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Preservation, Spoliation, and Adverse Inferences – a view from the Southern District of Texas

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In January, Judge Shira Scheindlin provided substantive guidance to bench, bar, and clients regarding legal holds, collections, and sanctions in the *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, case. On February 18, 2010, the Hon. Lee H. Rosenthal of the Southern District of Texas issued an opinion of equal significance, in *Rimkus Consulting Group, Inc. v. Cammarata*, that will also be cited often in cases this year and beyond.¹ It is also significant in light of Judge Rosenthal's position as Chair of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.

In circumstances that are both similar and dissimilar to *Pension Committee* decision, Judge Rosenthal confronts the difficult issues of spoliation of evidence and sanctions. Unlike the facts in *Pension Committee*, however, the Texas court finds that there was deliberate spoliation of evidence. Notably, Judge Rosenthal imposes the same sanction of a permissive adverse inference instruction against the spoliators of evidence, albeit for different reasons and with a different jury instruction.

The pertinent² analysis of the court focuses on (1) ascertaining when the deletion of evidence becomes spoliation, and (2) determining whether the spoliation in this case merits an adverse inference instruction.

Lessons from *Rimkus*

The facts of *Rimkus* seem straight out of *Jerry Maguire*: a top executive, inspiring manifesto in hand, leaves his company with a few other employees to start a competing enterprise. Initially, the ex-employees sought a declaratory judgment that their noncompetition and nonsolicitation agreements with their former employer, Rimkus Consulting Group, were unenforceable. Rimkus then sued the ex-employees for breach of these agreements, as well as use of trade secrets and proprietary information. *See id.* at *2. In this action, Rimkus alleges that defendants (the ex-employees) spoliated evidence and moves for sanctions against them. The spoliation allegations include “destroying evidence, failing to

¹ *Rimkus Consulting Group, Inc. v. Cammarata*, No. H-07-0405, 2010 WL 645253 (S.D. Tex. Feb. 19, 2010).

² The 144-page opinion addresses other aspects of the case that are not relevant to the preservation and sanctions discussion.

preserve evidence after a duty to do so had arisen, lying under oath, failing to comply with court orders, and significantly delaying or failing to produce requested discovery.” As outlined below, practitioners and courts should review the decision for its analysis as much as its conclusions.

(1) Overview of challenges presented by preservation obligations in an electronic age

The prologue to the decision is arguably the most significant part of the opinion as Judge Rosenthal seeks to address the “grave” concern that spoliation and sanctions motions essentially threaten to derail the civil discovery process. Judge Rosenthal, in the context of explaining the analytical framework to be applied in examining spoliation allegations, stresses that (a) there are no litmus tests or “negligence per se” rules that can be quickly applied in this area, and (b) what a party must do to preserve information is proportional to the case at hand:

[A]pplying [the general rules regarding preservation] 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. It 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. 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.^{FN8} As Judge Scheindlin pointed out in *Pension Committee*, that analysis depends heavily on the facts and circumstances of each case and cannot be reduced to a generalized checklist of what is acceptable or unacceptable.

Id. at *6 (emphasis added)(footnote 8 in original text cited THE SEDONA PRINCIPLES: SECOND EDITION, BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 17 cmt. 2.b. (2007) (“Electronic discovery burdens should be proportional to the amount in controversy and the nature of the case. Otherwise, transaction costs due to electronic discovery will overwhelm the ability to resolve disputes fairly in litigation.”)) Before proceeding to the remainder of the opinion, Judge Rosenthal also recognized that “sanctions (as opposed to other remedial steps) require some degree of culpability.” *Id.*

(1) When deletion of evidence becomes spoliation

Spoliation is the destruction or the significant and meaningful alteration of evidence. *Id.* at *5. The routine deletion of electronically stored information transforms into spoliation when three elements are present: (a) the duty to preserve the information, (b) a culpable breach of that duty, and (c) resulting prejudice. *Id.* at *5. Again, this formulation leaves open the real possibility that a non-culpable (and non-sanctionable) loss of relevant information can happen.

(a) Duty to preserve information

A party has a duty to preserve information when that party “has notice that the evidence is relevant to litigation, or . . . should have known that the evidence may be relevant to future litigation.” *Id.* at *6. The duty to preserve information encompasses documents or tangible things by or to individuals “likely to have discoverable information that the disclosing party may use to support its claims or defenses.” *Id.* This articulation makes clear that the scope of the preservation duty is directly proportional to the matter at hand and not an abstract, unbounded duty.

(b) A culpable breach of the duty to preserve information

A “culpable” breach of a duty is one that is blameworthy—in other words, not an innocent mistake. Judge Rosenthal specifically notes that mere negligence in most courts is generally not enough to warrant an instruction on spoliation. Also, Judge Rosenthal observes that in most circuits, courts do not impose the severe sanctions of granting default judgment, striking pleadings, or giving adverse inference instructions unless there is evidence of “bad faith.” *Id.* Judge Rosenthal further notes that her analysis and conclusions are, in part, at odds with the framework established in *Pension Committee* due to the rubric of case law developed in the Second Circuit. *Id.* at *7.

(c) Resulting prejudice

The third element of spoliation, “resulting prejudice,” is important because not all destruction or alteration of evidence negatively impacts the other party’s ability to present its case. Both “culpability” and “prejudice” are case-by-case determinations, in which notions of reasonableness and proportionality are paramount. *Id.* at *6. Thus, Judge Rosenthal’s opinion provides guidance to courts deciding a spoliation claim to consider the nature of the case, the amount in controversy, and the degree to which the conduct in question actually impairs the innocent party’s ability to present its case.

(2) Determining whether spoliation merits an adverse inference instruction

Judge Rosenthal’s decision identifies the elements of a request for an adverse inference instruction due to spoliation as similar, but not identical, to those of spoliation itself. The requesting party must establish that: (a) the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (b) the evidence was destroyed with a culpable state of mind; and (3) the destroyed evidence was “relevant” to the party’s claim or defense such that a reasonable trier of fact could find that it would support that claim or defense. *Id.* at *7. Judge Rosenthal notes that courts further divide the “relevance” factor of this analysis into three subparts: (i) whether the evidence is relevant to the lawsuit, (ii) whether the evidence would have supported the inference sought, and (iii) whether the non-destroying party has suffered prejudice from the destruction of the evidence. *Id.*

(a) Demonstrating the relevance of lost information

The burden on the innocent party to demonstrate the “relevance” of lost information begs the question: How is this possible, if the information is lost? Often, as in *Rimkus*, the party seeking discovery can replace some deleted information, or obtain extrinsic evidence of its content. *Id.* at *8. For example, a forensic analysis of Rimkus’ computer system revealed that, three days before his departure from the company, the executive sent a flurry of work documents to his personal e-mail account. *Id.* at *15. Rimkus was able to mine its own server for these e-mails, which contained income statements for several company offices. Yet, even if Rimkus had been unable to recover the e-mails, the circumstances under which they were sent would probably have satisfied the relevance criterion.

Requiring parties to show that lost information is relevant and prejudicial is an important check on spoliation allegations and sanctions motions. *Id.* at *8. Still, courts realize the difficulty inherent in demonstrating the nature of something that is missing. Speculative or generalized assertions that the missing evidence would have been favorable to the party seeking sanctions are insufficient. However, sometimes the evidence in the case as a whole sufficiently indicates that the lost information would have helped the requesting party support its claims or defenses. In *Pension Committee*, the court found that, even for severe sanctions, relevance and prejudice may be presumed when the spoliating party acts

in a grossly negligent manner.³ Here, because much lost information was recovered or its relevance shown by circumstantial evidence, Judge Rosenthal determined that there was “neither a factual or legal basis, nor need, to rely on a presumption of relevance or prejudice.” *Id.* at *36.

(b) The role of prejudice in *Rimkus*

Despite—or because of—the *Rimkus* defendants’ best efforts, the case generated voluminous discovery. *See id.* at *32. Defendants produced some records, Rimkus was able to retrieve many of the deleted records from other sources (such as internet service providers), and deposition testimony was plentiful. Judge Rosenthal concludes that, taken together, these sources of evidence provide sufficient material for Rimkus to present its case, thus mitigating the prejudicial effect of the defendants’ conduct. *Id.* The court also emphasizes the fact that some of the lost information appears to favor the defendants, further reducing the prejudice to Rimkus. *Id.* at *33.

(c) The adverse instruction in *Rimkus*⁴

Ultimately, Judge Rosenthal crafts the following adverse inference instruction:

[The jury will] hear evidence about the deletion of emails and attachments and about discovery responses that concealed and delayed revealing the deletions. . . . [The jury will learn that, after a certain date] the defendants had a duty to preserve emails and other information they knew to be relevant to anticipated and pending litigation. If the jury finds that the defendants deleted emails to prevent their use in litigation with Rimkus, the jury will be instructed that it may, but is not required to, infer that the content of the deleted lost emails would have been unfavorable to the defendant. In making this determination, the jury is to consider the evidence about the conduct of the defendants in deleting emails after the duty to preserve had arisen and the evidence about the content of the deleted emails that cannot be recovered.

Id. at *34. The nature of this inference—permissive rather than mandatory—is consistent with the inferences used in other spoliation cases cited by Judge Rosenthal. *See id.*, n.34. Notably, however, the instruction is significantly shorter than the instruction in *Pension Committee*, in part because the instruction in *Rimkus* concerns only the favorability of the evidence, whereas the instruction in *Pension Committee* deals with both relevance and favorability.⁵ The instructions also differ in terms of the defendants’ ability to overcome the negative inference. In *Pension Committee*, the jury instruction permitted jurors to presume that the lost evidence was both relevant and favorable to the defendants, but then asked jurors to assess whether the individual defendants had successfully rebutted this presumption. If jurors found that a defendant had done so, then they were to discard the negative inference. In contrast, the jury instruction in *Rimkus* was silent as to the defendants’ ability to rebut the presumption, thereby increasing the likelihood that jurors would apply the negative inference. Neither

³ *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am., LLC*, No. 05 Civ. 9016, 2010 WL 184312 at *5 (S.D.N.Y. Jan. 15, 2010).

⁴ On top of the adverse inference instruction, Judge Rosenthal also required the defendants to pay Rimkus the reasonable costs and attorneys’ fees required to identify and respond to the spoliation. *Id.* at *126-27. The defendants agreed that this sanction was appropriate. The court noted that attorneys’ fees serve as additional deterrence for spoliation and compensation for the innocent party.

⁵ *Pension Comm.*, 2010 WL 184312 at *23-24.

instruction places the jury in the role of assessing when the duty to preserve arose or the scope of the duty.

Conclusion

The *Rimkus* decision, like the *Pension Committee* decision, provides valuable guidance to parties, counsel, and courts regarding the nature of preservation duties and the consequences when relevant evidence is lost—whether intentionally or inadvertently. Together, the two decisions provide an important backdrop to the growing dialogue surrounding the question of whether further civil justice reform efforts are needed to provide additional guidance in the area of preservation duties and sanctions or whether the existing body of rules and case law are sufficient to deal with these issues.

As a practical matter, the decision underscores the importance of a defensible and workable preservation plan to every client—large and small. The best way to avoid the difficult, expensive, and potentially risky thicket of differing authority in the area of sanctions is to steer clear of such problems in the first place.

Contact us

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