



WHITE COLLAR COMPLIANCE & DEFENSE PRACTICE

ALERT

U.S. JUSTICE DEPARTMENT AND CRIMINAL DEFENSE BAR
SIGN E-DISCOVERY PROTOCOL FOR FEDERAL CRIMINAL CASES
STRESSING THOROUGH AND ONGOING COMMUNICATION BETWEEN COUNSEL

By Sekou Campbell and Eric Reed

The Joint Electronic Technology Working Group (Working Group) of federal criminal practitioners recently established a protocol consisting of recommendations, strategies and a checklist for managing discovery of electronically stored information (ESI) in post-indictment federal criminal cases. The protocol clearly benefits from local ESI rules that have become prevalent in many districts for civil cases. Once implemented, the protocol should promote consistency both in the form and manner of ESI discovery in federal criminal cases, and allow more accurate budgeting for the costs of gathering and producing ESI.

The Director of the Administrative Office of the United States Courts and the U.S. Attorney General created the Working Group, consisting of members of the federal criminal defense bar and federal prosecutors,¹ to examine efficient ways electronic technology can aid the collection, analysis and presentation of evidence in the federal criminal justice system. The Working Group concluded that 10 “basic principles” should guide post-indictment ESI discovery in federal criminal cases. Underlying those 10 principles is the ethic that counsel should methodically, diligently and proactively work together to resolve concerns regarding ESI before producing and transmitting data.

The Working Group’s “recommendations”

establish a “general framework for informed discussions between the parties about ESI discovery issues.” The “strategies” provide “specific technical guidance” on how to achieve the “recommendations.” The “checklist,” as its name implies, is a reasonably understandable, one-page list covering tasks that should be completed during the post-indictment ESI discovery process.

The Working Group suggests that all counsel should discuss the following topics:

1. Identify special considerations and limitations to the production of ESI like the exchange of classified information, contraband (i.e. child pornography), voluminous third-party records, non standard formatting and multiple defendant cases;
2. Acquisition of requisite technical knowledge;
3. Production of ESI including formatting, government investigative data, processing costs and search capabilities;
4. Transmission of ESI (i.e. on CDs, flash drives, or other digital media);
5. Use of a “Coordinating Discovery Attorney” (particularly useful in multiple defendant cases);
6. Informal resolution of discovery disputes, including a hesitation to suggest misconduct, abuse or neglect by opposing counsel; and
7. Security.

Counsel, in their meet and confer process, can use the above topics to construct a plan for producing ESI discovery materials. The Working Group stresses that these plans should not bind counsel, but rather lay out a roadmap for ESI production and transmission.

Once counsel charts the roadmap, they should continue their discussion in greater detail and agree to the style and format of the following specifics:

1. A table of contents;
2. Format of ESI that will be produced;
3. Treatment of proprietary or legacy data;
4. Whether privileged documents exist and how those documents will be segregated from the production set;
5. Naming conventions (i.e. Bates stamping);
6. Software and hardware limitations;
7. Forensics (i.e. mirror images of hard drives);
8. What, if any, metadata will be produced;
9. A schedule for the production and review of ESI; and
10. Security.

For example, the Working Group thoughtfully addresses the oft-disputed issue of production formatting. It suggests three standard formats that

should be considered acceptable for the production of ESI. **First**, parties may produce native files as received. **Second**, production of ESI converted to electronic image form is acceptable so long as the image is computer generated, it is stamped with a Bates number, the text of the original document is extracted and stored without formatting, the metadata is preserved and the metadata can be connected to the images and text. **Third**, parties may produce native files and metadata, making sure that “parent-child relationships” are preserved (i.e. an email (parent) stays with its attachments (children)). Thus, the Working Group provides necessary flexibility and sets forth some minimum requirements regarding metadata, parent-child relationships and other critical attributes of ESI.

The Working Group has provided a framework that should ensure a thorough discussion regarding complicated ESI Discovery issues in federal criminal cases and should help narrow the range of issues presented before judges in the future.

If you have questions about this Alert, please contact Sekou Campbell at 215.299.2115 or scampbell@foxrothschild.com or Eric Reed at 215.299.2741 or ereed@foxrothschild.com or any member of Fox Rothschild’s White Collar Compliance and Defense Practice.

¹ Members of the Working Group include representatives from the Administrative Office of the U.S. Courts, Office of Defender Services, Department of Justice, Federal Defender Organizations, private attorneys who accept Criminal Justice Act appointments, and liaisons with the U.S. Judiciary.

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