ISSUE: DO YOU NEED TO CERTIFY YOUR DISCOVERY EFFORTS UNDER RULE FRCP 26(G) AND YOUR SEARCH METHODOLOGY?
ANSWER: DEPENDS
Excerpt from *Arkfeld's Best Practices Guide for ESI Pretrial Discovery - Strategy and Tactics (2008-2009)*

§ 3.15 - Certification of Production Efforts and Search Methodology and Protocol

A. Certification of Production Efforts

Rule 26(g)(1) requires an attorney to sign all disclosures, discovery requests, responses and objections. “By signing, an attorney or party certifies that to the best of the person’s knowledge, information, and belief formed after a reasonable inquiry . . . * * *The attorney’s signature is not a certification of the truthfulness of the client’s responses. “Rather, the signature certifies that the lawyer has made 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.” Advisory Committee Note.

* * * 1. Requesting Party Strategy

• Argue that the producing party failed to conduct a reasonable search for responsive documents throughout the litigation.

• Argue that the producing party under Fed. R. Civ. P. 26(e)(2) failed to amend discovery responses.

• Argue that the producing attorney’s “litigation hold,” letter by itself, will not suffice to satisfy the ‘reasonable inquiry’ requirement in Rule 26(g)(2).

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2. Producing Party Strategy

• Argue that sanctions are not available after an attorney relies upon affidavits executed by the client’s chief information officer and an electronic evidence consultant.

• Argue that sanctions are not available after reliance on the expert’s report regarding discovery or disclosure of ESI.

3. Checklist

[ ] Has an attorney made a certification under Rule 26(g)(2) as to the discovery responses?

[ ] Has the producing attorney conducted a reasonable search for responsive ESI?

[ ] Has the producing attorney done more than issue a “litigation hold,” to search for ESI?

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B. Certification of Search Methodology and Protocol

The search and production protocol used by the producing party to identify, preserve, collect and process ESI is important in determining whether the entire relevant data population was disclosed to the requesting party. For the producing party, the production protocol for establishing a proper collection will lessen the spoliation risk inherent in e-discovery cases and provide defensibility for the data population.

The search protocol is one of the most critical steps in the production of ESI. Issues such as which computer devices and media were searched in acquiring the data, what search terms were utilized to gather the evidence and what filtering rules were in effect can have a profound effect upon the resulting data population that is disclosed.

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1. Requesting Party Strategy

• If it is shown that ESI is missing, request the court to order the producing party to execute an affidavit stating that after a diligent search there are no responsive documents in its 'possession, custody or control,' and to outline the steps the producing party has taken to locate and retrieve the missing ESI.

• If ESI is missing, request the court to order the defendant to explain precisely how keyword searches were conducted, whether key words were used and, if so, which key words were used to search for responsive documents?

* * *

2. Producing Party Strategy

• Argue that the requesting party has failed to provide any evidence establishing that the search was not conducted reasonably, in good faith and that all relevant ESI has been produced.

• If ESI is shown to be missing, request a certification from your client of who conducted the search, how the search was conducted, which electronic depositories were searched, and how it was designed to produce the ESI requested.

• Argue that the inquiring party must present at least some reliable information that the producing party's representations, as to the search methodology, are misleading or substantively inaccurate.* * *

* * * and . . . connote substantial omitted content

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