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CLIENT ALERT

Spoliation Sanctions: A Tale of Two Courts

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Two recent opinions by federal district court judges who are well respected experts in the field of e-discovery have launched a firestorm of commentary on the subject of appropriate sanctions for spoliation of evidence.

In January, U.S. District Court Judge Shira Scheindlin, author of the landmark opinions on e-discovery in the Zubulake case, issued an opinion Pension Committee of the Univ. of Montreal Pension Plan, et al. v. Banc of America Securities LLC, et al., 2010 U.S. Dist. LEXIS 4546 (S.D.N.Y. Jan. 15, 2010), which has received a great deal of attention from commentators speculating that the bar has been raised with respect to parties' obligations to preserve, collect and produce electronically stored information ("ESI"). In Pension Committee, Judge Scheindlin held that the following conduct supported a finding of gross negligence:

- failure to issue a written litigation hold order;
- failure to identify all of the key players and ensure that their electronic and paper records are preserved;
- failure to cease the deletion of email or preserve the records of former employees; and/or
- failure to preserve backup tapes when they are the sole source of relevant information.

Further, Judge Scheindlin held that such conduct could be subject to the severe sanction of an adverse inference instruction to the jury – even though such conduct was not done willfully or in bad faith.

Approximately one month later, Judge Lee Rosenthal, who served as Chair of the Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure during the drafting and adoption of the 2006 amendments to the Rules relating to ESI, issued a lengthy opinion regarding the imposition of adverse inference instruction sanctions in a case involving the "intentional destruction" of ESI after the parties had a duty to preserve relevant evidence. Rimkus Consulting Group, Inc. v. Cammarata, et al. 2010 U.S. Dist. LEXIS 14573 (S.D.Tex. Feb. 19, 2010). Although she distinguishes Pension Committee on its facts, Judge Rosenthal describes in detail the importance of culpability to the imposition of severe discovery sanctions, noting that the Second Circuit may be alone in permitting an adverse inference instruction based on a finding of gross negligence.

So has the e-discovery bar been raised? And if so, has it been raised only in the Second Circuit? What can and should parties do to deal with these seemingly inconsistent standards for addressing e-discovery obligations?

A recently published article by David Cross and Jared Hosid provides further analysis of the significance and consequences of the Pension Committee and Cammarata decisions. http://www.crowell.com/documents/Rimkus-v-Cammarata-Zublake-Revisited-Again.pdf

In addition, on March 23, Jeane Thomas will participate in a BNA-sponsored webinar with U.S. Magistrate Judge John M. Facciola (D.D.C.) and former U.S. Magistrate Judge Ronald J. Hedges to discuss these important developments. Click here for further details: http://www.legaledge.bna.com/Pagemanager.aspx?pageId=9518.

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