



Rule 26(g) certification means more than guide and advise: Key takeaways

eDiscovery Alert

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By: Dennis Kiker | Jennifer M. Feldman | Leeanne Sara Mancari | Andrew J. Peck

In a recent case, the Northern District of California imposed sanctions on an attorney for failing to properly oversee the client's discovery process to identify and produce responsive documents.

In federal court, the attorney's signature on discovery responses certifies that he or she has made a "reasonable inquiry" to confirm that the responses are "consistent with" the rules. Fed. R. Civ. P. 26(g)(1)(B). The "reasonableness of counsel's inquiry is measured by an objective standard" and requires "a reasonable effort to assure that the client has provided all the information and documents available to him that are responsive to the discovery demand." *Optronic Tech., Inc. v. Ningbo Sunny Elec. Co., Ltd.*, 2020 WL 2838806, *3, 4 (N.D. Cal., June 1, 2020). Sanctions, in the form of reasonable expenses or attorneys' fees, can be imposed on the attorney for violation of this rule. Fed. R. Civ. P. 26(g)(3).

In *Optronic*, the court had previously found that the defendant had deliberately withheld certain documents and ordered the defendant to submit a declaration explaining how it had searched for documents. *Id.* at *2. The defendant instead filed a notice stating that it was unable to find anyone "competent" to describe its search for responsive documents, prompting the plaintiff to move for sanctions under Rule 26(g). *Id.* at *3.

Since it was indisputable that the defendant "did *not* comply with its discovery obligations," the only question was whether

defense counsel “failed to make the reasonable inquiry required by Rule 26(g).” *Id.* at *4. Despite extensive discussions with its client about the search and collection process, defense counsel “candidly acknowledged that it [did] not know what decisions [the defendant] made about how to proceed.” *Id.* at *5. The court held that it “is not enough for counsel to provide advice and guidance to a client about how to search for responsive documents, and then not inquire further about whether that advice and guidance were followed.” *Id.* Because counsel did not “contend that it was prevented from complying with its duty of reasonable inquiry,” the court found that there was no “substantial justification” for the failure. *Id.* at *7. As a result, Rule 26(g) required that the court impose sanctions.

Key takeaways from *Optronic*

- **Be actively involved in discovery:** It is critical to provide clients with guidance and advice not only on the appropriate scope of discovery, but also on the generally accepted practices for preservation and collection of information.
- **Follow up and validate:** It is not enough to provide advice; you must also confirm that your advice was followed, and, if not, why.
- **Written responses should reflect anticipated production:** Before certifying any discovery responses, make sure that the written response accurately reflects what you anticipate producing, including any limitations in scope.
- **Cooperate when possible:** Many discovery disputes can be avoided if you are transparent and cooperative in your interactions with opposing counsel.

Learn more about the implications of this case by contacting the author or any member of DLA Piper’s eDiscovery and Information Management practice.

AUTHORS



Dennis Kiker

Senior Attorney
Phoenix | T: +1 480 606 5100
dennis.kiker@dlapiper.com



Jennifer M. Feldman

Of Counsel
San Diego (Downtown) | T: +1 619 699 2700
jennifer.feldman@dlapiper.com



Leeanne Sara Mancari

Of Counsel
Los Angeles (Century City) | T: +1 310 595 3000
New York | T: +1 212 335 4500
leeanne.mancari@dlapiper.com



Andrew J. Peck

Senior Counsel
New York | T: +1 212 335 4500
andrew.peck@dlapiper.com
