

THE ETHICAL DILEMMA OF SCRUBBING METADATA: THE PATHWAY TO A BETTER APPROACH

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I. INTRODUCTION

Imagine, you are an attorney in the process of an ongoing litigation and you receive a request from opposing counsel for a Microsoft Excel spreadsheet that contains the formulae, which your client company uses for Human Resource purposes, to determine who will be fired.¹ If opposing counsel discovers the formulae it could be damaging for your client and your case.² However, at the same time you are ethically required to disclose the document in the form that the requesting party designates.³ Is it ethical for you to scrub⁴ the formulae out of the document? Or can you convert it to a PDF or TIFF⁵ file, making the formulae unavailable to the opposing counsel?

As the scope of technology rapidly expands, many procedural issues puzzle attorneys and courts alike. Some of these uncertainties have been answered by the Supreme Court, as a result of the promulgation of new rules in the Federal Rules of Civil Procedure governing electronic discovery. However, the litigation world is still spinning in an effort to adjust to the new requirements of the electronic discovery rules. In particular, attorneys have been struggling with the scope and depth of the requirements of the new rules, leaving attorneys unclear of what to expect when litigation involves electronic discovery. Specifically, there is vagueness surrounding the controversial issue of the discoverability of metadata of documents and its applicability to the Federal Rules of Civil Procedure. As a result of inconsistencies in the application of Federal Rule of

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1. See *Williams v. Sprint*, 230 F.R.D. 640, 642-44 (D. Kan. 2005).

2. *Id.*

3. FED. R. CIV. P. 34(b)(1)(C), *in* FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES 192 (Thomson West 2008) (stating that a party “may specify the form or forms in which electronically stored information is to be produced”).

4. See generally Richard N. Lettieri, *What is Metadata Scrubbing, and is it Good for Business?*, EXECUTIVE COUNSEL, July-Aug. 2006, at 57, 59 (“Metadata scrubbing software allows a company to set guidelines for which metadata fields can leave the company, thus preventing access to proprietary information...that may compromise corporate positions.”).

5. See generally Jima Anne Kato, *The Brave New World of Electronic Discovery and Document Management*, 49 ORANGE COUNTY LAWYER MAGAZINE 6, 10 (Mar. 2007) (describing forms of production, TIFF files are Tagged Image File Format which are static images that cannot be altered. Generally, this format gives the producing party greater control over what metadata fields are being produced and what information is being exposed).

Civil Procedure 34, many attorneys continue to struggle with the ethics of scrubbing metadata from discovery documents. Generally, attorneys strive to protect their client's interest, but also want to avoid sanctions for violating the Federal Rules of Civil Procedure.

This article argues for a better approach to the application of Federal Rule of Civil Procedure 34 to accommodate for the discrepancies in its application among courts, as well as compliance with the procedural requirements. In Part III, this article will closely examine the differences in the contrary holdings in recent court decisions and the depth of the discrepancies. First, this article will discuss the effect of shifting the burden to request for the inclusion or exclusion of metadata. Second, this article will examine the differences in the courts' definition of a "reasonably usable" form. Third, this article will suggest appropriate instances in which scrubbing metadata will be feasible based on the recent court holdings. Finally, in Part IV, this article will analyze the useful and problematic aspects of recent holdings and argue for a better approach of the application of Rule 34 to the production of metadata.

II. BACKGROUND

A. *E-Discovery Changes in Federal Rules of Civil Procedure*

As a result of the emergence of electronic discovery, which has affected litigation across the United States, the Supreme Court promulgated new Rules of Civil Procedure for all federal courts to follow in an attempt to address the issues surrounding electronic discovery.⁶ On December 1, 2006, these newly established rules were put into effect by means of Rules 16, 26, 33, 34, 37, and 45.⁷ The significant changes in electronic discovery are reflected primarily in Rule 26, Rule 34, and Rule 37.

Rule 26 generally outlines the provisions governing discovery as well as the scope and limits of discovery.⁸ Rule 26 contains specific directions to attorneys regarding the discussion of any issue relating to preserving discoverable information and the duties surrounding the preservation of electronic information.⁹ Rule 34 includes alterations surrounding the rules governing the production of electronically stored information, ultimately allowing electronically stored information, including recordings, images, and data compilation stored in any medium, to be accessible in the discovery process.¹⁰ Additionally, Rule 34 outlines the procedure by which electronic information

6. See RAPH C. LOSEY, *E-DISCOVERY CURRENT TRENDS AND CASES 2* (2008).

7. *Id.* at 77-78.

8. See FED R. CIV. P. 26, *supra* note 3, at 143-48.

9. GEORGE L. PAUL & BRUCE H. NEARON, *THE DISCOVERY REVOLUTION: E-DISCOVERY AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE 19-20* (2006).

10. *Id.* at 13-16.

can be requested, allowing the opposing party to request a specific form in which it wants the electronically stored information, which includes Microsoft Word format, PDF, or TIFF.¹¹

In response to the above modifications, the Supreme Court created consequences for failure to comply with the new rules in Rule 37, which outline the sanctions for failure to make disclosures and cooperate in discovery.¹² Rule 37 states that, “[a]bsent 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.”¹³ Therefore, by maintaining electronic discovery in good faith, sanctions will not be imposed, accounting for the Advisory Committee’s concern with inappropriate use of sanctions where a litigant or her counsel might be powerless to stop spoliation of evidence.¹⁴

The most pertinent changes relevant to this article are those surrounding embedded metadata reflected in Rule 34(b)(2)(E)(i), which specifically state that, “[a] party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request[.]”¹⁵ The rule requires the responding party to identify the form in which it intends to produce the information if the requesting party does not specify a form or if the responding party objects to a form that the requesting party specifies.¹⁶ The rule also provides that, in absence of a party agreement or court order, the responding party must produce electronically stored information either in a form or forms which it is ordinarily maintained or in a form or forms that are reasonably usable.¹⁷ The application of the above named revision has left a slight uncertainty regarding the discoverability of metadata and the definition of “reasonably usable” form.

B. What is Metadata?

“Metadata literally means ‘data about data,’” and is defined as information about a particular data set or document that describes how, when and by whom it was collected, created, accessed, modified and how it is formatted.¹⁸ Some metadata can be seen easily by users, such as file dates and file sizes, while other metadata can be hidden or embedded, such as deleted comments or references to

11. *Id.*

12. FED. R. CIV. P. 37, *supra* note 3, at 201-03.

13. FED. R. CIV. P. 37(e), *supra* note 3, at 203.

14. *Id.*

15. FED. R. CIV. P. 34(b)(2)(E)(i), *supra* note 3, at 192.

16. Barbara J. Roth, Ronald J. Hedges, & Elizabeth C. Wiggins, *Managing Discovery of Electronic Information: A Pocket Guide for Judges*, FED. JUD. CENTER 13-14 (2007).

17. *Id.*

18. LOSEY, *supra* note 6, at 157.

prior drafts.¹⁹ Metadata is generally not reproduced in full form when a document is in printed format.²⁰ For example, in an email document there is information regarding the author, creation date, attachment, and identities of all recipients, including blind copy recipients.²¹

This information that is not easily seen by users is called “embedded” information and courts often refer to such information as metadata.²² However, “embedded” information is not true metadata, because it is information within a file, rather than information about data.²³ This “embedded” information is not visible without a command, and often, there is software by which one can instruct a program to reveal the hidden information, which is referred to as “mining.”²⁴ An example of embedded metadata would be the “Comments” feature in a Word document through which comments can be inserted in the document but remain invisible until you use the command to view the comments.²⁵ Another pertinent example is the formulae a user creates in an Excel or spreadsheet document; the math used in the formulae is embedded in the file itself.²⁶

As a result of possible confidential information being embedded in a file, many attorneys have turned to methods to clean, or “scrub,”²⁷ documents of embedded, hidden data.²⁸ However, if a document is subject to discovery there is concern with the format in which the document must be produced.²⁹ As stated above, the amended Federal Rule of Civil Procedure 34(b) permits a requesting party to specify the format in which it would like electronically stored information to be produced.³⁰ Accordingly, the issue arises concerning the application of Rule 34 to metadata and whether it is ethical to scrub documents prior to disclosure.

C. Application of Rule 34

The applicability of Rule 34 to embedded metadata has been mixed among the courts as to whether the Rule 34 encompasses the production of metadata and

19. THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION, Principle 12, Cmt. 12a, 185-86 (Jonathan M. Redgrave et al. eds., BNA Books 2d ed. 2007).

20. *Id.* at 189.

21. *See* LOSEY, *supra* note 6, at 157-58.

22. *Id.* at 158.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *See* Lettieri, *supra* note 4, at 59.

28. Eileen B. Libby, *What Lurks Within: Hidden Metadata in Electronic Documents Can Win or Lose Your Case*, A.B.A. CTR. FOR PROF'L RESP. (April 2007), http://abanet.org/cpr/about/Hidden_Metadata.html.

29. *Id.*

30. *Id.*

the form that is required. In *Williams v. Sprint/United Management Co.*, terminated employees brought a class action against their employer. In the process of discovery, the requesting party asked for Excel spreadsheets with all metadata intact including the embedded formulae.³¹ This court held that under “emerging standards of electronic discovery,” metadata ordinarily visible to users of Excel spreadsheets “should presumptively be treated as part of the ‘document’ and should thus be discoverable.”³²

In the process of reviewing the case, the court examined the *Sedona Principles for Electronic Discovery Document Production*, primarily Rule 12, which provides that “unless it is material to resolving the dispute, there is no obligation to preserve and product metadata absent agreement of the parties or order of the court.”³³ The Sedona Principle commentary also set forth an important caveat that “[o]f course, if the producing party knows or should reasonably know that particular metadata is relevant to the dispute, it should be produced.”³⁴ The court accepted Sedona Principle 12 and the commentary concerning the important part of the “emerging standard,” but the court held that the defendant should have known that the requested spreadsheet was material to the litigation.³⁵

Ultimately, the court held that the producing party should generate the electronic documents with their metadata intact, unless that party timely objects to production of metadata, the parties agree that it should not be produced, or the producing party requests a protective order.³⁶ The court asserted that metadata is an inherent part of an electronic document, and its removal ordinarily requires an affirmative act to alter it.³⁷

On the other end of the spectrum, the United States District Court of Delaware in *Wyeth v. Impax Laboratories, Inc.* reached the opposite conclusion of *Williams* and disallowed the production of native format.³⁸ This court refused to require metadata production.³⁹ The court relied primarily on the requesting party’s failure to ask for metadata prior to production as well as the jurisdiction’s local rules that make TIFF and JPEG the default format of production.⁴⁰ Thus, the court applied Rule 34(b) limiting production requirements to one format.⁴¹ Further, the *Wyeth* court noted that the defendant complied with the rules of

31. *Williams v. Sprint*, 230 F.R.D. 640, 640-41 (D. Kan. 2005).

32. *Id.* at 652.

33. *Id.* at 650 (citing THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION, Principle 12 (July 2005), http://www.thesedonaconference.org/dltForm?did=7_05TSP.pdf).

34. See LOSEY, *supra* note 6, at 159.

35. *Williams*, 230 F.R.D. at 653.

36. *Id.* at 652.

37. *Id.*

38. *Wyeth v. Impax Lab., Inc.*, 248 F.R.D. 169, 169 (D. Del. 2006).

39. *Id.* at 171.

40. *Id.*

41. *Id.*

production, as it was not foreseeable to produce the requested metadata and the plaintiff failed to demonstrate a particular need for the metadata production.⁴²

Moreover, the court in *Kentucky Speedway v. NASCAR* explicitly rejected *Williams v. Sprint/United Management Co.*⁴³ In this antitrust case against NASCAR, the defendant had already spent over \$3 million in five months responding to e-discovery requests.⁴⁴ The plaintiff requested the production of metadata, which had been previously produced.⁴⁵ This court rejected *Williams*, holding that, “[i]n the rapidly evolving world of electronic discovery, the holding of the *Williams* case is not persuasive.”⁴⁶ The court disagreed with the *Williams* court conclusion that a producing party should be required to produce a document with metadata intact unless it timely objects, agrees to not produce it, or requests a protective order.⁴⁷ The court came to the conclusion that in this specific case, the request from the plaintiff was too late and that the production would be far too burdensome on the defendant.⁴⁸ The effect of this decision is that when metadata production will create a substantial burden on the producing party, the requesting party will have to provide good cause.⁴⁹ The court rejected the holding in *Williams* and ultimately created the effect of shifting the burden of production of metadata. As opposed to requiring the producing party to show an undue burden or object to the production as in *Williams*, this court shifted the burden to the requesting party to show good cause.⁵⁰ The importance of this decision is the requisite for a balancing test between the parties and added a dimension of the debatable feasibility of redacting privileged materials of a native file.⁵¹

However, in the latest decision regarding the production of metadata, *In re Payment Card Interchange Fee*, the court’s decision is a combination of the cases above. This case is similar to the facts of *Kentucky Speedway*, in which defendants sought the production of metadata for documents which had previously been produced without metadata.⁵² The court in *In re Payment Card Interchange Fee* held that that the defendants waited too long to complain of the metadata-stripped production and ultimately this implied a waiver.⁵³ The effect of this case is that in order to obtain metadata, a party needs to request it in the

42. *Id.*

43. *Kentucky Speedway, LLC v. NASCAR, Inc.*, No. 05-138-WOB, 2006 U.S. Dist. LEXIS 92028, at *21-22 (E.D. Ky. Dec. 18, 2006).

44. *Id.* at *15.

45. *Id.* at *22.

46. *Id.*

47. *Id.* (citing *Williams v. Sprint*, 230 F.R.D. 640, 646 (D. Kan. 2005)).

48. *Id.* at *23.

49. *Kentucky Speedway*, 2006 U.S. Dist. LEXIS 92028, at *23.

50. See LOSEY, *supra* note 6, at 164.

51. *Id.*

52. *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, MD 05-1720, 2007 U.S. Dist. LEXIS 2650, at *5-6 (E.D.N.Y. Jan. 12, 2007).

53. *Id.* at *12-14.

beginning of the discovery process and, if it later receives a stripped production, then immediately object.⁵⁴ The holding of this case follows *Williams* to a certain extent by ordering future production by the plaintiff to include metadata.⁵⁵ Yet, the court relies primarily on the 2006 amendment to Rule 34(b) which states that a party responding to discovery request may elect to produce a “reasonably usable form” of electronic data rather than produce information as kept in the ordinary course of business.⁵⁶ However, the “reasonably usable form” of data should not be produced in a form that removes or significantly degrades this feature.⁵⁷ This new case supports the proposition that the emerging standard requires metadata production when requested and not objected to, but emphasizes the need for early clear requests and prompt objections when metadata is not produced.⁵⁸

As a result of the unclear application of this “emerging standard,” there is a dilemma of how to safeguard one’s confidential information in the form of embedded metadata and continue to comply with Rule 34. Below this article will analyze the above cases and apply a better approach to the application of Rule 34.

III. THE DILEMMA

As an “emerging standard” in a prevailing area of law, it is inevitable that there will be inconsistencies in the application of Rule 34. In this instance, the discrepancies primarily fall within the application of Rule 34 regarding the form of production in which electronic discovery should be disclosed. In the landmark *Williams* case, a Kansas United States District Court held that the burden of producing electronic discovery with metadata intact was placed on the producing party.⁵⁹ This court allowed the producing party to avoid producing metadata only in situations when the producing party timely objects, the parties agree to the non-production of metadata, or if the producing party requests a protective order for confidential information.⁶⁰ In its reasoning, the *Williams* court defined a “reasonably usable” form as one in which metadata was intact because the removal required an affirmative action.⁶¹ As such, the court’s decision leaves limited instances in which a producing party can scrub or redact metadata from electronic documents subject to discovery.

54. See LOSEY, *supra* note 6, at 165.

55. *In re Payment Card Interchange Fee*, 2007 U.S. Dist. LEXIS 2650, at *15.

56. See Fed. R. Civ. P. 34(b)(2)(E)(ii), *supra* note 3, at 192.

57. FED. R. CIV. P. 34(b) 2006 Amendment, Advisory Committee’s Note, *supra* note 3, at 194-95.

58. See LOSEY, *supra* note 6, at 166.

59. *Williams v. Sprint*, 230 F.R.D. 640, 652 (D. Kan. 2005).

60. *Id.*

61. *Id.*

However, a Kentucky United States District Court a year later in *Kentucky Speedway* explicitly disagreed with the court in *Williams* and placed the burden of the production of metadata on the requesting party.⁶² In this case, the court held that “[i]n most cases and for most documents, metadata does not provide relevant information.”⁶³ Relying on this principle, the requesting party holds the burden of asking for metadata and must prove good cause for a particularized need.⁶⁴

Moreover, the decision in *Wyeth* contradicts the holding in *Williams* because the court disagreed with its definition of a “reasonably usable” form. In this case, a United States District Court in Delaware held that a reasonably usable form was not necessarily one with metadata intact.⁶⁵ A PDF form without metadata intact was adequate to meet the requirements of “reasonably usable” as delineated in the Federal Rules of Civil Procedure.⁶⁶ Therefore, the court created the feasibility of safely scrubbing metadata from electronic documents.

As a result of these inconsistencies, a dilemma has developed concerning the form of production in which attorneys should produce electronic documents subject to discovery. How can an attorney comply with the Federal Rules of Civil Procedure, but also protect their client’s interests? When is it feasible to scrub electronic documents, which are subject to discovery? These questions have very unclear and contradictory answers, as evidenced in the courts’ applications of Rule 34. According to the strict holding in *Williams*, scrubbing metadata takes an affirmative step and would not be in compliance with the Federal Rules of Civil Procedure.⁶⁷ However, in *Wyeth* and *Kentucky Speedway*, the courts introduce a feasibility of redacting or scrubbing metadata from electronic documents because they place the burden on the requesting party to ask for relevant metadata.⁶⁸ Where does the attorney draw the line between the ethics of complying with the standards and protecting his client’s interest in litigation?

The form of production variations pivot on the shifting of the production burden by the courts, the unclear definition of a “reasonably usable” form and the vague understanding of when scrubbing is feasible. Each of these inconsistencies will be examined in turn to develop a better approach to the application of Rule 34.

62. *Kentucky Speedway, LLC v. NASCAR, Inc.*, No. 05-138-WOB, 2006 U.S. Dist. LEXIS 92028, at *22-25 (E.D. Ky. Dec. 18, 2006).

63. *Id.* at *24.

64. *Id.*

65. *Wyeth v. Impax Lab., Inc.*, 248 F.R.D. 169, 171 (D. Del. 2006).

66. *Id.*

67. *Williams v. Sprint*, 230 F.R.D. 640, 652 (D. Kan. 2005).

68. *Wyeth*, 248 F.R.D. at 171; *Kentucky Speedway*, 2006 U.S. Dist. LEXIS 92028, at *23-25.

A. *The Effect of Burden Shifting*

Whose responsibility is it to ensure metadata is produced, the producing party or the requesting party? This is an issue in which the courts have yet to develop a bright line test in the application of this “emerging standard.”

In *Williams*, the court held that in order for a producing party to avoid generating metadata, which could possibly contain privileged information, the party has three options. The party has to timely object to the production of the metadata, the party has to obtain an agreement with the opposing counsel to the non-production of the metadata, or the party has to request a protective order from the court.⁶⁹ This court reasoned that the burden to object to the disclosure of metadata was appropriately placed on the party ordered to produce its electronic documents as they are ordinarily maintained.⁷⁰ This logic was based on the reality that the producing party already has access to the metadata and is in the best position to determine whether it is privileged information that could be objectionable.⁷¹ This United States District Court reiterated that placing the burden on the producing party is further supported by the fact that metadata is an inherent part of an electronic document and its removal ordinarily requires affirmative acts by the producing party that alters the electronic document.⁷²

However, the court in *Kentucky Speedway* explicitly disagreed with the reasoning of the court in *Williams* regarding who should bear the burden of metadata production. One judge in *Kentucky Speedway* stated, “I respectfully disagree with [*Williams*] conclusion that a producing party ‘should produce the electronic documents with their metadata intact, unless the party timely objects . . . the parties agree that the metadata should not be produced, or the production party requests a protective order.’”⁷³ The court in *Kentucky Speedway* argued that the parties in the case had no prior agreement that the electronic files would be produced in any particular format.⁷⁴ The court held, pursuant to the facts of the case, that when the requesting party sought the metadata for a specific document or documents, the party should identify that document or documents by reasonable identifying features.⁷⁵

The key logic behind the court shifting the burden of soliciting the production of metadata to the requesting party was partially due to the unique facts of the case. Specifically, the plaintiff did not request the metadata until the defendant was seven months into discovery and had spent well over \$3 million

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

70. *Id.*

71. *Id.*

72. *Id.*

73. *Kentucky Speedway*, 2006 U.S. Dist. LEXIS 92028, at *22.

74. *Id.* at *23; *see also* FED. R. CIV. P. 34(b)(2)(E)(iii), *supra* note 3, at 192 (“A party need not produce the same electronically stored information in more than one form.”).

75. *Kentucky Speedway*, 2006 U.S. Dist. LEXIS 92028, at *24-25.

dollars.⁷⁶ Additionally, the burden shift was a result of the court's sentiment that the request for production of all the metadata of all electronic documents would be unduly burdensome.⁷⁷ The court reasoned that by having the requesting party ask for the metadata of a specific document or documents, it would be more likely to generate relevant information rather than being an inefficient burden for the producing party.⁷⁸ The effect of the *Kentucky Speedway* holding is that whenever metadata production will create a substantial burden on the producing party, the requesting party will have to provide good cause for the metadata production along with details of the specific document or documents in which it is requesting.⁷⁹

Moreover, in *In re Payment Card Interchange Fee* the court held that the requesting party waited too long to complain about metadata-stripped production, which implied a waiver.⁸⁰ The court stated that, in order to obtain metadata, a party must ask specifically for it and in the event that the production is scrubbed of the metadata that a party requested, the party should immediately object.⁸¹ Thus, the court implied that the burden is placed on the requesting party to ensure it obtains the metadata it requested.

As a result of the incompatible holdings, there is a vagueness of which party holds the burden of objecting to the production of metadata or requesting the production of metadata in electronic documents. It appears from these judgments that if a requesting party can show a relevant need to the metadata of electronic documents it may be possible to compel the production of metadata despite the possible burden on the producing party.⁸² The application of who holds the burden should be determined in a balancing test between the relevancy of the metadata and the burden on the producing party.

B. What is a "Reasonably Usable" Form?

According to Federal Rules of Civil Procedure 34(b)(2)(E)(ii) "[i]f a requesting party does not specify a form for producing electronically stored information, a party must produce it in . . . a reasonably usable form or forms [.]"⁸³ What is a "reasonably usable" form? This is an issue that courts have yet to consistently define in their application of Rule 34(b)(2)(E)(ii). In *In re Payment Card Interchange Fee*, a United States District Court in New York interpreted the Federal Rules of Civil Procedure exactly, holding that a producing party

76. *Id.* at *14-15.

77. *Id.* at *25.

78. *Id.*

79. *Id.* at *23-24.

80. *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, MD 05-1720, 2007 U.S. Dist. LEXIS 2650, at *16-17 (E.D.N.Y. Jan. 12, 2007).

81. See LOSEY, *supra* note 6, at 166.

82. *Id.*

83. FED. R. CIV. P. 34(b)(2)(E)(ii), *supra* note 3, at 192.

did not comply with the Federal Rule of Civil Procedure when it failed to supply metadata in a requested electronic document.⁸⁴ The court reasoned that a party may elect to produce a “reasonably usable” form of electronic data rather than the information as kept in the ordinary course of business.⁸⁵ However, this “reasonably usable” form should not be produced in a form that removes or significantly degrades this feature.⁸⁶ Accordingly, the inference from this judgment is that the court’s definition of a “reasonably usable” form is one in which metadata is intact, as removing it would likely degrade the feature.

Further, the court in *Williams* defined the “reasonably usable” form as electronic documents with metadata intact.⁸⁷ It explained that metadata is an inherent part of electronic documents and its removal ordinarily requires an affirmative act by the producing party to alter the electronic document.⁸⁸ The court relied on the fact that the usual course of business is to keep files in their native format, which includes metadata.⁸⁹ Typically, documents are used with metadata intact, such as documents created in Microsoft Word and Excel files, and all files by definition include all metadata.⁹⁰ As such, this court implies that the definition of a “reasonably usable” form is one in which metadata is intact as it would have been when originally created.

However, in contrast, the court in *Wyeth* disagreed with the *Williams* definition of “reasonably usable” form in its holding that the form of production is reasonable based on the stipulation of the requesting party.⁹¹ In *Wyeth*, the parties had no previous agreement of the form of the electronic documents and the producing party provided a “reasonably usable” form of electronic documents. Even though the default guidelines in Rule 34(b)(2)(E)(ii) refer to a “reasonably usable form”⁹² the *Wyeth* court found that the “reasonably usable” form could be a document in which metadata was not intact.⁹³ The court reasoned that the local rules in this district provided TIFF and JPEG as the default form of production.⁹⁴ The court ascertained that “reasonably usable” form does not have to provide metadata.⁹⁵ The court stated that if the requesting

84. *In re Payment Card Interchange Fee*, 2007 U.S. Dist. LEXIS 2650, at *14.

85. *Id.* (citing FED. R. CIV. P. 34(b), 2006 Amendment, Advisory Committee’s Note, *supra* note 3, at 194-95).

86. *Id.*

87. *Williams v. Sprint*, 230 F.R.D. 640, 652 (D. Kan. 2005).

88. *Id. See, e.g., Hagenbuch v. 3B6 Sistemi Elettronici Industriali S.R.L.*, No. 04 C 3109, 2006 WL 665005, at *2 (N.D. Ill. Mar. 8, 2006) (stating that by producing electronic documents without metadata intact the defendant had “altered the format and characteristics of the electronic media by converting it into TIFF format-essentially creating new documents . . .”).

89. *Id.*

90. *See LOSEY, supra* note 6, at 160.

91. *Wyeth v. Impax Lab., Inc.*, 248 F.R.D. 169, 171 (D. Del. 2006).

92. FED. R. CIV. P. 34(b)(2)(E)(ii), *supra* note 3, at 192.

93. *Wyeth*, 248 F.R.D. at 171.

94. *Id.*

95. *Id.*

party sought the metadata of a document or documents it should request a specific form in which it can view the appropriate metadata.⁹⁶ Therefore, this court contradicts the decisions of the previous cases because it defines a “reasonably usable” form as an electronic document without metadata intact.⁹⁷

Since courts cannot adequately define a consistent meaning of a “reasonably usable” form, attorneys hesitate in deciding whether they can scrub their electronic documents of metadata. An implication from the rules defined in the above-scrutinized cases is that it would be more reliable to err on the side of caution and produce electronic documents in an unaltered form that is consistent to the form in which it was created. However, as a result of the vagueness of the standard, it is feasible for a producing party to disclose an electronic document without metadata intact if it relies on the local rules or the agreement with opposing counsel regarding the form of production.

C. *The Feasibility of Scrubbing Metadata*

Due to the ambiguity in the courts’ judgments, there is no consistent definition of a “reasonably usable” form. As such, many attorneys are puzzled as to whether they can scrub metadata from electronic documents and remain in compliance with the Federal Rules of Civil Procedure. Although the Federal Rules of Civil Procedure allow for the exemption of privileged or confidential information, there are more often instances when the metadata an attorney seeks to protect is not necessarily “privileged” according to the Federal Rules of Civil Procedure standard.⁹⁸ The proper approach remains unclear as to what actions to take in situations where the metadata of an electronic document is not shielded from disclosure by a protective order;⁹⁹ yet the attorney would like to shield this information from opposing counsel in order to avoid negatively affecting his client’s case. The cases below offer an analysis of the instances based on the common law application of Rule 34 where scrubbing metadata from an electronic document may be feasible.

According to the court in *Kentucky Speedway*, production of metadata without a specific request or a relevant need can be burdensome to the producing party; as such, this implies a feasibility of scrubbing metadata that is not relevant

96. *Id.*

97. *Id.*; see Lisa Spinelli and Ghillaine A. Reid, *Production Format and The New Federal Rules Counsel Must Address Native File Production at the Outset of the Case*, 185 N.J.L.J. 1137 (2006) (arguing that the alternative default of the option of producing electronically stored information in ‘reasonably usable’ form includes TIFF and PDF. There is no reason to believe that federal courts will interpret rule 34 to preclude TIFF or PDF).

98. See FED. R. CIV. P. 26(b)(3)(A), *supra* note 3, at 145 (stating that materials that are created in anticipation of litigation may not be discoverable).

99. FED. R. CIV. P. 26(c)(1), *supra* note 3, at 146 (“A party from whom discovery is sought may move for a protective order in the court where the action is pending. . . . The court may issue, for good cause, an order for good cause to protect the party from annoyance, embarrassment, oppression, or undue burden or expense . . .”).

to the current litigation.¹⁰⁰ If the requesting party has not asked for the metadata of a specific document or documents and the privileged information within the document is not relevant to the dispute, then it would be feasible to scrub the document without being sanctioned.¹⁰¹

However, in *Williams*, the court defined conservatively that there were few if no any instances in which a producing party could affirmatively scrub or alter metadata from electronic documents subject to discovery, because metadata is an inherent part of an electronic document.¹⁰² This strict adherence to the non-removal of metadata leaves a producing party with little alternative in choosing whether to scrub metadata from electronic documents or produce possibly damaging information to the opposing counsel. According to the *Williams* court, the only alternative is to attempt to strike an agreement with opposing counsel or vie for a protective order from the court.¹⁰³

Moreover, in *In re Payment Card Interchange Fee*, the court was more lax in its interpretation of the instances in which metadata may be scrubbed from electronic documents. The court held that, for prospective discovery, the production of electronic documents should be in a form that does not remove or significantly degrade the electronic document.¹⁰⁴ It can be inferred from this holding that, although there remain few situations when a producing party can scrub an electronic document of metadata, it is still feasible to scrubbing in a manner that it does not degrade the document. Accordingly, in a situation in which the metadata is not relevant to the litigation, one could remove this information and it would not *per se* “significantly degrade” the electronic document.¹⁰⁵

Therefore, the situation surrounding the feasibility of scrubbing metadata from electronic documents subject to discovery remains vague. In one instance, it is feasible to redact information from the electronic document when it lacks relevance to the current litigation.¹⁰⁶ While on the other end of the spectrum, scrubbing would violate what is defined as a “reasonably usable” form because scrubbing would involve taking an affirmative step changing the form it was originally created.¹⁰⁷

100. *Kentucky Speedway, LLC v. NASCAR, Inc.*, No. 05-138-WOB, 2006 U.S. Dist. LEXIS 92028, at *23-24 (E.D. Ky. Dec. 18, 2006).

101. *Id.*

102. *Williams v. Sprint*, 230 F.R.D. 640, 652 (D. Kan. 2005).

103. *Id.*

104. *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, MD 05-1720, 2007 U.S. Dist. LEXIS 2650, at *14 (E.D.N.Y. Jan. 12, 2007).

105. *Id.*

106. *See Kentucky Speedway*, 2006 U.S. Dist. LEXIS 92028, at *23-24.

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

IV. THE PATH TO A BETTER APPROACH

Because of the perplexity surrounding the production of metadata, a better approach balancing the margins demonstrated in *Williams* and *Kentucky Speedway* is necessary. As such, this article will analyze the contributions and the problems created by these margins and develop a better approach to the application of Rule 34.

A. *The Williams Approach*

The decision in *Williams* was a landmark decision because, at the time of the ruling, few courts had dealt with electronic discovery issues and the district court of Kansas had very little precedent available to rely upon.¹⁰⁸ Accordingly, the court relied on its own analysis that ultimately bears useful logic surrounding the application of Rule 34.¹⁰⁹ However, in the same right, the holding has created problematic conditions because it conservatively applied the Federal Rules of Civil Procedure to the rapidly changing standard in electronic discovery.

The *Williams* court established that the burden of requesting the non-production of metadata is appropriately placed on the producing party.¹¹⁰ The court stated that this party would be in a better position to object to the disclosure of the metadata because it already had access to the information and would have the requisite knowledge of whether the metadata was privileged information.¹¹¹ The court reasoned the burden shift to the producing party was rooted in the theories surrounding the development of discovery. The underlying analysis stemmed from the idea that the discovery process was intended to allow both parties to adequately prepare for litigation.¹¹²

If the burden of requesting electronic documents with metadata intact is placed on the requesting party, then the requesting party will be placed in an unequal position than that of the producing party. The requesting party lacks the knowledge and specificity of the metadata within the other party's electronic documents. The purpose of the discovery phase of any litigation is to gain more information surrounding the facts of the case.¹¹³ If the requesting party is required to solicit with specificity all electronic documents it requires for

108. Lucia Cucu, *The Requirement for Metadata Production under Williams v. Sprint/United Management Co.: An Unnecessary Burden for Litigants Engaged in Electronic Discovery*, 93 CORNELL L. REV. 221, 226 (2007).

109. *Id.* at 226-27.

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

111. *Id.*

112. *See generally Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 945 (1961) (stating that the purpose served by discovery is disclosure of all relevant evidence which will prevent unfair surprise at trial and reduce the number of judgments which do not reflect the actual state of facts).

113. *Id.*

litigation, the requesting party will likely lack the substantial knowledge to adequately request the necessary electronic documents and prepare for litigation.

However, this burden shifting also creates a problem because it establishes an unnecessary burden on the producing party of preserving and producing electronic documents with metadata intact, even if that metadata is irrelevant.¹¹⁴ The court's logic in *Williams* is useful because it correctly reasons that the producing party will likely have more knowledge regarding the content of its electronic discovery.¹¹⁵ Yet, the court is unsuccessful in developing a lasting expansion of a standard in electronic discovery because it failed to place limits on the scope of metadata that should be provided.¹¹⁶ The court did not take into the account the unreasonable burden it placed on the producing party, requiring them to produce all metadata.¹¹⁷ This is clearly evidenced by the court's ruling that removing metadata from a document takes an affirmative action that would be a violation according to its definition of a "reasonably usable" form.¹¹⁸ In fact, "[r]equiring the routine production of metadata increases the usually enormous costs of electronic discovery."¹¹⁹ Under this ruling, the producing party is at the financial and ethical mercy of the requesting party to produce all electronic documents with metadata intact. A producing party's only options would be to timely object, agree with the opposing counsel for the non-disclosure of metadata, or request a protective order.¹²⁰

These flaws not only discourage attorneys from experimenting with electronic discovery because of fear of being sanctioned like the defendant in *Williams*,¹²¹ but also make the process of electronic discovery impractical. Regardless of the court's intentions to fairly protect both parties in the discovery process by shifting the burden, it took this reasoning to an extreme at the expense of the producing party. The *Williams* decision is important for the development of this emerging standard not because of its holding, but rather its logic which has helped develop potential standards in an ever-changing standard of electronic discovery.

B. *The Kentucky Speedway Approach*

After the uproar of the *Williams* holding, courts were interested in developing their own analysis in the interpretation of this ambiguous standard of law. As a result, the United States District Court in Kentucky took a strikingly

114. See Cucu, *supra* note 108, at 229.

115. *Williams v. Sprint*, 230 F.R.D. 640, 652 (D. Kan. 2005).

116. *Id.*

117. *Id.*; see generally FED. R. CIV. P. 26(b)(2)(B), *supra* note 3, at 145 ("A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.").

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

119. See Cucu, *supra* note 108, at 230.

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

121. See Cucu, *supra* note 108, at 229.

different approach to the application of Rule 34.¹²² The useful analysis from this holding is the court's focus on the relevancy of the metadata in electronic documents.¹²³ The court's logic is based in the intentions of the Federal Rules of Civil Procedure restricting discovery when it unduly burdens a party.¹²⁴ The court reasoned that there should be a presumption against the production of metadata¹²⁵ outlining that the issue of whether metadata is relevant or should be produced is one that ordinarily should be addressed by the parties in a Rule 26(f) conference.¹²⁶ The ultimate holding from this court created not only a shift of the burden to the requesting party to designate the metadata that it required for litigation, but the decision also created the theory that if metadata bears no relevancy, then the parties should be required to produce it only upon request.¹²⁷ Thus, this logic creates a feasibility of scrubbing metadata to protect a client's interest.

However, the problematic aspect of this decision is that it designated the responsibility of requesting or obtaining the metadata solely to the requesting party. Although, this basis appears to be logical because it alleviates the burden and cost for the producing party, it places an unreasonable strain on the requesting party to have the knowledge and specificity of opposing counsel's electronic documents. This logic starkly contrasts the argument in *Williams* that relies on the theory that the discovery process is to gain further information regarding litigation.¹²⁸ In an effort to develop consistency, this article will argue below for an approach that grasps the useful logic of the above cases and accounts for compliance with the Federal Rules of Civil Procedure.

C. A Better Approach

Because this is an emerging standard of law, there are likely to be discrepancies in its application. Both of the analyses in *Williams* and *Kentucky Speedway* offer useful logic in their applications, but also create potential problems for electronic discovery, as described above. A better approach to the application of Rule 34 regarding the form of production would be one that requires the producing party to provide only the metadata of electronic documents that is relevant to the current litigation. The burden of disclosing

122. See *Kentucky Speedway, LLC v. NASCAR, Inc.*, No. 05-138-WOB, 2006 U.S. Dist. LEXIS 92028, at *21 (E.D. Ky. Dec. 18, 2006).

123. *Id.* at *21-23.

124. *Id.*; see FED. R. CIV. P. 26(b)(2)(B), *supra* note 3, at 145.

125. *Kentucky Speedway*, 2006 U.S. Dist. LEXIS 92028, at *23; see also THE SEDONA PRINCIPLES, *supra* note 19, Principal 12, Cmt. 12a, at 186 ("The extent to which metadata should be preserved and produced in a particular case will dependent on the needs of the case.").

126. FED. R. CIV. P. 26(f)(2), *supra* note 3, at 147 ("[T]he parties must consider the nature and basis of their claims and defenses . . . make or arrange for the disclosures required . . . discuss any issues about preserving discoverable information; and develop a proposed discovery plan.").

127. *Kentucky Speedway*, 2006 U.S. Dist. LEXIS 92028, at *24-25.

128. *Williams v. Sprint*, 230 F.R.D. 640, 652 (D. Kan. 2005).

metadata would be placed on the producing party as outlined in *Williams*. Yet, unlike *Williams*, the scope of metadata would be limited to only relevant information as necessitated in *Kentucky Speedway*. In this approach, the unfair advantage of a producing party has regarding knowledge of electronic documents would essentially be eliminated.

Under this approach, the producing party who has the superior knowledge of the contents of electronic documents has the duty to examine and produce only relevant metadata. This would allow the requesting party to be provided with essential and relevant metadata without overwhelming the producing party with the expense of producing all metadata. The idea of only supplying relevant metadata is also stressed in the Sedona Principles, in the notion that metadata should only be produced absent agreement of parties or court order, when it is material to resolving the dispute.”¹²⁹

In effect, by providing that the producing party is to disclose only relevant metadata would allow the producing party to scrub metadata from electronic documents. The potential feasibility of scrubbing of metadata would not only provide protection for attorneys who are seeking to safeguard metadata, which is privileged, but also ethically comply with the Federal Rules of Civil Procedure.

Critics to this approach would argue that the producing party would protect itself by claiming that there is no relevant metadata in the electronic documents. However, this predicament will be diminished by the discussions in Rule 26(f) conferences when the requesting party could ask for, or inquire about, metadata that may be relevant to the litigation. Additionally, the Rule 26(f) conferences would provide an opportunity for the parties to agree to produce or not produce all or part of metadata in electronic documents.

This approach is not flawless, as it relies on the parties to subjectively recognize what metadata is relevant to the litigation. However, this approach is more consistent than the bewildering approaches seen in recent court decisions, which have settled on opposite margins in their applications. This proposed application has logical reasoning that accounts for the flaws created in the strict approach in *Williams*, and the failures in *Kentucky Speedway* to consider the unfair position in which the requesting party is placed.

V. CONCLUSION

Courts continue to stand divided in the application of the form of production necessitated according to Rule 34. The inconsistent holdings create a dilemma for attorneys in the process of litigation on whether the production of metadata in electronic documents is necessary. Attorneys are unsure of when it is feasible to scrub metadata from electronic documents. On one end of the spectrum, scrubbing metadata is subject to sanctions because it changes the inherent

129. See THE SEDONA PRINCIPLES, *supra* note 19, Principal 12, at 185-203.

qualities of electronic documents.¹³⁰ While on the other end, scrubbing metadata from electronic documents is feasible when it is not relevant to the litigation.¹³¹

This article argues that a better approach to the application of Rule 34 is one that shifts the burden to the producing party to supply only relevant metadata of electronics documents subject to discovery. It relieves the burden of knowing specifics of the opposing party's metadata from the requesting party and mitigates the burden of the producing party by only disclosing relevant metadata. Courts should employ this approach as it consistently applies the useful logic from both margins created by courts' applications and accurately complies with the Federal Rules of Civil Procedure.

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

131. *Kentucky Speedway*, 2006 U.S. Dist. LEXIS 92028, at *23-25.