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DISCOVERING THE GOVERNMENT'S DISCOVERY

Strategies for managing electronic discovery

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RESPONSIBILITIES OF DEFENSE COUNSEL

N.C. R. PROF'L CONDUCT 1.1 COMPETENCE

A lawyer shall not handle a legal matter that the lawyer knows or should know he or she is not competent to handle without associating with a lawyer who is competent to handle the matter. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

N.C. R. PROF'L CONDUCT 1.1, CMT. 8

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with the **technology** relevant to the lawyer's practice, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.

JOINT WORKING GROUP ON ELECTRONIC TECHNOLOGY - ESI PROTOCOL

For complex ESI productions, each party should involve individuals with sufficient technical knowledge and experience to understand, communicate about, and plan for the orderly exchange of ESI discovery. **Lawyers have a responsibility to have an adequate understanding of electronic discovery.**

Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases, Recommendation 4 (2012).

BUT I DON'T DEFEND COMPLEX FINANCIAL CRIMES.

E-discovery is increasingly important across all types of cases. Even a single-count drug or firearm prosecution can require production and review of cell-site location information, GPS data, and voluminous cell phone extractions.

BUT THIS CASE ISN'T GOING TO TRIAL.

- “During plea negotiations defendants are entitled to the effective assistance of competent counsel.” *Lafler v. Cooper*, 566 U.S. 156, 162 (2012) (quotation omitted).
- “Defense counsel’s effectiveness may depend on whether he or she has reviewed and understands the e-discovery in time to enter into informed plea negotiations.” *Criminal E-Discovery: A Pocket Guide for Judges* at 3 (Fed. Judicial Ctr. 2015).

BUT I'M COMPUTER ILLITERATE.

“Today, ignorance of technology is simply an inadequate excuse for failure to properly carry out discovery obligations.” *Small v. Univ. Med. Ctr. of S. Nevada*, No. 2:13-CV-00298-APG, 2014 WL 4079507, at *29 (D. Nev. Aug. 18, 2014) (followed by many and varied subsequent decisions overruling this decision in part, none of which blessed ignorance as an excuse).

GOVERNMENT'S DISCLOSURE OBLIGATIONS

FED. R. CRIM. P. 16

- Rule 16(a) controls what the government is required to provide *upon the defendant's request*. **Make a request!**
- Rule 16(a)(1)(E) contemplates discovery of electronically stored information: “Upon a defendant’s request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, **data**, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:
 - (i) the item is material to preparing the defense;
 - (ii) the government intends to use the item in its case-in- chief at trial;
or
 - (iii) the item was obtained from or belongs to the defendant.”
- Rule 16 (unlike Fed. R. Civ. P. 26, 34) says nothing about how the government must format or organize its production, or when the government must make the production.
- Discovery is reciprocal.

JUSTICE MANUAL 9-5.002 - CRIMINAL DISCOVERY

- “To ensure that all discovery is disclosed on a timely basis, generally all potentially discoverable material within the custody or control of the prosecution team should be reviewed.”
- “Prosecution team” includes law enforcement officers and agents working on the case.
- *Justice Manual* outlines where the AUSA should look for discoverable information.

JUSTICE MANUAL 9-5.004 - GUIDANCE ON THE USE, PRESERVATION, AND DISCLOSURE OF ELECTRONIC COMMUNICATIONS IN FEDERAL CRIMINAL CASES

- “All members of the prosecution team, including federal, state, and local law enforcement officers, are responsible for making available to the prosecutor all potentially discoverable e-communications. It is the prosecutor’s responsibility to oversee the gathering, review, and production of discovery.”
- “E-communications should be preserved in their native electronic format; when that is not feasible, another method of preservation should be identified and used.”

TIMING OF DISCOVERY

FED. R. CRIM. P. 16.1 (2019)

(a) Discovery Conference. No later than 14 days after the arraignment, the attorney for the government and the defendant's attorney must confer and try to agree on a timetable and procedures for pretrial disclosure under Rule 16.

(b) Request for Court Action. After the discovery conference, one or both parties may ask the court to determine or modify the time, place, manner, or other aspects of disclosure to facilitate preparation for trial.

COMMITTEE NOTE TO FED. R. CRIM. P. 16.1 (2019)

This new rule requires the attorney for the government and counsel for the defendant to confer early in the process, no later than 14 days after arraignment, about the timetable and procedures for pretrial disclosure. **The new requirement is particularly important in cases involving electronically stored information (ESI) or other voluminous or complex discovery. . . .**

The rule states a general procedure that the parties can adapt to the circumstances. Simple cases may require only a brief informal conversation to settle the timing and procedures for discovery. Agreement may take more effort as case complexity and technological challenges increase. . . .

Because technology changes rapidly, the rule does not attempt to state specific requirements for the manner or timing of disclosure in cases involving ESI. **However, counsel should be familiar with best practices.** For example, the Department of Justice, the Administrative Office of the U.S. Courts, and the Joint Working Group on Electronic Technology in the Criminal Justice System (JETWG) have published “Recommendations for Electronically Store Information (ESI) Discovery Production in Federal Criminal Cases” (2012). . . .

LOCAL CRIMINAL RULE 16.1

- AUSA must arrange pretrial conference with defense counsel within 21 days of indictment or initial appearance, whichever is later. Upon request, defense counsel is entitled to review all discoverable information at the conference. See LR 16.1(b).
- Counsel may agree to exchange discovery by mail in lieu of the pretrial conference. See LR 16.1(d).

OBTAINING AND USING ESI

JOINT ESI PROTOCOL

Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases (the “ESI Protocol”) (2012):

“The Joint Electronic Technology Working Group (JETWG) was created to address best practices for the efficient and cost-effective management of post-indictment ESI discovery between the Government and defendants charged in federal criminal cases. JETWG was established in 1998 by the Director of the Administrative Office of the U.S. Courts (AOUSC) and the Attorney General of the United States. It consists of representatives of the Administrative Office of U.S. Courts’ (AOUSC) Office of Defender Services (ODS), the Department of Justice (DOJ), Federal Defender Organizations (FDO), private attorneys who accept Criminal Justice Act (CJA) appointments, and liaisons from the United States Judiciary and other AOUSC offices.”

JOINT ESI PROTOCOL—PRINCIPLES

Principle 1: Lawyers have a responsibility to have an adequate understanding of electronic discovery.

Principle 2: In the process of planning, producing, and resolving disputes about ESI discovery, the parties should include individuals with sufficient technical knowledge and experience regarding ESI.

Principle 3: At the outset of a case, the parties should meet and confer about the nature, volume, and mechanics of producing ESI discovery. Where the ESI discovery is particularly complex or produced on a rolling basis, an on-going dialogue may be helpful.

Principle 4: The parties should discuss what formats of production are possible and appropriate, and what formats can be generated. Any format selected for producing discovery should maintain the ESI's integrity, allow for reasonable usability, reasonably limit costs, and, if possible, conform to industry standards for the format.

JOINT ESI PROTOCOL—PRINCIPLES

Principle 5: When producing ESI discovery, a party should not be required to take on substantial additional processing or format conversion costs and burdens beyond what the party has already done or would do for its own case preparation or discovery production.

Principle 6: Following the meet and confer, the parties should notify the court of ESI discovery production issues or problems that they reasonably anticipate will significantly affect the handling of the case.

Principle 7: The parties should discuss ESI discovery transmission methods and media that promote efficiency, security, and reduced costs. The producing party should provide a general description and maintain a record of what was transmitted.

Principle 8: In multi-defendant cases, the defendants should authorize one or more counsel to act as the discovery coordinator(s) or seek appointment of a Coordinating Discovery Attorney.

JOINT ESI PROTOCOL—PRINCIPLES

Principle 9: The parties should make good faith efforts to discuss and resolve disputes over ESI discovery, involving those with the requisite technical knowledge when necessary, and they should consult with a supervisor, or obtain supervisory authorization, before seeking judicial resolution of an ESI discovery dispute or alleging misconduct, abuse, or neglect concerning the production of ESI.

Principle 10: All parties should limit dissemination of ESI discovery to members of their litigation team who need and are approved for access, and they should also take reasonable and appropriate measures to secure ESI discovery against unauthorized access or disclosure.

MINIMUM QUESTIONS FOR PRETRIAL CONFERENCE

- What kind of discovery materials will the government produce?
- What volume of information is involved?
- How will discovery be organized?
 - Can documents be unitized?
 - Will the government provide an index?
 - How will files and folders be named?
 - Will documents be consecutively Bates numbered?
- What format(s) are materials in? Can the government provide discovery in more than one format?
 - Can the government use digitally created documents instead of scanned versions?
 - Will all PDFs be OCR'ed?
 - When will native files be produced in native versus non-native format?
 - Are there proprietary file formats? Will software be included?
- What metadata are available? Could metadata be important?
- Are there confidentiality considerations? Can restrictions be targeted to parts of the discovery and not others?

NOTE: SPEEDY TRIAL ISSUES

Fed. R. Crim. P. 16.1 and Local Rule 16.1 do not govern the timing of trial:

This rule focuses exclusively on the process, manner and timing of pretrial disclosures, and does not address modification of the trial date. The Speedy Trial Act, 18 U.S.C. §§ 3161-3174, governs whether extended time for discovery may be excluded from the time within which trial must commence.

Fed. R. Crim. P. 16.1, advisory committee note.

What if your client demands a speedy trial?

E-DISCOVERY RESOURCES FOR APPOINTED COUNSEL

BASIC HARDWARE AND SOFTWARE

The minimum hardware and software necessary to your practice are part of your firm's overhead:

- Laptop computer (must be replaced often enough to accommodate updates)
- PDF viewing/editing software (use caution with free online versions—uploading a PDF to have it OCR'ed is not appropriate when dealing with confidential discovery)
- Video/audio software (multiple free video and audio players available online)
- Discovery or document management software (reduced cost/free options available)

CJA PANEL ATTORNEY SOFTWARE DISCOUNTS

Litigation support software may be available to you at a discounted price. For information, see <https://www.fd.org/litigation-support/cja-panel-attorney-software-discounts>.

Note: dtSearch is an excellent tool for searching voluminous documents and it is available at no cost to CJA panel attorneys. Licenses are also available for a paralegal.

EXTERNAL SUPPORT

- In complex multi-defendant cases with voluminous discovery, a coordinating discovery attorney may be appointed.
- Consider requesting funding for e-discovery support services in cases that involve a significant volume of discovery, although they do not warrant appointment of a coordinating discovery attorney.
- Contact Larry Dash!

REFERENCE MATERIALS

National Litigation Support blog, <https://nlsblog.org/>

ESI Protocol, <https://www.fd.org/sites/default/files/Litigation%20Support/final-esi-protocol.pdf>

Criminal E-Discovery: A Pocket Guide for Judges,
https://www.fd.org/sites/default/files/litigation_support/pocket-guide_criminal-e-discovery.pdf

Recommended E-Discovery Practices for Federal Criminal Justice Act Cases, <https://www.fd.org/sites/default/files/Litigation%20Support/recommended-e-discovery-practices.pdf>

Justice Manual, <https://www.justice.gov/jm/jm-9-5000-issues-related-trials-and-other-court-proceedings#9-5.003>