

There Ain't No Easy Way Out: Counsel's Obligation to Oversee Discovery



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For all the conflict lawyers generate between themselves, most can agree on one thing: document collection, review, and production, is not much fun.

Yet complex discovery, often involving the production of huge numbers of documents, is the norm in civil litigation today. And it is the lawyer's responsibility to ensure the process is reliable and does not create prejudice to the opposing party. In fact, failing to properly oversee your client's collection of records and to ensure that all relevant, responsive documents are preserved and produced, can result in sanctions and adverse jury instructions.

Federal Rule of Civil Procedure 26(g) requires that every discovery response and objection be signed by at least one attorney of record. Signing certifies that the attorney has undertaken a reasonable inquiry to ensure that disclosures are complete and correct, and that the client has provided all information and documents responsive to the discovery demand. See Fed. R. Civ. P.

26(g); see also Minn. R. Civ. P. 26.07.

Courts recognize this responsibility and take a dim view of lawyers who fall short of their obligations. See *Claredi Corp. v. SeeBeyond Tech. Corp.*, 2010 WL 11579710, at *4 (E.D. Mo. Mar. 8, 2010) (awarding attorneys' fees for grossly negligent discovery efforts) (report and recommendation adopted in part). And, while a client's self-collection of documents is acceptable under limited circumstances "it is rarely a reasonable practice to be applied for the key custodians holding documents potentially central to the dispute." See *id.* In particular this is because non-lawyer record custodians "cannot be trusted to run effective searches" for responsive documents. *Nat'l Day Laborer Org. Network v. U.S. Immigration and Customs Enf't Agency*, 877 F. Supp. 2d 87, 108 (S.D.N.Y. 2012) (quotation marks omitted).

Because it is time-consuming to ensure that all of a client's documents have been collected, attorneys often take short cuts or fail to follow up on obvious holes in what they receive from clients. And there is some logic to thinking that your client will know their own documents best, so why not create some efficiencies by having the client figure out what to produce? While that rationale may be appealing, discovery is at its core a lawyer-created, and lawyer-driven process requiring expertise and judgment that only comes from experience. As well-versed as your client may be in their own documents, they likely lack the ability to critically review their own information—especially embarrassing documents—that may be responsive to discovery requests.

Given the serious consequences for failing to oversee discovery properly, here are a few basic steps you can take to avoid finding yourself on the wrong side of a motion for sanctions:

- Develop a document preservation notice and make it a habit to send the notice at the start of every representation. The notice should identify the obligation to preserve all documents that could potentially be relevant to the litigation.

- Have as many conversations with the client as you feel are needed to be satisfied that you understand where your client's documents are kept and how they are being identified. This includes understanding any document destruction policies or hardware or software issues that may impact your ability to accurately describe—in discovery responses, meet and confers, and before the judge—what documents exist and those that do not.

- Most critically, though acceptable to ask your client to perform some aspects of document collection and review, you should be involved at every step, refining and documenting the process and retaining overall control of responsiveness and production decisions.

Ensuring compliance with discovery obligations is both a professional obligation and works to the benefit of you and your client. Being involved in the document collection and review process will help you learn the case—including its strengths and weaknesses—and will head off unnecessary discovery fights and litigation consequences.

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