
IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

IN RE: GUIDELINES FOR
ELECTRONICALLY STORED
INFORMATION (ESI) DISCOVERY IN
CRIMINAL CASES

GENERAL ORDER NO. 22-003
*This Order vacates and supersedes
General Order No. 20-022*

On July 29, 2020, the Court entered a Criminal e-Discovery Protocol as General Order No. 20-022. This updated Order vacates and supersedes that prior Order.

Purpose. This Order establishes guidelines for the efficient and cost-effective, post-indictment production of discoverable electronically stored information (ESI) between the government and all individuals and business entities facing charges in criminal federal court proceedings. The Order aims to reduce unnecessary conflict and litigation over ESI discovery production by encouraging the parties to communicate about ESI discovery issues, establish guidelines for ESI discovery production and disputes, and avoid court intervention. The Court encourages all criminal practitioners to educate themselves and follow best practices to manage and use ESI discovery.

Scope. This Order applies to disclosure of ESI under Fed. R. Crim. P. 16, 16.1, 26.2, and DUCrimR 16-1. It does not limit the Court's authority to determine the timetable and procedures for discovery disclosure.

Limitations. This Order does not alter the parties' discovery obligations or protections under the U.S. Constitution, the Federal Rules of Criminal Procedure, the Jencks Act, or other federal statutes, case law, or local rules. The Order does not create any rights or privileges and does not limit any party's claims for relief. It does not give the Court any authority beyond what is provided under the Federal Rules of Criminal Procedure or applicable law. It does not alter any safeguards provided by the Jencks Act, the Classified Information Procedures Act, or other laws.

Strategies for Implementing ESI Discovery. The Court adopts by reference the [“Recommendations for Electronically Stored Information Discovery Production in Federal Criminal Cases”](#) (2012) (National ESI Recommendations), which are a product of the Department of Justice and Administrative Office of the U.S. Courts Joint Working Group on Electronic Technology in the Criminal Justice System. The Court also encourages the parties to make use of the ESI Discovery Production Checklist therein.

Procedures in Complex Cases. In cases involving complex criminal charges or criminal charges against multiple individuals (complex cases), the following guidelines should be followed for the appointment of a Discovery Coordinator and the production and receipt of ESI discovery.

Discovery Coordinator. Once the Court identifies a case as complex, the Court should consult with the Federal Defender and/or CJA Supervising Attorney to designate a person to act as a Discovery Coordinator in the case.

The Discovery Coordinator should be an attorney experienced with ESI and familiar with discovery platforms that make ESI easier to organize, search, and utilize. The Discovery Coordinator must know the technical aspects of ESI in the matter, including electronic document storage, organization, formats, and relevant information retrieval technology, including search methodology and platforms.

Upon the Court’s designation, the Discovery Coordinator should contact the Defender Services Office National Litigation Support Team to help determine the most effective, economic, and efficient way to receive, distribute, and utilize ESI discovery.

The Discovery Coordinator may be required to provide periodic reports to the Court and co-counsel on the status of discovery.

Upon the Discovery Coordinator’s request, the Court may authorize the appointment of qualified paralegals, Coordinating Discovery Attorneys funded by Defender Services, and other information technology experts to assist in the organization, dissemination, and use of ESI discovery in a case. All attorneys appointed to represent individuals in a case with a Discovery Coordinator must work with the Discovery Coordinator on ESI discovery matters. The

Discovery Coordinator must participate in any ESI disputes to limit the need for court intervention to resolve discovery disputes.

Discovery Production and Receipt. In all criminal cases, but particularly in complex cases, the United States Attorney’s Office (USAO) must, subject to subsection (3) below, produce ESI discovery consistent with the following provisions:

- (1) In cases having less than 25 GB of discovery, discovery will ordinarily be produced in pdf/native format in an organized folder structure and include a detailed discovery index;¹
- (2) In cases having 25 GB or more of discovery, discovery will ordinarily be produced via load file with a detailed discovery index. The load file will contain a .dat file, .opt file, native folders, an images folder, and a text folder that can be loaded into a discovery review platform;
- (3) If a case has a specialized need, it may be necessary to vary from the general rules outlined herein. This will be handled on a case-by-case basis and discussed with counsel as necessary;
- (4) The USAO will provide limited technical assistance, and it is defense counsel’s responsibility to access and utilize ESI software and maintain ESI proficiency to work with discovery once it is produced; and
- (5) Regardless of discovery size, discovery produced in native format will include, but not be limited to Google Earth files, Title III wire results, social media records, and any additional audio/video requiring players or executables to run. Phone downloads and pole camera footage will be produced with the appropriate executable or player, while native files will be produced in a separate folder.

Technological Knowledge and Experience. All attorneys are responsible for having an adequate understanding of ESI discovery and its utility in a case. For complex ESI discovery

¹ A “detailed discovery index” is one that organizes and identifies the categories of information available as ESI discovery and provides a high-level guide to the ESI discovery in a case. The index is intended to reduce the time the receiving party must spend finding the relevant information. The index does not diminish the responsibility of the parties to review the actual ESI.

production, all attorneys should maintain sufficient technical knowledge and experience to understand, communicate about, utilize, and plan for the orderly exchange of ESI discovery. Defense attorneys must maintain proficiency and capabilities to work with ESI in a format that is effective and efficient, once it is produced by USAO.

Discovery Conference. Prior to the Rule 16-1 conference, the producing party must be prepared to discuss the scope and timing of ESI discovery production. At the conference, the government and defense attorneys must confer in good faith to agree on a timetable and procedures for pretrial disclosure under Fed. R. Crim. P. 16, 26.3, and DUCrimR 16-1(a). When a case involves ESI, the parties should confer about the nature, volume, and mechanics of ESI discovery production. Additionally, the parties should consider the following issues: whether to propose a scheduling order that reflects their discovery agreements, whether ongoing dialogue would be helpful, and whether the parties should notify the Court of ESI discovery issues or problems they anticipate may affect the timing and nature of the case. The Court emphasizes the particular importance of cooperative exchanges of information at the earliest possible stage of discovery, including during the parties' Fed. R. Civ. P. 26(f) conference.

Memorializing Agreements. To help avoid later disputes, the parties should memorialize any agreements around the transfer of discovery.

Informal Resolution of ESI Discovery Matters. Before filing any motion addressing an ESI discovery issue, the moving party must confer with opposing counsel in a good-faith effort to resolve the dispute. If technical knowledge is required to resolve the dispute, the parties should involve individuals with sufficient knowledge to understand the technical issues, clearly communicate the problem(s) leading to the dispute, and either implement a proposed resolution or explain why a proposed resolution will not solve the dispute.

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.

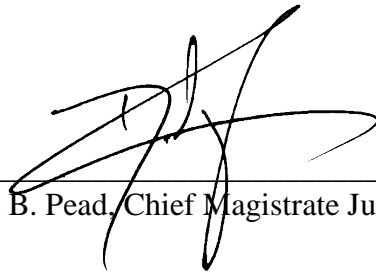
Motions Regarding Discovery Disputes. Motions addressing a discovery dispute concerning ESI production should include a statement by the moving party that after meaningful, good faith consultation with opposing counsel, the parties are unable to resolve the dispute without court action.

IT IS SO ORDERED

Dated this 25th day of January 2022.

A handwritten signature in black ink, appearing to be 'RJS', written over a horizontal line.

Robert J. Shelby, Chief Judge

A handwritten signature in black ink, appearing to be 'DP', written over a horizontal line.

Dustin B. Pead, Chief Magistrate Judge