

## Production of Metadata and the Importance of the Meet & Confer Process

This lawsuit demonstrates why it is so important that parties frilly discuss their ESI early in the evolution of a case. Had that been done, the Defendants might not have opposed the Plaintiffs' requests for certain metadata. Moreover, the parties might have been able to work out many, if not all, of their differences without court involvement or additional expense, thereby-furthering-the "just, speedy, and inexpensive determination" of this case. *See Fed. R. Civ. P. 1*. Instead, these proceedings have now been bogged down in expensive and time-consuming litigation of electronic discovery issues only tangentially related to the underlying merits of the Plaintiffs' *Bivens* claims. Hopefully, as counsel in future cases become more knowledgeable about ESI issues, the frequency of such skirmishes will diminish.

Magistrate Judge Frank Mass

The meet and confer process, effective communications between parties and specific discovery requests for metadata are imperative for effective litigation today. *Aguilar v. Immigration & Customs Enforcement Div.*, 2008 U.S. Dist. LEXIS 97018 ( Nov. 21, 2008 ) is an example of why early communications between parties is important for cost effective and efficient litigation.

*Aguilar v. Immigration & Customs Enforcement Div.*, is a civil rights case where the plaintiff claimed 4<sup>th</sup> Amendment violations for illegal searches. What followed was a case study of why discussing discovery requests, metadata, forms of production and collection are important.

Discovery in the case centered on emails from the Immigration & Customs Enforcement Division, several government databases, how that information was collected, and what was requested by the Plaintiffs. In an early Rule 26(f) conference the parties did not discuss metadata with their requests for production. The Plaintiffs first request for production was silent on the form of production and did not specifically request metadata. *Aguilar*, 7. Metadata was not discussed until a "passing" comment at a later meet and confer. *Aguilar*, 8.

The Plaintiffs discussed producing metadata on a separate conference call. The Plaintiffs requested the following:

(1) That emails and electronic documents be produced in Tagged Imaged File Format ("TIFF") with a corresponding load file containing metadata fields and extracted text and (2) that spreadsheets and databases be produced in native format. *Aguilar*, 8.

The Defendants opposed the Plaintiff's discovery requests and proposed production in text-searchable PDF format. Moreover, the Defendants would only produce metadata if the Plaintiffs could show it was relevant to their claims. *Aguilar*, 9-10.

After several conferences and hearings, the Court interpreted the Plaintiff's position as a motion to compel responsive emails and electronic documents (such as Word, PowerPoint, and Excel documents) in TIFF format with corresponding metadata. *Aguilar*, 10-11.

The Court engaged in a thorough discussion of the different types of metadata, including substantive metadata, system metadata and embedded metadata. Each is defined below:

Substantive metadata: Reflects changes made by the user, including prior edits or editorial comments. *Aguilar*, 13.

System metadata "reflects information created by the user or by the organization's information management system." *Aguilar*, 13, citing *The Sedona Principles, Second Edition: Best Practices*

*Recommendations and Principles for Addressing Electronic Document Production* Cmt. 12a (Sedona Conference Working Group Series 2007),  
[http://www.thesedonaconference.org/content/miscFiles/TSC\\_PRINCP\\_2nd\\_ed\\_607.pdf](http://www.thesedonaconference.org/content/miscFiles/TSC_PRINCP_2nd_ed_607.pdf)

Embedded metadata consists of “text, numbers, content, data, or other information” that appears in native files with spreadsheet formulas, hidden columns, hyperlinks, references and fields, and database information. *Aguilar*, 13, citing United States District Court for the District of Maryland; *Suggested Protocol for Discovery of Electronically Stored. Information* 27.

The Court reviewed the Sedona Principles, 2d regarding metadata production. Principle 12 to the Sedona Principles states:

Absent party agreement or court order specifying the form or forms of production, production should be made in the form or forms in which the information is ordinarily maintained or in a reasonably usable form, taking into account the need to produce reasonably accessible metadata that will enable the receiving party to have the same ability to access, search, and display the information as the producing party where appropriate or necessary in light of the nature of the information and the needs of the case. *Sedona Principles 2d* Principle 12.

In essence, *Sedona Principles 2d* Principle 12 focuses on “the enhanced accessibility and functionality that metadata provides to the recipients of ESI.” With that, the form of production might be a static image such as a TIFF or PDF with a corresponding load file containing searchable text and selected metadata. According to the Sedona Conference, this “satisfies the goals of Principle 12 because the production is in usable form, e.g., electronically searchable and paired with essential metadata.” *Aguilar*, 21-22.

The court reviewed a number of metadata production cases. Courts usually order production of metadata when 1) the original Rule 34 request calls for metadata 2) no ESI has been produced from the producing party. *Aguilar*, 22.

The Court turned its attention to the issue of email metadata production. This request was denied because the Plaintiff did not include metadata in their original ESI request. Given that the emails only amounted to 500 “documents,” coupled with the lack of showing if any Bcc’s or folder structure having any value, the Court was unwilling to order production of the email metadata. This might have turned out differently if the original request included metadata prior to the collection of the email messages. *Aguilar*, 34. This also might have been avoidable if the parties had discussed it early at the initial Rule 26(f) conference.

The Court did allow production of metadata for spreadsheets, word processing and PowerPoint files, on the condition the Plaintiffs agreed to pay for the production. The Court recognized the low burden of production, enhanced searchability and the Sedona Conference’s view on producing accessible metadata. However, since the ESI had already been produced in one form, the second production would need to be at the Plaintiff’s expense. *Aguilar*, 33-48.

Many of these issues could have been avoided, or limited at least, with earlier discussions of ESI production and specifically requesting metadata during discovery. While every case is different, lawyers should consider check lists for requesting production electronic evidence, consider which are the most reasonable forms of production for the ESI and determine which metadata they want from email messages, Word documents, Excel spreadsheets and request accordingly.