

ELECTRONIC Discovery

A SPECIAL REPORT

Scheidlin to the bar: Cooperation is not optional

In assessing sanctions, the judge made clear that the courts' patience is wearing thin.

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Metadata, an electronic document's underlying historic footprint, has long been a source for conflict among litigants. Historically, many litigants sought to minimize the metadata they provided their adversaries in a strategic effort to limit conclusions that could be drawn regarding an electronic file. Whether out of strategic imperative or otherwise, such attempts to degrade electronically stored information (ESI) by stripping its metadata are viewed with increasing skepticism by the courts.

Although U.S. District Judge Shira Scheindlin's opinion in *National Day Laborer Organizing Network v. U.S. Immigration and Customs Enforcement Agency*, 2011 WL 381625 (S.D.N.Y. Feb. 07, 2011), dealt primarily with applying the Federal Rules of Civil Procedure to Freedom of Information Act requests, it put the legal community on notice that metadata may no longer be used as a tool for disguising information. The opinion reaffirmed that such information is "an integral or intrinsic part of an electronic record." It is clear that the courts' patience regarding metadata disputes is coming to an end. *National Day Laborer* made it clear that if certain, specified metadata fields are requested by a litigant, and there is

no objection, the responding party should comply with the request. Data must be collected and processed in a way that allows parties to capture the requested metadata. Ultimately, this means that the form of production needs to be agreed upon early, to ensure that required metadata are not lost.

Scheidlin reiterated the importance of Fed. R. Civ. P. 26, writing that the Rule 26(f) "meet and confer" conference is the proper forum for parties to discuss form-of-production issues. However, under Rule 34, if a request does not specify a form of production, "a party must produce it in a form...in which it is ordinarily maintained or in a reasonably usable form."

USABLE MEANS SEARCHABLE

The term "usable" has come to mean "searchable." Historically, absent an agreement between litigants, to meet the usability requirements of the rule only static image files (PDF or TIFF), text and appropriate load files used to import ESI and metadata into a review database were provided. Absent agreement between the litigants on metadata production, Scheindlin ruled, the defendant was obligated to provide 23 specific metadata fields at a minimum in future productions. She did mention that she was not suggesting that these fields must be used in all cases, and that reasonableness and searchability remain the standard. But Scheindlin took the

opportunity to define the minimum fields that should be presented with ESI in every case. As such, she took another step toward creating uniformity in ESI productions.

Although Scheindlin mentioned that "native format is often the best form of production," the risks, costs and practical constraints associated with native-file production drive most litigants to produce ESI in static-image format. "In an effort to replicate the usefulness of native files while retaining the advantage of static productions, image format productions are typically accompanied by 'load files,'" she wrote, citing Sedona Principles 2d Principle 12, cmt 12(b).

Because load files are highly variable among document-management systems, presenting them as the standard production format opens the door for major discovery disputes. For example, in an adversarial environment, it is common practice for litigants to eliminate electronic relationships between e-mails and their attachments; eliminate text from static images; and provide static images in a single electronic file without delineating where a document begins and ends. At a minimum, and even if metadata are not specifically requested by a litigant, it is impermissible to downgrade ESI or a load file by eliminating the "means for permitting the use of electronic search tools."

