*Outline:*

# COMPLEX FRAUD TRIAL PREPARATION STRATEGIES

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## INTRODUCTION

A complex federal fraud case can easily outstrip a lone attorney's capacity to prepare and try. Discovery becomes overwhelming as its volume climbs into millions of pages and terabytes of data. The intricacies of a client's business may fall outside the experience of a criminal defense attorney. Since an attorney's judgment must guide the identification and development of issues, he or she should proactively manage legal staff and experts to identify key information relevant for plea negotiations or trial.

This outline describes a workflow for preparing a complex fraud case for trial in light of these considerations. Though every case is unique and every attorney works differently, the authors hope to provide broadly applicable strategies and a point of departure for tackling logistically daunting cases.

The workflow is broken into three stages: preliminary work; discovery review; and trial preparation and trial. Each stage folds in a workflow based on consulting with the client, assigning tasks among the defense team, and regrouping to share findings and plan next steps.

**WORKFLOW**

## *Preliminary Work*

**Case-Management Groundwork**

***Assess the scope of the case***

- Review government's allegations and investigations
- Meet and confer with the government
- Request early disclosures

**Initial Assessment**

***Assess the background & merits***

- Determine the nature and strength of the charges
- Familiarize yourself with your client's industry

1 Consult with your client

## *Discovery Review*

**Infrastructure**

***Build a team & systems to manage discovery***

- Determine staff, third-party, and other team members
- Determine centralized location for discovery and third-party information
- Select a database vendor based on discovery needs
- Obtain court funds for staff and database as needed
- Institute project management systems for team

2 Assign tasks to defense team

**Receiving Discovery**

***Ensure discovery is complete, usable, & in database***

- Quality-control check discovery productions
- Obtain third-party information
- Maintain discovery log
- Upload discovery to database
- Quality-control check discovery in database

**Build a Defense**

***Work with discovery & develop issues***

- Configure database based on case specifics
- Review discovery
- Identify and test potential issues
- Develop examinations or cross-examinations of potential witnesses
- Prepare case analysis

3 Work individually

## *Trial Preparation & Trial*

**Prepare Trial Notebooks & In-Court Material**

***Organize work into quickly accessible formats***

- Prepare trial notebooks
- Prepare government & defense notebooks
- Prepare trial thumb drives

**At Trial**

***Use tools to access information as needed***

- Exhibits and testimony
- Opening and closing remarks
- Jury instructions

4 Meet & review work

# I. PRELIMINARY WORK

## A. Case-management groundwork

1. Develop early discovery plan
2. Meet and confer
    a. Discovery production timeline
    b. Producing discovery by general category
    c. Tables of contents or indices of material produced
    d. Form of production and format of ESI discovery
    e. Rendering unusually formatted ESI into a generic format
    f. Procedures for segregating attorney–client, work product, or other protected information
    g. Using protective orders or redaction for confidential or personal information
    h. Providing discovery to an incarcerated client
    i. Estimated discovery volume
    j. Discovery naming conventions
    k. Any defense software or hardware constraints
    l. Origins of ESI and other discovery from third parties
    m. Inspection or forensic imaging of seized hard drives
    n. Form of production for third-party metadata
    o. Reasonable schedule government discovery production and initial defense review to identify problems
    p. Security issues with sensitive discovery material

3. Move for a case-schedule order with early disclosure deadlines

4. Multiple defendants

    a. Indexed discovery production

    b. Joint defense agreement

    c. Sharing resources and information

**B. Initial background and assessment**

Begin assessing the merits of the case while assembling your defense team and database as discussed below. Your preliminary assessment may change once discovery review begins in earnest, but will guide some of your team-building and review-strategy decisions.

1. The government's case

    a. Factual allegations

    b. Statutes and model jury instructions for charged offenses

    c. Strength of the government's case

        i. Defensibility

        ii. Client background and role

        iii. Loss amount and sentencing exposure

2. Background in the client's industry

    a. Vocabulary

    b. Typical documents and forms

    c. Consider assistance of subject-matter expert early in the case

3. Multiple defendants

    a. Joint Defense Agreements

    b. Sharing of resources and information

**C. Potential pre-trial motions**

Fraud cases are subject to the usual panoply of pretrial motions. However, the complicated and often unfamiliar business practices that undergird the charges may makes certain types of motions more or differently applicable than in other criminal prosecutions. Though not an exhaustive list of potential motions, keep an eye out for these issues from the outset.

1. Bill of particulars
2. Motion to strike prejudicial surplusage
3. Motion to preclude opinion/expert evidence
4. Motion to suppress search

## II. DISCOVERY REVIEW

### A. Assemble a defense team

The goal of the preliminary preparation was estimating the amount of work the case will require. The next goal is ensuring you have enough hands ready to meet that need. As needed, seek funding authorization for additional staff as soon as possible. Before asking the court, determine whether any staff can be shared (and costs split) with co-defendants' counsel. Explain to the court how the additional staff will cost less than if you did the work yourself and will allow you to meet court deadlines.

If not already on staff, consider hiring or contracting one or more of the following:

1. Associate attorneys
2. Paralegals and legal assistants
3. Investigators
4. Experts
5. Database vendors

### B. Storing and sharing discovery

An online discovery database is an excellent tool for making large volumes of discovery manageable.

Complex fraud cases involve many members of a defense team. A web-based database allows all defense-team members to log in from their own respective computers and view the same collection of data to work collaboratively *and* simultaneously.

Web-hosted databases are designed for litigation and provide additional features that online storage services such as Dropbox or Box.com do not. A database not only allows document sharing, it enables documents to be searched, collected by issue, and annotated. Different databases may feature expanded functions such as predictive coding, which suggest potentially relevant documents based on a user's manual searches (think Netflix recommendations for discovery). Database vendors offer different features that may be especially suited to your case.

1. Online discovery database
    a. Selecting a database vendor
        i. Security
        ii. Accommodations for multiple defense teams and experts
        iii. Ease of use
        iv. Technical support and training
    b. Determining what will be processed
    c. Obtain court funds
2. Other discovery systems
    a. Stand-alone desktop discovery management programs, for example Summation or Concordance
    b. Non-database web storage, for example Dropbox or SpiderOak

## C. Receiving discovery

The schedule and form in which the government will produce discovery should be agreed early. Promptly check any discovery produced for variances from the agreement or other issues—better the government fix problems with its discovery than you.

Absent a protective order that precludes the direct review of discovery by a client, share discovery with the client when it has been checked. If this is not possible—discovery produced in formats you client cannot access or if the client is incarcerated—notify the client of the general contents of the discovery, and ask if there are particular documents he or she would like printed for review. One team member could take on the task of directing critical discovery to the client.

1. Quality-control check discovery received
    a. Unitized, i.e. broken into individual documents?
    b. Searchable?
    c. Non-native documents Bates-numbered?
    d. Indexed (or accompanied by a table of contents) and complete?
2. Maintain a discovery log
3. Share discovery with client

**D. Use discovery to build a defense**

Once systems and people are ready to begin reviewing discovery, fashion the discovery into a defense. Begin by organizing the discovery database to aid issue-based searching. Conduct a team review of the discovery to investigate likely issues—and uncover new ones. Issues should be tested and tied to specific evidence and witnesses. Compile issue and witness memoranda into a case analysis to show your client the best defenses, and likely outcome, at trial.

1. Configure the discovery database
    a. Vendor loads data into folders by custodian
    b. Defense team creates subfolders by issue
    c. Defense team categorizes data into issue sub-folders
2. Develop Issues
    a. Identify potential issues
    b. Create issue and investigative memoranda
    c. Test potential issues
        i. Government evidence
        ii. Experts
3. Create witness memoranda
    a. Cross examinations of potential government witnesses

i. Identify names and roles of potential government witnesses

ii. Determine likely testimony government witnesses will give and evidence they will introduce

iii. Strategize cross-examination goals for each witness in light of case theory

iv. Prepare cross-examination memoranda

(a) Brief description of witness identity

(b) Summary of likely testimony

(c) List of documents used in government interviews

(d) Other evidence the government will likely seek to introduce

(e) List of documents to introduce or use during cross examination

(f) Cross examination questions, with likely answers and evidence supporting answers

b. Direct examinations of potential defense witnesses

i. Brief description of witness identity

ii. List of documents to introduce or use during testimony

iii. Questions to ask, with a brief description of sought-after testimony

4. Create a database or spreadsheet with hyperlinks to specific exhibits

5. Use CaseMap and TimeMap as a digital notebook

6. Prepare case analysis of discovery for client

## III. TRIAL PREPARATION & TRIAL

### A. Prepare trial notebooks

Prepare trial notebooks to make a physical and or digital copy of all the relevant and necessary documents readily available in one place. Also prepare a trial USB flash drive drive and prepare to make use of trial presentation programs.

1. Trial notebooks
    a. Pretrial orders
    b. Defense and government trial briefs
    c. Voir dire questions
    d. Opening statement and PowerPoint
    e. Potential half-time motions to dismiss
    f. Jury instructions
    g. Closing statement with PowerPoint
    h. Stipulations and admitted exhibits
2. Witness notebooks
    a. Cross-examination and direct-examination memoranda
    b. All exhibits referenced in memoranda
    c. Material for impeachment or to refresh recollection
3. Laptop and thumb drive with all relevant memoranda and exhibits
    a. Pretrial orders
    b. Voir dire questions
    c. Opening statement with PowerPoint
    d. Government exhibits broken down by topic
    e. Defense exhibits
    f. Cross examination memoranda;
    g. Defense direct examination of witnesses
    h. Jury instructions
    i. Closing statement with PowerPoint
    j. Stipulations and admitted exhibits

k. Daily trial notes

4. Synchronize data to keep information on all media current and backed up

a. Online database

b. Networked computers

c. Laptops

d. Thumb drives

**B. At trial**

Use the tools discussed above to track the course of trial. This will facilitate timely objections (by keeping track of which exhibits have been admitted or stipulated to); fine-tuning cross examinations; preparing closing argument; and preparing an appeal in the event of an unfavorable outcome. This work should be performed by an in-court assistant so you can focus on testimony. Any information generated during trial and stored on a trial thumb drive should be copied to all other trial thumb-drives at the end of the day.

1. Exhibits

a. Trial presentation software

i. TrialDirector

ii. Sanction

iii. PowerPoint

iv. Keynote

v. Tablet trial presentation apps

b. Thumb drive digital exhibit list

c. Physical exhibits and document camera

d. Charts and visual aids

2. Witnesses

3. Opening statement

4. Half-time motion to dismiss

5. Jury instructions

6. Closing argument

## IV. CONCLUSION

Preparing for and trying complex cases is as much about process as it is substance. Because in many ways complex fraud cases more closely resemble business litigation than other types of criminal prosecution, they require processes more familiar to large civil firms than to many criminal defense attorneys.

The workflow strategies in this outline are purely process—the meat of trying your case remains in your capable hands. Nor are every, or even *any*, of the strategies provided mandatory. However, it is hoped this outline has added new and useful tools to your toolbox, to deploy when and as appropriate.

## APPENDIX A

## ESI Discovery Production Checklist[1]

[1] Dep't of Justice & Admin. Office of U.S. Courts Joint Elec. Tech. Working Grp., Recommendations for Electronically Stored Information Discovery Production in Federal Criminal Cases, Strategies and Commentary on ESI Discovery in Federal Criminal Cases 22 (2012), *available at* http://fd.org/docs/litigation-support/final-esi-protocol.pdf.

**ESI Discovery Production Checklist**

- Is this a case where the volume or nature of ESI significantly increases the case's complexity?
- Does this case involve classified information?
- Does this case involve trade secrets, or national security or homeland security information?
- Do the parties have appropriate technical advisors to assist?
- Have the parties met and conferred about ESI issues?
- Have the parties addressed the format of ESI being produced? Categories may include:
    - Investigative reports and materials
    - Witness statements
    - Tangible objects
    - Third party ESI digital devices (computers, phones, etc.)
    - Photos, video and audio recordings
    - Third party records
    - Title III wire tap information
    - Court records
    - Tests and examinations
    - Experts
    - Immunity and plea agreements
    - Discovery materials with special production considerations
    - Related matters
    - Discovery materials available for inspection but not produced digitally
    - Other information
- Have the parties addressed ESI issues involving:
    - Table of contents?
    - Production of paper records as either paper or ESI?
    - Proprietary or legacy data?
    - Attorney-client, work product, or other privilege issues?

- Sensitive confidential, personal, grand jury, classified, tax return, trade secret, or similar information?
- Whether email transmission is inappropriate for any categories of ESI discovery?
- Incarcerated defendant's access to discovery materials?
- ESI discovery volume for receiving party's planning purposes?
- Parties' software or hardware limitations?
- Production of ESI from third-party digital devices?
- Forensic images of ESI digital devices?
- Metadata in third-party ESI?
- Redactions?
- Reasonable schedule for producing party?
- Reasonable schedule for receiving party to give notice of issues?
- Appropriate security measures during transmission of ESI discovery, *e.g.*, encryption?
- Adequate security measures to protect sensitive ESI against unauthorized access or disclosure?
- Need for protective orders, clawback agreements, or similar orders or agreements?
- Collaboration on sharing costs or tasks?
- Need for receiving party's access to original ESI?
- Preserving a record of discovery produced?

- Have the parties memorialized their agreements and disagreements?
- Do the parties have a system for resolving disputes informally?
- Is there a need for a designated discovery coordinator for multiple defendants?
- Do the parties have a plan for managing/returning ESI at the conclusion of the case?

# APPENDIX B

## Example Forms and Documents

### A. Joint Defense Agreement

## JOINT DEFENSE AGREEMENT

## *Privileged and Confidential*

THIS AGREEMENT, by and among the undersigned counsel, acting for and on behalf of their respective clients, hereby memorializes their prior verbal joint defense agreement initially reached upon the indictment of their respective clients on the matter of *U.S. v. Example*.

1. The undersigned counsel believe and agree there is a mutuality of interest in a common defense of their respective clients in this matter. In this regard, the undersigned wish to continue to pursue the separate but common interests and avoid any suggestion of a waiver of privileged communications or work product. Accordingly, it is the undersigned's intention in understanding that the results of counsel's joint communications with their clients, as well as discussions on perspective witnesses, experts, and any other communications among counsel are confidential and protected from disclosure to any third party by the clients' attorney–client privilege and by way of the work product doctrine.

2. It is understood and agreed that all memoranda of law, debriefing memoranda, factual summaries, transcripts, digests, documents, letters, email communications, text messages or other forms of written communications, and any other written materials, as well as oral communications or information contained therein which otherwise would be protected from disclosure to third parties (the "Defense Materials") and which are exchanged between or among any of the undersigned lawyers or firms in connection with the proceedings, will remain confidential and protected from disclosure to any third party by the clients' attorney–client privilege and the work product doctrine.

3. It is understood and agreed that all work performed by the undersigned counsel with regard to their representations and communicated among them in connection with the proceedings shall be accomplished pursuant to the "Joint Defense Doctrine."

4. It is understood and agreed that no documents obtained from any of the undersigned counsel shall be disclosed to third parties without the consent of the counsel originating the materials. It is understood and agreed that if counsel feels it is necessary to give their client any information received pursuant to this agreement, counsel will direct that client not to disclose the information to others.

5. Any of the undersigned counsel may withdraw from this agreement on written notice to the other undersigned counsel. Any such withdrawal will be solely on the

prospective basis and any documents or information exchanged by counsel prior to such a withdrawal shall continue to be governed by the terms of this Agreement.

6. It is agreed that this Joint Defense Agreement applies to all communications and other exchanges of information (whether electronic, written, or oral) between or among any of the undersigned counsel. This Joint Defense Agreement is intended merely as the written embodiment of a prior oral understanding among counsel.

_____
[Attorney A]
Attorney for Defendant Example

Dated: _____

_____
[Attorney B]
Attorney for Codefendant 1

Dated: _____

**B. Discovery Log**

| *Date Rec'd* | *Format* | *Rec'd From* | *Bates* | *Custodian* | *Description* | *Sent to Client?* |
|---|---|---|---|---|---|---|
| 9/2/2013 | CD | Gov't | MLAT0001–MLAT0239 | Bank of Germany | Documents from foreign bank account | Yes; 9/4/2013 |
| 9/3/2013 | CD | Wells Fargo | WF0001–WF1879 | Wells Fargo | Client's bank records | Yes; 9/6/2013 |
| … | | | | | | |

### C. Discovery Memorandum

# Memorandum

*January 10, 2013*

To: **Client File**
From: **TNC**
Case: **U.S. v. Example**
Re: **Chart of Documents in Co-Defendant No. 2 Proffer**

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Below is a chart of documents directly referred to during the proffer of Defendant No. 2. I have included a short description of the information in the document that the Government seemed to think significant, a Bates number locating the document within our database when I could find one, and the page of the proffer transcript on which the document is first mentioned.

| *Document/Relevance* | *Bates No.* | *Page in Transcript* |
|---|---|---|
| Settlement Statement for loan from Wells Fargo to Ms. Co-Defendant, Jan. 10, 2009<br><br>Showing $100,000 loan secured by the downtown property | WF0100–WF0130 | 12 |
| Fax from Ms. Co-Defendant to Bank of Germany, Sept. 30, 2008<br><br>Opening a foreign currency account in Ms. Co-Defendant's name | MLAT0020–MLAT0022 | 40 |
| … | | |

**D. Witness Memorandum**

# Memorandum

*July 1, 2013*

To: **Client File**
From: **HAL**
Case: **U.S. v. Example**
Re: **Ximena Ortiz Cross Examination**

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Ximena Ortiz joined Wells Fargo as District Manager in late 2008, and handles commercial loans. Mr. Example's loan was already in place when she arrived.

## RELATED DOCUMENTS

### Memorandum of Interview

- WITN03022 (August 10, 2010)

### Documents Used During Interview

- Settlement Statement for loan from Wells Fargo to Ms. Co-Defendant (Jan. 10, 2009), WF0100
- Wire Transfer Form (Jan. 13, 2009), WF0135

## EXPECTED TESTIMONY

Ms. Ortiz will testify regarding her involvement with the loan. She will likely say she was unaware the property was already securing another loan.

## CROSS EXAMINATION

### Additional Information

| *Question* | *Answer* | *Source* |
|---|---|---|
| | | |

### Impeachment

| *Question* | *Answer* | *Source* |
|---|---|---|
| | | |

## E. Hyperlinked Chart of Government Exhibits

| *Exhibit* | *Document* | *Bates* | *Hyperlink* | *Count 1* | *Count 2* | *Count 3* |
|---|---|---|---|---|---|---|
| 0001 | Purchase & Sale Agreement (Dec. 5, 2008) | AB1360 | E:\… | x | | |
| 0002 | Wire Transfer Form (Jan. 3, 2009) | WF0135 | E\… | x | | |
| 0003 | Handwritten note from Bus. Assoc. No. 3 | SW0506 | E:\… | | x | x |
| … | | | | | | |