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ANALYSIS AND PERSPECTIVE

On February 19, 2010, Judge Lee Rosenthal of the U.S. District Court for the Southern District of Texas issued an important decision providing further guidance on how federal courts approach failures to properly preserve electronically stored information (ESI) and the range of sanctions permitted for such failures. It comes hot on the heels of an equally important opinion from the U.S. District Court for the Southern District of New York. Crowell & Moring's David D. Cross and Jared S. Hosid explore some of the decisions' ramifications.

Rimkus v. Cammarata: Zubulake Revisited Again

BY DAVID D. CROSS AND JARED S. HOSID

In *Rimkus Consulting Group, Inc. v. Cammarata, et al.*, S.D. Texas, No. H-07-0405, 2/19/10, Judge Lee Rosenthal imposes certain sanctions upon the defendants based upon findings of ''intentional destruction of e-mails and other electronic information at a time when they were known to be relevant to anticipated or pending litigation.''[1]

The *Rimkus* decision comes barely more than a month after another widely-known jurist, Judge Shira Scheindlin, granted sanctions for spoliation of evidence in *Pension Committee of the Univ. of Montreal Pension Plan, et al. v. Banc of America Securities LLC, et al.*, S.D. N.Y., No. 05 Civ. 9016 (SAS), 1/15/10). Judge Scheindlin titled the decision ''*Zubulake* Revisited: Six Years Later,'' referring to the often-cited series of decisions she issued in the *Zubulake* litigation concerning the duty to preserve ESI.

Judge Rosenthal discusses the *Pension Committee* decision at length in *Rimkus* and highlights certain significant differences among the federal circuits in their approaches to spoliation allegations and the appropriate sanctions.

The Underlying Case. The plaintiff in *Rimkus* alleged that several former employees misappropriated confidential and proprietary business records to support the launch of a company they formed, in violation of non-compete and non-solicitation agreements.[2] As so often happens in litigation today, these central factual and legal issues became overshadowed by protracted and ex-

[1] *Rimkus Consulting Group, Inc. v. Cammarata, et al.*, 2010 WL 645253 (S.D. Tex. Feb. 19, 2010), at *1.

[2] *Id.* at *2.

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pensive discovery-about-discovery.[3] Judge Rosenthal notes in the decision that ''the past year of discovery in this case has focused on spoliation.''[4]

Rimkus sought evidence to support its belief that the defendants used e-mail and office applications to transfer and utilize the misappropriated business records. Supporting evidence was ultimately obtained by Rimkus, but only after several years of motion practice that also uncovered evidence of alleged spoliation by the defendants and a purported systematic failure to fulfill their discovery obligations. The alleged discovery failures, chronicled by Judge Rosenthal in *Rimkus*, include:

- deleting e-mails directly relevant to impending litigation;[5]
- failing to undertake steps to preserve electronic evidence following the initiation of litigation;[6]
- conducting a ''superficial'' search when confronted with numerous discovery requests and court orders;[7]
- giving away or destroying laptops that contained electronic evidence;[8]
- making no effort to identify alternate sources of electronic evidence;[9]
- providing inconsistent testimony regarding preservation and spoliation of electronic evidence;[10]
- producing electronic evidence years after applicable requests;[11] and
- producing a key e-mail in a format that left no indication that six documents had been attached and were not produced.[12]

In determining the appropriate sanction, Judge Rosenthal stresses a number of factors, including the defendants' level of culpability with respect to the lost ESI, the level of relevance of that ESI to both the plaintiff's and the defendants' theories, and the availability of other relevant ESI supportive of the plaintiff's claims.[13] Judge Rosenthal ultimately concludes that there is sufficient evidence to find that the defendants acted in bad faith and intentionally deleted e-mails and other ESI relevant to the litigation after their duty to preserve arose.[14]

Departures From *Pension Committee*. Notably, however, Judge Rosenthal crafts a jury instruction that gives the jury the *discretion* to decide whether the defendants acted in bad faith and, even if they did, whether to draw adverse inferences.[15]

This approach differs from that taken by Judge Scheindlin in *Pension Committee*, where Judge Schiendlin issued a jury instruction requiring the jury to accept the court's finding that the plaintiffs were grossly negligent in performing their discovery obligations and directing the jury that it could *presume* that the evidence that had been lost was relevant to the case and prejudicial to the plaintiffs, unless the jury were to find that the plaintiffs had rebutted that presumption with evidence at trial.[16]

Judge Rosenthal acknowledges this difference in the *Rimkus* decision and attributes it to differences among the approaches to spoliation sanctions taken by the federal circuits.[17]

Cost Allocation. Judge Rosenthal also ordered the defendants to pay the plaintiff ''the reasonable attorneys' fees and costs it incurred in investigating the spoliation, including fees and costs for obtaining e-mails through third-party subpoenas, taking additional depositions, and filing and responding to motions on sanctions.''[18]

In other words, the defendants were required to pay not only fees and costs associated with the motion for sanctions, but also for *all* the discovery efforts the plaintiff made in obtaining evidence to support their spoliation allegations.

Judge Rosenthal observes, ''Like an adverse inference instruction, an award of costs and fees deters spoliation and compensates the opposing party for the additional costs incurred.''[19] According to the decision, ''[t]he defendants agree that this sanction is appropriate.''[20]

Culpability: Bad Faith Versus Negligence. Judge Rosenthal notes that the general rules regarding the duty to preserve ''are not controversial.''[21] She avers, though, that ''applying them to determine when a duty to preserve arises in a particular case and the extent of that duty requires careful analysis of the specific facts and circumstances.''[22]

She states that ''[d]etermining whether sanctions are warranted and, if so, what they should include, requires a court to consider both the spoliating party's *culpability* and the level of *prejudice* to the party seeking discovery.''[23]

Regarding culpability, Judge Rosenthal holds that in the Fifth Circuit, ''the severe sanctions of granting default judgment, striking pleadings, or giving adverse inference instructions may not be imposed unless there is evidence of 'bad faith.' ''[24] She emphasizes that ''[d]estruction or deletion of information subject to a preservation obligation is not sufficient for sanctions. Bad faith is required.''[25]

Judge Rosenthal notes that the court in *Pension Committee* accepted a lesser level of culpability for spoliation sanctions:

> The focus of *Pension Committee* was on when *negligent* failures to preserve, collect, and produce documents—including electronically stored information—in discovery may justify the severe sanction of a form of adverse inference instruction. Unlike *Pension Committee*, the present case does not involve allegations of negligence in electronic

[3] *Id.* at *1.
[4] *Id.*
[5] *Id.* at 31.
[6] *Id.* at 30.
[7] *Id.* at 20.
[8] *Id.* at 31.
[9] *Id.* at 20.
[10] *Id.* at 31.
[11] *Id.* at 50.
[12] *Id.* at 26.
[13] *Id.* at 6.
[14] *Id.* at 32.
[15] *Id.* at 34.
[16] *Pension Comm.*, 2010 WL 184312, at *23-24.
[17] *Rimkus*, 2010 WL 645253, at *7.
[18] *Id.* at *3.
[19] *Id.* at *34.
[20] *Id.*
[21] *Id.* at *6.
[22] *Id.*
[23] *Id.* (emphasis added).
[24] *Id.*
[25] *Id.* at *31.

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discovery. Instead, this case involves allegations of *intentional* destruction of electronically stored evidence.[26]

Circuit Split. Judge Rosenthal points out that the Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits, like the Fifth, appear to require bad faith while the First, Fourth, and Ninth Circuits do not. The Third Circuit, meanwhile, ''balance[s] the degree of fault and prejudice.''[27]

She notes that the court in *Pension Committee* ''applied case law in the Second Circuit'' and ''imposed a form of adverse inference instruction based on a finding of gross negligence . . . . ''[28]

Gross Negligence for Second Circuit Only? Judge Rosenthal seems to suggest that only the Second Circuit permits an adverse inference sanction for gross negligence. She concludes: ''The circuit differences in the level of culpability necessary for an adverse inference instruction limit the applicability of the *Pension Committee* approach.''[29]

Relevance and Prejudice: Presumption Versus Proof. Judge Rosenthal declines to apply a presumption of relevance and prejudice to the ESI lost in *Rimkus*, instead holding that the moving party must make a showing of relevance and prejudice.[30]

The instruction she orders to be presented to the jury in *Rimkus* effectively permits the jury to determine whether the *evidence* at trial supports a finding that the allegedly spoliated e-mails and other ESI were relevant to the plaintiff's claims or otherwise harmful to the defendant:

> ''The instruction will inform the jury that if it finds that the defendants intentionally deleted evidence to prevent its use in anticipated or pending litigation, the jury *may*, *but is not required to*, infer that the lost evidence would have been unfavorable to the defendants.''[31]

One of the factors considered by Judge Rosenthal in fashioning the jury instruction was evidence that some of the deleted e-mails were favorable to the defendants, notwithstanding the evidence that other deleted e-mails were favorable to the plaintiff.[32]

She also emphasizes that ''the record shows that Rimkus was able to obtain a significant amount of evidence,'' some of which was produced belatedly, but produced nonetheless.[33]

She states that in determining whether the deleted evidence was unfavorable to the defendants, the jury will be instructed ''to consider the evidence about the conduct of the defendants in deleting e-mails after the duty to preserve had arisen and the evidence about the content of the deleted e-mails that cannot be recovered.''[34]

Judge Rosenthal again observes that the approach in *Pension Committee* differs from that in *Rimkus* and the Fifth Circuit generally.[35] She notes that in that case, ''the court followed the approach that even for severe sanctions, relevance and prejudice may be presumed when the spoliating party acts in a grossly negligent manner.''[36]

She contrasts this with the approach of the Fifth Circuit, where, ''an adverse instruction is not proper unless there is a showing that the spoliated evidence would have been relevant.''[37] Judge Rosenthal observes ''that a showing that the lost information is relevant and prejudicial is an important check on spoliation allegations and sanctions motions.''[38]

She further observes that ''in many case—including the present case—there are sources from which at least some of the allegedly spoliated evidence can be obtained . . . and the party seeking discovery can also obtain extrinsic evidence of the content of at least some of the deleted information from other documents, deposition testimony, or circumstantial evidence.''[39] Judge Rosenthal finds:

> In the present case, the party seeking sanctions for deleting e-mails after a duty to preserve had arisen presented evidence of their contents. The evidence included some recovered deleted e-mails and circumstantial evidence and deposition testimony relating to the unrecovered records. There is neither a factual nor legal basis, nor need, to rely on a presumption of relevance or prejudice.[40]

Jury to Decide Ultimate Issue. In declining to adopt a presumption of relevance and prejudice in *Rimkus*, Judge Rosenthal concludes:

> ''Rather than instruct the jury on the rebuttable presumption steps, it is sufficient to present the ultimate issue: whether, if the jury has found bad-faith destruction, the jury will then decide to draw the inference that the lost information would have been unfavorable to the defendants.''[41]

Remedies: Scope of Adverse Inferences. Judge Rosenthal acknowledges the well-recognized principle that a sanction for spoliation ''should be no harsher than necessary to respond to the need to punish or deter and to address the impact on discovery.''[42]

She also opines that adverse inferences ''are properly viewed as among the most severe sanctions a court can administer.''[43]

In fashioning the remedy in *Rimkus* and recognizing the severity of adverse inferences, Judge Rosenthal emphasizes that she had made only ''preliminary findings necessary to submit the spoliation evidence and an adverse inference instruction to the jury.''[44]

Unlike *Pension Committee*, where the court ''instructed the jury that these plaintiffs were grossly negligent in performing discovery obligations and failed to preserve evidence after a preservation duty arose,'' Judge Rosenthal declines to instruct the jury that the defendants destroyed evidence.[45] She, instead, leaves it to the jury ''to decide whether the defendants intention-

[26] *Id.* at *4 (emphasis added).
[27] *Id.* at *7.
[28] *Id.*
[29] *Id.*
[30] *Id.* at *8.
[31] *Id.* at *1 (emphasis added).
[32] *Id.* at *32.
[33] *Id.* at *33.
[34] *Id.* at *34.
[35] *Id.* at *8.
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.* at *10.
[42] *Id.* at *9.
[43] *Id.*
[44] *Id.* at *10.
[45] *Id.* at *9-*10.

ally deleted e-mails and attachments to prevent their use in litigation.''[46]

Rule 37(e): Applicability of the Safe Harbor Provision. The defendants in *Rimkus* found no safe harbor in the protections afforded by Rule 37(e) of the Federal Rules of Civil Procedure. Judge Rosenthal acknowledges that ''Rule 37(e), which precludes sanctions if the loss of the information arises from the routine operation of the party's computer system, operated in good faith, does not apply here.''[47]

She finds that the evidence shows that the defendants ''did not have e-mails deleted through the routine, good-faith operation of the [company's] computer system,'' but rather the defendants ''decided on a 'policy' of deleting e-mails more than two weeks old.''[48]

Timing is Everything. The timing of this ''policy's'' adoption is a crucial fact for Judge Rosenthal, who holds that ''a policy put into place after a duty to preserve had arisen, that applies almost exclusively to e-mails subject to that duty to preserve, is not a routine, good-faith operation of a computer system.''[49]

Another crucial fact was evidence showing that the defendants ''manually and selectively deleted e-mails, after the duty to preserve arose,'' as opposed to an arbitrary computer system that indiscriminately deletes e-mails based upon temporal or space limitations built into the system.[50]

Lessons Learned. As with the *Pension Committee* decision, the *Rimkus* decision provides some valuable lessons about what the courts might expect of a party in complying with the duty to preserve. It also provides helpful guidance on what a party can do to build an effective record to support a motion for spoliation sanctions.

In the category of what *not* to do after the duty to preserve arises, perhaps the most obvious lesson in *Rimkus* is generally to avoid implementing a new policy that deletes or destroys potentially relevant ESI, especially if the policy calls for the selective destructive of relevant electronic evidence.

In the category of what to do where the other side might have lost or destroyed relevant evidence or otherwise refuses to provide relevant discovery, it is helpful to consider key steps that the plaintiff took to uncover evidence devastating to the defendants, including:

- performing a forensic examination of a company laptop used by one of the defendants, uncovering evidence that the defendant—contrary to his repeated assertions—possessed a web-based e-mail account;[51]
- obtaining from that e-mail account evidence that it was used by a defendant to transfer sensitive corporate information from Rimkus;[52] and
- obtaining a subpoena that resulted in the defendants' internet service providing many critical e-mails sent and received by the defendants.[53]

Ironically, the eventual availability of this evidence contributed to Judge Rosenthal's reluctance to instruct the jury that the plaintiff had been prejudiced by the defendants' alleged spoliation, but perhaps more importantly, it was crucial to satisfying the plaintiff's required showing that the deleted ESI was relevant and at least partly unfavorable to the defendants.[54]

Judge Rosenthal notes that ''[s]poliation of evidence—particularly of electronically stored information—has assumed a level of importance in litigation that raises grave concerns.''[55] She observes that ''[t]he frequency of spoliation allegations may lead to decisions about preservation based more on fear of potential future sanctions than on reasonable need for information.''[56] Judge Rosenthal's discussion of the bad faith requirement and the discretionary jury instruction issued in *Rimkus* suggest that parties may have less to ''fear'' in the Fifth and other circuits than in the Second Circuit.

That said, parties and their counsel would be well served to understand and follow the guidance provided by both these decisions, along with many other recent decisions addressing the duty to preserve ESI and permissible sanctions for failures to comply with that duty.

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The views expressed in this article are the authors' and not those of their firm or its clients.

[46] *Id.* at *10.
[47] *Id.* at *30.
[48] *Id.*
[49] *Id.* at *30.
[50] *Id.*
[51] *Id.* at *37.
[52] *Id.* at *23.
[53] *Id.* at *22.
[54] *Id.* at *1, *31.
[55] *Id.* at *1.
[56] *Id.*

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