### E-Discovery 2.0

Managing e-Discovery & Technology

... without it killing you ...

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### E-Discovery 2.0



"Worried, you are."

### E-Discovery 2.0

# 2-Factor Authentication Large vs Small Discovery Scanned Paper

### **Evolution of ESI**

**Paper** 



**E-Paper** 



**Native** 



**Audio/Video** 





**Forensic Data** 



**Holodeck** 





- Accessible,
- Searchable,
- Accurate, and
- Time- & Cost-Efficient

You want it ... and the Court wants it

### Handout: "ESI Protocol"

#### "ESI Protocol"

### **ESI Protocol Goals**

- Forethought!!!
- Cooperation!!!
- Competency (IT)!!!

#### **ESI Protocol**

### **ABA Standards**

ER 1.1 comm. (Competency):

"To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."

### States are incorporating it California

Ethics Opinion requiring familiarity with electronic evidence review and using it.

### States are incorporating it Florida

Mandatory CLE re e-discovery and using technology to review it.

### States are incorporating it Nevada?



### SCENARIO #1: Solo Defendant, Tax Return ID Fraud

"Protocol? What protocol?"

### At IA

- AUSA suggests waive Prelim for discovery with 1 week
- Agree
- No discussion re content or volume of discovery
- No setting a meet & confer

### 5 days after IA Discovery

- 302's
- Tax returns
- Client's statements
- Client's priors
- Total: 110 paper pages

## Friday before trial Data Dump

- Jail calls
- Cl recorded calls
- Video surveillance
- Cell tower records
- Emails
- Texts
- Bank account data
- Total: 6 CD's

# Friday before trial Data Dump



# 10 days before trial Data Dump

Forethought??! Cooperation??!

### **Immediately**

Approach AUSA to resolve

Approach his Sup to resolve

Approach the Court to resolve

### Discovery Motions ...

- Preclude late discovery
  - But is there Brady in there? So must
  - Motion identify Brade
- Motions Denied! analysis/report Alternat
- Alta , depose case agent
- Alternatively, disclose Grand Jury transcript
- Sealed Motion for Lit Support & Expert(s)

### Help!



### SCENARIO #2: Solo Defendant, Tax Return Fraud

Using the ESI Protocol

### Handout: "ESI Protocol"

#### "ESI Protocol"

### **ESI Protocol Principles**

- Lawyers are responsible to be able to address ESI in discovery
- Should include tech expertise personnel
- Meet & confer early
  - Volume
  - Format
  - Means of production
  - Scheduling

#### **ESI Protocol**

### **ESI Protocol Principles**

- Not required to process evidence for opponent ... but ...
- If processed, should share, for instance:
  - OCR'ed
  - Indexed or Table of Contents
  - Source
  - Exhibits or "hot docs"
- That goes for Defense discovery production too!

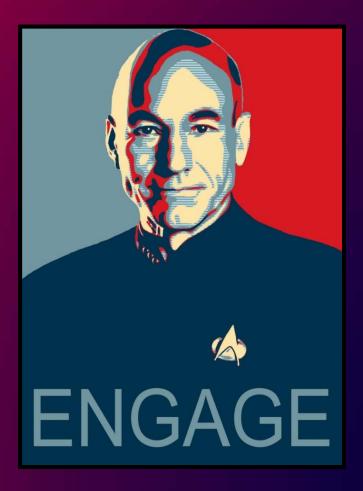
#### **ESI Protocol**

### **ESI Protocol Principles**

- Make good faith efforts to resolve disputes without litigation
- If AUSA is intractable, contact his sup about applying the ESI Protocol

#### **ESI Protocol**

### **Engage in the Process**



#### **ESI Protocol**

### SCENARIO #2: Solo Defendant, Tax Return Fraud

**Using the Protocol** 

#### At IA ...

#### AQU'S More abbitissification itse in string titled Adults A

- Jail calls
- CI recorded calls
- Video surveillance
- Cell tower records
- Emails
- Texts
- Bank account data

#### At IA ...

This is Big ESI case
Schedule a "meet & confer"

Forethought!!! Cooperation!!!

### Soon thereafter ...

In preparation for "meet & confer:"

What's critical in e-discovery?

- Review paper discovery
- Discuss case with client

Select IT/Lit Support person

Forethought!!!!
IT Competency!!!

### Within a week of IA ...

"Meet & Confer" session

IT folk swap info re ESI, including:

Formats to produce evidence in



### Format:

# Format: scanned paper

Look for computer-generated versions of the files ("native")

## Format: Ask what is the original form in which they received the materials

And that does not mean on a CD rom ...

## Format: scanned paper

Multi-page searchable PDFs with Document Breaks\*

# Format: Ask for a table of contents of the discovery

#### Format: Searchable and Usable

#### Within a week of IA ...

"Meet & Confer" session

#### IMfollnewed prointfor a eee E6t, explending lp

- Formats to produce evidence in Native format
- OCR'ed
- Identified by sources
- Table of Contents
- Naming conventions
- Bates stamping
- Reports of their searches (?)
- Identify "hot docs," Brady (?)

#### After "Meet & Confer"

Report ESI plans to Court

Advise of expert and Lit Support needed

#### When ESI Arrives

Check discovery immediately

- ... best laid plans ...
- Conform with agreement?
- Can you open it?
- Does your software work on it?

#### Reviewing ESI

Search for info that matters

Revise search as learn more

Tag (bookmark, link) important evidence

Forethought!!!!
IT Competency!!!!

#### Rolling Production of ESI

Per "Meet & Confer" Agreement

Defense likewise produces its ESI early

## Friday before trial Data Dump



#### Bench Book Handout

#### CRIMINAL E-DISCOVERY

A Pocket Guide for Judges

Federal Judicial Center 2015

#### Structure

- Overview
- Common Issues in Criminal e-Discovery
- Judicial Management of Criminal e-Discovery
- Appendices
  - Responsibilities of both parties
  - First Appearance Colloquy
  - Discovery Status Conference e-Discovery Colloquy



#### Common Issues

- Funding e-Discovery
- Necessity of Litigation Support Assistance
- Variety of e-Discovery Software Tools
- Volume
- Form of Production



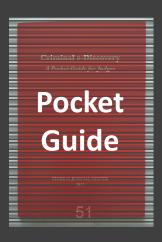
#### Funding e-Discovery

"When a case has complex e-discovery issues, the judge considering a CJA appointment may need to factor in the additional cost of reviewing, organizing, and working with e-discovery."



## Necessity of Litigation Support Assistance

"Just as judges should be mindful of attorney knowledge and experience in managing ediscovery, they should also be aware that even knowledgeable attorneys need skilled litigation support."



## Variety of e-Discovery Software Tools

"There is a vast array of software tools for handling all of the stages of electronic discovery."

"No single software tool does everything needed for e-discovery."



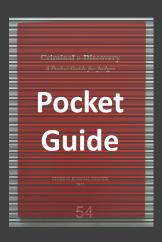
## Variety of e-Discovery Software Tools

"It also may be beneficial to place the discovery into a cloud-based document-review platform, so defendants, counsel, investigators, and experts can access it as needed from various locations."



#### Form of Production

"To benefit from the information available in ediscovery, attorneys must know what format the original data was in, what formatting options are available, and how those options affect their potential review of the data."



#### Structure

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#### Appendix A: Both party responsibilities

- Conduct a meet-and-confer
- Discuss a reasonable schedule for producing e-discovery.
- Memorialize any e-discovery agreements
- Give the court advance notice of any issues that will significantly affect the production or review of e-discovery, the need to request supplemental funds, or the scheduling of pretrial motions or trial.



## Appendix A: Producing party responsibilities

- When possible, produce ESI as processed to save the receiving party the expense of replicating the processing.
- Create a table of contents.
- Volume estimate.
- Third-party ESI in original format or in a reasonably usable format
- Discoverable materials in a searchable and reasonably usable format



#### Appendix A: Receiving party responsibilities

 Inspect e-discovery promptly after its receipt and give notice to the producing party of any production issues or problems that may impede using the e-discovery.



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#### IA Colloquy

- Court asks AUSA re volume discovery?
- Parties familiar with & using ESI Protocol?
- Is there litigation support available?
- Scheduling a meet & confer?
- Explains expectations to use ESI Protocol
- Refers defense to sources of help



#### Discovery Conf. Colloquy

- Multi-def cases
  - Designated one attorney/firm to manage ESI?
  - Hooked up with National Lit Support Center?
- Held meet & confer?
  - Using ESI Protocol?
- AUSA: evidence production schedule?
  - Def: Started review of it?
- All e-discovery issues resolved?



#### SCENARIO #3: 8 Defendants, Drug Smuggling

Using the ESI Protocol

## Using ESI Protocol & Judge managing e-Discovery

- AUSA is cooperative in getting defense the e-discovery
- Can get Coperation dugh Box.com in formats you can use
- Now ne Expression and the Ith multiple defendants

Cooperation!!!!

#### Joint Defense ESI Review

- 1 Lawyer manages ESI
- Hires exporetthiousghubblit
- Makes Engretion to all counsel
- Organizes Esi for all

#### Finding what you need

The proverbial "needle in the haystack"

Yeah, there's an app for that

Work will expert to determine the determine t

With multiple to review

how to allow all

#### **Cloud Computing**

It's not what you may think ...



#### Cloud Computing, Storing, and Sharing: A Guidance for the Solo and Small Firm Lawyer

Donna Lee Elm and Sean Broderick

Most of us went to law school to become trial or lawyers, not "techies." But with the explosion of technology offering such attractive services, lawyers who had approached IT with "fear and loathing" are overnight embracing it. From reading and sending emails using Gmail, to conducting legal research using Westlaw or LexisNexis, to preparing briefs using Microsoft Office 365, solo practitioners and large firms alike have quickly adopted cloud technology. The cloud offers many benefits, but it also presents a number of potential pitfalls to unwary, inexperienced practitioners.

#### BENEFITS AND PITFALLS OF CLOUD STORAGE

Confronting increasing volumes of information in their cases, lawyers have realized that the cloud can improve their efficiency, allow for greater flexibility, and reduce costs. Cloud storage is especially attractive. For small firm practitioners with little to no IT support, free to low-cost cloud storage services like Dropbox and Box.com are far cheaper than adding computers to the office, and require no tech capabilities. Providers tend to charge for the services used, and customers can turn on and off apps as needed. See ARMA International, GUIDELINE FOR OUTSOURCING RECORDS STORAGE TO THE CLOUD (2010). Lawyers can expand their cloud storage with a click of the button and not have to worry about buying new hardware or learning how to create a network.

Cloud storage also allows attorneys greater options in accessing files. They can reach their data any time from anywhere in the world, regardless whether they are on an office computer, laptop, tablet, or smartphone. Moreover, other people can be given secure access to cloud-stored information (e.g., clients, experts, investigators, and co-counsel) without having to let them breach the firm's firewall

Particularly popular is how cloud files are immediately updated or synched so that anyone accessing them from any device automatically reaches the most recent version of a document. Because attorneys often collaborate with others in different offices, the ability to share and synch files with them makes cloud storage

#### Handout:

Cloud Computing, Storage, and Sharing: Guidance for the Solo and Small Firm Lawyer

## Cloud Computing, Storage, & Access

- Joint Defense/Evidence Agreement
- Who does & how ESI is organized
- Segregating Work Product
- Alerts, comments, communications
- Access to investigators, experts

#### **Cloud Computing**



#### Cost of Cloud Service

- Not cheap
- Let Court know in advance
- 1 cloud service and filligation Support person is cheaper than 8 doing it without expert assistance, technology

Cooperation!!!!

#### Selecting the Cloud Service

- Accessible to all lawyers
- What software apps available
- Ability to partition each defendant's work on discovery
- Collaborative, concurrent drafting on same document

#### Selecting the Cloud Service

- Confidentiality
- Who owns data?
- Alert if attempts to get data?
- Security?



## Cloud Computing: Security Concerns



#### **Greatest Security Risk**



- National Litigation Support office
  - Sean Broderick, et al.
  - sean\_broderick@fd.org
  - 510-637-1950

Check with jail if already allows it

Cannot hold laptop while client reviews

- -- Cost-prohibitive
- -- USMS and AUSA may help

#### Check with Jail:

- -- Who provides laptop or iPad?
- -- Who provides discovery?
- -- Can client mark discovery, make notes?

Check with jail if already allows it

-- If not, get the process started

How?



Use the Guidance for the Provision of ESI to Detainees Luke.

Guidance for the Provision of ESI to Detainees

Joint Electronic Technology Working Group October 25, 2016

#### The Guidance provides:

- Government / Defense / Court / USMS /Detention Facility working group
- -- Identify facility capabilities
- -- Collaborate to reach a practical solution

Guidance for the Provision of ESI to Detainees

#### For Instance:

- -- What equipment can be used there?
- -- Who will provide equipment?
- -- Who will provide e-discovery?
- -- In what format?
- -- How will client access it?
- -- Where can client review it?
- -- Can client annotate e-discovery?
- -- How does client share notes with counsel?

Guidance for the Provision of ESI to Detainees

### The end



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