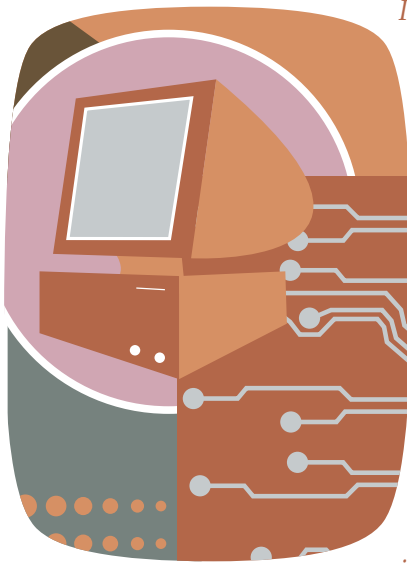


SHOULD METADATA AUTOMATICALLY BE PRODUCED?

THE WILLIAMS V. SPRINT/UNITED MANAGEMENT CO. CASE
(230 F.R.D. 640 (D. KAN. 2005))

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In the most comprehensive judicial analysis on the subject of whether metadata should automatically be produced in response to a discovery request, Magistrate Judge Waxse from the Federal District Court in Kansas, in a September 29, 2005 opinion, decided if a party, when told to produce electronic spreadsheets “in the manner in which they were kept in the ordinary course of business,” should be sanctioned for “scrubbing” the metadata and locking down certain data in cells of Microsoft Excel spreadsheets prior to producing them. In yet another example of parties and their lawyers failing to communicate clearly, the opinion demonstrates that because there exists very little guidance from the Courts or the regulatory agencies on the subject of the production of metadata, companies must do their own due diligence and be proactive in terms of knowing what data they have and how it is stored. In addition, lawyers need to be informed, direct and forthright in how they articulate the manner in which they are going to produce that data in discovery.

FACTUAL SETTING

This case concerned a group of employees who were terminated in a reduction-in-force (RIF) and brought a class action in April 2003 against Sprint/United Management (“Sprint”) alleging wrongful termination of employment based on age. Due to the highly contentious nature of the litigation, the Court, two years into the case, in March 2005, started scheduling discovery conferences twice a month to resolve the disputes and keep the parties moving forward. One of the ongoing disputes involved the plaintiffs’ request for the defendant to produce the spreadsheets the defendant’s Human Resources department used to determine who would be fired in the RIF.

In response to the Plaintiffs’ request, the Court entered an Order requiring the Defendant to produce

“candidate selection spreadsheets.” Subsequent to that Order at another discovery conference but before production, Plaintiffs requested that the Defendant be required to “produce the actual electronic ‘active file’ version” of all of the Excel spreadsheets so the Plaintiffs could perform “statistical or manipulative things without ... the laborious process of keying in all of that data again.” The Court asked the Defendant whether it was now producing the “active files” of the spreadsheets, and if not, why not. In response, the Defendant did not raise any objection to producing the spreadsheet in electronic format but rather it wanted to continue to produce data in TIFF images (as the parties had agreed to prior to this dispute) and then at a later time, go back and review what it held in electronic format.

It is clear from the opinion that at this point, the Judge had the clear impression that it was not a matter of if, but when, the Defendant was going to produce the data in an electronic format. While the Defendant Sprint ultimately did produce the data in an electronic format, prior to production it decided to scrub the metadata which included information such as names and dates, authors and recipients as well as printout and change dates. Sprint admitted that it scrubbed the metadata and locked certain cells but it argued that, among other things, the metadata was irrelevant and contained privileged information. Sprint also claimed that its actions were in good faith, designed to prevent the plaintiffs from discovering information that the Court had already decided was undiscoverable and maintained data integrity.

What makes this decision really unique is that the Court concluded that the federal rules (including the proposed changes to the federal rules), the state rules and the case law failed to provide sufficient guidance on the production of metadata, to base its decision.

ELECTRONIC DATA IN SPREADSHEETS “KEPT IN THE ORDINARY COURSE”

The Defendant contended that “emerging standards” of electronic discovery articulate a presumption against the production of metadata. The Court, in order to determine whether the Defendant’s contention was correct, had to determine the emerging standard for the production of metadata and whether that emerging standard provided any guidance to the Court in the circumstance surrounding the production of metadata. Finally, the Court had to determine which party had the burden with regard to the disclosure of metadata.

What makes this decision really unique is that the Court concluded that the federal rules (including the proposed changes to the federal rules), the state rules and the case law failed to provide sufficient guidance on the production of metadata, to base its decision. Instead, the Court turned to two of the Sedona Principles for Electronic Production for guidance on the “**emerging standards**” of electronic document production, specifically with regard to metadata.

In what can best be described as “a virtual primer on metadata,” the Court, in great detail, analyzed the Sedona Principles. The Court concluded that when a party is ordered to produce electronic documents as they are maintained in the ordinary course of business, the producing party should produce the electronic documents with their metadata intact unless that party timely objects to the production of metadata, the parties agree that the metadata should not be produced or the producing party requests a protective order. As a result, the burden rests appropriately on the producing party with regard to disclosure of the metadata or objecting to such disclosure, since metadata is an inherent part of an electronic document and its removal ordinarily requires an affirmative act by the producing party. Although the Court did not sanction Sprint, it decided that Sprint

should not have “scrubbed” the metadata from the Excel spreadsheets and as a result, it ordered Sprint to produce the spreadsheets and “unlocked” versions of those spreadsheets.

LESSON LEARNED FROM THIS CASE:

1 The Court decided a narrow issue. The holding in this case is limited to the situation where a party is ordered to produce the data in spreadsheets in the “form in which it is ordinarily maintained.” As the Court noted, the general rule is that metadata should be produced, absent objection or agreement otherwise. This case should not be interpreted to require the production of data in an Excel spreadsheet in native format. The Court did not address the issue of data production in native format in this case.

2 “What we have here is a failure to communicate.” There seems to be some confusion in the use of certain critical terms and phrases in the case. For example, the Plaintiffs asked that the Defendant produce the electronic “active file” version of the spreadsheet. The Court then asked why the Defendant could not produce the data in “electron-

ic form.” While the Court eventually threatened to sanction the Defendant for failing to produce the metadata connected to the spreadsheets, the Court admitted that the plaintiffs never expressly requested metadata (nor did Plaintiffs ever mention metadata in any of the discovery conferences) and the Court never ordered the defendant to produce metadata. Notwithstanding that gap, the Court found that: (i) the Defendant “should reasonably have been aware that the spreadsheets’ metadata was encompassed within the Court’s directive that [Defendant should] produce the electronic Excel spreadsheets as they were maintained in the regular course of business;” and (ii) the Court expected and intended for the Defendant to produce the spreadsheet metadata along with the Excel spreadsheets.

3 It pays to be proactive instead of reactive. The Court noted that if the Defendant thought the metadata was irrelevant and did not want to produce it, then it should have either objected in a timely fashion or moved for a protective order. Instead, Sprint made a unilateral and unannounced decision to not produce the metadata and then wait and see if the plaintiffs noticed that. Plaintiffs initially raised the issue of RIF-related spreadsheets at the May 5, 2005 discovery and the Court ordered Sprint to produce the information by June 1, 2005. Thereafter, a number of other discovery conferences were held but Sprint never said anything about not producing the metadata even after it produced the scrubbed version of the spreadsheets on June 23, 2005. If, as here, the producing party is concerned about maintaining the integrity of the data being produced, it should not do what Sprint did and unilaterally lock down the data. Instead, Sprint should have raised the issue with the plaintiffs as well as the Court as early as possible in order to get clarity on the issue.

4 Be prepared for the long haul. This action was filed in April 2003 and the dispute

about the metadata wasn’t resolved until September 2005. As a result, Sprint had to locate and track from the outset of the litigation (or possibly before) what relevant information it had, where it was located, how it was stored and how it should be preserved and then implement that preservation scheme for over two years

5 Be sure what the requesting party is seeking in discovery (typically through an early meet and confer) and don’t take discovery requests too literally. While it is important to carefully review the discovery requests and produce what is requested, here the Court found that the defendant should have known that the plaintiffs wanted something that the plaintiffs never mentioned. The Court noted that the defendant “should have reasonably understood”, based upon the context of the requests and the discussions between the parties during the discovery conferences, that the plaintiffs wanted the metadata so they could perform statistical analysis without going through the laborious process of keying in all of that data.



6 If you want something in electronic or native form, be selective and you have a better chance of getting it. In most cases, where a party asks for “all” information in electronic or native format, that party is faced with significant resistance because of the expense and problems associated with a large scale review and production in electronic format. It may be ever IT persons fear to give a group of lawyers’ unlimited access to metadata without significant quality controls in place. Because the Plaintiffs in this case asked specifically for a small subset of the production—an Excel spreadsheet—to be produced in electronic format and they articulated a good reasons for the request (the intended use by the Plaintiffs was made very clear), the Plaintiffs maximized their chances that the Court would agree to their request.