Judge yanks earlier e-discovery decision

by David E. Frank

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A federal judge's decision to withdraw a decisive e-discovery ruling she issued earlier this year muddies the waters with regard to the production of metadata and other electronic evidence in complex civil litigation, according to several Massachusetts practitioners familiar with the case.

In her widely discussed *National Day Laborer Organizing Network v. U.S. Immigration and Customs Enforcement Agency* ruling in February, Judge Shira Scheindlin of the U.S. District Court for the Southern District of New York held that such evidence must be turned over regardless of whether opposing counsel expressly requests it.

Four months later, however, Scheindlin took many by surprise when she issued an order invalidating her earlier decision.

Noting that Scheindlin — author of the country's seminal e-discovery decisions in 2004 — has been vocal about electronic discovery issues, Boston lawyer Brian A. Davis said "there is no doubt that her [February] ruling attracted a lot of attention in the legal community. But the explanation offered in her [June] withdrawal is not particularly expansive, and it remains a little bit mysterious as to why she did what she did."

Although the e-discovery issues before Scheindlin arose in a Freedom of Information Act suit, the case was being cited and relied on by lawyers in the private commercial-litigation context, Davis said.

"Most folks thought the February decision was a clear indication of the fact that you had a presumptive obligation to produce metadata without even being asked, but that belief is cast into doubt again," he said. "The question very much back on the table is whether you have that obligation automatically, or whether you have to wait for it to be requested."

Wave 'still coming'

Davis, who co-chairs the litigation department at Choate, Hall & Stewart, said the judge's withdrawal of her ruling makes it difficult to determine whether or not the obligation is automatic.

However, he said, clients should still expect that they will be required to produce metatdata. The term generally refers to information hidden in an electronic document about its creation.

"The February order was perceived to be part of a natural progression in the field that parties must produce electronic documents in electronic native form," he said. "That is still very much the coming wave, and parties ought to be prepared to deal with it. What the June withdrawal does is cast a cloud of confusion at this point in time over whether a party is obligated in the first instance, without further prompting, to produce metadata."

Although Lawrence M. Kraus of Foley & Lardner in Boston agreed that the withdrawal complicates the analysis, he said the advice lawyers give clients about turning over metadata should stay the same.

"More than anything else, decisions like this reinforce the general rule that the best way to deal with e-discovery is to be in communication with opposing counsel early and often and to work out the protocols that you are going to operate under," he said.

Kraus added that the courts "have been pretty clear that there is always a risk that a judge will find that your preservation efforts have been inadequate, so if you can work it out on your own, you're going to be much better off."

Stephen D. Riden, a civil litigator at Boston's Beck, Reed, Riden, said Scheindlin's February ruling created a new understanding of what government parties had to produce in response to a FOIA request.

That understanding is now off the table, he observed.

"The guidance that the judge provided is simply no longer there," he said. "But a lot of what was written in her [February] decision is still relevant because it was a back-to-the-basics approach of encouraging attorneys to deal with each other in a way that is fair and open with one another."

On second thought

The National Day Laborer Organizing Network, which advocates on behalf of day laborers, had sued under FOIA when it became unhappy with the government's response to requests it had made concerning a U.S. Immigration and Customs Enforcement program.

When the government produced some electronically stored information, or ESI, the organization complained to the court that the electronic records were stripped of all metadata.

Scheindlin wrote in her February decision that metadata is an "integral part" of electronic records and that the government must supply "minimum fields of metadata" in response to a FOIA request.

The judge's 26-page opinion set the parameters for future compliance with electronic discovery, listing nine fields that apply to all forms of electronically stored information as "the minimum fields of metadata that should accompany any production of a significant collection of ESI."

She wrote that that the parties had resolved their disputes over the form and format of electronic records.

Subsequent submissions in the case, she wrote, showed that her original decision was not based on a full and developed record.

In response, the government appealed. Bur before the appeal was resolved, the judge retracted her earlier ruling.

"By withdrawing the [February] decision, it is the intent of this Court that the decision shall have no precedential value in this lawsuit or any other lawsuit," Scheindlin wrote.