

Sean Broderick
National Litigation Support Administrator
Administrative Office of U.S. Courts, Defender Services Office
Federal Public Defender
1301 Clay Street, Suite 1350N
Oakland, CA 94612

February 19, 2016

CJA Study Committee
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building, Suite 4-250
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Solicitation of Views Regarding the Criminal Justice Act

Dear Judge Cardone and Members of the CJA Study Committee:

Thank you for the opportunity to testify before the Committee to Review the Criminal Justice Act and to submit these comments. By way of introduction, I am the National Litigation Support Administrator for the Defender Services Office (DSO) and I am responsible for the National Litigation Support Team (NLST). I have served in this role since December 2007. Our team's primary functions are to advise the federal judiciary, federal public and community defenders, and CJA panel attorneys on matters relating to electronic discovery and litigation support goods and services. With others, we also train and educate federal defender staff and CJA practitioners on strategies for addressing electronic discovery, and methods of choosing appropriate resources and beneficial ways of using technology in cases. I also serve as co-chair of the Joint Working Group on Electronic Technology (JETWG), a joint DOJ-AO working group focused on addressing best practices for the efficient and cost-effective management of post-indictment electronic discovery between the Government and defendants charged in federal criminal cases. Established in 1998 by the Director of the Administrative Office of the U.S. Courts and the Attorney General of the United States, it is composed of representatives of Department of Justice (DOJ), Federal Public and Community Defender Organizations (FDOs), DSO, CJA panel attorneys, and liaisons from the United States Judiciary and other Administrative Office of the U.S. Courts' offices.

Today, technology impacts every attorney defending an indigent client against a federal criminal prosecution. A generation ago, when the Prado committee convened in the early 1990s, technology was not listed as one of the fourteen issues to be examined. As the members of the committee know well, much has changed since then. Thanks to the computer revolution, the legal system has moved from a paper world to one where the vast majority of information is created, transmitted and stored electronically. The volume and exponential growth of discovery and the potentially relevant areas of investigation (since so much more information is captured digitally on a daily basis) are staggering compared to just a decade ago. Electronic discovery (also known as e-discovery or electronically stored information (ESI)) is now a multi-billion

The Honorable Kathleen Cardone
February 19, 2016
Page 2

dollar industry and all estimates point to its continued growth. Technology strategies must be considered and effectively employed to address government discovery productions even in “simple” single defendant prosecutions.

There are numerous advantages to using technology which attorneys and other legal professionals have embraced. From reading and sending e-mails via a laptop, tablet or a smart phone, to conducting legal research using Westlaw or LexisNexis, or preparing briefs with any number of word processing tools, solo practitioners and large firms alike are using technology in ways not imaginable a generation ago. Electronic discovery, as opposed to traditional paper discovery, provides great benefits including speed, efficiency, and quality of information. And yet with these benefits, there are also potential risks. As one example, 20 state bars currently opine that attorneys may use cloud technology for legal files, if done with “reasonable care.” To do so, an attorney must consider whether that service provider can provide adequate security to protect confidential, privileged, or otherwise sensitive e-discovery. If the attorneys do not understand how to use the cloud technology properly and how to take reasonable measures to safeguard client data in it, they can compromise client confidentiality.

Evolving attorney competency requirements with e-discovery and technology

With the rise in technology and the growing presence of e-discovery, attorney competency ethics standards are also evolving to require an adequate understanding of e-discovery and the technology needed to review it. For example, the State Bar of California issued a formal ethics opinion on this subject. *See* The State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 2015-193 (2015). This development follows the 2012 American Bar Association amendment to its Model Rule 1.1, stating that lawyers need to “keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology.*” ABA Model Rules of Professional Conduct, Model Rule 1.1, comment 8 (emphasis supplied). State bars have followed suit. (*See, e.g.,* Arizona Professional Responsibility and Conduct. 1.1 comment 6 (Jan. 1, 2015, adopting ABA Model Rule comment); Pennsylvania Professional Responsibility and Conduct Rule 1.1, 1.6(d) (amended Nov. 21, 2013).) Also in 2015, the Florida State Bar Board of Governors approved a requirement that lawyers take three hours of technology-related CLE courses, with an amendment to a comment in Bar rules saying lawyers should have technological competence necessary to protect clients’ interest and necessary for their areas of practice.

CJA practitioner challenges

There are significant challenges for federal criminal practitioners adapting to the digital era. Some of these e-discovery challenges affect both prosecutors and defense attorneys (large volume of information; a variety of sources and formats; hidden information (metadata and embedded data); differing formats for production; and software and hardware limitations). The lack of experience with e-discovery is also a challenge for both prosecutors and defense counsel, but it is disparity of resources compared to DOJ (such as money, personnel, and training), that often overshadows all other problems for federal CJA practitioners. The challenges of e-

The Honorable Kathleen Cardone
February 19, 2016
Page 3

discovery are especially daunting for CJA panel counsel who are predominantly solo or small-firm lawyers with little exposure to complex e-discovery.

In the work we have done as part of JETWG, we identified nine recurring issues for defense counsel addressing technology and managing e-discovery:

Funding e-Discovery: As the role of e-discovery expands in criminal cases, judges and lawyers must be particularly sensitive to costs and funding. In particular, the Court should strive to provide a level of funding that permits the defense to manage e-discovery to effectively represent the client.

Lack of ESI Experience, Knowledge, and Competency: Many lawyers do not have an adequate understanding of e-discovery and litigation technology. Before those lawyers accept a complex e-discovery case, they should acquire the relevant knowledge, hire or work with experienced counsel or consultants, acquire that expertise through litigation support experts, or decline the representation.

Necessity of Litigation Support Assistance: Lawyers need skilled staff to handle voluminous e-discovery. Litigation support staff can provide a combination of project management and technology skills to help lawyers navigate complex e-discovery more efficiently and cost effectively.

Variety of e-Discovery Software Tools: The vast array of e-discovery software tools used by litigants creates compatibility issues. The ESI Protocol (a document produced by JETWG for managing post-indictment e-discovery, described further below) identifies a number of these potential problems and recommends that the parties discuss and resolve those during a meet-and-confer session.

Volume of e-Discovery: The volume of ESI that lawyers face in criminal cases will continue to grow. Without proper technological aids, finding critical evidence in voluminous e-discovery can be very difficult and consume excessive time and resources.

Form of Production: To access the information available in e-discovery, counsel must be familiar with the various ESI formats and ensure that they do not accept discovery in a form that they cannot access or review efficiently. This applies to electronic data as well as to paper discovery that was scanned or converted to digital discovery.

Disorganized and Redundant ESI: An unintended consequence of technology is that it leads to what appears to be disorganized and redundant discovery, such as multiple versions of the same email or document in different locations. There are software tools that, if used properly, can mitigate these problems - reducing the volume of discovery and the amount of time needed to review it - and improve the value of e-discovery.

The Honorable Kathleen Cardone
February 19, 2016
Page 4

Multiple Defendant Cases: Complex e-discovery cases with multiple defendants require greater coordination of e-discovery, and may generate e-discovery disputes that require the court's attention. Managing ESI issues early in these cases should help minimize disputes and delays.

Incarcerated Defendants: Defendants in pretrial detention face significant e-discovery challenges, including accessing and reviewing e-discovery. Providing defendants reasonable access to ESI promotes fairness and should reduce attorney time and costs.

There are no "magic bullet" solutions for solving the challenges involving e-discovery and technology. That said, having a combination of counsel that is knowledgeable about e-discovery; experienced litigation support staff; software and discovery management tools; usable and searchable formats of e-discovery; and a table of contents or index to provide some context to the case and what the discovery contains goes a long way towards utilizing the advantages of electronic discovery and containing the overall costs.

Disparity of resources between DOJ and the Defender Services program

Anecdotally, we know that DOJ has more resources available for addressing e-discovery and technology. That said, we have little public data available to easily quantify the differences between DOJ and the Defender Services program. It is public record that DOJ has the Mega-4 contract vehicle specifically designed for electronic discovery, litigation support and case management services. Awarded in August 2013, it is a six-year contract with a cap of \$1.1 billion for four companies to provide seven of its divisions, including the Criminal Division, litigation support and case management services. This vehicle is used for criminal and non-criminal cases, but does not account for resources and personnel used by various federal agencies such as FBI, DEA and ATF (to name a few).

There is also the Litigation Technology Service Center (LTSC) in South Carolina (presumably funded as part of the Mega-4 contract but unclear from public records) which serves as a litigation support center to process electronic discovery for U.S. Attorney Offices.¹ In the Department of Justice FY 2017 budget proposal recently released, DOJ has included (presumably besides the services already in place with the LTSC and the Mega-4 contract) the e-Discovery Program Initiative which requests \$19.6 million in additional funds to add 138 positions to address the need for additional resources and IT infrastructure in order to be competitive with the private sector in addressing the shift from paper discovery to electronic discovery.

¹ The Mega-4 contract vehicle follows the Mega-3 contract which was awarded in June 2007. With that procurement vehicle, DOJ awarded a six-year contract with a cap of \$950,000,000 for three companies to provide seven of its divisions, including the Criminal Division, with litigation support and case management services. As part of that contract, the Litigation Technology Service Center was created.

As others have mentioned in prior submissions, DOJ also operates the National Advocacy Center (NAC), which provides training for federal, state, and local prosecutors and support personnel. Traditionally, there have been a number of classes devoted to technology and e-discovery, both at the site and available on-line. Classes currently listed on their public-facing website include instruction on IPRO Eclipse (a document review platform), TrialDirector (a trial presentation program), Relativity (a web-hosted document review platform), and CaseMap (a fact-based litigation support database). Most likely there are more options available on the DOJ intranet that are not public knowledge, including sessions that discuss legal and strategic considerations involved with electronic discovery and digital evidence.

Current strategies

Though dwarfed in comparison to the resources utilized by DOJ, there are a number of strategies currently being implemented by the Defender Services program, approved by the Committee on Defender Services, which are assisting defenders and CJA panel attorneys in better managing e-discovery.

Recommendations for ESI Discovery Production in Federal Criminal Cases

Historically, one of the challenges for all federal criminal practitioners has been the lack of established rules and procedures regarding how to manage e-discovery in criminal cases. Unlike the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure are largely silent on how to conduct e-discovery and do not address the form of production. After years of attempts at developing a protocol with DOJ regarding e-discovery productions, in February 2012 a non-binding document for managing post-indictment e-discovery, titled the Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases, was produced by JETWG.

Published with the support and encouragement of then Deputy Attorney General James Cole on behalf of DOJ, the ESI Protocol as it is commonly referred to, outlines ten principles for managing post-indictment e-discovery. The document includes an introduction, the recommendations themselves, commentary that addresses technical and logistical issues in more detail, and an "ESI Discovery Production Checklist." In general, the Recommendations are designed to encourage early discussion of electronic discovery issues through "meet and confers," the exchange of data in industry standard or reasonably usable formats, and resolution of disputes without court involvement where possible.

Building upon those efforts, DSO and DOJ representatives met with Judge Jeremy D. Fogel (CA-N), Director of the Federal Judicial Center, and agreed to collaborate on a pocket guide on criminal electronic discovery as a supplement to the federal judiciary's bench book. With considerable feedback and input from others, a JETWG subcommittee with members from both DOJ and the Defender Services program prepared "Criminal e-Discovery: A Pocket Guide for Judges," which was recently published. Though written for judges, it is also a helpful resource for all federal criminal practitioners.

Resources: The National Litigation Support Team

To begin to address some of the litigation support needs of CJA panel attorneys and federal defender staff, the National Litigation Support Administrator position (NLSA) was created in the fall of 2005. In the summer of 2009, two additional staff were added, with a fourth position added last summer. As mentioned earlier, the NLST provides assistance to the Judiciary, CJA panel attorneys, and FDOs on matters related to electronic discovery and litigation support. It is available to provide advice, make recommendations on funding requests involving e-discovery, advise courts and parties about economical and practical solutions to e-discovery issues, leverage various litigation support software tools, and can provide guidance on how to utilize third party vendors in a cost-effective manner. The team assists with managing three Coordinating Discovery Attorneys, national litigation support and computer forensic software contracts for the defender system, and, with others, trains court-appointed counsel and defender personnel on the use of technology in litigation.

Coordinating Discovery Attorneys

The Defender Services program has three national CDAs who are experts in e-discovery, have experience with CJA cases, and are knowledgeable about litigation technology. They work with CJA counsel and federal defenders in multi-defendant cases to manage large volumes of e-discovery efficiently and cost-effectively to best fit the defendants' needs. The Court can ask CJA counsel to request that the case be referred to a CDA through the National Litigation Support Team. As of February 2016, the CDAs have been appointed by federal courts to assist defense counsel in 60 cases that are currently active.

Federal Public and Community Defender Organizations

In addition to the NLST and CDAs, many federal public and community defender offices have in-house personnel with "litigation support" expertise on an ad hoc basis. They are found in a variety of traditional job roles, including paralegals, investigators, and computer systems administrators. Optimally, they have legal and IT experience and training to organize, analyze, and present case materials through technology equipment and computer programs.

Technology

In 2006, the Defender Services program had no national software contracts for managing e-discovery. Since that time, with the approval of the Committee on Defender Services, there are a number of software programs available for federal defender offices, and reduced rate contracts for software for CJA panel attorneys. The Committee on Defender Services endorsed the purchase of various litigation support software and services, recognizing that litigation support software, when used properly, can dramatically assist in completing various legal tasks involved with modern litigation. When e-discovery is provided in reasonably usable formats, computer-assisted systems can be invaluable in searching, sorting, classifying, indexing, storing, retrieving, and analyzing that information. Use of these tools has been shown to increase the effectiveness of counsel in their trial preparation, and to improve the efficiency and lower the overall costs of

The Honorable Kathleen Cardone
February 19, 2016
Page 7

litigation. With criminal cases having moved into the digital era, access to litigation support software is vitally important for any litigator.

There are several vendors who offer discounted rates to CJA panel attorneys for their litigation support software. Currently, there are discounted rates being offered on CaseMap, TimeMap, DocManager, and TrialDirector. There is also hosted space available in the web-hosted version of Summation (a document review platform) for select CJA and FDO cases which involve complex e-discovery. In addition, there are limited number of dtSearch Desktop software licenses for CJA panel attorneys with current, active cases.

Training

Training is a critical element in getting attorneys comfortable and conversant with e-discovery. Working with colleagues at the DSO Training Division, the NLST frequently presents at national trainings such as DSO Training Division Winning Strategies Seminar, the National Seminar for Federal Defenders, the Federal Defender Investigator and Paralegal Seminar, and the Computer Systems Administrator Conference. For federal defender staff, the team facilitates training on various computer and mobile forensic software with an outside vendor. Working with FDOs, the NLST also provides training of their attorneys and staff, and/or local CJA panel attorneys, approximately half a dozen times a year.

The NLST and DSO Training Division have developed two successful hands-on workshops that address using technology.

Techniques in Electronic Case Management (TECM) Workshop

This two and one-half day workshop on technology teaches end users hands-on skills for handling small and medium-sized volumes of discovery. It exposes FDO staff and CJA panel attorneys to the legal, strategic, and technological considerations involved with handling electronic and/or voluminous discovery. Participants learn basic and advanced features of three litigation support software programs (Adobe Acrobat Pro, dtSearch, and the CaseMap/TimeMap suite), and after the program, attendees have a better understanding of how legal litigation support programs work, and how to coordinate thoughtful workflow processes with co-counsel, staff and potential vendors.

Electronic Courtroom Presentation (ECP) Workshop

This two and one-half day workshop teaches end users hands-on skills for electronically presenting information in the federal courtroom in hearings and at trial. Using a combination of plenary presentations and small group, hands-on instruction, FDO staff and CJA panel attorneys learn about the legal, strategic, and technological considerations involved with presenting information in the courtroom. In the small group sessions, attendees practice direct and cross-examination, opening statements and closing arguments using two popular software tools for courtroom presentation (TrialDirector and PowerPoint).

Two case examples

Consider the following two examples which demonstrate the advantage of having knowledgeable e-discovery counsel, experienced litigation support staff and the appropriate technology involved in a case. In a recent a death-penalty eligible case, the government produced 18,000 consensual telephone recordings, totaling thousands of hours. It later filed a notice of 900 pertinent calls that it may use at trial, categorizing the calls on a per defendant basis. The defense teams needed to find the 900 calls out of the 18,000 call production but the names of the audio files in the government's notice of pertinent calls did not match the actual file names. They were abbreviations or the title was altered, making it inconsistent with the actual file name. Only a few titles in the government's notice matched the actual file names. Hundreds of titles had differing file names and the government hadn't kept a record of the file names. For example, the notice identified a pertinent call as "July 2, 2013 @ 18:12:44 PM to 614-937-8431". No such file name existed in the discovery. When the government produced its notice, it sometimes used the word "July," but the actual file name may have Jul_ or the number 7. In this instance, experienced counsel and litigation support staff were involved who knew how to perform alternative keyword searches to find an audio file. So to locate the Government's pertinent call of July 2, 2013, the query used was "[July or Jul or 7] and [2] and [13 or 2013] and [18] and [12] and [44] and [6149378431]". When this search was run in dtSearch, the correct file name was located which was: "6948406_Jul_02_2013_18_12_44_PM_6149378431". Besides needing the software, the attorneys needed to know how to do searches more sophisticated than the basic key word searches that many attorneys utilize.

In a multi-defendant mortgage fraud case with over three terabytes (three trillion bytes) of data, the cost of five vendor proposals for a web-hosted document review database ranged from \$70,000 to \$1.7 million. The experienced e-discovery counsel (one of the three national CDAs), recommended a proposal costing \$95,400. There are several important aspects of this decision that demonstrate the value of a counsel with e-discovery expertise. A less knowledgeable CJA attorney may have only obtained one quote, or believed the tools and services in the \$1.7 million quote were needed and sought funds for that vendor's services. Because of the CDA's knowledge of the technology and vendor services, the CDA obtained multiple bids, and was satisfied that the \$95,400 proposal would meet the needs of the defense lawyers in the case and, because it included technological features the \$70,000 proposal did not, would ultimately save money by reducing the amount of attorney time needed to find and review discovery materials.

Conclusion

In the past, when the overall volume of discovery was traditionally more limited than in civil cases, attorneys frequently could print and read all discovery. Those days are gone. Discovery productions now include computer hard drives, tablets and smart phones. Law enforcement agents regularly scour social media and obtain historical cell site location information from telephone companies. Months of pole-camera recordings, business security videos, and concealed camera footage in proprietary formats are frequently provided. With the government having turned to surveillance technology such as body wires, GPS tracking devices, and IMSI-

The Honorable Kathleen Cardone
February 19, 2016
Page 9

catchers (used to intercept mobile phone traffic and tracking movement of mobile phone users), it has become clear technology is the tool to gather evidence, the means to manage evidence, and frequently the evidence itself. Although tempting, hitting the print button will not solve discovery management problems. Hard copies will not address the mixed-media discovery - the volume is too substantial to print, and critical information will not appear on the paper. Counsel for indigent defendants will lose out on the speed, efficiency, and quality of information that e-discovery can provide if they continue to receive discovery in paper. With the proper knowledge, the appropriate technology and the experienced litigation support staff, defense counsel can maximize the information embedded in e-discovery and benefit from gained efficiencies if the data is produced in reasonably usable formats.

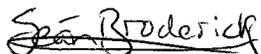
Managing e-discovery is a critical component of today's criminal defense work, not just in the complex multi-defendant case but in the "simple" single defendant prosecutions. To take on this subject, the Defender Services program will have to do what Deputy Attorney General James Cole said at Georgetown in April 2012 when discussing the ESI Protocol: "We are all going to have to bite the bullet and enter the digital age." DOJ has done so by putting significant resources towards improving their capabilities in managing e-discovery. Though the Defender Services program has taken some good initial steps towards this goal, much remains to be done to achieve parity with DOJ in this area. The speed at which technology changes requires continuous assessment of the technological case needs and flexibility. Some possible future steps could include:

- A. Additional NLST staff to provide more litigation support and case management services in the nature of those provided by DOJ's technology center;
- B. Additional CDA contracts to provide assistance in specific cases;
- C. Specialized panels of lawyers with the technological knowledge and skills to provide quality representation effectively and efficiently;
- D. Technology training requirements in CJA plans.

In any event, all indications are that more resources will be necessary to effectively manage the inevitable growth in the size and complexity of electronic discovery in federal criminal cases.

I appreciate the time and effort each member of this Committee has devoted to this very important study. Thank you.

Respectfully submitted,



Sean Broderick