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The Role of Rule 26(g) in E-Discovery

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An attorney's signature on discovery responses certifies that the attorney "made a reasonable effort to assure that the client had provided all the information and documents available to him that are responsive to the discovery demand." Advisory Note Fed. R. Civ. P. 26(g). In a case involving a large volume of e-discovery, counsel should be thorough and diligent in locating relevant electronically stored information (ESI) prior to providing a Rule 26(g) certification. Failure to do so may have consequences for both the attorney and his client. **Used Against a Party or its Counsel** Rule 26(g) could be invoked against a party or its counsel where:

- there is evidence of spoliation,
- there is evidence of failure to produce relevant e-discovery
- the attorney for the party has failed to conduct sufficient due diligence in the discovery process prior to certifying the responses

If a lawyer or a party makes a Rule 26(g) certification that violates the rule, without substantial justification, the court must impose a sanction which may include the payment of reasonable attorney's fees and expenses caused by the violation. Fed. R. Civ. P. 26(g)(3). **Sanctions for E-discovery Misconduct** Rule 26(g) has been used sparingly in the e-discovery context, a recent case from the United States District Court for the District of Maryland involved the imposition of sanctions as a result of e-discovery violations under that rule. Branhaven, LLC v. BeefTek, Inc., 288 F.R.D. 386 (D. Md. 2013). In Branhaven, the defendants charged that plaintiff had violated Rule 26(g) in signing the response to defendants' requests for production of documents. The requests were served on plaintiff on January 31, 2012. Plaintiff filed its response on March 21, 2012. The record demonstrated that as of March 21 plaintiff's counsel "had done little, or nothing, in terms of a reasonable inquiry and indeed had no knowledge of the number and identity of responsive documents." Initially, plaintiff produced 388 pages of responsive documents to defendants. On July 20, 2012, only a few business days before plaintiff's Rule 30(b)(6) depositions, plaintiff produced

112,106 responsive documents. When pushed for an explanation as to the delay in producing the large volume of electronic documents, plaintiff responded that it was a “start-up” and had limited litigation funds. The plaintiff wanted to attempt to locate the documents on its own without the use of an outside vendor. The Court rejected this explanation, reasoning that the plaintiff had delayed five months before seeking an outside vendor to assist with the document production. The Court explained that it would be reasonable for a plaintiff to take one month to review and locate documents through an in house process. In this case, the plaintiff took five months to try to locate documents in house without the assistance of a vendor, and such a delay was not reasonable. Even more important, the plaintiff essentially misled the defendants and their lawyers in its discovery responses. When the plaintiff filed its March response offering production of responsive documents for review, it had not yet even obtained access to e-mail servers, much less reviewed and identified responsive documents. In signing the responses to the request for production, plaintiff’s counsel wrongly certified that they were responding to the discovery request to the best of their knowledge, information, and belief after a reasonable inquiry. The Court awarded defendants the reasonable litigation support costs involved in receiving and processing the additional documents from plaintiff. The Court also awarded defendants the attorneys’ fees it incurred in bringing the violation to the Court’s attention. The sanctions award was against plaintiff and its counsel jointly and severally.

Lessons Learned From the Branhaven Case

1. Rule 26(g) can be used against a party that does not conduct a thorough, diligent search for responsive e-discovery.
2. The attorney representing the party can be culpable for his client’s lack of diligence. Simply placing the responsibility for searching and producing documents on the company without any oversight or input is problematic under Branhaven.
3. A document dump of e-discovery late into the case when the party and its counsel has previously certified that it has conducted a reasonable search for documents may create sanctionable conduct.

Ultimately, Branhaven demonstrates that it is important from the outset of the case for an attorney to understand:

- his or her client’s IT infrastructure
- where responsive documents may be located
- the best method to search for and produce responsive documents

Taking an active approach to manage e-discovery can mitigate the risks that an attorney or company may face in litigation *This article was republished, with permission, of I-sight.com. Read the original here:* "The Role of Rule 26(g) in E-Discovery"

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