

Civil Discovery Standards Influence New Criminal Guidelines

By Anne M. Chapman and Joseph N. Roth – August 30, 2012

In February 2012, the Joint Electronic Technology Working Group (JETWG) published the first substantial, formal guidance for e-discovery in federal criminal cases. The JETWG's [Recommendations for Electronically Stored Information \(ESI\) Discovery in Federal Criminal Cases](#) have generated considerable interest in the months since publication.

E-discovery has long been a topic of interest to civil practitioners. Because most information is now created and stored electronically, managing large amounts of electronic data is a regular feature even in small civil cases. Case law has developed for more than a decade to define the obligations and rights of parties and counsel when searching for, preserving, and producing ESI. The Federal Rules of Civil Procedure have incorporated that law into amendments to Rule 26, and an industry exists to help law firms and clients manage their responsibilities and implement “best practices” for data management in the civil context.

The criminal bar has been affected by the massive increase in the relevance of ESI as well. From street crime to sophisticated financial crimes, ESI often plays a significant role. ESI can provide prosecutors with key evidence even in the most straightforward cases, with incriminating text messages, social media posts, or web searches retrieved through forensic examination of a seized computer. In some sophisticated cases, the majority of evidence may derive from ESI. *See, e.g., Clark v. State*, 915 N.E.2d 126, 129–31 (Ind. 2009) (affirming admission of incriminating MySpace post in murder trial). ESI has also played an important role for the defense in criminal cases. For example, prosecutors have dropped charges when forensic evidence demonstrates an absence of knowing possession of illegal images or where restored evidence supports a defendant's version of events in fraud and identity theft cases. The importance of ESI in criminal litigation cannot be overstated.

Until now, however, practitioners have not had rules or formal guidance on how to manage the preservation and disclosure of ESI in criminal cases. The need for rules and guidance is apparent. Without a consistent framework of applicable standards, judges are left to make it up on a dispute-by-dispute basis. This common-law style regulation may be a history-tested means of resolving substantive legal questions, but it is an inefficient way to manage the logistics of modern litigation.

The new recommendations are a step toward formalizing practice and expectations involving ESI in federal criminal cases. They also borrow heavily from rules and practices in the civil system. Civil practitioners and law firms with existing e-discovery expertise can leverage their experience with ESI to benefit their clients under indictment. A review of the recommendations, however, raises a number of concerns that may limit the extent to which expertise developed in the civil arena can be transferred to criminal cases.

Existing Law: The System Needs Standards

The need for formal guidance is illustrated in a recent decision in the Western District of New York, *United States v. Briggs*, No. 10 CR 184S, 2011 WL 5881593, at *3–5 (W.D.N.Y. Nov. 23, 2011). There, the magistrate judge resolved several issues dealing with the manner of production of various kinds of ESI. In his decision, Magistrate Judge Scott voiced a hope surely shared in other courts: “As in the best civil practice . . . the parties should work out among themselves the details of discovery . . . and not have this Court micro-manage discovery in this case.” *Id.* at *5.

It appears, however, that the court's expectations for cooperation were not met; the court lamented that the "case provides an example of the perils of not having express rules about the manner and methods of criminal discovery." *Id.* at *4. The defendant sought an order compelling the government to provide a summary of certain ESI and to produce other ESI using a certain format and particular software. Looking to relevant civil rules and case law, the court noted that Civil Rule 34 does not require production in a particular manner, only in a "reasonably usable form." *Id.* Likewise, Rule 34 allows a party to produce documents "as they are kept in the usual course of business." *See* Fed. R. Civ. P. 34(a)(1)(A), (b)(2)(E)(i). Applying those civil standards, the court rejected the defense motions.

In the *Briggs* decision, the court ably described the problem that the JETWG recommendations were designed to address:

There is no specific federal criminal rule regarding the manner of criminal ESI production . . . whereas the Federal Rules of Civil Procedure set the foundation for handling ESI and provides a standard for dealing with the particular discovery demand. . . . Criminal Rule 16 dictates *what* is to be produced and is silent as to the *manner and methods of production*.

Briggs, 2011 WL 5881593, at *4.

Overview of the Recommendations

The JETWG is a joint effort of various institutional stakeholders in the federal criminal system, among them the Department of Justice, Federal Defender Organizations, and the Administrative Office of U.S. Courts. The purpose of the recommendations is to "promote the efficient and cost-effective post-indictment production of" ESI. Recommendations §1. They provide "a general framework for informed discussions between the parties about ESI discovery issues." *Id.* There is a companion document, "Strategies and Commentary on ESI Discovery in Federal Criminal Cases." The group also created the helpful ESI Discovery Checklist, which provides a useful starting-point overview of issues to consider at the start of a case. Each of these documents has been made a part of the [recommendations](#).

The recommendations begin to answer the frustrations voiced by the court in *Briggs*. Like *Briggs*, the recommendations borrow heavily from concepts familiar to civil practitioners. In the introduction to the recommendations, the group listed 10 "basic principles" that guided their process. The principles reflect several themes that are seen throughout the recommendations.

The first principle is that "[l]awyers have a responsibility to have an adequate understanding of electronic discovery." The Recommendations repeatedly stress that attorneys must make ESI management part of their everyday practice skills or they must pay someone with expertise to assist them.

The principles also emphasize the importance of cooperation. At least five of the principles concern, in some way, collaboration between opposing parties or codefendants. And one of the primary purposes of the recommendations is "to reduce unnecessary conflict and litigation over ESI discovery by encouraging the parties to communicate about ESI discovery issues." The guidelines recommend that in any case involving "substantial or complex ESI discovery, the parties should meet and confer about the nature, volume, and mechanics of producing" the data. This requirement is akin to Federal Rule of Civil Procedure 26(f), which requires a "meet and confer" early in a civil case to discuss, among other things, the exchange of electronic discovery.

The tenth principle includes a warning that, given the volumes of ESI, parties should "limit dissemination" and "take reasonable and appropriate measures to secure ESI discovery against unauthorized access or disclosure." This is another area where the recommendations strongly encourage the use of technical experts. *See* Strategies and Commentary § 5(p) & n.8. The recommendations devote considerable space to ensure that the parties carefully think through security issues, and the recommendations provide a suggested set of rules for the transmission of sensitive ESI. *Id.* § 7.

Using the Recommendations to Your Client's Advantage

In light of the institutional players involved and the attention received thus far, it is likely that the recommendations will have significant influence on how both practitioners and judges view a party's compliance with discovery obligations. Nevertheless, the JETWG was careful to note that the recommendations "do not alter the parties' discovery obligations or protections under the U.S. Constitution, the Federal Rules of Criminal Procedure, the Jencks Act, or other" law. Recommendations § 3. It is also clear that the JETWG seeks to limit the use of the recommendations as a weapon: "They may not serve as a basis for allegations of misconduct or claims for relief." *Id.* "In addition, the recommendations are meant to guide *post-indictment* discovery only." *Id.* § 1 n.1.

Those caveats aside, it is clear that the recommendations rely significantly on civil standards, including a heavy focus on early and frequent collaboration, dispute avoidance, and a theory of proportionality in discovery: The more substantial and complex the ESI, the more resources are necessary in the form of experts, time, and the like.

Civil practitioners know these concerns well and can use their experience to leverage the recommendations in favor of their (or their firm's) clients under indictment. Many larger firms now have civil e-discovery gurus that have vast knowledge of the problems associated with ESI and the ways modern discovery can be used tactically in litigation. With the adoption of these civil-style recommendations, that expertise should be used to exert influence in a criminal case from the start of the case. For example, the recommendations encourage early coordination between parties on the full range of ESI issues. Although the recommendations support this to create efficiencies, the focus on early intervention also gives the defense an opportunity to point to the government's cost and burdens of full-blown litigation at an earlier stage, which can influence plea negotiations.

Defense counsel should also avoid the temptation to focus exclusively on the recommendations' emphasis on the production and management of data. Before negotiating the application of the recommendations, counsel should continue to focus on the soundness of the government's seizure, forensic examinations, and results. Counsel can also use the recommendations to focus on ESI disclosure from the government: What emails and text messages were passed between agents and the U.S. Attorney, and what electronic evidence exists relating to confidential informants? How has the government preserved this evidence for disclosure to the defense?

Criminal Law Is Different

The civil-style recommendations are a laudable effort to bring standards and predictability to the federal criminal system. Importing the dominant civil standards of encouraging cooperation from the beginning likely does promote a more efficient discovery system and, it is hoped, fewer avoidable discovery disputes.

But the parallels between the civil and criminal context are limited, and defense counsel looking to the recommendations should use caution when applying existing experience from civil litigation. The recommendations raise several concerns unique to criminal cases that should be the subject of further discussion.

First, courts and parties should carefully question whether civil rules and civil case law should guide the parties' conduct. The *Briggs* court applied civil rule standards without first analyzing whether it made sense to do so in the criminal context. But civil litigation is about resolving disputes; criminal cases are about determining whether the government is justified in depriving a person or an entity of liberty. Thus, in the civil context, both parties will typically share an interest in the efficient management of ESI and less costly litigation. In addition, the civil rules encourage a sense of proportionality in discovery by limiting discovery when "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, parties' resources. . . ." Fed. R. Civ. P. 26(b)(2)(C)(iii). In criminal cases, the balance of interests is very different and is not directly comparable. A criminal defendant, even in most white-collar cases, has a liberty interest at stake that can justify imposing more costs than is necessarily clear from the "size" of the case.

Accordingly, the calculation a criminal defendant makes in determining how and whether to cooperate must go beyond monetizing the cost of litigation. Although the recommendations place a high value on encouraging an efficient, dispute-free ESI production through collaboration and the use of technical experts, a criminal defendant may place little value on the efficient production of information.

Furthermore, the scope and purpose of discovery are quite different depending on the context. In civil cases, the parties are entitled to “obtain discovery regarding any non-privileged matter that is relevant to any party’s claim or defense.” Fed. R. Civ. P. 26(b)(1). The criminal discovery rules are substantially narrower and are not fully reciprocal as they are under the civil rules. In addition to Criminal Rule 16, there are constitutional and statutory rights to have certain information (e.g., *Brady* material) and to withhold other information (e.g., information subject to the Classified Information Procedures Act).

Second, there is a significant lack of attention to dealing with ESI in cases involving incarcerated defendants. The recommendations acknowledge the issue without offering significant guidance. Strategies and Commentary § 5(g). The recommendations promote the use of electronic production that can take advantage of search tools and the like. But in many instances, using such tools will not be a realistic option for incarcerated defendants. When managing ESI productions, counsel who follow the recommendations should consider carefully how their chosen method of production will affect an incarcerated defendant’s ability to assist in his defense.

Third, defense counsel must carefully consider whether the focus on efficiency in ESI discovery is appropriate in each instance. Although more efficient discovery will often help an attorney represent a client, defense counsel owe duties to their clients that may require more. For example, the recommendations focus on ensuring that production formats make ESI text-searchable. That surely is important, but defense counsel must not be lulled into forgoing an in-depth review of the discovery. A keyword search may be adequate in the civil context, but is it justified in every criminal case? Likewise, there are risks of inadvertent disclosure of privileged information, and counsel may need to consider asking the court for an order under Federal Rule of Evidence 502(d) if text searching is a primary review method.

As for the prosecutor, the new standards may risk watering down *Brady* obligations by encouraging the prosecutor to conceal potentially exculpatory material within large volumes of other data. In combination with the increased reliance on keyword searches for review, both parties’ overreliance on technology as a replacement for thoughtful disclosure and careful review may ultimately increase harm to defendants’ constitutional rights to present a complete defense.

Conclusions

The JETWG’s recommendations are an important step in bringing predictability and rationality to the management of ESI in federal criminal cases. Although the recommendations borrow liberally from civil rules and experience, neither practitioners nor courts should assume that civil standards necessarily make sense in every criminal case. As disputes arise regarding e-discovery issues, counsel and courts should take a fresh look at what the rules should be so that civil concepts, including the primacy of efficiency, do not unintentionally harm important constitutional principles.

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