

New Federal Guidelines Promote Uniform Treatment of E-Discovery in Criminal Proceedings

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The Department of Justice (DOJ), the federal courts, and the criminal defense bar have developed a set of guidelines that appears to be a major step towards uniform treatment of e-discovery in federal criminal investigations and federal criminal trials. For the time being, the new protocol, signed earlier this month, has been introduced to the U.S. Attorney's Offices, investigative agencies, judges, and various law enforcement divisions as a guideline and a training tool.

The protocol is intended to “promote the efficient and cost-effective post-indictment production of electronically stored information . . . and to reduce unnecessary conflict and litigation over ESI [electronically stored information] discovery”¹ It will apply only to disclosure of ESI under Federal Rules of Criminal Procedure 16 and 26.2, materials that the government is obligated to produce in litigation, under the caselaw emanating from *Brady* and *Giglio*, and the Jencks Act. Though the DOJ specifically excludes application of the protocol to criminal investigations,² it will likely give structure to DOJ's production requests through subpoenas and other investigative mechanisms. In order to meet ESI obligations at trial, DOJ will, by necessity, have stronger incentives to ensure that investigative materials are produced to DOJ in a format that is “trial ready.”

The 21-page document is based on core e-discovery principles rooted in civil discovery procedures, including the precepts that all lawyers have a responsibility to have an adequate understanding of e-discovery; parties should approach ESI production collaboratively with mutual and interdependent responsibilities; and parties should raise issues and problems with the court early, preferably after good-faith meet and confer sessions. Similar to e-discovery requirements in the Federal Rules of Civil Procedure and common local court rules, the new protocol recommends that parties agree—from the outset of the case—on production standards, transmissions methods, and security measures; and negotiate, in good faith, to resolve any issues or problems that may arise, and inevitably do arise, between the parties.

Because the production of ESI involves the balancing and appreciation of several factors—legal discovery obligations; volume of ESI; processing and review time; adherence to industry standards; and protection of work product, privileged, and other confidential information—the adoption of the new criminal e-discovery guidelines and recommendations will give much needed predictability to the ever-expanding arena of ESI production in criminal proceedings. And though the protocol is limited to practices for DOJ and related entities, it will provide all parties with a framework to conduct informed discussions to quickly resolve ESI-related conflicts.

The DOJ has not officially announced when the protocol will become mandatory or when the training will begin; however, DOJ has suggested that it will review participant updates in April 2012. The new e-discovery guidelines were prepared by a Joint Electronic Technology Working Group, which includes representatives from DOJ, the Administrative Office of the U.S. Courts, Federal Defender Organizations, private attorneys who accept Criminal Justice Act (CJA) appointments, and liaisons from the U.S. Judiciary.

¹ U.S. Department of Justice, Recommendations for ESI Disc. Produc. in Fed. Crim. Cases, at 3 (2012), http://pdfserver.amlaw.com/legaltechnology/USDOJ_Intro_Recommendations_ESI_Discovery.pdf

² *Id.* at 1, n. 1

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