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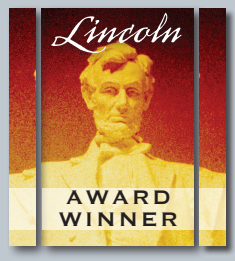


General and Boilerplate Objections: Curbing Routine Abuse of the Discovery Process

Recently published opinions from the Illinois Appellate Court have unequivocally condemned the practice of making general and boilerplate objections to written discovery. With a focus on Illinois civil practice, this article discusses the impropriety of general and boilerplate objections and offers recommendations and potential solutions for curtailing their use.

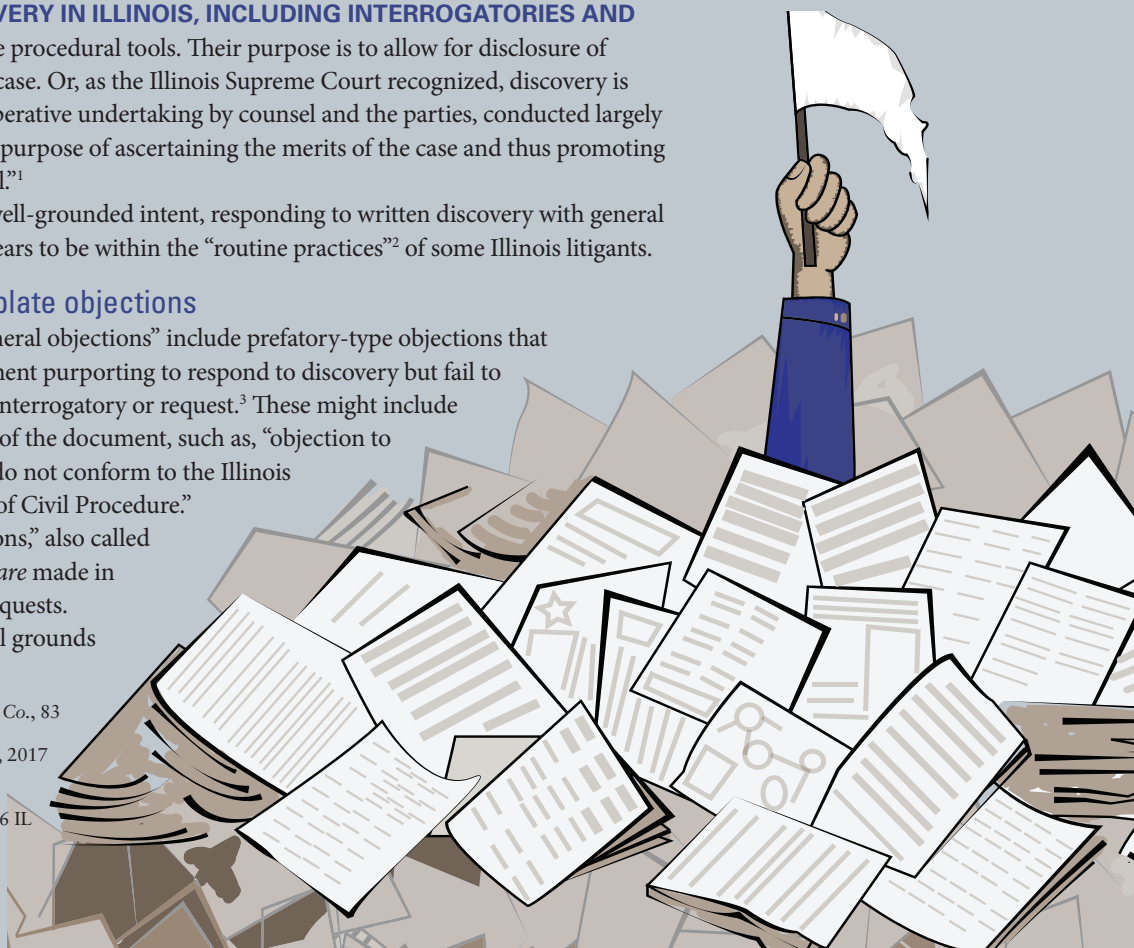
PRETRIAL WRITTEN DISCOVERY IN ILLINOIS, INCLUDING INTERROGATORIES AND written requests for production, are procedural tools. Their purpose is to allow for disclosure of information relevant to a pending case. Or, as the Illinois Supreme Court recognized, discovery is "intended as, and should be, a cooperative undertaking by counsel and the parties, conducted largely without court intervention, for the purpose of ascertaining the merits of the case and thus promoting either a fair settlement or a fair trial."[1]

Despite this longstanding and well-grounded intent, responding to written discovery with general and boilerplate objections still appears to be within the "routine practices"[2] of some Illinois litigants.

Defining general and boilerplate objections

For purposes of this article, "general objections" include prefatory-type objections that appear at the beginning of a document purporting to respond to discovery but fail to directly respond to any *individual* interrogatory or request.[3] These might include quasi-disclaimers at the beginning of the document, such as, "objection to the extent that any of the requests do not conform to the Illinois Supreme Court Rules or the Code of Civil Procedure."

In contrast, "boilerplate objections," also called "stock" or "formulaic" objections,[4] *are* made in response to individual discovery requests. However, they simply state the legal grounds



1. *Williams v. A. E. Staley Manufacturing Co.*, 83 Ill. 2d 559, 566 (1981).
2. *Simpkins v. HSHS Medical Group Inc.*, 2017 IL App (5th) 160478, ¶ 35.
3. *Id.* at ¶ 36.
4. *Zagorski v. Allstate Insurance Co.*, 2016 IL App (5th) 140056, ¶ 34.

for the objection and nothing more. For example, a party may object on "grounds that the interrogatory [or request for production is] overly broad and unduly burdensome, that the information sought [is] irrelevant, and that [the information sought is] protected by the work-product and attorney-client privileges."[5] But then the party fails to specify "*how* each request … is deficient" and ends the objection "without *articulating* the particular harm that would accrue if [the answering party] were required to respond."[6]

The spirit of discovery

The Illinois Rules of Professional Conduct provide that, in pretrial procedure, an attorney shall not "fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party."[7]

The scope of discovery in Illinois allows a party to obtain "full disclosure regarding any matter relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking disclosure or of any other party."[8] The concept of relevance is broader in the scope of discovery than the concept of relevance for evidence admissible at trial, and thus "relevance for discovery purposes includes not only that which is admissible at trial, but also that which leads to admissible evidence."[9] In principle, general and boilerplate objections directly conflict with the broad scope of discovery and the concept of "full disclosure."

While the principles of Illinois discovery rules and procedures often have been discussed in Illinois caselaw, less attention has been paid to general and boilerplate objections. However, two recently published opinions out of the fifth district (*Zagorski v. Allstate Insurance Co.* and *Simpkins v. HSHS Medical Group Inc.*) specifically address the issue.

General objections

Illinois Supreme Court Rule 213 requires a party to answer or object to "*each* interrogatory;"[10] Rule 214 requires written objections in response to a request for production to set forth "that the request is improper *in whole or in part*" and "[i]f written objections to a *part* of the request are made, the remainder of the request shall be complied with."[11]

Indeed, there is nothing in the supreme court's Rules or the Code of Civil Procedure

5. See *id.* at ¶ 32.
6. *St. Paul Reinsurance Co. v. Commercial Financial Corp.*, 198 F.R.D. 508, 512 (N.D. Iowa 2000) (emphasis added).
7. Ill. R. Prof'l Conduct 3.4(d).
8. Ill. S. Ct. R. 201(b)(1).
9. *Zagorski*, 2016 IL App (5th) 140056, ¶ 22.
10. Ill. S. Ct. R. 213(d) (emphasis added).
11. Ill. S. Ct. R. 214(c) (emphasis added).

TAKEAWAYS >>

- In principle, general and boilerplate objections directly conflict with the spirit of discovery and the concept of "full disclosure."
- The Illinois Appellate Court has noted that "the use of 'General Objections' lacks utility and preserves nothing for review because the objections are not directed toward any specific question or request for production."
- The Illinois Rules of Professional Conduct provide that, in pretrial procedure, an attorney shall not "fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party."

2019 Lincoln Award Legal Writing Contest Winners

The first-place winner of the 2019 Lincoln Award Legal Writing Contest is **Gregory R. Jones**, Edwardsville, whose article, "General and Boilerplate Objections: Curbing Routine Abuse of the Discovery Process," appears in this issue of the Illinois Bar Journal.

Daniel C. Katzman, Belleville, won second place for his article, "Can You Record Me Now? Tapping into the Illinois Eavesdropping Act and its Effect."

The third-place winner is **Jake Crabbs**, Chicago, for his article, "Responding to Affirmative Defenses."

The first-, second-, and third-place winners received $2,000, $1,000, and $500 respectively. Contest judges reviewed a total of 18 articles, some of which will appear in upcoming issues of the Illinois Bar Journal.

On behalf of the contest's sponsors—the Illinois Bar Journal Editorial Board and the Young Lawyers Division—the Illinois Bar Journal would like to thank all contest participants. Details about the 2020 Lincoln Award Legal Writing Contest will be announced this spring.

NOTWITHSTANDING ANY POTENTIAL GREY AREA IN THE TEXT OF THE APPLICABLE RULES, THE TAKEAWAYS FROM *ZAGORSKI* AND *SIMPKINS* ARE CLEAR: GENERAL AND BOILERPLATE OBJECTIONS ARE IMPROPER.

that authorizes prefatory objections in written discovery. As noted in *Simpkins*, "the use of 'General Objections' lacks utility and preserves nothing for review because the objections are not directed toward any specific question or request for production."[12]

Boilerplate objections

Establishing the impropriety of various categories of boilerplate objections is not as direct or clear cut under the language of the rules. Specifically, the express language and related committee comments of Rules 201, 213(d), and 214(c) do not clearly rebuke all of the common categories of boilerplate objections identified in this article. Both Rules 213(d) and 214(c) are silent as to any level of specificity required for an objection to be deemed proper. To illustrate, an express requirement in the rules for specificity in an objection would call on the objecting party to:

1) Explain how a request is deficient (*e.g.*, explaining precisely what words or aspects of an interrogatory are unclear to support a claim that the interrogatory is "vague and ambiguous"); and

2) Articulate how, and to what extent, a request is "overly broad and unduly burdensome" (*e.g.*, detailing the tasks or labor necessary to comply with a given request for production, together with an estimated expense, to enable the trial court to make a proportionality determination[13] if the objection is later brought before it for disposition).

To be sure, the inclusion of boilerplate objections, even when followed with "subject-to-and-without-waiving-the-objections" refrains and seemingly responsive information, always leaves a party uncertain as to whether the response is exhaustive. Therefore, the practice runs afoul of the "enduring goal" of "full disclosure" in the discovery process.[14]

Nevertheless, the rules do contain language and comments demonstrating that, at the very least, certain categories of boilerplate objections are improper.

First, Rule 201(n) requires that "[w]hen information or documents are withheld from disclosure or discovery on a claim that they are privileged … any such claim shall be made *expressly* and shall be *supported by* a description of the nature of the documents, communications or things not produced or disclosed and the *exact privilege* which is being claimed."[15] Put another way, "[w]hen an objection is based on attorney-client privilege or work-product privilege, the objecting party … *must* submit a privilege log[.]"[16]

Second, Rule 213(j) provides that the "[Illinois] Supreme Court, by administrative order, may approve standard forms of interrogatories for different classes of cases."[17] And, "[i]n an effort to avoid discovery disputes, the practitioner is encouraged to utilize interrogatories approved by the [Illinois] Supreme Court pursuant to paragraph (j) whenever possible."[18] Indeed, standard-form interrogatories for plaintiffs and defendants in several classes of cases, including motor-vehicle and medical-malpractice cases, have been approved.[19] Therefore, disseminating boilerplate objections in response to approved standard-form interrogatories can be characterized both as a particularly egregious abuse of the discovery process as well as a transgression against the supreme court's undertaking to facilitate the efficiency of certain discovery.

Third, Rule 214(c) contains elements that address the concern of ascertaining exhaustiveness. Parties claiming that an item is not in their possession or control, or that they do not have information calculated to lead to discovery of the item's whereabouts, "may be ordered to submit to examination in open court or by deposition regarding such claim."[20] Additionally, producing parties are required to "furnish an affidavit stating whether the production is complete in accordance with the request."[21] As a result, documents purporting to be responsive to a request for production are improper if they fail to fully disclose a party's knowledge or fail to attach the requisite affidavit of completeness.

With respect to burdens of the parties engaged in written discovery, the fifth district reminded in *Zagorski* that "a bald objection preserves nothing for review."[22] And, in addition to bearing the burden with respect to privilege objections, a party asserting an objection based on the grounds that the request "is overly broad, unduly burdensome, or harassing … has the obligation to offer an adequate defense to the grounds claimed."[23] On the other hand, the court also provided that when an objection claims irrelevance, the party propounding the discovery has the obligation to establish how the request is relevant.[24]

Key takeaways from *Zagorski* and *Simpkins*

Notwithstanding any potential grey area in the text of the applicable rules, the takeaways from *Zagorski* and *Simpkins* are clear: General and boilerplate objections are improper. To emphasize, the fifth district opined that an attorney "abuses the

12. *Simpkins v. HSHS Medical Group Inc.*, 2017 IL App (5th) 160478, ¶ 36.
13. See Ill. S. Ct. Rs. 201(c)(3), 214(c).
14. See *Simpkins*, 2017 IL App (5th) 160478, ¶ 33.
15. Ill. S. Ct. R. 201(n) (emphasis added).
16. *Zagorski v. Allstate Insurance Co.*, 2016 IL App (5th) 140056, ¶ 35 (emphasis added).
17. Ill. S. Ct. R. 213(j).
18. Ill. S. Ct. R. 213, Committee Comments (rev. June 1, 1995) (paragraph (j)).
19. See Ill. S. Ct. R. 213, Appendix.
20. Ill. S. Ct. R. 214(c).
21. *Id.*
22. *Zagorski v. Allstate Insurance Co.*, 2016 IL App (5th) 140056, ¶ 39.
23. *Id.* at ¶ 35.
24. *Id.*

discovery process" if he or she "asserts a litany of grounds for objection to discovery without any intention or any ability to defend those grounds."[25] And similarly, the "supreme court rules regarding discovery do not permit litigants to make objections, without some statement supporting them."[26]

Costs and consequences

As the fifth district noted, the "habitual practice of setting out a litany of baseless, [general, and] boilerplate objections is not merely an affront to the supreme court rules, but a perilous practice."[27] The costs and consequences of this practice include unnecessary delays in the discovery process, increased costs of litigation, risk of having objections summarily denied, and failure to preserve anything for appeal.[28]

Perhaps of equal significance, it is impossible for an attorney to ensure that any information he or she does receive is exhaustive, if that information is subject to general and boilerplate objections.[29] In other words, responses made subject to general and boilerplate objections tend to foster uncertainty, doubt, and mistrust during the discovery process. In Illinois, this may be particularly true if a party responding to a request for production either fails, or otherwise tries to avoid, furnishing the appropriate affidavit of completeness required by Rule 214(c).

AT THE FEDERAL LEVEL, THE HON. MARK W. BENNETT RECENTLY AUTHORED A MEMORANDUM OPINION IN WHICH HE STATES A "'BOILERPLATE' DISCOVERY CULTURE" IS "FIRMLY ENTRENCHED" IN CERTAIN REGIONS … [BUT THERE] IS NOTHING IN THE ILLINOIS SUPREME COURT RULES THAT PERMITS PREEMPTIVE-OBJECTION MAKING IN DISCOVERY.

How and why are general and boilerplate objections made?

Notably, the fifth district acknowledged in *Zagorski* that its "conversation regarding the roles of the parties regarding discovery disputes is a remedial primer rather than a new declaration."[30] However, not long after, the court was again addressing near identical issues in *Simpkins*.

While unintentional, there are a few aspects of the Illinois discovery rules that facilitate the practice. Rules 213(d) and 214(c) require the party seeking discovery to motion for the court to hear objections.[31] Until 1995, a party answering interrogatories was responsible for noticing objections, but the change was made to reduce the number of necessary rulings by suspending interrogatories that a party is not seriously interested in pursuing.[32] While this change is justifiable, it is abused when attorneys engage in making general and boilerplate

25. *Id.* at ¶ 36.
26. *Simpkins v. HSHS Medical Group Inc.*, 2017 IL App (5th) 160478, ¶ 39.
27. *Id.*
28. *Id.*
29. Matthew L. Jarvey, *Boilerplate Discovery Objections*, 61 Drake L. Rev. 913, 929-30 (footnotes omitted).
30. *Zagorski*, 2016 IL App (5th) 140056, ¶ 38.
31. Ill. S. Ct. Rs. 213(d), 214(c).
32. Ill. S. Ct. R. 213, Committee Comments (rev. June 1, 1995) (paragraph (d)).

2019 Lincoln Award Legal Writing Contest Judges

The **Hon. Cynthia Y. Cobbs** is currently a justice of the First District of the Illinois Appellate Court. Her judicial career has included service as a Cook County Circuit Court judge where she presided over traffic matters, eviction cases, small claims, and civil jury trials. Prior to joining the bench, Justice Cobbs served as the director of the Illinois Courts.

Janaan Hashim is a cofounder and the managing partner of Amal Law Group, LLC, which handles immigration law, commercial law, estate planning, and postconviction relief. Since 2006, Janaan has served as an adjunct professor at the McCormick Theological Seminary and at Loyola University. She graduated *cum laude* from the DePaul University College of Law in 2005.

Sandra L. Sweeney graduated from Chicago Kent School of Law in 1999 and has been in private practice since 2000. She is a member of ISBA's Law Related Education for the Public section.

The **Hon. Richard Tognarelli** is the presiding circuit court judge of felony cases in Madison County and vice-chair of the Illinois Supreme Court Commission on Professionalism. A 1974 graduate of Saint Louis University School of Law, he served as an assistant state's attorney for 13 years and was in private practice for 27 years before his appointment to the circuit court in January 2002. He was elected circuit judge in 2008.

R.J. VanSwol is a partner at Purcell & Wardrope, Chartered, in Chicago. His practice focuses on insurance coverage and insurance-litigation defense.

objections. Also, unless by order or in motion practice, discovery is not filed in the circuit courts;[33] thus, attorneys making improper objections have some peace of mind in knowing that their practices are unlikely to be scrutinized by a judge unless action is taken by the opposing party. Finally, as in most jurisdictions, Illinois requires parties to make reasonable attempts to resolve differences over discovery before seeking court intervention,[34] which further insulates the objecting party from any immediate judicial inspection.

Determining exactly why presumably diligent and ethical attorneys engage in abusive and obstructive practices is a difficult task. At the federal level, the Hon. Mark W. Bennett recently authored a memorandum opinion in which he states a "'boilerplate' discovery culture" is "firmly entrenched" in certain regions.[35] Judge Bennett further opined that it was clear to him that "admonitions from the courts have not been enough to prevent such conduct and that, perhaps, only sanctions will stop [the] nonsense."[36] He also noted that attorneys suggest these objections are made as a result of "lawyer paranoia" to preserve and avoid waiving objections.[37]

While "lawyer paranoia" seems like an honest justification, it is not a valid one. There is nothing in the Illinois Supreme Court Rules that permits preemptive-objection making in discovery. Even if privileged information is later identified as responsive to a discovery request that otherwise requires a party to seasonably supplement,[38] information that is privileged is expressly outside the scope of discovery.[39] If a party does find out later that additional responsive information exists, but that it would be extremely burdensome or expensive to produce, the party could seek to have a protective order entered by the court after establishing that the newly discovered information is not proportional to the needs of the case.[40]

From a cynical perspective, improper objection practices can seem sinister. For instance, attorneys could use general and boilerplate objections to *justify* withholding information or documents that tend to either damage their client's case or add credence to the position of another party. Furthermore, the time and expense associated with both submitting a meaningful Rule 201(k) correspondence and preparing a thorough motion to compel can be strenuous or even seemingly fruitless—particularly if there are a multitude of objections but *some* information is produced 'subject to' objections. In any event, objecting attorneys may contemplate minimal risk in engaging in abusive discovery practices if there is little-to-no credible threat that the attorney will be met with any real challenge—or, even less likely, sanctions.

The issue of sanctions

Rule 219(c) governs instances of failure to comply with the discovery rules or with any order entered under the rules.[41] Upon motion, the trial court has authority and discretion to enter "such orders as are just" to address discovery misconduct, including the barring of evidence, the striking of pleadings, and the entry of a judgment.[42] Further, Rule 219(c) provides that a court, upon motion or upon its own initiative, may also impose "an appropriate sanction," which can result in an order to pay expenses incurred as a result of the misconduct, "including a reasonable attorney fee, and when the misconduct is wilful, a monetary penalty."[43] Sanctions for discovery abuse are also potentially supported by Rule 137, which requires an attorney of record to sign pleadings, motions, or other documents to certify that they are warranted by existing law and not interposed for any improper purpose.[44] However, the more appropriate vehicle for discovery-abuse sanctions is Rule 219(c),[45] as Rule 137 requires the filing of a pleading, motion, or other document before the rule may be triggered.[46]

The *Zagorski* opinion confirms that a trial court must promptly rule on motions regarding objections or discovery matters and noted that "failure to issue a ruling, and where appropriate, to impose sanctions, constitutes an abuse of the court's discretion, and an abdication of its authority and responsibility."[47] However, issuing sanctions may be an "odious task" for judges and, out of mutual respect or professional courtesy, there is a reluctance for attorneys to seek sanctions and for judges to impose them.[48]

ISBA RESOURCES >>

- Stanley N. Wasser, *Boilerplate Objections in Discovery—Tread Lightly*, Federal Civil Practice (Dec. 2017), law.isba.org/2EBNxPd.
- George S. Bellas & Misty J. Cygan, *Say Goodbye to Boilerplate Objections and Responses to Discovery Requests*, Trial Briefs (May 2017), law.isba.org/2LtVpDq.
- ISBA Free On-Demand CLE, *How to Not Throw Away Your Shot at Appeal: Protect-ing and Preserving the Record for Review* (recorded May 19, 2017), law.isba. org/2SXmVvR.

33. Ill. S. Ct. R. 201(m).
34. Ill. S. Ct. R. 201(k).
35. *Liguria Foods, Inc. v. Griffith Laboratories, Inc.*, 320 F.R.D. 168, 171 (N.D. Iowa 2017).
36. *Id.*
37. *Id.* at 181.
38. Ill. S. Ct. Rs. 213(i), 214(d).
39. Ill. S. Ct. R. 201(b)(2).
40. Ill. S. Ct. R. 201(c).
41. Ill. S. Ct. R. 219(c).
42. *Id.*
43. *Id.*
44. Ill. S. Ct. R. 137(a).
45. See *Diamond Mortgage Corp. v. Armstrong*, 176 Ill. App. 3d 64, 72 (1st Dist. 1988).
46. Ill. S. Ct. R. 137.
47. *Zagorski v. Allstate Insurance Co.*, 2016 IL App (5th) 140056, ¶ 37.
48. See, *e.g.*, *Liguria Foods, Inc. v. Griffith Laboratories, Inc.*, 320 F.R.D. 168, 188 (N.D. Iowa 2017).

Proposed solutions and recommendations

While the fifth district interprets the Illinois discovery rules as forbidding general and boilerplate objections, additional clarification might help curb their use. The Federal Rules of Civil Procedure, including several amendments and comments in 2015, offer guidance. For instance, similar to Illinois' Rule 201(c)(3), federal Rule 26 considers proportionality; but the provision is not "intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that [a request] is not proportional."[49] Additionally, Rule 33(b)(4) requires that the grounds for objecting to an interrogatory be stated with "specificity."[50] Similarly, amendments to Rule 34 made in 2015 were "aimed at reducing the potential to impose unreasonable burdens by objections to requests to produce,"[51] and include two notable requirements. First, objections must be stated with "specificity."[52] Second, an objection must also state "whether any responsive materials are being withheld on the basis of that objection."[53]

For practitioners, it is important to avoid serving duplicitous or inapplicable discovery requests,[54] including when using standard-form interrogatories. Failure to propound meaningful and appropriate discovery runs afoul of the procedural rules and invites the opposing party to make general and boilerplate objections.

Finally, if a party serves abusive general and boilerplate objections and fails to cooperate and comply with the rules after reasonable attempts at resolution, then it is incumbent on the practitioner to promptly bring a motion to review the matter and, when appropriate, for the judiciary to impose sanctions. IBJ

49. Fed. R. Civ. P. 26 (Committee Notes on Rules—2015 Amendment).
50. Fed. R. Civ. P. 33(b)(4).
51. Fed. R. Civ. P. 34 (Committee Notes on Rules—2015 Amendment).
52. Fed. R. Civ. P. 34(b)(2)(B).
53. Fed. R. Civ. P. 34(b)(2)(C).
54. See, *e.g.*, Ill. S. Ct. Rs. 201(a), 213(b).