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SCHEINDLIN'S 'DAY LABORER' DECISION: MUCH ADO ABOUT METADATA

A year after her opinion in *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC.* fueled debate over document preservation and discovery sanctions, Southern District of New York Judge Shira Scheindlin has issued a "must read" decision on the production of electronically stored information.

While shorter and less sweeping than Scheindlin's opinions in the landmark *Zubulake v. UBS Warburg*, and in *Pension Committee*,[FOOTNOTE 1] the Feb. 7, 2010 decision, *National Day Laborer Organizing Network v. U.S. Immigration and Customs Enforcement Agency*, 2 011 WL 381625 (S.D.N.Y. Feb. 07, 2011) provides concrete guidance on important subjects, including (1) the format of production of ESI, including the extent to which parties must produce metadata; (2) e-discovery standards applicable to the government, particularly in response to Freedom of Information Act requests; and (3) the need for cooperation among litigants engaged in electronic data discovery.

In *Nat'l Day Laborer*, plaintiffs sought to compel four federal agencies to comply with their FOIA requests, and a dispute arose regarding the format of defendants' production.[FOOTNOTE 2] Defendants had failed to agree or otherwise respond to a protocol suggested by plaintiffs, which, among other things, called for the production of responsive documents in individual files, the production of Microsoft Excel documents in native format, and consecutive Bates numbering. Instead, defendants produced materials in five unsearchable PDF files consisting of "indiscriminately merged" documents that had been stripped of all metadata and lacked load files.[FOOTNOTE 3] Plaintiffs argued that the production was unusable in this form and moved to compel production consistent with their proposed protocol.

In adjudicating plaintiffs' motion, Scheindlin held, as a preliminary matter, that FOIA requests are subject to the production requirements of the Federal Rules of Civil Procedure.[FOOTNOTE 4] In her view, Rule 34 of the FRCP, which establishes procedures for determining the form in which documents must be produced,[FOOTNOTE 5] "surely should inform highly experienced litigators" -- at least as a matter of common sense -- "as to what is expected of them when making a document production in the twenty-first century."[FOOTNOTE 6]

Scheindlin also offered a message to the government, which found itself responding to discovery in this case rather than demanding it. Citing to her own previous opinion in *SEC v. Collins & Aikman Corp.*, 256 F.R.D. 403 (S.D.N.Y. 2009), Scheindlin reminded the government that it must adhere to the same discovery standards as civil litigants, and stated, in sum, that "[t]he Government would not tolerate such a production [stripped of metadata and load files] when it is a receiving party, and it should not be permitted to make such a production when it is a producing party."[FOOTNOTE 7]

Nat'l Day Laborer places particular emphasis on metadata. Although a number of state courts have ruled that metadata is a part of public records and must be disclosed pursuant to state freedom of information laws, no federal court previously had reached those issues in the FOIA context. In the absence of federal precedent, defendants argued that plaintiffs' failure to request metadata up front justified the agencies' decision to strip the metadata and exclude load files from the documents before producing them. Scheindlin disagreed, stating that, "[b]y now, it is well accepted, if not indisputable, that metadata is generally considered to be an integral part of an electronic record."[FOOTNOTE 8] As a matter of first impression in the FOIA context, Scheindlin held that "metadata maintained by the agency as part of an electronic record is presumptively producible under FOIA, unless the agency demonstrates that such metadata is not 'readily reproducible.'"[FOOTNOTE 9]

Even if metadata were not an integral part of a file, Scheindlin concluded that defendants acted improperly in stripping the metadata from their production, because where "ESI is kept in an electronically-searchable form, it should not be produced in a form that removes or significantly degrades this feature."[FOOTNOTE 10]

Because plaintiffs had not requested metadata at the outset, and because defendants were concerned that producing metadata would enable plaintiffs to reverse-engineer redacted portions of the files, Scheindlin did not order defendants to re-produce all text records in native format. Instead, she required them simply to reproduce the documents in a more usable "static image single file format together with their attachments."[FOOTNOTE 11]

Similarly, Scheindlin required that all spreadsheets presumptively be reproduced in native format, but allowed that the government could produce the spreadsheets as TIFF images with load files if a native production would reveal protected information (that is, information subject to FOIA exemptions).

With respect to metadata, Scheindlin identified specific categories that were "likely to be necessary in any production of ESI produced in a digital image format":

1) identifier (i.e., a unique production identifier of the item), 2)

file name, 3) custodian, 4) source device, 5) source path, 6) production path, 7) modified date, 8) modified time, 9) time offset value.

In addition, according to Scheindlin, the following metadata fields should accompany any production of e-mails: 1) to, 2) from, 3) cc, 4) bcc, 5) date sent, 6) time sent, 7) subject, 8) date received, 9) time received, 10) attachments (i.e., the Bates ranges of e-mail attachments).

Finally, productions of paper records also should include 1) Bates_begin. 2) Bates_end, 3) attach_begin; 4) attach_end.[FOOTNOTE 12]

Scheindlin declined to require the production of certain additional fields that plaintiffs had requested -- 1) parent folder, 2) file size, 3) file extension, 4) record type, 5) master_date and 6) author[FOOTNOTE 13] -- but noted that "[r]equests for additional fields should be considered by courts on a case-by-case basis."[FOOTNOTE 14]

Given Scheindlin's prominence in the e-discovery area and the paucity of opinions regarding metadata, this list likely will serve as a starting point for conversations about the fields that must be included in productions.[FOOTNOTE 15]

In the end, Scheindlin expressed exasperation at having to "rule on an e-discovery issue that could have been avoided had the parties had the good sense to 'meet and confer,' 'cooperate' and generally make every effort to 'communicate' as to the form in which ESI would be produced."[FOOTNOTE 16]

This is not the first time that Scheindlin has conveyed this sentiment, and counsel would be well advised to heed her warning that "lawyers -- even highly respected private lawyers, Government lawyers, and professors of law -- need to make greater efforts to comply with the expectations that courts now demand of counsel with respect to expensive and time-consuming document production."[FOOTNOTE 17]

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::::FOOTNOTES::::

FN1 See, e.g., *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003) and progeny; *Pension Comm. v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010).

FN2 The four federal agencies were the Immigration and Customs Enforcement Agency, the Department of Homeland Security, the Federal Bureau of Investigation, and the Office of Legal Counsel.

FN3 Metadata is "[d]ata typically stored electronically that describes characteristics of ESI ... Metadata can describe how, when, and by whom ESI was collected, created, accessed, modified, and how it is formatted." The Sedona Conference Glossary: E-Discovery & Digital Information Management (Third edition, Sept. 2010). A load file is a "file that relates to a set of scanned images or electronically processed files, and indicates where individual pages or files belong together as documents, to include attachments, and where each document begins and ends. A load file may also contain data relevant to the individual documents, such as selected metadata, coded data, and extracted text." Id.

FN4 The goal of the statutory provision and the FRCP "is the same" -- "to facilitate the exchange of information in an expeditious and just manner," and, therefore, "common sense dictates that parties incorporate the spirit, if not the letter, of the discovery rules in the course of FOIA litigation." Slip op. at 16 n.33.

FN5 More specifically, FRCP 34 allows the responding party to produce ESI in the form in which it "is ordinarily maintained," or in a "reasonably usable form."

FN6 Slip op. at 16.

FN7 Id. at 24.

FN8 Id. at 10.

FN9 Id. at 18 (emphasis in original). *Nat'l Day Laborer* provides guidance regarding the production of load files as well. Judge Scheindlin explained: "A party often has the option to produce ESI in native format, which will reduce costs. But if a party chooses to produce a significant collection of TIFF [or PDF] images, it must assume that the receiving party will review those images on some sort of review platform--such as a Concordance database--which requires load files in order to be reasonably usable." Id. at 24 n.45. Because of that common practice, "it is by now well accepted that when a collection of static images are produced, load files must also be produced in order to make the production searchable and therefore reasonably usable." Id. at 11.

FN10 Slip op. at 9 (quoting FED R. CIV. P. 34(b), 2006 Advisory Committee Note) (internal quotation marks omitted).

FN11 Id. at 17.

FN12 See id. at 20-23 for further explanation of these fields.

FN13 Slip op. at 23.

FN14 Slip op. at 20 n.41.

FN15 In arriving at her conclusions regarding metadata, Judge Scheindlin cited Judge Frank Maas's "guidebook" on metadata in *Aguilar v. Immigration and Customs Enforcement Division of the United States Department of Homeland Security*, 255 F.R.D. 350 (S.D.N.Y. 2008) (Maas, Mag. J.).

FN16 Slip op. at 25. Here, the failure to cooperate led to a blow to the defendants' pocketbooks. Citing to *Covad Communications Co. v. Revonet, Inc.,* 254 F.R.D. 147 (D.D.C. 2008) (Facciola, Mag. J.), Judge Scheindlin noted that courts generally will consider cost-shifting or cost-sharing where, as here, a re-production of data is ordered. See id. at 17 n.36. In this case, however, Judge Scheindlin declined to shift any costs to plaintiffs because defendants had not been sufficiently cooperative: they failed to comply with or even respond to plaintiffs' protocol request, and they refused plaintiffs' offer to meet and confer.

FN17 Slip op. at 25.