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UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF OKLAHOMA

AUG 20 2009

ROBERT D. DENNIS, CLERK  
U.S. DIST. COURT, WESTERN DIST. OF OKLA.  
BY RS DEPUTY

IN RE: BEST PRACTICES FOR ELECTRONIC )  
DISCOVERY OF DOCUMENTARY MATERIALS ) G.O. 09-05  
IN CRIMINAL CASES )

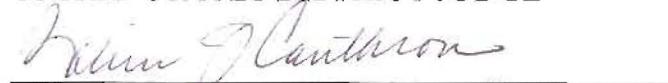
**GENERAL ORDER REGARDING BEST PRACTICES  
FOR ELECTRONIC DISCOVERY OF DOCUMENTARY  
MATERIALS IN CRIMINAL CASES**

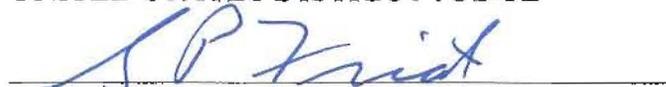
The Court has adopted the attached "Best Practices for Electronic Discovery of Documentary Materials in Criminal Cases." This guidance will be updated from time to time and will be available with the Local Criminal Rules.

DATED this 20th day of August, 2009.

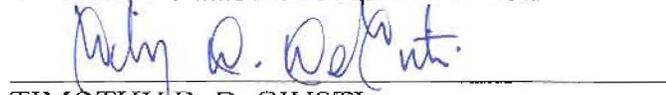
  
VICKI MILES-LAGRANGE  
CHIEF UNITED STATES DISTRICT JUDGE

  
DAVID L. RUSSELL  
UNITED STATES DISTRICT JUDGE

  
ROBIN J. CAUTHRON  
UNITED STATES DISTRICT JUDGE

  
STEPHEN P. FRIOT  
UNITED STATES DISTRICT JUDGE

  
JOE HEATON  
UNITED STATES DISTRICT JUDGE

  
TIMOTHY D. DeGIUSTI  
UNITED STATES DISTRICT JUDGE

## BEST PRACTICES FOR ELECTRONIC DISCOVERY OF DOCUMENTARY MATERIALS IN CRIMINAL CASES

District Court for the Western District of Oklahoma  
February 2009

“Electronic discovery” is defined as the production of discovery materials in the form of electronic files. Nothing in the existing versions of Federal Rule of Criminal Procedure 16 or 18 U.S.C. § 3500 requires the government or defense to produce discovery materials in electronic form. The government and defense retain ultimate control over the form of production. Counsel for the government and for the defense anticipate pursuing electronic discovery of documentary materials in an increasing number of cases, but cannot commit to doing so in all cases. However, the parties recognize the utility and efficiency of this process, and have been producing discovery electronically for some time on a case-by-case basis. Electronic evidence can be presented during trial, and producing documents electronically generally eliminates disputes between parties as to whether they received complete discovery. Disclosure of materials and documents pursuant to Rule 16 will be considered a request for reciprocal discovery.

These "best practices" are intended to summarize proposed electronic discovery practices. Open communication between the government and defense counsel is critical to ensure that discovery is handled and completed in a manner agreeable to all parties. Cost-sharing arrangements should also be discussed when appropriate.

### **Best Practices Applicable to All Cases**

1. In accordance with Rule 16.1 of the Local Criminal Rules of the Western District of Oklahoma (“Local Rule 16.1”), and no later than the Local Rule 16.1 discovery conference the U.S. Attorney’s Office and defense counsel will discuss whether electronic discovery of documentary materials is appropriate in the case. The AUSA and defense counsel should specifically address the following issues:

- a. The "best practices" outlined herein with respect to the parties' positions on electronic discovery;
- b. The nature and volume of the discoverable documentary and tangible evidence;

- c. The litigation support capabilities of the government and defense counsel;
- d. The current available resources and the prospective time frame for completing initial production by the government and defense;
- e. Where appropriate – especially in cases involving voluminous documents, the time frame and process by which defense counsel will review the evidence and select documents it wishes to be produced in electronic or other format;
- f. The government will produce all evidence it is obligated to produce in accordance with Rule 16(a), Jencks, Brady and Giglio at the government’s expense and generally in electronic format;
- g. In cases with privately-retained or court-appointed counsel, the preferences of the parties, logistics, and Rule 6(e) issues involved in the defense utilizing the services of a commercial vendor for scanning and/or copying of documentary evidence, with the cost to be borne by the defense; and
- h. The government and defense counsel will produce electronic discovery in a standard .PDF format. Production of files in this format will involve batch (file) sizes generally of 250 pages but not more than 500 pages.
- i. Should access issues arise involving electronic discovery of audio and/or video files provided by a third party, government and defense counsel will either provide the proprietary software necessary to view the material or will work together to devise a viewing format.

2. To assist the government or defense counsel with review of electronic discovery provided by the opposing party, counsel will provide general indexing information that identifies the source and/or nature of the materials. This best practice should not be construed to require any party to create an exhaustive detailed “index” describing every document produced in electronic form. Rather, a party will provide a general index, on the CD containing electronic discovery or in an accompanying letter, that identifies various types of discovery items within the

electronic files produced. As an example only, such an index may identify electronic files (by Bates number) as containing a defendant's statements, search warrants, investigative reports, photos, recordings, etc.

3. The U.S. Attorney's Office and defense counsel reserve the right not to produce any information considered to be work product, or evidence that is privileged or otherwise non-discoverable by law.

4. At the discovery conference, the parties will discuss and consider in good faith possible cost-sharing measures in handling voluminous discovery, such as jointly-commissioned Bates numbering and copying/scanning of documentary materials by outside vendors; provided, however, that an ability to enter into cost-sharing agreements may be limited by the government's budget constraints and/or the Department of Justice requirement that we allocate litigation expenditures only for mandatory obligations.

5. The parties will discuss and make appropriate arrangements to ensure disclosure of documents that may be subject to Rule 6(e) requirements, tax privacy requirements or health care privacy requirements are maintained when the evidence is in the possession of a commercial vendor.

6. These practices do not apply to the handling of classified materials or other national security information that may need to be produced as part of discovery in a criminal case. Disclosure of those materials will be governed by the Classified Information Procedures Act.

### **Continuing Discovery**

7. All discovery provided by the government or defense following the initial production will be Bates numbered in accordance with the system established in the initial production. Both parties reserve the right to produce future discovery in either paper or electronic format, depending on the volume of each subsequent production.