New York Law Journal
Technology Today
WWW.NYLJ.COM
An ALM Publication
VOLUME 256—NO. 108
TUESDAY, DECEMBER 6, 2016

FEDERAL E-DISCOVERY

A Harsh Reminder of Counsel's Need for 'Reasonable Inquiry'

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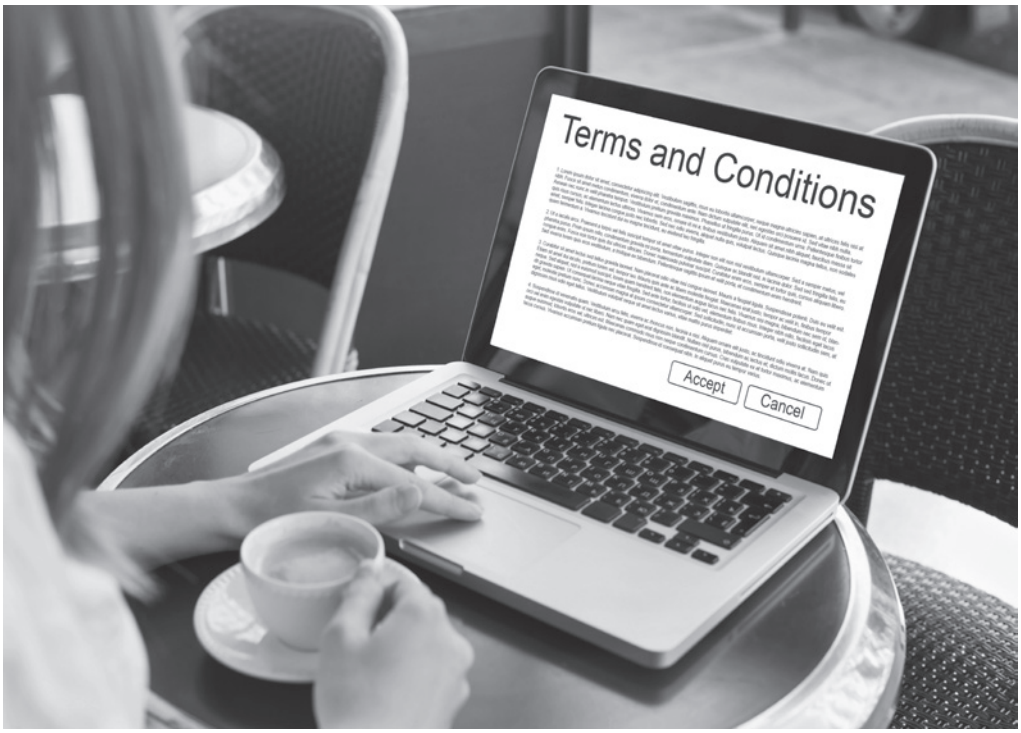
In one of her landmark *Zubulake* decisions, now retired U.S. District Judge Shira Scheindlin, in the midst of quoting novelist Philip Roth, memorably wrote, "Lawyers and their clients need to communicate clearly and effectively with one another to ensure that litigation proceeds efficiently. When communication between counsel and client breaks down, conversation becomes 'just crossfire,' and there are usually casualties."



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Citing to this *Zubulake* decision, but to the more prosaic quote that "counsel is responsible for coordinating her client's discovery efforts," a district court recently determined that counsel's failure to reasonably supervise an electronic document search by its client's employee was a sanctionable violation of Federal Rule of Civil Procedure 26(g).

'Rodman v. Safeway'

In *Rodman v. Safeway*, 2016 WL 5791210 (N.D. Cal. Oct. 6, 2016), a breach of contract class action, the plaintiff alleged that defendant Safeway had charged class members who had registered to shop online at Safeway.com higher prices for groceries than charged in the physical stores from which the products came—even though Safeway's online contract with such registrants had promised that the prices would be the same. The court had granted summary judgment

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for class members who registered on Safeway.com post-2006 after reviewing the contract, or "Special Terms," that had been presented on the website. It had, however, denied summary judgment for the pre-2006 class registrants due to insufficient evidence that they had agreed to the same Special Terms regarding pricing. Thus, the plaintiff submitted document requests to Safeway for the production of the Special Terms in effect from 2001 to 2005. In response, Safeway stated that it did not have access to these Special Terms and that it had not located any responsive documents.

Despite this attestation, on the eve of trial, Safeway produced "ten highly relevant documents related to Safeway's pre-2006 terms and conditions." Id. at *1. Safeway's Director of Marketing found the newly produced documents on a "legacy" computer drive as he was reviewing the drive in preparation for trial. Although he had not located any responsive documents while initially searching the drive in relation to the plaintiff's discovery request, this time, after accessing the "Help" functionality, he searched within the contents of the files—instead of just the file names as done the first time—and located the responsive documents. Soon thereafter, the parties stipulated that the pre-2006 registrants had agreed to the same contractual terms as the rest of the class and that the court's earlier summary judgment order equally applied to them. The court issued a judgment totaling almost $42 million for the certified class plaintiffs, which Safeway has appealed to the Ninth Circuit.

The plaintiff moved for discovery sanctions under Federal Rule of Civil Procedure 26(g) for "Safeway's 'false and inaccurate statements … concerning the non-existences of documents reflecting historic copies of' Safeway's pre-2006 terms and conditions." Id. at *2. Citing precedent and the rule itself, the court noted that Rule 26(g) "requires a signing attorney to certify that a reasonable inquiry has been made with respect to the factual and legal basis for any discovery request or response" and that "reasonableness of the inquiry is measured by an objective standard; there is no required showing of bad faith." Id. Moreover, under Rule 26(g)(3), upon a violation of the rule without substantial justification, a court "*must* impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both." Id.

> Counsel's failure to reasonably supervise an electronic document search by its client's employee was a sanctionable violation of Federal Rule of Civil Procedure 26(g).

Opposing the motion for sanctions, Safeway argued that its inquiry was reasonable, claiming, inter alia, that its initial search of the legacy drive was "comprehensive at the time[.]" Id. Disagreeing, the court concluded that, while there was no bad faith, the original search of the legacy drive—merely using Microsoft Windows' built-in search functionality to search file and folder names—was unreasonable. Even though neither party provided authority regarding whether or not just searching file names and not the file contents "constitutes an unreasonable inquiry under Rule 26(g)," the court found that "Safeway's failure to search within the contents of the legacy drive constitutes an unreasonable inquiry for at least three reasons." Id. at *3.

First, the court determined that Safeway's counsel's "lack of guidance and oversight supports a finding of unreasonableness." Id. Indeed, the court found "no indication that Safeway's counsel guided or monitored [the original] search of the legacy drive in any significant way" or "ever determined whether [the Director of Marketing] searched within the contents of the files on the legacy drive, as opposed to merely within the documents' file names." Id.

Second, the court held that Safeway's counsel's reliance on the Director of Marketing's search was

itself unreasonable, as there was no evidence that he "had any experience conducting searches of large document repositories, such as the approximately 300 GB legacy drive, for responsive documents." Id. He had admitted that he had "no meaningful assistance from Safeway's in-house or outside counsel or IT personnel … ; had no experience conducting such searches; and kept no record of the searches he made." Id. Harshly criticizing the initial search effort, the court stressed that "Safeway's counsel could have, but did not, request a member of Safeway's IT department (or anyone else familiar with modern e-discovery techniques) conduct the search … . Had such a request been made, it is indisputable that the documents-in-question would have been located[.]" Id.

Third, the court found that the initial search of the legacy drive was in and of itself objectively unreasonable, especially given that Safeway was not "looking for what amounts to a needle in a haystack." Id. at *4. Rather, the subsequently produced documents came from clearly titled file folders with names such as "Special Terms" and "OldSiteDesign\sitedesign\Registration." Thus, "[a]nyone conducting an adequate search would have looked in those folders." Id.

The court concluded that Safeway's failure to initially search within the contents of the legacy drive folders constituted an unreasonable inquiry under Rule 26(g). After finding that Safeway did not present a substantial justification for violating the rule, the court next considered the appropriate sanction. The plaintiff sought various attorney fees totaling over $1 million for expenditures related to the additional discovery requests and trial preparation. The court was "convinced that a substantial portion of the work identified by Plaintiff would not have been incurred had Safeway conducted a reasonable search of the legacy drive" and awarded the requested fee, but reduced it by one-third to $688,644 in light of two factors. Id. First, the court pointed out that had Safeway produced the relevant documents at the onset, the plaintiff would still have had expenditures related to litigating the pre-2006 contractual terms issue. And second, the court highlighted that the plaintiff was "not immune from blame for the failure to discover the ten documents-in-question." Id. During the earlier deposition of Safeway's Director of Marketing, he had indicated that he did not know whether the search terms he initially ran within the legacy drive searched the contents as well as the file names. The plaintiff neglected to follow up on the completeness of the search, thereby contributing to the "large portion of the subsequent work completed by Plaintiff's attorneys [that] may have been avoided." Id.

Conclusion

In this age of increased expectations of counsel and parties in the area of e-discovery competency, what previously may have been seen as a common error while searching for responsive documents may now be seen, as in *Safeway*, as a sanctionable violation of a lawyer's duties under the Federal Rules of Civil Procedure. Borrowing from Judge Scheindlin's observations in *Zubulake*, in *Safeway*, communications between counsel and client broke down and casualties resulted. The decision serves as a reminder that Rule 26(g) provides courts with another vehicle to issue severe e-discovery-related sanctions; a notion possibly forgotten in light of the spotlight on recently amended Rule 37(e). And irrespective of whether the court's fee awarded in this case may appear disproportionate to the conduct, *Safeway* serves as a cautionary tale to remind counsel of their obligations to conduct a reasonable inquiry into the e-discovery processes used by their clients.

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