Litigation - USA

District Court Addresses Presumption of Discovery of Metadata

Contributed by **Paul, Weiss, Rifkind, Wharton & Garrison LLP**

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Electronic discovery issues are now such a part of the fabric of US litigation that the Judicial Conference Committee on Rules of Practice and Procedure recently adopted amendments to the Federal Rules of Civil Procedure that address electronic discovery. As electronic discovery issues become more common, courts are forced to confront many issues of first impression. In October 2005 the Kansas District Court, in *Williams v Sprint/United Management Company* ,(1) became one of the first US courts to rule on the production of 'metadata' - the information embedded in electronic documents that is often described as 'data about data'. Although the court acknowledged a general presumption against the production of metadata, the court recognized an exception to that presumption for instances in which the producing party is aware or should reasonably be aware that the metadata in question is relevant to the dispute. Applying this exception, the court held that the plaintiff's request for, and the court's prior order requiring the production of, Excel spreadsheets as maintained in the ordinary course of business was sufficient to put the defendant on notice that metadata found in Excel spreadsheets should have been produced.

Facts

Plaintiff Shirley Williams was one of 1,727 plaintiffs in a class action suit alleging that Sprint/United Management had impermissibly used age as a determining factor in a round of lay-offs. Counsel had been involved in an ongoing dispute over the production of certain Excel spreadsheets relating to the terminations. After the defendant had produced tagged image file format (2) versions of certain Excel spreadsheets relating to candidate selections and other reduction-in-force data, the plaintiff requested that the court order the defendant to produce active electronic files upon which it could perform statistical analyses. The magistrate judge sided with the plaintiff and ordered the defendant to produce electronic versions of the Excel spreadsheets. In response, the defendant produced 3,083 Excel spreadsheets in electronic form. Prior to production, however, the defendant used software to 'scrub' metadata - including file names, dates, authors, social security numbers and printout and modification dates - from the spreadsheets, and 'locked' the value of certain cells in the spreadsheets.

Upon discovering these facts, the plaintiff again sought assistance from the court. The court in turn directed the defendant to show cause why it should not produce the spreadsheets in active format, and why counsel should not be penalized for scrubbing the metadata and locking the cells prior to production.

Decision

Noting the novelty of the issue and the apparent lack of guidance in case law, the federal rules and the proposed federal rules specific to electronic discovery, the court engaged in a substantial

discussion of the definition and emerging practices relating to the production of metadata. For authority, the court turned to the Sedona Guidelines for Managing Information and Records in the Electronic Age (September 2005 version), and the Sedona Principles Addressing Electronic Document Production (July 2005 version).(3) The court quoted Principle 12 of the Sedona Principles, stating "[un]less it is material to resolving the dispute, there is no obligation to preserve and produce metadata absent agreement of the parties or order of the court", and the comment stating "[o]f course, if the producing party knows or should reasonably know that particular metadata is relevant to the dispute, it should be produced".

The court seized on the caveat in the comment to Principle 12, ruling that when a party is ordered to produce documents as maintained in the ordinary course of business, or in active or 'native' format, the producing party should produce electronic documents with the metadata intact. The court reasoned that the burden to object to the disclosure of the metadata is properly placed on the producing party, because it is generally in the best position to determine whether production would be objectionable.

Applying this rule to the facts of the case, the court held that the defendant should have been reasonably aware from the magistrate judge's prior order requiring the production of Excel spreadsheets in their native format that the production of metadata was required. It reached this conclusion despite the fact that neither the plaintiff nor the magistrate judge had ever specifically addressed the issue of metadata. (The court did permit the defendant to withhold from production certain metadata covered by a prior order.) With respect to the defendant's decision to lock the values in certain spreadsheet cells, the court similarly found that the defendant's actions did not accord with the magistrate judge's prior order - the very purpose of which was to enable the plaintiffs to manipulate and analyze the data found in the Excel spreadsheets.

Responding to the defendant's claim that locking the spreadsheet was necessary to ensure that the data was not tampered with or modified, the court suggested that the defendant could have used a less obtrusive system of hash marks or digital fingerprints to ensure that post-production changes to the data would be impossible to conceal.

The court declined to impose penalties, citing a lack of clear law and "arguable ambiguity" in the magistrate judge's prior order requiring that the Excel spreadsheets be produced in native form.

Comment

No doubt some will argue for a broad reading of *Williams*, under which parties wishing to discover all kinds of metadata would need only to word their requests in terms of ‘active’ or ‘native’ files, or request documents ‘as kept in the ordinary course of business’. However, such a reading would have the exception swallow the rule, as those phrases are already part of language in virtually every document request. For that reason, *Williams* should be limited to its special facts.

As a result, the real lesson of *Williams* is found in the court's direction that parties be clear and direct in objecting to requests for electronic data, and in communicating with adversaries and the court about electronic discovery issues. To do this, litigators must understand the difficulties associated with the production of all manner of electronic data (eg, word-processing files, email, Excel spreadsheets), and craft objections that put the requesting party on notice as to what the producing party does and does not intend to do. That advice has universal applicability.

This reading of *Williams* also finds support in the proposed amendments to the Federal Rules of Civil Procedure.(4) The proposed amendment to Rule 26(b) permits parties to withhold production of electronic data if "not reasonably accessible because of undue burden or cost". The rule does not elaborate on the concepts of burden or accessibility in this context, or the role of metadata, but rather focuses on disclosure by the parties, as the committee note states:

> "*If the parties cannot agree whether, or on what terms, sources identified as not reasonably accessible should be searched and discoverable information produced, the issue may be raised either by a motion to compel discovery or by a motion for a protective order. The parties must confer before bringing either motion. If the parties*

> *do not resolve the issue and the court must decide, the responding party must show that the identified sources of information are not reasonably accessible because of undue burden or cost.*"

The notes to proposed Rule 34(b)(ii) contain the same message. Proposed Rule 34(b)(ii) states:

> "*If a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable.*"

However, the committee note encourages communication between the parties, in place of a mere election:

> "*A party that responds to a discovery request by simply producing electronically stored information in a form of its choice, without identifying that form in advance of the production in the response required by Rule 34(b), runs a risk that the requesting party can show that the produced form is not reasonably usable and that it is entitled to production of some or all of the information in an additional form.*"

While the proposed rules do not squarely address the issue of the production of metadata, the broadest reading of *Williams* - that production of metadata is presumptive - appears to conflict with the spirit of the rules. After all, proposed Rule 34(b)(ii) does give the producing party the choice to produce electronic data in any "reasonably usable" form. Presumably, this would include text-searchable images and other documents that do not contain metadata. Proposed Rule 26(b)'s focus on burden also cuts somewhat against the production of metadata, as other authorities have suggested that the production of metadata is *ipso facto* burdensome. For example, the Manual for Complex Litigation states:

> "*More expensive forms of production, such as production of word-processing files* with all associated metadata *or production of data in specified non-standard format, should be conditioned upon a showing of need or sharing expenses*" (emphasis added).(5)

Until the law on the discovery of metadata becomes more settled, neither the proposed rules nor the Kansas District Court decision will likely prevent other courts from coming to their own conclusions. Accordingly, parties wishing to avoid the production of sensitive metadata would be best served by assuming that metadata is within the scope of all electronic discovery requests. As the *Williams Case* makes clear, a lack of clear language in the request or in a court order will not preclude a later finding that a party should have produced metadata intact. They should also include, as appropriate, specific and clear objections to the production of metadata. As the Sedona Principles note, most metadata will likely be undiscoverable either because it is unrelated to discoverable material or because it contains personal and protected information.

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Endnotes

(1) 2005 WL 2401626 (D Kan September 29 2005).

(2) This is a file format commonly used for high-quality images and that can be viewed on most computers.

(3) Available generally at www.thesedonaconference.org.

(4) Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure (September 2005), available at www.uscourts.gov/rules/Reports/ST09-2005.pdf#page=114.

(5) 4th Section 11.446.

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