

Pension Committee and Rimkus Consulting: Differing Approaches to Determining Spoliation

Two prominent federal judges in the field of e-discovery have recently issued opinions setting forth differing analytical frameworks for deciding whether to impose sanctions for the spoliation of electronic evidence. Although both courts imposed sanctions for spoliation of evidence, their analyses highlight the continued variance among the federal courts in analyzing and determining when to order discovery sanctions.

In e-discovery circles, Judge Shira Scheindlin is most well known as the author of the oft-cited *Zubulake* line of decisions, which predated the 2006 Amendments to the Federal Rules of Civil Procedure. On Jan. 11, 2010, Judge Scheindlin issued an opinion on *Pension Committee*¹ that was titled “*Zubulake* Revisited: Six Years Later” and outlined an analytical framework for imposing severe sanctions for discovery failures. Judge Scheindlin noted that even with this more detailed analytical framework, there is no one test for determining whether to award sanctions, as it is an “inherently subjective” and “fact intensive” decision that must be based on judicial experience. *Pension Committee* at *7.

Just weeks after *Pension Committee*, highly respected jurist Judge Lee Rosenthal reinforced this statement in an opinion she issued in *Rimkus Consulting*,² in which she took a different approach than Judge Scheindlin in analyzing the culpability level necessary for imposing sanctions for preservation failures. Like Judge Scheindlin, Judge Rosenthal is well known in e-discovery circles as she chairs the Judicial Conference Committee on Rules of Practice and Procedure and led efforts to amend the Federal Rules to address information technology in 2006.

I. ***Pension Committee* and *Rimkus Consulting* Highlight the Federal Courts’ Differences in Determining When Sanctions Should be Granted for the Spoliation of Evidence**

In both *Rimkus* and *Pension Committee*, the courts followed the following framework for analyzing whether discovery conduct violated current legal standards and warranted sanctions: The innocent party must prove that the spoliating party (1) had control over the evidence and the obligation to preserve it at the time of the loss; (2) acted with a culpable state of mind upon destroying or losing the evidence; and (3) that the missing evidence is relevant to the innocent party’s claim or defense. *Pension Committee* at *5; *Rimkus* at 17. Below we compare and contrast the two courts’ analysis within this framework, which led to different sanctions being issued by each court.

A. **WHEN THE DUTY TO PRESERVE ARISES**

At the outset of their analysis, both courts emphasized the importance of issuing timely, *written* litigation holds by examining the “interplay between the duty to preserve evidence and the spoliation

1. *Pension Committee of Univ. of Montreal v. Banc of America Sec. LLC, et. al.*, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010) (Amended Order).

2. *Rimkus Consulting Group Inc. v. Cammarata*, H-07-0405 (S.D. Tex. Feb. 19, 2010).

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of evidence.” *Pension Committee* at *2. Judge Scheindlin noted that case law makes “crystal clear that the breach of the duty to preserve” is well established and arises when a party “reasonably anticipates litigation” requiring the party to “suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.” *Pension Committee* at *4. The failure to timely issue a written litigation hold impacts the court’s determination of a party’s culpability for failing to preserve documents. Judge Scheindlin emphasized that “definitely after July, 2004, when the final relevant *Zubulake IV* was issued, the failure to issue a *written* litigation hold constitutes gross negligence” and could result in substantial sanctions if such breach resulted in the destruction of relevant information. *Pension Committee* at *3.

Rimkus also recognized the importance of a timely and a thorough litigation hold effort. Judge Rosenthal acknowledged, however, that “[i]t can be difficult to draw bright-line distinctions between acceptable and unacceptable conduct in preserving information.” She reiterated that the relevant standard is reasonableness which “in turn depends on whether what was done – or not done – was *proportional* to that case and consistent with clearly established applicable standards.” *Rimkus* at 12-13.

B. CULPABILITY

In both decisions, the courts analyzed the evidence presented by the movant for sanctions to determine if the spoliating party’s level of culpability was simply negligent, grossly negligent, or willful. In *Pension Committee*, the court determined that the spoliating party’s actions in failing to timely institute written litigation holds, failing to execute a comprehensive search for documents, and/or failing to sufficiently monitor their employees’ document collection were grossly negligent. *Pension Committee* at *10. More generally, the court noted that conduct likely to be deemed grossly negligent includes the failure to issue an adequate written litigation hold, the intentional destruction of relevant records after the duty to preserve has attached, and the failure to collect records from key players and former employees. *Id.* at *3. In contrast, the following missteps are likely to be deemed simply negligent by the court: failure to assess the accuracy and validity of selected search terms; failure to obtain records from all employees likely to have relevant records; and failure to take all appropriate measures to preserve ESI. *Id.*

In *Rimkus Consulting*, the court found there was sufficient evidence for a reasonable jury to find that the spoliating party willfully destroyed electronic evidence after the duty to preserve arose. *Rimkus* at 71. The court determined that the spoliating party acted with bad faith throughout the discovery process based on the following misconduct: lacking a preservation policy when the duty to preserve arose; failing to issue a preservation

notice; failing to search for relevant electronic data sources and evidence; destroying laptops that contained potentially relevant data; producing electronic evidence years after the initial document requests were made; providing inconsistent testimony regarding preservation and spoliation of electronic evidence; and producing an e-mail in non-native format, which hid the fact that six documents had been attached and were not produced. *Id.* at 20, 26, 30-31, 50.

While both courts agreed that culpability and prejudice should be analyzed to determine if severe sanctions should be awarded, the two courts analyzed those measurements differently to make their determinations. Judge Scheindlin determined that either grossly negligent or willful behavior was enough to allow severe sanctions in the Second Circuit. *Pension Committee* at *6-7. In contrast, Judge Rosenthal requires a showing of bad faith before an adverse inference instruction may be imposed. *Rimkus* at 14-16.

Judge Rosenthal distinguished *Pension Committee*’s imposition of an adverse inference instruction based on a finding of gross negligence by stating that “[t]he circuit differences in the level of culpability necessary for an adverse inference instruction limit the applicability of the *Pension Committee* approach.” *Rimkus* at 16. To support her position that circuits outside of the Second Circuit require bad faith to impose an adverse inference instruction, Judge Rosenthal cited decisions from the Fifth Circuit recognizing that “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.’” *Rimkus* at 14. This “bad faith” standard is consistent with federal court decisions in the Seventh, Eighth, Tenth, Eleventh, and D.C. circuits which also appear to require bad faith rather than negligence. *Id.* at 14-15. Judge Rosenthal acknowledged that the First, Fourth, and Ninth Circuits do not require bad faith to impose sanctions if there is severe prejudice, although she noted that these cases often emphasize the presence of bad faith. *Id.* at 15. And, in the Third Circuit, courts “balance[s] the degree of fault and prejudice” to decide whether to impose severe sanctions. *Id.*

C. RELEVANCE AND PREJUDICE

Judges Scheindlin and Rosenthal also agreed that generally the innocent party must prove that the spoliating party (1) had control over the evidence and the obligation to preserve it at the time of the loss; (2) acted with a culpable state of mind upon destroyed the evidence; and (3) the missing evidence is relevant to the innocent party’s claim or defense. *Pension Committee* at *5; *Rimkus* at 17. However, the courts reached different decisions regarding whether the court should apply a presumption of relevance and prejudice if there is gross negligence or willfulness.

In *Pension Committee*, Judge Scheindlin determined that, even for severe sanctions, relevance and prejudice may be presumed

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when the spoliating party acts in bad faith or in a grossly negligent manner. *Pension Committee* at *5. The burden then shifts to the spoliating party to rebut the presumption. *Id.* In contrast, Judge Rosenthal refused to apply a presumption of relevance or prejudice because an adverse inference instruction is not proper in the Fifth Circuit “unless there is a showing that the spoliated evidence would have been relevant.” *Rimkus* at 19. Judge Rosenthal explained that requiring the movant to establish relevance and prejudice “is an important check on spoliation allegations and sanctions motions.” *Id.* at 18.

D. REMEDIES

In discussing the criteria to consider for determining the appropriate remedy, both courts considered the goals of discovery sanctions. In *Pension Committee*, Judge Scheindlin said the goals of the court’s sanctioning power were to: (1) deter the parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who created the risk; and (3) restore ‘the prejudiced party to the same position [it] would have been in absent the wrongful destruction of evidence.’” *Pension Committee* at *6. In contrast, Judge Rosenthal stated that a goal in imposing sanctions is to have the sanction be proportionate to the culpability involved and the prejudice that results. *Rimkus* at 20-21.

Importantly, the courts differed in the adverse inference jury instruction that each issued as a penalty for the spoliation of evidence. In *Pension Committee*, Judge Scheindlin instructed the jury that the plaintiffs were grossly negligent in failing to preserve evidence after the duty to preserve arose, and, therefore, informed the jury that they could presume that such lost evidence was relevant and would have been favorable to the innocent party. *Pension Committee* at *23. In comparison, Judge Rosenthal’s instruction did not instruct the jury that the defendants engaged in intentional misconduct and, instead, asked the jury to decide whether the defendants intentionally deleted e-mails and attachments to prevent their use in litigation and, if the jury found such misconduct, then instructed the jury to decide whether to

infer that the lost information would have been unfavorable to the defendants. *Rimkus* at 25.

II. Key Take-Aways From *Pension Committee* and *Rimkus*

The *Pension Committee* and *Rimkus* decisions provide welcome guidance for handling discovery misconduct with greater efficiency. Both the amended federal rules that address electronic discovery obligations, as well as the *Pension Committee* and *Rimkus* opinions and its predecessors, focus not on perfection but instead, on good faith, reasonably defensible methods. Although there is still an inconsistency among the circuits regarding the standard of culpability necessary for the imposition of severe sanctions and whether to impose a presumption of relevance and prejudice, the guidance of *Pension Committee* and *Rimkus* indicate that the components of a good-faith approach should include:

- Timely issuance of written preservation notices;
- Ensuring the implementation of not only preservation, but also reasonably defensible searching and collection of all relevant information;
- Ensuring e-mail is not automatically deleted;
- Taking action to preserve records of former employees at the onset as well as during the pending litigation; and
- If appropriate, the preservation of backup tapes or other legacy ESI.

For further information, or to get a copy of Winston & Strawn’s client alert relating to Judge Scheindlin’s opinion on spoliation in the *Pension Committee* case, please contact your Winston & Strawn LLP attorney or our eDiscovery & Information Management Practice Group.

If you have any questions regarding this briefing, please contact one the following Winston & Strawn attorneys:

John Rosenthal	jrosenthal@winston.com	(202) 282-5785	Chair, eDiscovery & Information Management Practice Group
Karen Quirk	kquirk@winston.com	(312) 558-5212	Vice-Chair, eDiscovery & Information Management Practice Group

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