

## Judge Rosenthal Analyzes Standards for Sanctions in Cases of Spoliation

April 5, 2010

In her recent opinion in *Rimkus v. Cammarata*,<sup>1</sup> Judge Lee Rosenthal of the U.S. District Court for the Southern District of Texas, widely regarded as a leading authority on electronic discovery issues, takes an in-depth look at the standards for sanctions in cases of spoliation. The opinion (1) outlines the distinct standards for negligent spoliation and intentional spoliation, (2) discusses the sliding scale of culpability and prejudice, and (3) explains the circumstances under which an adverse inference jury instruction is an appropriate sanction.

The opinion also contains an analysis of the recent *Pension Committee*<sup>2</sup> decision from Judge Shira Scheindlin, another recognized expert on the subject, and identifies important differences between the two circuits.

### ***Rimkus* Facts**

*Rimkus* concerns a group of forensic engineers that left Rimkus to set up their own business, U.S. Forensics. Those former employees then filed suit in Louisiana state court seeking to nullify their noncompete agreements with their former employer. Rimkus countered with the abovementioned action in Texas, alleging breach of the noncompetition and nonsolicitation covenants in the former employees' employment agreements and alleging that the employees had used Rimkus's trade secrets and proprietary information in setting up and operating a competing business.

Rimkus alleged that the former employees intentionally deleted some emails and attachments that they were obligated to preserve for the litigation. The court agreed that there was a duty to preserve the materials but found conflicting evidence on the issue of intent. Rimkus requested several sanctions, including the issuance of an adverse inference instruction to the jury.

### **Analytical Framework for Imposition of Sanctions in Intentional Misconduct Cases**

Judge Rosenthal begins her order with a discussion of the framework for the imposition of sanctions set forth by Judge Scheindlin in *Pension Committee*. Judge Rosenthal notes that this case, unlike

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<sup>1</sup> *Rimkus v. Cammarata*, 07-cv-00405 (S.D. Tex. Feb. 19, 2010).

<sup>2</sup> *The Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities*, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010).

*Pension Committee*, involves allegations of spoliation that was intentional rather than merely negligent. Judge Rosenthal also identifies some key differences between the Fifth Circuit and Judge Scheindlin’s circuit, the Second Circuit.

First, Judge Rosenthal notes that in the Fifth Circuit, unlike in the Second Circuit, negligence alone does not warrant the sanction of an adverse inference instruction. In the Fifth Circuit, evidence of bad faith by the spoliating party must be found for the court to grant that sanction. Second, Judge Rosenthal points out that the Fifth Circuit has not addressed “whether even bad-faith destruction of evidence allows a court to presume that the destroyed evidence was relevant or its loss prejudicial.” Instead, she notes case law that shows that the instruction is not warranted unless there is a showing that the spoliated evidence would have been relevant. Rosenthal also notes her view that the U.S. Supreme Court’s decision in *Chambers v. NASCO, Inc.*,<sup>3</sup> may “require a degree of culpability greater than negligence” for a court to grant an adverse inference instruction based upon a court’s inherent power.

Judge Rosenthal then provides that determining whether and what sanctions to impose “requires a court to consider both the spoliating party’s culpability and the level of prejudice to the party seeking discovery.” She goes on to explain that there is a continuum of culpability—from intentional conduct intended to make evidence unavailable in litigation to the negligent loss of information—as well as a continuum of prejudice—from the loss of a claim or a defense due to lost evidence to little or no impact when other evidence is available.

Judge Rosenthal states that the two sliding scales should be measured in tandem:

A court’s response to the loss of evidence depends on both the degree of culpability and the extent of prejudice. Even if there is intentional destruction of potentially relevant evidence, if there is no prejudice to the opposing party, that influences the sanctions consequence. And even if there is an inadvertent loss of evidence but severe prejudice to the opposing party, that too will influence the appropriate response, recognizing that sanctions (as opposed to other remedial steps) require some degree of culpability.

So, a high level of culpability with a low level of prejudice may not warrant a severe sanction, while a high degree of prejudice with a low level culpability may. This analysis would depend entirely on the facts of each case.

### **Adverse Inference Instruction—Burden of Proof**

Citing to *Zubulake v. UBS Warburg LLC*,<sup>4</sup> Judge Rosenthal enumerates the elements of proof that a party seeking an adverse inference instruction must demonstrate:

(1) [T]he party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) 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.

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<sup>3</sup> *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43–46 (1991).

<sup>4</sup> *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 220 (S.D.N.Y. 2003).

Judge Rosenthal also notes that the “relevance” factor of the adverse inference analysis is often broken down into three subparts: “(1) whether the evidence is relevant to the lawsuit; (2) whether the evidence would have supported the inference sought; and (3) whether the nondestroying party has suffered prejudice from the destruction of the evidence.” (*Citing Consol. Aluminum Corp. v. Alcoa, Inc.*, 244 F.R.D. 335, 346 (M.D. La. 2006)).

### **Analysis Applied in *Rimkus***

In *Rimkus*, Judge Rosenthal finds that the evidence included some recovered emails that were shown to be relevant, as well as evidence from which one could reasonably find different levels of culpability. Consequently, she concluded that presumptions of relevance or prejudice or culpability were not warranted in this case as they had been in *Pension Committee*.

Judge Rosenthal determined that it was within the jury’s purview to determine (1) what level of culpability should be inferred about the employees’ deletion of the emails and attachments; and, if found to be misconduct, (2) whether or not to infer that the lost information would have been unfavorable to the defendants.

### **Conclusion**

Going forward, the availability and severity of sanctions for spoliation of evidence is likely to turn on a case-specific balancing of the level of culpability and the degree of prejudice, and those elements may be balanced differently depending on the circuit in which the case is in litigation.

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