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Recent Judge Scheindlin Opinion Again Charts New eDiscovery Ground

***Nat. Day Laborer Org. Network v. United States Immigration and Customs Enforcement Agency*, 2011 WL 381625 (S.D.N.Y. Feb. 7, 2011)**

Continuing her role as a judicial pioneer in the area of electronic discovery, Southern District of New York Judge Shira A. Scheindlin last week penned an opinion that used the unusual context of electronic document production in a FOIA proceeding to address the obligations of parties in the controversial but relatively uncharted waters of metadata production.[1]

The plaintiffs in *National Day Laborer* brought an action pursuant to the Freedom of Information Act ("FOIA") against four federal agencies seeking records relating to a collaborative immigration program involving federal, state, and local governments. After originally requesting the documents in February 2010 and having received no substantive response from the government agencies, plaintiffs brought suit on April 27, 2010. After some negotiation with the agency defendants, on December 22, 2010 plaintiffs sent the agencies' counsel a "Proposed Protocol" that set forth, *inter alia*, a requested format for the production of electronic records. On January 12, 2011, defendants produced five PDF files totaling fewer than 3,000 pages. Plaintiffs petitioned the court for assistance regarding the format of defendants' document production. Specifically, plaintiffs complained: (1) the data was produced in an unsearchable PDF format; (2) electronic records were stripped of all metadata; and (3) paper and electronic records were indiscriminately merged together in one PDF file.

FOIA provides that "[i]n making any record available to a person . . . an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format." 5 U.S.C. § 552(a)(3)(B). Noting the paucity of federal decisions interpreting this requirement, Judge Scheindlin looked to other authority and noted that the form of record production is also addressed by Rule 34 of the Federal Rules of Civil Procedure, albeit in the context of civil discovery. She stated that "[r]egardless of whether FOIA requests are subject to the same rules governing discovery requests, Rule 34 surely should inform highly experienced litigators as to what is expected of them when making a document production in the twenty-first century." Furthermore, "because the fundamental goal underlying both the statutory provisions and the Federal Rules is the same—i.e., to facilitate the exchange of information in an expeditious and just manner—common sense dictates that parties incorporate the spirit, if not the letter, of the discovery rules in the course of FOIA litigation." Therefore, Judge Scheindlin held, in an

[1] Judge Scheindlin authored the *Zubulake* line of opinions and the recent decision in *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Secs., LLC*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010). These cases have been much discussed by commentators and cited by federal and state courts. In fact, *Zubulake vs. Warburg*, 220 F.R.D. 212 (S.D.N.Y. 2003) ("*Zubulake III*") has been cited in 190 judicial opinions and in a little over a year *Pension Committee* has been cited 19 times.

apparent case of first impression, that "metadata maintained by the agency as a part of an electronic record is *presumptively producible* under FOIA, unless the agency demonstrates that such metadata is not 'readily reproducible.'" (emphasis added).

This decision may have a significant impact in two areas. First, federal agencies arguably will have to consider this decision in responding to or litigating FOIA requests. According to the U.S. Department of Justice, in 2009, the total cost of all FOIA-related activities was over $382M.[2] Imposing an obligation to produce metadata in these actions will undoubtedly add to the federal government's FOIA-related costs and could lead to delays in FOIA responses.

Second, despite some limiting language in the opinion (addressed below), Judge Scheindlin's views may significantly alter the negotiation and litigation landscape with respect to metadata in civil matters by requiring that productions of ESI by a party include load files that contain certain listed fields applicable to all forms of ESI. These fields included:

- Identifier: A unique production identifier ("UPI") of the item.
- File Name: The original name of the item or file when collected from the source custodian or system.
- Custodian: The name of the custodian or source system from which the item was collected.
- Source Device: The device from which the item was collected.
- Source Path: The file path from the location from which the item was collected.
- Production Path: The file path to the item produced from the production media.
- Modified Date: The last modified date of the item when collected from the source custodian or system.
- Modified Time: The last modified time of the item when collected from the source custodian or system.
- Time Offset Value: The universal time off-set of the item's modified date and time based on the source system's time zone and daylight savings time settings.

This list is followed by a significant footnote in which Judge Scheindlin sets forth her broad view that "[w]hile not necessary to the holding in this case, I believe that these are *the minimum* fields of metadata that should accompany *any production* of a significant collection of ESI. Requests for additional fields should be considered by courts on a case-by-case basis." (both emphases added). She concluded that, "[w]hether or not metadata has been specifically requested—which it should be—production of a collection of static images without any means of permitting the use of electronic search tools is an inappropriate downgrading of the ESI . . . Thus, it is no longer acceptable for any party . . . to produce a significant collection of static images of ESI without accompanying load files."

To the extent that *National Day Laborer* is interpreted as setting forth a presumptive requirement that parties must produce these fields of information at the minimum, litigants will need to determine whether, from a technical standpoint, their electronic records even have these fields to produce. While up to now production of such metadata generally required a specific request, requesting parties and court now may begin to expect production of such metadata as a matter of course. This may not be welcome news, especially for smaller, cost-constrained companies, and it underscores the need for parties to meet and confer about metadata.

To be sure, Judge Scheindlin's statement that certain "minimum fields of metadata" must be included in "any production" is dicta. Indeed, in another footnote she stated that the list of required metadata is limited to the parties in the *National Day Laborer* matter. In that regard, however, *National Day Laborer* perpetuates a pattern in Judge Scheindlin's eDiscovery jurisprudence – establish a broad universal, minimum standard with respect to eDiscovery and then putatively limit it (normally in a footnote) to the parties in the specific matter before the Court. Given Judge Scheindlin's national reputation with respect to eDiscovery, her opinion will likely have an impact well beyond the parties in the *National Day Laborer* matter or, for that matter, litigation in the Southern District of New York or FOIA proceedings more generally. If adopted, her metadata list could have a profound effect on *all* parties faced with a document request; when discussing with an opponent the terms of a document production, Judge Scheindlin's list may serve as a *de facto* floor from which negotiations will begin.

[2] http://www.justice.gov/oip/foiapost/2010foiapost18.htm.

This ruling will spur debate among both scholars and litigants, and, in the short run, may raise more questions than answers. That said, one clear and immediate conclusion is that imposition of a list of required metadata—such as the one set forth in *National Day Laborer*—will increase the cost, and therefore, the burden of document productions.

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