New York Law Journal
Technology Today
WWW.NYLJ.COM

An ALM Publication
VOLUME 243—NO. 64
TUESDAY, APRIL 6, 2010

FEDERAL E-DISCOVERY

'Rimkus Consulting' Shows Standards Remain Unsettled

By **H. Christopher Boehning** And **Daniel J. Toal**

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Last time, we reviewed Judge Shira Scheindlin's must-read decision in *Pension Committee*,[1] in which she suggests that her series of *Zubulake* decisions (the last of which was issued in 2004) imposed a range of categorical e-discovery duties in the Southern District of New York and quite possibly beyond. Her *Pension Committee* decision warns that the breach of these post-*Zubulake* duties will almost invariably constitute "gross negligence" and subject litigants to the most severe of discovery sanctions.

But a recent decision by Judge Lee H. Rosenthal of the Southern District of Texas—another luminary in the constellation of judges shaping the law of e-discovery—highlights that e-discovery standards remain unsettled and defy application of immutable and inflexible rules. Indeed, Judge Rosenthal's opinion in *Rimkus Consulting v. Cammarata*[2] notes that circuit splits have emerged on some fundamental e-discovery concepts.

Rimkus Consulting involved allegations of intentional destruction of evidence, but, much like Judge Scheindlin's opinion in *Pension Committee,* Judge Rosenthal engages in a wide-ranging discussion of the duty to preserve evidence, conduct that breaches that duty, the level of culpability necessary to impose sanctions, and the standard that must be satisfied to justify a spoliation instruction.

Unlike Judge Scheindlin, however, Judge Rosenthal does not seek to establish bright-line rules. Instead, she invokes the traditional negligence language of reasonableness and proportionality that arguably was absent from *Pension Committee*. The opinion also cautions against viewing the e-discovery efforts of litigants through the distorting lens of hindsight, through which flaws in even the most vigilant e-discovery efforts can be brought into stark relief.

Moreover, as had Judge Scheindlin in *Pension Committee*, Judge Rosenthal expresses "grave concerns"[3] about the ascendancy of spoliation litigation, particularly as related to electronic documents. It is obvious to most jurists who have had occasion to focus on e-discovery issues that the cost and delay inherent in "discovery about discovery" are all too often needless and avoidable.

Judge Rosenthal was also troubled by the likelihood that the explosion of spoliation litigation would negatively impact preservation policies, as litigants would base their actions "on fear of potential future sanctions" rather than "on reasonable need for information."[4]

Briefly outlined, the facts of *Rimkus Consulting* are as follows. Former employees of Rimkus Consulting, a forensic engineering firm, launched a competing business. In November 2006, the ex-employees preemptively sued Rimkus in Louisiana state court seeking a declaratory judgment that the forum-selection, choice-of-law, non-competition, and non-solicitation provisions in agreements they had signed with Rimkus were unenforceable.

In January and February 2007, Rimkus sued the ex-employees in separate suits in Texas, alleging they had breached their non-competition and non-solicitation covenants and used Rimkus's trade secrets and proprietary information in setting up their competing business. The Texas suits eventually were consolidated before Judge Rosenthal.

Discovery in the Texas suit began in fall 2007. In their spoliation motion, Rimkus charged that despite numerous requests and depositions, its former employees had produced only two responsive e-mails before June 2009.

During the spring 2009, Rimkus deposed the defendants and served them with subpoenas duces tecum again seeking e-mail communications. During the depositions, defendants sought to explain their failure to produce e-mails, although they offered inconsistent explanations. All the defendants essentially admitted they had not taken steps to preserve relevant e-mails when they first

H. CHRISTOPHER BOEHNING *and* DANIEL J. TOAL *are litigation partners at Paul, Weiss, Rifkind, Wharton & Garrison LLP*. REBECCA KINBURN, *an associate at the firm, assisted in the preparation of this article.*

recognized the likelihood of litigation concerning their competing business, and even after filing their preemptive suit. One defendant initially testified that he deleted e-mails over storage-capacity concerns, but later contradicted that, saying he and his co-defendants had a policy to delete e-mails after two weeks.

Another testified that he had searched for e-mails but had been unable to find any, and further testified that he got rid of his e-mails frequently, but had not agreed with the other defendants on a deletion policy. A third deponent testified that he had a custom of deleting e-mails frequently, and that they could not be recovered as he had donated his personal computer to charity in 2007.

Rimkus ultimately was able to recover a number of e-mails and other electronic documents through searches of its former employee's work computers and third-party subpoenas issued to Internet service providers. These e-mails were both responsive to plaintiff's original discovery requests and relevant to the questions being litigated.

Judge Rosenthal found the defendant's duty to preserve documents arose no later than Nov. 11, 2006, when they were preparing to file suit in Louisiana. She also found that defendants not only failed to take steps to preserve relevant documents, but also took affirmative steps to delete them.

The judge also found that the documents that were destroyed contained potentially relevant evidence. She therefore concluded that there was enough evidence for a reasonable jury to find that defendants intentionally and in bad faith destroyed relevant documents, and that even though plaintiff was able to recover many relevant documents, it was entitled to an adverse inference instruction.

Standard of Negligence

Judge Rosenthal begins her analysis by noting that electronic documents are deleted and altered as a matter of course, and that such deletions and alterations "cannot be spoliation unless there is a duty to preserve the information, a culpable breach of that duty, and resulting prejudice."[5]

This standard departs from *Pension Committee*, which seems to suggest that "[a] failure to preserve evidence resulting in the loss or destruction of relevant information is surely negligent."[6]

Rimkus Consulting thus moves the discussion of spoliation standards back toward negligence, and away from the standard propounded by *Pension Committee*, which some consider akin to strict liability.

Duty to Preserve

The duty to preserve extends to those documents or items that may be in the possession of individuals who are likely to possess relevant materials.

Judge Rosenthal explicitly invokes traditional negligence standards in crafting the test for breach of the duty to preserve: "Whether preservation or discovery conduct is acceptable in a case depends on what is reasonable, and that in turn depends on whether what was done—or not done—was proportional to that case and consistent with clearly established applicable standards."[7]

Reasonableness and proportionality are thus given greater weight than seemed apparent in *Pension Committee*'s analysis, thereby reflecting a pragmatic approach and one that expressly recognizes the real-world difficulties in crafting and applying litigation holds.

While failing to institute any preservation policies will always be, at minimum, negligent under this standard, a litigating party may assess the likelihood that an individual possesses relevant documents in the context of the broader litigation, and make decisions that take into consideration the difficulty and expense required to preserve those documents.

Preservation efforts that would be unduly burdensome in relation to the size of the litigation or the likelihood of finding relevant materials would be unreasonable and thus unnecessary.

While *Rimkus Consulting* obviously is not controlling on other courts, it may serve as compelling persuasive authority for the proposition that preservation efforts that proved faulty in hindsight, but that were made reasonably and in good faith, were nonetheless appropriate and non-negligent.

A recent decision by Judge Lee H. Rosenthal of the Southern District of Texas highlights that e-discovery standards defy application of immutable and inflexible rules. Indeed, her opinion notes that circuit splits have emerged on some fundamental e-discovery concepts.

This decision is thus an important reminder that litigants must exercise diligence, not omniscience, to discharge properly their duties to preserve relevant electronic evidence.

Relevance and Prejudice

Culpability is not the only factor Judge Rosenthal considers in her spoliation analysis. When documents are destroyed with any degree of culpability, an inquiry must be conducted to determine if those documents were relevant and if their destruction prejudices the innocent party.

While such a determination is difficult to make, given that the documents at issue are not generally available, it is necessary to produce some evidence to ensure that sanctions are not imposed unjustly, while still preventing the spoliating party from benefiting from its destruction of evidence.

As Judge Scheindlin noted in *Pension Committee*, courts in the Second Circuit may, but are not required, to presume relevance and prejudice upon a finding of bad faith.

Judge Rosenthal casts doubt on whether the Fifth Circuit would permit such a presumption, but had no need to resolve the issue because Rimkus had managed to gather some of the documents at issue, and also presented circumstantial evidence and deposition testimony relating to the unrecovered records. Judge Rosenthal thus held that the defendants (the ex-employees) had culpably destroyed documents that were relevant to the litigation and that their destruction had prejudiced Rimkus.

Sanctions

Judge Rosenthal then turned to the appropriate sanction to redress the spoliation. She noted that severe sanctions are justified where an offending party engages in a "willful or intentional destruction of evidence to prevent its use in litigation."[8] The severity of the sanction must be "proportionate to the culpability involved and the prejudice that results"[9] and a judge should strive to restore the prejudiced party to the position it would have held absent the spoliation.

A range of sanctions, from costs to default judgment, are available. Often, when a party is prejudiced, but not to the extent that it is unable to prove its claims, an appropriate sanction is a presumption by the fact-finder that the destroyed evidence would have been prejudicial to the spoliating party's case.

Although Judge Rosenthal did choose to use the spoliation instruction to sanction defendant's conduct, she also stressed that such instructions "are properly viewed as among the most severe sanctions a court can administer."[10]

It should be noted that Rimkus' argument for terminating sanctions was ultimately undermined by its own success in gathering examples of the spoliated evidence. The third-party subpoenas

produced sufficient relevant evidence to convince the court that plaintiff would be able to put forth a cogent case, and thus justice would not be frustrated by permitting the suit to go forward.

Of course, this somewhat perverse outcome should not be taken as a disincentive to recover evidence, for without the finding of relevance and prejudice that was supported by these documents, the question of sanctions would not have arisen.

Spoliation Instruction

Judge Rosenthal also includes an exploration of the current circuit split regarding the level of culpability necessary to warrant an instruction on spoliation. The Fifth Circuit, as a general rule, requires evidence of bad faith in order to impose severe sanctions, including the granting of default judgment, striking of pleadings or giving of adverse inference instructions.

Judge Rosenthal highlights precedent that held explicitly that "'[m]ere negligence is not enough' to warrant an instruction on spoliation."[11]

She then details the standard for such instructions in the various circuits. The Seventh, Eighth, Tenth, Eleventh and D.C. circuits all appear to agree that bad faith is required for such an instruction.

However the First, Fourth, and Ninth circuits are willing to issue such an instruction even in the absence of bad faith if the prejudice to the innocent party is sufficiently severe.

The Third Circuit employs a balancing test to weigh the degree of fault and prejudice. And in the Second Circuit, some authority suggests that a spoliation instruction may be given on the basis of mere negligence under the theory that "each party should bear the risk of its own negligence."[12]

Unlike Judge Scheindlin's spoliation instruction, which includes a complex burden shifting presumption, Judge Rosenthal sets out a very simple charge. Rather than instruct the jury on rebuttable presumption, her charge simply presents the ultimate issue to the jury, permitting them to draw the inference that destroyed documents would have been unfavorable to defendants if they find that defendants destroyed the documents in bad faith.

Conclusion

Rimkus Consulting reminds us that the law of e-discovery remains unsettled. The relevant standards continue to evolve and, even when the standards are clear, application of those standards is unavoidably a fact-intensive exercise. As a result, predictability in this area is elusive. As Judge Scheindlin noted in *Pension Committee*, "[e]ach case will turn on its own facts and the varieties of efforts and failures is infinite."

In the end, as Judge Scheindlin has acknowledged, courts must make judgment calls that "cannot be measured with exactitude and might be called differently by a different judge."

Similarly, Judge Rosenthal noted that "[i]t can be difficult to draw bright-line distinctions between acceptable and unacceptable conduct in preserving information and in conducting discovery, either prospectively or with the benefit (and distortion) of hindsight."

In the interest of avoiding needless and wasteful judicial detours into "discovery about discovery," jurists like Judges Scheindlin and Rosenthal have offered thoughtful analyses about the current state of the law regarding e-discovery and attempted to provide guidance for litigants intent on staying out of harm's way. But there is a tension here: Guidance necessarily comes in the form of generalizations while the contours of acceptable conduct in the realm of e-discovery are inherently fact-intensive, case-specific and defy efforts to promulgate universal rules.

And yet certain principles unquestionably emerge from cases like *Rimkus Consulting* and *Pension Committee* that we would all be wise to heed.

First, the duty of preservation must be addressed at the earliest possible opportunity. For defendants, this will often be when a suit is filed, but may happen earlier if litigation is reasonably anticipated. The duty of preservation for plaintiffs often will arise even earlier given that plaintiffs will expect and must plan for litigation before the suit is filed.

Second, document preservation cannot be approached as a rote exercise, but must be carefully tailored to the particulars of each case.

Third, courts can be expected to be more exacting in their e-discovery requirements when there is more at stake.

Fourth, transparency in e-discovery serves the interests of all involved so that decisions can be made by consensus or, when that is not possible, disagreements can be resolved before electronic data has been lost irretrievably.

Although there may be no safe harbors when it comes to e-discovery, following these common sense lessons should help litigants avoid washing up on the shoals and becoming an object lesson for others.

1. *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, No. 05 Civ. 9016(SAS), 2010 WL 184312, *3 (S.D.N.Y. Jan. 15, 2010).

2. Civil Action No. H-07-0405, 2010 WL 645253 (S.D.Tex. Feb. 19, 2010).

3. *Rimkus Consulting*, 2010 WL 645253 at *1.

4. Id.

5. Id. at *5.

6. *Pension Committee*, 2010 WL 184312 at *3.

7. *Rimkus Consulting*, 2010 WL 645253 at *6 (emphasis in the original).

8. Id. at *9

9. Id. at *9

10. Id. at *9

11. Id. at *6 (quoting *Russell v. Univ. of Tex. of Permian Basin*, 234 F. App'x 195, 208 (5th Cir. 2007)).

12. Id. At *7 (quoting *Residential Funding Corp. v. DeGeorge Financial Corp.*, 206 F.3d 99, 108 (2d Cir. 2002)).