

ANSWERING DISCOVERY “SUBJECT TO” OBJECTIONS: LESSONS FROM FLORIDA’S DISTRICT COURTS

R. Jason Richards*

I. INTRODUCTION

Every lawyer knows that legal objections can be waived, whether intentionally or unintentionally. The most obvious example of an intentional waiver is where a party knowingly decides not to lodge an objection. But unintentional waivers of objections are not uncommon, and some of the most detrimental (and costly) of those can arise during the discovery phase of litigation. For instance, the mere failure to timely respond to discovery requests can result in all objections being lost. Asserting “general objections” is typically insufficient to preserve specific objections. And the inadvertent disclosure of privileged information or work-product material has been held to constitute a waiver. While most practitioners are well aware of these practice pitfalls, few realize that one of the most commonly asserted discovery objections can also lead to a finding of waiver.

Most practitioners at one time or another have responded to discovery requests “subject to” or “without waiving” their objections. But these types of responses have come under recent scrutiny, most notably among Florida’s district courts. Florida’s federal bench is not alone in its criticism, however. Other courts, both state and federal, have likewise called the practice of reserving objections “misleading”¹ at best and “essentially worthless” and “without legitimate purpose or effect”² at worst. Legal commentators have also criticized this practice, calling it “manifestly improper.”³ Notwithstanding such harsh criticism, many practitioners

* R. Jason Richards is a partner in the firm of Aylstock, Witkin, Kreis & Overholtz in Pensacola, Florida. B.A., B.A., University of Alabama at Birmingham; M.A., University of Colorado; J.D., John Marshall Law School; LL.M., DePaul University of College of Law.

1. Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 858 P.2d 1054, 1080–81 (Wash. 1993).
2. VNA Plus, Inc. v. Apria Healthcare Grp., Inc., No. Civ.A. 98-2138-KHV, 1999 WL 386949, at *5 (D. Kan. June 8, 1999).
3. John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 554 (2000).

continue to answer discovery while purporting to reserve objections. The question is “why?”

Some practitioners may simply be using old “form” objections from years ago. Others may have concerns that their interrogatory answers or production responses are incomplete, so failing to reserve objections may constitute a waiver of any legitimate objection that may be asserted once additional information is uncovered. Still other commentators believe that practitioners use this tactic for more sinister purposes—like obfuscation—to leave the opposing counsel uncertain as to whether an answer or production is complete and potentially obscuring harmful information about their client. These commentators also contend that such evasive responses often go unpunished “so long as the responding party does not ignore a discovery request or totally fail to respond.”⁴ This is because the opponent, absent resolution through the mandatory meet-and-confer process, must first undertake the time and expense of filing a motion to compel and then obtain a favorable ruling.⁵ Even then, however, many courts do not consider such tactics particularly egregious and permit the responding party to file a supplemental response before running the risk of any serious repercussions.⁶

Regardless of motivation, practitioners should be aware that Florida’s federal courts have begun to look unfavorably upon answering discovery “subject to” or “without waiving” objections. These federal courts opine that, contrary to their intended purpose, qualifying discovery responses in this way preserves nothing, wastes the time and resources of the parties and the court, and leaves the requesting party in the dark as to whether the opposing party has fully answered the discovery request. Although this article is intended to highlight recent Florida federal court decisions on this issue, it bears mentioning that there appear to be no reported Florida appellate court decisions directly critical of this practice.⁷ The author would simply remind Florida practitioners that Florida’s Rules of Civil Procedure are modeled after their Federal counterpart.⁸

4. *Id.*

5. *Id.*

6. *Id.*

7. Compare Fla. R. Civ. P. 1.340(a) with Fed. R. Civ. P. 33(b).

8. “Because the Florida Rules of Civil Procedure are modeled after the Federal Rules of Civil Procedure, federal decisions are highly persuasive in ascertaining the intent and operative effect of various provisions of the rules.” *City of Jacksonville v. Rodriguez*, 851 So. 2d 280, 283 n.3 (Fla. Dist. Ct. App. 2003) (quoting *Wilson v. Clark*, 414 So. 2d 526, 531 (Fl. Dist. Ct. App. 1982)).

II. PLACING THE FEDERAL RULES IN PERSPECTIVE

Rules 33 and 34 of the Federal Rules of Civil Procedure are designed to allow one party to obtain information from the other party for use at trial.⁹ Liberal discovery is the rule rather than the exception, as each party is entitled to be informed as to the burdens each will have to meet at trial. The rules are also aimed at avoiding the gamesmanship that often accompanies attempts to gather this information from the opposing party. As the Supreme Court observed more than 50 years ago, the goal of the liberal federal discovery rules is to “make a trial less a game of blind man’s bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.”¹⁰

Between 1970 and 1993, if a party objected to an interrogatory she could object in lieu of an answer.¹¹ This allowed the party to avoid providing an answer at all, even to the portions of the interrogatory that were not objectionable. To the extent an objection was followed by an answer, courts deemed the objection waived: “Whenever an answer accompanies an objection, the objection is deemed waived, and the answer, if responsive, stands.”¹²

But authorizing a party to object in lieu of an answer created unforeseen problems. Because few interrogatories are perfectly phrased, many practitioners would solely rely on their objections to avoid answering. In an effort to prevent stonewalling, Rule 33 was amended in 1993 to clarify the duty of a party to answer. The amended version (which reads similarly today)¹³ provides that the responding party must fully answer to the extent the interrogatory is not objected to.

More than fifteen years later, however, this amendment has failed to achieve its desired result in at least in one important respect. Experienced practitioners still routinely respond to discovery requests “subject to” or “without waiving” objections. The rationale most often asserted for reserving objections is to protect against the possibility that any objection not made will be deemed waived. This issue usually shows up where interrogatory responses are incomplete or discovery is ongoing.

The problems with these rationales, however, are twofold. First, it is insufficient for a party to answer discovery “subject to” or “without

9. See Fed. R. Civ. P. 33-34.

10. United States v. Proctor & Gamble Co., 356 U.S. 677, 682 (1958).

11. Fed. R. Civ. P. 33(b)(1) advisory committee’s note from 1993 amendments.

12. Meese v. Eaton Mfg. Co., 35 F.R.D. 162, 166 (N.D. Ohio 1964).

13. Fed. R. Civ. P. 33(b)(3). The current version of the Rule provides: “Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath.” *Id.*

waiving” objections on the basis that she must conduct additional investigation to answer an interrogatory or because discovery is ongoing. This is because a responding party has an obligation to answer discovery with whatever information she then possesses. She may later supplement her responses if necessary, as required under Federal Rule of Civil Procedure 26(e).¹⁴ As stated by one district court:

[An] objection that “discovery is ongoing” is not a valid objection. The Court is aware of no rule or case recognizing such a blanket objection. To the extent Plaintiff is concerned that its answer to this interrogatory might change during the course of discovery, then Plaintiff can, and in fact, may have a duty to, supplement its interrogatory answer.¹⁵

Second, and perhaps more importantly, “[t]here is no authority in the Federal Rules of Civil Procedure for reserving objections.”¹⁶ Unlike deposition questions, which are intended to be answered “subject to” objections,¹⁷ the same exception does not apply to interrogatories or production requests.¹⁸ “Parties have a duty either to answer discovery or object to it.”¹⁹ This is not to say that a party may not object to a portion of discovery and also provide an answer to the non-objectionable portion. It simply means that an objecting party cannot have it both ways.

The discovery rules require that all grounds for an objection be stated “with specificity.”²⁰ And Rule 37 provides that an “evasive or incomplete” discovery response “is to be treated as a failure to disclose, answer, or respond.”²¹ Common sense would seem to indicate that responding to

14. Fed. R. Civ. P. 26(e) provides:

A party is under a duty seasonably to amend a prior response to an interrogatory . . . if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

See also *Stabilus, Div. of Fichtel & Sachs Indus., Inc. v. Haynsworth, Baldwin, Johnson & Greaves, P.A.*, 144 F.R.D. 258, 264 (E.D. Pa. 1992).

15. *DIRECTV, Inc. v. Puccinelli*, 224 F.R.D. 677, 689 (D. Kan. 2004) (citing Fed. R. Civ. P. 26(e)(2)).

16. *Jones v. Forrest City Grocery, Inc.*, No. 4:06CV00944-WRW, 2007 WL 841676, at *1 (E.D. Ark. Mar. 16, 2007). *See also* *Casson Constr. Co., Inc. v. Armco Steel Corp.*, 91 F.R.D. 376, 378-79 (D. Kan. 1980) (“There is no provision in the Federal Rules for preserving objections.”).

17. *See* Fed. R. Civ. P. 30(c).

18. *Beckerman, supra* note 3, at 553-54. Furthermore, providing discovery does not waive objections as to the admissibility of such evidence at trial. *VNA Plus, Inc. v. Apria Healthcare Grp., Inc.*, No. Civ.A. 98-2138-KHV, 1999 WL 386949, at *5 (D. Kan. June 8, 1999).

19. *Id.* *See also* Miles Davis, *One Judge's Approach to the Problem of Discovery Abuse in Civil Cases*, THE SUMMATION, Oct. 2007, at 7.

20. Fed. R. Civ. P. 33(b)(3).

21. Fed. R. Civ. P. 37(a)(4).

discovery requests while reserving objections constitutes an “evasive or incomplete” response in that it “hides the ball” as to what information is being provided and what information is being withheld.²² Of course, the requesting party could seek clarification from the responding party as to whether information is being withheld based on the reservation of objections. But placing such a burden on the requesting party proves the point that the conditional response is “evasive or incomplete” to begin with, and thus, in violation of Rule 37. Requesting parties should not be expected to guess which discovery responses are complete and which responses are not. The burden of providing explicit, responsive, complete, and candid responses rests with the responding party.²³

Thus, in short, while the amended rules require that a party must answer discovery to the extent not objected to, the rules do not authorize a party to condition its responses upon its objections. If a party does this, the requesting party is arguably justified in ignoring those objections when they are followed by a responsive answer.²⁴ Florida’s federal courts have recently begun to acknowledge as much. As the Southern District of Florida reminded adversaries in an opinion issued in 2008:

The Parties shall not recite a formulaic objection followed by an answer to the request. It has become common practice for a Party to object on the basis of any of the above reasons, and then state that “notwithstanding the above,” the Party will respond to the discovery request, subject to or without waiving such objection. Such an objection and answer preserves nothing and serves only to waste the time and resources of both the Parties and the Court. Further, 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.²⁵

The Middle District of Florida recently echoed these sentiments:

22. *Athridge v. Aetna Cas. & Sur. Co.*, 184 F.R.D. 181, 190 (D.D.C. 1998).

23. *Hansel v. Shell Oil Corp.*, 169 F.R.D. 303, 305 (E.D. Pa. 1996) (“Parties must provide true, explicit, responsive, complete, and candid answers to interrogatories.” (citing Fed. R. Civ. P. 33(b)(1))).

24. *Traxler v. Ford Motor Co.*, 576 N.W.2d 398, 401 (Mich. Ct. App. 1998).

25. *Consumer Elec. Ass’n v. Compras and Buys Magazine, Inc.*, No. 08-21085-CIV, 2008 WL 4327253, at *2 (S.D. Fla. Sept.18, 2008).

[I]t is common practice for a party to assert boilerplate objections and then state that “notwithstanding the above,” the party will respond to the discovery request, “subject to or without waiving the objection.” Such an objection and answer preserves nothing and wastes the time and resources of the parties and the court. Further, this practice leaves the requesting party uncertain as to whether the opposing party has fully answered its request.²⁶

The Northern District of Florida has similarly recognized that “[e]xcept for inadvertent disclosures, a party cannot produce something without waiving the objection. Worse, this kind of equivocal response to discovery leaves the opposing party in the dark as to whether something unidentified has been withheld.”²⁷

The point to be taken away from these opinions is this: If a responding party wishes to answer certain interrogatories while maintaining an objection, there is a specific protocol to follow, which does not include responding “subject to” or “without waiving” objections. Instead, the responding party should either expressly (i) answer the interrogatory or (ii) state that the answer being provided is only in response to that portion of the interrogatory for which no objection has been asserted.²⁸ The Advisory Committee Notes for the 1993 amendments to Rule 33 provides the following illustration:

If, for example, an interrogatory seeking information about numerous facilities or products is deemed objectionable, but an interrogatory seeking information about a lesser number of facilities or products would not have been objectionable, the interrogatory should be answered with respect to the latter even though an objection is raised as to the balance of the facilities or products.²⁹

The same rules apply for Rule 34 requests, as noted in the Advisory Committee Notes to the 1993 amendment: “[T]he rule is modified to make clear that, if a request for production is objectionable only in part, production should be afforded with respect to the unobjectionable

26. *Martin v. Zale Del. Inc.*, No. 8:08-CV-47-T-27EAJ, 2008 WL 5255555, at *2 (M.D. Fla. Dec. 15, 2008) (citation omitted) (citing ABA CIVIL DISCOVERY STANDARDS 12 cmt. at 24 (2004), available at <http://www.abanet.org/litigation/discoverystandards/2004civildiscoverystandards.pdf>).

27. *See Myers v. Goldco, Inc.*, No. 4:08cv8-RH/WCS, 2008 WL 1995131, at *1 (N.D. Fla. May 6, 2008).

28. ABA CIVIL DISCOVERY STANDARDS 7 cmt. at 18.

29. Fed. R. Civ. P. 33(b)(1) advisory committee’s note from the 1993 amendments.

portions.”³⁰ Consistent with the spirit of this amendment, the Northern District of Florida has likewise admonished those appearing before its court as follows: “[T]o the extent that material [is] produced ‘subject to’ or ‘without waiving’ an objection, [parties] should not expect the objection to be sustained by this court.”³¹ In responding to requests for production, then, the responding party should either state that (i) all requested documents are being produced or (ii) the only documents being produced “are those to which the stated objection does not apply.”³²

III. THE THREAT OF SANCTIONS

Not only can the practice of reserving objections result in a waiver of objections and possibly the imposition of attorney’s fees if the motion to compel is granted, under certain circumstances it can also constitute a violation of the discovery rules for the attorney who signs the responses.³³ Pursuant to Rule 26(g), an attorney’s signature on a discovery response constitutes a certificate that to the best of the signer’s knowledge after reasonable inquiry, the response is complete as of the time it is made. The Advisory Committee Notes for Rule 26 explain further the duty imposed by the Rule’s provisions:

Rule 26(g) 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. In addition, Rule 26(g) is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions. The subdivision provides a deterrent to both excessive discovery and evasion by imposing a certification requirement that obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection. The term “response” includes answers to interrogatories and to requests to admit as well as responses to production requests.³⁴

Thus, if the responding party is found to be intentionally shielding otherwise discoverable information, she can be found to be in violation of this rule.

30. *Id.*

31. *Mullins v. Encore Senior Living II, LLC*, No. 3:07cv325/WS/EMT, 2007 WL 4098851, at *1 (N.D. Fla. Nov. 16, 2007).

32. ABA CIVIL DISCOVERY STANDARDS 12 cmt at 24. *See also* *Martin v. Zale Dela. Inc.*, No. 8:08-CV-47-T-27EAJ, 2008 WL 5255555, at *2 (M.D. Fla. Dec. 15, 2008).

33. *See* *Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 858 P.2d 1054 (Wash. 1993).

34. Fed. R. Civ. P. 26 advisory committee’s note from 1993 amendments.

Perhaps the best example of such a violation occurring in practice is the case of *Washington State Physicians Insurance Exchange & Ass'n v. Fisons*.³⁵ In this case, the defendant objected to plaintiff's production request on numerous grounds, but agreed to produce responsive documents "without waiver of these objections and subject to these objections."³⁶ After production, plaintiff discovered that various "smoking gun" documents had not been produced.³⁷ Upon review, the court found the defendant's discovery objections "misleading," warranting sanctions.³⁸ "If the discovery rules are to be effective," then the practice of reserving objections in response to discovery requests must be rejected, said the court.³⁹

Although the *Washington State Physicians Insurance Exchange* case dates back to the adoption of the 1993 amendments themselves, it appears that little has changed in the way of serious reform. In 2004, the American Bar Association disparaged what it perceived as the uncontrolled escalation of discovery abuses, noting that "a major problem is the perception by counsel that judges are unwilling to resolve discovery disputes and are reluctant to impose meaningful sanctions for discovery violations."⁴⁰ Consistent with the objectives of the rules—to provide for speedy, efficient and fair litigation—practitioners have likewise demanded change.⁴¹ Practitioners recognize that if a party's right to obtain relevant and meaningful discovery is to be taken seriously, courts must begin to impose sanctions in the event serious discovery abuses are found to have taken place.⁴² Without the fear of sanctions, it is likely that these practices will continue, resulting in more unnecessary motion practice and wasted time. As a result, the stress on our already overcrowded and overburdened court system and the concept of "fair play" embodied in the discovery rules demand action.

IV. CONCLUSION

Practitioners should no longer expect that the practice of responding to discovery requests "subject to" or "without waiving" objections will be

35. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 858 P.2d 1054 (Wash. 1993).

36. *Id.* at 1081.

37. *Id.* at 1083.

38. *Id.* at 1080–81.

39. *Id.* at 1083.

40. ABA CIVIL DISCOVERY STANDARDS 3 cmt. at 11 (2004), available at <http://www.abanet.org/litigation/discoverystandards/2004civildiscoverystandards.pdf>.

41. Mark Kosieradzki & Kara Rahimi, *Keep Discovery Civil*, 44 TRIAL 30, 34 (2008).

42. *Id.*

sustained by Florida’s federal courts; instead, the expectation should be that such responses will result in a finding that the responding party has waived its objections, and may even be liable for attorney’s fees. And in the event a party has used such objections to intentionally shield harmful information that is otherwise discoverable, sanctions will probably follow.

To be sure, there is little doubt that responding to discovery in such an equivocal manner serves only to confuse and frustrate the propounding party’s legitimate discovery efforts and the judiciary’s truth-seeking function. But changing the way in which many attorneys for years have responded to discovery will be a challenging undertaking. Old habits die hard. Established procedures are likely to be entrenched and to be continued. However, practitioners should not overlook the fact that Florida’s federal court judges are less and less inclined to countenance discovery responses that seem to obfuscate more than they inform. This is a positive step in the right direction—for both practitioners and the courts. It follows that the more forthright the discovery response, the more likely it is there will be a legitimate discovery dispute worthy of expending judicial resources as opposed to a wasteful game of blind man’s bluff.

