

# Practical Advice for Managing eDiscovery in Small Cases

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# Dialogue leaders

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- ❖ Hon. Timothy S. Driscoll
    - ❖ Supreme Court of the State of New York
  - ❖ Julia M. Voss
    - ❖ Greensfelder, Hemker, & Gale, PC
  - ❖ Michael J. Scimone
    - ❖ Outten & Golden LLP
  - ❖ Greg M. Kohn
    - ❖ Nagel Rice LLP
  - ❖ Trena M. Patton
    - ❖ Epiq
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# Panel Overview

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- ❖ A Brief Update from the Drafting Team
- ❖ Importance of Meet & Confers
- ❖ ESI Protocol
- ❖ Tips from the Bench
- ❖ Use of Technology

# Importance of Meet & Confers – For “Small” Cases

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- ❖ Honesty
- ❖ Meet and confer with client before meet and confer with opposing counsel
- ❖ Get a handle on the scope of ESI that is potentially relevant to the case
- ❖ Discuss what technology is being used
- ❖ Productive meet and confer = better document requests

# ESI Protocol – what's it all about?

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- ❖ ESI Protocols can cover a range of topics, including:
    - ❖ Form of production
    - ❖ Preservation obligations
    - ❖ Search methodology
    - ❖ Meet & Confer process
    - ❖ Philosophical ramblings
      - ❖ Which, if any, are worth pursuing?
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# ESI Protocol – what's the default?

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- ❖ If negotiating a protocol threatens to become a time-consuming side project, what is the alternative?
- ❖ Rule 34 and many state procedures have default procedures for form of production, and objecting to form.
- ❖ Case-specific question: will it be more efficient to litigate form of production, or negotiate it on the front end?

# ESI Protocol – it's all in the timing ...

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- ❖ One option for a protocol that addresses search is to establish a timetable
- ❖ This presumes the parties can agree on the sequence of steps
- ❖ Can be an effective means of managing the calendar when the discovery timeframe is limited

# Tips from the Bench re ESI in “Small” Cases

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- ❖ Know what the jurisdiction considers a “small” case
- ❖ Know the law of the jurisdiction
  - ❖ E.g., Rule 37 isn’t followed everywhere (and even if you are in federal court, the judge may have her own view of “inherent authority”)
- ❖ Know the peculiarities of your jurisdiction and judge
  - ❖ Case management forms
  - ❖ Meet and confer protocol

# Tips from the Bench re ESI in “Small” Cases

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- ❖ Have your “geeks” available
  
- ❖ Not everything is worth fighting about
  - ❖ Form of production – YES
  - ❖ What to produce? – NOT always worth fighting about
    - ❖ Instead, just get something!

# Tips from the Bench re ESI in “Small” Cases

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- ❖ Judge is more interested in “What-ware” than “hardware” or “software”
  - ❖ What are the issues?
  - ❖ What are the most important documents to address the issues?
  - ❖ What are the identities of the key custodians?
  - ❖ What do the documents show?

# Tips from the Bench re ESI in “Small” Cases

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- ❖ When it comes to ESI (whether in large or small cases), don’t forget that the judge is a generalist
  - ❖ Indeed, most of the experts on ESI are now FORMER judges (Hedges, Peck, Francis, Facciola, Sheindlin)
    - ❖ We don’t know what we don’t know
    - ❖ Point us in the right direction
      - ❖ Is it in the Federal Judges’ Guide?
      - ❖ New York State Bench book?
      - ❖ *Soon* – ABA Bench Book for Business Court Judges

# Tips from the Bench re ESI in “Small” Cases

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- ❖ Don't forget that the rules of evidence still apply at trial
  
- ❖ The Judge wants to help (bring the case to resolution), so ask the Judge to help you!
  - ❖ Frequent conferences
  - ❖ Cost saving proposals

# Use of Technology for a “Small” Case

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- ❖ Litigation Hold
  - ❖ Collections
  - ❖ Foreign Language Translation
  - ❖ Redaction Headaches?
  - ❖ Other Data Type Headaches?
  - ❖ Native Productions
  - ❖ Review workflow
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# Technology– Litigation Hold

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- ❖ Excel and e-mail work just fine
- ❖ Larger matters/clients may need sophisticated legal hold systems, but using excel is the most common way of tracking everything.

# Technology - Collections

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- ❖ Collection of e-files (from a network or laptop, etc.)
    - ❖ Fast copy, Robocopy, Safecopy, Beyond Compare, just zip up data before you copy it
  - ❖ Collection of Emails
    - ❖ If only a few, forward them AS ATTACHMENTS to the legal team
    - ❖ If many, export to PST from Outlook – you can find instructions on the Internet
    - ❖ There are lower-cost programs online that can help you pull email from cloud providers like yahoo
    - ❖ Google allows you to download to an mbox file
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# Technology - Collections

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## ❖ Collection of Texts

- ❖ iPhone backup
- ❖ Cheap programs to pull out texts available for download
- ❖ Screenshots
- ❖ \*\* If you are not imaging the phone, you need to know what you are missing \*\*

# Technology – Foreign Language Translation

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## ❖ Google translate

- ❖ Assuming your client approves it for security purposes.  
Google says it doesn't keep it ... except when it does ...

# Technology – Redaction Headaches?

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- ❖ Save a copy of the original file for preservation then manually delete the data and put in a black box for a production native
- ❖ Payne Group has an inexpensive redaction tool that can work if the number of documents is not large

# Technology– Other Data Types

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- ❖ Extensive Audio recordings
  - ❖ Outside provider, such as Veritone
- ❖ “Live” exhibits (e.g., live websites, interactive data)
  - ❖ Videotape of witness manipulating what the program is
- ❖ Face recognition or other biometrics
  - ❖ Outside provider
- ❖ Website data for when a static image is acceptable
  - ❖ Pagevault will create a static image of a website in a way that can be backed up by Affidavit showing that it was what it was on the Internet at the time of the capture
  - ❖ Witness screenshots

# Technology– Native Production

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- ❖ TreeSize report can act as a metadata index when have a large amount of e-files that should be produced natively

# Technology– Review workflow

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- ❖ With small enough volume, you can create a few folders (responsive, non-responsive, privilege) and move documents into folders on your computer.
  - ❖ Print to PDF as PDFs and redact in Adobe (PRO – make sure the redactions burn in) and bates in Adobe or a program like EZBates
    - ❖ The metadata will be changed – you should keep a clean copy of the original collected data as there is a danger that you might accidentally delete something and not realize it
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# Technology– Review workflow

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- ❖ Even with a small case, a review platform is much easier.
  - ❖ There are many software providers that are affordable, even for small cases.
  - ❖ Some programs can also be used in-house if you have trained personnel.
- ❖ Analytics is not just for big cases – they are often built into review platforms, many times at no additional cost, and will save attorney time