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Chapman Sidebar

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Producing Documents Subject to Objections May Amount to Waiver of Objections

All litigators have written the phrase: "Subject to and without waiving the foregoing objections, see documents attached hereto." Despite its frequent use, this phrase may soon join the assemblage of overused and outdated legalese.

A growing number of courts have recently attacked the routine discovery practice of providing conditional responses to document requests. Such conditional responses, or responses that assert objections but state that documents will be produced subject to the objections, may be improper and may even result in an inadvertent waiver of stated objections, or worse. Attorneys and their clients should rethink any boilerplate strategy for responding to written discovery to prevent unintentional waivers and sanctions.

Conditional responses to written discovery requests have long been commonplace in discovery exchanges because they allow a party to respond to the opposing party's request for information while simultaneously protecting objectionable materials from disclosure. However, courts in Arizona, California, Florida, Georgia, Kansas, and Ohio have recently held that conditional responses are confusing, misleading, and lack basis under the applicable Rules of Civil Procedure. *See, e.g., Sprint Commc'ns Co. v. Comcast Cable Commc'ns, LLC*, No. 11-2684, 2014 WL 545544 (D. Kan. Feb. 11, 2014); *Chambers v. Sygma Network, Inc.*, No. 6:12CV1802, 2013 WL 1775046 (M.D. Fla. Apr. 25, 2013); *Haeger v. Goodyear Tire & Rubber Co.*, 906 F. Supp. 2d 938 (D. Ariz. 2012); *Carmichael Lodge No. 2103 v. Leonard*, No. S07-2665, 2009 WL 1118896 (E.D. Cal. Apr. 23, 2009); *Meese v. Eaton Mfg. Co.*, 35 F.R.D. 162 (N.D. Ohio 1964).

For example, in the case *Sprint Commc'ns Co. v. Comcast Cable Commc'ns, LLC*, the United States District Court for the District of Kansas concluded that "answering subject to an objection lacks any rational basis. There is either a sustainable objection to a question or request or there is not." 2014 WL 545544, at *2 (quoting *Tardif v. PETA*, No. 2CV537, 2011 WL 1627165 (M.D. Fla. Apr. 29, 2011)).

In *Sprint*, defendants who were being sued by plaintiff for patent infringement served document requests upon plaintiff for, among other things, documents relating to another of plaintiff's patent infringement suits. *Sprint*, 2014 WL 545544, at *1. Plaintiff answered defendant's requests for such documents with conditional responses: "Subject to and without waiver of the foregoing objections . . . [plaintiff] will produce nonprivileged responsive documents within its custody and control." *Id*. at *2. Defendants subsequently filed a motion to compel, which was granted by the Court. *Id*.

The *Sprint* Court recognized that "it has become common practice among practitioners to respond to discovery requests by asserting objections and then answering," but went on to note that such conditional responses are not permitted by Federal Rule of Civil Procedure 34(b)(2). *Id*. at **2-3. As the Court explained, the plain language of Rule 34(b)(2) allows parties to (1) produce the documents as requested, (2) state an objection to the request as a whole, or (3) state an objection to part of the request provided that the response specifies the part objected to and responds to the non-objectionable portion. *Id*. at *3 (emphasis added). The *Sprint* Court then observed that conditional objections are not one of the "allowed choices" under Rule 34(b)(2). *Id*.

The *Sprint* Court also reasoned that conditional answers are confusing because they can lead the requesting party to believe that important documents were not produced. *Id*. at 2. Because the requesting party cannot determine if a question has been fully answered, conditional responses "obscure" the discovery process. *Id*. In granting defendant's motion to compel, the *Sprint* Court held that plaintiff's "purported reservation of rights" was improper and had the ultimate effect of waiving objections to discovery requests. *Id*.

Finding that conditional answers are improper is not only a trend among federal courts. State courts too have recently followed *Sprint*'s example, holding that discovery responses which "maneuver to hide the truth" are not only inappropriate, but may even result in extreme consequences for litigants. *See, e.g., Ford Motor Co. v. Conley*, 757 S.E.2d 20, 42 (Ga. 2014). In *Conley*, the Georgia Supreme Court ordered a new trial in a product liability suit when it learned that plaintiff had failed to disclose information about its insurance coverage in responding to defendant's interrogatories. *Id*. at 31. Although defendants specifically inquired about insurance in their

discovery requests, plaintiff responded with a conditional objection and further stated it had "sufficient resources to cover any judgment." *Id*. The *Conley* Court held that this response mislead defendants and resulted in a trial that was "not based on the truth." *Id*. at 42. The Court further concluded that the use of conditional responses was an "ill-considered discovery practice." *Id*.

Although conditional responses may now amount to a waiver of objections or other extreme results pursuant to *Sprint* and its progeny, *Sprint* teaches that such a waiver can be readily avoided. By complying with the plain language of Rule 34(b)(2), providing clear and direct discovery responses, and avoiding boilerplate objections, litigants will not risk the inadvertent disclosure of confidential or irrelevant information.

For More Information

For more information, please contact Jeffrey Close (312.845.2984), Brittany Viola (312.845.3448) or your primary Chapman attorney, or visit us online at chapman.com.

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