



REDGRAVE RESOURCES CASE ALERT

JUNE 2011

Case Alert Addendum - Judge Scheindlin's NDOL Opinion & Order: Withdrawn but Not Forgotten

Earlier this year, Judge Shira A. Scheindlin entered an opinion and order in the case of *Nat'l Day Laborer Org. Network v. United States Immigration and Customs Enforcement Agency* ("the Order") to resolve a dispute regarding production format and required metadata fields. Although set in the context of a Freedom of Information Act ("FOIA") request, Judge Scheindlin discussed the requirements of Rule 34 and, in dicta, set forth "the minimum fields of metadata that should accompany any production of a collection of text-based ESI." (See the Redgrave Case Alert entitled *Judge Scheindlin's Latest eDiscovery Opinion & Order: Observations on Metadata and More Failures to Communicate* located at www.redgravellp.com/resources/case-alerts.)

On June 17th, citing a resolution by the parties of the dispute regarding the form and format of future productions, Judge Scheindlin withdrew the order. This short order stated:

This court has been informed that the parties have recently resolved their dispute regarding the form and format in which records will be produced by defendants in this Freedom of Information Act lawsuit. In the interests of justice, this Court now believes that it would be prudent to withdraw the opinion it issued on February 7, 2011 (Docket #41). I do so because, as subsequent submissions have shown, that decision was not based on a full and developed record. By withdrawing the decision, it is the intent of this Court that the decision shall have no precedential value in this lawsuit or in any other lawsuit. The Court also withdraws its Supplemental Order dated February 14, 2011 (Docket # 50).

It appears from the June 17, 2011 *Stipulation And Order Regarding Resolution Of Dispute For The Form And Format In Which Records Will Be Produced By Defendants* that the parties reached consensus on an alternate production standard.

Lessons for the Rest of Us

- Metadata and production format remain key issues that can arise in any case involving the production of ESI. Judge Scheindlin articulated several positions: noting a preference for native format, requiring that static images be accompanied by load files and identifying specific metadata fields required to accompany productions of all forms of ESI. While these positions are not precedential, parties should be on notice that courts can and will define default production standards absent party agreement. Thus, unless you have negotiated a



production standard with the opposing parties, be prepared for judicial scrutiny of your chosen production process and standard.

- Another lesson to take from this dispute is that solutions crafted through cooperation are likely to better serve both parties than a court-ordered solution. Judge Scheindlin's call that parties "fulfill their obligations" to communicate and cooperate regarding discovery issues rings true despite the withdrawal of the opinion & order. Early discussion of these issues allows parties to cooperate and to resolve disputes *prior* to production and would have saved the substantial cost of motions and appeals. Be prepared to meet and confer meaningfully on all discovery issues.
- Finally, if you find yourself in a situation where the issue of production format (or any discovery matter) will be briefed and argued before a court, ensure that you have a full and complete record that can stand behind your decisions and arguments. Arguing points without sufficient facts or an understanding of the salient technologies can lead to substantial confusion, which in turn can lead to erroneous decisions, extended costs and risks to the client. In addition, putting yourself in such a situation can damage your credibility before the court and such impairment is likely to linger long after the instant dispute has passed.

Contact Us

For further information or if you have any questions regarding this Alert, please contact your Redgrave LLP attorney or Managing Partner Victoria Redgrave at (202) 681-2599 or vredgrave@redgravellp.com.

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