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DISCOVERY

The ESI Document Dump in White Collar Cases: Make DOJ Adhere to Its Own Policies and Comply With *Brady*

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It might come as a surprise that the Department of Justice has provided extensive guidance and policy initiatives aimed at leveling the field in e-discovery. Defendants in white collar cases have increasingly been the victim of massive document dumps involving multimillion-page electronic document productions, also known as electronically stored information (ESI). The huge costs of the resources and third-party vendors necessary to transform insurmountable piles of ESI into usable information for defense can often shock the client. So the defense should be comforted to know that DOJ has internal policies and external publications supporting those policies that espouse fairness. To be sure, we will not be seeing the same level of balance that is seen in civil discovery. Steps are being taken by both DOJ and federal courts to establish a foundation of fair play and common sense in white collar cases.

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The landmark decision in *Brady v. Maryland*[1] obligates the prosecution to provide material exculpatory evidence to the defense. The government does not automatically satisfy its *Brady* obligations simply by dumping its open file of ESI or voluminous documents on a defendant.[2] Hence, ''the prosecutorial duty to produce exculpatory evidence imposed by *Brady* may not be discharged by 'dumping' (even in good faith) a voluminous mass of files, tapes and documentary evidence on a trial judge.'' It is the prosecutor who has the constitutional obligation to initially screen the materials and hand over to defense items that are clearly exculpatory evidence.[3]

In a thorough analysis of a white collar case involving an ESI discovery dispute, the U.S. District Court for the Eastern District of California held, ''Case law does not preclude the [court] as a matter of case management (and fairness) in ordering identification to be done.''[4] The court additionally noted that ''a duty to disclose may be unfulfilled by disclosing too much'' information and that ''identification'' is needed as well.[5]

[1] 373 U.S. 83 (1963).

[2] See *United States v. Skilling*, 554 F. 3d 529, 577 (5th Cir. 2009) (noting that ''we do not hold that the use of a voluminous open file can never violate *Brady*.'').

[3] *Emmett v. Rickets*, 397 F. Supp. 1025, 1042-43 (N.D. Ga. 1975).

[4] *United States v. Salyer*, No. CR. S-10-0061 LKK, 2010 U.S. Dist. LEXIS, at *6 (E.D. Cal. Aug. 2, 2010).

[5] 2010 U.S. Dist. LEXIS, at *19-20.

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Other courts have addressed this same issue and found that ''open-file discovery does not relieve the government of its *Brady* obligations.''[6]

It is helpful to understand how DOJ directs its internal discovery process before looking at discovery interactions with the defense. On Jan. 4, 2010, Deputy Attorney General David Ogden circulated a memorandum titled ''Guidance for Prosecutors Regarding Criminal Discovery.''[7] This manual describes where to look for impeachment and exculpatory information, what to review, and how to review this critical information.[8] Ogden states that ''prosecutors must ensure that the material is *reviewed* to identify discoverable information.''[9]

DOJ Best Practices

In collaboration with others, DOJ developed a set of best practices for ESI discovery management to help prosecutors and defense attorneys confront and manage the challenges of electronic discovery (''ESI Protocol'').[10] Principle 4 states that ''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.'' The ESI Protocol strongly advocates the use of a table of contents. This makes practical sense. In complex white collar cases, a table of contents to discovery materials can ''expedite the opposing party's review of discovery, promote early settlement, and avoid discovery disputes, unnecessary expense, and undue delay.''[11] The defense should highlight this DOJ policy in discovery and *Brady* requests. There is some question whether the U.S. Attorney's Offices have put this into practice in the field.

Principle 5 of the protocol provides recognition of the ESI costs on defense by stating, ''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 on discovery production.'' Nonetheless, ''these recommendations operate on the general assumption that where a producing party elects to engage in the processing of ESI, the results of that processing should, unless they constitute work product, be produced in discovery along with the underlying ESI so as to save the receiving party the expense of replicating the work.''[12]

Both the National Criminal Discovery Coordinator for the Office of the Deputy Attorney General and Criminal Discovery Coordination for the Executive Office for United States Attorneys support this point forcefully: ''Our goal of the Protocol is to save the parties' money by reducing unnecessary duplication or processing.''[13] It may be surprising that DOJ seeks to save defendants money in discovery in white collar investigations and prosecutions. Hence, if the government processes PDF business records ''to create TIFF and OCR text for its case preparation . . . then it should produce the TIFF/text files upon the defendant's request to save the defendant the unnecessary expense of replicating the government's processing.''[14]

Moreover, the ''Protocol recommends that ESI received from third parties . . . be produced in the form it was received or in a reasonably usable form,'' language that is similar to Federal Rule of Civil Procedure 34(b)(2)(E)(ii). For example, emails received as native files can be produced as native files or in another format, such as searchable PDFs or as TIFF images and OCR text with a load file.[15]

Courts are also jumping on board. In *United States v. Briggs*,[16] prosecutors produced wiretap data from voice box software and other discovery using IRPO, a suite of software products commonly used by DOJ. The defendants disputed the use of IRPO, arguing that its TIFF images could not be sorted or searched. The defendants said they were entitled to production in a different file format that would give them more extensive electronic searching, sorting, and tagging features. The government responded that concerns about redaction of information from the original ''native files,'' server space, and cost limited what it could provide.

The court held that, ''for purposes of the motion in this case, the standard of Federal Rule of Civil Procedure 34(b)(2)(E)(ii) should apply here, that is the Government produces this ESI 'in a reasonably usable form or forms.' ''[17] The court determined this is because the government is in a ''better position to organize this mass of information and re-present it in a manner that is searchable by the defense.''[18]

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[6] *United States v. Hsia*, 24 F. Supp.2d 14, 29 (D.D.C. 1998).

[7] See U.S. Attorneys' Manual, Criminal Resource Manual 165.

[8] Id. at p. 5, no. 3.

[9] Id. at p. 8, step 2.

[10] See Department of Justice and Administrative Office of the U.S. Courts Joint Working Group Electronic Technology in the Criminal Justice System,*Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases* (2012) (available at http://www.fd.org/docs/litigation-support/final-esi-protocol.pdf).

[11] ESI Protocol, *Strategies and Commentary* at p. 2.

[12] Id. at p. 6-7.

[13] United States Attorneys' Bulletin, Criminal Discovery, *The New Criminal ESI Protocol: What Prosecutors Need to Know*, at p. 8 (A. Goldsmith and J. Harid, September 2012).

[14] Id.

[15] *The New Criminal ESI Protocol: What Prosecutors Need to Know*, at p. 8.

[16] 2011 WL 4017886 (W.D.N.Y. Sept. 8, 2011).

[17] *Briggs*, 2011 WL 4017886, at *8; see also *United States v. Stirling*, No. 1:11-cr-20792-CMA, Order Granting Motion for New Trial, ECF No. 214 (S.D. Fla. June 5, 2012) (adopting FRCP 34(b)(2)(E)(ii) and requiring government to produce ESI, which was not apparent by reading the disk or hard drive, in a reasonably usable form).

[18] *Briggs*, 2011 WL 4017886, at *8.

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Finally, in the preface titled *In the Digital Age, Ensuring that the Department Does Justice*, written by Attorney General Eric Holder for the 2012 *Georgetown Law Journal Annual Review of Criminal Procedure*, Holder addresses how federal prosecutors strive to exceed what the Constitution requires when it comes to disclosure in criminal cases, how the ESI Protocol will enable prosecutors to address criminal discovery in the digital age, and why a table of contents is critical in cases involving large quantities of ESI.[19]

The ESI Protocol and the attorney general both promote a change in the way ESI discovery is reviewed, managed, and produced. These recent DOJ policies and statements do not create rights for the defense but may provide a reasonable and substantive means to encourage U.S. Attorney's Offices to adhere to them in white collar cases involving ESI discovery so that *Brady* material is identified, disclosed, and produced to the defense.

[19] 41 GEO. L.J. ANN. REV. CRIM. PROC (2012).