




**Managing Discovery, ESI and
Privilege Issues in an Antitrust
Context**


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**Twombly as the Impetus for Controlling
Discovery Costs in Antitrust Litigation**


- Discovery comments by District Courts
- Ever increasing amounts of information. *In re Intel*




Discovery Focus is Crucial

- Broad scope of relevance in antitrust cases
- “Claims and defenses”
- Relevant Market(s); time periods
- Conspiracy issues
- Strategy for summary judgment
- Phased discovery, e.g., market definition, market power



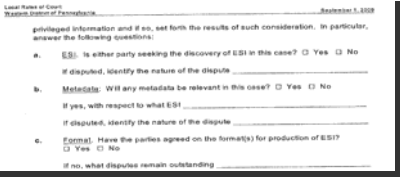
Limitations Imposed by the Rules

- Deposition Limits:
 - 10 depositions
- Deposition time limit:
 - 7 hours
- Interrogatory Limits:
 - 25
- Check Local Rules for other Limits
- Be ready to discuss at Rule 26(f) Conference




The Rules

- Western District local rules related to metadata:
 - Duty to investigate. (LCvR 26.2)
 - 26(f) report. (Appendix LCvR 16.1A)



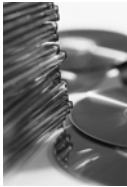

What is “Metadata”

- Describes the characteristics of the document
- Application metadata: created by software
 - Microsoft Word: modifications to document, author of modifications
 - User-created metadata
- System metadata: created by IMS
 - User ID, assigned owner or author, creation dates, modified dates
 - Not within file, can change when moved





Metadata Examples

- Excel Spreadsheet
 - to find metadata, hit “prepare” and “properties”
- PowerPoint slides
- Word Document


When is Metadata Relevant?

- Metadata could be critical, or completely irrelevant, depending on the facts of the case
 - Sedona Principles, Comment 12.a
- What metadata is relevant?

Relevance

- Substantive Relevance:
 - Examples
 - Drafting history, author
 - Authenticity
 - Creation date
- Functional Relevance: Enable the receiving party to have the same ability as the producing party to access, search and display information
 - Example
 - E-mail sorting




Which Metadata is Relevant?

(1) The following metadata fields associated with each electronic document will be produced:

- RegDoc
- RegDoc
- RegAttach
- RegAttach
- FS_DateCreated
- FS_DateLastModified
- FS_Extension
- FS_FileName
- FS_Path
- FS_Size
- Author (where available)
- BCC (where available)
- CC (where available)
- Company (where available)
- ContactName
- Date Created (where available)
- Date Last Modified (internal to document)
- DocTypeExtension
- Email_Attachment Count
- Email_Attachment Name
- Email_Received Date
- Email_Sent Date
- Email_Topic (i.e., subject line)
- From
- Recipient
- Spreadsheet_Sheet Names
- Spreadsheet_Sheets
- Spreadsheet_Total Pages
- Subject (if field is populated)
- Title (if field is populated)

• Hostler and DMS seek to have the parties produce the following metadata fields associated with each electronic document to which Plaintiffs object:

- FS_Attributes
- Date Last Printed




Should Metadata be Preserved?

Questions


1. Is metadata maintained and reasonably accessible?
2. Is metadata relevant to the dispute, and what metadata is relevant?
3. Will the metadata facilitate review, production and use of the ESI?

Sedona Principles, Comment 12.a



The Rules


- Producing Electronically Stored Information - Rule 34(b)(2)(E)
 - If a request does not specify a form for producing electronically stored information, a party must produce it in (1) a form in which it is ordinarily maintained or (2) in a reasonably usable form.



Metrics Calculation

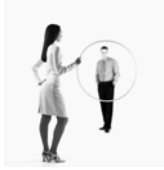

Metrics Calculation – ESI Document Review

Pages	Rate: Pages per Hour	Total Review Hours Needed	Weeks Before Project Deadline (-1Wk)	Typical Reviewer Hours Per Week	Review Hours/Week	Number of Reviewers Needed to Meet Deadline?
250,000	120	2083.3	4.0	40	520.8	14
250,000	130	1923.1	4.0	40	480.8	13
250,000	140	1785.7	4.0	40	446.4	12
250,000	150	1666.7	4.0	40	416.7	11




Privilege and Waiver Issues

- Federal Rule of Evidence 502:
 - Scope of waiver
 - Inadvertent disclosure
 - Effect of court orders and agreements

Rule 502(b) "Inadvertent Disclosure"

- Not a waiver if:
 - (1) The disclosure is inadvertent;
 - (2) The holder of the privilege or protection took reasonable steps to prevent disclosure;
 - (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following FRCP 26(b)(5)(B)



Rule 26(b)(5)(B)

- After being notified, the receiving party:
 - Must promptly return, sequester or destroy
 - Must not use or disclose
 - Must take reasonable steps to retrieve
 - May promptly present to the court under seal for a determination of the claim

