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Litigation Alert

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Electronic Discovery Update - January 2011

In February, 2010, we reported on a case, *Pension Committee of the Univ. of Montreal Pension Plan v. Banc of America Securities LLC,* 2010 U.S. Dist. LEXIS 1839 (January 15, 2010), that provides important guidance about when a company's obligation to preserve electronically stored information (ESI) commences and what is required of lawyers and clients in connection with a "Litigation Hold." It also specified when the failure to take appropriate action constitutes **negligence** and **gross negligence**.

Since the *Pension Committee* decision came out, courts and commentators have continued to grapple with the issues of how to preserve and produce ESI and what the penalties should be for failure to do so. E-Discovery highlights of 2010 include two other long federal district court opinions that, like *Pension Committee,* have received significant national attention:

Rimkus Consulting Group, Inc. v. Cammarata

In *Rimkus*, 2010 U.S. Dist. LEXIS 14573 (February 19, 2010), Judge Rosenthal of the Southern District of Texas, chair of the Judicial Conference Committee on Rules of Practice and Procedure, reviewed the different ways that the various federal circuits have addressed E-Discovery issues. Instead of using the categorical approach taken in the *Pension Committee* case, Judge Rosenthal emphasized the need to consider reasonableness and proportionality in assessing the scope of the duty to preserve.

Judge Rosenthal found that the defendants in *Rimkus* failed to satisfy their preservation obligations and had intentionally destroyed documents. In determining the proper sanctions for the defendants' misconduct, she also reviewed the different standards among the federal circuits for imposing an adverse inference jury instruction for spoliation of evidence. Here also, the judge determined that the remedy should be proportional to the harm done. Although Judge Rosenthal awarded the plaintiff attorneys fees and costs incurred in discovering and addressing the defendants' spoliation, she declined to instruct the jury that defendants had engaged in intentional misconduct. Rather, she ruled that the jury should be instructed to determine for themselves whether the misconduct was intentional, and if so, whether the information destroyed would have been unfavorable to the defendants.

Victor Stanley, Inc. v. Creative Pipe, Inc.

Completing the trilogy of long opinions from 2010 reviewing differences among the circuits on E-Discovery issues, Magistrate Judge Grimm of the District of Maryland issued a Memorandum, Order and Recommended decision in *Victor*

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Stanley, 2010 U.S. Dist. LEXIS 93644 (September 9, 2010), which focused on remedies for spoliation. After reviewing the facts in one of the most egregious cases yet reported on discovery abuse and spoliation, as well as the law of the various circuits on standards and remedies (and the opinion is replete with an annotated chart), Judge Grimm found the defendant in civil contempt and ordered the defendant's principal to serve a two-year prison sentence if he did not pay the monetary sanctions imposed by the court (the plaintiff's attorneys fees and costs) by the date ordered. Judge Grimm also recommended that the district court enter a default judgment and grant the motion for injunctive relief on one count of the complaint. *Victor Stanley* is a wake up call for litigants who may have doubted whether courts are serious about discovery obligations.

Stay tuned for further developments in the Federal Rules

Because of continuing concerns over the cost, disruption, and need for clearer guidance on E-Discovery issues, the federal Advisory Committee on Civil Rules sponsored a two-day conference at Duke University in May, 2010. Legal organizations, professors, lawyers and judges made presentations on the efficacy of the federal rules for discovery, and in particular, the rules as applied to E-Discovery. As a result of the conference, the Advisory Committee recommended that a new federal rule of civil procedure be written to address preservation and spoliation of ESI. There was a consensus that the current system is too expensive but that cooperation and "active judicial management" are essential to making the system work. Conference participants, however, continued to struggle with how to make the cost of discovery proportional to the needs and size of a case.

The Sedona Conference® added to the discussion on how to solve these problems by issuing commentary in 2010 on the guidelines it previously developed on "Proportionality in Electronic Discovery" and on "Legal Holds: The Trigger & The Process" (both are available for download at http://www.thesedonaconference.org).

While none of these issues will be solved easily or quickly, we expect 2011 to be a year in which greater consensus develops on how the burdens of E-Discovery should be managed.

Closer to Home

Meanwhile, federal judges in Connecticut rendered decisions on E-Discovery issues in 2010 that deserve mention:

- In *Genworth Financial Wealth Management, Inc. v. McMullan,* 2010 U.S. Dist. LEXIS 53145 (June 1, 2010), Judge Bryant found that a defendant had discarded a personal computer after receiving a notice to preserve ESI and other information and that sanctions were warranted. She granted a motion to compel forensic imaging by a neutral, court-appointed expert to recover data from defendants' files and forward it to the plaintiff, and she allocated the costs for the expert to be borne 80% by the defendants. She also awarded attorneys fees and costs to the plaintiff.
- In *Trusz v. UBS Realty Investors, LLC,* 2010 U.S. Dist. LEXIS 92603 (September 7, 2010), Magistrate Judge Margolis expressed

exasperation with the inability of the parties and their counsel to resolve discovery disputes themselves amid charges and counter-charges of massive document dumping and overbroad discovery requests. Citing an article from The Sedona Conference® on cooperation between counsel, she ordered counsel to meet in person to attempt to resolve their discovery disputes and signaled that a Special Master would be appointed to solve the dispute (and recommend allocation of cost) if they could not do so.

- And finally, in *Barrera v. Boughton,* 2010 U.S. Dist. LEXIS 103491 (September 30, 2010, Magistrate Judge Martinez was called upon to resolve a discovery dispute in which plaintiff proposed search parameters for the ESI of forty individuals, and defendants claimed that the information sought was both irrelevant and not reasonably accessible. The court found that the defendants had met their burden of demonstrating that the information was not reasonably accessible and ordered discovery to proceed in a phased approach, beginning with only three people. The court also denied both sides' requests for attorneys fees and costs.

We anticipate that in 2011 the Rules Committee for Connecticut courts will begin to address whether Connecticut should join the 37 other states that have changed their state court practice rules specifically to address E-Discovery. Most states that have made such changes have adopted rules identical or similar to the Federal Rules. Given the pervasive impact of the federal E-Discovery changes, it is only a matter of time before the Rules Committee will decide whether and how to address similar issues in Connecticut state practice.

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