Nothing to Hide: Why Metadata Should Be Presumed Relevant*

I. INTRODUCTION

The amount of information being produced electronically is large and continues to grow. In fact, "[n]inety-two percent of new information is stored on [electronic] media."[1] Individuals and businesses are also increasingly relying on electronic modes of communication.[2] As the prevalence of electronic documents increases, it is likely that "the only record companies have of their business decisions, results, and strategies are maintained in electronic form."[3] In fact, a majority of corporate records are stored electronically.[4] These electronic documents, because they contain metadata—"'information describing the history, tracking, or management of an electronic document'"[5]—are "of more value in the discovery process" than their paper counterparts.[6]

---

* *Mike Breen*. J.D. 2007, University of Kansas School of Law; B.A. 2001, St. John's University (MN). I would like to thank Professor Ellen Sward for her invaluable insight and suggestions in the development of this article. I would also like to thank the Honorable David J. Waxse of the United States District Court, District of Kansas and his clerk Melissa Taylor for inspiring my interest in the topic of electronic discovery. Finally, I thank my wife Nicky for her patience and support.

1. PETER LYMAN & HAL R. VARIAN, HOW MUCH INFORMATION? 2003 (2003), http://www2.sims.berkeley.edu/research/projects/how-much-info-2003/printable_execsum.pdf (last visited Dec. 29, 2007).

2. Dennis R. Kiker, *Waiving the Privilege in a Storm of Data: An Argument for Uniformity and Rationality in Dealing with the Inadvertent Production of Privileged Materials in the Age of Electronically Stored Information*, 12 RICH. J.L. & TECH. 15, ¶¶ 3–6 (2006), http://law.richmond.edu/jolt/v12i4/article15.pdf. The increase in use of electronic information is particularly evident in communication, as "computer users sent approximately 31 billion e-mail messages every day in 2002." *Id.* at ¶ 4.

3. Stephen D. Williger & Robin M. Wilson, *Negotiating the Minefields of Electronic Discovery*, 10 RICH. J.L. & TECH. 52, ¶ 57 (2004), http://law.richmond.edu/jolt/v10i5/article52.pdf.

4. Lori Enos, *Digital Data Changing Legal Landscape*, E-COMMERCE TIMES, May 16, 2000, http://www.ecommercetimes.com/story/3339.html ("[M]ost companies store up to 70 percent of their records in electronic form.").

5. Williams v. Sprint/United Mgmt. Co., 230 F.R.D. 640, 646 (D. Kan. 2005) (quoting the proposed advisory committee note to Fed. R. Civ. P. 26(f)). *See infra* Part II.A.

6. James Gibson, *A Topic Both Timely and Timeless*, 10 RICH. J.L. & TECH. 49, ¶ 3 (2004), http://law.richmond.edu/jolt/v10i5/article49.pdf.

The increase in volume of electronic information is wreaking havoc with discovery rules and litigation practices.[7] In the age of electronic discovery, litigators must address issues of data preservation, the scope of discovery, form of production, privilege waiver as a consequence of inadvertent disclosure, and sanctions for abuses. Perhaps the most contentious electronic discovery issue surrounds metadata.[8] Metadata presents novel issues because every electronic document contains metadata,[9] metadata potentially is of high evidentiary value,[10] and metadata is difficult to remove.[11]

Metadata gives meaning to much electronic information,[12] and thus its presence or absence can be outcome determinative.[13] Now that a majority of information is created and stored electronically,[14] the rules regarding the role of electronic information in litigation have a significant impact. A rule that allows parties to produce electronic information in any manner they choose may leave the seeking party with an indecipherable mass of data. On the other hand, a rule requiring metadata preservation may be overly burdensome on the producing party and may expose information that the producing party was formerly able to shelter in traditional discovery.

The current trend is to require production of electronic information in native format with metadata intact.[15] Courts are requiring metadata production "'if the producing party knows or should reasonably know that metadata is relevant to the dispute.'"[16] The burden is currently on the seeking party to establish relevance if the producing party determines metadata is irrelevant.[17] A more logical approach, however, is to presume metadata relevant and require the producing party to rebut the presumption. A rule that presumes the relevance of metadata better

7. Kiker, *supra* note 2, at ¶ 6.

8. J. Brian Beckham, *Production, Preservation, and Disclosure of Metadata*, 7 COLUM. SCI. & TECH. L. REV. 1, 1 (2006), http://www.stlr.org/html/volume7/beckham.pdf.

9. *Id.* at 3.

10. *See infra* Part III.A.2.

11. *See* Beckham, *supra* note 8, at 4 (citing David Hricik, *The Transmission and Receipt of Invisible Confidential Information* (2003), http://www.hricik.com./eethics/Metadata1103.doc).

12. *See infra* notes 25–32 and accompanying text.

13. *See infra* Part III.A.1.

14. *See* LYMAN & VARIAN, *supra* note 1.

15. *See infra* Part II.C.

16. Williams v. Sprint/United Mgmt. Co., 230 F.R.D. 640, 651 (D. Kan. 2005) (quoting THE SEDONA CONFERENCE, THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 47 (July 2005), *available at* http://www.thesedonaconference.org/content/miscFiles/7_05TSP.pdf [hereinafter THE SEDONA CONFERENCE July 2005].

17. *See id.*

serves judicial economy and is consistent with the intent of the Federal Rules of Civil Procedure in allowing "the parties to obtain the fullest possible knowledge of the issues and facts before trial."[18] Because metadata is so closely related to the information contained in the electronic document, metadata will rarely be irrelevant when the electronic document to which the metadata pertains is relevant. A corollary to this proposal is that parties should be required to maintain metadata when litigation is reasonably foreseeable. A rule presuming the relevance and requisite production of metadata ensures that metadata, which may be determinative in a case, will be preserved for litigation.

Contrary to arguments commonly offered by producing parties, especially those frequently involved in litigation, production of large quantities of electronic information will not have a crippling effect.[19] The producing party is actually obligated to do less work if required to produce electronic documents in the form in which they are produced and maintained; with metadata intact. One magistrate judge has described the process of removing metadata as laborious and counter-intuitive.[20] Furthermore, when courts require production of electronic information in native format, the court provides a check on producing parties to ensure electronic documents are not altered between the time when litigation was foreseeable and the commencement of discovery.[21] Finally, because the trend is toward requiring metadata production, attorneys will be forced to become competent regarding metadata. As a result, problems surrounding metadata, such as inadvertent disclosure of privileged information, will occur less often. The end result is that the court will have a more complete record on which to rule and justice will be better served.

Part II of this Comment discusses the evidentiary value of metadata and the effect of a rebuttable presumption of metadata relevance. I describe how this presumption meshes with the Federal Rules of Civil Procedure and the recent amendments thereto. I also discuss how requiring metadata production is an increasing trend and describe how courts are tempering the requirement. Part III begins by using *Williams v. Sprint/United Management Co.*[22] to illustrate the value of metadata in

18. Hickman v. Taylor, 329 U.S. 495, 501 (1947).

19. *Contra* Holt v. Nw. Mut. Life Ins. Co., No. 1:04-CV-280, 2005 WL 3262420, at *4 (W.D. Mich. Nov. 30, 2005) (discussing arguments against producing larger quantities of electronic information).

20. *In re* Payment Card Interchange Fee & Merch. Disc., No. MD 05-1720(JG)(JO), 2007 WL 121426, at *1, 3 (E.D.N.Y. Jan. 12, 2007).

21. *See infra* note 105 and accompanying text.

22. 230 F.R.D. 640 (D. Kan. 2005).

discovery. I then elaborate on the evidentiary value of metadata and discuss the benefits of a rebuttable presumption of metadata relevance. Next, I describe how the Federal Rules of Civil Procedure support such a presumption and argue that a stricter standard for production and preservation is necessary. I then explain why a stricter rule for electronic discovery, compared with traditional paper discovery, is advisable. Finally, I describe why a stricter rule on metadata production promotes good lawyering.

II. BACKGROUND

A. Metadata Is Rich with Evidentiary Information

Metadata is the locus of the debate surrounding electronic discovery. Metadata is the "information about a particular data set which may describe how, when, and by whom it was received, created, accessed, and/or modified and how it is formatted."[23] Metadata serves various purposes and functions, including "enhanc[ing] the editing, viewing, filing, and retrieval of . . . documents."[24] "[M]etadata can come from a variety of sources; it can be created automatically by a computer, supplied by a user, or inferred through a relationship with another document."[25]

Metadata has a significant effect on the evidentiary value of electronic documents: "metadata is the key to showing relationships between the data."[26] Metadata reveals "a file's name, a file's location (e.g., directory structure or pathname), file format or file type, file size, file dates (e.g., creation date, date of last data modification), and file permissions (e.g., who can read the data, who can write to it, who can run it)."[27] Metadata reveals authors and editors and edits and changes to electronic documents.[28] Metadata contained in emails is perhaps the

23. *Id.* at 646 (citing THE SEDONA CONFERENCE, THE SEDONA GUIDELINES: BEST PRACTICE GUIDELINES & COMMENTARY FOR MANAGING INFORMATION & RECORDS IN THE ELECTRONIC AGE 94 (Sept. 2005), *available at* http://www.thesedonaconference.org/content/miscFiles/TSG9_05.pdf.

24. Beckham, *supra* note 8, at 4 (quoting David Hricik, *The Transmission and Receipt of Invisible Confidential Information* 1 (2003), http://www.hricik.com/eethics/2.3.html (last visited Jan. 23, 2008)).

25. *Williams*, 230 F.R.D. at 646–47.

26. *Id.* at 647.

27. *Id.* at 646.

28. Beckham, *supra* note 8, at 2.

most charged form of metadata because it discloses when a message was sent.[29] Email metadata also reveals recipients of blind carbon copies.[30]

Some characteristics of metadata create special problems for electronic discovery. Metadata is not static—it is possible for producing parties to alter metadata: "Metadata can be altered intentionally or inadvertently and can be extracted when native files are converted to image files."[31] Therefore, metadata is not always accurate. For instance, metadata for a form document "reflects the author as the person who created the template but who did not draft the document."[32] Metadata can also be deleted or "spoliated."[33] However, barring alteration, deletion, or spoliation, metadata is rich with evidentiary information.

B. The Federal Rules of Civil Procedure Require Production of Relevant Electronic Documents

1. The Federal Rules of Civil Procedure Provide That a Party May Obtain Any Material Relevant to the Claim

The Federal Rules of Civil Procedure provide a background for the discussion of electronic discovery. The Rules apply equally to electronic discovery and traditional paper discovery.[34] The Rules are intended to allow broad discovery,[35] and specifically, "authorize broad discovery of computer-related information, while affording many protections against unreasonably intrusive discovery of such materials."[36]

Federal Rule of Civil Procedure 26(b)(1) sets the scope of discovery. Under Rule 26(b)(1), "[p]arties may obtain discovery regarding any matter . . . relevant to the claim or defense of any party."[37] "'[A] request for discovery should be considered relevant if there is any possibility that the information sought may be relevant to the subject matter of the

29. *Id.* at 4.

30. *Id.* at 14.

31. *Williams*, 230 F.R.D. at 646.

32. *Id.*

33. "Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999).

34. Jones v. Goord, No. 95 CIV. 8026(GEL), 2002 WL 1007614, at *6 (S.D.N.Y. May 16, 2002).

35. Codd v. Velger, 429 U.S. 624, 638 (1977).

36. Mark D. Robins, *Computers and the Discovery of Evidence—A New Dimension to Civil Procedure*, 17 J. MARSHALL J. COMPUTER & INFO. L. 411, 427 (1999).

37. FED. R. CIV. P. 26(b)(1).

action.'"[38] A producing party bears the burden of establishing lack of relevance if the information sought appears facially relevant.[39] To establish lack of relevance, the producing party must either show the discovery does not come within the broad limits of Rule 26(b)(1) or that the information sought is only marginally relevant and production would cause more harm than good.[40] Potential evidence does not become relevant and discoverable simply because it exists.[41]

Rule 26(b)(2) limits what a propounding party may seek.[42] Discovery requests are limited to those that are reasonable and not duplicative or available from other sources.[43] A party who has squandered an earlier opportunity to obtain a document cannot later rectify the situation through court assistance.[44] Courts can limit the propounding party's requests under Rule 26(b)(2) if the "burden or expense of the proposed discovery outweighs its likely benefit."[45] If the responding party claims a discovery request is overly burdensome, the responding party must establish the limiting factors.[46] Moreover, Rule 26(c)(1) gives the trial judge "broad discretion to tailor discovery narrowly to protect a party from undue burden or expense."[47]

Seeking parties can require a party to produce electronic documents under Rule 34.[48] According to Rule 34(a), data compilations constitute "documents," and parties are required to produce "data compilations from which information can be obtained" upon request.[49] In addition, the 1970 advisory amendment to Rule 34 provides specifically that "Rule 34 applies to electronic data compilations from which information can be

38. AM Int'l, Inc. v. Eastman Kodak Co., 100 F.R.D. 255, 257 (N.D. Ill. 1981) (quoting 8 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2008 (1970)).

39. Scott v. Leavenworth Unified Sch. Dist. No. 453, 190 F.R.D. 583, 585 (D. Kan. 1999).

40. *Id.*

41. *See In re* Harmonic, Inc., No. C-00-2287 PJH, 2002 WL 31974384, at *18 (N.D. Cal. Nov. 13, 2002) ("There is no obligation to disclose material information simply because it exists."), *aff'd in part and rev'd in part by* Kollenberg v. Harmonic, Inc., 152 Fed. App'x 674 (9th Cir. 2005).

42. FED. R. CIV. P. 26(b)(2).

43. *Id.*

44. *Id.*

45. *Id.*

46. Thompson v. Dep't of Hous. & Urban Dev., 199 F.R.D. 168, 171 (D. Md. 2001); FED. R. CIV. P. 26(b)(2)(iii).

47. Sasha K. Danna, *The Impact of Electronic Discovery on Privilege and the Applicability of the Electronic Communications Privacy Act*, 38 LOY. L.A. L. REV. 1683, 1688 (2005) (citing Jones v. Goord, No. 95 CIV. 8026(GEL), 2002 WL 1007614, at *6 (S.D.N.Y. May 16, 2002)).

48. FED. R. CIV. P. 34.

49. *Id.* 34(a).

obtained only with the use of detection devices."[50] These electronic documents must be produced "as they are kept in the usual course of business."[51] Metadata constitutes a "data compilation" under the broad definition provided in Rule 34.[52]

2. The 2006 Amendments to the Federal Rules of Civil Procedure Deal Explicitly with Electronic Discovery

The December 2006 amendments to the Federal Rules of Civil Procedure address the novel issues raised by electronic discovery.[53] Rule 34(a) was amended to explicitly include "electronically stored information" as a category of document that a seeking party can request.[54] Rule 34(b) was amended to include the following language regarding the format in which electronic information must be produced:

> Unless the parties otherwise agree, or the court otherwise orders, . . . (ii) 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.[55]

The Advisory Committee intended this amendment to ensure searchable electronic data be produced in a searchable, if not native, format.[56] Courts determine the "conformity of a responding party's production of electronic files to the rule . . . on a case-by-case basis."[57]

The amendment to Rule 26(b)(2) addresses the issue of producing material that has been deleted and is only preserved on backup storage.[58] More specifically, the amendment "acknowledge[s] that producing such

50. *Id.* 34(a) advisory committee's note.

51. *Id.* 34(b).

52. Williams v. Sprint/United Mgmt. Co., 230 F.R.D. 640, 648–49 (D. Kan. 2005).

53. *See* Robert Douglas Brownstone, *Collaborative Navigation of the Stormy e-Discovery Seas*, 10 RICH. J.L. & TECH. 53, ¶ 7 (2004), http://law.richmond.edu/jolt/v10i5/article53.pdf ("Black letter law is now to the effect that e-information is as susceptible to discovery rules and principles as paper.").

54. FED. R. CIV. P. 34(a).

55. *Id.* 34(b).

56. *Id.* 34(b) advisory committee's note.

57. Pace v. Int'l Mill Serv., Inc., No. 205 CV 69, 2007 WL 1385385, at *2 (N.D. Ind. May 7, 2007).

58. *See* Nathan Drew Larsen, Note, *Evaluating the Proposed Changes to Federal Rule of Civil Procedure 37: Spoliation, Routine Operation and the Rules Enabling Act*, 4 NW. J. TECH. & INTELL. PROP. 212, ¶ 8 (2006), http://www.law.northwestern.edu/journals/njtip/v4/n2/4/ (discussing the differences between the "life cycle" of a paper document and an electronic file).

material can be highly burdensome and, in cases where such data is not 'reasonably accessible,' [it] should not be discoverable."[59] The amendment to Rule 26(b)(2) creates a presumption that information is outside the scope of discovery if the electronic document "resides on a source that is not reasonably accessible, such that the relevance of the information to either the claims and defenses or the general subject matter of the litigation cannot be determined without incurring undue costs and burdens."[60] The seeking party can challenge the presumption "by the presentation of circumstantial evidence indicating that the data source contains relevant data."[61]

Rule 37, addressing sanctions for discovery violations, was amended to read: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system."[62] When read along with the amendment to Rule 26(b)(2), the general rule is that "companies cannot be sanctioned for routine spoliation of material not reasonably accessible."[63] However, "[t]he rule does not modify the sanctions currently available under Rule 37 if the spoliation of electronic discovery is found to be improper."[64] The amendment does not address any responsibilities for a party prior to the filing of the lawsuit, nor does it "articulate a positive duty of preservation."[65]

C. Requiring Native Format Production, with Metadata Included, Is a Growing Trend

In 2004, the Ninth Circuit Advisory Board proposed that "all documents shall be produced in electronic form (including metadata) absent specific objection, agreement of the parties, or order of the court."[66] A year later, in *Williams v. Sprint/United Management Co.*, the court held:

---

59. *Id.*

60. Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 7 SEDONA CONF. J. 1, 21 (2006).

61. *Id.*

62. FED. R. CIV. P. 37.

63. Larsen, *supra* note 58, at ¶ 21.

64. *Id.* at ¶ 22.

65. *Id.*

66. Beckham, *supra* note 8, at 2 (citing Ninth Circuit Advisory Bd., Proposed Model Local Rule on Electronic Discovery, http://www.krollontrack.com/library/9thCirDraft.pdf (2004)).

> [W]hen 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 production of metadata, the parties agree that the metadata should not be produced, or the producing party requests a protective order.[67]

The court elaborated on its holding by noting that the producing party has the initial burden to demonstrate that particular metadata is irrelevant because it has access to and is in control of the electronic document, thus enabling the producing party to extract or redact privileged or irrelevant metadata prior to production.[68] The *Williams* court noted that its decision was consistent with the emerging standards of electronic discovery.[69]

The *Williams* court framed the issue before it as follows: "whether, under emerging standards of electronic discovery, the Court's Order directing Defendant to produce electronic spreadsheets as they are kept in the ordinary course of business requires Defendant to produce those documents with the metadata intact."[70] The propounding party sought to compel the producing party to produce spreadsheet cells containing information relevant to a reduction in force.[71]

The *Williams* court considered the electronic discovery guidelines proposed by the Sedona Conference Working Group on Electronic Document Production among the "emerging standards" in electronic discovery.[72] To understand why the court relied on the Sedona Guidelines, it is necessary to gain some background knowledge on the group:

> The Sedona Conference exists to allow leading jurists, lawyers, experts, academics and others, at the cutting edge of issues in the area of antitrust law, complex litigation, and intellectual property rights, to come together - in conferences and mini-think tanks (Working Groups) - and engage in true dialogue, not debate, all in an effort to move the law forward in a reasoned and just way.[73]

---

67. 230 F.R.D. 640, 652 (D. Kan. 2005) (internal citations omitted).

68. *Id.*

69. *Id.* at 651–52.

70. *Id.* at 651. Given rule 34(b)'s requirement that requested documents be produced "as they are kept in the ordinary course of business," it is safe to assume that all document requests ordered by the court require producing parties to produce documents in such a manner.

71. *Id.* at 642.

72. *Id.* at 650–52.

73. The Sedona Conference Mission, http://www.thesedonaconference.org/content/tsc_mission/

The court focused on Principles 9 and 12 from the Electronic Document Working Group.[74] Principle 12 states that "[u]nless 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."[75] Comment 12.a to the Sedona Principles further provides that "if the producing party knows or should reasonably know that particular metadata is relevant to the dispute, it should be produced."[76]

Although the court alludes to the Sedona Principles, the holding in *Williams* favors a stricter metadata production requirement than the Sedona Principles. For instance, Comment 12.a to the Sedona Principles states that "[a]lthough there are exceptions to every rule, especially in an evolving area of the law, there should be a modest legal presumption in most cases that the producing party need not take special efforts to preserve or produce metadata."[77] The court acknowledges that the Sedona Principles "articulate a general presumption against the production of metadata,"[78] but found that the facts before the court fit the caveat that requires production of metadata when "the producing party is aware or should reasonably be aware that particular metadata is relevant to the dispute."[79]

The *Williams* approach is not rogue; it has been followed in other jurisdictions. In *Nova Measuring Instruments Ltd. v. Nanometrics, Inc.*, for example, the court held that absent compelling reasons by the producing party, an electronic document must be produced in its native format with original metadata intact.[80] Additionally, in *Hagenbuch v. 3B6 Sistemi Elettronici Industriali S.R.L.*, the court held that a seeking party is entitled to materials in the format in which the producing party keeps them in the ordinary course of business because metadata was lost when the producing party converted the information in Tagged Image File Format ("TIFF") documents.[81] Unlike *Williams*, neither the *Nova*

show_page_html (last visited Dec. 29, 2007).

74. Principle 9 is focused primarily on preservation and production of compromised electronic data and thus is beyond the scope of this Comment. Principle 9 states: "Absent a showing of special need and relevance a responding party should not be required to preserve, review, or produce deleted, shadowed, fragmented or residual data or documents." THE SEDONA CONFERENCE July 2005, *supra* note 16, at i.

75. *Id.*

76. *Id.* at 47.

77. *Id.* at 46 (citing Pub. Citizen v. Carlin, 184 F.3d 900, 908–11 (D.C. Cir. 1999)).

78. Williams v. Sprint/United Mgmt. Co., 230 F.R.D. 640, 652 (D. Kan. 2005).

79. *Id.*

80. 417 F. Supp. 2d 1121, 1122 (N.D. Cal. 2006).

81. No. 04 C 3109, 2006 WL 665005, at *3 (N.D. Ill. Mar. 8, 2006). "[T]he tiff documents do not contain information such as the creation and modification dates of a document, e-mail attachments and recipients, and metadata." *Id.* A TIFF-file, like a .pdf file, is essentially an

Measuring nor *Hagenbuch* courts qualified their holdings with a requirement that the producing party be aware that metadata is relevant to the dispute.

In *Hagenbuch*, the court required production of electronic documents in native format and with metadata intact.[82] The court cited the differences between the TIFF format in which the defendant produced electronic documents and native format, noting that "unlike the original electronic media, the TIFF documents do not contain information such as the creation and modification dates of a document, e-mail attachments and recipients, and metadata."[83] The seeking party characterized, and the court agreed, that the producing party "creat[ed] new documents" when it converted files from native format into TIFF format.[84] The court also cited as a rationale that the defendant did not maintain the relevant documents in TIFF format in the "usual course of business."[85] Finally, the court noted that the information defendant unilaterally subtracted when it produced TIFF images of documents was relevant under Federal Rule of Civil Procedure 26(b)(1).[86]

The *Nova Measuring Instruments Ltd. v. Nanometrics, Inc.* court required native format production with metadata intact citing only the holding in *In re Verisign, Inc. Securities Litigation* as authority.[87] The *In re Verisign* court held that even though a large, potentially burdensome volume of electronic information was at stake, the producing party must produce electronic documents in native format with metadata intact.[88] The *In re Verisign* court noted that the producing parties' burden was "prompted by their own noncompliance" and that they were "solely at fault for their now inconvenient predicament."[89] The court deferred to the Magistrate Judge's opinion that native format production would not be overly burdensome for the producing party.[90]

Although the rule requiring metadata production is the majority rule, some courts have instituted rules more favorable to producing parties. In *CP Solutions PTE, Ltd. v. General Electric Co.*, the court denied the

electronic printout of a data file. TIFF files do not contain the metadata present when the file was in native format. *In re* Verisign, Inc. Sec. Litig., No. C 02-02270 JW, 2004 WL 2445243, at *1 (N.D. Cal. Mar. 10, 2004).

82. 2006 WL 665005, at *4.

83. *Id.* at *3.

84. *Id.* at *2.

85. *Id.*

86. *Id.* at *3.

87. 417 F. Supp. 2d 1121, 1122 (N.D. Cal. 2006).

88. No. C 02-02270 JW, 2004 WL 2445243, at *3 (N.D. Cal. Mar. 10, 2004).

89. *Id.*

90. *Id.*

plaintiff's request to have the defendant produce emails in native format—including attachments—with accompanying metadata intact.[91] The court based its decision on the difficulty the producing party would encounter sorting out emails containing privileged information[92] because of the producing party's "software incompatibility problem."[93] The court, however, reserved the right to order the producing party to produce documents in native format if the seeking party was able to "show the need for a specific . . . file and a means to secure this without the production of privileged or irrelevant documents."[94] In *Wyeth v. Impax Laboratories, Inc.*, the court held that a seeking party must demonstrate a particular need for an electronic document in native format.[95] The court did allow that a seeking party could demonstrate need at some point during discovery, and thus "the producing party must preserve the integrity of the electronic document it produces."[96]

In *In re Payment Card Interchange Fee and Merchant Discount*, the court modified a discovery order during litigation to require a party to produce metadata.[97] The plaintiff requested documents be presented with metadata intact and the defendant failed to comply.[98] The defendants sought to force plaintiffs to produce metadata.[99] The court excused the plaintiff's earlier non-compliance but required metadata production in the future.[100]

In its *Guidelines for State Trial Courts Regarding Discovery of Electronically Stored Information*, the Conference of Chief Justices notes that paper production of electronic information is counter-intuitive because valuable information would be lost in the transition and the resulting product would be costly to store.[101] The Conference also notes that converting native format electronic information into image files negates the advantage of searchability.[102] The Conference recommends production in the format in which "information is ordinarily maintained"

91. No. 3:04cv2150(JBA)(WIG), 2006 WL 1272615, at *4 (D. Conn. Feb. 6, 2006).
92. *Id.*
93. *Id.* at *3.
94. *Id.* at *4.
95. No. Civ.A. 06-222-JJF, 2006 WL 3091331, at *2 (D. Del. Oct. 26, 2006).
96. *Id.*
97. No. MD 05-1720(JG)(JO), 2007 WL 121426, at *5 (E.D.N.Y. Jan. 12, 2007).
98. *Id.* at *1–2.
99. *Id.* at *1.
100. *Id.* at *5.
101. CONFERENCE OF CHIEF JUSTICES, GUIDELINES FOR STATE TRIAL COURTS REGARDING DISCOVERY OF ELECTRONICALLY-STORED INFORMATION vi (Aug. 2006), *available at* http://www.ncsconline.org/images/EDiscCCJGuidelinesFinal.pdf.
102. *Id.* at 6.

but stops short of recommending metadata production in every instance.[103] However, the Conference recommends a case-by-case determination of whether parties must produce metadata.[104]

D. Existing Protections for Producing Parties

1. Court-Imposed Qualifications and the Federal Rules of Civil Procedure

In reaction to the plaintiff-friendly rule of native format and metadata production, some courts that required metadata production have instituted protections to ease the burden on producing parties. For example, one court has held that the metadata preservation requirement is applicable only when litigation is reasonably foreseeable.[105] Another has held that metadata production is required only if the propounding party specifically requests metadata or if the producing party "knows" the metadata is relevant to the dispute.[106] The producing party can object to the propounding party's request, and if the court grants the objection, the producing party will not be required to produce metadata.[107] In addition, a propounding party is generally not allowed direct access to a producing party's electronic information.[108]

The producing party also has a right to object to discovery requests under Federal Rule of Civil Procedure 34(b). An objection to a Rule 34 request should be stated with some specificity,[109] and "boilerplate objections or blanket refusals inserted into a response to a Rule 34 request for production of documents are insufficient to assert a privilege."[110] When determining whether to sustain a producing party's objection, the court should consider "the magnitude of the document production."[111] The court in *Treppel v. Biovail Corp.* denied a producing party's request that it not be required to produce electronic information

---

103. *Id.* at 6–7.

104. *Id.* at 7.

105. Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 433 (S.D.N.Y. 2004).

106. Williams v. Sprint United Mgmt. Co., 230 F.R.D. 640, 651 (D. Kan. 2005); *see also* THE SEDONA CONFERENCE July 2005, *supra* note 16, at 47.

107. *Williams*, 230 F.R.D. at 652.

108. Bob Barker Co. v. Ferguson Safety Prods., Inc., No. C 04 04813 JW (RS), 2006 WL 648674, at *5 (N.D. Cal. Mar. 9, 2006).

109. Ava K. Doppelt, *Developing and Executing the Discovery Plan: What Do You Need*, 74 A.L.I. 13, 89 (2005).

110. Burlington N. & Santa Fe. Ry. v. U.S. Dist. Court for the Dist. of Mont., 408 F.3d 1142, 1149 (9th Cir. 2005), *cert. denied*, 546 U.S. 939 (2005).

111. *Id.*

in native format with metadata intact because the producing party "provided no substantive basis for its objection."[112]

2. Courts Honor Document Destruction and Retention Policies

A party will not be sanctioned for failing to produce responsive documents if the documents were destroyed consistent with the party's document retention policy.[113] The *Rambus* court deferred to the producing party's policy and reasoned that the seeking party failed to provide evidence that the policy was specifically aimed at destroying documents relevant to the litigation and the policy was installed prior to the point at which litigation was reasonably foreseeable.[114] The court honored the producing party's document retention policy because it was in place prior to the time at which "the path to litigation" was "clear" or "immediate."[115] The *Rambus* court did, however, qualify its holding by saying the holding did not "mean that a party can destroy documents with impunity prior to contemplation of actual litigation. The implementation of a document retention policy that was intentionally designed to discard damaging documents should litigation later become probable or actually commence would be improper."[116] In *Arthur Andersen LLP v. United States*, a case involving traditional paper discovery, the United States Supreme Court held that compliance with a valid document retention policy was a legitimate defense to destruction of would-be relevant documents.[117]

3. Courts Use Sanctions to Promote Compliance with Electronic Discovery Rules

Courts can balance electronic discovery obligations by threatening sanctions against seeking parties who make unwieldy requests, including those requesting a large volume of documents and those requesting documents difficult for the producing party to access.[118] For example, in

112. 233 F.R.D. 363, 374 n.6 (S.D.N.Y. 2006).

113. Hynix Semiconductor, Inc. v. Rambus, Inc., No. C-00-20905 RMW, 2006 WL 565893, at *25 (N.D. Cal. Jan. 4, 2006).

114. *Id.* at *24–25.

115. *Id.* at *22.

116. *Id.* at *25.

117. 544 U.S. 696, 704 (2005).

118. *See* Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 318 (S.D.N.Y. 2003) ("[C]ost-shifting should be considered *only* when electronic discovery imposes an 'undue burden or expense' on the responding party."); *see infra* Part III.E.1.

Zubulake, the court threatened to shift the costs of discovery to the seeking party as a consequence of its potentially unwieldy discovery request when relevant information was inaccessible.[119] The *Zubulake* court announced seven factors to consider when determining whether to shift discovery costs:

> 1. The extent to which the request is specifically tailored to discover relevant information;
>
> 2. The availability of such information from other sources;
>
> 3. The total cost of production, compared to the amount in controversy;
>
> 4. The total cost of production, compared to the resources available to each party;
>
> 5. The relative ability of each party to control costs and its incentive to do so;
>
> 6. The importance of the issues at stake in the litigation; and
>
> 7. The relative benefits to the parties of obtaining the information.[120]

Cost-shifting and other sanctions protect producing parties from unduly burdensome electronic discovery requests.

III. ANALYSIS

A. Metadata Provides Litigants and Courts with a More Complete and Accurate Record on Which to Resolve a Dispute

A metadata production requirement results in a more complete record on which the court can rule. Rather than just having the information printed on a page, the court and propounding party also have access to the infrastructure under that printed information. The advantages offered by electronic documents and metadata should be embraced, not avoided.

---

119. 217 F.R.D. at 324.
120. *Id.*

1. *Williams v. Sprint/United Management Co.*

The facts of *Williams v. Sprint/United Management Co.*[121] illustrate the value of metadata and why parties devote substantial effort to arguing about whether it must be produced. The dispute in *Williams* arose after a large corporation decided to downsize its workforce and a group of workers brought suit alleging the corporation relied on age-ist factors to terminate employees.[122] The propounding party in *Williams* sought to discover a spreadsheet that contained information regarding the reduction in force.[123] The spreadsheet contained the product of a formula used to derive a value on which the reductions were based—a formula plaintiffs alleged was age-ist.[124] The producing party provided the spreadsheet in TIFF format, denying the seeking party and the court evidence (the formula, which was contained in metadata) critical to plaintiff's claim.[125] The value in the spreadsheet was meaningless absent the formula from which the value was derived.[126] In other words, the electronic nature of the document resulted in an altogether different document than a similar spreadsheet created before the age of computers. Although the propounding party did not seek hard copy printouts, the printouts would have presented the same issues as did the TIFF files.

2. Metadata is of Great Evidentiary Value

As illustrated by *Williams*, without metadata, some electronic documents are no more valuable than a random list of numbers. If the purpose of discovery is "for the parties to obtain the fullest possible knowledge of the issues and facts before trial,"[127] then a very pro-metadata production rule should be instituted. As the *Williams* court pointed out, metadata can be the key factor in showing how data on the face of the electronic document relate to each other.[128] Metadata is the code through which electronic data can be interpreted.[129] Metadata

121. 230 F.R.D. 640, 641 (D. Kan. 2005).

122. *Id.*

123. *Id.* at 642.

124. *Id.*

125. *Id.* at 643.

126. *See id.* at 647 ("To understand the spreadsheet, the user must be able to ascertain the formula within the cell.").

127. Hickman v. Taylor, 329 U.S. 405, 501 (1947).

128. *See Williams*, 230 F.R.D. at 647 ("[M]etadata is the key to showing the relationships between the data.").

129. *See id.* ("[W]ithout such metadata, the tables of data would have little meaning.").

allows a seeking party to connect individuals to particular decisions and ideas, to determine who knew what and when, and how the producing party's position on a specific issue changed over time.[130]

Metadata provides an insight into documents that simply did not exist prior to the information age and the widespread use of computers. The information offered by metadata previously was only accessible in the minds of those individuals or entities that created a document. Before metadata infiltrated discovery, a producing party was not required to account for changes in documents or the absence of documents from production—the document itself was the only evidence by which the court could make a determination.

3. Metadata Serves as a Check on the Producing Party's Compliance

Requiring production of electronic documents in native format and with metadata intact eliminates the temptation for producing parties to alter electronic documents after litigation is underway but before discovery is complete. For example, a producing party required to produce a spreadsheet with smoking gun evidence supporting plaintiff's claim will be unable to delete an incriminating column of information after the party realizes litigation is imminent.

Metadata serves a policing purpose by tracking any alterations[131]—metadata allows a seeking party (and the court) to discover if the producing party has made any changes to the document between the point when the document was created and the time it was produced.[132] A document cannot be modified without that modification being reflected in the metadata.[133] Courts should embrace the benefits offered by metadata instead of looking at them as a hindrance to efficient discovery. To utilize metadata to its fullest extent, courts should craft rules that promote metadata preservation and ensure metadata accessibility during discovery. If for no other reason, metadata production should be required because it guarantees that relevant electronic documents are being produced in their most genuine form. This is a luxury the judiciary

130. *See* Beckham, *supra* note 8, at 13 ("[M]etatdata may reveal the date a certain fact was known, which is crucial in tort and product liability actions.").

131. *Id.* at 2.

132. *See Williams*, 230 F.R.D. at 646 (Metadata reveals "a file's name, a file's location (e.g., directory structure or pathname), file format or file type, file size, file dates (e.g., creation date, date of last modification), and file permissions (e.g., who can read the data, who can write it, who can run it).").

133. *Id.*

should embrace because it allows a check on authenticity of documents unavailable in traditional paper discovery.

4. Requiring Metadata Production Would Ensure Uniformity in the Format in Which Documents Are Produced

The trend toward electronic maintenance of documents is unlikely to change. A broad metadata production requirement would bring uniformity to the issue of production format. There are multiple formats (e.g., TIFF, .pdf, printouts), in which electronic information can be produced, and it is likely that technological developments will result in a greater variety of production formats.

If there was a rebuttable presumption of metadata relevance (and thus a presumptive metadata production requirement under Federal Rule 26), an element of predictability and uniformity would come to the electronic discovery debate. Such uniformity is consistent with Congress' intent of uniformity in the federal courts.[134] Every electronic document contains metadata,[135] and thus a presumptive requirement of metadata production would alleviate or eliminate disputes over how electronic documents may have been manipulated prior to production. With metadata intact, any evidence of document manipulation, regardless of format, will be reflected in the metadata.[136]

B. The Federal Rules of Civil Procedure Justify Requiring Metadata Production

1. The Current Federal Rules of Civil Procedure Require Production of Relevant Information

Metadata behind relevant documents will rarely, if ever, be irrelevant under Rule 26(b)(1).[137] In addition, if the producing party fails to produce relevant metadata upon a seeking party's request, "the court may order discovery of any matter relevant to the subject matter involved in the action."[138] If the court can order discovery of relevant metadata under Rule 26(b)(1), and if the seeking party is aware of the metadata (as

134. G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 666 (7th Cir. 1989) (Ripple, J., dissenting).

135. Beckham, *supra* note 8, at 3.

136. *Id.* at 2; *see also Williams*, 230 F.R.D. at 646.

137. *See supra* Part I.

138. FED. R. CIV. P. 26(b)(1).

they likely will be if requesting electronic documents), then it is logical to require production of metadata for all relevant electronic documents as an initial matter under Federal Rule 26(a)(1)(A)(ii).

If the producing party objects to metadata production on grounds that it was prepared in preparation for trial, the seeking party would still likely be able to obtain the information under Rule 26(b)(3).[139] For example, consider again the spreadsheet in *Williams*. The seeking party wants to discover how a particular value—the value upon which the producing party relied to make its decision about whose employment to terminate—was derived. The seeking party will likely have little difficulty showing "a substantial need of the materials"[140] because the formula potentially presents smoking gun evidence and is necessary to understanding the information on the face of the document. In addition, the formula, because it is peculiar to the cells in the spreadsheet, is unlikely to be obtained by the seeking party "by other means."[141]

The producing party may argue that it is protected under Rule 26(b)(2) and may ask the court to limit the seeking party's request because it is overly burdensome. This argument, however, is flawed. It is more burdensome to remove metadata than it is to produce metadata.[142] Metadata production requires no action aside from production of the electronic document while metadata removal requires scrubbing of metadata—a process that can be time-consuming and expensive[143]—or conversion of electronic documents into ".pdf" or TIFF image files.

A presumption of relevance and required production of metadata would alleviate the judicial uncertainty and time consumption created by Rule 37 motions to compel documents. Granted, the Federal Rules anticipate that parties will not produce relevant information in its mandatory disclosures under Rule 26(a)(1)(B), but a presumption of metadata relevance would result in more uniform metadata production and, ideally, Rule 37 motions to compel would arise less frequently.

---

139. FED. R. CIV. P. 26(b)(3).

140. *Id.*

141. *Id.*

142. Orange County Bar Ass'n Comm. on Professionalism and Ethics, Formal Op. 2005-01 (2006) (discussing duties regarding metadata and filing).

143. *See id.* at 44.

2. The Amended Federal Rules of Civil Procedure Further Substantiate a Rebuttable Presumption of Metadata Relevance

The amendment to Rule 34(b), requiring production "in a form or forms in which [the document] is ordinarily maintained,"[144] strengthens the argument for required metadata production. Metadata accompanies every electronic document, and, unless the producing party has a policy that metadata is destroyed as part of its ordinary maintenance of electronic files, metadata will accompany the production of the electronic document.[145] The amendment allows for agreement between the parties or court order to produce the electronic documents in a form other than which they are ordinarily maintained.[146] This exception grants producing parties sufficient protection if the party is opposed to producing metadata.

The amendment to Rule 37 provides additional protection for producing parties that have a document policy in place whereby metadata is scrubbed or certain types of documents are destroyed altogether.[147] Consequently, parties involved in litigation can protect themselves with the institution of a policy under which metadata is routinely scrubbed. The amendment does not, however, protect parties from improper spoliation of electronic information.[148]

The amended Rule 37 will only serve the goal of broad discovery if courts interpret the protection for document destruction policies narrowly, that is, if document retention polices are scrutinized. The "good-faith"[149] requirement should be read to include not only the implementation of the policy, but also the creation of the policy. For instance, if a party's policy is to scrub metadata from every document produced, that policy should be void on its face. Scrubbing metadata is an arduous task—as producing parties will argue when they are asked to redact privileged information from a large volume of documents—and a policy of metadata scrubbing can serve little purpose other than to hinder any opponent who seeks metadata during discovery.

There are bound to be instances when relevant documents are destroyed pursuant to a legitimate document destruction policy. When determining whether to issue sanctions for spoliation, the court should

144. FED. R. CIV. P. 34(b).
145. *See* Beckham, *supra* note 8, at 3–4.
146. FED. R. CIV. P. 34(b).
147. *See* FED. R. CIV. P. 37; Larsen, *supra* note 58, at 219.
148. *See* Larsen, *supra* note 58, at 220.
149. FED. R. CIV. P. 37.

engage in a two-step process: (1) whether the policy was created in good faith; and (2) whether the destruction was consistent with the policy. Courts will have to make this determination on a case-by-case basis. In making this determination, courts should consider factors such as the party's rationale for its policy, the percentage of relevant documents that have been destroyed, the likelihood that the destroyed information could potentially have been relevant in litigation (for example, if the producing party in *Williams* had destroyed the spreadsheet containing the formula it used to fire a category of employees), and whether the party consulted an information technology specialist in its drafting of the policy (to ensure that an expert took part in the creation of the policy).[150] If the case-by-case approach results in inconsistency, it may be advisable to include in the Federal Rules of Civil Procedure a rule requiring metadata preservation.

C. Stricter Rules for Metadata Production and Preservation Are Necessary

Stricter rules for metadata production and preservation are necessary. A soft rule on metadata production will have adverse effects on litigation. Forgiving metadata production because of inconvenience to the producing party will create inconsistency and inequity. Additionally, courts should avoid granting great deference to document destruction policies, interpreting the amendment to Rule 37 narrowly. Plenty of existing rules are sufficient to protect the interest of producing parties, and in fact, presuming the relevance of metadata has its benefits for producing parties.

1. A Rule Soft on Metadata Production Has Adverse Effects on Litigation

Sedona Principle 12, which the *Williams* court referenced extensively in its opinion, is too soft on producing parties because it allows them to make the determination of whether metadata is material to resolving the dispute.[151] There are two problems inherent in this approach: (1) the producing party has an incentive to determine particular metadata is irrelevant if it is damaging to its case; and (2) if the producing party makes a determination of irrelevance and scrubs the

150. *See* Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 433–34 (S.D.N.Y. 2004).

151. THE SEDONA CONFERENCE July 2005, *supra* note 16, at i.

metadata, and it later turns out the scrubbed metadata is relevant, it might be too late if the party permanently erased the metadata. If left up to the producing party to decide, the producing party will rarely "know" metadata supporting the opponent's case is relevant to the dispute.[152] When a party must choose between not producing a potentially damaging document or producing the document in its native format, with metadata intact, parties will almost certainly choose the former. Such abuse can be countered with sanctions, but sanctions will not compensate the propounding party (or the court, for that matter) for frustration and time lost squabbling over the party's failure to produce relevant metadata.[153] In addition, if, as is consistent with Sedona Principle 12, the producing party has unilaterally determined that metadata is not "material to resolving the dispute," the producing party will have already scrubbed the metadata or taken the time to convert the files from native format to image files. If the court determines the missing metadata is in fact relevant to the dispute, the producing party will be forced to reproduce the electronic document in native format with metadata intact[154] (if the metadata has not already been destroyed) and the time and effort the producing party invested in converting the documents will have been wasted.

Metadata, because it is so closely related to the information visible on the face of the electronic document, will rarely be irrelevant when the document itself is relevant. Therefore, a better approach is to simply presume metadata relevance, allow the producing party to redact privileged information from the metadata, and then have the producing party produce all the remaining metadata and allow the seeking party to sift through the data and determine metadata relevance for itself. Sedona Principle 12 fails to take into account the reality that if an electronic document is relevant, the document's metadata is (in all but very rare circumstances) relevant by default.[155] For example, even with a word processing document, for which metadata is "usually not critical to understanding the substance of the document,"[156] metadata, if nothing else, allows the seeking to party to discover if the producing party has altered the document in any way between the time it was created and the time it was produced. The argument for presumptive relevance of

152. *Id.* at 47.

153. *See supra* Part III.E.1.

154. CP Solutions PTE, Ltd. v. Gen. Elec. Co., No. 3:04cv2150(JBA)(WIG), 2006 WL 1272615, at *4 (D. Conn. Feb. 6, 2006).

155. *E.g.*, *id.*

156. Williams v. Sprint/United Mgmt. Co., 230 F.R.D. 640, 647 (D. Kan. 2005).

metadata is even stronger for spreadsheets and databases, because without metadata these types of documents are "a completely undifferentiated mass of tables of data."[157]

2. A Rule Forgiving Metadata Production Because of Inconvenience to the Producing Party Results in Inconsistency and Inequity

The *CP Solutions PTE, Ltd. v. General Electric Co.* court excused metadata production because of the large volume of information at issue.[158] The court excused a party from producing metadata related to email documents because it would have been too burdensome for the party to redact privileged information from the mass of emails.[159] This rule sets a precedent extremely unfair to seeking parties: metadata production may not be required if there is a large amount of relevant electronic information that is difficult to produce because of the producing party's own technology errors. This rule essentially excuses large corporations from producing metadata because it simply would take too much time and expense to properly prepare the information for production. The ultimate result is that a stricter rule is in place for parties in cases where there is not a huge volume of relevant electronic information. Granted, this holding may entice seeking parties to more carefully articulate their discovery requests, but it is hardly in the spirit of broad discovery.[160]

Federal Rule 26(b)(2)(iii) allows the court to limit discovery if the burden outweighs the benefit,[161] but, at least in the case of emails, rarely will the date of the message, the recipients of the message, or the author of the message not be beneficial. Furthermore, there is no burden in producing metadata beyond the necessary burden incurred by producing required electronic documents. There is, of course, the burden of examining the metadata and redacting privileged information, but it is unlikely that metadata will contain privileged information when the email itself does not. This fact would expedite the process and decrease the burden on the producing party, making a limitation by the court less necessary and less likely.

Requiring frequent judicial determination of the burden of metadata production will create inconsistencies potentially harmful to seeking

157. *Id.*
158. No. 3:04cv2150(JBA)(WIG), 2006 WL 1272615, at *3–4 (D. Conn. Feb. 6, 2006).
159. *Id.*
160. Codd v. Velger, 429 U.S. 624, 638 (1977).
161. FED. R. CIV. P. 26(b)(2)(ii).

parties. Unfairness to seeking parties can result in two ways: (1) different courts will have different views on what constitutes undue burden, and (2) parties frequently involved in litigation have an incentive to make metadata retrieval difficult (this would require that the producing party even has access to the metadata because in order to create any metadata retrieval burden, the producing party must have taken measures to separate the metadata from the document). No burden exists, of course, if the metadata was never scrubbed or otherwise separated from the electronic document. The court in *In re Verisign* recognized this reality.[162] The producing party argued that it would be too burdensome to produce documents in their native format after it had scrubbed metadata and converted the documents to an image format.[163] The court penalized the producing party by ordering it to produce relevant documents in native format with metadata intact.[164]

3. Courts Should Interpret the Amendment to Rule 37 Narrowly and Not Grant Great Deference to Document Destruction Policies

The amendment to Rule 37 protects producing parties who fail to produce information as a result of good-faith adherence to a document destruction policy,[165] but good-faith operation of an extremely pro-destructive policy has the same result for the seeking party as intentional destruction. Once again, like the judicial decisions, no measure is in place to evaluate a party's destruction policy. If the amendment to Rule 37 is to have a fair effect on parties involved in electronic discovery, the Rule must set forth how courts should evaluate the producing party's document destruction policy. Even then, it may be too late for the seeking party as the document or metadata may have been permanently deleted.

The perfect rule would allow for evaluation of every document retention/destruction policy in existence—even before litigation has begun or is reasonably foreseeable. This is not feasible for obvious

162. *In re* Verisign, Inc. Sec. Litig., No. C 02-02270 JW, 2004 WL 2445243, at *3 (N.D. Cal. Mar. 10, 2004).

163. *Id.* at *2.

164. *Id.* at *3.

165. *See* Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure, at 33, Sept. 2005, (Proposed amendment 37(f) "states that absent exceptional circumstances, sanctions may not be imposed under the civil rules if electronically stored information sought in discovery has been lost as a result of the routine operation of an electronic information system, as long as that operation is in good faith."), *available at* http://www.uscourts.gov/rules/Reports/ST09-2005.pdf.

reasons. However, this result could be manipulated by the threat and use of harsh sanctions for parties, once their policies are reviewable during the discovery process, that have instituted destruction policies that call for destruction of all or virtually all potentially relevant electronic information.

The courts in *Arthur Andersen*[166] and *Hynix Semiconductor*[167] put a great deal of power in the hands of producing parties by yielding to document destruction policies.[168] The potential left open for abuse reveals a need for courts to be wary of and closely scrutinize a producing party's document retention or destruction policy. By honoring preexisting document destruction policies, and by not placing any limits on such policies, courts are encouraging entities frequently involved in litigation to create extremely pro-destruction document destruction policies. Parties will always be able to assert that the policy was in place prior to the point at which litigation was reasonably foreseeable as a defense. Such a result could hardly be said to serve the ends of justice. To protect against such abuse, courts should back off *Arthur Andersen*-like protection for producing parties involved in electronic discovery. The *Hynix Semiconductor* court recognized as much when it included a caveat in its holding saying that its honoring of the producing party's document policy by no means meant that such policies will be honored de facto.[169]

As a general rule, the amendments to the Federal Rules of Civil Procedure are consistent with preexisting case law. The amended Rule 37 is consistent with the holdings in *Arthur Andersen* and *Hynix Semiconductor* in its honoring of a party's document retention/destruction policy. The amendment to Rule 34(a), explicitly including "electronically stored information" in the definition of a document, is consistent with the *Williams* court's reading of current Rule 34 (as it should be because the *Williams* court relied on the proposed amendments).[170] The *Williams* court's rule requiring a party to produce electronic information in the format in which it is ordinarily maintained is also consistent with the amendment to Rule 34(b).

166. 544 U.S. 696 (2005).

167. No. C-00-20905 RMW, 2006 WL 565893 (N.D. Cal. Jan. 4, 2006).

168. *See supra* Part II.D.2.

169. *See* 2006 WL 565893, at *25 ("The court concludes that Rambus did not engage in unlawful spoliation of evidence . . . . The implementation of a document retention policy . . . intentionally designed to discard damaging documents . . . would be improper.").

170. Williams v. Sprint/United Mgmt. Co., 230 F.R.D. 640, 649 (D. Kan. 2005).

4. Traditional Tactics Available to Producing Parties are Sufficient to Protect Their Interests

The requirement of native-format metadata production is not as one-sided as the defense bar might argue. For instance, the holding in *Williams* does not require a party to produce metadata "unless the producing party is aware or should reasonably be aware that particular metadata is relevant."[171] In other words, the *Williams* rule is not a blanket metadata requirement. In addition, the *Williams* rule explicitly allows for a producing party to lodge an objection to the production of metadata.[172] The rule is far from onerous or unwieldy for producing parties.

The producing party can, under Rule 34(b), object to production of metadata, and, if the court finds merit in the objection, the producing party can scrub the metadata making it unavailable to the propounding party. There is no reason to believe Rule 34 objections will fail to protect adequately parties objecting to metadata production when it has, by all accounts, protected producing parties objecting to production of paper documents.

The producing party also has the option of redacting privileged information. Parties can redact information if it is protected by the attorney-client privilege[173] or the work product privilege.[174] Although the court can limit requests under Rule 26(b)(2),[175] it is difficult to reconcile the decision in *CP Solutions*—forgiving non-native format production because to redact privileged information from the documents in native format would have been too burdensome because it had already converted the documents into image format[176]—with Rule 26(b)(1), which allows "discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party."[177]

171. *Id.* at 651.

172. *Id.*

173. The attorney-client privilege applies (1) where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived. JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 2292 (John T. McNaughton ed., 1961).

174. FED. R. CIV. P. 26(b)(3).

175. *See supra* Part II.B.1.

176. CP Solutions PTE, Ltd. v. Gen. Elec. Co., No. 3:04cv2150(JBA)(WIG), 2006 WL 1272615, at *4 (D. Conn. Feb. 6, 2006).

177. FED. R. CIV. P. 26(b)(1).

Beyond these protections, a producing party should have nothing to hide in metadata. Before a court allows the party to produce in a format other than the native format because of convenience, the court should at least consider cost-shifting—that is, put the risk on the propounding party that if nothing in the documents it seeks to compel is relevant, then the court can impose the costs of document production on the propounding party.[178]

Defenders of producing parties will likely argue that if producing parties are required to produce metadata in every instance, the defendant, like the defendant in *CP Solutions*, will have to go through a tedious, time-consuming process every time a plaintiff brings a suit against them. However, there is a solution that can ease the life of parties frequently involved in litigation: maintain documents in the form in which they are kept in the ordinary course of business, in native format, with metadata intact, and there will be no issue with reverting image files back into native format.

5. A Rebuttable Presumption of Metadata Relevance Is Not a One-Sided Rule

Parties frequently involved in litigation, and thus frequent recipients of discovery requests, might ask how a presumption of metadata relevance benefits them. After all, the party would be forced to preserve electronic information that could potentially serve as smoking gun evidence against it. This is a valid argument presuming the producing party is guilty as charged by the seeking party. However, the frequent litigant would be spared the uncertainty of how to produce electronic documents once discovery commences. Further, a rule presuming metadata relevance—or any rule requiring frequent litigants to maintain documents of potential evidentiary value—serves as a deterrent to engage in illegal activities.

178. *See* Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 320 (S.D.N.Y. 2003) (holding that cost-shifting is to be considered when electronic discovery imposes an undue burden or expense on the responding party).

D. The Greater Evidentiary Value of Metadata Compared to its Paper Discovery Equivalent Justifies a Stricter Rule for Electronic Discovery

Opponents to requisite metadata disclosure might argue that parties are not required to produce any paper analog to metadata. Before addressing this concern, it must first be determined what traditional discovery material is analog to metadata. Previous drafts of paper documents provide some, but not all of the information contained in metadata. For example, if the final draft of a paper document lists no author, it is unlikely that any previous version will list an author. Likewise, for a spreadsheet listing values derived from a formula computed on a calculator, there was unlikely any record of the calculator computation. Previous drafts would, however, enable the seeking party to compare the final draft and discover which changes have been made along the way, although not by whom. Unlike the track changes mechanism in metadata, which lingers behind the electronic document, previous drafts of documents are typically destroyed or discarded and lost forever.

The difference with a requirement of previous draft production and metadata production lies primarily in organization and searchability. With electronic discovery, the seeking party need not look at metadata at all—the distinction between the actual document and metadata is clear. Actual text and metadata are easily separable. With previous drafts in traditional paper discovery, unless the court requires the producing party to neatly organize all paperwork and group together all final drafts with previous attempts, the seeking party is required to page through what could amount to stacks of documents in order to find the relevant documents among many drafts. The likelihood of such an order is slim because of the immense burden it would impose on producing parties.

Requiring production of electronic documents in native format and with metadata intact—with a presumption of metadata relevance—actually relieves the producing party of costly and time-consuming preparatory work.[179] If a strict metadata production rule were instituted and parties understood that metadata was presumed relevant, producing parties would actually be prohibited from the tedious process of converting native format files into ".pdf" or similar image format.

179. *See In re* Verisign, Inc. Sec. Litig., No. C 02-02270 JW, 2004 WL 2445243, at *3 (N.D. Cal. Mar. 10, 2004) (holding that the burden of producing documents in their native format is a question of fact).

Producing parties will only be obligated to redact privileged information and can produce the responsive documents in a tidy electronic media format.

E. A Rebuttable Presumption of Metadata Relevance Promotes Good Lawyering

Finally, a rebuttable presumption of metadata production will promote good lawyering. Sanctioning electronic discovery violations will ensure that lawyers and their clients comply with the Federal Rules of Civil Procedure. Further, requiring metadata production will force attorneys to become competent regarding metadata.

1. Sanctions for Electronic Discovery Violations Would Help to Ensure Compliance with the Federal Rules

In order to encourage metadata preservation and ultimate production, courts must impose stiff sanctions on parties who willfully spoliate metadata after the point at which litigation is reasonably foreseeable. Courts have developed a list of sanctions to be levied against parties abusing electronic discovery, including granting the seeking party direct access to the producing party's electronic files,[180] cost-shifting,[181] payment of costs incurred as a result of late production,[182] and an adverse inference instruction if a producing party willfully spoliates evidence.[183] The court can also sanction a violating party by precluding the violating party from using information contained in electronic documents it failed to produce in a timely manner[184] and can even dismiss the case with prejudice if the violating party is sufficiently culpable.[185] The severity of these sanctions is enough of a stick to encourage producing parties to comply with electronic discovery guidelines. By consistently imposing sanctions, courts can promote consistent production of metadata and the benefits that accompany its production.

---

180. *See In re* Ford Motor Co., 345 F.3d 1315, 1317 (11th Cir. 2003) (vacating the district court's decision to allow direct access to electronic files but noting such access "might be permissible in certain cases").

181. Zubulake v. UBS Warburg LLC (*Zubulake I*), 217 F.R.D. 309, 316–18 (S.D.N.Y. 2003).

182. Zubulake v. UBS Warburg LLC (*Zubulake V*), 229 F.R.D. 422, 437 (S.D.N.Y. 2004).

183. *Id.*

184. Thompson v. Dep't of Hous. & Urban Dev., 219 F.R.D. 93, 104–05 (D. Md. 2003).

185. *See* Procter & Gamble Co. v. Haugen, 427 F.3d 727, 736 (10th Cir. 2005) (reversing the district court because there was insufficient culpability to justify the sanction of dismissal).

The cost-shifting sanction available to courts is an adequate check on the seeking party's requests. A seeking party is unlikely to abuse its Rule 34 document request privileges with the looming specter of paying discovery costs. If the seeking party has satisfied the first factor laid out by the *Zubulake* court (specifically tailored request),[186] then the producing party should have no objection to producing the relevant electronic document.

2. Requiring Metadata Production Will Force Attorneys to Become Competent Regarding Metadata

The metadata production requirement forces parties to be aware that metadata exists. The amendment to Rule 34(a) provides incentive for an attorney to understand the advantages offered by metadata discovery, because the amended Rules will recognize electronically stored information as a "document." Furthermore, Model Rule of Professional Conduct 1.1 requires an attorney to be competent in her representation of his or her client: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[187] Courts have heightened expectations for attorneys involved in electronic discovery, including no longer accepting technical ignorance as an excuse for incompetence regarding electronic discovery.[188] An attorney must also ensure his or her client is adhering to its document retention policy.[189] As a result, attorneys on both sides of discovery need to be aware of the existence and contents of electronically stored information to competently represent their respective clients and be in compliance with the Federal Rules (for the attorney representing the producing party).

If courts are lenient with attorneys who are, out of ignorance of the rules or a lack of understanding of the significance of metadata, incompetent regarding electronic discovery, great inequity and inconsistency would result. Attorneys and their clients could feign ignorance and "accidentally" delete critical documents without the fear

186. *Zubulake I*, 217 F.R.D. at 324.

187. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2005).

188. *See* Metro. Opera Ass'n v. Local 100, Hotel Employees & Rest. Employees Int'l Union, 212 F.R.D. 178, 181 (S.D.N.Y. 2003) (noting that, among other actions, the attorney failed to explain to a non-lawyer that a "document" for the purposes of discovery encompasses documents in electronic form), *aff'd on reh'g*, No. 00 Civ. 3613(LAP), 2004 WL 943099 (S.D.N.Y. Aug. 27, 2004).

189. *Zubulake V*, 229 F.R.D. 422, 431–32 (S.D.N.Y. 2004).

of significant sanctions. In the absence of competency-forcing consequences, attorneys have little incentive to become versed in electronic discovery matters and would thus be doing their client a disservice and potentially making false representations to the court in violation of Model Rule of Professional Conduct 3.3.[190] Competence must be prodded through a broad metadata production requirement—a presumption of metadata relevance—coupled with significant sanctions for failure to adhere to the rules.

Furthermore, if parties are aware of the existence of metadata, they are more likely to review the metadata for privileged information and are thus less likely to inadvertently disclose privileged information. As a result, courts will not be required to confront the frustrating issue of inadvertent disclosure.

"[E]lectronic communications are no less deserving of privileged status than verbal or paper communications."[191] Inadvertent disclosure of confidential or privileged material is inevitable as a consequence of the sheer volume of electronic documents in cases with discoverable electronic information.[192] Inadvertent disclosure is especially problematic with metadata because many attorneys are unaware that potentially privileged information contained in metadata is not visible on the face of the document.[193] Courts are divided on how to handle inadvertent disclosure, and inconsistency plagues the courts.[194] Three approaches used by courts include (1) strict liability,[195] (2) intent-required,[196] and (3) case-by-case multi-factor analysis.[197] Under the strict liability approach, "once a communication has been disclosed to a third party it is . . . no longer confidential."[198] Under the intent-required approach, "privilege can only intentionally be waived."[199] Finally, under the case-by-case multi-factor analysis, factors such as precautions taken, delay between disclosure and attempts at rectification, and the extent of

190. Model Rule 3.3(a) states "[a] lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal . . . ." MODEL RULES OF PROF'L CONDUCT R. 3.3(a) (2005).

191. Danna, *supra* note 47, at 1693.

192. Kiker, *supra* note 2, at ¶ 1.

193. *See id.*

194. *Id.* at ¶ 8.

195. *Id.* at ¶¶ 9–12.

196. *Id.* at ¶¶ 13–14.

197. *Id.* at ¶¶ 15–20.

198. *Id.* at ¶ 9.

199. *Id.* at ¶ 13.

the disclosure are used to determine whether inadvertent disclosure waives privilege.[200]

The inadvertent disclosure debacle could be made uniform—in addition to becoming a less frequent occurrence—if a minimum level of attorney competence was required. Strict liability would be a fair approach because if courts could safely presume attorneys are competent regarding metadata, constructive knowledge will be imputed to attorneys involved in electronic discovery and any disclosure of confidential information disclosed via metadata will be deemed to have waived the privilege. The legal fiction that parties will not use information inadvertently disclosed can be avoided altogether.

IV. CONCLUSION

The emergence of electronic discovery and metadata in particular, has forced courts to apply the discovery rules contained in the Federal Rules of Civil Procedure to an entirely different category of information. Prior to the institution of the amended Federal Rules, courts generally required metadata production with certain exceptions.[201] In so doing, courts have taken a step in the right direction, but are not taking full advantage of the evidentiary benefits offered by metadata.

Metadata serves as a watchdog on a producing party, tracking the party's every move as it relates to that document. A party is required to produce metadata if it "knows or should reasonably know that particular metadata is relevant to the dispute."[202] Otherwise, the burden is on the seeking party to establish the relevance of particular metadata it is seeking. If the burden were shifted to the producing party—if metadata were presumed relevant—the frequent problems of spoliation and inaccessibility would be alleviated.

A metadata production requirement would provide the court with a more complete record on which to decide a case.[203] If metadata is presumed relevant, attorneys would be forced to become competent regarding electronic discovery and would be in a better position to represent their clients. Finally, a rule requiring that evidence-rich metadata be produced is consistent with the intent of the Federal Rules of Civil Procedure to promote broad discovery and provide parties "the

200. *Id.* at ¶ 15.
201. *See supra* Part II.C.
202. THE SEDONA CONFERENCE July 2005, *supra* note 16, at 47.
203. *See supra* Part II.A.

fullest possible knowledge of the issues and facts" as they prepare for trial.[204]

204. Hickman v. Taylor, 329 U.S. 495, 501 (1947).