Focus On
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Document Production in Federal Litigation: Can You Redact for Nonresponsiveness?

LITIGATORS MANAGING DOCUMENT DISCOVERY IN THE FEDERAL COURTS OFTEN FACE THE TEMPTATION TO REDACT “NONRESPONSIVE” OR “IRRELEVANT” MATERIAL OUT OF PRODUCED COPIES. AN INCREASING NUMBER OF LITIGATORS APPEAR TO BE SUCumbing TO THIS TEMPTATION. BUT ARE SUCH “RESPONSIVENESS” REDACTIONS PERMISSIBLE? AND SHOULD THEY BE? AN ANALYSIS OF THE FEDERAL RULES OF CIVIL PROCEDURE AND THE EXISTING CASE LAW IN THE SECOND CIRCUIT SUGGESTS THAT THE PRACTICE OF REDACTING DOCUMENTS FOR RESPONSIVENESS IS IMPROPER. POLICY CONSIDERATIONS ALSO DISFAVOR THE PRACTICE.

In the ordinary course of responding to document requests counsel must locate and identify those documents that are fairly encompassed within the requests. Typically, unless those documents are subject to a claim of privilege, the documents are produced in their entirety to the adversary. But what if some information in responsive documents is irrelevant or outside the scope of the request? And what if you and the client would prefer that the adversary not see such information? Some litigants have chosen to produce versions of such otherwise discoverable documents redacted on the basis of “responsiveness.” Yet such redactions are not identified on a log or accompanied by any reference to authority justifying the deletions. The issue needs to be addressed head-on.

The threshold question is whether the Federal Rules of Civil Procedure provide any support for redacting a document on this basis. While the rules do not speak to this issue directly, Rule 26, which deals with “[d]iscovery scope and limits,” offers some guidance in four of its provisions. First, the scope of discovery under Rule 26(b)(1) is deliberately broad. It provides that “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense.” Importantly, it further provides that “[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” The overarching directive under Rule 26, then, is broad discovery of relevant matter.

Second, the definition of “document” under the Federal Rules is broad and encompassing and it does not seem to contemplate carving out portions of existing items on responsiveness grounds. In any event, document requests often will include an instruction to the effect that each “document” must be produced in its entirety without abbreviation, alteration, or expurgation. Nothing in the rules prohibits such an instruction or indicates that it need not be followed.

Third, the existing limitations on the broad directive of Rule 26, specifically, Rule 26(b)(2)(C), Rule 26(b)(5) and Rule 26(c), do not provide for the redaction of nonresponsive information from otherwise discoverable documents. Rule 26(b)(2)(C) is plainly inapplicable since it deals principally with limitations designed to protect against undue burden and expense. Additionally, it requires judicial intervention before it comes into play. The same is true for Rule 26(c), which provides that a party “may move for a protective order … and [t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” Under Rule 26(c)(1)(B), (D), a court may limit discovery by, among other things, “specifying terms, including time and place, for the disclosure or discovery” and “forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters.” So the only way Rule 26(c) would permit redaction for nonresponsiveness is if the court so ordered it.

Fourth, aside from seeking a redacting order from the court, the only basis in the rules for withholding discoverable information in response to a discovery request is by making a claim of privilege or work product immunity from discovery. Rule 26(b)(5) addresses the requirements that attach “[w]hen a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial preparation material.” Privilege and relevance are distinct and unrelated concepts. Nothing in the rules relating to materials immunized from production based on privilege has anything to do with how “irrelevant” matter should be treated. Significantly, Rule 26(b)(5) imposes a duty on the party withholding privileged information to describe the nature of the withheld information in a manner sufficient to “enable other parties to assess the claim.” No similar duty applies to information withheld for production due to a purported lack of relevance, perhaps because no recognized claim of “privilege” for nonresponsiveness exists.

Thus, in sum, the Federal Rules provide no explicit basis for redacting documents on responsiveness grounds. What, then, does the case law say? In the Second Circuit the guidelines are, surprisingly, less than completely clear. Several of the decisions where “non-
responsive” redactions were allowed do not discuss the rules; indeed, these cases contain little discussion and seem simply to condone the practice rather than expressly endorse it. Thus, these courts have allowed redactions of material on the basis of relevance without articulating any governing legal principle. For instance, in the context of a defendant’s motion to strike plaintiffs’ document requests, the court in Strategic Growth Int’l Inc. v. Remotemdx Inc. conducted an in camera review and, with little discussion, found that certain redactions concerned irrelevant material and “therefore, they may remain redacted.”5 Similarly the court in Lambert v. Chase Manhattan Bank N.A. allowed the redaction of “nonresponsive” information following in camera review without any accompanying discussion or analysis.4

Similarly, several of the decisions where “nonresponsive” redactions were not allowed do not discuss the courts’ reasoning.3 For example, the court in Anthropologie Inc. v. Forever 21 Inc. concluded without discussion that defendant’s redactions of “irrelevant material” appearing “in the midst of a string of [responsive] e-mail exchanges” would not be allowed and ordered defendant to produce the documents in unredacted form within seven days.6 And in U2 Home Entertainment Inc. v. Kylin TV Inc. the court rejected with little discussion defendant’s argument that they were “entitled to redact from concededly discoverable documents information that they contend is irrelevant and commercially sensitive.”7 The same result occurred in Howell v. City of New York where the court held that defendant could not redact “irrelevant” information from discoverable documents without seeking and obtaining a protective order under Rule 26(c)), and also in Brandwynne v. Combe Int’l Ltd. where redaction of board of director minutes to exclude irrelevant material was not permitted and the court declined to undertake in camera review of the documents in question.9 The obvious inference is that these rulings assume the Federal Rules simply do not justify the redactions.

In other cases, redaction was found incompatible with the adversary process insofar as it involves the constant exercise of subjective judgments—which would be unchallengeable by opposing counsel—about what is and what is not “responsive” to the discovery request.10 There exist no clear standards or rules to which the redactions would have to conform. Redactions of nonresponsive matter, particularly those that occur within a responsive email thread, deprive the reader of context and, indeed, if the redactions are extensive they may render the document incomprehensible. This is precisely the situation addressed in United States v. Davis, in which the court rejected defendant’s argument that it had a “unilateral right ... to redact from otherwise relevant documents and files all references, notations, entries, dates, names, paragraphs, sentences and even words, it deems irrelevant to the case,” and concluded that defendant’s redactions rendered the documents in question incoherent and deprived plaintiff “of its discovery rights in the action.”11 Similarly, in In re State Street Bank and Trust Co. Fixed Income Funds Investment Litigation the court disallowed redactions for nonresponsiveness and irrelevance in light of the existence of a protective order, adding that in any event “such redactions are generally unwise as [they] breed suspicions, and they may deprive the reader of context.”12

In a final category of cases dealing with this issue, the existence of constitutional and privacy concerns appear to have been operative factors. For example, in Schiller v. City of New York the court denied the city’s motion to compel production and allowed redaction of “irrelevant” information from certain otherwise discoverable meeting minutes.13 The case, however, involved an action against the government arising out of allegations of wrongful arrest and the parties resisting discovery invoked “the First Amendment guarantees of freedom of speech and freedom of association.”14 In this context, the court understandably tailored discovery in a manner that would balance the government’s entitlement to obtain the information with the relevant constitutional concerns associated with disclosing certain information to the government. A similar balancing exercise occurred in Davis v. City of New York where redactions were allowed because “the strong federal interest in protecting constitutional rights, which favors a lenient construction of the discovery rules in a Section 1983 action, do not mandate production of the requested documents in unredacted form because the unproduced and unredacted information is not relevant to the case.”15 The same point was made in Morrissey v. City of New York, also a federal civil rights action, in which the court allowed redactions on the ground of relevance but did so principally on the basis of law enforcement and official information privileges.16 Thus, in each of these cases there were important constitutional and privacy concerns at stake that distinguished the dispute from the ordinary run-of-the-mill civil litigation.

Because the cases that have allowed redactions on responsiveness grounds are either unreasoned or tied to constitutional concerns involving government litigants, the best interpretation of the case law is that the practice is not permitted in the ordinary case. Policy considerations may also be involved. First, reviewing and redacting documents line by line for responsiveness involves a granularity of review that in the typical litigation involving thousands (if not hundreds of thousands) of documents would be time-consuming and expensive without any corresponding benefit. Also, a line-by-line review for “responsiveness” of all e-mails falling within the scope of a document request in a given case would be not only inefficient, but also, as noted above, inconsistent with the spirit of a liberal discovery regime, in which judicial intervention is discouraged.

As mentioned above, another problem is the absence of agreed-upon standards for making such redactions. How much technically “nonresponsive” information is the adversary entitled to in order to have a proper context for the responsive information? For instance, in

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an employment discrimination case, imagine a string of e-mails among high-level executives at the defendant company in which there is both a discussion of plaintiff’s work performance and a series of off-color jokes on some extraneous, and say, politically sensitive topic. Depending on the exact language and scope of the document requests at issue, the jokes may not be literally “responsive.” Thus, if undertaking a line-by-line responsiveness review, defendant’s counsel might be inclined to redact them. But there should be little doubt that the material in question is critical to evaluating the overall context of the document, among other things. For starters, the executives’ behavior may say something about the work environment or company culture. As such, no redaction should occur. While an unlikely scenario, it illustrates the point: whether a particular sentence in an e-mail string is itself “responsive” to a document request is a highly subjective inquiry, and redacting documents on this basis is a process with a great potential for abuse, particularly in the absence of any enforceable standards for making such redactions or, by the same token, challenging them in court.

This leads to yet another policy reason why “responsiveness” redactions should not be permitted. The process has the same propensity to abuse as it does to being made the subject of litigation. Of course, court involvement in the discovery process is disfavored. See Advisory Committee Comment to Rule 26 (noting that the rules are “designed to encourage extrajudicial discovery with a minimum of court intervention.”) A regime or practice of endorsing nonresponsive redactions would appear to have a natural tendency to make such intervention the rule rather than the exception. Indeed, if nonresponsive redactions of documents are permitted, logic demands that other forms of discovery—photographs, sound and video recordings, inspection of accident scenes, etc.—also be subject to the equivalent of “redaction” on grounds of responsiveness. Such limitations may occur during jury trials but not at the discovery stage of a civil case.

While a court could always settle disputes by reviewing nonresponsive redactions on an in camera basis, such an approach seems as unwise as it is unnecessary. It is unwise because busy courts will not welcome the burden associated with the task of reviewing documents for “responsiveness” and making rulings at the discovery stage on a document-by-document basis. The inquiry is essentially a relevance inquiry, which goes to admissibility of the evidence, a question reserved for trial. And it is unnecessary because if there is a legitimate and compelling basis for the redactions the party seeking to protect certain “nonresponsive” information from disclosure may always seek a protective order under Rule 26(c). Indeed, in cases where such a protective order already exists, as in most complex federal litigations, there is unlikely to ever be a compelling basis for any redactions not based on privilege.

In conclusion, an analysis of the Federal Rules of Civil Procedure appears to provide no basis whatsoever for the practice of redacting documents on “responsiveness” or “relevance” grounds. While the case law in the Second Circuit is not uniform, the better-reasoned cases disallow the practice in the absence of unusual circumstances, a view that is supported by several policy considerations.

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Endnotes

1Rule 34 requires the production of “any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form.”

2Arguably, documents produced with “responsiveness” redactions constitute “an evasive or incomplete disclosure,” which is “treated as a failure to disclose, answer, or respond” under Fed. R. Civ. P. 37(a)(4), thus potentially subjecting the producing party to sanctions.


5Many of the cases speak in terms of “relevance” rather than “responsiveness.” Though the two concepts are not the same, courts have usually not undertaken to distinguish between them.


10This problem would be ameliorated if the documents were logged; however, since there is no “privilege” to redact on responsiveness grounds, the logging requirement of Rule 26(b)(5) does not apply.


14Id. at *3.
