THE MIDDLE GROUND

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President's Message

By Christopher R. Clifton
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Ever since Judge Tilley spoke at our fall meeting a few years ago, I have been intrigued by the history of our District. I was impressed by Judge Tilley's ability to recite the lineage of each of the Judges who have served the Middle District of North Carolina without a single note. As he pointed out, his speech was not based on the history he studied; it was based on the personal connection he has had with virtually every person to ever sit on the bench in The United States District Court for the Middle District of North Carolina (M.D.N.C.).

Our district was established on March the 2nd of 1927. During the eighty-seven year history of our existence, there have been only nineteen different US Attorneys. Even more amazing is that we have had only thirteen judges, five of whom are currently serving. By contrast, the United States District Court of South Carolina and the United States District Court for the Eastern district of Virginia have had forty and forty-four judges, respectively.

My criminal practice has taken me to many other federal Districts over the past several years. I have consistently found the people in those Districts to be professional, helpful and kind, whether in a large jurisdiction like Atlanta or a smaller setting like Roanoke. And, while the mechanics of ECF, pleadings and scheduling vary little, there is always a specific and different "feel" to each place. What I find comforting about having a federal practice is that no matter where I go, I can navigate the system and use the same skill set that I have honed here in the M.D.N.C.

The training we receive here at home is a little different. Our feel is a little more formal. This "formal training" has prepared all of us to go anywhere in the United States and practice with skill and aptitude. Our Federal Bench expects us to be prudent, timely, and prepared in every aspect of our practice before them. Those expectations are, I think, borne of the history of our District – specifically that our Judges don't see their positions as stepping stones to a higher salary in large firms or the start of a career in politics.

It is precisely because we have had only thirteen judges in eighty-seven years that the M.D.N.C. retains the character that now defines it. Because our institutional memory is *not* institutional, it is human.

Clerk's Corner: An Update from the Clerk of Court for the United States District Court for the Middle District of North Carolina

By John S. Brubaker

Revised Local Rules. Several changes to the local rules took effect on March 1, 2014. A summary of the changes and the amended rules are posted on the Court's website at www.ncmd.uscourts.gov.

Filing Documents Under Seal. Local Civil Rule 5.4, which is incorporated in the Local Criminal Rules, addresses the filing of documents under seal. The rule prescribes how parties should move for court permission to file documents under seal and when documents can be filed under seal without a motion or order. To help filers understand the workings of this rule, the Court's website includes sealed document guidelines and examples at http://www.ncmd.uscourts.gov/sealed-document-guidance.

Hyperlinks to CM/ECF Documents. Hyperlinks to CM/ECF documents are now permissible. By using hyperlinks in briefs and other papers filed in CM/ECF, attorneys promote efficiency and better advocacy. The Clerk's Office will provide instructional materials in the near future. In the meantime, you can refer to http://federalcourthyperlinking.org for resources and further information on adding hyperlinks to CM/ECF filings.

Presentence Filing Procedures. Effective May 1, the Probation Office for the Middle District of North Carolina will file all Presentence Investigation Reports (PSR's) electronically via CM/ECF. Objections to PSR's should be filed as a sealed CM/ECF event and no longer submitted directly to the Probation Office. Further information is available on the Court's website.

Helpful Hints.

- If you are appearing in a case where the parties have agreed upon the selection of a mediator, you should ensure that the mediator is available to conduct the mediation. There have been recent instances where parties have selected mediators who cannot conduct the mediation and one instance where the parties selected a retired magistrate judge, who was neither on the mediator list nor interested in being a mediator.

- When filing a sealed document, carefully select the parties who should have access. Changes in access privileges can only be made by Clerk's Office staff after the document is filed.

- If you are viewing a sealed document which you have access to view, use your CM/ECF password and login instead of your PACER login. The PACER login will not allow access to documents with restricted access.

- Please do not be shy about calling the Clerk's Office for assistance if you have a question about filing documents in CM/ECF. We want to help you!

Removing the Problems from Removal

By Kip Nelson
Smith Moore Leatherwood LLP

Your client has just been sued in state court. You are running up against the removal deadline, but you are not sure if you can remove the case. You know the basic rules. But the complaint does not include a request for specific damages, and you do not know where the plaintiff LLC's members are located. And if you do remove, you are unsure of whether you could get the case dismissed on a Rule 12(b)(6) motion. So what do you do? Conventional wisdom is that defendants prefer to be in federal court. But with limited information and limited time, defendants are often faced with serious difficulties in removing a case to federal court.

1. Amount in Controversy

By statute, federal district courts have original jurisdiction over matters in which the parties are completely diverse and "where the matter in controversy exceeds the sum or value of $75,000." 28 U.S.C. § 1332(a). However, state procedural rules *prohibit* plaintiffs from alleging a specific number in many civil cases. *See* N.C. R. Civ. P. 8(a)(2). What happens if you want to remove a case to federal court but are unsure of the amount in controversy?

The general rule is that the parties are bound by the amount specified in a plaintiff's complaint. Of course, a plaintiff may be limited by the complaint as much as a defendant. *See, e.g.*, *Fridinger v. Stonegate Wealth Mgmt.,* LLC, No. 1:10CV906, 2013 WL 3994176 (M.D.N.C. Aug. 5, 2013) (denying a motion to remand despite a plaintiff's attempt to change the amount alleged in the complaint). However, even with a specific demand, courts have consistently found that the complaint is not dispositive. *See, e.g.*, *Harvey v. Liberty Mut. Grp., Inc.*, No. 13-cv-04693, 2014 WL 1244059, at *2 (E.D. Pa. Mar. 26, 2014) ("[T]he Court must examine not just the amount claimed by the plaintiff, but also his actual legal claims. The amount in controversy is measured by a reasonable reading of the value of the rights being litigated." (internal citation omitted)).

Furthermore, the Supreme Court long ago found that a plaintiff can avoid federal court jurisdiction by "resort[ing] to the expedient of suing for less than the jurisdictional amount." *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 294 (1938). Although courts have hinted that representations made "merely to defeat diversity jurisdiction" are improper and sanctionable under Rule 11, *see Federated Mut. Ins. Co. v. McKinnon Motors, LLC*, 329 F.3d 805, 808 (11th Cir. 2003), parties may continue to engineer creative arguments to skirt the amount in controversy requirement and keep a case in state court. But, courts do not always look favorably on litigants' attempts to avoid federal court. Last year, for example, the Supreme Court unanimously found that a lead plaintiff for a potential class could not defeat federal court jurisdiction by stipulating that the class would seek less than the required amount in controversy. *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013). A plaintiff cannot bind a class before the class is certified, and therefore the stipulation was insufficient to defeat federal court jurisdiction. *Id.* at 1348-49.

But the trickier part is if there is simply no way to determine what the plaintiff is seeking. Federal statute does allow a defendant to assert the amount in controversy in the notice of removal if the initial pleading seeks non-monetary relief or if the state procedural rules do not require a specific demand as described above. 28 U.S.C. § 1446(c)(2). But the removing defendant still needs to provide some evidence that the amount is correctly stated. Courts have provided limited guidance on how a defendant can satisfy its burden, such as "by contentions interrogatories or admissions in state court; by calculation from the complaint's allegations; by reference to the plaintiff's informal estimates or settlement demands; or by introducing evidence, in the form of affidavits from the defendant's employees or experts, about how much it would cost to satisfy the plaintiff's demands." *Meridian Sec. Ins. Co. v. Sadowski*, 441 F.3d 536, 541-42 (7th Cir. 2006) (internal references to cases omitted). In making this showing, defendants are not necessarily bound by the rules of evidence. *Raskas v. Johnson & Johnson*, 719 F.3d 884, 888 (8th Cir. 2013); *see also Fischer v. GlaxoSmithKline, LLC*, No. 1:12CV392, 2012 WL 6738318, at *2 n.3 (M.D.N.C. Dec. 28, 2012) (finding it sufficient when the plaintiff alleged extensive medical treatment and requested $1 million in an earlier demand letter). Therefore, parties should be aware that they may be able to satisfy the jurisdictional requirement even if it seems unlikely at first blush.

2. Citizenship of the Parties

In addition to the amount in controversy requirement, a party may only remove a case based on diversity jurisdiction "if there is complete diversity between all named plaintiffs and all named defendants, and no defendant is a citizen of the forum State." *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 84 (2005). In many cases, the question arises as to where a business entity is considered a "citizen" for diversity purposes. Corporations are citizens of their state of incorporation and principal place of business. 28 U.S.C. § 1332(c)(1). National banks are citizens of the state in which they are "located." *Id.* § 1348. But what about entities that are *not* corporations?

In *Carden v. Arkoma Associates*, the Supreme Court addressed the question of "whether, in a suit brought by a limited partnership, the citizenship of the limited partners must be taken into account to determine diversity of citizenship among the parties." 494 U.S. 185, 186 (1990). Justice Scalia, writing for a five-justice majority, said yes. Courts have since used *Carden* to find that, for diversity jurisdiction purposes, any limited-liability entity is a citizen of every state in which one of its members resides. *See, e.g.*, *Gen. Tech. Applications, Inc. v. Exro Ltd.*, 388 F.3d 114, 120 (4th Cir. 2004).

There may be some irony in the rule: an entity chooses to organize under the laws of a certain state, seeking the rights and protections available under that state's laws, yet for purposes of litigation, the entity is not even a citizen of that state. *See, e.g.*, *In re Phoenix Envtl., LLC*, No. 11-11-15031 SA, 2012 WL 4739941, at *2-3 (Bankr. D.N.M. Oct. 3, 2012) (concluding under the above rule that a New Mexico limited-liability company was a Georgia citizen and therefore complete diversity existed). Furthermore, litigants occasionally still forget this rule. *See, e.g.*, *Fischer v. GlaxoSmithKline, LLC*, No. 1:12CV392, 2012 WL 6738318, at *2 (M.D.N.C. Dec. 28, 2012); *Meyn Am., LLC v. Omtron USA LLC*, 856 F. Supp. 2d 728, 733 (M.D.N.C. 2012). And the current state of the law may create a predicament for defendants who wish to remove a case to federal court. Unlike corporations, secretaries of state generally do not provide information about limited-liability entities. Therefore, defendants may not be able to determine the citizenship of limited-liability plaintiffs. Unless plaintiffs release that information willingly, defendants should gather as much information as possible and affirmatively state the citizenship (as best they can) in the notice of removal. Defendants should not state the citizenship of other parties upon information and belief. Remember, courts in other jurisdictions have even reprimanded and imposed sanctions on counsel for failing to describe the citizenship of parties properly. *See BondPro Corp. v. Siemens Power Generation, Inc.*, 466 F.3d 562 (7th Cir. 2006) (per curiam); *Cincinnati Ins. Co. v. E. Atl. Ins. Co.*, 260 F.3d 742, 747-48 (7th Cir. 2001).

3. Pleading Standards

The Federal Rules of Civil Procedure require a plaintiff to include in the complaint "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Those who practice in federal court are likely familiar with the watershed opinions interpreting this rule. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

But the Federal Rules of Civil Procedure only govern proceedings in federal court. States have their own rules, and they have treated *Twombly* differently. For example, five jurisdictions have explicitly adopted the standard announced in *Twombly*, and many others have quoted the case or seemed to rely on it. On the other hand, 14 jurisdictions have outright rejected *Twombly* along with a few that have implicitly rejected it. North Carolina is one of a few states that have acknowledged the standard but declined to decide the issue. *See Holleman v. Aiken*, 193 N.C. App. 484, 490-91, 668 S.E.2d 579, 584 (2008). And appellate courts in the remaining 16 states have not decided one way or the other. Thus, *Twombly*'s status in a state court will vary by jurisdiction.

So what happens when a complaint is filed in state court, whose proceedings may or may not be governed by *Twombly*, and then the case is removed to federal court? Does the *Twombly/Iqbal* standard apply? Courts have invariably said yes. The federal rules apply to proceedings in federal court, regardless of their origin. And this rule even applies to pure state-law claims. *See, e.g.*, *Watkins v. Lincoln Cmty. Health Ctr., Inc.*, No. 1:12CV1250, 2013 WL 2285250, at *3 n.3 (M.D.N.C. May 23, 2013).

But that is not to say that courts apply *Twombly* in the same manner. Some courts apply *Twombly* with leniency, while other courts suggest that when removal is a possibility, plaintiffs should understand the federal standards and proceed accordingly. Still, the difference in standards may be important. *See, e.g.*, *Sykes v. Health Network Solutions, Inc.* No. 13 CVS 2595, 2013 NCBC 55, ¶ 19 n.5 (Dec. 5, 2013) (stating that the outcome could be different depending on which standard is used).

Defendants should also remember that the *Twombly/Iqbal* standard has created a split among courts about whether the standard applies to a ***defendant's*** pleadings, specifically affirmative defenses. Some plaintiffs are filing motions to strike bare-boned affirmative defenses, and courts have responded with varying results. If *Twombly* applies, courts may grant a plaintiff's motion to strike, grant a motion for more definite statement, deny a defendant's motion to amend, or even raise the issue *sua sponte* and order that affirmative defenses be forfeited. Some judges even strike defenses *without* leave to amend. Other courts have created their own rule of thumb such as only applying *Twombly* to defenses not listed in Rule 8(c)(1). The Middle District has not squarely addressed the issue. *See Izzard v. Credit Fin. Servs., Inc.*, No. 1:13CV998, 2014 WL 1330548, at *2 (M.D.N.C. Apr. 2, 2014); *Guessford v. Pa. Nat'l Mut. Cas. Ins. Co.*, 918 F. Supp. 2d 453, 467-68 (M.D.N.C. 2013). However, Judge Fox from the Eastern District did apply *Twombly/Iqbal* and granted a motion to strike in part. *See Racick v. Dominion Law Assocs.*, 270 F.R.D. 228 (E.D.N.C. 2010). When filing a responsive pleading, defendants should be aware that their pleading may be scrutinized under the new standard.

4. Conclusion

Removal procedure is generally governed by statute, but judicial interpretation can create significant problems for parties seeking federal court jurisdiction. Thus, defendants need to be aware of potential pitfalls that may challenge removal. If they continue to seek entrance into federal court, litigants should recognize these issues and plan accordingly.

Avoiding Waiver of Privilege and Ensuring Enforceability in Any Proceeding of the Parties' Non-Waiver Agreement

By Amanda T. Johnson, Thurston H. Webb, and Richard J. Keshian
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In today's litigation practice, it is common to worry about the extensive costs associated with e-discovery. Parties to large and complex cases are often amazed (and upset) at how costly discovery becomes due in large part to the need to process and review a significant number of electronic documents.

Federal Rule of Evidence 502, which became effective in 2008, represents the first formal attempt to help control litigation costs in the e-discovery context. In a federal proceeding, Rule 502 applies to determine whether the disclosure of a privileged or protected document waives the attorney-client privilege or the work product protection.

Rule 502 was proposed and passed in order to codify existing case law regarding inadvertent disclosure of privileged materials and to alleviate concerns about the rising costs associated with both document review and litigation, particularly in the e-discovery context. Where tens of thousands or even millions of electronic documents must be reviewed, the risk of privileged documents slipping through the cracks is high. Even a thorough privilege review may result in inadvertent disclosure because of the massive amount of ESI material transmitted via e-discovery. Therefore, Rule 502 established certain safeguards with respect to the inadvertent disclosure of privileged information. The rule also complements Rule 26 and provides additional strength to traditional clawback agreements.

However, attorneys who plan to rely or utilize Rule 502 should tread carefully before going headlong into discovery. The following is a brief discussion of the various portions of Rule 502 and what attorneys should consider when hoping to rely on its various provisions.

Subject Matter Waiver under 502(a)

Rule 502(a) provides that a disclosure of privileged material will result in a subject matter waiver only when (1) the disclosure is "intentional," and (2) the disclosed and undisclosed communications or information "ought in fairness to be considered together." Rule 502(a) is, in essence, about fairness. The Advisory Committee notes indicate that subject matter waiver is the exception, rather than the rule, and is reserved for circumstances in which failure to recognize a subject matter waiver would give unfair advantage to the objecting party, such as when "a party intentionally puts protected

information into the litigation in a selective, misleading and unfair manner."

Courts have interpreted this to mean that the provision intended "to curtail prior waiver doctrine significantly, limiting subject matter waiver to situations in which a litigant discloses protected information to obtain an advantage in the case, and then invokes the privilege to 'deny its adversary access to additional materials that could provide an important understanding of the privileged materials.'" *Chick Fil-A v. Exxon Mobil Corp.*, 2009 WL 3763032, at *5-6 (S.D. Fla. 2009); *but see Mills v. Iowa*, 285 F.R.D. 411, 416 (S.D. Iowa) ("while a party's disclosure of privileged matter 'in a selective, misleading and unfair manner' is certainly relevant to the fairness inquiry, it is not essential under the plain language of the rule"). Thus, courts may find a subject matter waiver in certain situations even where disclosure was not intended to gain an advantage.

Inadvertent Disclosure under 502(b)

Rule 502(b) provides that an inadvertent disclosure made in a federal proceeding or to a federal office or agency does not operate as a waiver in any federal or state proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including, for example, requesting a "clawback" of a disclosed document pursuant to Federal Rule of Civil Procedure 26(b)(5)(B). All three prongs must be met in order to find that a disclosure of a privileged or protected document does not result in waiver. *See, e.g.*, *Maxtena Inc. v. Marks*, 289 F.R.D. 427, 444 (D. Md. 2012). The party seeking the protection of Rule 502(b) bears the burden of proving that each of its elements has been met. *Amobi v. D.C. Dep't of Corrections*, 262 F.R.D. 45, 53 (D.D.C. 2009).

In evaluating whether these conditions are met, courts often use existing, pre-Rule 502 case law (often involving Rule 26(b)(5)(B)) to analyze a party's actions. For example, the District Court of Maryland, in *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 259 (D. Md. 2008), established a multi-factor test balancing the following five factors: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2) the number of inadvertent disclosures; (3) the extent of the disclosures; (4) any delay in measures taken to rectify the disclosures; and (5) overriding interests of justice. Some courts may calculate the ratio of inadvertently produced documents as compared with the total document production. *See Kmart Corp. v. Footstar, Inc.*, 2010 WL 4512337, at *4 (N.D. Ill. Nov. 2, 2010) (noting that a production of 130 pages of privileged documents out of total of 4,500 pages, an error rate under 3 percent, was not a significant mistake).

Parties must be prepared to provide the court with substantial details as to the precise precautions and actions taken both before and after disclosure, as courts sometime apply the "reasonableness" standard in an unforgiving manner. *See id.* at *4-5 (despite small number of privileged documents inadvertently produced, court still found waiver because disclosing party failed to describe in affidavits or otherwise "the software used to prevent disclosure, the records management system in place, or any other facts that would demonstrate it used a sufficient screening process" to prevent disclosure).

In *Martin v. State Farm Mut. Auto Ins. Co.*, 2011 WL 1297819 (S.D. W. Va. Apr. 1, 2011), the defendant inadvertently produced one privileged letter. In analyzing the Rule 502(b) prongs, the court noted that the defendant provided "no insight into the process that it followed in reviewing documents to prevent the inadvertent disclosure" and had even omitted the letter from its privilege log. *Id.* at *5. The Court thus had "no basis upon which to conclude [the defendant] acted reasonably to protect the letter from unintentional disclosure." Moreover, when the letter's existence became known during a deposition, the defendant failed to immediately assert the privilege, and did not object to a line of questioning about the document. *Id.* The privilege was thus waived. Similarly, in *Maxtena Inc. v. Marks*, after a third party disclosed Maxtena's documents pursuant to a subpoena of which Maxtena was aware, the Court found Maxtena's purported reliance on a non-disclosure agreement and an engagement letter with the third party to be unreasonable. 289 F.R.D. at 445. The Court determined the non-disclosure agreement only applied to information exchanged between Maxtena and the third party *before* the parties had "formalized" their business relationship, and narrowly interpreted the engagement letter to find it required the third party to notify Maxtena of receipt of a subpoena, and nothing else. *Id.* Maxtena had thus failed to act reasonably to prevent the disclosure. *See also Williams v. Dist. of Columbia,* 806 F. Supp. 2d 44, 49 (D.D.C. 2011) (holding that defendant failed to

establish preventative measures were reasonable when it only offered an attorney's assertion that "[p]rior to production, [the documents at issue were] reviewed by an experienced litigation paralegal under the supervision of an attorney"); *Felman Production, Inc. v. Industrial Risk Insurers, Inc.*, at 2010 WL 2944777, at *4 (S.D. W. Va. July 23, 2010) (applying *Victor Stanley* factors in Rule 502(b) analysis and pointing to the "result" – i.e., the large production of irrelevant and privileged documents, as evidence that measures were unreasonable and care was not taken).

The lesson from these and other cases is that to avoid waiver as a result of inadvertent disclosure under Rule 502(b), parties must carefully plan procedures and appropriate steps that will satisfy these reasonableness prongs and act quickly to respond to subpoenas to third parties in possession of arguably privileged information. If the receiving party asserts a waiver, the disclosing party must provide substantial detail to the court as to the reasonable steps taken to prevent and rectify the inadvertent disclosure to meet its burden of proof.

Agreement of the Parties and Court Orders Regarding Waiver

Rule 502(d) provides that "a federal court may order that the privilege or protection is not waived by the disclosure connected with the litigation pending before the court – in which event the disclosure is also not a waiver in any other federal or state proceeding." Rule 502(e) provides that parties may enter agreements clarifying the circumstances under which inadvertent disclosure will result in a waiver. Even if parties cannot agree as to the scope of waiver and clawback provisions—often the case in contentious litigation—a court may nonetheless issue an order *sua sponte* without any motion by the parties. *See Fleisher v. Phoenix Life Ins. Co.*, 2012 WL 6732905 (S.D.N.Y. Dec. 27, 2012).

Rule 502(d) and (e) are important tools to restrict waiver of attorney-client privilege, not only to the current proceeding and between the parties to an agreement, but to concurrent or subsequent proceedings in other courts, state or federal. No longer must parties be as concerned about the risks in clawback agreements of the use of privileged information by non-parties to the agreement, or by the receiving party in another jurisdiction. This freedom (theoretically) enables parties to avoid some of the costs of comprehensive pre-production privilege review, and ultimately saves litigation costs of determining whether privilege was waived.

When is a Rule 502(d) Order Needed?

A 502(d) order is particularly important if a large amount of ESI will be reviewed. Parties should determine early whether ESI will be reviewed (perhaps even before the Rule 26(f) conference), and come to an agreement regarding inadvertent production of privileged materials. Under Rule 502(e), an agreement on the effect of disclosure of privileged materials will be binding only on the parties to the agreement. This means that if a document is produced inadvertently, the bell cannot be un-rung insofar as third parties or other litigation proceedings are concerned. Parties should therefore move the Court to incorporate the agreement into a 502(d) order to obtain the full protection of the rule.

Crafting a Suitable Agreement or Proposed Order

Rule 502(d) permits the parties to avoid the application of the standard rules under 502(b) and simply agree that waiver will not occur. However, while some courts have enforced Rule 502(d) provisions without requiring all 502(b) factors to be set out in the agreement, some courts nonetheless require that the agreement address and define the three prongs of 502(b) in order to be enforceable. Thus, if a court order or agreement does not provide sufficient detail regarding what constitutes inadvertence—(b)(1), what precautionary measures are required—(b)(2), and what the producing party's post-production responsibilities consist of in order to avoid a waiver—(b)(3), a court may default to Rule 502(b) to fill in the gaps. *See, e.g.*, *Mt. Hawley Ins. Co. v. Felman Prod., Inc.*, 271 F.R.D. 125, 130, 133 (S.D. W. Va. 2010) (although the court followed the parties' agreement regarding post-production responsibilities, it reverted to Rule 502(b)(2) regarding required precautionary measures because the agreement was silent on that prong).

Therefore, if parties wish to have a court order or agreement under Rule 502(d) or (e) supersede the default Rule 502(b) standard test, the court order or agreement must explicitly cover *all three prongs* of 502(b) in sufficient detail. An agreement or order should *not* merely state that the parties agree not to waive privilege for documents inadvertently produced. Parties should keep in mind the critical eye with which many courts tend to evaluate pre-production "reasonableness" in particular. It may

also be advisable to specifically include in a 502(d) order a promptness provision to satisfy the 502(b)(3) standard, even though 502(d) does not require a party to act within any defined amount of time after production. If such a term is left out of a 502(d) order, a court later assessing a claim of waiver may very well impose a promptness requirement and find post-disclosure actions were unreasonable. Thus, failing to meet one prong of 502(b) may waive the privilege despite a controlling court order. Of course, it is possible that the court will strictly follow the parties' agreement as contained in the order, and decline to graft or "gap fill" 502(b)'s standards onto the analysis. But this is not a risk parties should take; rather, they should be mindful to promptly seek the return of inadvertently disclosed materials.

The court's order should be unequivocal and explicitly restate the rule, stating that disclosure does not affect a waiver in the pending litigation or in any other state or federal proceeding. It must set forth and expound upon the three prongs of Rule 502(b) to establish the standards by which a court will judge each prong should a disclosure occur. It should set forth procedures under which a party may assert and address privilege claims after production of information. Finally, it should, of course, include a clawback provision.

In sum, while Rule 502 will hopefully help parties better control the cost of producing discovery, it is important to keep the above discussion in mind at the outset of the discovery process in each case. Otherwise, parties run the risk of losing the protections afforded by Rule 502 and thus the incentive to manage discovery costs.

Focus on Federal Practice: An Interview with Ron Davis

By Laura J. Dildine
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Focus on Federal Practice is a new column that will focus on a member of the M.D.N.C. Bar in each newsletter. It is fitting that the first M.D.N.C. practitioner to be highlighted is Ron Davis who was instrumental in the establishment of this chapter of the F.B.A. Ron is a graduate of Davidson College (B.A.) and UNC-Chapel Hill (J.D./M.B.A.) and a partner at Womble Carlyle, practicing in complex business litigation.

Q: *Have you had any mentors in the M.D.N.C.?*

A: **Grady Barnhill and Jimmy Barnhill are my mentors. My office in Winston is between their offices, and I keep hoping some of their intellect will migrate through the walls. I also consider William K. Davis a professional and personal mentor.**

Q: *What brought you to practice in the M.D.N.C.?*

A: **I was raised about an hour east of here. Even though my first job out of law school was out-of-state, I knew I would return home to practice. My colleagues at Womble brought me home.**

Q: *Do you have a favorite type of case?*

A: **I particularly enjoy working on disputes among members of LLCs.**

Q: *Can you share any experiences you've had practicing in the M.D.N.C.?*

A: **I learned a memorable lesson about counsel working together during a 2-week jury trial in the Middle District. Opposing counsel refused to even discuss cooperating on a joint videotape to be shown to the jury. Although the Court let our edited version in and let opposing counsel play an omitted snippet, the Court also let us play additional tape so the jury could understand the context of all the edits. We won the case, in part because opposing counsel's failure to cooperate on a joint videotape resulted in the jury seeing some of our videotape evidence twice.**

Q: *Is there anything unique about practice in the M.D.N.C. compared to other districts?*

A: **One of the delights of practicing in the Middle District is that we members of its Bar have an unusual number of opportunities to interact with our local federal judges. I have volunteered for the last five years as a judge on the DHC deciding issues of attorney discipline. That experience has given me a new appreciation of how hard it is for a judge to strike the right balance in interacting with attorneys who appear in front of them. The Middle District is blessed with smart, hard-working judges who strike the right balance of expecting and exhibiting professional and collegial interactions with our Bar.**

Q: *Was there any advice that someone gave you about practice in the M.D.N.C. that has paid off?*

A: **More wisdom from Grady. One of his favorite questions is: "Assuming you have and keep your license to practice law, what is THE ONE ABSOLUTELY ESSENTIAL FACTOR to a successful career?" His answer: "Your health." This is a high-stress profession. I have practiced long enough to see the ravages of time and stress take a toll not only on the generation above me but also friends who are members of this Bar in their 40s and 50s. At the risk of sounding like your mother or doctor, read the medical information that abounds and get an annual physical. You are the only person who can guard your health, and you need to so you can be there for your family, your law partners, and your clients.**

A Supreme Experience

By John Korzen
Wake Forest University School of Law
Director of the Appellate Advocacy Clinic, Associate Professor of Legal Writing, & N.C. State Bar Certified Specialist in Appellate Practice

In each newsletter, we will highlight one of the law schools in the M.D.N.C. This issue, we have asked John Korzen to tell us about the recent case in which he and his Appellate Advocacy Clinic students represented a client before the Fourth Circuit and the U.S. Supreme Court.

Introduction

I have been asked to write generally about the Appellate Advocacy Clinic at Wake Forest and specifically about a case of ours argued in the Supreme Court of the United States on April 23.

The Appellate Advocacy Clinic is one of six clinics at Wake Forest. Ten or so 3L students enroll in the Clinic each year. They work in pairs on one or more appeals, under my supervision as counsel of record. The Clinic has handled appeals in the Fourth Circuit, Seventh Circuit, Eleventh Circuit, Court of Appeals of North Carolina, and Full Commission of the North Carolina Industrial Commission. Since 2007, twenty-two different 3Ls have made oral arguments in these appellate courts. Students also meet weekly to learn about appellate practice, brainstorm arguments in their classmates' appeals, and help prepare for any upcoming oral arguments.

This year we have a case in the Supreme Court of the United States, *CTS Corporation v. Waldburger*. Our representation began last year in the Fourth Circuit. Our clients, homeowners near Asheville, allege that Defendant CTS Corporation released TCE and other hazardous substances into the groundwater at a plant it operated there before selling the property in 1987. In 2009, our clients learned that their well water was contaminated with TCE, and in 2011 they filed a single-count complaint for nuisance in the United States District Court for the Western District of North Carolina. CTS moved to dismiss based on the ten-year period of repose in N.C. Gen. Stat. § 1-52(16). The District Court allowed the motion in March 2012, and our clients appealed.

At the Fourth Circuit

Our clients' trial counsel, Joseph Anderson, a former partner of mine, asked if our Clinic would like to handle the appeal. I was just starting to look for appeals for the 2012-13 school year. I saw that the circuits are split on a legal issue in the case, which is whether 42 U.S.C. § 9658, a section in CERCLA, preempts periods of repose such as that in N.C. Gen.

Stat. § 1-52(16). I readily accepted the appeal, due to the good timing and the presence of an important, unsettled issue.

Two outstanding students, Emma Maddox and Hillary Kies, volunteered to work on it. They were just finishing their second year and were able to work on the briefs throughout that summer. Emma and Hillary had both studied statutory interpretation in Professor Margaret Taylor's Legislative and Administrative Law course, so they were well prepared for the issue in *Waldburger*. In June 2012, we filed our appellants' brief, contending that either the plain wording or the purpose of section 9658 preempted the state period of repose.

Shortly after CTS Corporation filed its appellee brief, we received quite a surprise when the United States filed an *amicus curiae* brief in support of CTS! We learned that the United States had raised the exact same statute of repose defense in Federal Tort Claims Act litigation arising from water contamination at the Camp Lejeune Marine Corps base in North Carolina. Several lawsuits had been consolidated by the Multi-District Litigation panel and transferred to the Northern District of Georgia. So in our Reply Brief, which Emma and Hillary drafted and we filed in August 2012, we included some points relevant to the Camp Lejeune litigation.

Oral argument in *Waldburger* was then scheduled for January 2013 in Richmond. Emma would argue for our side, against both an attorney for CTS Corporation and an attorney for the United States. We had several practice arguments before the real thing, with other members of the clinic grilling Emma and offering suggestions. (Before our oral arguments, other clinic members act as judges at multiple practice arguments.)

After arriving at the Fourth Circuit, we saw that we would have the fourth and final argument in our courtroom. Emma liked being able to hear other arguments before hers. We had quite a support group there, including her clinic partner Hillary, three of our clients' trial attorneys, one client, and both of Emma's parents.

Emma did a fantastic job. Based on the questioning and her argument, we felt like we had at least two votes to reverse, and we anxiously awaited the decision. In the meantime, the Clinic also took over the appeal in the Eleventh Circuit Camp Lejeune litigation, on behalf of the Marines and family members who are plaintiffs in those cases. Emma, Hillary, and two other clinic students worked on those briefs, with Emma and Hillary again working on the CERCLA preemption issue and the other two working on a state law issue not present in *Waldburger*. The last brief in the Eleventh Circuit appeal was filed in April 2013.

In July 2013, the Fourth Circuit issued a published decision in *Waldburger*, a 2-1 decision in our favor. It was great timing for Emma and Hillary, who were soon to take the bar exam.

The cert stage

CTS Corporation elected not to petition for rehearing en banc and filed a Petition for Certiorari on September 8, well before the mid-October deadline. It seemed that Petitioner hoped the Supreme Court would reach the case this Term, before the Eleventh Circuit would have time to decide the Camp Lejeune case, which still had not been scheduled for oral argument.

We had various strategic choices to make once the cert petition was filed, including whether to file a response voluntarily and whether to obtain an extension of time to respond. Because we believed that the Court was likely to call for a response anyway, we decided to respond voluntarily.

As for extensions, we needed at least one, due to other time conflicts in October, and so we obtained one thirty-day extension. We did not really need another, but it was tempting to ask for one, because that would have pushed the case to the next Term and possibly have allowed the Eleventh Circuit to affirm in favor of preemption in the Camp Lejeune appeal in the meantime. (The Northern District of Georgia had agreed with the plaintiffs in that case that 42 U.S.C. § 9658 preempts N.C. Gen. Stat. § 1-52(16)). In the end, we did not ask for another extension and filed our response in late November, which put the case on the Court's January 10 conference schedule.

What to say in our response was another big decision. Emma and Hillary had graduated, so three of this year's 3L students worked on our "BIO," short for Brief in Opposition to Petition for Certiorari. We also had a long teleconference with Allison Zieve, who is the Director of the Supreme Court Assistance Project at Public Citizen and who had offered to help. Allison had written a BIO on the same issue four years before, when only two appellate courts had reached the issue. She noted that the case was now "cert-worthy" due to the split across three federal circuits. In addition, a state supreme court had since ruled against preemption, making a 2-2 split on the issue.

On to the Supreme Court

After a late lunch on January 10, I returned to my office and noticed the red light was blinking on my phone. It was a message was from the Merits Clerk at the Supreme Court, informing me that cert had been granted in *Waldburger*, the argument would be in the second half of April, and due to the timing no extensions would be allowed as to any of the briefs. We were off to the Supreme Court!

Unlike the Fourth Circuit and most other circuits, the Supreme Court does not allow law students to argue, so I would have the opportunity to argue *Waldburger*, which would be my first argument at the Supreme Court. We made a very lengthy to-do list, which included reserving seats at the Court for this year's students, Emma and Hillary, and a couple of clients who could attend; lining up amicus support; and choosing co-counsel (Allison). I also needed a new suit, new shoes, and bifocals. I wanted bifocals because I need glasses to see across a room, but then have to take them off to read. I wanted to be able to see the Justices clearly while also being able to read something if necessary without taking my glasses off.

Most importantly, we had to concentrate on the brief. Our respondents' brief would be due in late March. From mid-January on, all ten clinic students had multiple research assignments. We created a master list that grew to about 50 topics. Some were highly relevant, such as all state statutes of repose that could apply to hazardous wastes released into the environment from a facility (what CERCLA covers). Others were much more esoteric, such as the origin of statutes of limitation (a statute passed in England in 1623), laches, and Alabama's common law rule of repose. Students chose the topics they would research from the master list and prepared memos on them, and we used multiple class meetings to discuss the topics and their findings.

I had hoped to have the brief largely drafted before spring break, but instead the drafting occurred over spring break. Students were again key participants. One spent an entire day preparing the Table of Authorities. Three others proofread every word, making numerous corrections. I later could find only a single typo in the final brief, and even that had been caught by a clinic student; I just missed making the correction. We finished the brief a day early and then had the printer hold it until the March 26 due date. In the brief, as in the Fourth Circuit, we contended that section 9658 either expressly or impliedly preempts the state ten-year repose period.

Oral argument preparation

Preparing for oral argument consisted of four practice arguments, or "moots," and much "TAYC," or "thinking about your case" (a concept and term I heard Jim Williams of Brooks Pierce explain at a CLE years ago).

My first moot was before this year's ten appellate clinic students in the big courtroom at Wake Forest. All ten asked tough questions, and then we had a good discussion immediately afterwards, identifying areas that needed work. I am glad that the first moot was before so many engaged students, because it really jump-started my preparations. The next moot was at the federal courthouse in Statesville, where a former appellate clinic student reserved a courtroom, and was before that former student, another former student, and an Asheville appellate attorney. The final two moots were in Washington, DC: one at Public Citizen's office and the other at George Washington Law School. The "TAYC" was either solitary or with my wife, the latter usually combined with walking our golden retriever. It reminded us of my 1L year, when we similarly walked our previous golden retriever

while I prattled on about the law. (1L's tend to be consumed with talking about the law.)

After my fourth and final moot, I was about ready to go. I then made a two-column list of "bullet points," words or short phrases, the only thing I would bring to the podium. I put about ten bullets in each column, with one column containing responses to some of Petitioner's arguments and the other containing some of our side's main points. Most of the points came directly from the research and drafting my students had done. Having never managed to get bifocals, I put the list in 16 point font and made sure I could read it easily with my glasses on. My plan was to make each of the points in response to an appropriate question, but in no particular order, while remaining flexible. We encourage our clinic students and moot court participants to follow that same approach in oral arguments.

"Magic time!"

Counsel for argued cases must report to the "Lawyers' Lounge" near the courtroom between 9:00 and 9:15, which we did on April 23. Clerk of Court Scott Harris then greeted us as a group and previewed what would happen in Court that day, including that the Court would announce two opinions. Mr. Harris then spoke to us individually and made me feel at home. After he and a couple of other Court personnel left, we remained in the Lawyers Lounge for a while. The Lawyers Lounge is also used as an overflow room for Bar members when the Court is full, and a few attorneys began to show up, including one of the trial attorneys and an amicus attorney in our case. Allison and I talked with them for a while.

At 9:50, it felt like the right time to leave the Lawyers Lounge and go into the courtroom. "It's magic time!" I announced to Allison and the two other lawyers we'd been chatting with. I explained that the actor Jack Lemmon always said the same thing right before the cameras started rolling. Allison gave me what I think was an amused look, and the two of us walked into the courtroom and to our counsel table.

At 10:00, the Justices entered the courtroom through the red curtains behind the bench. Justice Scalia read an excerpt from the majority opinion in one decision, and Justice Kennedy did the same in another. Then seven different attorneys – including me – moved to admit new members of the Supreme Court bar. I moved to admit two of the trial attorneys from the *Waldburger* case, including my former partner Joseph Anderson. The Chief Justice allowed each motion, and then Mr. Harris administered the oath to the new members. Next came the first argument, which was a tax case. I did not pay close attention to that argument and remember little about it. I stared at my bullet point list from time to time.

Finally it was time for our argument. While counsel for the Petitioner and counsel for the Government (again appearing as *amicus* in support of the defendant) argued, I took a few notes, first on a legal pad, and then on my bullet point list. Then it was my turn. After the obligatory "Mr. Chief Justice, and may it please the Court," I began by stating that I wanted to discuss express preemption but first wanted to start with a couple of sentences about the purpose of the statute. After I stated that the purpose of the statute is to preserve claims for latent harm, and then explained that latent harm includes groundwater contamination as in *Waldburger* or cancer as in the Camp Lejeune case, the questions started coming.

In all, seven of the Justices asked me questions, all but Justice Thomas and Justice Breyer. The Chief Justice asked me eight questions, after not asking Petitioner's counsel any. During one stretch of the argument, the Chief Justice, Justice Kennedy, and Justice Scalia asked multiple questions, which meant that all the questions for a while came from the middle of the bench. But at other times they came from the wings, including multiple questions each from Justice Kagan and Justice Sotomayor. A few of the questions were clearly meant to be helpful to my side, but most did not seem to be. I ended up returning to the purpose of the statute often, and I hit all but three or so of the bullet points on my list.

Following a short rebuttal by Petitioner's counsel, the Chief Justice announced that "the case is submitted," thanked counsel, and made eye contact with each arguing counsel; and then all the Justices exited back through the red curtains.

Aftermath

After the argument, current students, former students, trial counsel, clients, my family, and I all walked down the fabulous front steps of the Supreme Court. Then we posed at the base of the steps for photos in various combinations: students and professor, counsel, clients, family.

Then it was off to lunch at "The Monocle," a nearby restaurant. Nine of this year's clinic students and three of last year's – including Emma and Hillary – were there. Emma's parents were also there, as they had been in Richmond. They had gotten in line at 5:30 a.m. that morning to be sure to make it into the public seating for the argument, and they had been the seventh and eighth people in line. The lunch was a nice end to the case and to this year's Clinic.

Back at my law school office the next day, I eagerly read the SCOTUSblog description of the argument. In what has to be the highlight of my professional career, the reporter stated, "Showing no signs that he was making his Supreme Court debut, John Korzen, Director of the Appellate Advocacy Clinic at Wake Forest, made a polished and confident argument." The reporter went on to conclude that the case, which many had seen as a sure win for Petitioner, seemed after the oral argument to be a toss-up.

While we wait impatiently for the decision with fingers crossed, I am grateful for all the help from the many people who made the experience possible, including all the Clinic's current students and the former Clinic students who worked on the case or assisted with moots. Going to the Supreme Court was a true team effort.

Middle District Bankruptcy Bar Holds Its 35th Annual Bankruptcy Seminar

By Brian R. Anderson
Nexsen Pruet, PLLC

On April 25 and 26, the Middle District of North Carolina held its 35th Annual Bankruptcy Seminar at the Hampton Inn and Suites in Aberdeen, North Carolina. Over 175 practitioners, judges, faculty, trustees, clerks, and Bankruptcy Court officials from within and outside the Middle District gathered to network and discuss timely bankruptcy-related issues in the relaxed confines of the Sandhills.

The Seminar featured a day and a half of presentations and discussions on a wide range of issues. Richard Carmody, who recently served as Vice-Chair of the American Bankruptcy Institute's National Task Force on Ethics, kicked off the Friday portion of the Seminar with a presentation on the timely topic of ethical duties in a social media world. Professor Susan Hauser of North Carolina Central University School of Law gave the audience a review of the important bankruptcy issues currently before the Supreme Court and Congress, which included a lively discussion on the ever-increasing burden of student loans on law school graduates and the issues courts face when deciding whether or not those student loans can be discharged when a borrower files for bankruptcy. Just prior to lunch, the audience was greeted with updates and practical tips from our District's four bankruptcy judges.

Of course, the Friday session of the Seminar would not be complete without the annual golf tournament at the Hyland Golf Club in Southern Pines. Over forty golfers of all skill levels competed in a Captain's Choice tournament, with the winning team receiving the coveted MDNC Seminar Trophy. The Saturday portion of the Seminar included topics such as the extension of the automatic stay to third-parties, common mistakes in Chapter 7 filings, and an office address from the United States Bankruptcy Administrator. As is Seminar tradition, the law clerks concluded the festivities with their annual case update.

The Proposed Proportionality and Specificity Amendments to the Federal Rules

By Whit Pierce
Smith Moore Leatherwood LLP

The Advisory Committee on Civil Rules has recently proposed extensive amendments to the Federal Rules of Civil Procedure, including Rules 1, 4, 6, 16, 26, 30, 31, 33, 34, 36, 37, 55, 84, and the Appendix of Forms. Of the Committee's numerous suggestions, the proposed amendment to Rule 26(b)(1) has perhaps garnered the most controversy. Essentially, the amendment would make it clear that the scope of discovery should be "proportional to the needs of the case." By contrast, there is relatively little debate regarding the proposed amendment to Rule 34(b)(2), even though it seems poised to shake up federal practice. The proposed changes to Rule 34 will require litigants to state each objection to a Rule 34 request "with specificity," including whether any responsive material is being withheld pursuant to that objection. The Advisory Committee has conducted three crowded hearings on the proposed amendments—one each in Washington, D.C.; Phoenix; and Dallas. This article briefly summarizes the proposed amendments and the views expressed at the hearings.

I. Rule 26

The broad scope of discovery currently described in Rule 26(b)(1) is buffered by Rule 26(b)(2)(C)(iii), which requires courts to limit discovery when "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." This "proportionality" standard has proven itself a weak buffer, however. The problem, according to the Committee, "is not the with the rule text but with its implementation—it is not invoked often enough to dampen excessive discovery demands." *See* Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure* 265 (2013) (hereinafter "*Proposed Amendments*"), *available at* http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf. The Committee intends to change that by hoisting the proportionality language from the backwaters of Rule 26 and installing it more prominently, in Rule 26(b)(1). The proposed Rule 26(b)(1), with the new language underlined and the old language stricken-through, looks like this:

(b) Discovery Scope and Limits.

> **(1)** ***Scope in General.*** Unless otherwise limited by court order, the scope of discovery is as follows: 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, considering the amount in controversy, the importance of the issues at stake in the action, 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. ~~— including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C)~~.

In addition to the proportionality language, the proposed rule includes two other significant changes. First, it would eliminate the court's ability to "order discovery of any matter relevant to the subject matter involved in the action," meaning that discovery would be cabined to the *claims and defenses* in the pleadings. Second, the amendment would rewrite the portion of the rule explaining that information need not be admissible to be discoverable, the net effect being the elimination of the phrase "reasonably calculated" from the rule. According to the Committee, this

change is needed because "judges often hear lawyers [incorrectly] argue that this sentence sets a broad standard for appropriate discovery." *Proposed Amendments* 266.

During the public hearings, the most fundamental disagreement related to whether the changes constitute a significant departure from the status quo, or something less. One plaintiffs' attorney at the D.C. hearing urged the Committee to "carefully consider these proposed changes" because "[t]hey are not minor. They are not modest. They are drastic, and they will not help the cause of justice." D.C. Transcript 30, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/public-hearings/civil-hearing-transcript-2013-11-07.pdf. Other speakers expressed the opposite view: "Without any sacrifice to the pursuit of justice, the modest revisions to the rules you propose will go a long way towards reducing overall costs and improving litigation practice. [These revisions] are modest, they're incremental, they're common sense." *Id.* at 46.

The other major disagreement related to the *need* for change. For instance, Professor Arthur Miller opined, "I don't think it befits the American civil justice system to have this preoccupation with cost, abuse, extortion, clichés that have been thrown out by the defense bar that sadly in my judgment have been picked up in judicial opinions without any empiric demonstration whatsoever." Phoenix Transcript 37, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/public-hearings/civil-hearing-transcript-2014-01-09.pdf. On the other side of the debate, former U.S. Senator Jon Kyl spoke about discovery's "impositional function," by which a party can use discovery to make sweeping requests, drive up costs for the other side, and "in some cases forc[e] settlements in situations where it probably is not appropriate." *Id.* at 45.

II. Rule 34

As presently written, Rule 34(b)(2) says that for each item or category of production requests, a party's response "must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons." If a party objects to *part* of a request, the party "must specify the part and permit inspection of the rest." This formulation has resulted in "the common lament that Rule 34 responses often begin with a 'laundry list' of objections, then produce volumes of materials, and finally conclude that the production is made subject to the objections." *Proposed Amendments* 269. In an effort to reduce litigants' ability to "impose unreasonable burdens" by objecting to production requests, *Proposed Amendments* at 308, the committee has proposed these changes:

(2) Responses and Objections.

. . .

(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state ~~an objection to the request~~ the grounds for objecting to the request with specificity, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection stated in the request or a later reasonable time stated in the response.

(C) *Objections.* An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.

The most notable changes would be the requirement that parties state their objections "with specificity," as well as actually stating whether they are withholding responsive materials on the basis of a particular objection. As for the change to Rule 34(b)(2)(C), the Committee hopes it will "end the confusion" that results from the common practice of stringing together objections while still producing information, a tactic that often leaves the requesting party uncertain whether the producing party has actually withheld responsive information on the basis of an objection. *Id.* at 308.

During the Dallas hearing, one speaker said the proposed rule ought to propose symmetrical obligations on the requesting party. He explained, "It makes no sense for a responding party to actually spend any effort in the due diligence to make a particularized objection to a request [the other side] never fashioned appropriately." Dallas Transcript 342, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/public-hearings/civil-hearing-transcript-2014-02-07.pdf. But the proponents of the specificity amendment expect that it will nevertheless increase efficiency, reduce costs, and encourage candid information exchange:

> [M]y hope would be that changes to Rule 34 would encourage more candid exchange of this type of information. Frequently I don't understand until after months of meeting and conferring [the objections and bases underlying the defendant's decision to withhold documents].
>
> So Rule 34 would affirmatively require the responding party to state the objections with specificity from the outset, I would hope, and then also identify . . . the basis of the objection. Are you withholding documents because of privilege or is it an undue burden? And if so, let's talk about that undue burden.

Phoenix Transcript 282. The detractors of the proposed rule argued that these hopes are misplaced because the rule would actually *cause* ancillary litigation. Such litigation would arise, they say, because the rule would require an affirmative statement that documents are being withheld, without requiring the identification of those withheld documents. Consequently, any affirmative statement that documents are being withheld would be followed promptly by a request that the producing party identify each and every withheld document. Next stop: the courtroom. *See* D.C. Transcript 17–18.

Conclusion

After three days of spirited debate, it is difficult to predict how the Committee will respond. The best clue might be in an easy-to-overlook Committee Note explaining the modest proposed amendment to Rule 1. There, the Committee sets forth its view that "[e]ffective advocacy is consistent with—and indeed depends upon—cooperative and proportional use of procedure." If that sentiment is any guide, change is coming.

This newsletter was produced by the Younger Lawyers Committee for the M.D.N.C. Chapter of the Federal Bar Association and edited by Laura J. Dildine, with special thanks to Philip Cox. The editorial staff is currently accepting articles for upcoming issues. Please direct all inquiries to Laura J. Dildine at laura.dildine@smithmoorelaw.com.

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Thursday, May 22, 2014

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Sheraton Hotel at Four Seasons
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Entry F from parking lot, Imperial Room

Registration: 11:45 a.m. – 12:00 p.m.
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