVABLE AMBIGUITIES

A. PRINCIPLES OF INTERPRETATION

In the years immediately after the rules' enactment, a freewheeling interpretive schematic reigned.²⁵⁸ For decades, however, in fealty to the more restrictive approach that emerged upon equity's eclipse, five tenets have guided the judicial construction of Rules 26 through 37 specifically and federal procedural rules more generally.²⁵⁹ Though not all are similarly applicable to Rule 34, these principles still circumscribe any interpreter's given route.

First, as with statutes, and subject to the same exceptions,²⁶⁰ a rule's terms are "give[n] . . . their plain meaning."²⁶¹ If the words' import is both unambiguous and clear, any further inquiry into its obvious purpose and its drafters' intent is foreclosed.²⁶² A rule plainly read is one whose words have been accorded their ordinary meaning,²⁶³ and the import of even the plainest language hinges on context.²⁶⁴ Similarly, ambiguity exists if "several plausible interpretations of the same . . . text, specific and different in substance" yet equally plain in denotation, can be cohered with the relevant provision's context and structure and must be dispelled with the same interpretive contrivances.²⁶⁵ The stridency of this methodology acquires a shoring impetus

258. See, e.g., *Ashcroft v. Iqbal*, 556 U.S. 662, 686–87 (2009); cf. *Bowles v. Russell*, 432 F.3d 668, 673–75 (6th Cir. 2005) (rejecting "a contrary and more liberal interpretation" of Federal Rule of Appellate Procedure 4 epitomized in "a line of Supreme Court cases employing an equitable interpretation of appeals time limits"). The instinct remains strong. See, e.g., *EEOC v. Go Daddy Software, Inc.*, 581 F.3d 951, 961 (9th Cir. 2009) (preferring a "liberal interpretation" of Rule 50(a), as the rule would otherwise be "a harsh one"); *Uniroyal Chem. Co. v. Syngenta Crop Prot., Inc.*, No. 02-2253, 2005 U.S. Dist. LEXIS 4545, at *5, 2005 WL 677806, at *2 (D. Conn. Mar. 23, 2005) ("[T]he court finds the better and more equitable interpretation of Rule 15(a) is the moderate approach . . .").

259. Shachmurove, *Claims*, *supra* note 13, at 528–34 (summarizing the relevant tenets); Shachmurove, *Disruptions*, *supra* note 45, at 194–97 (same).

260. Shachmurove, *Claims*, *supra* note 13, at 530–33 (detailing the exceptions).

261. *Pavelic & LeFlore v. Marvel Entm't Grp.*, 493 U.S. 120, 123 (1989); *accord* *El-liott v. Archdiocese of N.Y.*, 682 F.3d 213, 225 (3d Cir. 2012).

262. *Bus. Guides v. Chromatic Commc'ns Enters.*, 498 U.S. 533, 540–41 (1991) (citing *Pavelic & LeFlore*, 493 U.S. at 123), *superseded by* FED. R. CIV. P. 11 (1993 amendment); *Hagan v. Rogers*, 570 F.3d 146, 157 (3d Cir. 2009) (citing *Berkeley Inv. Grp., Ltd. v. Colkitt*, 259 F.3d 135, 142 n.7 (3d Cir. 2001)); Shachmurove, *Disruptions*, *supra* note 45, at 194–97 (summarizing the relevant case law); Shachmurove, *Claims*, *supra* note 13, at 528–30 (same).

263. See *Lara-Ruiz v. I.N.S.*, 241 F.3d 934, 940 (7th Cir. 2001).

264. *Conroy v. Aniskoff*, 507 U.S. 511, 515 (1993).

265. *Stern v. Am. Home Mortg. Servicing, Inc. (In re Asher)*, 488 B.R. 58, 64 (Bankr. E.D.N.Y. 2013).

from the rules' peculiarity, for, unlike statutes, they must be read most narrowly so as to avoid conflict with a more substantive stricture in keeping with the Rules Enabling Act.²⁶⁶

Second, "discovery rules are to be accorded a broad and liberal treatment to effect their purpose of adequately informing the litigants in civil trials."²⁶⁷ As all concur, Rule 26 enshrines "the fundamental principle that the public has a right to every man's evidence"²⁶⁸ via its "low threshold of relevance."²⁶⁹ Impelled by this entrenched concept, "[c]ourts commonly look unfavorably at significant restrictions placed upon the discovery process."²⁷⁰ Traditionally, therefore, an objecting party has borne the heavy burden of demonstrating a particular request's impropriety.²⁷¹

Third, magistrate and district court judges retain broad discretion over pretrial discovery.²⁷² By virtue of this deference, a district court's "discretion will not be disturbed ordinarily unless there are unusual circumstances showing a clear abuse."²⁷³ This relative autonomy is the product of a pervasive recognition that trial judges habitually possess more "intimate knowledge of

266. 28 U.S.C. § 2072(b) (2012) ("[R]ules [of practice and procedure] shall not abridge, enlarge or modify any substantive right."). In effect, the Rules Enabling Act compels a stringent application of the plain meaning approach, thereby minimizing the possibility of a conflict between rule and statute. See Shachmurove, *Claims*, *supra* note 13, at 531–33.

267. *Herbert v. Lando*, 441 U.S. 153, 177 (1979) (first citing *Schlagenhauf v. Holder*, 379 U.S. 104, 114–15 (1964); and then citing *Hickman v. Taylor*, 329 U.S. 495, 501, 507 (1947)); see also, e.g., *Carrera v. First Am. Home Buyers Prot. Co.*, No. 13cv1585-BAS (JLB), 2014 U.S. Dist. LEXIS 101064, at *3–4, 2014 WL 3695403, at *1 (S.D. Cal. July 23, 2014) (citing *Herbert*, 441 U.S. at 177); *Blangsted v. Snowmass-Wildcat Fire Prot. Dist.*, 642 F. Supp. 2d 1250, 1261 n.7 (D. Colo. 2009) (same).

268. *Trammel v. United States*, 445 U.S. 40, 50 (1980); see also, e.g., *Simpson v. Univ. of Colo.*, 220 F.R.D. 354, 356 (D. Colo. 2004) (citing *Trammel*, 445 U.S. at 50).

269. *Breon v. Coca-Cola Bottling Co.*, 232 F.R.D. 49, 53 (D. Conn. 2005).

270. *Kodish v. Oakbrook Terrace Fire Prot. Dist.*, 235 F.R.D. 447, 450 (N.D. Ill. 2006); accord *Rubin v. Islamic Republic of Iran*, 349 F. Supp. 2d 1108, 1111 (N.D. Ill. 2004).

271. See *Kodish*, 235 F.R.D. at 450.

272. See, e.g., *Danos v. Union Carbide Corp.*, 541 F. App'x 464, 467 (5th Cir. 2013) ("[A] district court has broad discretion over discovery matters . . ."); *Conti v. Am. Axle & Mfg., Inc.*, 326 F. App'x 900, 903 (6th Cir. 2009) ("The scope of discovery is, of course, within the broad discretion of the trial court . . .") (quoting *Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389, 402 (6th Cir. 1998)); *Little v. City of Seattle*, 863 F.2d 681, 685 (9th Cir. 1988) ("The district court has wide discretion in controlling discovery."); *Cook v. Kartridg Pak Co.*, 840 F.2d 602, 604 (8th Cir. 1988) (citing *O'Neal v. Riceland Foods*, 684 F.2d 577, 581 (8th Cir. 1982)) ("A district court must be free to use and control pretrial procedure in furtherance of the orderly administration of justice A district court is afforded wide discretion in its handling of discovery matters[.]"). At present, magistrate judges mostly manage the discovery process in federal court. See Ruth Dapper, *A Judge by Any Other Name? Mistitling of the United States Magistrate Judge*, 9 FED. CTS. L. REV. 1, 2–5 (2015).

273. *Moore v. CITGO Ref. & Chems. Co.*, 735 F.3d 309, 315 (5th Cir. 2013).

the facts,” a particular case’s fetter, and their own “administrative problems.”²⁷⁴ Indeed, this principle holds with such force that, in most cases, not even Rule 26’s permissiveness will prompt reversal of a decision to deny discovery “except upon the clearest showing” of “actual and substantive prejudice.”²⁷⁵

Fourth, every rule “should be viewed, not as [an] isolated fragment[], but as [a part of] an integrated whole, and thus one rule cannot be read to circumvent another.”²⁷⁶ A pivotal interpretive constraint springs from this tenet: the effective meaning and the practical application of Rule 34 in any case should not be divined and determined solely within its four corners.²⁷⁷ Instead, the policies embodied in and parameters demarcated by others, maybe most significantly Rules 1 and 26, must always be perpended.²⁷⁸

Finally, even Rule 26 is bounded by limitations that “come into existence when . . . [a party’s] inquiry touches upon the irrelevant or encroaches upon the recognized domains of privilege.”²⁷⁹ As such, when a clash looms,

274. *Syracuse Broad. Corp. v. Newhouse*, 271 F.2d 910, 915 (2d Cir. 1959).

275. *Goehring v. Brophy*, 94 F.3d 1294, 1305 (9th Cir. 1996), *cited in* *Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002); *see also, e.g., Associated Metals & Minerals Corp. v. S.S. Geert Howaldt*, 348 F.2d 457, 459 (5th Cir. 1965) (“Trial courts have the right to exercise appropriate control of the discovery process when necessary and may deny, limit, or qualify it.”).

276. *Garza v. Webb Cty.*, 296 F.R.D. 511, 512 (S.D. Tex. 2014); *see also, e.g., Cipollone v. Liggett Grp., Inc.*, 822 F.2d 335, 342 (3d Cir. 1987) (quoting *Cipollone v. Liggett Grp., Inc.*, 113 F.R.D. 86, 92–93 (D.N.J. 1986)); *United States v. Aluminum Co. of Am.*, 1 F.R.D. 57, 58 (S.D.N.Y. 1938) (construing Rules 34 and 45, which “relate to the same subject [matter.] . . . *in pari materia.*”); *cf. Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 274 (9th Cir. 2009) (Kozinski, J., concurring) (“The Federal Rules aren’t just a series of disconnected procedural devices.”); Baicker-McKee, *supra* note 58, at 355 (contending that the rules “were conceived as one unified set of rules flexible enough to govern cases of all sizes and variations in complexity” and collecting sources so saying); Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the “One Size Fits All” Assumption*, 87 DENV. U. L. REV. 377, 383 (2010) (commenting that their drafters “assumed that the rules would apply uniformly to all cases”).

277. *See, e.g., Marek v. Chesny*, 473 U.S. 1, 21 (1985); *Herbert v. Lando*, 441 U.S. 153, 177 (1979); *Marvin Lumber & Cedar Co. v. PPG Indus.*, 177 F.R.D. 443, 444 (D. Minn. 1997) (relying in part on *Hickman v. Taylor*, 329 U.S. 495, 505 (1947)).

278. Shachmurove, *Disruptions*, *supra* note 45, at 194–97; *see also, e.g., Shachmurove, Claims*, *supra* note 13, at 528–34; David Marcus, *Institutions and an Interpretive Methodology for the Federal Rules of Civil Procedure*, 2011 UTAH L. REV. 927, 967–69 (2011) (discussing the relevant so-called “policy canons”).

279. *Hickman v. Taylor*, 329 U.S. 495, 508 (1947); *see also SEC v. Rajaratnam*, 622 F.3d 159, 181 (2d Cir. 2010) (“The right of access to discovery materials is frequently qualified in the interest of protecting legitimate interests.”); *Herbst v. Chicago, Rock Island & Pac. R. Co.*, 10 F.R.D. 14, 17 (S.D. Iowa 1950) (declaring that a party’s rights under Rules 33 and 34 “must be exercised only under definitely restricted circumstances, as permitted by Rule 26(b), and subject always to such limitations as the court may direct for the protection of the parties under Rule 30(b)”).

a careful balance must be struck between discovery's *relevance* standard—the rules “should not be narrowly applied so as ‘to deprive a party of the discovery that is reasonably necessary to afford a fair opportunity to develop and prepare the case’”²⁸⁰—and the rationales behind both the relevant privileges, these safeguards “designed to protect weighty and legitimate competing interests”²⁸¹ yet “not lightly created nor expansively construed,”²⁸² and Rule 26(b)'s operative *discoverability* standard, implanted in subparagraphs (b)(1) and (b)(2)(C)²⁸³ and impliedly incorporating the prerequisites for a protective order lodged in Rule 26(c)(1).²⁸⁴ Hence, a jumble of four policies

280. Jones v. Forrest City Grocery, Inc., No. 4:06CV00944-WRW, 2007 U.S. Dist. LEXIS 19482, at *2 & n.3, 2007 WL 841676, at *1 & n.3 (E.D. Ark. Mar. 16, 2007) (quoting Trevion v. Celanese Corp., 701 F.2d 397, 405 (5th Cir. 1983)); cf. e.g., Thalheim v. Eberheim, 124 F.R.D. 34, 35 (D. Conn. 1988) (“A party’s loss of the ‘right to contest a matter on the merits is not to be treated lightly’” even when it has failed to comply with a rule’s clear command (quoting O’Byrant v. Allstate Ins. Co., 107 F.R.D 45, 48 (D. Conn. 1985))).

281. For example, “[t]he rule which places the seal of secrecy upon communications between client and attorney,” the Court once wrote, “is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.” Hunt v. Blackburn, 128 U.S. 464, 470 (1888); see also United States v. Jicarilla Apache Nation, 564 U.S. 162, 169 (2011) (citing Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)).

282. United States v. Nixon, 418 U.S. 683, 710 (1974); see also, e.g., Pierce Cty. v. Guillen, 537 U.S. 129, 145 (2003) (“[W]hen possible, privileges should be construed narrowly.”).

283. Rule 26(b)(1) contains a minimal relevance standard, Teichgraeber v. Mem’l Union Corp. of Emporia State Univ., 932 F. Supp. 1263, 1265 (D. Kan. 1996), and attorneys invariably emphasize this fact in argument. See United States ex rel. Carter v. Bridgepoint Educ., Inc., 305 F.R.D. 225, 234–35 (S.D. Cal. 2015). As of December 1, 2015, however, it also contains a proportionality qualifier, and even before that date, Rule 26(b)(2)(C) allowed a court to limit the discoverability of all relevant evidence for a variety of factors. FED. R. CIV. P. 26(b)(2)(C); B&S Equip. Co. v. Truckla Servs., No. 09-3862c/w10-0832,10-1168,10-459, 2011 U.S. Dist. LEXIS 72436, at *11–13, 2011 WL 2637289, at *3 (E.D. La. July 6, 2011) (listing factors). In effect, to obtain discovery in the face of another’s opposition, a party must first show relevance and thereafter prove discoverability. The 2015 amendments to Rule 26 have made this implication explicit. FED. R. CIV. P. 26(b)(1) advisory committee’s note to 2015 amendment (“Information is discoverable under revised Rule 26(b)(1) if it is relevant to any party’s claim or defense and is proportional to the needs of the case . . .”). For more on this addition, see Elizabeth D. Laporte & Jonathan M. Redgrave, *A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure 26*, 9 FED. CTS. L. REV. 19, 39–43, 47–72 (2015).

284. FED. R. CIV. P. 26(c)(1); see, e.g., Uppal v. Rosalind Franklin Univ. of Med. & Sci., 124 F. Supp. 3d 811, 814 (N.D. Ill. 2015) (contending that with the authority conferred by Rule 26(b)(1) and Rule 26(c) “judges should not hesitate to exercise appropriate control over the discovery process”); Eastman v. Allstate Ins. Co., No. 3:14-CV-00703-WQH-WVG, 2015 U.S. Dist. LEXIS 92144, at *15–16, 2015 WL 4393287, at *5 (S.D. Cal. July 15, 2015) (explicating the connection between these provisions).

always tangle (and must be mulled) when a court considers imposing sanctions for a party's use of boilerplate: a request's bare relevance under Rule 26(b)(1), with every litigant having a capacious right to another's proof;²⁸⁵ the requested material's discoverability, evaluated in light of the proportionality factors now set forth in Rule 26(b)(1) and the related concerns indexed in Rule 26(b)(2)(C); the respondent's right to be secure from "annoyance, embarrassment, oppression, or undue burden or expense," as recognized in Rule 26(c)(1); and a certain privilege's apparent function. Even if the resulting tension may, in fact, be irreconcilable,²⁸⁶ the conflict must be acknowledged and resolved.

B. PRECEDENT'S OVERSIGHTS

Once they are rigorously applied, the preceding principles disclose a troubling verity. Simply put, no definite resolution about the proper sanction for all boilerplate response to Rule 34 requests can be comfortably reached based on the rules' plain text. Consequently, by having found all boilerplate to be forbidden and to effectuate a waiver, too many courts have wandered too far for the sake of Rule 1's ineffable, if laudable, aims.²⁸⁷ True, the most recent amendments tried to strengthen this majority position; in certain ways, as shown above and below, many haunting ambiguities will no longer vex. Nonetheless, much remains too ambiguous for comfort once those "well-established principles of construction" are "clearly and predictably" applied to the regnant texts.²⁸⁸ Almost paradoxically, the policing of boilerplate has

285. Still used, this quip—"right to every man's evidence"—dates to 1950. *See* *Trammel v. United States*, 445 U.S. 40, 50 (1980) (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)) ("Testimonial exclusionary rules and privileges contravene the fundamental principle that 'the public . . . has a right to every man's evidence.'").

286. *See In re Grand Jury Matter*, 673 F.2d 688, 698 (3d Cir. 1982) (Adams, J., dissenting).

287. *Cf., e.g., Baker Botts L.L.P. v. ASARCO L.L.C.*, 135 S. Ct. 2158, 2169 (2015) ("Whether or not the Government's theory is desirable as a matter of policy, Congress has not granted us roving authority Our job is to follow the text even if doing so will supposedly undercut a basic objective of the statute." (citations omitted) (internal quotation marks omitted)); *Lamie v. U.S. Tr.*, 540 U.S. 526, 538 (2004) ("Our unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding."); *Cent. Tr. Co. v. Official Creditors' Comm. of Geiger Enters., Inc.*, 454 U.S. 354, 360 (1982) (*per curiam*) ("While the Court of Appeals may have reached a practical result, it was a result inconsistent with the unambiguous language used by Congress."); *Bd. of Trs. of IBT Local 863 Pension Fund v. C&S Wholesale Grocers, Inc.*, 5 F. Supp. 3d 707, 720 (D.N.J. 2014) ("Just because the application of . . . bright line rules sometimes leads to harsh outcomes does not mean that courts may deviate from them whenever doing so seems fair.")

288. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 648 (2012); *see also Peterson v. Somers Dublin Ltd.*, 729 F.3d 741, 749 (7th Cir. 2013) (citing *RadLAX Gateway Hotel*, 566 U.S. at 648-49) ("Statutes often are written more broadly than their genesis suggests.")

been so indiscriminate as to obscure frailties that only another round of revisions can fully uproot.²⁸⁹

Significantly, each of the four types of boilerplate plaguing modern discovery—(1) administrative and absolute, (2) administrative and conditional, (3) substantive and absolute, and (4) substantive and conditional²⁹⁰—has been subjected to a distinctly flawed analysis within an often crepuscular judicial discourse. Some preteritions infect judicial dissections of all four; a few crop up only when absolute boilerplate is at issue; and fewer still can be detected when conditional boilerplate has been expended. Sitting at the intercourse of two strains bedeviled by specialized weaknesses—those peculiar to the courts’ treatment of substantive boilerplate and those pervasive in their handling of conditional boilerplate—the juridical scrutiny of substantive and conditional boilerplate manifests the most defects. Too often unnoticed, this jurisprudence’s errors number six.²⁹¹

1. *Problems Common to All Forms of Boilerplate*

i. Rule 34’s Phantom Waiver

The first problem to dog the dominant approach is posed by the text of Rule 34. Prior to December 1, 2015, an objection had to include its “reasons,” while “[a]n objection to part of a request” had to “specify the part and permit inspection of the rest.”²⁹² Ever since, Rule 34(b)(2)(B) also requires that an objection’s grounds be “state[d] with specificity,” and a new first sentence— “[a]n objection must state whether any responsive materials are being withheld on the basis of that objection”—has been affixed to Rule 34(b)(2)(C).²⁹³ The former “adopt[ed] the language of Rule 33(b)(4), eliminating any doubt that less specific objections might be suitable under Rule 34.”²⁹⁴ The latter directly targeted conditional boilerplate, the advisory committee expressing its hope that this addition would “end the confusion that frequently arises when a producing party states several objections and still produces infor-

289. Cf. Ruling and Order at 4–5, *SEC v. Commonwealth Advisors, Inc.*, No. 3:12-cv-00700-JWD-SCR (M.D. La. Nov. 14, 2014) (reversing in part a magistrate judge’s grant of a motion to compel).

290. See *supra* Part II.A.

291. For a summary, see *infra* Part IV.B.4.

292. FED. R. CIV. P. 34(b)(2)(B)–(C); *Doe v. Mastolini*, 307 F.R.D. 305, 311 n.5 (D. Conn. 2015) (citing rule).

293. FED. R. CIV. P. 34(b)(2)(B)–(C).

294. FED. R. CIV. P. 34 advisory committee’s note to 2015 amendment (alteration in original).

mation, leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objections.”²⁹⁵ This decided similarity between this iteration of Rule 34(b)(2)(B) and (A) and the language of Rule 33(b)(4) is obvious,²⁹⁶ and the mandatory character of the shared “must” cannot be linguistically disputed.²⁹⁷ Accordingly, especially considering the most recent academic commentary available²⁹⁸ and in line with the most authoritative treatise on federal procedure,²⁹⁹ Rule 34 would seem to support ordering all valid objections’ waivers upon a party’s use of any boilerplate,³⁰⁰ the anticipated tonic for a widespread malpractice.³⁰¹

295. *Id.*; *Saliga v. Chemtura Corp.*, No. 3:12cv832 (RNC), 2013 U.S. Dist. LEXIS 167801, at *1 n.3, 2013 WL 6247219, at *1 n.3 (D. Conn. Nov. 26, 2013) (citing note); *see also* Philip J. Favro, *A Comprehensive Look at the Newly Proposed Amendments to the Federal Rules of Civil Procedure*, UTAH B. J., Sept.-Oct. 2013, at 38, 40 (“This recommended change is supposed to do away with the assertion of general objections.”).

296. *Compare* FED. R. CIV. P. 33(b)(4), *with* FED. R. CIV. P. 34(b)(2)(B).

297. *See, e.g.*, *Hyatt v. U.S.P.T.O.*, 797 F.3d 1374, 1380 (Fed. Cir. 2015) (“The ‘shall’ makes this language mandatory, not discretionary.”).

298. *See* *Tome v. United States*, 513 U.S. 150, 167 (1995) (Scalia, J., concurring in part and concurring in judgment) (describing the explanatory notes prepared by the advisory committees, “a body of experts,” as “assuredly persuasive scholarly commentaries—ordinarily *the* most persuasive—concerning the meaning of the [r]ules”). Nevertheless, a committee’s notes “bear no special authoritativeness as the work of the draftsmen.” *Id.*; *see also* *Nat’l Mining Ass’n v. Kempthorne*, 512 F.3d 702, 709 n.3 (D.C. Cir. 2008) (“[While] [a]cademic commentary supports our reading . . . we cannot outsource the task of statutory interpretation to the professoriate.”).

299. 7 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE-CIVIL* § 34.13(2)(c) (3d ed. 2014) (“Although Rule 34 does not contain an automatic waiver provision for untimely objections as found in Rule 33(b)(4) for interrogatories, the courts have reasoned that a waiver should be implied into all rules involving the use of the various discovery mechanisms.”).

300. ADVISORY COMM. ON CIVIL RULES, *supra* note 63, at 165–66. Statements from various commentators bear this out. Thus, for example, Jennie Lee Anderson for the American Association for Justice’s Class Action Litigation Group saw the new Rule 34 as “desirable” due to its effective prohibition of conditional boilerplate, which leads to “[c]ountless hours of meeting and conferring.” ADVISORY COMM. ON CIVIL RULES, *supra* note 63, at 165. J. Burton LeBlanc for the same entity concurred, damning conditional boilerplate as “mak[ing] it difficult to assess what has not been produced and which objections go to whatever has not been produced.” ADVISORY COMM. ON CIVIL RULES, *supra* note 63, at 165. He then believed that “[t]he proposed change will discourage parties from evading discovery on procedural grounds and enable the requesting party to assess whether further discovery will produce evidence to support its claims.” ADVISORY COMM. ON CIVIL RULES, *supra* note 63, at 165. Louis A. Jacobs of the Ohio State University’s Moritz College of Law agreed, as did Stuart F. Delery of the Department of Justice. ADVISORY COMM. ON CIVIL RULES, *supra* note 63, at 166.

301. *Charter Practices Int’l v. Robb*, No. 3:12cv1768 (RNC), 2015 U.S. Dist. LEXIS 34112, at *6 n.2, 2015 WL 1268295, at *2 n.2 (D. Conn. Mar. 19, 2015); Favro, *supra* note 295, at 40 (“This recommended change is supposed to do away with the assertion of general objections.”).

Nonetheless, Rule 34's actual text, the very words that must control,³⁰² still poses a decisive hurdle: while Rule 33(b)(4) includes an express waiver clause, the same amendments that sought to make Rules 33 and 34 more alike did not lead to the inclusion of any parallel clause in Rule 34. This absence cannot be ascribed to mere ignorance, as per the advisory committee's own notes, its latest drafters were well acquainted of the two provisions' language and consciously strove to harmonize these disparate rules.³⁰³ For instance, after endorsing the "amend[ment]" of Rule 34(b)(2)(A) "to fit with new Rule 26(d)(2)," it said so explicitly as to Rule 34(b)(2)(B): in justifying the addition of one clause to this subparagraph—"the response must . . . state with specificity the grounds for objecting to the request, including the reasons"—the advisory committee wrote: "This provision adopts the language of Rule 33(b)(4), eliminating any doubt that less specific objections might be suitable under Rule 34."³⁰⁴ Having so expressly transposed Rule 33(b)(4)'s first sentence into Rule 34(b)(2)(B), however, the advisory committee did not import Rule 33's waiver remedy.³⁰⁵

By most accounts, then, Rule 34(b)(2) boasts a rare—and pregnant—lucidity. Whereas waiver upon boilerplate's use follows from Rule 33(b)(4)'s second sentence, no such textual anchor can support this sanction's pinning onto the more silent Rule 34.³⁰⁶ Equally significantly, though its cognizance of this absence cannot be debated, after copying clauses and phrases from Rule 33, the advisory committee opted to appropriate no remedial slice. In light of this bare history, as evidenced by the most patent texts, Rule 34(b)(2)(C)'s incongruity with Rule 33(b)(4) triggers an old canon's application: "[A] drafter is presumed to act purposely in the inclusion or exclusion

302. See *supra* Part IV.A; see also, e.g., *United States v. Ron Pair Enters.*, 489 U.S. 235, 241–42 & n.5 (1989) (making use of both "the natural reading of . . . [a] phrase" and "the grammatical structure of . . . [a] statute"); *Lockhart v. Napolitano*, 573 F.3d 251, 255–56 (6th Cir. 2009) (considering a grammatical analysis as a component of "a natural reading of the full text"); *South Dakota v. Hood*, 391 F.3d 581, 589–90 (5th Cir. 2004) (focusing on a phrase's "natural reading" and a statute's "grammatical structure").

303. FED. R. CIV. P. 34 advisory committee's note to 2015 amendment.

304. *Id.*

305. FED. R. CIV. P. 33(b)(4). Even at a time when Rule 34 less perfectly mirrored Rule 33, the advisory committee had still insisted on their harmony in simple commentary, a tactic followed with Rule 37 in 1993. Compare FED. R. CIV. P. 37(c) (listing sanctions for violations of orders and discovery obligations and identifying them as discretionary), with FED. R. CIV. P. 37 advisory committee's note to 1993 amendment (describing these same optional punishments as "automatic" and "self-executing"); see also *supra* note 135.

306. Cf. *Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Court for Dist. of Mont.*, 408 F.3d 1142, 1147 (9th Cir. 2005) ("While . . . Rule [34(b)] imposes a bright-line rule defining timeliness, it does not contain an explicit prohibition against boilerplate objections or assertions of privilege.").

of disparate language.”³⁰⁷ True, the rules may be a knitted and cohesive edifice,³⁰⁸ but a specific rule’s explicit script, holistically analyzed, always controls.³⁰⁹ In accordance with the law’s dominant interpretive framework, when conscious knowledge of another rule’s divergent version can be inferred, and when the newest sentence in a second rule was partly molded to mirror another’s first, introducing the latter’s remnant into the former is verboten.³¹⁰ However advisable as policy,³¹¹ the submersion of Rule 33’s orphaned waiver clause into Rule 34’s newly sharpened specificity requirement cannot be characterized as anything except such an impermissible, albeit understandable, sleight of hand by boilerplate’s foes.³¹² With Rule 34 still unimproved by a clause resembling Rule 33(b)(4)’s second sentence, no apparent

307. Shachmurove, *Claims*, *supra* note 13, at 524 (collecting sources).

308. *Hickman v. Taylor*, 329 U.S. 495, 505 (1947); *see also, e.g.*, *Mortg. Info. Servs. v. Kitchens Inc.*, 210 F.R.D. 562, 566–67 (W.D.N.C. 2002) (collecting sources so saying, including *Hickman*, 329 U.S. at 505); *Drexel Heritage Furnishings, Inc. v. Furniture USA, Inc.*, 200 F.R.D. 255, 258 (M.D.N.C. 2001) (“Courts have long viewed the discovery rules as an integrated mechanism to be read *in pari materia*.”).

309. *See Pioneer Invs. Servs. Co. v. Brunswick Assocs. L.P.*, 507 U.S. 380, 388 (1993); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 643–44 (1992); *Bus. Guides v. Chromatic Commc’ns Enters.*, 498 U.S. 533, 540–41 (1991), *superseded by* FED. R. CIV. P. 11 (1993 amendment). Naturally, therefore, the rules are often, if not always, treated as statutes. Jesse N. Panoff, *Rescuing Expedited Discovery from the Commodity Futures Trading Commission & Returning It to Fed. R. Civ. P. 26(d)(1): Using a Doctrine’s Forgotten History to Achieve Legitimacy*, 42 GOLDEN GATE U. L. REV. 393, 415 (2012).

310. *See, e.g., BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (citing *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992)) (“The preeminent canon of statutory interpretation requires us to ‘presume that [the] legislature says in a statute what it means and means in a statute what it says there.’” (alteration in original)); *see also Alper v. United States*, 190 F.R.D. 281, 283 (D. Mass. 2000) (stating that “while the language of Rule 45 . . . may . . . not be crystal clear, it is apparent . . . that discovery of documents from a party, as distinct from a non-party, is not accomplished pursuant to Rule 45” (alterations in original) (quoting *Hasbro, Inc. v. Serafino*, 168 F.R.D. 99, 100 (D. Mass. 1996))); 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2452 (2d ed. 1995 & Supp. 2001) (same); *cf. Hasbro Inc.*, 168 F.R.D. at 100 (quoting FED. R. CIV. P. 34(c)) (concluding that Rule 45 cannot be used to subpoena parties and non-parties as Rule 34 explicitly “directs that ‘a person not a party to the action may be compelled to produce documents and things or to submit to an inspection as provided in Rule 45’”). Unsurprisingly, this position is contested. *See, e.g., Badman v. Stark*, 139 F.R.D. 601, 603 (M.D. Pa. 1991) (taking the opposite view).

311. *See supra* Part III. *But see infra* Part IV.B.1.iii.

312. *See supra* Part III; *Hobley v. Chicago Police Commander Burge*, No. 03 C 3678, 2003 U.S. Dist. LEXIS 20585, at *9 n.2, 2003 WL 22682362, at *3 n.2 (N.D. Ill. Nov. 12, 2003) (opining that “[w]hile Rule 34 does not contain an express provision for waiver of objections not timely made, failure to respond to a document request subjects the party to sanctions under Rule 37(d)” and observing that “courts have interpreted Rule 34 as containing an implicit waiver provision to parallel the express provision of Rule 33(b)(4)”).

judicial consensus³¹³ can thwart this inference's inevitability, its application compelled by both a fundamental principle (the plain meaning doctrine) and a contextual canon (presumption of consistent usage). For these reasons, the reading of "the automatic-waiver provision of Rule 33(b)(4) . . . into Rule 34" continues to be "an odd conclusion to draw[:] If the drafters of the . . . [r]ules saw fit to include an automatic-waiver provision in Rule 33 and to omit such a provision from Rule 34, that implies that there is no automatic waiver of an untimely objection under Rule 34."³¹⁴

Two more textual facts appear to bolster this ratiocination. First, while this canon normally relies on a presumption of full awareness even in the absence of any actual proof of such sentience, the advisory committee's most recent notes provide ample and patent evidence of the drafters' conscious cognizance of a distinct yet related text, i.e. Rule 33(b)(4), in the shared subpart, i.e. Title V, of the exact same body of law, i.e. the rules in total, during their remodeling of Rule 34(b)(2)(C).³¹⁵ In point of fact, a number of comments that the advisory committee included with its most germane report expressly linked the two rules,³¹⁶ further denuding any and all potency from a presumption of authorial ignorance. Second, the utter absence of any reference in Rule 34 to Rule 33, a telling contrast with the explicit incorporation of Rule 45 in Rule 34(c) and of Rules 26 and 29 in Rule 34(b)(2)(A),³¹⁷ lends greater force to this disinclination on the same canon's basis.³¹⁸ To wit, when reference or incorporation was desired, the drafters inscribed such clear language into the germane rule, and only reliance on willful inconsistency could

313. See, e.g., *Cargill, Inc. v. Ron Burge Trucking, Inc.*, 284 F.R.D. 421, 424 (D. Minn. 2012) (collecting cases so saying); *First Nat'l Bank v. Civic Partners Sioux City, LLC* (*In re Civic Partners Sioux City, LLC*), Bankr. No. 11-00829, Adv. Proc. No. 11-9046, 2011 Bankr. LEXIS 4620, at *7-8, 2011 WL 6013847, at *3 (Bankr. N.D. Iowa Dec. 2, 2011) (same); *Caudle v. Dist. of Columbia*, 263 F.R.D. 29, 32 (D.D.C. 2009) (same).

314. *Ashford v. City of Milwaukee*, 304 F.R.D. 547, 549 (E.D. Wis. 2015); see also, e.g., *Brenford Envtl. Sys., L.P. v. Pipeliners of P.R., Inc.*, 269 F.R.D. 143, 146 (D.P.R. 2010) ("It is clear that failure to comply with Rule 34(b) does not automatically result in waiver of an objection."); *Cunningham v. Connecticut Mut. Life Ins.*, 845 F. Supp. 1403, 1409 (S.D. Cal. 1994) ("Failure to specifically identify documents on a privilege log does not automatically waive the privilege for omitted documents."); cf. *Pub. Serv. Co. of N.H. v. Portland Nat. Gas*, 218 F.R.D. 361, 363 (D.N.H. 2003) ("While it is possible to read Rule 33(b)(4) to incorporate Rule 26(b)(5) . . . a more harmonious reading of the rules as a whole leaves the enforcement of Rule 26(b)(5) to the nuanced sanctioning regime governed by [Rule 37] rather than the nearly automatic waiver process required by Rule 33(b)(4).").

315. FED. R. CIV. P. 34 advisory committee's note to 2015 amendment; see also FED. R. CIV. P. 34 advisory committee's note to 1970 amendment.

316. ADVISORY COMM. ON CIVIL RULES, *supra* note 63, at 165.

317. FED. R. CIV. P. 26(a)(5), 34(c); cf. *Mortg. Info. Servs. v. Kitchens Inc.*, 210 F.R.D. 562, 566 (W.D.N.C. 2002) (noting that most courts have concluded that a Rule 45 subpoena must be served by the close of discovery based on "the text of Rule 26, which expressly incorporates Rule 45 subpoenas into its definition of discovery").

318. See, e.g., *Fedorenko v. United States*, 449 U.S. 490, 512-14 (1981).

justify ignoring these examples, each of which counsels against the conflation of Rules 33 and 34.³¹⁹ In effect, by interpretive explication, many have affixed a sentence absent from Rule 33 onto Rule 34, a result accordant with the rules' overarching theory yet, fatally, not Rule 34's categorical final text.³²⁰ It is, however displeasing it may be, the latter alone that here controls,³²¹ a presumption which throws into doubt waiver's convection.

ii. Rule 37's Gravid Silences

Allowing a party to file a motion to compel a discovery response upon another's failure to comply with Rules 30, 31, 33, and 34,³²² so long as it has first "in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action,"³²³ Rule 37 treats "an evasive or incomplete disclosure, answer, or response . . . as a failure to disclose, answer, or respond."³²⁴ For such improper feats, Rule 37 lists seven possible sanctions,³²⁵ a court free to impose

319. See GARNER & SCALIA, *supra* note 135, at 167–69 (discussing the whole-text canon). Notably, this canon can lend itself to abuse while its corollary—the presumption of consistent usage—"assumes a perfection of drafting that, as an empirical matter, is not achieved." GARNER & SCALIA, *supra* note 135, at 168, 170.

320. *Pavelic & LeFlore v. Marvel Entm't Grp.*, 493 U.S. 120, 123 (1989). Only true ambiguity would allow such wandering. See *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 377–80 (2004) (looking to statutory purpose to interpret an ambiguous statute); *Reves v. Ernst & Young*, 494 U.S. 56, 73 (1990) ("Given this ambiguity, the [provision] must be interpreted in accordance with its purpose.").

321. *Bus. Guides, Inc. v. Chromatic Commc'ns Enters.*, 498 U.S. 533, 540–41 (1991) ("As with a statute, our inquiry is complete if we find the text of the Rule to be clear and unambiguous."), *superseded by* FED. R. CIV. P. 11 (amended 1993).

322. FED. R. CIV. P. 37(a)(3)(B); *Petrucelli v. Bohringer & Ratzinger*, 46 F.3d 1298, 1310 (3d Cir. 1995) ("In order to succeed on a motion to compel discovery, a party must first prove that it sought discovery from its opponent."). Rule 37(a)(3)(A) authorizes sanctions for a party's failure to provide the mandatory disclosures presently required by Rule 26. FED. R. CIV. P. 37(a)(3)(A); *Alexander v. Ohio State Univ. Coll. of Soc. Work*, 429 F. App'x 481, 486 (6th Cir. 2011).

323. FED. R. CIV. P. 37(a)(1); see also *Robinson v. Potter*, 453 F.3d 990, 995 (8th Cir. 2006) ("Before the court can rule on a motion, the parties must demonstrate they acted in good faith to resolve the issue among themselves.").

324. FED. R. CIV. P. 37(a)(4); see, e.g., *United States v. All Assets Held at Bank Julius Baer & Co.*, 276 F.R.D. 396, 399 (D.D.C. 2011) (citing Rule 37(a)(1)); *Med. Assur. Co. v. Weinberger*, No. 4:06 cv 117, 2011 U.S. Dist. LEXIS 67516, at *13, 2011 WL 2471898, at *2 (N.D. Ind. June 20, 2011) (same).

325. FED. R. CIV. P. 37(b)(2)(A), (c)(1)(C); *Vicknair v. Louisiana Dep't of Pub. Safety & Corr.*, 555 F. App'x 325, 332 (5th Cir. 2014) (listing some of the relevant sanctions and adding that "[s]anctions must be both just and specifically related to the claim at issue in the discovery order").

“other appropriate”³²⁶ ones in the exercise of its reasoned discretion.³²⁷ Because absolute and conditional boilerplate “border” on frivolity, such objections can trigger Rule 37’s application,³²⁸ its intricate mechanism designed to achieve four ends,³²⁹ both punitive³³⁰ and remedial.³³¹ Overall, three exceptions may justify stay of a sanction’s imposition: “the failure to disclose was substantially justified” regardless of the underlying act; it was “harmless” if a failure to disclose took place; or “other circumstances make an award of expenses unjust” when reasonable attorneys’ fees amount to a party’s proposed punishment or a motion to compel has been granted.³³² Typically, “[t]he overriding consideration” is whether the sanction’s severity is “commensurate with the non-compliance,”³³³ as courts strive “to restore the prejudiced party to the same position it would have been in absent the wrongful [withholding] of evidence by the opposing party.”³³⁴

As an initial matter, one omission from two different sources looms large, damaging Rule 37’s value in the regulation of boilerplate. First, in its

326. FED. R. CIV. P. 37(c)(1)(C); *Neiberger v. FedEx Ground Package Sys.*, 566 F.3d 1184, 1191 (10th Cir. 2009) (citing rule). Significantly, if not unremarkably, Rule 37(c)(1)(C) does not define “appropriate.” *Cf. Societe Internationale Pour Participations et Commerciales S.A. v. Rogers*, 357 U.S. 197, 208 (1958) (“Rule [37(b)(2)] allows a court all the flexibility it might need in framing an order appropriate to a particular situation.”).

327. *See, e.g., Roberts v. Shawnee Mission Ford, Inc.*, 352 F.3d 358, 360 (8th Cir. 2003); *Daval Steel Prods. v. M/V Fakredine*, 951 F.2d 1357, 1365 (2d Cir. 1991).

328. *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1358 (11th Cir. 1997); *see also, e.g., Steed v. EverHome Mortg. Co.*, 308 F. App’x 364, 371 (11th Cir. 2009) (citing *Chudasama*, 123 F.3d at 1358); *Update Art, Inc. v. Modiin Publ’g, Ltd.*, 843 F.2d 67, 71 (2d Cir. 1988) (quoting *Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1064 (2d Cir. 1979)).

329. *Wachtel v. Health Net, Inc.*, 239 F.R.D. 81, 99–100 (D.N.J. 2006); *Carlucci v. Piper Aircraft Corp.*, 775 F.2d 1440, 1453 (11th Cir. 1985).

330. *Gratton v. Great Am. Commc’ns*, 178 F.3d 1373, 1374–75 (11th Cir. 1999).

331. *Roadway Express v. Piper*, 447 U.S. 752, 763–64 (1980); *First Mariner Bank v. Resolution L. Grp., No. MJG-12-1133*, 2013 U.S. Dist. LEXIS 153299, at *11, 2013 WL 5797381, at *4 (D. Md. Oct. 24, 2013).

332. FED. R. CIV. P. 37(c)(1), (d)(3); *Hewlett-Packard Fin. Servs. Co. v. Alt. Graphics, Inc. (In re Alt. Graphics, Inc.)*, No. CC-14-1193-DTaKu, 2015 Bankr. LEXIS 3696, at *28, 2015 WL 6605542, at *10 (B.A.P. 9th Cir. Oct. 29, 2015). This final sanction has been called Rule 37’s “great operative principle.” *Rickels v. City of S. Bend*, 33 F.3d 785, 786 (7th Cir. 1994).

333. *In re Terrorist Attacks on September 11, 2001*, No. 03 MDL 1570 (GBD) (FM), 2013 U.S. Dist. LEXIS 155085, at *102, 2013 WL 5788307, at *3 (S.D.N.Y. Oct. 28, 2013); *Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130, 140 (2d Cir. 2007).

334. *Linde v. Arab Bank, PLC*, 269 F.R.D. 186, 195 (E.D.N.Y. 2010) (alteration in original) (internal quotation marks omitted).

explicit array of sanctions, Rule 37 hints at no waiver, unlike the overt mention of this punitive measure in Rules 26(a)(3),³³⁵ 32(d),³³⁶ 33(b)(4),³³⁷ 35(b)(4),³³⁸ and 45(d)(3)(A)(iii).³³⁹ As these examples attest, when the rules do designate waiver as a possible price, they do so in the body of the specific provision that lays forth the duties whose flouting can trigger such an assessment. Second, in decided contrast with its commentary on the equivalently silent Rule 16, the advisory committee's notes to Rule 37 make no allusion to waiver as a viable penalty.³⁴⁰ Like Rule 34's recent failure to echo Rule 33(b)(4) in full, and pursuant to the same well-known rule of thumb,³⁴¹ the presumptively knowing drafters' non-inclusion of waiver in Rule 37's text and official exposition cannot be disregarded.

In fact, one more canon can be adduced so as to solidify this conclusion: "It is a commonplace of statutory construction that the specific governs the general."³⁴² As text unabashedly reveals, Rule 37 catalogues certain remedies, waiver not among them, while Rule 34 alone maintains taciturnity as to this peculiar remedy. Logically, because Rule 37 enumerates a number of mulcts for violations of Rule 34 without expressly alluding to waiver, unlike Rule 33(b)(4), its authorization for "any other appropriate sanctions" should not be read to license a punishment—waiver—left unnamed within its text. Otherwise, a court would have decoded neighboring provisions in a way that renders the specific passage "superfluous" by allowing it to be "swallowed"

335. FED. R. CIV. P. 26(a)(3)(B); *Welch v. Tritt*, No. 15-CV-191, 2015 U.S. Dist. LEXIS 81204, at *9, 2015 WL 3887087, at *4 (E.D. Wis. June 23, 2015) (quoting Rule 26(a)(3)(B)).

336. FED. R. CIV. P. 32(d); *Woods v. Deangelo Marine Exhaust Inc.*, No. 08-81579-Civ-Hurley/Hopkins, 2010 U.S. Dist. LEXIS 110293, at *13, 2010 WL 4116571, at *4 (S.D. Fla. Sept. 27, 2010) (quoting Rule 32(d)).

337. FED. R. CIV. P. 33(b)(4); *Cooper v. Dall. Police Ass'n*, 584 F. App'x 208, 209 (5th Cir. 2014) (quoting rule).

338. FED. R. CIV. P. 35(b)(4); *United States v. Turner*, No. 5:07-HC-2167-D, 2012 U.S. Dist. LEXIS 871, at *6, 2012 WL 27425, at *2 (E.D.N.C. Jan. 4, 2012) (quoting rule).

339. FED. R. CIV. P. 45(d)(3)(A)(iii); *Ala. Educ. Ass'n v. Bentley (In re Hubbard)*, 803 F.3d 1298, 1307 (11th Cir. 2015) (quoting rule).

340. FED. R. CIV. P. 16 advisory committee's note to 1983 amendment ("If counsel fail to identify an issue for the court, the right to have the issue tried is waived."); *Smith v. Gulf Oil Co.*, 995 F.2d 638, 644 (6th Cir. 1993) (finding waiver on the basis of this sentence). The propriety of relying on these notes is open to question. *See supra* Part IV.A.

341. *See supra* Part IV.B.1.i.

342. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). This result is unsurprising, as this duo often works hand-in-hand. *See BNSF Ry. v. United States*, 775 F.3d 743, 759 (5th Cir. 2015).

by the general one,³⁴³ a construction that should never be countenanced.³⁴⁴ Based on these linguistic deductions, a serious question can be raised about whether Rule 37 can be fairly read to authorize waiver as a sanction for non-compliance with Rule 34,³⁴⁵ one often unaddressed.

Rule 37's efficacy in boilerplate's governance is undercut by its constricted language in two more ways. First, Rule 37(b) requires that a discovery order be in place, and Rule 37(d) has been understood to authorize sanctions only when a party has wholly ignored a discovery request.³⁴⁶ Admittedly, "an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond" pursuant to Rule 37, but only "for purposes of" Rule 37(a), which governs motions to compel alone, and by implication not for purposes of Rule 37(d)(1)(ii), which lists the sanctions possible for a party's noncompliance with Rule 34.³⁴⁷ As a consequence of this rather convoluted design, which too must be respected during any interpretive endeavor,³⁴⁸ "evasive or incomplete responses," such as absolute

343. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 640 (2012); *see also, e.g., HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981) (per curiam) (finding that a specific provision tends to govern a more general, "particularly when the two are interrelated and closely positioned, both in fact being parts of [the same statutory scheme]"); *BNSF Ry.*, 775 F.3d at 759 ("The specific-general canon applies where there is a specific statutory provision that would be subsumed by a general statutory provision.").

344. *See RadLAX Gateway Hotel*, 566 U.S. 639 at 645 ("The general/specific canon . . . has full application . . . to statutes . . . in which a general authorization and a more limited, specific authorization exist side-by-side. There the canon avoids not contradiction but the superfluity of a specific provision that is swallowed by the general one."); *see also, e.g., Prime Time Int'l Co. v. Vilsack*, 930 F. Supp. 2d 240, 258 n.8 (D.D.C. 2013) (citing *RadLAX Gateway Hotel*, 566 U.S. 639 at 645) ("When a general provision is allowed to trump a more specific provision, the specific provision may be greatly diminished, as that provision had a narrower reach to begin with.").

345. Admittedly, as commonly construed, Rule 37 provides a nonexclusive range of sanctions. *Hathcock v. Navistar Int'l Transp. Corp.*, 53 F.3d 36, 40 (4th Cir. 1995). Nonetheless, its textual failure to mention waiver and other rules' explicit incorporation of this sanction cannot be properly glossed over with nary a mention; pursuant to modern principles, that gaping omission must somehow be addressed.

346. FED. R. CIV. P. 37(b), (d); Beckerman, *supra* note 4, at 554. *But see Collins v. Landry's Inc.*, No. 2:13-cv-1674-JCM-VCF, 2014 U.S. Dist. LEXIS 83003, at *11–12, 2014 WL 2770702, at *5 (D. Nev. June 17, 2014).

347. FED. R. CIV. P. 37(a)(3)–(4), (d)(1). Axiomatically, headings and titles can bear on meaning. *I.N.S. v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991).

348. *Cf. Hinck v. United States*, 550 U.S. 501, 506 (2007) (quoting *EC Term of Years Trust v. United States*, 550 U.S. 429, 434 (2007)) ("[I]n most contexts, 'a precisely drawn, detailed statute pre-empts more general remedies.'"). *But see King v. Burwell*, 135 S. Ct. 2480, 2502 (2015) (Scalia, J., dissenting) ("Statutory design and purpose matter only to the extent they help clarify an otherwise ambiguous provision.").

and conditional boilerplate, cannot be fairly treated as failures to respond or answer under Rule 37(d).³⁴⁹

Second, by custom, willfulness, fault, or bad faith must often be shown for Rule 37 to be invoked; regardless of the violation at issue, lesser sanctions should always be considered.³⁵⁰ At least in part, this presumption rests on the common view that “a Rule 37 [sanction] is effectively a criminal contempt sanction,”³⁵¹ and logic alone suggests that, just as preclusion of evidence generally requires a strong showing of prejudice,³⁵² an objection’s waiver should require a similar impact.³⁵³ Meanwhile, under Rule 26(g)(1), in responding to a request under Rules 33 and 34, a lawyer must do no more than a reasonable investigation before adducing a particular objection.³⁵⁴ Reading these provisions *in pari materia*, as courts recommend,³⁵⁵ a lawyer’s compliance with Rule 26(g)(1)’s minimal requirement, even if rightful discovery is thereby impeded, should foreclose a finding of willfulness, fault, or fraud under Rule 37.³⁵⁶ In light of this jurisprudence, Rule 37 raises two final issues when invoked to punish boilerplate’s use: so long as a response to a request for production is not self-evidently false or fanciful, Rule 26(g)(1) should place a lawyer beyond Rule 37’s grasp, while Rule 37(b) and (d) demand either total flouting or an order’s docketing before any authorized sanctions can be sought for a party’s noncompliance with Rule 34.

In sum, Rule 37 is no unalloyed prop for boilerplate’s enemies. Even after December 1, 2015, not firm links but ambiguities interoscuate its structure. The sole repository of the courts’ punitive authority in the rules themselves is, in the end, an even more tenuous point of departure than Rule 34’s ghostly waiver clause.

349. Pringle v. Garcia, No. 2:09-CV-22-PPS-PRC, 2013 U.S. Dist. LEXIS 65463, at *11 n.1, 2013 WL 1911484, at *4 n.1 (N.D. Ind. May 8, 2013).

350. *E.g.*, R & R Sails, Inc. v. Ins. Co. of Pa., 673 F.3d 1240, 1247–48 (9th Cir. 2012); *see also* Wendt v. Host Int’l, Inc., 125 F.3d 806, 814 (9th Cir. 1997) (limning the test for assessing sanctions).

351. Bradley v. Am. Household, Inc., 378 F.3d 373, 379 (4th Cir. 2004).

352. First Mariner Bank v. Resolution L. Grp., P.C., No. MJG-12-1133, 2013 U.S. Dist. LEXIS 153299, at *25 n.5, 2013 WL 5797381, at *9 n.5 (D. Md. Oct. 24, 2013).

353. These distinct doctrines rely on the same fundamental predicate—a willful violation of some evidentiary or procedural rule—to justify the same dramatic result—an automatic relaxation of an otherwise firm rule-based boundary.

354. FED. R. CIV. P. 26(g)(1); *see supra* Part II.B.1.

355. *See* sources cited *supra* note 276.

356. *See, e.g.*, Hake v. Carroll Cty., No. WDQ-13-1312, 2014 U.S. Dist. LEXIS 112572, at *8–9, 2014 WL 3974173, at *3 (D. Md. Aug. 14, 2014).

iii. Asymmetrical Treatment

Lastly, the practical issue of proportionality, newly invigorated by the addition of such language into the body of Rule 26(b)(1), has often been overlooked in this developing jurisprudence. For all the commonality of boilerplate objections, boilerplate requests are also often propounded.³⁵⁷ Not infrequently, it is such indeterminate bids for documents that “set the stage for discovery problems because the recipient does not know specifically what is being requested,”³⁵⁸ with the proponent’s request “facially encompass[ing]” every aspect of their opponent’s case and “thus[] the broadest possible range of documents.”³⁵⁹ Consistent with this observation, courts have deemed a discovery request to be facially overbroad if it uses such “omnibus term[s],” as “relating to,” “pertaining to,” or “concerning.”³⁶⁰ These cases, recognizing the frequent, if less noticed, tendency of lawyers to propound vagaries, are not outliers.³⁶¹ As one court has warned, “[a party] must specify in ‘sufficient detail to permit [the other party] to locate and to identify, as readily as can [the . . . party] the records from which the answer may be ascertained.’”³⁶² If not, a boilerplate request may induce a boilerplate objection,³⁶³ the latter no more than a reasonable response to an untailed probe.

357. See, e.g., Shaffer & Shaffer, *supra* note 25, at 201; Girard & Espinosa, *supra* note 115, at 474–75.

358. Howard v. Segway, Inc., No. 11-CV-688-GKF-PJC, 2013 U.S. Dist. LEXIS 31402, at *5, 2013 WL 869955, at *2 (N.D. Okla. Mar. 7, 2013).

359. Everlast World’s Boxing Headquarters Corp. v. Ringside, Inc., No. 13-2150-CM-KGG, 2014 U.S. Dist. LEXIS 84704, at *17, 2014 WL 2815515, at *6 (D. Kan. June 23, 2014).

360. Johnson v. Kraft Foods N.A., 238 F.R.D. 648, 658 & n.31 (D. Kan. 2006); see also Cardenas v. Dorel Juvenile Grp., Inc., 232 F.R.D. 377, 381 (D. Kan. 2005) (“[T]his Court has held on several occasions that a document request may be vague, or overly broad and unduly burdensome on its face if it uses an omnibus term such as ‘relating to,’ ‘pertaining to,’ or ‘concerning.’”).

361. See Beisner, *supra* note 26, at 551; see also Grimm & Yellin, *supra* note 39, at 521.

362. Hansel v. Shell Oil Corp., 169 F.R.D. 303, 307 (E.D. Pa. 1996) (quoting FED. R. CIV. P. 33); cf. Am. Health Sys., Inc. v. Visiting Nurse Ass’n, No. 93-0542, 1994 U.S. Dist. LEXIS 15447, at *20–21, 1994 WL 594424, at *5–6 (E.D. Pa. Oct. 20, 1994) (pointedly relying on a plaintiff’s earlier stated agreement to define specific undefined terms included in its first document request after it arbitrarily cut off further attempts to resolve a dispute concerning its first document request).

363. See Durden v. Citicorp Tr. Bank, 763 F. Supp. 2d 1299, 1310 n.13 (M.D. Fla. 2011) (as to fee application); Mancía v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 362 (D. Md. 2008) (“A lawyer who seeks excessive discovery given what is at stake in the litigation, . . . or pursues discovery in order to make the cost for his or her adversary so great that the case settles to avoid the transaction costs, . . . is . . . hindering the adjudication process[.]”); Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 736 (2010) (“[L]awyers regularly violate Rule 26(g) by serving excessive and thoughtlessly broad discovery requests”); cf. Eastman v. Allstate Ins. Co., No. 3:14-CV-00703-WQH-

In view of these facts, a finding of waiver in response to a respondent's boilerplate may effectively absolve the proponent of their own responsibility for originally vague queries. Consumed by one side's misdeeds, such an order may grant the propounding party a benefit predicated on another's violation of a standard that they themselves have contravened in their production's drafting.³⁶⁴ Both parties have offended the rules' ensconced spirit, yet while the second suffers, the first prospers for crafting ambiguous, if not impermissibly so, demands.³⁶⁵ Revealingly, such a result runs counter to the imputations of another juridical strain, as reflected in Rule 36's jurisprudence. As one jurist explained in regards to the admissions covered by this rule, upon the propounding party lies the duty to not state "half a fact" or "half-truths" that effectively "require the answering party to qualify responses."³⁶⁶ In such cases, a clear and good faith qualification openly offends no settled rule,³⁶⁷ and even if the chosen answers appear evasive, a party should be allowed to amend such an authentic rider,³⁶⁸ a precept as applicable to Rule 34 as to Rule 36. And, as "it is not always easy to know whether a denial is 'specific' or an explanation is 'in detail,'"³⁶⁹ the Rule's drafters once cautioned against "giving a defective answer the automatic effect of an admission."³⁷⁰ With these concerns in mind, the iron rule endorsed by many scholars and courts—

WVG, 2015 U.S. Dist. LEXIS 92144, at *29–30, 2015 WL 4393287, at *10 (S.D. Cal. July 15, 2015) (emphasizing that the remarkable breadth of a plaintiff's subpoenas demanded "some curtailment").

364. ADVISORY COMM. ON CIVIL RULES, *supra* note 63, at 159, 166–67. In opposing Rule 34's new specificity provision, David J. Kessler commented: "[I]t would be better to direct that the responding party state what it is looking for." ADVISORY COMM. ON CIVIL RULES, *supra* note 63, at 166. Alex Dahl added: "The requesting party also has a duty to propound specific demands." ADVISORY COMM. ON CIVIL RULES, *supra* note 63, 167.

365. Some hope that Rule 26(b)(1), as amended on December 1, 2015, will mitigate this imbalance. *See infra* note 373. Yet, so long as discovery's scope is broad, expansively worded requests will likely persist.

366. *Herrera v. Scully*, 143 F.R.D. 545, 549 (S.D.N.Y. 1992) (quoting *Havenfield Corp. v. H & R Block, Inc.*, 67 F.R.D. 93, 96–97 (W.D. Mo. 1973)). *But see* *Poole v. Textron, Inc.*, 192 F.R.D. 494, 499 (D. Md. 2000).

367. *See Xcel Energy, Inc. v. United States*, 237 F.R.D. 416, 422 (D. Minn. 2006) ("While we have no quarrel with allowing a qualification of a Response, the qualification must both clear and advanced in good faith . . .").

368. *Tri-State Hosp. Supply Corp. v. United States*, 226 F.R.D. 118, 138 (D.D.C. 2005).

369. FED. R. CIV. P. 36 advisory committee's note to 1970 amendment; *Clements v. Toombs Cty. Hosp. Auth.*, 334 S.E.2d 188, 190 (Ga. Ct. App. 1985) (quoting language).

370. FED. R. CIV. P. 36 advisory committee's note to 1970 amendment; *In re K-Dur Antitrust Litig.*, No. 01-1652 (JAG), MDL No. 1419, 2007 U.S. Dist. LEXIS 96066, at *38 n.8 (D.N.J. Jan. 2, 2007) (citing note); *see also* *United Coal Co. v. Powell Constr. Co.*, 839 F.2d 958, 967–68 (3d Cir. 1988).

“[g]eneral, or boilerplate, objections that do not respond specifically to requests for production are not proper”³⁷¹—pays no mind to these concerns and thereby enthrones an asymmetry in both duty and punishment inconsistent with the rules’ overarching emphasis on *all* parties’ fair and just treatment. As the advisory committee recently reminded one and all, “the parties share the responsibility to employ the rules in the same way” and are expected to make “proportional use of procedure.”³⁷² As rejiggered on December 1, 2015, Rule 26(b)(1)’s qualification of its relevance standard has given a modicum of official support to this focus on the asymmetrically retributive effects that can be begat by a proponent’s own unclear and questionable requests.³⁷³ Per the golden rule, when both parties have strayed, neither should be rewarded.

2. *Problems Unique to Conditional Boilerplate*

i. Rule 34’s Conditional Language

Strangely, Rule 34(b) is rather vague on the propriety of conditional boilerplate, a fact too often neglected by the current judicial majority.³⁷⁴ True, Rule 37(a)(4) ensures that either an “incomplete” or an “evasive” response to a Rule 34 request will be treated as a “failure to disclose, answer, or respond.”³⁷⁵ At first blush, such language can reasonably be read to sweep into its natural ambit both conditional and absolute boilerplate.

Still, Rule 34(b)(2)(C) seems to allow for partial objection, if so labeled. At first blush, conditional boilerplate does seem to fit its own clumsy formulation that “[a]n objection to part of a request . . . specify the part and permit inspection of the rest,”³⁷⁶ acknowledging the surrender of all non-privileged materials “except to the extent a valid objection has been made.” Though the latter clause’s addition in 2015 was intended to combat “the confusion that frequently arises when a producing party states several objections and still

371. Cal. Sportfishing Prot. Alliance v. Chico Scrap Metal, Inc., No. 2:10-cv-1207-GEB-AC, 2014 U.S. Dist. LEXIS 144173, at *12, 2014 WL 5093398, at *5 (E.D. Cal. Oct. 9, 2014).

372. FED. R. CIV. P. 1 advisory committee’s note to 2015 amendment; Witt v. GC Servs. Ltd. P’ship, 307 F.R.D. 554, 556 n.1 (D. Colo. 2014) (citing and relying upon this commentary).

373. See ADVISORY COMM. ON CIVIL RULES, *supra* note 63, at 23 (“This change reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests . . .”).

374. See *supra* Part III.C.

375. FED. R. CIV. P. 37(a)(4); Cunningham v. Hamilton Cty, 527 U.S. 198, 206 (1999) (quoting FED. R. CIV. P. 37(a)(4)).

376. FED. R. CIV. P. 34(b)(2)(C); Heller v. City of Dallas, 303 F.R.D. 466, 475 (N.D. Tex. 2014) (quoting FED. R. CIV. P. 37(b)(2)(C)).

produces information, leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objections,” this language was inputted so as “to alert other parties to the fact that documents have been withheld and thereby facilitate an informed discussion of the objection.”³⁷⁷ Supposing even a single document has been withheld on the basis of a boilerplate objection, conditional boilerplate technically informs the objection’s recipient of some documents’ withholding. In this most limited sense, Rule 34(b)(2)(C) would appear satisfied—or, at worst, a good-faith defense afforded.

In addition, the appending of an arbitrary date range would seemingly suffice to render even conditional boilerplate proper under this rule’s bare terms. In fact, the advisory committee specifically discounted the requirement that “a detailed description or log of all documents withheld” be provided and concluded that “[a]n objection that states the limits that have controlled the search for responsive and relevant materials qualifies as a [proper] statement that the materials have been ‘withheld.’”³⁷⁸ In a telling bit of evidence, in its observation on the post-November 30, 2015, form of Rule 34, the Association of the Bar of the City of New York did not read its new specificity language as barring conditional boilerplate and advocated for a more express and “better method” of regulation.³⁷⁹

3. *Problems Unique to Substantive Boilerplate*

i. Limits of Waiver Doctrine

By rule and custom, an assertion of privilege can be a valid objection to a discovery request.³⁸⁰ These familiar shields can, of course, be waived deliberately or accidentally,³⁸¹ as courts have found when boilerplate objections

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

378. *Id.*

379. ADVISORY COMM. ON CIVIL RULES, *supra* note 63, at 167. Others obviously disagreed. ADVISORY COMM. ON CIVIL RULES, *supra* note 63, at 167. (statement of Sidney I. Schenkier for Federal Magistrate Judges Association). Most important here, the mere existence of doubt immeasurably strengthens a lawyer’s own defense to Rule 37 on the basis of good faith.

380. FED. R. CIV. P. 26(b)(1); *see Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Court for Dist. of Mont.*, 408 F.3d 1142, 1148–49 (9th Cir. 2005).

381. *See Davis v. Fendler*, 650 F.2d 1154, 1160 (9th Cir. 1981) (concluding that a failure to object to interrogatories within the time fixed by Rule 33 constitutes a waiver “even of an objection that the information sought is privileged”); FED. R. CIV. P. 26 advisory committee’s note to 1993 amendment (“To withhold materials without . . . notice [of a claim of privilege or work product protection] is contrary to the rule, subjects the party to sanctions under Rule 37(b)(2), and may be viewed as a waiver of the privilege or protection.”); *cf. Law v. Medco Research, Inc.*, 113 F.3d 781, 787 (7th Cir. 1997) (“Failure to contest a point is not necessarily a waiver, but it is a risky tactic, and sometimes fatal.”). During a federal proceeding, inadvertent disclosure is governed by Federal Rule of Evidence 502. FED. R. EVID. 502.

have been tendered.³⁸² Axiomatically, as a consequence of the esteemed status of the common law's various privileges,³⁸³ waiver is considered to be "a harsh sanction," "reserved generally for unjustified, inexcusable, or bad faith conduct" and "unnecessary where other remedies are available."³⁸⁴ Usually, only "unjustifiably delayed discovery,"³⁸⁵ or "gross negligence and ethical violations,"³⁸⁶ can warrant its possible finding. Hence, "minor procedural violations, good faith attempts at compliance, and other such mitigating circumstances militate against finding waiver"; conversely, "evidence of foot-dragging or a cavalier attitude towards following court orders and the discovery rules supports [its] finding."³⁸⁷ Even where found, despite all privileges' cabined scope,³⁸⁸ implied waivers are construed narrowly³⁸⁹ after an exacting

382. See *supra* Part III; see also, e.g., *Gonzales v. City of San Jose*, No. 5:13-cv-00695-BLF, 2014 U.S. Dist. LEXIS 165662, at *3–4, 2014 WL 6687138, at *2 (N.D. Cal. Nov. 25, 2014); *Bourne v. Town of Madison*, No. 05-cv-365-JD, 2007 U.S. Dist. LEXIS 23945, at *10, 2007 WL 951552, at *3 (D.N.H. Mar. 27, 2007); *Nat'l Union Fire Ins. Co. v. Midland Bancor, Inc.*, 159 F.R.D. 562, 567 (D. Kan. 1994).

383. See, e.g., *Jaffee v. Redmond*, 518 U.S. 1, 17–18 (1996); *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); cf. *United States v. Nixon*, 418 U.S. 683, 709–13 (1974) (weighing the importance of one privilege against "the inroads of such a privilege on the fair administration of criminal justice").

384. *USF Ins. Co. v. Smith's Food & Drug Ctr., Inc.*, No. 2:10-cv-001513-RLH-LRL, 2011 U.S. Dist. LEXIS 63926, at *8, 2011 WL 2457655, at *3 (D. Nev. June 16, 2011) (citing *Moe v. System Transp., Inc.* 270 F.R.D. 613, 623 (D. Mont. 2010)); accord, e.g., *Shao Ying Sun v. Ikea US W., Inc.*, No. 15-cv-01146-MEJ, 2015 U.S. Dist. LEXIS 150544, at *7, 2015 WL 6734480, at *3 (N.D. Cal. Nov 4, 2015); *Moe v. Sys. Transp., Inc.*, 270 F.R.D. 613, 623 (D. Mont. 2010).

385. *EEOC v. Safeway Store, Inc.*, No. C-00-3155 TEH (EMC), 2002 U.S. Dist. LEXIS 25200, at *6, 2002 WL 31947153, at *2 (N.D. Cal. Sept. 16, 2002).

386. *Boag v. Litton Loan Servicing*, No. C11-5838 BHS, 2013 U.S. Dist. LEXIS 146461, at *18–19, 2013 WL 5569908, at *7 (W.D. Wash. Oct. 9, 2013).

387. *Ritacca v. Abbott Labs.*, 203 F.R.D. 332, 335 (N.D. Ill. 2001) (collecting cases standing for these propositions).

388. See, e.g., *Herbert v. Lando*, 441 U.S. 153, 175 (1979) ("Evidentiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances."); *United States v. Oloyede*, 982 F.2d 133, 141 (4th Cir. 1992) ("[T]he [attorney-client] privilege is to be 'strictly confined within the narrowest possible limits consistent with the logic of its principle.'" (quoting *In re Grand Jury Investigations*, 599 F.2d 1224, 1235 (3d Cir. 1979))).

389. *Teleglobe Commc'ns Corp. v. BCE, Inc. (In re Teleglobe Communc'ns Corp.)*, 493 F.3d 345, 378 (3d Cir. 2007); see also, e.g., *Schofield v. U.S. Steel Corp.*, No. 2:04-CV-520-PRC, 2005 U.S. Dist. LEXIS 30471, at *8–9, 2005 WL 3159165, at *3 (N.D. Ind. Nov. 28, 2005) (opining that courts tend to limit a waiver to the narrowest possible subject matter); *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992) (citing *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 25 (9th Cir. 1981)). Dangers can, however, arise. See *Aspex Eyewear, Inc. v. E'Lite Optik, Inc.*, 276 F. Supp. 2d 1084, 1093 (D. Nev. 2003) ("A narrowly circumscribed waiver, at the discovery stage, creates a danger of a defendant utilizing favorable opinion letters while allowing unfavorable evidence to languish in their

fact-specific analysis,³⁹⁰ recurrently limited to those documents intended to attain an unfair advantage³⁹¹ and rarely “broader than needed to ensure the fairness of the [relevant] proceedings.”³⁹²

Aside from this extraordinarily rigorous view of a waiver’s contours, courts have tended to treat the very notion of an automatic waiver as inconsistent with varied privileges’ honored roles. In a seminal opinion, the Ninth Circuit famously rejected a party’s attempt to defend the existence of “a per se waiver rule that deems a privilege waived if a privilege log is not produced within Rule 34’s 30–day time limit” and when boilerplate has been offered.³⁹³ As a substitute, it urged courts to engage in a “holistic reasonableness analysis” in which four nonexclusive factors (“*Burlington* Factors”) should be weighed:

[(1)] the degree to which the objection or assertion of privilege enables the litigant seeking discovery and the court to evaluate whether each of the withheld documents is privileged . . . ; [(2)] timeliness of the objection and accompanying information about the withheld documents (where service within 30 days, as a default guideline, is sufficient); [(3)] the magnitude of the document production; and [(4)] other particular circumstances of the litigation that make responding to discovery unusually easy (such as, here, the fact that many of the same documents were the subject of discovery in an earlier action) or unusually hard.³⁹⁴

attorney’s files under the protection of the work-product doctrine.” (citing *Dunhall Pharms., Inc. v. Discus Dental, Inc.*, 994 F. Supp. 1202, 1204 (C.D. Cal. 1998)).

390. *XYZ Corp. v. United States (In re Keeper of the Records of XYZ Corp.)*, 348 F.3d 16, 23 (1st Cir. 2003); *see also United States v. Doe (In re Grand Jury Proceedings)*, 219 F.3d 175, 183 (2d Cir. 2000) (“Whether fairness requires disclosure has been decided by the courts on a case-by-case basis, and depends primarily on the specific context in which the privilege is asserted.”).

391. *See, e.g., Greater Newburyport Clamshell All. v. Pub. Serv. Co.*, 838 F.2d 13, 22 (1st Cir. 1988) (holding that the client need reveal only information “for which defendants have so far shown a true need and without which they may be unfairly prejudiced in their defense”); *cf. United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991) (“[T]he attorney-client privilege cannot at once be used as a shield and a sword.”).

392. *Bittaker v. Woodford*, 331 F.3d 715, 720 (9th Cir. 2003), *cited in In re Lott*, 424 F.3d 446, 453 (6th Cir. 2005).

393. *Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Court for Dist. of Mont.*, 408 F.3d 1142, 1149 (9th Cir. 2005).

394. *Id.*; *see also, e.g., Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615, 638 (D. Nev. 2013) (citing the four *Burlington* factors); *Universal City Dev. Partners, Ltd. v. Ride & Show Eng’g, Inc.*, 230 F.R.D. 688, 698 (M.D. Fla. 2005) (adopting *Burlington*’s “thoughtful analysis”).

Three more elements have been mined as this technique has become entrenched within and without the Ninth Circuit: “[(5)] the prejudice to the party seeking discovery; [(6)] the flagrancy of the violation; and [(7)] whether the responding party made a good faith effort to comply with the discovery rules.”³⁹⁵ In the balancing ratified by this case law, even though providing the particulars typically contained in a privilege log is characterized as “presumptively sufficient” and boilerplate as “presumptively insufficient,” no “mechanistic determination” has ever been commended.³⁹⁶ Instead, courts have reiterated their wariness of both steely rules and standards “too amorphous to provide practical guidance to litigants and [certain to] expose[] parties to greater chance of inadvertently waiving privileges.”³⁹⁷ For all this fluidity, two constants can be spotted within this area of law. First, under *Burlington*, no waiver occurs “when the court is provided enough specificity to evaluate whether each document is protected.”³⁹⁸ Second, per this same opinion, privileges can be waived, whether Rule 33 or Rule 34 is in play,³⁹⁹ for even as the law’s many privileges retain their importance,⁴⁰⁰ they conflict with the rules’ lenient discovery policy.⁴⁰¹

ii. *Initial Complications*

Adhering to this precedent, the finding of waiver in cases involving substantive boilerplate invites two complications. First, numerous courts hold that “a party cannot ‘inadvertently’ waive a privilege, much less have it” waived by an agent’s oversight.⁴⁰² This fact, when conjoined with a recognition that substantive boilerplate is habitually used and historically common,

395. *Casale v. Nationwide Children’s Hosp.*, No. 2:11-cv-1124, 2014 U.S. Dist. LEXIS 42548, at *24, 2014 WL 1308748, at *8 (S.D. Ohio Mar. 28, 2014).

396. *Burlington*, 408 F.3d at 1149; *see also, e.g., Bullion Monarch Mining, Inc. v. Newmont USA Ltd.*, 271 F.R.D. 643, 647–48 (D. Nev. 2010) (quoting *Burlington*, 408 F.3d at 1149); *Terrell v. OTS, Inc.*, No. 1:09-cv-626-RWS, 2011 U.S. Dist. LEXIS 24270, at *3–4, 2011 WL 864501, at *1 (N.D. Ga. Mar. 9, 2011) (same).

397. *Universal City Dev. Partners, Ltd.*, 230 F.R.D. at 698 (as to Rule 45’s reasonable time standard).

398. *United States v. Ary*, 518 F.3d 775, 784 (10th Cir. 2008).

399. *See, e.g., Broom, Clarkson, Lanphier & Yamamoto v. Kountze*, No. 8:14CV206, 2015 U.S. Dist. LEXIS 157449, at *25–26, 2015 WL 7302226, at *7 (D. Neb. Nov. 18, 2015); *SEC v. ARVCO Capital Research, LLC*, 3:12-cv-00221-MMD-WGC, 2014 U.S. Dist. LEXIS 145460, at *31–32, 2014 WL 5106100, at *12 (D. Nev. Oct. 10, 2014).

400. *See, e.g., ROGER C. PARK, TRIAL OBJECTIONS HANDBOOK* § 5 (2d ed. 2015) (discussing the elements of various privileges); EDWARD J. IMWINKELRIED, *THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES* § 5 (2015) (exploring their rationales).

401. *See, e.g., STMicroelectronics, Inc. v. Motorola, Inc.*, 308 F. Supp. 2d 754, 756 (E.D. Tex. 2004); *In re Burlington N., Inc.*, 822 F.2d 518, 524 (5th Cir. 1987).

402. John T. Hudley, *Inadvertent Waiver of Evidentiary Privileges: Can Reformulating the Issue Lead to More Sensible Decisions?*, 19 S. ILL. U. L.J. 263, 267–68, 268 nn.14–15

undermines waiver's enthusiasts. Second, and more significantly, the reflexive tendency to treat substantive boilerplate as leading to an automatic waiver ignores the courts' detailed and comprehensive approach to the finding of such a capitulation. Certainly, assuming a party has attempted to comply with Rule 26(b)'s technical requirements,⁴⁰³ neither conditional nor absolute substantive boilerplate intimates demonstrable bad faith or cavalier disregard of the Rule's clear commands if a privilege can be said to arguably exist.⁴⁰⁴ Whatever the merits of the strict boilerplate tactic, the waiver of evidentiary privileges has long required a more involved analysis, not a plain prohibition's recitation and application, as *Burlington* recognized and its successors have insisted. To hold otherwise is to ignore the courts' "particular[] reluctant[ce] to find waiver of privilege objections unless truly warranted because of the important policies served by the attorney-client privilege and work-product doctrine,"⁴⁰⁵ documents withheld on the basis of a privilege inherently different from things withheld for the sake of administrative convenience.⁴⁰⁶ Substantive objections, then, simply possess a dissimilar character, ennobled by time and theory.⁴⁰⁷

iii. *Rule 26*

Parties' discovery rights and obligations emanate from Rule 26.⁴⁰⁸ When courts and parties seek to regulate substantive boilerplate, this provision presents its own special problems. Two, one familiar and one peculiar, most menace.

(1995); see also Lawrence A. Steckman & Richard Granofsky, *The Assertion of Attorney-Client Privilege by Counsel in Legal Malpractice Cases: Policy, Privilege, and the Search for Truth in Cases Involving Implied Waiver*, 45 TORT TRIAL & INS. PRAC. L.J. 839, 851–61 (2009–10) (summarizing many key cases).

403. See *supra* Part II.B.1.

404. Indeed, for a court to even adjudicate the matter properly necessitates the profusion of briefing over discovery issues so disliked by parties, courts, and scholars. See Beckerman, *supra* note 4, at 550; cf. *DCP Midstream, LP v. Anadarko Petroleum Corp.*, 303 P.3d 1187, 1191 (Colo. 2013) (preferring the practical approach offered by the advisory committee's notes "because it avoids the possibility of additional litigation").

405. *Mills v. Iowa*, 285 F.R.D. 411, 413 (S.D. Iowa 2012).

406. See *D'Onofrio v. Borough of Seaside Park*, No. 09-6220 (AET), 2012 U.S. Dist. LEXIS 75651, at *31–33, 2012 WL 1949854, at *6–7 (D.N.J. May 30, 2012).

407. Arguably, to the extent privileges are viewed as substantive rights, they may not be abridged by any rules' extrapolation. See 28 U.S.C. § 2072 (2012); cf. *Shachmurov, Claims*, *supra* note 13, at 531–33.

408. FED. R. CIV. P. 26(b)(1).

First, like Rule 34 and unlike Rule 33,⁴⁰⁹ Rule 26 contains no general waiver provision.⁴¹⁰ Once more, the advisory committee contemplated that privileges could be waived.⁴¹¹ Again, however, it chose not to adjoin the specific reference to waiver embedded in Rule 33(b)(4) into the rule setting forth discovery's expansive parameters. Consequently, as still holds true with regards to Rule 37,⁴¹² reference to the punishment often sought in the boilerplate cases—waiver—has been omitted in the only rule which addresses the proper method for withholding privileged but otherwise discoverable information. Concurrently, waiver has been expressly identified as a possible price for disobedience in a more tapered rule pertaining to only one specific instrument, i.e. interrogatories under Rule 33. A canon already discussed now rears its head once more: “When a statute [or rule] limits a thing to be done in a particular mode, it includes the negative of any other mode,”⁴¹³ as it is “highly improbable that” a drafter, whether Congress or an advisory committee, “absent mindedly forgot to mention an intended” sanction “[i]n view of . . . [other] express provisions for enforc[ement].”⁴¹⁴ And, regardless of the committee's intent and the rule's purpose, Rule 26's text, including its presumptively deliberate omission of waiver as a sanction for discovery violations, generally must decide this dispute.⁴¹⁵ Heeding this logic, which unfortunately pits commentary versus language,⁴¹⁶ an automatic waiver rule requires an approved text's rewriting, a task beyond the courts' finite competence.⁴¹⁷

More subtle, a second defect enfeebles the strict approach to waiver's exploitation in cases involving substantive boilerplate. In its first clause, Rule

409. See *supra* Part IV.B.1.i.

410. FED. R. CIV. P. 26(b)(1); see also *Ritacca v. Abbott Labs.*, 203 F.R.D. 332, 334–35 (N.D. Ill. 2001) (discussing the law of waiver).

411. FED. R. CIV. P. 26 advisory committee's note to 1993 amendment (“To withhold materials without [providing notice as described in Rule 26(b)(5)] is contrary to the rule, subjects the party to sanctions under Rule 37(b)(2), and may be viewed as a waiver of the privilege or protection.”); see, e.g., *Anderson v. Hale*, 202 F.R.D. 548, 553 (N.D. Ill. 2001) (“Although this result is not mandated by the [r]ules, the Advisory Committee contemplated the sanction.”).

412. See *supra* Part IV.B.1.ii.

413. *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (quoting *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929)).

414. *Transamerica Mortg. Advisors (Tama) v. Lewis*, 444 U.S. 11, 20 (1979) (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 742 (1979)).

415. See *supra* Part IV.A.

416. Cf. *Design Strategy, Inc. v. Davis*, 469 F.3d 284, 298 (2d Cir. 2006) (refusing to honor an advisory committee's “characterization” of a rule as it could not “be squared with . . . [its] plain language”); see also *Martin v. Winn-Dixie Louisiana, Inc.*, 132 F. Supp. 3d 794, 808–09 (M.D. La. Sept. 2015) (adhering to the same course).

417. Shachmurove, *Claims*, *supra* note 13, at 528–34.

26(b)(1) provides: “Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case”⁴¹⁸ Thus, by its own terms, Rule 26 classifies privileged material as non-discoverable, and while improperly designated material cannot qualify, verifiably privileged material necessarily does so.⁴¹⁹ The failure to comply with Rule 26(b)(5) by the provision of a minimally sufficient privilege log may rightly entitle the propounding party to damages. But it cannot, if the text of Rule 26(b)(1) marks out discovery's outer limits, gift that party with access to privileged documents. Ineluctably tagged, such materials have been expressly removed from Rule 26(b)(1)'s expansive, but still definite, ambit in the first instance.⁴²⁰ Accordingly, to order waiver of any and all valid objections upon a party's use of substantive boilerplate affords the proponent with a cache of documents to which it is not entitled under the rules' unambiguous text. A lawyer's improper privilege log or imprecise description does not, in this sense, denude matter of its privileged fiber. Assuming the relevant predicates for a specific shield's invocation have been satisfied, the documents at issue are innately privileged, their quiddity not extirpated by a lawyer's carelessness. Following this reasoning, substantive boilerplate's expenditure should not lead to waiver as to a valid remonstrance under Rule 26, as the rule itself authorizes discovery of no more than non-privileged matters. Any other result embraces a second asymmetry,⁴²¹ one not in derogation of a practical evenhandedness but rather impliedly forbidden by discovery's delimited range. However unsatisfactory a respondent's conduct may strike an observer, Rule 26(b)(1) sets legitimately privileged material beyond an opponent's offended grasp. Albeit wasteful, that privilege's assertion via empty boilerplate cannot alter this literal verity.

4. Summary

The font of much frustration, each form of boilerplate has been the subject of a uniquely defective exegesis. Three errors taint the approach to all forms of boilerplate: Rule 34's dearth of any waiver clause, Rule 37's persistent ambiguity, and the asymmetrical effect of any pro-waiver presumption.

418. FED. R. CIV. P. 26(b)(1); *see also supra* Part II.B.1.

419. *See ReedHycalog UK, Ltd. v. Baker Hughes Oilfield Operations Inc.*, 251 F.R.D. 238, 241 (E.D. Tex. 2008) (“The Court adheres to a policy of liberal discovery, but where a claim of privilege renders an item undiscoverable, the Court will allow a party to withhold that item.”).

420. Various comments to the new Rule 34 emphasize this point. ADVISORY COMM. ON CIVIL RULES, *supra* note 63, at 166. Others, naturally, disagree. ADVISORY COMM. ON CIVIL RULES, *supra* note 63, at 166.

421. *See supra* Part IV.B.1.iii.

Rule 34's vagueness applies only to the judicial distaste for conditional boilerplate, whether administrative or substantive. The final two objections—the high bar to cross for most privileges to be waived and Rule 26's own textual constraints—can be made only as to the courts' ordinary treatment of substantive boilerplate. Like in much of law, the cogency of these grounds is disputable. Even so, a parsing of the rules reveals a cardinal truth: as written this corpus neither countenances indiscriminate boilerplate nor compels waiver's finding upon boilerplate's outlay in responses to Rule 34 requests.

V. RECOMMENDATIONS

Nevertheless, the concerns about such objections are well-founded, if overblown.⁴²² In the interest of impeding their proliferation, the rules need only be changed a little for the weakness discussed in this Article to be addressed. In fact, the addition of a handful of clauses will serve to place the courts' authority to rein in this excess on a firmer textual footing than the rules presently provide. Inchoate and incomplete, a beginning and no more, these six may do⁴²³:

Relevant Rule	Proposed Addition
Rule 26(b)(1)	<ul style="list-style-type: none"> • After “nonprivileged,” input language indicating that even privileged matters may be embraced by Rule 26’s discoverability standard as a consequence of a party’s actions. <p><i>Proposed Addition:</i> “Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter <u>(or, if originally privileged, over which privilege has been waived, purposely or inad-</u></p>

422. See ADVISORY COMM. ON CIVIL RULES, *supra* note 63, at 165–69.

423. The below chart quotes extensively from various rules' text. In the interest of readability and presentation, however, no pincites will be used

Relevant Rule	Proposed Addition
	<p><u>vertently</u>), that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.”</p>
Rule 26(b)(2)(C)	<ul style="list-style-type: none"> • Add language allowing court to limit any discovery not specifically made, a restriction similar to that added to Rule 34(b)(2)(C) on December 1, 2015, and encompassing respondents only. Subsection iii would become iv, serving as the ultimate safety valve. <p>Proposed Addition: “. . . (iii) <u>the proposed discovery has not been requested with reasonable specificity</u> . . .”</p>
Rule 34(b)(2)(C)	<ul style="list-style-type: none"> • Add the waiver clause in Rule 33(b)(4) as a third sentence to Rule 34(b)(2)(C). <p>Proposed Addition: “<u>Any ground not stated in a timely objection is waived unless the court, for good</u></p>

Relevant Rule	Proposed Addition
	<p><u>cause, excuses the failure.</u>”</p> <ul style="list-style-type: none"> • Add a specific prohibition on conditional objections as a second addition after the insertion of foregoing clause. <p>Proposed Addition: “<u>Any response made subject to an objection waives any and all valid objections related to that request.</u>”</p>
Rule 37(c)(1)	<ul style="list-style-type: none"> • Add “waiver” to the list of sanctions in Rule 37(c)(1) and specify that this sanction is intended to be redundant. Subsection iii would become iv. <p>Proposed Addition: “. . . (iii) <u>may find any and all valid objections to have been waived, whether or not allowed for expressly in the relevant rule . . .</u>”</p>
Rule 37(d)	<ul style="list-style-type: none"> • Clarify the scope of Rule 37(d) by adding “. . . to production of document” to its current title: <p>Proposed Addition: “Party’s Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, Respond to a Request for Inspection, <u>or Production of Documents.</u>”</p>

VI. CONCLUSION

Wedded to an ideal, the rules' drafters built an open network for the delineation of issues and the distillation of facts.⁴²⁴ Even as initially disregarded fears were realized with maddening frequency, this image retained its hold. More information was sought; more data was withheld; and the rules were toyed with in the hopes of striking equilibrium. In time, boilerplate objections to interrogatories and requests for production of documents became the reformers' focus, their indiscriminate use seen as anathema to the realization of an already dimmed aspiration. Naturally, resting on sundry provisions and embedded purposes, courts would begin to construe them as automatic waivers and strike them down as tantamount to unpardonable silence (at best) or malicious obstruction (at worst). In this response, the shadows of Pound and Clark can be glimpsed.

In the process, however, even after the recent amendments to Rules 26 and 34, gaps in the controlling texts have gone unnoticed. That Rule 34 contains no waiver clause, Rule 37 boosts ominous silences, a certain unobvious asymmetry typifies discovery, Rule 34 only vaguely hints at the impropriety of conditional boilerplate, and Rule 26 places privileged matter beyond discovery's lawful ken—all these pestering bugs have lain unaddressed. Once they are considered fully, as modern tenets adjure, serious doubts about the prevailing approach to policing boilerplate responses to Rule 34 requests via a waiver's imposition grow in strength. The majority's goal may be commendable, but it is not yet clearly supportable. Rather, if such castigation is to be fairly meted out without offense to the law's interpretive and procedural constraints, Rule 34's reform remains undone, either "petty tinkering"⁴²⁵ or

424. See *supra* Part II.B.

425. Frank F. Flegal, *Discovery Abuse: Causes, Effects, and Reform*, 3 REV. LITIG. 1, 38 (1982) (quoting Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395 (1906)).

“comprehensive reform” required still,⁴²⁶ as an apt creed compels indeed.⁴²⁷
With due precaution, by all means.⁴²⁸

426. History may then come full circle, from Field to Pound to Field once more. See Subrin, *Equity*, *supra* note 3, at 947–48 (observing that Pound, one of the inspirational figures behind the rules, “suggested less definition and more judicial discretion”); see also Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 772-75 (1998) (discussing the 1993 amendments to the Rules and how they represented an attempt to seemingly limit costly discretion). Of course, one may disagree with such changes and find the whole process both misdirected and misbegotten. See, e.g., Jeffrey Stempel, *Refocusing Away from Rules Reform and Devoting More Attention to the Deciders*, 87 DENV. U. L. REV. 335, 346–48 (2009–10) (discussing the varied and contradictory responses to the Rules’ amendments over the last twenty years); Stempel, *supra* note 40, at 532 (“[T]here has been a significant shrinkage in a litigant’s ability to obtain information, which tends to advantage the disputants who would prefer to provide less information[, post-1976]. For the most part, this group is comprised of defendants.”); Stephen N. Subrin, *Teaching Civil Procedure While You Watch It Disintegrate*, 59 BROOK. L. REV. 1155, 1156–57 (1993) (denouncing many post-1970 changes to the rules for erring too greatly in the direction of restricting claims and reducing adjudication in favor of encouraging settlement). After all, cases with larger stakes are bound to have higher costs, and their expensiveness is the product of reality rather than a defective procedural system. See Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 786 (2010) (noting that an oft-cited study by the Federal Judicial Center had actually “found that discovery and overall litigation costs were largely proportionate to stakes, and that the stakes in a case were the single best predictor of overall cost”). *But see*, e.g., J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713, 1731 (2012) (“Asymmetrical cost imposition is usually most pronounced during the discovery process. In general, access to discovery is granted without limitation once a motion to dismiss is denied, enabling claimants to impose significant, asymmetric production costs on the opposing party.”); Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 64 (2010) (“Though it is not clear whether high discovery costs are really the wide-scale problem some believe, at least some discovery is disproportionately high, and both unfairness and inefficiency result from subjecting defendants to high discovery costs, which they generally must bear, just to get summary judgment on a frivolous claim that never had a chance in the first place.”).

427. Jerome Lederer, *Mechanic’s Creed*, FED. AVIATION ADMIN., <https://www.faa.gov/files/gslac/library/documents/2013/Feb/74231/MechanicsCreed.pdf> (last visited on Dec. 23, 2016).

428. See ALDO LEOPOLD, *Conservation*, in ROUND RIVER 145–46 (1993) (“To keep every cog and wheel is the first precaution of intelligent tinkering.”).