Trends

Joint Federal Criminal E-Discovery Protocol
Places Cooperation Above Motion Filings

By Eric Topor

A federal working group released a new set of electronic discovery protocols for criminal practice Feb. 10, espousing a cooperative framework for government prosecutors, defense attorneys, and the judiciary to follow in order to better manage the increasing number of criminal cases with voluminous electronically stored information (ESI).

The Joint Electronic Technology Working Group produced the protocols, titled “Recommendations for ESI Discovery Production in Federal Criminal Cases” (Recommendations). The working group consisted of representatives from the Department of Justice and private Criminal Justice Act (CJA) panel attorneys, as well as members of the Administrative Office of U.S. Courts’ Office of Defender Services, Federal Defender Organizations, Federal Public Defenders, and the U.S. judiciary.

The Recommendations include general guidance for how to manage various stages of e-discovery, from including meet-and-confers between parties, to transfer of data, and conflict resolution. Also included are e-discovery strategies outlining more specific advice for particularized situations and issues, and an e-discovery checklist.

Purpose. The Recommendations are meant to address the growing stress that ESI is placing on both parties in criminal cases, along with the increased expenditures of judicial resources needed to resolve them when the parties file e-discovery related motions. Prosecutors and defense attorneys are responsible for having “an adequate understanding” of e-discovery under the Recommendation’s 10 principles (see box), and to engage in multiple good faith efforts to reach e-discovery agreements when a dispute arises, before resorting to motion practice and court involvement.

Justin Murphy, counsel at Crowell & Moring LLP spoke with Bloomberg BNA on his assessment of the Recommendations and stated, “I believe the most important aspect of the protocol is that it seeks to bring the parties to the table, encourages and endorses a dialogue about ESI discovery, and promotes consistency in dealing with ESI discovery issues.”

Training, Education to Begin Soon. All DOJ attorneys have received a copy of the Recommendations already, said the DOJ’s National Criminal Discovery Coordinator, Andrew Goldsmith, with more formal training on the way. Goldsmith told Bloomberg BNA that, “All federal prosecutors will get training on the protocol in the next few months. And that will dovetail with the collaborative effort we have with the judiciary and the federal public defenders and CJA panel attorneys.” The Federal Judicial Center will be working with the DOJ to produce educational programs for attorneys and the federal judiciary as well, said Goldsmith.

Goldsmith also said that he’s been getting “a fair amount of traction,” with the private bar on the Recommendations. “The sense that I’m getting . . . is that the private bar is already embracing the protocol as the means by which to address ESI in criminal cases,” said Goldsmith.

Formality Traded for Collaboration. As the name suggests and the report specifies, the Recommendations are not enforceable rules per se, and are not strictly binding on any party or the judiciary. The Recommendations instruct parties to meet-and-confer multiple times in the event of an e-discovery related impasse, but ultimately if the parties cannot come to an agreement they must look to the courts for a resolution.

Goldsmith, Broderick, and Murphy support the spirit of cooperation that is at the heart of DOJ’s Recommendations for ESI Discovery Production in Federal Criminal Cases.

However, Goldsmith said the Recommendations’ lack of formal enforcement authority contributes to its spirit of cooperation between parties in solving e-discovery disputes. “We don’t want to set this up where you have too much formality, that destroys the spirit of cooperation, collegiality, and collaboration,” said Goldsmith. He added that in some instances judicial intervention
Basic Principles for ESI Discovery in Federal Criminal Cases

Principle 1: Lawyers have a responsibility to have an adequate understanding of electronic discovery. You must learn what you need to know about how to acquire the best possible ESI discovery for your case. This includes knowing the basics of ESI, such as the types of ESI that exist and the methods by which ESI can be discovered. You must also learn how to use ESI in your case, such as how to analyze and interpret ESI. You must also learn how to protect your ESI from unauthorized access or disclosure.

Principle 2: In the process of planning, producing, and resolving disputes about ESI discovery, the parties should include individuals with sufficient technical knowledge and experience regarding ESI.

Principle 3: At the outset of a case, the parties should meet and confer about the nature, volume, and mechanics of producing ESI discovery. Where the ESI discovery is particularly complex or produced on a rolling basis, an on-going dialogue may be helpful.

Principle 4: The parties should discuss what formats of production are possible and appropriate, and what formats can be generated. 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.

Principle 5: When producing ESI discovery, 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 or discovery production.

Principle 6: Following the meet and confer, the parties should notify the court of ESI discovery production issues or problems that they reasonably anticipate will significantly affect the handling of the case.

Principle 7: The parties should discuss ESI discovery transmission methods and media that promote efficiency, security, and reduced costs. The producing party should provide a general description and maintain a record of what was transmitted.

Principle 8: In multi-defendant cases, the defendants should authorize one or more counsel to act as the discovery coordinator(s) or seek appointment of a Coordinating Discovery Attorney.

Principle 9: The parties should make good faith efforts to discuss and resolve disputes over ESI discovery, involving those with the requisite technical knowledge when necessary, and they should consult with a supervisor, or obtain supervisory authorization, before seeking judicial resolution of an ESI discovery dispute or alleging misconduct, abuse, or neglect concerning the production of ESI.

Principle 10: All parties should limit dissemination of ESI discovery to members of their litigation team who need and are approved for access, and they should also take reasonable and appropriate measures to secure ESI discovery against unauthorized access or disclosure.

will indeed be necessary, “[b]ut you shouldn’t be running to the court and filing motions unless you’ve made a good faith effort to resolve the issues with your adversary.”

Sean Broderick, National Litigation Support Administrator at the Administrative Office of U.S. Courts’ Office of Defender Services spoke with Bloomberg BNA and said that the Recommendations are “a best practices document,” and while the guidelines themselves are not binding, “we are strongly encouraging a dialogue first approach to ESI, and encouraging people to consult with others who have technical knowledge and expertise.”

Go to Your Boss Before Running to the Judge. One interesting aspect of the Recommendations is the instruction to parties to “consult with a supervisor, or obtain supervisory authorization,” before filing motions after unsuccessful good faith attempts to resolve e-discovery disputes. Goldsmith said that “many times a lack of understanding leads to an unnecessarily adversarial process” with regard to e-discovery.

Goldsmith said that by mandating parties first go to their own supervisors before motion practice, “you take the participants’ subjective perspective out of it, and you assure that they are going to have a more objective supervisor, who may be a little more tech-savvy, and certainly less emotionally invested. It makes it less likely that the initial reaction of either side is to file a motion, and particularly to allege misconduct.” Once motions are filed and the parties adopt more adversarial positions on an e-discovery dispute, “the likelihood that you will resolve things in a mutually acceptable way is reduced dramatically,” Goldsmith indicated.

Murphy lauded the suggestion to turn to supervisory attorneys before motion practice. Murphy said, “This again promotes a dialogue and promotes attempts at cooperation.”

Rules Incorporation Not Sought. Goldsmith said it was “highly unlikely” that the Recommendation protocols would be incorporated into the Federal Rules of Criminal Procedure in the near term. “I think the judiciary is looking to this as more of a ‘how to’ deal with issues like Brady and Jencks, in addition to the rules [Federal Rules of Criminal Procedure], as a way to complement Brady and Jencks and Rule 16,” said Goldsmith.

Smother Sailing in Criminal E-Discovery. Murphy had high hopes for the Recommendations’ adoption and incorporation into federal criminal practice, stating, “I believe the protocol was needed and I see it as a positive step in the right direction.” Murphy added, “Through this dialogue, many issues about ESI discovery will be addressed up front and hopefully resolved by following the suggested framework. In addition, I believe the pro-
tocol's framework provides a useful educational tool, and may help ease misunderstandings and apprehension about dealings with ESI.”

Broderick echoed Murphy’s comments, stating that he hoped “this will give people a broad framework to start thinking about ESI.” Broderick said that many federal and CJA panel attorneys were ill-equipped to handle ESI, and said the Recommendations were a good framework to instruct attorneys on the lessons learned in federal civil practice, “but within the lens of the criminal context.”

Full text of Recommendations for ESI Discovery Production in Federal Criminal Cases