



## TRIAL SKILLS WORKSHOP II:

# CRIMES DECODED: EMERGING DIGITAL TECHNOLOGY LITIGATION STRATEGIES

ADMINISTRATIVE OFFICE OF THE U.S. COURTS  
DEFENDER SERVICES OFFICE TRAINING DIVISION

Oakland Marriott City Center  
1001 Broadway, Oakland, CA 94607

September 5-7, 2019

**DRAFT AGENDA (7.12.19)**

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### Thursday, September 5, 2019

- 7:30 - 8:30 a.m.**     **Registration - Continental Breakfast**
- 8:30 - 8:40 a.m.**     **Welcoming Remarks**  
*Steven Kalar, Federal Defender, Federal Public Defender's Office for the Northern District of California, Oakland, CA*
- 8:40 - 8:45 a.m.**     **Introduction to the Workshop**  
*Kyana Givens, Visiting Attorney Advisor, Training Division, Defender Services Office, Washington, DC & Assistant Federal Public Defender, Federal Public Defender's Office, Western District of Washington, Seattle, WA*
- 8:45 - 10:00 a.m.**   **PLENARY SESSION 1: Where We've Been & The Places We Will Go - Unpacking *Carpenter v. United States***  
*Nathan Freed Wessler, Staff Attorney, ACLU Speech, Privacy and Technology Project, New York, NY*

This plenary presentation will explore the holdings in *Carpenter v. United States*, 138 S.Ct.138 S.Ct.2206 (2018) (holding the government must generally obtain a search warrant based on probable cause before

acquiring cell-site location information from a wireless carrier). Attorney Wessler argued the case in the U.S. Supreme Court in 2017. He will also explore the significance of other case law trends related to emerging digital technology.

**10:00 - 10:15 a.m. Break**

**10:15 - 11:15 a.m. PLENARY SESSION 2: Track, Tracking, Tracked**

John C. Ellis, Jr., *Attorney at Law, San Diego, CA*

Law enforcement's aggressive tracking of cell phones has become a powerful and widely used surveillance tool for both federal authorities and local police. Law enforcement claims that a person's location can be pinpointed to a smart phone in a pocket using historic cell site location information (CSLI). Some in law enforcement describe these devices as "the virtual biographer of our daily activities." Not so fast! Use of CSLI contains pitfalls, misleading data and misunderstood technology which may lead to erroneous conclusions by law enforcement, attorneys, and most importantly, juries. This presentation will help attorneys identify these pitfalls, help elucidate the issues, the technology and the problems with over-reliance on CSLI, and present strategies for attacking the reliability of law enforcement opinions about your client's location based upon cell phone use. This presentation will also address issues involving other forms of electronic surveillance and identify resources to find experts in digital technology and explain key questions to screen and retain an expert.

**11:15 a.m.-**

**12:15 p.m. WORKSHOP SESSION I: What are the Coordinates to the Electronic Frontier? Understanding How to Find, Interview, Retain and Prepare an Expert Technologist for Court**

Participants will meet in their small groups to practice effectively screening and interviewing expert technologists to comprehend what is needed to understand the technology utilized in preparation for contested hearings.

**12:15 - 1:30 p.m. Lunch**

**1:30 - 2:45 p.m. PLENARY SESSION 3: The System Is Buggy: Federal Rules of Evidence and Digital Technology**

Andrea George, *Federal Defender, Federal Public Defender's Office for the Eastern District of Washington, Spokane, WA*

Andrea Roth, *Professor of Law, Berkeley School of Law & Faculty Director, Berkeley Center for Law and Technology*

In this plenary participants will learn evidence rules and strategies related to 3<sup>rd</sup> Party Information, authentication and inadmissible bolstering veiled in technology. Based on the workshop fact patterns, participants will explore several evidence problems to identify evidentiary issues and how to argue for the admission or exclusion of evidence in court.

**2:45 - 3:00 p.m. Break**

**3:00 - 4:25 p.m. Spotlights**

*Berkeley Information School, Oakland, CA - Mapping Data*

Sean Broderick, *National Litigation Support Administrator, Defender Services Office, Training Division, Administrative Office of U.S. Courts, Oakland, CA - XI Social Discovery*

Mike Price, *Senior Litigation Counsel, Fourth Amendment Center, NACDL, Washington, DC - ESI Records*

Participants will rotate through three 25 minute live demonstrations of emerging digital technology in criminal cases: (1) Mapping Data; (2) XI Social Discovery, and (3) ESI Records.

<b>SPOTLIGHT 1: Mapping Data <i>Room X</i></b>	<b>SPOTLIGHT 2: Capturing Social Media With X1 Social Discovery <i>Room Y</i></b>	<b>SPOTLIGHT 3: Electronic Storage &amp; Information Records <i>Room Z</i></b>
The Berkeley Information School will illustrate and discuss the basics of data visualization. This spotlight will help Defenders understand how to organize, categorize & present data ( <i>i.e.</i> , Data Dumps, GPS Coordinates).	The DSO Litigation Support Team will illustrate the Software Program X1 Social Media as an investigation tool to capture and organize social media in criminal cases.	Mr. Price will illustrate: What a government imaged phone reveals; law enforcement digital programs; unique technology the government uses; and location information

**3:00 - 3:25 p.m. Spotlight Rotation 1:**

*Mapping Data*

*XI Social Discovery*

*ESI Records*

***Room X:***

***Room Y:***

***Room Z:***

*Groups A, B, C*

*Groups D, E, F, G*

*Groups H, I, J, K*

3:30 - 3:55 p.m. **Spotlight Rotation 2:**  
*Mapping Data* **Room X:** *Groups H, I, J, K*  
*XI Social Discovery* **Room Y:** *Groups A, B, C,*  
*ESI Records* **Room Z:** *Groups D, E, F, G*

4:00 - 4:25 p.m. **Spotlight Rotation 3:**  
*Mapping Data* **Room X:** *Groups D, E, F, G*  
*XI Social Discovery* **Room Y:** *Groups H, I, J, K*  
*ESI Records* **Room Z:** *Groups A, B, C*

4:30 - 5:30 p.m. **PLENARY SESSION 4: Let Me Use your Face for a Moment – Understanding Emerging Biometrics and Compelled Facial Recognition**  
 TBD, *Moderated Panel*

This session will define and explore facial recognition and biometrics, describe how this technology presents in our cases, and explore some of the privacy implications & 5<sup>th</sup> Amendment Challenges.

5:30 p.m. **Adjourn for the Day**

### Friday, September 6, 2019

7:30 - 8:30 a.m. **Continental Breakfast**

8:30 - 9:30 a.m. **PLENARY SESSION 5: Predictive Policing – The impact of Data & Analytics in Criminal Cases**  
*Hanni Meena Fakhoury, Assistant Federal Defender, Federal Public Defender Office for Northern District of California, Oakland, CA*

This plenary explores police investigation tactics related to Data & Analytics, fusion centers, data sharing across government agencies and private sectors. We will discuss litigation strategies to preclude or limit the use of this information in court.

9:30 - 11:00 a.m. **WORKSHOP SESSION II: Mapping the Data is Not Equal to Mapping the Person – Bail & SR Violation Arguments Related to Social Media, Data Analytics and Location Tracking**

Participants will practice making effective arguments using digital evidence to support hearings under the Bail Reform Act. Participants will also learn how to mitigate social media and location tracking evidence in contested hearings.

**11:00 - 11:15 a.m. Break**

**11:15 a.m. -**

**12:15 p.m. PLENARY SESSION 6: First You Must Compel – Persuasive Writing to Exclude Technology Involving Black Box Algorithms**  
Megan Graham, *Clinical Supervising Attorney, UC Berkeley School of Law, Berkeley, CA*

This plenary will explore common litigation themes in technology that uses Black Box Algorithms. Through the lens of a DNA STRmix case, participants will learn about this technology in criminal cases, learn how and why it is important to compel source codes, understand *Daubert* challenges to Black Box Algorithms, and identify key questions to ask from discovery exchange to contested hearings.

**12:15 - 1:30 p.m. Lunch**

**1:30 - 3:30 p.m. WORKSHOP SESSION III: Keeping Black Box Algorithms Out of the Jury Box – Persuasive Writing for Arguing Daubert Challenges Related to Black Box Algorithms**

Participants will utilize techniques from the writing plenary to structure persuasive technical arguments, draft a discovery letter for a Black Box Algorithm, and outline their argument to compel “proprietary” information.

**3:30 - 3:45 p.m. Break**

**3:45 - 4:45 p.m. PLENARY SESSION 7: The Stored Communications Act 101 – Understanding a § 2703(d) orders in Criminal Defense Cases**  
TBD

The privacy of stored internet communications in the United States is governed by a federal statute known as the Stored Communications Act (“SCA”). *See* 18 U.S.C. §§ 2701–2711 (2000). This session will focus on the SCA to help explain the basic structure and text of the Act so that we can understand how it works—and in some cases, how it doesn’t work. This session will cover the nuts and bolts of the statute’s many distinctions and dichotomies and touch on some of the current controversies about a statute actively present in criminal cases.

**4:45 - 6:00 p.m.    WORKSHOP SESSION IV: Direct Examination of Defense Experts and Other Technical Witnesses**

In this session participants will practice direct examinations of defense experts.

**6:00 p.m.            Adjourn for the Day**

**Saturday, September 7, 2019**

**7:30 - 8:30 a.m.    Continental Breakfast**

**8:30 - 9:15 a.m.    PLENARY SESSION 8: From Triage to Trial – Discovery Management and Electronic Case Presentation in the Digital Age**

Tim Watkins, *Director’s Leadership Program Resident, Administrative Office of the U.S. Courts, Washington, DC*

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. In addition to the explosion of documents in electronic form, even a “simple” single defendant prosecution may feature hours of audio and video, several of your client’s cellphones, and other detritus culled from the “internet of things.” And then we have to present it to increasingly distracted jurors in a focused and engaging way. This session will use the Joint Working Group on Electronic Discovery’s “ESI Protocol” as a framework to discuss strategies for organizing and effectively reviewing complex discovery productions and discuss tools for distilling and effectively presenting evidence electronically at trial.

**9:15 - 10:00 a.m.    PLENARY SESSION 9: Technical Cross-Examinations – Revealing the Myths Behind the “Science”**

Colette Tvedt, *Criminal Defense Attorney, Tvedt Law, Denver, CO*

Emerging digital technology in criminal cases is full of ideas and opinions that pass for “science” in the courtroom. This session will explain the foundations of effective cross-examinations and reveal some of the prevailing myths and assumptions that can be undercut through cross-examination.

**10:00 - 10:15 a.m. Break**

**10:15 a.m. -**

**12:00 p.m. WORKSHOP SESSION V: Cross-Examinations**

In this session, we will focus on the chapter method of crossing a technologist by identifying known areas of weakness that usually fall into several broad categories. Participants will develop crosses on particular types of challenges (i.e., insufficient expertise, insufficient scientific validation, bias, etc.).

**12:00 - 1:15 p.m. PLENARY SESSION 10: Slipping into DMs and Landing in Hot Water – Ethics, Social Media and the First Amendment**  
Callie Glanton Steele, *Senior Litigator, Federal Public Office for the Central District of California, Los Angeles, CA*

This session will focus on the intersection between Ethics, Social Media and the First Amendment.

**1:15 p.m. Closing Remarks / Adjournment**