



*The Iowa State Bar Association's  
Federal Practice Seminar presents*  
**2010 Federal Practice Seminar**

**Everyday Issues Involving Electronic Discovery**

**Civil Breakout  
2:00-3:00 pm**



**Presented by**

Hon. Thomas J. Shields  
Chief Magistrate Judge  
United State Courthouse  
Davenport, IA 52801  
Phone: (563) 884-7601

Michael A. Dee  
Brown Winick PLC  
666 Grand Avenue  
Suite 2000 Ruan Center  
Des Moines, IA 50309  
Phone: (515) 242-2400

**Friday, December 17, 2010**

IN THE IOWA DISTRICT COURT FOR \_\_\_\_\_ COUNTY

Plaintiff,  v.  Defendants.	Case No. _____  ACKNOWLEDGMENT OF RECEIPT OF ORDER AND AGREEMENT TO COMPLY
---	---

I, \_\_\_\_\_, have been retained by one of the parties in the above captioned case to provide computer forensics, data recovery, and electronic discovery services. I hereby acknowledge the receipt of the "Order on Joint Electronic Discovery Protocol" dated \_\_\_\_\_ ("Order"). I agree to be bound by such Order and comply with all requirements of the Order.

Dated: \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
E-Discovery Consultant

Plaintiff,  v.  Defendants.	Case No. _____  ORDER ON JOINT ELECTRONIC DISCOVERY PROTOCOL
---	---

IT IS HEREBY ORDERED that the following protocol governs the parties' handling of electronic discovery in this case. This protocol is in addition to and supplements traditional discovery requirements, including written discovery.

**Definitions**

"Application" means a collection of one or more related software programs that enable a user to enter, store, view, modify or extract information from files or databases. The term is commonly used in place of "program," or "software." Applications may include word processors, Internet browsing tools and spreadsheets.

"Backup" means to create a copy of data as a precaution against the loss or damage of the original data.

"Backup Data" is stored information that is not currently in use by an organization and is routinely stored separately upon portable media, to free up space and permit data recovery in the event of a loss of data. Backup data can also be stored on media that is not portable. Such systems are referred to as "near-line storage."

"Deleted Data" is data that, in the past, existed on the computer as live data and which has been deleted by the computer system or end-user activity. Deleted data remains on storage media in whole or in part until it is overwritten by ongoing usage or "wiped" with a software program specifically designed to remove deleted data.

"Document," "data," "electronic information," or synonyms thereof, means documents or electronically stored information referred to in Fed.R.Civ.P. 34. These terms also include all digital or analog electronic files, including "deleted" files and file fragments, stored in machine-readable format on magnetic, optical or other storage media, including the hard drives or tapes used by computers and their backup media or otherwise.

"E-Discovery Consultant" means a third party unaffiliated to any party in the case who

offers computer forensics, data recovery, and electronic discovery services.

"Electronic Device" means, but is not limited to: computer systems, including servers, networks, e-mail systems, voice mail systems, mobile or cell phones, data bases, desktop or laptop computers, telephone message records or logs; computer and network activity logs; electronic calendars; scheduling and rolodex systems; electronic messaging (text or instant messages) systems, PDAs, MP3 players (including i-Pods), digital cameras, digital video; or other digital recordings or transcripts thereof; any devices with memory cards and flash drives (also known as thumb drives or key chain drives), CD's, DVD's and backup or archival tapes or other similar storage media, including but, not limited to, computerized files, storage media (including but not limited to floppy disks, hard drives, CD-ROMS, zip disks, punch cards, magnetic tape, backup tapes, and computer chips) on which information has been saved, and any and all equipment needed to read any such material.

"Hard Drive" means the primary storage unit on servers or PCs, consisting of one or more magnetic media platters on which digital data can be written and erased magnetically and includes network attached storage (NAS) or storage area network (SAN) or other similar devices. This definition also includes "solid state hard drives" which do not use magnetic media platters.

"Mirror Image" is a sector-by-sector or bit-by-bit copy of a computer hard drive or other Memory Device that ensures the operating system is not altered during the forensic examination. This definition includes what is also known as a "bit stream copy."

"Memory Device" shall include Hard Drives as described herein and shall also include solid-state memory chips or other devices capable of storing information that can be exchanged, including flash drives, "thumb drives," "USB drives," and similar devices.

"Native Format" means all documents that are created in digital format (exchange logs, e-mail logs, mail store files, server error logs, word processing files, spreadsheets, presentations, and E-mail) have a native file format-that is, a format designed specifically for the most efficient use of the information in which this kind of software specializes.

"Network" is a group of computers, servers, or devices that is connected together for the exchange of data and sharing of resources.

"Search Terms" means the words, phrases, or numbers, either singly or in combination, including the use of Boolean or comparable search methods, used to find documents that may be responsive to discovery requests.

"Search Requests" means the use of Search Terms to locate documents

### **Mirror Images.**

*Custody:* Each party pursuant to the Iowa Rules of Civil Procedure, may obtain up to two Mirror Image of certain files, Memory Devices and Hard Drives belonging to another party. The Mirror

Images will be held in the custody of third party consultants ("E-Discovery Consultant") retained by the respective parties. Plaintiffs have initially retained \_\_\_\_\_. Neither party is waiving any right to change the E-Discovery Consultant at a later date. If a party does in fact change its respective E-Discovery Consultant, or if individual parties retain additional E-Discovery Consultants, then that party shall provide notice to all other parties if there is a change in the custodian of the Mirror Images or any future images in order to alert the other party that there has been a change in the chain of custody, and to allow the other party to timely object if necessary.

*Preservation of Images:* Neither party shall in any way alter the Archived Mirror Image that is made. Both parties shall maintain a chain of custody log for any additional Mirror Image they create for the purpose of conducting searches.

### **Electronic Search Requests**

*Search Requests:* The E-Discovery Consultant for each requesting party may conduct searches of non-archived Mirror Images of the producing party's Memory Devices. In order to avoid unnecessarily expansive requests, the requesting party may run as many such searches as it desires through its E-Discovery Consultant. However, until the results of the search are provided to the producing party, and until the producing party has an opportunity to review the search results for privilege and relevance as set forth below, the E-Discovery Consultant shall only provide to the requesting party information describing the number and types (file format and dates) of documents responsive to the search. If documents or files that are potentially responsive to a discovery request are not searchable through a text search using software that is available through an E-Discovery Consultant or otherwise, then the parties shall, subject to the need to determine if the document is subject to any privilege, voluntarily attempt to find a means to produce the document or file, in Native Format (and any other documents or files that may be necessary to use the potentially responsive document or file).

*Production of Results.* When the requesting party has determined that it desires to receive the documents responsive to the search request, the E-Discovery Consultant shall provide to the producing party the documents and metadata responsive to the Search Request. Counsel for the producing party may raise objections to the production thereof as allowed by the Iowa Rules of Civil Procedure and to identify attorney-client privileged or work product documents or information. Objections must be made within seven (7) business days of receipt of the Search Request results. Nothing in this Protocol or the procedures described therein shall act as a waiver of any party's attorney-client or work product privilege. If the parties cannot agree on the objections to the production of documents or metadata responsive to Search Request then they may seek the Court's assistance by a motion to compel, motion for protective order, or other appropriate remedy.

*Native Format Requests.* Upon receipt of the producing party's objections, the E-Discovery Consultant for the requesting party shall turn over the documents and metadata for which no objection was made to the requesting party's custody.

*Attorney Privilege Logs:* Both parties shall generate logs disclosing documents that are generated by a Search Request that are considered to be subject to the attorney client privilege or

attorney work product privilege. Such logs shall reasonably provide the following:

- a. The nature of the privilege claimed (i.e., attorney/client, work product, etc.);
- b. The name of the person claiming privilege and the name of the attorney, if any, with respect to whom the privilege is claimed;
- c. The facts upon which the party relies as the basis for claiming the privilege as to the specific information or document;
- d. The date of such document; the type of document (i.e., letter, memo, etc.); the matter thereof; the person who prepared it and each person (if any) who signed it; each person to whom it was directed, circulated, or shown; and each person now in possession of the document. If any document is produced in redacted form, the word “redacted” is to be placed in the redacted section of the document.

*Destruction Log:* In the event that any document requested by a party has been destroyed, discarded or deleted, that document is to be identified by stating:

- a. The nature of the document;
- b. Any addresser or addressee;
- c. Any indicated or blind copies;
- d. The document’s metadata including but not limited to the date, subject matter, number of pages, and attachments or appendices;
- e. All persons to whom the document was distributed, shown or explained;
- f. Its date of destruction or discard, manner of destruction or discard; and
- g. The person authorizing or carrying out such destruction or discard.

*Metadata:* Both parties shall make metadata for a responsive document or documents available to the other party.

### **E-Discovery Consultant**

All E-Discovery Consultants retained by the Parties shall sign the attached “Acknowledgment of Receipt of Order and Agreement to Comply” whereby the E-Discovery Consultant acknowledges receipt of this Order and agrees to comply with all requirements of this Order.

Dated: \_\_\_\_\_, 20\_\_

---

JUDGE,

IN THE IOWA DISTRICT COURT FOR \_\_\_\_\_ COUNTY

Plaintiff,  v.  Defendant.	Case No. _____  REQUEST FOR INSPECTION
--	--

COMES NOW [Plaintiff/Defendant], by and through [its/his/her] undersigned counsel and pursuant to Iowa Rules of Civil Procedure 1.512 and 1.513, hereby request that the \_\_\_\_\_ permit a forensic inspection and duplication of the tangible things described below, at \_\_:\_\_\_ \_\_.m. on \_\_\_\_\_, 20\_\_\_, at the offices of \_\_\_\_\_.

**REQUEST FOR FORENSIC DUPLICATION**

**REQUEST NO. 1:** [Plaintiff/Defendant] requests that a computer forensic examiner, \_\_\_\_\_, of \_\_\_\_\_ have physical access to the following tangible things of [Plaintiff/Defendant] for the purpose of creating a non-destructive bit-stream (mirror) image:

A. All laptops/desk-top computer/PDAs/servers/other (?) (whether in operating condition or otherwise) used by \_\_\_\_\_ from 20\_\_\_ to present.

The above computer forensic examiner will maintain one copy as an archive copy and will maintain a second copy for purposes of examination. Prior to the examiner turning over any data from the hard drive, the parties shall confer and agree on a protocol for the retrieval of said data. In addition, counsel for [Plaintiff/Defendant] will review



and remove any attorney-client communications or documents that result from said data retrieval.

Attached to this Request as Exhibit A is the resume of \_\_\_\_\_ computer forensic examiner.

IN THE IOWA DISTRICT COURT FOR \_\_\_\_\_ COUNTY

Plaintiff,  v.  Defendants.	Case No. _____  ORDER ON JOINT ELECTRONIC DISCOVERY PROTOCOL
---	---

IT IS HEREBY ORDERED that the following protocol governs the parties' handling of electronic discovery in this case. This protocol is in addition to and supplements traditional discovery requirements, including written discovery.

**Definitions**

"Application" means a collection of one or more related software programs that enable a user to enter, store, view, modify or extract information from files or databases. The term is commonly used in place of "program," or "software." Applications may include word processors, Internet browsing tools and spreadsheets.

"Backup" means to create a copy of data as a precaution against the loss or damage of the original data.

"Backup Data" is stored information that is not currently in use by an organization and is routinely stored separately upon portable media, to free up space and permit data recovery in the event of a loss of data. Backup data can also be stored on media that is not portable. Such systems are referred to as "near-line storage."

"Deleted Data" is data that, in the past, existed on the computer as live data and which has been deleted by the computer system or end-user activity. Deleted data remains on storage media in whole or in part until it is overwritten by ongoing usage or "wiped" with a software program specifically designed to remove deleted data.

"Document," "data," "electronic information," or synonyms thereof, means documents or electronically stored information referred to in Fed.R.Civ.P. 34. These terms also include all digital or analog electronic files, including "deleted" files and file fragments, stored in machine-readable format on magnetic, optical or other storage media, including the hard drives or tapes used by computers and their backup media or otherwise.

"E-Discovery Consultant" means a third party unaffiliated to any party in the case who

offers computer forensics, data recovery, and electronic discovery services.

"Electronic Device" means, but is not limited to: computer systems, including servers, networks, e-mail systems, voice mail systems, mobile or cell phones, data bases, desktop or laptop computers, telephone message records or logs; computer and network activity logs; electronic calendars; scheduling and rolodex systems; electronic messaging (text or instant messages) systems, PDAs, MP3 players (including i-Pods), digital cameras, digital video; or other digital recordings or transcripts thereof; any devices with memory cards and flash drives (also known as thumb drives or key chain drives), CD's, DVD's and backup or archival tapes or other similar storage media, including but, not limited to, computerized files, storage media (including but not limited to floppy disks, hard drives, CD-ROMS, zip disks, punch cards, magnetic tape, backup tapes, and computer chips) on which information has been saved, and any and all equipment needed to read any such material.

"Hard Drive" means the primary storage unit on servers or PCs, consisting of one or more magnetic media platters on which digital data can be written and erased magnetically and includes network attached storage (NAS) or storage area network (SAN) or other similar devices. This definition also includes "solid state hard drives" which do not use magnetic media platters.

"Mirror Image" is a sector-by-sector or bit-by-bit copy of a computer hard drive or other Memory Device that ensures the operating system is not altered during the forensic examination. This definition includes what is also known as a "bit stream copy."

"Memory Device" shall include Hard Drives as described herein and shall also include solid-state memory chips or other devices capable of storing information that can be exchanged, including flash drives, "thumb drives," "USB drives," and similar devices.

"Native Format" means all documents that are created in digital format (exchange logs, e-mail logs, mail store files, server error logs, word processing files, spreadsheets, presentations, and E-mail) have a native file format-that is, a format designed specifically for the most efficient use of the information in which this kind of software specializes.

"Network" is a group of computers, servers, or devices that is connected together for the exchange of data and sharing of resources.

"Search Terms" means the words, phrases, or numbers, either singly or in combination, including the use of Boolean or comparable search methods, used to find documents that may be responsive to discovery requests.

"Search Requests" means the use of Search Terms to locate documents

### **Mirror Images.**

*Custody:* Each party pursuant to the Iowa Rules of Civil Procedure, may obtain up to two Mirror Image of certain files, Memory Devices and Hard Drives belonging to another party. The Mirror

Images will be held in the custody of third party consultants ("E-Discovery Consultant") retained by the respective parties. Plaintiffs have initially retained \_\_\_\_\_. Neither party is waiving any right to change the E-Discovery Consultant at a later date. If a party does in fact change its respective E-Discovery Consultant, or if individual parties retain additional E-Discovery Consultants, then that party shall provide notice to all other parties if there is a change in the custodian of the Mirror Images or any future images in order to alert the other party that there has been a change in the chain of custody, and to allow the other party to timely object if necessary.

*Preservation of Images:* Neither party shall in any way alter the Archived Mirror Image that is made. Both parties shall maintain a chain of custody log for any additional Mirror Image they create for the purpose of conducting searches.

### **Electronic Search Requests**

*Search Requests:* The E-Discovery Consultant for each requesting party may conduct searches of non-archived Mirror Images of the producing party's Memory Devices. In order to avoid unnecessarily expansive requests, the requesting party may run as many such searches as it desires through its E-Discovery Consultant. However, until the results of the search are provided to the producing party, and until the producing party has an opportunity to review the search results for privilege and relevance as set forth below, the E-Discovery Consultant shall only provide to the requesting party information describing the number and types (file format and dates) of documents responsive to the search. If documents or files that are potentially responsive to a discovery request are not searchable through a text search using software that is available through an E-Discovery Consultant or otherwise, then the parties shall, subject to the need to determine if the document is subject to any privilege, voluntarily attempt to find a means to produce the document or file, in Native Format (and any other documents or files that may be necessary to use the potentially responsive document or file).

*Production of Results.* When the requesting party has determined that it desires to receive the documents responsive to the search request, the E-Discovery Consultant shall provide to the producing party the documents and metadata responsive to the Search Request. Counsel for the producing party may raise objections to the production thereof as allowed by the Iowa Rules of Civil Procedure and to identify attorney-client privileged or work product documents or information. Objections must be made within seven (7) business days of receipt of the Search Request results. Nothing in this Protocol or the procedures described therein shall act as a waiver of any party's attorney-client or work product privilege. If the parties cannot agree on the objections to the production of documents or metadata responsive to Search Request then they may seek the Court's assistance by a motion to compel, motion for protective order, or other appropriate remedy.

*Native Format Requests.* Upon receipt of the producing party's objections, the E-Discovery Consultant for the requesting party shall turn over the documents and metadata for which no objection was made to the requesting party's custody.

*Attorney Privilege Logs:* Both parties shall generate logs disclosing documents that are generated by a Search Request that are considered to be subject to the attorney client privilege or

attorney work product privilege. Such logs shall reasonably provide the following:

- a. The nature of the privilege claimed (i.e., attorney/client, work product, etc.);
- b. The name of the person claiming privilege and the name of the attorney, if any, with respect to whom the privilege is claimed;
- c. The facts upon which the party relies as the basis for claiming the privilege as to the specific information or document;
- d. The date of such document; the type of document (i.e., letter, memo, etc.); the matter thereof; the person who prepared it and each person (if any) who signed it; each person to whom it was directed, circulated, or shown; and each person now in possession of the document. If any document is produced in redacted form, the word “redacted” is to be placed in the redacted section of the document.

*Destruction Log:* In the event that any document requested by a party has been destroyed, discarded or deleted, that document is to be identified by stating:

- a. The nature of the document;
- b. Any addresser or addressee;
- c. Any indicated or blind copies;
- d. The document’s metadata including but not limited to the date, subject matter, number of pages, and attachments or appendices;
- e. All persons to whom the document was distributed, shown or explained;
- f. Its date of destruction or discard, manner of destruction or discard; and
- g. The person authorizing or carrying out such destruction or discard.

*Metadata:* Both parties shall make metadata for a responsive document or documents available to the other party.

### **E-Discovery Consultant**

All E-Discovery Consultants retained by the Parties shall sign the attached “Acknowledgment of Receipt of Order and Agreement to Comply” whereby the E-Discovery Consultant acknowledges receipt of this Order and agrees to comply with all requirements of this Order.

Dated: \_\_\_\_\_, 20\_\_

---

JUDGE,

IN THE IOWA DISTRICT COURT FOR \_\_\_\_\_ COUNTY

Plaintiff,  v.  Defendant.	Case No. _____  REQUEST FOR INSPECTION
--	--

COMES NOW [Plaintiff/Defendant], by and through [its/his/her] undersigned counsel and pursuant to Iowa Rules of Civil Procedure 1.512 and 1.513, hereby request that the \_\_\_\_\_ permit a forensic inspection and duplication of the tangible things described below, at \_\_:\_\_ \_\_.m. on \_\_\_\_\_, 20\_\_, at the offices of \_\_\_\_\_.

**REQUEST FOR FORENSIC DUPLICATION**

**REQUEST NO. 1:** [Plaintiff/Defendant] requests that a computer forensic examiner, \_\_\_\_\_, of \_\_\_\_\_ have physical access to the following tangible things of [Plaintiff/Defendant] for the purpose of creating a non-destructive bit-stream (mirror) image:

A. All laptops/desk-top computer/PDAs/servers/other (?) (whether in operating condition or otherwise) used by \_\_\_\_\_ from 20\_\_ to present.

The above computer forensic examiner will maintain one copy as an archive copy and will maintain a second copy for purposes of examination. Prior to the examiner turning over any data from the hard drive, the parties shall confer and agree on a protocol for the retrieval of said data. In addition, counsel for [Plaintiff/Defendant] will review

and remove any attorney-client communications or documents that result from said data retrieval.

Attached to this Request as Exhibit A is the resume of \_\_\_\_\_ computer forensic examiner.