



# NDTX Standard Protocol for Discovery Production in Federal Criminal Cases

A joint working group consisting of NDTX representatives for the United States Attorney's Office, the Federal Defender's Office, and the United States District Court has prepared the following standard protocol to encourage best practices for the production and management of post-indictment discovery between the government and defendants charged in NDTX federal criminal cases. This protocol is intended to be consistent with the 2012 Recommendations for Electronically Stored Information Discovery Production in Federal Criminal Cases (ESI Protocol) promulgated by the Department of Justice and Administrative Office of the U.S. Courts Joint Working Group on Electronic Technology in the Criminal Justice System (JETWG) nationally, which should be referenced for more specific production issues not addressed here. Any perceived conflict between this protocol and the ESI protocol is unintentional. Further, this protocol is not intended to delay times for producing discovery set forth by a Court order in a particular case. The goal of this protocol is to benefit all parties by setting out uniform standards and a predictable framework for discovery productions from the government and defense to promote efficient and cost-effective discovery, set reasonable expectations for the parties, and reduce unnecessary discovery disputes and Court intervention.

## Government Disclosure Obligations (Generally)

The government fulfills its disclosure obligations under Rule 16 of the Federal Rules of Criminal Procedure, and Local Criminal Rule 16.1, by making discovery available to the defense for inspection, copying, or photographing, as to most categories of discoverable materials. In most cases, however, the government will go beyond the requirements under these rules and provide copies of all such information, as set out below, unless it is impracticable to do so. <sup>1</sup>

The following guidelines set forth the processes by which the government provides discovery to the defense in federal criminal cases:

### Transmission

1. Discovery that is 5 GBs or less is provided via USAfx.
2. Discovery over 5 GBs is transferred to an appropriately sized USB Flash drive/Jump drive or USB external hard drive provided by defense counsel to the government. A minimum of three (3) days is needed for data transfer.
3. All outgoing discovery is encrypted. The government currently uses McAfee EndPoint. Encryption passwords will be sent and accepted separately via email.

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<sup>1</sup> This discovery/best practices guidance is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. The guidance 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, and may not serve as a basis for allegations of misconduct or claims for relief. The guidance does not place any limitations on otherwise lawful litigation prerogatives of the government or the defense.

## Production Formats

4. The government processes discovery in a PC-based format.

### **PLEASE NOTE:**

- a. The majority of federal agencies and incoming data files/software from third parties are PC-based and may not open or play with other operating systems.
5. Standard productions:
    - a. Cases with small data sets: In cases with small data sets, the government's standard production includes searchable PDF files and necessary natives. Load ready files/tiffs/text/natives are available upon request and require 14 days notice.
    - b. Cases with large data sets or complex file types: In cases involving large or complex data sets the government provides load ready files/tiffs/text/natives in industry standard format (.dat, .opt).

### **PLEASE NOTE:**

- c. The government does not provide paper productions of ESI.
  - d. Color paper documents scanned to PDF: The government does not scan in color unless color content is particularly significant to the case.
6. Tracking productions: When feasible, discovery is produced with a means of tracking the material, including but not limited to assigning a Bates number to a particular item, endorsing sequential Bates numbers to each page of the material, or assigning a unique control identification number.
  7. Production table of contents: When possible, productions are accompanied by table of contents. The amount of detail in the table of contents will vary with the needs of each case, the timing of production, and the government's available resources. When appropriate, a more detailed table of contents will list the Bates range, number of pages, and name for each file. When possible, the table of contents may also include the source of the data if it was obtained from a third party device.
  8. Proprietary software: Proprietary A/V, forensic reports/images, and similar software files are produced in the same native format as the government originally received them.

### **PLEASE NOTE:**

- a. Many A/V programs have .exe files or require the user to install various "codecs" in order to play them correctly. Counsel must have administrative rights rather than just user rights on his/her PC to install a codec. Please check with whomever maintains the IT network or administers the PC.
- b. The government cannot troubleshoot your equipment. Every configuration is different.

- c. The government uses Windows Media Player, VLC Player, and TrialDirector software.
  - d. The government will provide instructions for playing proprietary software programs if the government has the ability to do so.
  - e. The government will attempt to provide converted versions of proprietary A/V software along with the original program format when resources permit.
9. Pre-processed data: Generally, the government produces pre-processed data in the same format in which the government received it. (e.g., third-party productions from SEC).

#### Reciprocal Duty to Inspect

Duty to inspect in 21 days: The receiving party of a discovery production—whether government or defense—should be proactive to test the accessibility of the production when it is received to promptly identify technical problems or missing material as soon as possible, and shall make good faith efforts to do so within 21 days following production. Doing so will allow the producing party reasonable time to cure any error and avoid affecting any trial dates or Speedy Trial rights.

#### Criminal Discovery Coordinator

In multi-defendant cases of sufficient size and complexity, the Court may appoint or the parties may request the appointment of the Federal Public Defender as Criminal Discovery Coordinator to receive and host discovery productions. The FPD hosts data in Summation—an all-inclusive, web based review tool—and provides the parties with basic training to use the tool. As CDC, the FPD is not a party to the litigation nor does it troubleshoot your equipment.

For those cases that do not qualify for the appointment of a Criminal Discovery Coordinator, parties may contact the National Litigation Support Counsel for assistance:

<https://www.fd.org/litigation-support/coordinating-discovery-attorneys>.

#### Guidance: Meet and Confer/Court Notification/Informal Resolution of Discovery Disputes

1. Meet and Confer: At the outset of a case, the parties should meet and confer about the nature, volume, and mechanics of producing discovery, including reviewing these guidelines. The meet-and-confer should address potential discovery issues specific to the case, such as:
  - a. How to ensure that the process does not run afoul of Speedy Trial deadlines;
  - b. Whether a rolling production—due to the volume and/or complexity of the data—is appropriate and establishing a regular dialogue during the discovery phase;
  - c. The feasibility of producing certain metadata;
  - d. Any reasonable objections to the NDTX standard protocol;
  - e. Identifying circumstances presenting special challenges that may require special procedures (e.g., potentially privileged materials, incarcerated defendants, classified information, or contraband).

2. Court notification: Promptly following the meet-and-confer, the parties should notify the Court of any discovery production issues or problems that they reasonably anticipate will significantly affect the handling of the case and/or Court deadlines.
3. Informal Resolution of Discovery Disputes: Before filing any motion addressing a discovery issue, parties should confer in good-faith to resolve the dispute, including involving those with sufficient technical knowledge to understand technical issues, clearly communicate the problem leading to the issue, and either implement a proposed resolution or explain why a proposed resolution will not solve the issue. Subsequently, any motion addressing the discovery dispute should include a statement acknowledging that after consultation with the opposing party, the parties were unable to resolve the dispute.