

The Sedona Conference Primer on Crafting eDiscovery Requests with Reasonable Particularity

The Sedona Conference



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The Sedona Conference *Primer on Crafting eDiscovery Requests with “Reasonable Particularity”*

Public Comment Version Cover Memorandum

For years, parties and courts have lamented the use of boilerplate discovery that provides only a vague picture of information being requested or produced. After the Rules Committee targeted the problem of boilerplate objections in the 2015 Amendments to the Federal Rules of Civil Procedure, those amendments became the focus of court opinions and industry guidance, including The Sedona Conference *Federal Rule of Civil Procedure 34(b)(2) Primer: Practice Pointers for Responding to Discovery Requests*, published in 2018. The 34(b)(2) Primer focused on guidance for preparing discovery responses. The focus on nonspecific objections also shed light on an opposing problem: *Requests* lacking in precision. The Sedona Conference *Primer on Crafting eDiscovery Requests with “Reasonable Particularity”* provides practitioners with thoughtful guidance on crafting relevant and proportional discovery requests that describe the information sought with “reasonable particularity.”

Since 1970 and consistent with well-established Supreme Court precedent, Federal Rule of Civil Procedure 34(b) has required that discovery requests “describe with reasonable particularity” the information sought. Rule 26(b) limits all discovery to information that is relevant and proportional to the needs of the case. And Rule 26(g) requires counsel to certify that every discovery request is “neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.” Despite these Rules, vague and overbroad discovery requests have continued, clogging the courts and increasing litigation costs.

This Primer explores the origins of the “reasonable particularity” requirement, as well as the evolving case law addressing the standard. The Primer provides practical guidance on how practitioners may endeavor to better target discovery, and practice pointers for drafting instructions, definitions, and “particular” requests. The Sedona Conference received no substantive comments during the member-comment period. Therefore, limited edits have been made since that version. Public comments are welcome through January 6, 2022, at comments@sedonaconference.org and will be considered prior to publication of the final edition of this Primer.

The Sedona Conference Primer on Crafting eDiscovery Requests with “Reasonable Particularity”

*A Project of The Sedona Conference Working Group on
Electronic Document Retention and Production (WG1)*

PUBLIC COMMENT VERSION

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Preface

Welcome to the 2021 Public Comment Version of The Sedona Conference *Primer on Crafting eDiscovery Requests with “Reasonable Particularity”* (*Primer*), a project of The Sedona Conference Working Group on Electronic Document Retention and Production (WG1). This is one of a series of Working Group commentaries published by The Sedona Conference, a 501(c)(3) research and educational institute dedicated to the advanced study of law and policy in the areas of antitrust law, complex litigation, intellectual property rights, and data security and privacy law. The mission of The Sedona Conference is to move the law forward in a reasoned and just way.

In March 2018, WG1 published the *Federal Rule of Civil Procedure 34(b)(2) Primer*, providing practical pointers on responding to discovery requests and a detailed framework for drafting responses to requests for production that comply with amended Rule 34(b)(2). However, the *Rule 34(b)(2) Primer* did not address one of the causes of poorly drafted Rule 34 responses: Deficiencies with Rule 34 requests. Vague and overbroad discovery requests continue to clog the courts and increase litigation costs. This *Primer on Crafting eDiscovery Requests with “Reasonable Particularity”* is intended to provide practical considerations for drafting requests for production in compliance with Federal Rule of Civil Procedure 34(b)(1). It’s hoped that the guidance in this *Primer*, along with the *Rule 34(b)(2) Primer*, will result in more efficient discovery, reduced costs, and decreased court involvement in discovery disputes.

The *Primer* was a topic of discussion at the Working Group 1 meetings in 2019 and 2020 and was published for member comment earlier this year. This public comment version reflects the valuable input provided by working group members.

On behalf of The Sedona Conference, I thank drafting team leaders Rebekah Bailey and Don Myers for their leadership and commitment to the project. I also recognize and thank drafting team members Scott Borrowman, Kelly Cullen, MaryBeth Gibson, Jill Griset, Kristen Orr, and Michael Showalter for their dedication and contributions, and Steering Committee liaisons Lea Malani Bays, Jennifer Coleman, Greg Kohn, and Lauren Schwartzreich for their guidance and input. I also wish to recognize the Hon. Kristen L. Mix for serving as Judicial Observer to the drafting team.

Please note that this version of the *Primer on Crafting eDiscovery Requests with “Reasonable Particularity”* is open for public comment through January 6, 2022, and suggestions for improvement are very welcome. After the deadline for public comment has passed, the drafting team will review the public comments and determine what edits are appropriate for the final version. Please submit comments by email to comments@sedonaconference.org.

In addition, we encourage your active engagement in the dialogue. Membership in The Sedona Conference Working Group Series is open to all. The Series includes WG1 and several other Working Groups in the areas of international electronic information management, discovery, and disclosure; patent remedies and damages; patent litigation best practices; trade secrets; data security and privacy liability; and other “tipping point” issues in the law. The Sedona Conference hopes and anticipates

that the output of its Working Groups will evolve into authoritative statements of law, both as it is and as it should be. Information on membership and a description of current Working Group activities is available at <https://thesedonaconference.org/wgs>.

Craig Weinlein
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The Sedona Conference
November 2021

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I. INTRODUCTION

The December 2015 amendments to the Federal Rules of Civil Procedure (“Rules”) were crafted with the goal of reducing costs and delay by promoting cooperation among the parties, encouraging proportionality in the use of discovery tools, and supporting early and active judicial case management.¹ Judicial commentary and litigation experience demonstrate that the promised “just, speedy, and inexpensive determination of every action and proceeding” remains unachieved in many matters.² Change, however, was never going to happen overnight. Indeed, Chief Justice Roberts warned “[t]he practical implementation of the rules may require some adaptation and innovation.”³ Practitioners should proactively transform their discovery practices, starting with a heightened focus on discovery requests.

The 2015 amendments to Rule 34 were driven, in part, by concerns that objections to Rule 34 requests were not sufficiently specific, contributing to unreasonable discovery burdens.⁴ In support of Chief Justice Roberts’ call for adaptation and innovation, in March 2018, The Sedona Conference Working Group 1 published the *Federal Rule of Civil Procedure 34(b)(2) Primer*, which included practical pointers on responding to discovery requests, provided guidance on the revised Rules’ push for early discovery conferences and increased court involvement, and provided a detailed framework for drafting responses to requests for production that comply with revised Rule 34(b)(2).⁵

The Rule amendments also provide an opportunity to explore one of the causes of poorly drafted Rule 34 responses—deficiencies with Rule 34 **requests**. Indeed, vague and overbroad discovery requests have continued after the 2015 Amendments, clogging the courts and increasing litigation costs.⁶ In response, The Sedona Conference Working Group 1 has prepared this *Primer on Crafting*

¹ Memorandum from Hon. David G. Campbell, Advisory Committee on Civil Rules, to Hon. Jeffrey S. Sutton, Chair of Committee on Rules of Practice & Procedure, regarding Proposed Amendments to the Federal Rules of Civil Procedure (May 2, 2014).

² See Fed. R. Civ. P. 1.

³ U.S. Sup. Ct., 2015 Year-End Report on the Federal Judiciary 9 (Dec. 31, 2015).

⁴ FED. R. CIV. P. 34 advisory committee’s note to 2015 amendment (stating “Rule 34(b)(2)(B) is amended to require that objections to Rule 34 requests be stated with specificity,” and were intended to reflect amendments to Rule 34(b)(2)(C) that objections must specify the extent of objections and the nature of productions); see also The Sedona Conference, *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1, 69 (2018) (comment 2e) [hereinafter *The Sedona Principles, Third Edition*].

⁵ The Sedona Conference, *The Sedona Conference Federal Rule of Civil Procedure 34(b)(2) Primer: Practice Pointers for Responding to Discovery Requests*, 19 SEDONA CONF. J. 447 (2018) [hereinafter *Federal Rule of Civil Procedure 34(b)(2) Primer*].

⁶ See, e.g., *Michael Kors, LLC v. Su Yan Ye*, No. 2:18-cv-2684, 2019 WL 1517552, at *3 (S.D.N.Y. Apr. 8, 2019) (“The 2015 amendments to the Rules were designed to stop counsel from relying on standard, overbroad requests and to also require tailoring on the particular issues and circumstances in the case. Defendant clearly did not comply with its discovery obligations under Rules 1, 26, and 34 when propounding the requests.”).

eDiscovery Requests with “Reasonable Particularity” (“*Primer*”) with the purpose of providing practical considerations for drafting requests for production in compliance with Rule 34(b)(1).

Rule 34(b)(1) has required parties to draft requests for production with “reasonable particularity” since 1970. Section II of this *Primer* explores the history of the phrase “reasonable particularity” as well as the case-specific circumstances that drive its definition. It then addresses the relationship between Rule 26 and Rule 34. A party’s ability to obtain materials through Rule 34 is constrained by the discoverability standard in Rule 26(b), which limits the scope of discovery to: “any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.”⁷ Indeed, Rule 34 incorporates Rule 26(b)’s scope requirement by reference, stating: “A party may serve on any other party a request within the scope of Rule 26(b)” Moreover, drafting reasonably particular requests requires thoughtfulness and due diligence because Rule 26(g) treats an attorney’s signature as a certification that the requests were formed “after a reasonable inquiry,” and that the requests comply with the Rules.

Section II also explores how courts have addressed “reasonable particularity” at a time when the volume of discovery is increasing significantly. While a request for “all documents” may be convenient and may have been appropriate in the past, it may not be proportional to the needs of a case or set forth the information sought with “reasonable particularity” given the exponential growth of electronically stored information (“ESI”).

Section III explains how to draft requests that satisfy the “reasonable particularity” standard. For example, counsel should consider focusing on the end result—i.e., on the information necessary to establish or defeat a claim or defense. Further, if the requesting party cannot articulate how the information sought relates to an allegation in the complaint or an affirmative defense, it should reconsider the request. Moreover, counsel should conference with opposing counsel to facilitate discussion about relevant topics for discovery, the sequence of discovery, proportionality considerations, likely sources of ESI, as well as sources of potential conflict and motion practice. The parties may also conference to discuss staging discovery, focusing first on areas where there is little or no objection to the information sought and then expanding the requests as necessary.

Section IV provides a practical, example-based framework for how to draft requests for production in light of the renewed focus on “reasonable particularity.” Suggestions include avoiding “form” requests as well as overbroad “boilerplate” definitions and instructions. Instead, requests should identify specific, identifiable, or discrete documents. This could include limiting requests to certain custodians or locations or requesting information using phrases such as “sufficient to show” rather than “any and all,” where appropriate.

As explained throughout this *Primer*, drafting requests with “reasonable particularity” requires a heightened focus on requests that are specific to the needs of the case. A request cannot be particular if it is comprised of confusing or unnecessary instructions, boilerplate definitions, and template

⁷ FED. R. CIV. P. 26(b)(1).

requests. In short, in preparing Rule 34 requests, a requesting party must understand its goals. The suggestions provided in this *Primer*, along with the *Federal Rule of Civil Procedure 34(b)(2) Primer*, are designed to promote efficient discovery, reduce costs, limit delays, and decrease court involvement in discovery disputes.

II. HISTORICAL AND LEGAL BACKGROUND

A. The Standard’s Origin

Since 1970, Rule 34 has required parties requesting the production or inspection of documents to “describe with *reasonable particularity* each item or category of items” they seek to discover.⁸ The concept of “reasonable particularity,” however, was first introduced several decades earlier, in the 1946 Advisory Committee Notes’ citation to two U.S. Supreme Court cases, *Consolidated Rendering Co. v. Vermont*,⁹ and *Brown v. United States*.¹⁰ These cases are helpful for understanding just how “particular” requests were originally required to be.¹¹

In *Consolidated Rendering*, the requesting party served a notice, akin to a subpoena *duces tecum*, for documents concerning “business dealings” between the two identified parties during a specified time period.¹² On appeal, the U.S. Supreme Court heard arguments that “the documents [sought] were not described with the particularity required in the description of documents.”¹³ In the 1908 opinion, the U.S. Supreme Court acknowledged that the requests appeared “quite broad” as written, but the Court pointed out that they were limited to relevant documents during a specified period of time.¹⁴ The Court saw “no reason why all such books, papers and correspondence which related to the subject of the inquiry, and were described with reasonable detail” were not discoverable.¹⁵

Similarly, in its 1928 decision in *Brown v. United States*, the U.S. Supreme Court addressed the reasonableness of a request seeking “all letters or copies of letters, telegrams, or copies of telegrams, incoming and outgoing” passed between one identified party and another during a specified time period relating to any of a list of eighteen broadly described topics.¹⁶ The Supreme Court overruled the

⁸ FED. R. CIV. P. 34(b)(1)(A) (as amended 2015) (emphasis added).

⁹ 207 U.S. 541 (1908).

¹⁰ 276 U.S. 134 (1928).

¹¹ FED. R. CIV. P. 34, advisory committee notes to the 1946 amendment.

¹² *Consolidated Rendering*, 207 U.S. at 554 (paraphrasing request as seeking “such books or papers as related to, or concerned, any dealings or business between January 1, 1904, and the date of the notice, October, 1906, with the parties named therein, who were cattle commissioners of the state of Vermont, and which papers were to be used relative to the matter of complaint pending”).

¹³ *Id.* at 553–54.

¹⁴ *Id.* at 554 (analyzing a request for “books or papers as related to, or concerned any dealings or business between January 1, 1904, and the date of the [subpoena], with the parties named therein” and holding that these requests “related to the subject of inquiry, and were described with reasonable detail” and that responsive documents should be produced).

¹⁵ *Id.* Of course, this opinion was delivered almost a century before the explosion of ESI.

¹⁶ *Brown v. United States*, 276 U.S. 134, 138–39 (1928) (citing a long list of topics for the subject matter of the documents sought as exchanged between specified parties during particular time frames, including documents referencing general meetings, zone meetings, “costs of manufacture,” “issuing new price lists,” “exchanging price lists,”

objections, reasoning “[t]he subpoena . . . specifies . . . with *reasonable particularity* the subjects to which the documents called for relate” and the time period at issue.¹⁷

When the “reasonable particularity” concept moved from the Advisory Committee Notes to the text of the Rule in 1970, “leading commentators view[ed] the designation requirement as concerning identification” of documents, not as addressing the requests’ scope or breadth.¹⁸ In other words, a request that is not reasonably particular may be more appropriately objected to as vague or ambiguous.¹⁹

Whether a request is “reasonably particular” under the Rules depends on the circumstances of the case, including the degree of knowledge that the requesting party may reasonably have about the documents sought when the request is made.²⁰ For example, a plaintiff-employee requesting documents from their defendant-employer is generally equipped with a greater understanding of the types

“maintaining prices,” “reducing prices,” “curtailment of production,” cost bulletins, and the intention of specific parties to attend a particular exposition).

¹⁷ *Id.* at 143 (emphasis added). The Court further contrasted the subpoena in question with that at issue in *Hale v. Henkel*, 201 U.S. 43 (1906). In contrast with *Brown*, the requesting party in *Hale* did not identify a date range or the subject matter of documents sought. The Court in *Hale* therefore ruled the requests to be “to [sic] sweeping to be regarded as [r]easonable [sic],” and that production of all such documents could “completely put a stop to the business of the company.” *Id.* at 142–43 (citing *Hale*, 201 U.S. 43).

¹⁸ *Mallinckrodt Chem. Works v. Goldman, Sachs & Co.*, 58 F.R.D. 348, 349, 354 (S.D.N.Y. 1973) (ordering production of “all documents submitted to the [SEC] in connection with the SEC’s investigation of the financial collapse of the Penn Central Company” because “it is clear that defendant can identify the documents demanded by plaintiffs”); *see, e.g.*, *Parsons v. Jefferson-Pilot Corp.*, 141 F.R.D. 408, 412 (M.D.N.C. 1992) (analyzing “reasonable particularity” by asking whether the “requests place the respondents on reasonable notice of what is called for and what is not”); *In re Folding Carton Antitrust Litig.*, 76 F.R.D. 420, 424 (N.D. Ill. 1977) (“In our opinion, Request Nos. 49-51 comport with the reasonable particularity requirement of Rule 34 and defendants can identify the documents demanded by plaintiffs. The requests designate by well described categories and specific time periods the documents to be produced. This is all that is required under Rule 34.”); *United States v. Int’l Bus. Machs. Corp.*, 72 F.R.D. 78, 82 (S.D.N.Y. 1976) (“[T]he Request embraces a demand to government agencies for all documents relating to the ‘employment’ by the agencies, regardless of when that employment occurred, of any of the witnesses. Since all documents relating to an employee are theoretically concerned with his employment, on its face paragraph one demands every document[] in the ‘employing’ agency’s possession which in any way mentions one of the witnesses. Since this construction would make much of if not all of the balance of the Request superfluous, the court must conclude that IBM in fact desires by this part of its demand less than every such document. What is desired is not reasonably particularized.”).

¹⁹ *See, e.g.*, *Lykins v. CertainTeed Corp.*, No. CIV.A. 11-2133, 2012 WL 3578911, at *9 (D. Kan. Aug. 17, 2012) (characterizing responding party’s vague and ambiguous objections to document requests as taking issue with the request’s lack of particularity). Note, however, that other courts have stressed the close connection between burden and “reasonable particularity.” *See* discussion of *Regan-Touhy v. Walgreen Co.*, *infra* Section II.C.

²⁰ *Mallinckrodt*, 58 F.R.D. at 353 (“The ‘reasonable particularity’ requirement is not susceptible to exact definition. What is reasonably particular is dependent upon the facts and circumstances in each case.”). The Federal Practice & Procedure Manual concurs that the analysis of the “reasonable particularity” of a request:

[n]ecessarily . . . must be a relative one, turning on the degree of knowledge that a movant in a particular case has about the documents it requests. . . . [T]he ideal is not always attainable and Rule 34 does

of documents the employer may possess and how to most appropriately describe them to ensure that the employee obtains what it seeks. Conversely, a plaintiff-consumer or plaintiff-competitor, who only interacts with a defendant-corporation in rare, arm’s lengths transactions, may have a much more difficult time describing which documents exist, how they are referenced, how they are stored, etc. Thus, whether a document request is properly drafted to meet the “reasonable particularity” requirement must be analyzed in the context of the information available to the requesting party when making the request.

Of course, a poorly drafted request may also cause problems with overbreadth and burden. For example, a request seeking documents without specifying a time frame may lack particularity, and as a result, may ultimately seek voluminous, irrelevant documents outside the scope of the case—the production of which could be unduly burdensome. However, the concepts of particularity and breadth/burden are not directly synonymous and should be considered separately.²¹

As discussed in the Introduction, in 2015 Rule 34 was amended once again to require increased specificity when drafting *responses* to document requests, but the amendment did not provide any additional guidance regarding the “reasonable particularity” requirement for propounding requests.

B. Relationship Between Rule 26(g) and Rule 34

Counsel has an ethical obligation to serve Rule-compliant discovery requests.²² As discussed in more detail in *The Sedona Principles, Third Edition*, three themes dominated the 2015 amendments: cooperation, proportionality, and increased judicial involvement.²³ Among other things, Rule 26(b) was amended to allow parties to obtain discovery “relevant to any party’s claim or defense and proportional to the needs of the case” and delete the broad former language permitting “discovery of any matter relevant to the subject matter involved in the action” or that is “reasonably calculated to lead to the discovery of admissible evidence.”²⁴ Rule 34(a) permits a “request within the scope of Rule

not require the impossible. Even a generalized designation should be sufficient when the party seeking discovery cannot give a more particular description and the party from whom discovery is sought will have no difficulty in understanding what is wanted. . . . There have been a great many cases in which courts have relied on the requirement of designation as a ground for refusing to require a general search or inspection of voluminous records. . . . Such concerns are addressed more directly under the proportionality provisions added in 1993 and now found in Rule 26(a)(2)(C).

Charles Alan Wright, et al., 8A Federal Practice & Procedure § 2211 at 415 (3d ed. Apr. 2020 update) [hereinafter Wright & Miller].

²¹ *Id.*; see also FED. R. CIV. P. 34, advisory committee notes to the 1970 amendment (stating the question of undue burden is best addressed by Rule 26 in “consideration of the needs of the party seeking discovery”).

²² See Model Rules of Prof’l Conduct r. 3.4 (Am. Bar Ass’n 2020).

²³ *The Sedona Principles, Third Edition*, *supra* note 4, at 30.

²⁴ FED. R. CIV. P. 26(b)(1).

26(b),” and therefore necessarily incorporates the relevance and proportionality elements of amended Rule 26(b)(1).²⁵

One of the important reasons to keep the scope of discovery, including relevance and proportionality, in mind when drafting Rule 34 requests is that Rule 26(g) treats service of a discovery request as a certification. The requesting party and its counsel certify that each request is consistent with the Rules, not interposed for any improper purpose, and “neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.”²⁶ Courts have also held that the requesting party “bears the burden of fashioning the requests appropriately.”²⁷ Sedona Principle 4 similarly provides that “Discovery requests for electronically stored information should be as specific as possible”²⁸

The court in *Effyis, Inc. v. Kelly* ordered sanctions against the defendant for issuing overbroad requests, holding that the requests violated Rule 26(g) and that in such a case, the court *must* impose sanctions.²⁹ The court noted that the defendant issued 98 separate requests, and they all began with “any and all” and were not limited by time or scope.³⁰ The court also noted that the definition of “document” in the requests stretched over a page in length.³¹ One document request that the court found especially egregious sought “[a]ny and all DOCUMENTS in Plaintiff’s possession, custody, or control which reflect or relate to any meetings Plaintiffs, Plaintiff’s employees, or Plaintiff’s agents had with Darren Kelly including any handwritten or typed notes.”³² The court said that the request was so broad, it would take an “extreme ‘subjective guessing game’ to understand whether a document—as broadly defined in the request—relates to ‘any’ meetings that anyone involved with Plaintiffs had with Defendant.”³³ The magistrate judge’s report and recommendations proposed a finding of a violation of Rule 26(g), but the district court went further, sanctioning the defendant by requiring the defendant to pay the plaintiff’s attorneys’ fees.³⁴

²⁵ FED. R. CIV. P. 26, 34.

²⁶ *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 356 (D. Md. 2008) (quoting FED. R. CIV. P. 26(g)(1)(B)(iii)); *see also* *Effyis, Inc. v. Kelly*, No. 18-13391, 2020 WL 4915559 (E.D. Mich. Aug. 21, 2020) (imposing sanctions on defendant’s counsel under Rule 26(g)(3) for serving discovery requests “unbounded by time, relevance, or reason”).

²⁷ *See, e.g.*, *Peterson v. Hantman*, 227 F.R.D. 13, 17 (D.D.C. 2005) (finding no error when responding party responded to the “letter” of requests that were originally “misworded”).

²⁸ *The Sedona Principles, Third Edition*, *supra* note 4, at 51.

²⁹ *Effyis*, 2020 WL 4915559, at *1–2.

³⁰ *Id.* at *2.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* at *1.

As the court said in *Bottoms v. Liberty Life Assurance Co. of Boston*, Rule 26(g) “obligates each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection.”³⁵ Counsel does not satisfy Rule 26(g) by “robotically recycling discovery requests” used in other cases.³⁶ In *Bottoms*, which involved claims brought under the Employment Retirement Income Security Act, the court cited numerous examples of the plaintiff’s failure to comply with Rule 26(g). For example, in one request, the plaintiff asked the defendant to produce complete personnel files for every person “who was in any way involved in the handling, processing or denial of Plaintiff’s claim for benefits.”³⁷ The court said that such a request swept too broadly, as it failed to distinguish between the defendant’s employees involved in clerical activities (e.g., the handling of the plaintiff’s claim), and the decision-makers responsible for denying plaintiff’s claim.³⁸

Despite these ethical obligations and requirements in the Rules and case law, counsel routinely issue overbroad, noncompliant discovery requests, and cases often get bogged down in costly discovery disputes, leading to protracted, expensive litigation.³⁹ The 2015 amendments were an attempt to curb these abuses.⁴⁰ Crafting document requests that specify the items sought with “reasonable particularity” provides an additional opportunity to achieve this goal.

C. “Reasonable Particularity” in the Age of Electronic Discovery

As discussed in the preface to *The Sedona Principles, Third Edition*, there has been an “explosion in the volume and diversity of forms of electronically stored information,” a “constant evolution of technology applied to eDiscovery,” and litigation experience dealing with eDiscovery that have demonstrated both the complications and benefits of electronic discovery.⁴¹ Because most discovery of ESI

³⁵ *Bottoms v. Liberty Life Assurance Co. of Boston*, No. 11-cv-01606, 2011 WL 6181423, at *4 (D. Colo. Dec. 13, 2011) (quoting *High Point Sarl v. Sprint Nextel Corp.*, No. 09-2269, 2011 WL 4036424, at *11 (D. Kan. Sept. 12, 2011)).

³⁶ *Bottoms* at *5.

³⁷ *Id.* at *6.

³⁸ *Id.*

³⁹ *Id.* at *4 (“Despite the requirements of [Rule 26(g)], however, the reality appears to be that with respect to certain discovery, principally interrogatories and document production requests, lawyers customarily serve requests that are far broader, more redundant and burdensome than necessary to obtain sufficient facts to enable them to resolve the case through motion, settlement or trial.”); see also *Legends Mgmt. Co. v. Affiliated Ins. Co.*, 2:16c-v-01608-SDW-SCM, 2017 WL 4618817, at *2 (D.N.J. Oct. 13, 2017) (“[T]he sole purpose of discovery is to add flesh for trial on the parties’ respective claims and defenses in the given action”); *Adams v. City of Chicago*, No. 06 C 4856, 2011 WL 856589, at *3 (N.D. Ill. Mar. 9, 2011) (“[A] lawsuit is about deciding the particular rights and liabilities of these parties arising out of these events, not about discovery for its own sake.”).

⁴⁰ *Federal Rule of Civil Procedure 34(b)(2) Primer*, *supra* note 5, at 452; see also *Michael Kors, LLC v. Su Yan Ye*, No. 2:18-cv-2684, 2019 WL 1517552, at *3 (S.D.N.Y. Apr. 8, 2019) (“The 2015 amendments to the Rules were designed to stop counsel from relying on standard, overbroad requests and to also require tailoring on the particular issues and circumstances in the case.”).

⁴¹ *The Sedona Principles, Third Edition*, *supra* note 4, at 8.

is conducted under Rule 34, it is appropriate to consider specifically how “reasonable particularity” applies to electronic discovery.⁴²

As electronic discovery emerged in the 21st century and the volume of ESI exploded, the need for compliance with the “reasonable particularity” requirement became more pronounced. The Tenth Circuit recognized in *Regan-Touhy v. Walgreen Co.* that “the burdens and costs associated with electronic discovery, such as those seeking ‘all email,’ are by now well known”⁴³ *Regan-Touhy* cautioned courts to prevent collateral discovery disputes from shifting focus away from the merits of the case.⁴⁴ *Regan-Touhy* and the additional cases discussed below illustrate courts’ application of Rule 34’s “reasonable particularity” requirement in the age of electronic discovery.

1. Requests for “All Communications” and “All Documents”

The proliferation of electronic communications and the large volumes of electronic documents maintained by organizations have led courts in some cases to reject requests that seek “all communications,” or “all documents” on the grounds that they fail Rule 34’s “reasonable particularity” requirement. In *Regan-Touhy*, for example, the plaintiff claimed that an employee at Walgreen’s used her position to access the plaintiff’s pharmacy records and then disclosed the records to her ex-husband and others.⁴⁵ The plaintiff’s document requests sought a copy of the employee’s entire personnel record, all communications between Walgreen’s and the employee, and all documents that mentioned or related in any way to the employee.⁴⁶ The plaintiff filed a motion to compel Walgreen’s to produce documents responsive to the request, which was denied by the trial court.⁴⁷ On appeal, the circuit court affirmed the lower court’s ruling, holding that the request for “all communications” was not narrowly tailored and could have been more focused on whether Walgreen’s disciplined its employee for disclosing the plaintiff’s condition.⁴⁸ While some of the opinion focused on the overbreadth and burden of the requests, the court recognized that overbreadth and burden are closely tied to the “reasonable particularity” requirement. The court recognized that while litigants enjoy broad discovery privileges, “with those privileges come certain modest obligations, one of which is the duty to state discovery requests with ‘reasonable particularity.’ All-encompassing demands of this

⁴² Non-party electronic discovery is conducted under Rule 45, which is subject to the same limitations as those imposed by Rule 34. FED. R. CIV. P. 45, advisory committee notes to the 1991 amendment; *see also* *Gutierrez v. Mora*, No. CV 18-781-KS, 2019 WL 8953125, at *5 (C.D. Cal. Dec. 18, 2019) (“the scope of document production under Rule 45 is governed by the same standards as production under Rule 34”).

⁴³ *Regan-Touhy v. Walgreen Co.*, 526 F.3d 641, 649 (10th Cir. 2008).

⁴⁴ *Id.*

⁴⁵ *Id.* at 644.

⁴⁶ *Id.* at 648–49.

⁴⁷ *Id.* at 646.

⁴⁸ *Id.* at 649, 653.

kind take little account of that responsibility.”⁴⁹ The court explained that what qualifies as “reasonably particular” depends on the circumstances of each case, but at a minimum, the request must “apprise a person of ordinary intelligence what documents are required and [enable] the court . . . to ascertain whether the requested documents have been produced.”⁵⁰

Other courts have held that “[a]ll-encompassing demands that do not allow a reasonable person to ascertain which documents are required do not meet the particularity standard of Rule 34(b)(1)(A).”⁵¹ Broad requests that seek all documents that “refer or relate” to the allegations in the complaint, particularly when the complaint asserts broad allegations, may not satisfy the “reasonable particularity” requirement.⁵² Conversely, a request that sought documents that “refer or relate to [the plaintiff’s allegedly involuntary] retirement,” was valid, as “there was no mystery” to what documents plaintiff requested, and the request identified a narrow category of documents related to the elimination of the plaintiff’s position.⁵³ The court said that requests “should be reasonably specific, allowing the respondent to readily identify what is wanted.”⁵⁴ Requests that are “all inclusive of a general topic function like a giant broom, sweeping everything in their path, useful or not,” are accordingly problematic.⁵⁵ They “require the respondent either to guess or move through mental gymnastics which are unreasonably time-consuming and burdensome to determine which of many pieces of paper may conceivably contain some detail, either obvious or hidden, within the scope of the requests.”⁵⁶

2. Setting a Time Period for the Requests

Requests that seek broad categories of documents concerning events that occurred over a very short time period may satisfy the “reasonable particularity” standard.⁵⁷ One court held that requests for production that sought “any and all” documents and communications regarding events described in the complaint, where the events took place over a couple of hours and involved the policies and

⁴⁹ *Id.* at 649 (citation omitted) (addressing the request for “all documents . . . that refer to, mention or relate in any way to Plaintiff, Whitlock, or the litigation or the allegations, facts and circumstances concerning the litigation”).

⁵⁰ *Id.* at 649–50 (quoting *WRIGHT & MILLER*, *supra* note 20, at 415); *see also* *Lopez v. Don Herring Ltd.*, 327 F.R.D. 567, 575 (N.D. Tex. 2018) (noting that the “reasonable particularity” requirement in the Rule must describe the documents “sufficient to apprise a man of ordinary intelligence which documents are required.” (citations omitted)).

⁵¹ *In re Milo’s Kitchen Dog Treats Consol. Cases*, 307 F.R.D. 177, 179–80 (W.D. Pa. 2015) (quoting *In re Asbestos Prods. Liab. Litig.* (No. *180 VI), 256 F.R.D. 151, 157 (E.D. Pa. 2009)).

⁵² *See, e.g.*, *Dauska v. Green Bay Packaging, Inc.*, 291 F.R.D. 251, 261–62 (E.D. Wis. 2013).

⁵³ *Id.* at 262.

⁵⁴ *Id.* at 261.

⁵⁵ *Id.* (quoting *Audiotext Commc’ns v. U.S. Telecom, Inc.*, No. CIV A. 94–2395–GTV, 1995 WL 18759, *1 (D. Kan. Jan. 17, 1995)).

⁵⁶ *Id.*

⁵⁷ *Freedom Found. v. Sacks*, No. 3:19-CV-05937-RBL, 2020 WL 2219247, *2 (W.D. Wash. May 7, 2020).

practices of a single state agency, were “sufficiently particular.”⁵⁸ Where communications related to a lawsuit are relevant, a request seeking production of communications with third parties related to the lawsuit may be sufficiently restricted in time (i.e., the duration of the lawsuit) that the time frame is reasonably particular.⁵⁹ Another court similarly held that a request that was limited to a discrete time period—two years—was “reasonably particular.”⁶⁰

Yet, even shorter time periods may be viewed as not reasonably particular in certain contexts. For example, a six-month period may be too long if the requesting party seeks broad categories of sensitive information. One court considered a request for all Facebook posts for a six-month period relating to “Plaintiff’s activities or mental status.”⁶¹ In evaluating the request, the court held that the information requested must be described with “reasonable particularity,” and that “[t]he test for reasonable particularity is whether the request places a party upon ‘reasonable notice of what is called [f]or and what is not.’”⁶² The court ordered the defendant to request specific items from the plaintiff’s Facebook or other social media accounts relating to physical activities or mental status in a six-month period.⁶³

In sum, the requirement to identify documents with “reasonable particularity” should not require the producing party “to ponder and to speculate in order to decide what is and what is not responsive.”⁶⁴ “Broad and undirected” requests for all documents that in any way relate to the complaint

⁵⁸ *Id.*

⁵⁹ *See, e.g.*, *Boehm v. Scheels All Sports, Inc.*, No. 15-cv-379-jdp, 2016 WL 6811559, *2 (W.D. Wis. Nov. 17, 2016) (holding that informal discovery requests, which the court evaluated under Rule 34, seeking “your client’s or your firm’s communications with [certain third parties] related to this lawsuit” provided sufficient information to allow the defendant to identify responsive documents and therefore satisfied the “reasonable particularity” requirement.) However, the duration of the lawsuit may impact whether the time period is sufficiently particular.

⁶⁰ *Guerra v. Balfour Beatty Communities, LLC*, No. EP-14-CV-268-DB, 2015 WL 13794439, at *6-7 (W.D. Tex. Nov. 19, 2015) (holding that because Plaintiff limited request 31, which sought “all agreements between the United States government, or any of its agencies, and Defendant in regards to Defendant’s operations at its Fort Bliss and White Sands Missile Range locations” for a period of 2 years, and because it related to a subject integral to her claim, it was reasonably particular and not overbroad).

⁶¹ *Locke v. Swift Transp. Co. of Ariz. LLC*, No. 5:18-CV-00119, 2019 WL 430930, at *1 (W.D. Ky. Feb. 4, 2019).

⁶² *Id.* at *2 (citations omitted).

⁶³ *Id.* at *5.

⁶⁴ *Bruggeman v. Blagojevich*, 219 F.R.D. 430, 436 (N.D. Ill. 2004); *see also* JUDGE VIRGINIA A. PHILLIPS & JUDGE KAREN L. STEVENSON, *ROUTER GROUP PRACTICE GUIDE: FEDERAL CIVIL PROCEDURE BEFORE TRIAL, CALIFORNIA & NINTH CIRCUIT EDITION* § 11:1886 (2020 ed.) (“[T]he apparent test is whether a respondent of average intelligence would know what items to produce.”).

are generally inappropriate.⁶⁵ “A request for ‘all documents and records’ that relate to ‘any of the issues [in the lawsuit],’ while convenient, fails to set forth with reasonable particularity the items or category of items sought for [the responding party’s] identification and production of responsive documents.”⁶⁶ One court described an adequate request as one that “describes items with ‘reasonable particularity’; specifies a reasonable time, place, and manner for the inspection; and specifies the form or forms in which electronic information can be produced.”⁶⁷ A properly drafted request will describe the items or category of items sought with a level of detail that the requesting party should be reasonably expected to know. Thus, a request is sufficiently clear if it “places the [responding] party upon reasonable notice of what is called for and what is not.”⁶⁸

⁶⁵ *Lopez v. Don Herring Ltd.*, 327 F.R.D. 567, 575 (N.D. Tex. 2018) (“[B]road and undirected requests for all documents which relate in any way to the complaint’ do not meet Rule 34(b)(1)(A)’s standard.” (quoting *Parsons v. Jefferson-Pilot Corp.*, 141 F.R.D. 408, 412 (M.D.N.C. 1992))).

⁶⁶ *Id.* (quoting *Sewell v. D’Alessandro & Woodyard, Inc.*, No. 2:07-CV-343-FTM-29, 2011 WL 843962, at *2 (M.D. Fla. Mar. 8, 2011)).

⁶⁷ *Pearson v. Bakersfield Police Dep’t*, No.: 1:18-cv-00372 - JLT, 2019 WL 1765279, at *2 (E.D. Cal. Apr. 22, 2019) (citation omitted) (quoting *Kidwiler v. Progressive Paloverde Ins. Co.*, 192 F.R.D. 193, 202 (N.D. W. Va. 2000)).

⁶⁸ *Id.* Note too that some courts have local rules that require specificity in the requests. *See, e.g.*, *Glass Egg Digital Media v. Gameloft, Inc.*, No. 17-cv-04165-MMC(RMI), 2019 WL 5720731, at *2 (N.D. Cal. Nov. 5, 2019) (“Regarding discovery in general, and motions to compel in particular, Northern District Local Civil Rule 37-2 makes it incumbent on a party moving to compel discovery to ‘detail the basis for the party’s contention that it is entitled to the requested discovery and show how the proportionality and other requirements of Fed. R. Civ. P. 26(b)(2) are satisfied.’”).

III. DRAFTING REQUESTS THAT SATISFY THE REQUIREMENT

Given the increased complexity of modern discovery and the evolving case law, how should practitioners draft requests to comply with the Rules? The following are practice considerations to help attorneys balance these concerns.

A. Start at the End: Focus on Information Needed for Claims and Defenses

It may be useful to start at the end: focus on information necessary to establish or defeat a claim or defense, deal with pertinent collateral issues (e.g., standing, jurisdiction, or class certification), win summary judgment, or succeed at trial. Jury instructions often are a good starting place to evaluate the required elements of each claim and defense. Other documents to review include the complaint, Rule 12 motions, the answer, and initial disclosures. Consider compiling a list of document categories and asking: How are the documents sought helpful? If an answer or initial disclosure does not contest a factual assertion in the complaint, there may be no need to request information relevant to that factual assertion. Or, if an answer or initial disclosure identifies the nature of a dispute, the requesting party can focus on that dispute.

Clients will benefit from this early time investment that will yield “just, speedy, and inexpensive” results through reasonably particular requests. As counsel drafts each request, it should consider how the information sought relates to a claim or defense. If counsel cannot articulate such a relationship, it should reconsider the request. Counsel might also consider having a colleague review the requests and point out likely objections so that those might be proactively addressed in the drafting of the request. By articulating the reason for each request and how it ties to a claim or defense, counsel will be well prepared to confer with opposing counsel and for any hearings on a motion for protective order or motion to compel. Counsel will strengthen professional relationships with judges and opposing counsel by propounding thoughtful requests.

B. Resources to Consider that Do Not Require Discussions with Opposing Counsel

Counsel should talk with its client about drafting requests. For example, in an employment wage-and-hour case, the plaintiff may know what systems were used for timekeeping records and the type of detailed information those systems contain. In a dispute between two companies that have had a business relationship, one company may similarly have information about the other company’s relevant systems based on that relationship. If a client has information about relevant sources of information that an opposing party is likely to have, counsel can serve targeted requests for that information. The client may also have information about specific people involved in the matter that may guide requests for production of communications and can inform the relevant time period for different requests.

Counsel should also consider using publicly available resources to find out as much about the responding party as possible to aid in the drafting of reasonably particular requests. Potential sources

to consider include the responding party’s website or online sources of information, marketing materials distributed by the responding party, or publicly available filings with government agencies.

C. Meet and Confer with Opposing Counsel

Conferences between the parties can also help counsel craft or refine requests that do not impose unreasonable discovery burdens. As discussed in the *Federal Rule of Civil Procedure 34(b)(2) Primer*, a “substantive conference between the parties early in the case provides an opportunity to comply with the Rules amendments and avoid disputes about requests for production or responses to those requests.”⁶⁹ Several courts provide guidelines for conducting discovery conferences.⁷⁰

Early conferences among the parties can help facilitate discussion about the scope of discovery, including relevance and proportionality, sequence of discovery, areas of inquiry that are least likely to draw objection, and those where motion practice is likely. For example, in a putative consumer products liability class action, the plaintiff may seek to represent consumers nationwide. However, the manufacturer may believe discovery should be limited to a particular state because of different marketing or distribution arrangements that are relevant to the claims or defenses. Even if the parties are unable to agree on the scope of discovery without some initial discovery, these conversations can facilitate staging discovery to focus first on locations to which there is no objection and then expanding, as necessary, as additional facts are learned.

Early conferences can also assist where requesting counsel may have limited information about the responding party’s systems or may misunderstand the responding party’s ability to easily produce requested documents. Where this is the case, the parties may find it helpful to conference early to better understand how requests should be tailored. While some “any and all” requests are objectionable, courts may approve of “all” language when limited to certain categories of information.⁷¹

D. Staging Requests

Sending a small number of targeted requests early in a case may quickly provide access to documents that may assist in crafting additional compliant requests. Consider, for example, a product liability

⁶⁹ Federal Rule of Civil Procedure 34(b)(2) Primer, *supra* note 5.

⁷⁰ For example, the Northern District of California, the Northern District of Illinois, and the District of Colorado publish guidelines that include checklists for conversations about eDiscovery. See <https://cand.uscourts.gov/forms/e-discovery-esi-guidelines/>; <https://www.ilnd.uscourts.gov/Pages.aspx?jYyawIFLXKMJrmXzxFk8lw==>; http://www.cod.uscourts.gov/Portals/0/Documents/Forms/CivilForms/E-Discovery_Guidelines.pdf.

⁷¹ Compare *St. Paul Reins. Co. v. Com. Fin. Corp.*, 198 F.R.D. 508, 512–13 (N.D. Iowa 2000) (approving “all documents identified, or relied on” in a party’s answers to a counterclaim plaintiff’s first set of interrogatories directed to the counterclaim defendant), and *Mallinckrodt Chem. Works v. Goldman Sachs & Co.*, 58 F.R.D. 348, 354–55 (S.D.N.Y.) (approving request for “all” documents submitted to the Securities and Exchange Commission in connection with a particular SEC investigation), with *Frank v. Tinicum Metal Co.*, 11 F.R.D. 83, 85 (E.D. Pa. 1950) (“[A] blanket request . . . for the production of all books and records related to the subject matter is obviously too general and indefinite to be granted.” (citation omitted)).

suit alleging a design-related failure in a system component. Targeted requests for design drawings showing the component may result in quick access to core documents for consulting experts, who can then assist with crafting additional document requests. Moreover, opposing counsel may be less likely to ask for an extension of time in responding to a small number of targeted requests, allowing the parties to begin substantive discovery earlier. Such targeted requests may even lead to resolution of some claims or early settlement discussions.

When considering staging discovery requests, it is often useful to discuss the proposed process with opposing counsel. Doing so can help set expectations about the staging process and potential time frames. The parties may include information about proposed or agreed staged discovery in a Rule 26(f) case management statement or other filing with the court.⁷²

E. Early Delivery of Rule 34 Requests

The 2015 amendments allow delivery (to be distinguished from “service”) of Rule 34 requests 21 days after service of the complaint.⁷³ The Advisory Committee Notes acknowledge that this allows delivery of requests *before* an answer or Rule 12 motion is filed, but they explain that the revised timeline was “designed to facilitate focused discussion during the 26(f) conference” that “may produce changes in the requests.”⁷⁴

Early delivery of Rule 34 requests permits the parties to engage in specific discussions about potential objections to the requests, including relevance, scope, and proportionality, and strategies for resolving those objections as early as the Rule 26(f) discovery conference.⁷⁵ For example, after understanding what a requesting party is seeking, a responding party may disclose searches it would be willing to make to identify potentially responsive materials. Confering about early Rule 34 requests provides the requesting party with an opportunity to further revise and refine its requests and reserve further requests for after consideration of the responding party’s questions, concerns, and likely objections.

F. Other Considerations

Counsel should consider whether there may be unintended consequences associated with the requests. For example, overly broad requests, especially those that use “any and all” or similar language, may prompt a producing party to produce documents in a “document dump,” which can increase the requesting party’s burden and cost associated with reviewing the documents. A requesting

⁷² The discovery plan required by Rule 26(f)(3) requires, among other things, a discussion of “the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues.” FED. R. CIV. P. 26(f)(3).

⁷³ FED. R. CIV. P. 26(d)(2).

⁷⁴ FED. R. CIV. P. 26, advisory committee’s notes to the 2015 amendment.

⁷⁵ See Philip Favro, *Navigating the Discovery Chess Match Through Effective Case Management*, 53 AKR. L. REV. 31, 45 (2019) (discussing the salutary effect of early Rule 34 requests on streamlining discovery).

party’s counsel should also consider whether its request calls for discoverable materials that may create unnecessarily higher discovery costs for both parties and even draw a cost-shifting request. Counsel also should consider how it would respond if the other party parroted back the structure or substance of the requests in requests to its own client. For example, in a lost-profits case, both parties are likely to request the other party’s financial statements. If the requesting party is willing to produce the financial statements but objects to a request for “any and all documents related to” those financial statements, the requesting party should consider limiting its own request to just the financial statements.

Courts have mostly opted for practical solutions over sanctions when examining poorly drafted requests. For example, courts may order the parties to meet and confer over the scope of the request at issue. Courts may redraft a problematic request and compel production of a much narrower set of documents, which may or may not include pertinent documents the requesting party needs to prove its case.⁷⁶ Still other courts may refuse to compel production of documents responsive to a request lacking in particularity, partly in recognition that it is not the court’s job to revise requests for production.⁷⁷ Such a result could have dire consequences for a requesting party, especially when the documents sought are necessary to support claims or defenses.

Nonetheless, sanctions are still a real possibility for counsel drafting overbroad and voluminous requests, as the *Effyis* decision, discussed above, demonstrates.⁷⁸

⁷⁶ Cf. *William A. Gross Constr. Assocs., Inc. v. Am. Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134, 135 (S.D.N.Y. 2009) (observing in a dispute over search terms that the court was placed “in the uncomfortable position of having to craft a keyword search methodology for the parties.”).

⁷⁷ Cf. *McMaster v. Kohl’s Dep’t Stores, Inc.*, No. 18-13875, 2020 WL 4251342 at *3 (E.D. Mich. July 24, 2020) (rejecting the parties’ request to select one of their competing lists of search terms and reasoning that the court had “no interest in going where angels fear to tread.”).

⁷⁸ *Effyis, Inc. v. Kelly*, No. 18-13391, 2020 WL 4915559, at *2 (E.D. Mich. Aug. 21, 2020).

IV. PRACTICE CONSIDERATIONS

Practice considerations for drafting requests that satisfy the “reasonable particularity” requirement are outlined below. In light of the focus in the Rules and this *Primer* on considering the needs of individual cases, these practice considerations should be evaluated with that aim in mind. Further, one size does not fit all—each case will be different and will be impacted by the nature of the parties in dispute (large organizations, individuals, government, etc.), the time frame for the facts (events that occurred over many years or a few days), the amount of ESI the parties retain, and myriad other factors. Nevertheless, by accounting for the topics listed below, counsel is more likely to satisfy the “reasonable particularity” requirement and ultimately obtain the right documents needed to prosecute or defend the case.

A. Avoid Reusing Form Requests

Requesting parties often duplicate their own template discovery requests, which cannot, by definition, be “particular.” This practice may be motivated by concern that anything less than broad and voluminous requests will result in missing key information. Inexperienced attorneys may also rely on form discovery requests because they either do not know what they will need to prove or defend their case or they have not been properly trained by more seasoned counsel. Yet “[w]here the propounding counsel has made little effort to tailor the [requests] to the facts and circumstances” of the case, it should be no surprise that the other party responds with objections.⁷⁹ Referred to colloquially as “garbage in, garbage out,”⁸⁰ this practice of “robotically recycling discovery requests propounded in earlier actions” also violates Rule 26(g) obligations.⁸¹

The discovery process is designed to obtain the relevant facts essential to the case. Rote reliance on forms or templates fails to consider the factual nuances of each lawsuit. Vague and overbroad Rule 34 requests delay production and create disruptive disputes. Moreover, overbroad requests often lead to motion practice that derails discovery, clogs the courts, and increases litigation costs.⁸² To promote the “just, speedy, and inexpensive” resolution of cases in accordance with Rule 1, counsel

⁷⁹ *Robbins v. Camden City Bd. of Educ.*, 105 F.R.D. 49, 56–57 (D.N.J. 1985) (criticizing the use of pattern interrogatories that are based on little more than “some word-processing machine’s memory of prior litigation”).

⁸⁰ *Cf. United States v. Esquivel-Rios*, 725 F.3d 1231, 1234 (10th Cir. 2013) (“Garbage in, garbage out. Everyone knows that much about computers: you give them bad data, they give you bad results.”); *Moyle v. Liberty Mut. Ret. Benefits Plan*, No. 10-cv-2179, 2013 WL 100281 at *2 (S.D. Cal. Jan. 7, 2013) (“The Court has been asked to rule and it will do so. The result, considering the confusing, incomplete mishmash before the Court, may be a function of the old adage, ‘garbage in, garbage out.’”).

⁸¹ *Bottoms v. Liberty Life Assurance Co.*, No. 11–cv–01606, 2011 WL 6181423 at *5 (D. Colo. Dec. 13, 2011) (observing that this “approach to discovery would be antithetical to the ‘stop and think’ mandate underlying Rule 26(g).”).

⁸² *See Caves v. Beechcraft Corp.*, No. 15-CV-125-CVE-PJC, 2016 WL 355491, at *2 (N.D. Okla. Jan. 29, 2016) (denying motion to compel and sustaining defendant’s objections to document requests seeking “any and all” testimony concerning any “other litigation” as “clearly objectionable” because “[n]either Defendants nor the Court should have to guess what Plaintiff is really seeking. Nor is it the Court’s job to redraft Plaintiff’s discovery requests.”).

should take the time to think about how each discovery request advances the goal of obtaining evidence necessary to advance the matter.

B. Avoid Overbroad or Boilerplate Instructions and Definitions

An important part of drafting Rule-compliant requests is determining whether and/or how to include instructions and definitions. Instructions and definitions should be used sparingly and deliberately to clarify, reduce misinterpretation, or establish broad parameters for the corresponding requests. When used properly, instructions and definitions can be a useful tool for providing further particularity to requests. When used thoughtlessly, instructions and definitions can unnecessarily complicate discovery requests and draw objections.

Instructions should provide context to the requests collectively. To the extent an instruction obligates a responding party to do more than required under applicable Rules or accompanying Advisory Committee Notes, the instruction should include supporting legal authority. Additionally, consider including an instruction that the requests should not be construed to seek production of attorney-client privileged or work-product documents, but simply that such withheld documents should be reflected on a privilege log. This should obviate the need for the responding party to object to production of privileged documents. Instructions related to date ranges are also encouraged, making clear that all requests, unless specifically stated otherwise, should be interpreted to seek documents relevant to an identified date range.⁸³ Requests that specify no time frame are more likely to draw an objection. Lastly, instructions that specify the format of production pursuant to Rule 34(b)(1)(C) could be used if the parties have not previously agreed to a form of production. This is particularly true for productions of ESI that are difficult to extract in a user-friendly format or ESI produced from emerging technologies.

Unfortunately, instructions have been overused and abused in practice. Requesting parties commonly propound instructions that contain obligations greater than, or in conflict with, the requirements of Rule 34 or state rule equivalents.⁸⁴ Requesting parties should resist the urge to include these commonly used (but also commonly ignored) instructions, and instead turn them into interrogatories. An example of an instruction that would be a good candidate for an interrogatory would be one that asks the responding party to identify known responsive documents that are in the possession, custody, or control of a third party. Likewise, instructions that go beyond the requirements

⁸³ See *Wells Fargo Bank NA v. Wyo Tech Inv. Grp., LLC*, No. CV-17-04140-PHX-DWL, 2019 WL 5653425, at *8 (D. Ariz. Oct. 31, 2019) (resolving dispute about time frame covered by discovery requests referencing instructions when relevant to deciding whether defunct organization had to produce historical financial records).

⁸⁴ See *Calcor Space Facility, Inc. v. Super. Ct.*, 61 Cal. Rptr. 2d 567, 569 (Cal. Ct. App. 1997) (issuing a writ of mandate vacating trial court orders requiring a non-party’s compliance with plaintiff’s subpoena and finding that plaintiff’s “six pages of ‘definitions’ and ‘instructions’ is particularly obnoxious . . . [and] in effect, turns each of the 32 requests into a complicated ‘category’ described in more than 6 pages.”).

of Rule 26(b)(5)—for example, requiring the responding party to identify specific metadata or attributes of a document on a privilege log—would be better addressed through meeting and conferring in good faith.

Similarly, the definition section should provide further clarity by defining phrases and words that are truly open to disagreement or confusion. For example, the section may define case-specific words or phrases so that the parties all understand the scope of what is being sought. As with instructions, definition sections are commonly misused and abused.

Requests often include unnecessary definitions of common words or known terms of art. Consider instead a catch-all instruction that directs the responding party to attribute ordinary meaning to commonly used words or cite the regulations or case law that define applicable terms of art. Avoid defining words that already enjoy a standard definition. For example, requests often define “Document” by listing every conceivable type of physical evidence and ESI,⁸⁵ but Rule 34(a)(1)(A) already includes a definition for “documents or electronically stored information.” Of course, a more specific definition of “document” may be appropriate where the requesting party can tailor its request to the specific types of relevant documents or ESI. Also, if the matter is in a state court where there is no equivalent state-law definition for “document,” a requesting party may consider simply defining “document” by citing Rule 34(a)(1)(A) in the Federal Rules.

Poorly drafted definitions may render a request nonspecific and objectionable because the definition of a term used by the request is so overbroad. For example, a definition of “You” that includes third parties may exceed the proper scope of Rule 34’s possession, custody, or control standard, rendering every request using that term improper by seeking information that can only be obtained via Rule 45 subpoena. Defining terms that do not appear in the requests themselves is not reasonably particular—unless of course, the term relates to a statutory claim in litigation, and the definition could be helpful.

When improperly drafted, definitions and instructions can make an otherwise appropriate request unreasonable, unduly burdensome, or otherwise improper under Rule 26(g). Well-crafted definitions and instructions can make requests clearer by, for example, defining the relevant time period for the requests or a term based on a statutory definition. A requesting party should consider several questions before drafting an instruction or definition:

- Are the definitions and instructions merely copied from a prior request? If so, pursuant to the discussion above, the request may not be reasonably particular.
- Does the instruction request ESI that is proportional to the needs of the case? Particularly egregious instructions such as requiring a responding party to search for documents

⁸⁵ See *Effyis, Inc. v. Kelly*, No. 18-13391, 2020 WL 4915559 at *2 (E.D. Mich. Aug. 21, 2020) (imposing sanctions on counsel for propounding unreasonable document requests and spotlighting as particularly problematic the more than one-page definition for the word “document”).

not in its possession, custody, or control “exceed or contradict the requirements of the Rules, [and use] definitions that are not actually used in the requests”⁸⁶

- Is the source of ESI sought reasonably accessible, or will it create undue burden or cost?⁸⁷ For example, avoid (unless necessary) an instruction that the responding party must search deleted data, slack space, random access memory (“RAM”), disaster recovery tapes, and other nonprimary sources of ESI that may not be readily or reasonably accessible in the normal course.⁸⁸ Similarly, instructions asking a party to itemize each document responsive to the discovery requests that may have existed at a point in time and now no longer exists may be unduly burdensome or seek information that is impossible to provide.
- Does the instruction contemplate production of documents that “can be obtained from some other source that is more convenient, less burdensome, or less expensive?”⁸⁹ If a requesting party believes that there is a basis for demanding that the responding party engage in such a search, it may be useful to meet and confer about such an instruction before issuing the discovery requests.
- Do the definitions include words that have commonly understood but unnecessary definitions, such as “and,” “concerning,” or “refer,” especially where the special definition varies from the commonly understood definition?⁹⁰
- Have the definitions and instructions complicated the request to such an extent that the request is akin to an interrogatory?⁹¹

⁸⁶ *Federal Rule of Civil Procedure 34(b)(2) Primer*, *supra* note 5, at 464.

⁸⁷ *The Sedona Principles, Third Edition*, *supra* note 4, at 138–40.

⁸⁸ FED. R. CIV. P. 26(b)(2)(B); *see The Sedona Principles, Third Edition*, *supra* note 4, at 134–43.

⁸⁹ FED. R. CIV. P. 26(b)(2)(C)(i).

⁹⁰ For example, definitions of “concerning” sometimes purport to seek documents that “explicitly or implicitly, in whole or in part, reflect, refer to, record, regarding, are connected with, relate, describe, discuss, mention” and other verbs topics covered by the request. *See, e.g.*, *CS Bus. Sys., Inc. v. Schar*, No. 5:17-cv-86-Oc-PGBPRL, 2017 WL 8948376, at *3 (June 15, 2017) (describing a definition of “concerning” as “expansive” where it included “in addition to its commonly understood meanings, analyzing, comprising, concerning, constituting, dealing with, demonstrating, discussing, evidencing, explaining, Concerning [sic], pertaining to, providing, referencing, reflecting, regarding, relating to, revealing, supporting, showing, providing, and/or disproving”). Requests for materials that implicitly relate to a topic may add unnecessary subjective considerations into the request.

⁹¹ *See Facedouble, Inc. v. Face.com, Inc.*, No. 12CV1584-DMS (MDD), 2014 WL 585868, at *4 (S.D. Cal. Feb. 13, 2014) (“The definitional, typically boilerplate, section of requests for production cannot be used to expand the scope of a request for production into an interrogatory.”).

C. Draft Well-Tailored, Proportional Requests

The same principles that apply to the definitions and instructions apply to the requests themselves. The requesting party should draft well-tailored document requests that identify the discrete time period at issue in connection with the particular request and the items or category of items sought.⁹² Requests should also abide by Rule 26(b)’s admonition that discovery should be “proportional to the needs of the case.”⁹³ The following principles may be considered when drafting requests.

1. Request Specific, Identifiable, or Discrete Documents

Counsel should attempt to draft requests for specific documents important to the claims or defenses that are readily identifiable. Consider categories of documents that for many organizations or individuals may be kept in a discrete location and may be relatively easy to collect (absent unique circumstances) such as:

- account statements related to the plaintiff’s account in a case involving financial transactions;
- a personnel file related to an individual in an employment case;
- statements of work, the final contract, and invoices related to a contract dispute; or
- a particular policy in a discrete time period that relates to the claim.

Responding parties may be able to quickly produce documents responsive to specific, targeted requests. Consider making the request as simple and targeted as possible, such as “produce all board minutes from 2012 related to the Acme contract,” or “produce the original design specifications for the [relevant component] in the [relevant product].”

Also, note that requests beginning with the “any and all” preamble usually draw objections and delay production, but such requests may be narrowed depending on the needs of the case. For example, a request for “any and all documents related to policies and procedures” would appear to call for all communications around the drafting and implementing of the policies and procedures, which may

⁹² The party drafting a document request has the burden of fashioning the request appropriately. *See* *Washington v. Thurgood Marshall Acad.*, 232 F.R.D. 6, 10 (D.D.C. 2005). “Standard” requests are disfavored. *See, e.g.,* *Michael Kors, L.L.C. v. Ye*, No. 1:18-CV-2684 (KHP), 2019 WL 1517552, at *3 (S.D.N.Y. Apr. 8, 2019) (“The 2015 amendments to the Rules were designed to stop counsel from relying on standard, overbroad requests and to also require tailoring based on the particular issues and circumstances in the case.”).

⁹³ *See* FED. R. CIV. P. 34 (limiting discoverable documents to those “within the scope of Rule 26(b)”); *see also* Hon. Craig B. Shaffer, *The “Burdens” of Applying Proportionality*, 16 SEDONA CONF. J. 55 (2015) (“Claims of ignorance should not absolve an attorney of his or her responsibility to pursue discovery that is proportional to the needs of the case nor excuse discovery requests that bear more resemblance to unguided missiles than thoughtful efforts to obtain truly relevant information.”).

be unnecessary where the requesting party simply needs a specific policy or procedure that was applied to the transaction giving rise to a claim or defense.

In addition, when requesting email or other electronic communications, counsel should narrow requests by, for example, seeking only communications between certain relevant individuals and during discrete relevant time periods and about specific topics. Specific topics can guide the responding party in developing appropriate search parameters and methodologies. The volume of emails and communications sent through other mediums has exponentially increased over recent years. Even requests for a small number of custodians’ communications can require substantial time and cost to collect and review, particularly if the request spans a number of years.

2. “Sufficient to Show” Requests and Interrogatories in Lieu of Requests

Counsel should consider “sufficient to show” requests when appropriate, as they are often less objectionable than those requesting “any and all” documents.⁹⁴ Sufficient-to-show requests seek documents on a topic about which counsel needs information, but where counsel does not need the responding party to find and produce *every* document that contains or relates to that information. Sufficient-to-show requests can be helpful for producing necessary, noncontroversial documents to confirm a presumption in the case. An initial round of sufficient-to-show requests may be useful in framing iterative discovery requests. Sufficient-to-show phrasing may prompt a quicker production of relevant information because the producing party may be able to identify and produce what is sufficient to show the specific request without searching all ESI on the topic.

For example:

- Where information about the locations where the responding party did business is relevant and proportional, a request for information “sufficient to show all locations where Company A did business in 2012 to 2015” would be more appropriate than a request for “all information that reflects or relates to the locations where Company A did business.”
- Where organizational charts and other information that would establish the responding party’s structure are relevant, requests seeking information “sufficient to show” the organizational structure as it relates to the case would be an effective way to obtain the evidence needed in a proportional way. Note how such a request does not seek evidence about the organization globally, nor does it ask for all documents reflecting the organiza-

⁹⁴ *Vangelakos v. Wells Fargo Bank*, No. 13-cv-06574-PKC, at *1–2 (S.D.N.Y. Feb. 4, 2014), ECF No. 21. In *Vangelakos*, the court held in a wage and hour case, that “Plaintiffs’ request for all emails to or from the employee during the course of their employment is hopelessly overbroad. It would likely pick up appeals for corporate sponsored charities and company personnel news. More importantly, it is not necessary to reconstruct the work-life of each plaintiff on each day of employment in order to prosecute or defend a FLSA case. The Federal Rules of Civil Procedure counsel in favor of proportionality.” *Id.* The court went on to state that it did not foreclose the possibility that a limited test period of 30 days, for example, might be appropriate for some type of email search. *Id.*

tion’s structure. Specificity is key here. For example, in a breach-of-contract case, requests for materials sufficient to show the individuals involved in the formation, execution, and breach of the contract and to whom they reported could be reasonable and specific.

- Where information about the development of a particular product may be relevant, such as in a trademark infringement case or certain types of product liability cases, requests seeking information “sufficient to show” the design of the product or a particular component at issue may be an effective way to obtain the evidence needed to establish a claim or defense. This phrasing may avoid or minimize disputes about irrelevant competitive or other information that may be prompted by a request for “all documents” about the product.
- In a case related to reasonable accommodation, consider whether it would be appropriate to request information sufficient to show the nature of accommodations provided to potential comparator employees without requesting “all” information related to those requests. This would allow the requesting party to see what other types of accommodations an employer has provided without producing non-party medical information.

Sufficient-to-show document requests may not be reasonably particular when seeking information to satisfy a legal element of a claim, however. For example, a request for documents “sufficient to show that defendant breached the standard of care” in a professional malpractice lawsuit is not sufficiently particular, as it seeks documents to prove a legal conclusion. It may also invade attorney work product, as seeking discovery from an opponent to prove legal conclusions necessarily requires application and disclosure of attorney mental impressions.

In some cases, an interrogatory may be a more efficient way to obtain the needed information. For example, an interrogatory requiring identification of the locations where the responding party did business may be more straightforward than a sufficient-to-show request. Alternatively, instead of requesting “all ESI that relates to the Acme Widgets account,” consider an interrogatory that asks the responding party to list all products sold to Acme Widgets, the dates those products were sold, and prices at which the products were sold. Note that the Federal Rules of Civil Procedure pose limits on the number of interrogatories propounded; however, there is no such limit on document requests.

“Any and all” requests may still be appropriate for documents that go to the heart of the claims or defenses and for which the full breadth of responsive materials may itself be instructive. To illustrate, in an antitrust case, every communication among competitors about supply or pricing of the relevant products may be critical to proving the existence of a conspiracy. “Documents sufficient to show” under these circumstances may be insufficient. “Any and all” requests may also be appropriate when the requests seek only a limited, knowable number of the documents. In a slip-and-fall case, a party may request all surveillance footage of the incident. The key is to use “any and all” requests sparingly and appropriately.

3. Limit Requests to Specific Custodians

Identifying specific custodians or locations may further the goal of particularity in requests. Requests for information about relevant communications associated with particular custodians may provide greater specificity when used in conjunction with requests for relevant content, as opposed to requests for “any and all” content or communications to/from/cc/bcc “any and all” custodians. For example, in a breach-of-contract case, requests seeking all communications authored by the contract negotiator about the contract during the relevant time period may provide adequate specificity because the request includes limitations as to custodian, time period, and relevant content. If a requesting party cannot see a way to narrow an “any and all” request, counsel should consider conferencing with opposing counsel and preparing a list of questions that would supply information useful to narrowing the request.

4. Include a Temporal Scope in the Request

At its core, the “reasonable particularity” concept requires identification of documents by subject matter and time frame.⁹⁵ That is the essence of the requirement. Therefore, all requests should, at a minimum, identify a temporal limitation and describe with particularity the subject matter of the documents sought. The specificity with which the temporal scope can be defined, of course, depends upon the specific facts and circumstances of a case.⁹⁶ Opening cooperative dialogue with the responding party about these issues may help counsel draft the targeted requests contemplated by the Rules.

5. Requests Tied to Specific Allegations or Arguments

Consider using factual contentions made by the responding party (in the answer or other response to the complaint or in a deposition) to define the limits of a request. Where a responding party has asserted certain facts, requests targeted at testing the veracity of such assertions may be appropriate.

⁹⁵See Section II.A, *supra*.

⁹⁶See, e.g., *Carlson v. Sam’s West, Inc.*, No. 2:17-cv-02882-MMD-GWF, 2018 WL 4094856, at *2 (D. Nev. Aug. 28, 2018) (collecting cases that discuss “reasonable particularity” in the Rule 34 context to address the similar language in Rule 30(b)(6)).

V. CONCLUSION

Well-crafted Rule 34 requests are important tools in securing “the just, speedy, and inexpensive determination of every action and proceeding” as required by Rule 1. Drafting well-crafted Rule 34 requests requires counsel to think about the needs of the case. In most cases, this means avoiding robotic reliance on forms or templates, particularly template definitions and instructions that do not apply to the case. Instead, counsel should use available resources to make the requests reasonably particular and applicable to counsel’s case. Regardless of the case, meeting and conferring in good faith can be an essential resource. Depending on the case, other resources may include delivering early Rule 34 requests, staging discovery, setting reasonable time frames for requests, limiting requests to specific custodians or locations, requesting specific documents or information sufficient to establish a particular factual issue, using requests for “any and all documents” thoughtfully, and thinking at the outset how to defend each request in the event of a challenge.

The early investment of time in crafting thoughtful, reasonably particularized Rule 34 requests, and meaningfully meeting and conferring where appropriate, is likely to reduce delay in conducting discovery and objections. Where objections are made, these techniques are likely to assist the requesting party in overcoming them through informal conferences and formal motion practice. The ideas presented in this *Primer* will help in preparing such well-crafted requests, which will promote efficiency and cost savings associated with discovery in litigation.