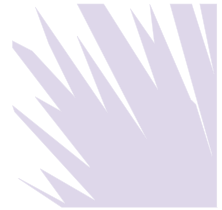


## E-Discovery in Criminal Matters— Emerging Trends & the Influence of Civil Litigation Principles

Justin P. Murphy



---

Recommended Citation: Justin P. Murphy, *E-Discovery in Criminal Matters—Emerging Trends & the Influence of Civil Litigation Principles*, 11 SEDONA CONF. J. 257 (2010).

Copyright 2010, The Sedona Conference

For this and additional publications see:

<https://thesedonaconference.org/publications>

# E-DISCOVERY IN CRIMINAL MATTERS – EMERGING TRENDS & THE INFLUENCE OF CIVIL LITIGATION PRINCIPLES

## *Post-Indictment E-Discovery Jurisprudence*

---

*Justin P. Murphy*  
*Crowell & Moring LLP*  
*Washington, DC*

Although considerable attention has been paid to e-discovery issues and decisions in civil litigation, little focus has been presented to similar issues arising in the criminal post-indictment context. This article will address the influence of established civil litigation principles on criminal matters, how courts manage what can often be government intransigence toward defendants' discovery rights and requests related to Electronically Stored Information ("ESI"), and suggests civil litigation principles that may eventually impact criminal defendants.

There are relatively few court decisions relating to post-indictment discovery of ESI. Because of that small universe, the influence of civil litigation principles on these decisions is magnified. From these decisions, several guiding principles emerge: First and most generally, the government should comply with certain civil procedural principles governing e-discovery, particularly Rule 34, as well as court rulings enforcing those rules. Second, government "data dumps" may be impermissible, absent producing the materials in a searchable, indexed and reasonably organized format. Third, criminal defendants may insist on expansive ESI discovery based on their own theories of the case; the government may not limit discovery based on its own assumptions of what evidence may or may not be relevant to the case.

Importantly, although trends and guiding principles can be drawn from court decisions, the decisions themselves are very fact-specific, and different courts have decided similar e-discovery issues in very different ways. Some courts take a permissive approach and allow defendants expansive discovery, or punish the government for non-compliance. Other courts take a more pragmatic approach and seek to strike a balance between the needs of the parties. Finally, some courts are restrictive and limit defendants' access to electronic evidence. Examples of these approaches are in the pages that follow.

### **The *O'Keefe* Framework – The Government Must Comply with Rule 34 of the Federal Rules of Civil Procedure**

*United States v. O'Keefe*<sup>1</sup> represents the first systematic discussion of how civil discovery rules and principles – specifically those related to ESI – may apply to criminal matters. Given that the discovery provisions of the Federal Rules of Criminal Procedure do

---

<sup>1</sup> *United States v. O'Keefe*, 537 F. Supp. 2d 14 (D.D.C. 2008).

not specifically address e-discovery, and given the paucity of post-indictment e-discovery precedent in criminal matters, *O'Keefe* represents fresh thinking that civil standards can be imported into criminal matters in order to clarify defendants' discovery rights.

In *O'Keefe*, the court held that a document production by the government in a criminal matter must adhere to standards similar to those set forth in Rule 34 of the Federal Rules of Civil Procedure.<sup>2</sup> The defendants argued that the government produced documents such that it was impossible to identify the source or custodian of the document.<sup>3</sup> Noting that there was no analogous criminal rule to guide judges in determining whether a government production had been tendered in an appropriate form or format, and acknowledging that the "big paper case" would be the exception rather than the rule in criminal cases, the court observed that Rule 34 of the Federal Rules of Civil Procedure speaks directly to form of production and should be looked to for guidance.<sup>4</sup> "The Federal Rules of Civil Procedure in their present form are the product of nearly 70 years of use and have been consistently amended by advisory committees consisting of judges, practitioners, and distinguished academics to meet perceived deficiencies. It is foolish to disregard them merely because this is a criminal case, particularly where . . . it is far better to use these rules than to reinvent the wheel when the production of documents in criminal and civil cases raises the same problems."<sup>5</sup> Following this pragmatic approach, the court determined that the government's production must, at a minimum, be labeled and ordered as they were maintained in the ordinary course of business.

The *O'Keefe* court is not the only body to advance the influence of civil principles in criminal matters. The Advisory Notes of the 2009 amendments to the Federal Rules of Criminal Procedure state that its use of the term ESI is "drawn" from the Federal Rules of Civil Procedure. The Advisory Committee Notes to Rule 41(e)(2) state that the term "electronically stored information" is drawn from Rule 34(a) of the Federal Rules of Civil Procedure, which states that ESI includes "writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained. The 2006 Committee Note to Rule 34(a) explains that the description is intended to cover all current types of computer-based information and to encompass future changes and developments. The same broad and flexible description is intended under Rule 41."<sup>6</sup>

*O'Keefe's* reliance on the civil rules in a criminal case has already been employed by other criminal defendants. For example, in *United States v. Stevens*, the defense objected that the government produced thousands of pages of documents in an unusable format that "appeared to be an undifferentiated mass, with no discernible beginning or end of any given document."<sup>7</sup> Citing *O'Keefe* and highlighting the unnecessary and increased burden to the defendant, the defense argued that "even civil litigants must either produce documents as they are kept in the course of business or label the documents in response to requested subject areas. Where the government produces documents in an undifferentiated mass in a large box without file folders or labels, then these documents have not been produced in the manner in which they were ordinarily maintained as [Fed. R. Civ. P. 34] requires and thus the government has equally failed to meet its obligations under Fed. R. Crim. P. 16."<sup>8</sup> The defense also requested metadata and logs related to the government's forensic

2 *Id.* at 18-19.

3 *Id.* at 18.

4 *Id.* at 18-19.

5 *Id.* at 19.

6 Fed. R. Crim. P. 41(e)(2), *Advisory Committee Notes, 2009 Amendments*.

7 Defendant's Motion to Compel Discovery, *United States v. Stevens*, No. 08-231, at 14 (D.D.C. Sept. 2, 2008).

8 *Id.* at 15.

photography, adding that “[t]here is nothing remarkable about asking the government to produce metadata. Courts routinely permit the discovery of metadata in the civil context . . . and there is no principled reason why it ought not be produced in a criminal case.”<sup>9</sup> Other criminal defendants have also relied on *O’Keefe* in challenging disorganized government productions.<sup>10</sup>

In sum, the *O’Keefe* decision provides a vehicle for parties and courts in criminal matters – where no criminal rule applies – to allow civil rules to guide their practice relating to ESI. The guiding principles discussed below emerge from these circumstances.

### Government “Data Dumps” Must Be Organized, Searchable and Indexed

E-discovery in criminal matters should not be more burdensome for criminal defendants who enjoy more enhanced constitutional protections of the Fifth and Sixth Amendments, for example, than their civil counterparts who enjoy the benefits of procedural standards established by the Federal Rules of Civil Procedure and the growing body of caselaw interpreting those rules. One such civil standard – as discussed in detail in *O’Keefe* – is Rule 34 of the Federal Rules of Civil Procedure, providing guidance relating to form of production in discovery.<sup>11</sup> Both civil and criminal courts have addressed issues relating to Rule 34, and, specifically, a party’s obligation when it backs up the proverbial electronic dump truck to the requesting party’s door.

One such example is *United States v. Skilling*,<sup>12</sup> where the defendant asserted that the government’s several hundred-million page production violated the government’s *Brady* obligations because the voluminous “open file” suppressed exculpatory evidence.<sup>13</sup> Skilling claimed that no amount of diligence could have successfully identified exculpatory materials within the morass of information produced by the government. The Fifth Circuit, adopting a pragmatic approach, rejected this argument, and instead focused on the reasonable steps that the government had taken in their “open file” production. Importantly, the files in the “data dump” were searchable, the government provided an index of the documents along with access to databases from other related cases, and produced a set of “hot documents” that the government believed were important to its case and/or potentially relevant to the defendant’s case. Highlighting that the government was in no better position than the defendant to identify potentially exculpatory material, the court identified several factors that in its view would render such “data dumps” unacceptable: (1) open file productions padded with “pointless or superfluous” materials to frustrate a defendant’s review of those materials; (2) producing files so voluminous that access is “unduly onerous;” and (3) the placement of exculpatory evidence within voluminous files in order to conceal it.<sup>14</sup> The Fifth Circuit, finding that

9 Defendant’s Reply in Support of Motion to Compel Discovery, *United States v. Stevens*, No. 08-231, at 9 (D.D.C. Sept. 6, 2008). Ultimately, the issues were resolved without a written opinion by the court.

10 See Defendant’s Reply to Government’s Opposition to Discovery Motion, *United States v. Nozette*, No. 09-276 (D.D.C. Jan. 4, 2010) (noting that the vast bulk of discovery produced by the government lacked “any indication of its provenance or relevance” and that the government is required to produce the documents as they are maintained in the ordinary course of business or it must organize and label the materials to correspond to the discovery requests).

11 Fed. R. Civ. P. 34(b)(e) provides that, *inter alia*, “Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information: (i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request; (ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms. . . .”

12 *United States v. Skilling*, 554 F.3d 529 (5th Cir. 2009).

13 *Id.* at 576.

14 *Id.* at 577.

these factors were not present, determined that government had not acted in bad faith or violated its *Brady* obligations.<sup>15</sup>

The Fifth Circuit, in considering the additional steps that the government took beyond merely producing an “open file,” settled on a rule of reasonableness in its decision in *Skilling*. But what if the government had not taken such step? Such production deficiencies, especially in civil enforcement cases where the government’s discovery failures have been the subject of judicial opinions, might bring the *O’Keefe* paradigm and civil rules and cases interpreting them into play.

In *SEC v. Collins & Aikman Corp.*,<sup>16</sup> a defendant argued that the size of the SEC’s production – 1.7 million documents spread across six databases – impermissibly hampered its defense because the SEC failed to search for and identify documents relevant to the factual allegations in the complaint. The SEC argued that it did not conduct such searches in the normal course of business and was not obligated to do so for the defendant, and while acknowledging that it had internally organized the produced documents in folders corresponding to the specific allegations of the complaint, stated that its organization constituted attorney work product.

The court disagreed, stating “[i]t is patently inequitable to require a party to search ten million pages to find documents already identified by its adversary as supporting the allegations of a complaint.”<sup>17</sup> Noting that even if the document compilation folders constituted attorney work product, the defendant had shown a substantial need for the material because of the “undue hardship” and considerable expense he would face if forced to search through the government’s document dump, page by page.<sup>18</sup> The court also criticized the “SEC’s blanket refusal to negotiate a workable search protocol responsive to [the defendant’s] requests” as “patently unreasonable”<sup>19</sup> and ordered the parties to meet and develop a search protocol that would reveal “at least some of the information defendant seeks.”<sup>20</sup> Following a pragmatic approach, the court noted that the SEC’s documents, collected through its investigation, were not part of the government’s “ordinary course of business” (as opposed to government contracting and other business-like activities) and held that such investigations are never within the “ordinary scope of business” under Rule 34. The court’s conclusion – that “[w]hen a government agency initiates litigation, it must be prepared to follow the same discovery rules that govern private parties”<sup>21</sup> – may have relevance to criminal matters as well.

If one subscribes to the *O’Keefe* construct, *Collins* provides intriguing applications to criminal matters. *Collins* sets boundaries for an impermissible “data dump” and implies that a government agency cannot unilaterally attempt to restrict the scope of discovery (by rejecting proposals to establish search protocols, for example), particularly where it initiated the action. Moreover, there is no “usual course of business” where government agency investigative files are at issue – as the *Collins* court found – so such materials must be produced in a format that organizes or indexes the materials according to the subjects of the

15 An example of a court taking a slightly more restrictive approach is *United States v. Ferguson*, 478 F. Supp. 2d 220 (D. Conn. 2007). In *Ferguson*, the defendant argued that the government failed to provide sufficient guidance to navigate a 3.5 million-page database provided during discovery. The court said the government provided sufficient guidance by making the database searchable and handing over a list of the most relevant documents. The court held that those factors, combined with a sufficiently detailed indictment, was enough guidance for the defendant to prepare a defense, avoid prejudicial surprise at trial, and protect against future double jeopardy. *Id.* at 227.

16 *SEC v. Collins & Aikman Corp.*, 256 F.R.D. 403 (S.D.N.Y. 2009).

17 *Id.* at 411.

18 *Id.*

19 *Id.* at 414.

20 *Id.* at 415.

21 *Id.* at 418.

discovery request. The *Collins* holding leaves one to wonder whether in a criminal case a defendant could request ESI from the government in a similarly “usable” format. In addition, if the ESI is housed and/or organized in a database, a defendant could also request some or all of the folder structure and/or coding that accompanies the data – which *Collins* determined was not attorney work product – which would be the equivalent of the investigative files in *Collins* that the SEC was ordered to turn over.

However, some courts have taken a more restrictive approach to criminal e-discovery and found, in circumstances similar to *Collins*, that a defendant cannot gain access to the government’s internal search and coding information. For example, in *United States v. Schmidt*,<sup>22</sup> the government provided summaries of certain bank records in a tax fraud case that were part of a discovery file that both sides acknowledged was too voluminous to be examined in court. The defendant requested access to the IRS computer programs used to compile and generate a summary spreadsheet of the records. The court refused, holding that “access to the computer database program would reveal what queries [the Government] ran in order to prepare the spreadsheets. Such access . . . would clearly invade the province of the agent’s work product by giving defendants insight into the agent’s thought processes as he analyzed and compiled the underlying documents. The database, therefore, is not discoverable.”<sup>23</sup>

Ultimately, government “data dumps” or failures to properly manage the production of ESI may lead to the dismissal of its case. In *United States v. Graham*, the government was slow to produce millions of documents and significant amounts of other media, productions were often incomplete or tainted with computer viruses, and the defendants had great difficulty in coping with the large volume.<sup>24</sup> The court, taking a more permissive approach for the defendant, dismissed the indictment for Speedy Trial Act violations but noted that discovery was at the heart of the matter: “In this case, the problem . . . is and has been discovery . . . . One, the volume of discovery in this case quite simply has been unmanageable for defense counsel. Two, like a restless volcano, the government periodically spews forth new discovery, which adds to defense counsels’ already monumental due diligence responsibilities. Three, the discovery itself has often been tainted or incomplete.”<sup>25</sup> In dismissing the case, the court noted that although the government did not act in bad faith, “discovery could have and should have been handled differently.”<sup>26</sup>

### **The Government’s Production of ESI Cannot be Unduly Limited By Its Own Assumptions About What is Relevant.**

In civil discovery, parties may seek discovery about items both relevant and/or likely to lead to the discovery of admissible evidence. The standard for relevance is expansive,<sup>27</sup> in contrast with the more limited discovery afforded by Rule 16 of the Federal Rules of Criminal Procedure. However, in some instances, courts have permitted discovery requests related to ESI which resemble the expansive view of discovery followed in civil matters.

<sup>22</sup> *United States v. Schmidt*, 04-cr-00103-REB, 2007 WL 1232180 (D. Colo. Apr. 25, 2007).

<sup>23</sup> *Id.* at \*1.

<sup>24</sup> *United States v. Graham*, No. 1:05-CR-45, 2008 WL 2098044, at \*2-3 (S.D. Ohio May 16, 2008). See also *State v. Dingman*, 202 P.3d 388 (Wash. Ct. App. 2009) (court reversed conviction and remanded for new trial after finding that trial court erred by denying defendant meaningful access to hard drives seized from his house).

<sup>25</sup> *Graham*, at \*5.

<sup>26</sup> *Id.* at \*8. But see *United States v. Qadri*, Crim. No. 06-00469 DAE, 2010 WL 933752, at \*5 (D. Haw. Mar. 9, 2010) (despite considerable and lengthy delays in Government’s discovery production due “in part to the nature of electronic discovery [and] the complex nature of the alleged crimes,” court declined to dismiss indictment because defendant, after several years of delay, was provided with evidence seven months before trial).

<sup>27</sup> See, e.g., FED. R. CIV. P. 26(b) and 34(a) (Advisory notes to Fed. R. Civ. P. 34(a) indicate that federal rules take an “expansive approach toward discovery of ESI and that discovery of [ESI] stands on equal footing with discovery of paper documents”).

In *United States v. Safavian*,<sup>28</sup> the defendant served discovery requests on the government seeking emails between government officials and third parties. The government objected, arguing that the emails had no bearing on the defendant's state of mind at the time he allegedly made false statements because the defendant had never seen the emails. The government also argued that the term "government" did not encompass more than the Justice Department, FBI, the GSA-OIG and other investigative agencies. The court rejected the government's arguments, noting that "simply because the e-mails themselves were not sent to or received by Mr. Safavian and therefore do not reflect on his state of mind, and may or may not be admissible in evidence at trial, does not mean they are not material to the preparation of a defense or that they will be unlikely to lead to admissible evidence."<sup>29</sup> Further, the court took a broad view of "government," determining that it was irrelevant whether documents were in the possession of Justice Department prosecutors or the FBI; instead, the documents were to be produced if they were in the possession, custody, or control of any agency of the executive branch of the government and either material to the defense or *Brady* material.<sup>30</sup>

### Other Civil Litigation Principles that May Influence Criminal Matters

As the prevalence of e-discovery in criminal matters expands, the need to rely on established civil litigation rules and principles to make the criminal discovery process more efficient and predictable may increase, especially at early stages in criminal proceedings where various issues – including evidentiary disputes – can be resolved. Two such areas are Rules 26(f) and 26(b)(2)(B) and (C) of the Federal Rules of Civil Procedure.

#### *Rule 26(f)*

Rule 26(f) requires parties in civil litigation to meet and confer to develop a proposed discovery plan to be submitted to the court in writing, addressing various discovery issues and discovery scheduling. Issues relating to the disclosure and/or production of ESI, including the sources of such data, its form of production and the costs of such production, among others, are required to be discussed at the conference.

Although there is no criminal rule equivalent, it is just as important to identify and address potential ESI issues in criminal matters given, among other things, the severe consequences that can result from spoliation.<sup>31</sup> In conversations similar to a Rule 26(f) conference, when ESI issues are present, the parties should try to reach agreement on the scope, form and potential limits of production, the potential use of search terms, the use of non-waiver agreements for privileged materials and whether any unique ESI issues need to be addressed (such as third party repositories or dynamic and/or proprietary databases), among other items. *United States v. Graham*, discussed *supra*, provides an excellent example of the potential consequences that can occur when parties skip this step in criminal matters.

Interestingly, one judicial district has recently adopted "Best Practices for Electronic Discovery of Documentary Materials in Criminal Cases," which contains a specific requirement that the prosecutor and defense counsel meet and confer, post-indictment,

---

28 *United States v. Safavian*, 233 F.R.D. 12 (D.D.C. 2005).

29 *Safavian*, 233 F.R.D. at 18.

30 *Id.* at 18-19.

31 See generally, 18 U.S.C. § 1519 and 18 U.S.C. § 1512(c) (Obstruction of justice provisions of Sarbanes-Oxley Act of 2002).

about “electronic discovery of documentary materials.”<sup>32</sup> At the discovery conference, the prosecutor and defense counsel must specifically address certain issues, including the nature and volume of discovery; the litigation capabilities of counsel; 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; that electronic discovery will be produced in a standard .pdf format; and that if access issues arise involving electronic discovery of audio and/or video files from a third party, the government and defense counsel will either provide the proprietary software needed to view the material or work together to devise a viewing format.<sup>33</sup> These “Best Practices” certainly recognize the lack of guidance in Fed. R. Crim. P. 16 relating to e-discovery, and may signal a shift towards a model based on civil principles. Moreover, in the absence of changes to the criminal rules to address ESI, local rules—such as from the Western District of Oklahoma—may attempt to fill this void for criminal matters.

*Rules 26(b)(2)(B) and (C)*

In addition to Rule 26(f), one of the hallmarks of the civil rules is proportionality of discovery, as discussed in Rule 26(b)(2)(B). In the civil realm, if a party from whom discovery is sought can show that the ESI is not “reasonably accessible because of undue burden or cost,” the party may not have to provide that discovery, its responses may be limited by the court, or the court may order cost shifting to the requesting party.<sup>34</sup> Again, there is no criminal rule analog, but with the marked increase in ESI in criminal matters—particularly the rising volumes of ESI—proportionality will likely come into play, as it already has, for example, in the Western District of Oklahoma. The “Best Practices” for ESI in criminal cases instruct that “[o]pen communications 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.*”<sup>35</sup> Further, the “Best Practices” mandate that at the discovery conference previously described, the “parties *will* discuss and consider in good faith possible cost-sharing measures in handling voluminous discovery . . . 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.”<sup>36</sup>

- 
- 32 See General Order Regarding Best Practices for Electronic Discovery of Documentary Materials in Criminal Cases (W.D. Okla. Aug. 20, 2009) (ordering that the “Best Practices for Electronic Discovery of Documentary Materials in Criminal Cases” has been adopted). The Western District of Oklahoma is not the only judicial district to adopt protocols relating to e-discovery in criminal matters. See also Northern District of California Suggested Practices Regarding Discovery in Complex Cases and Northern District of California Protocol Regarding Discovery in Complex Cases (suggesting practices regarding discovery in wiretap and other complex, document-intensive cases but noting that the Practices and Protocol are not intended to expand the parties’ discovery obligations under Federal Rule of Criminal Procedure 16, the Jencks Act, or other federal statutes or rules); and U.S. Attorney’s Office Best Practices for Electronic Discovery of Documentary Materials in Large Cases (W.D. Wash. Sept. 2005) (requiring the U.S. Attorney’s Office to discuss with all defense counsel whether electronic discovery of materials is appropriate and identifying other best practices that the U.S. Attorney’s Office will pursue).
- 33 See Best Practices for Electronic Discovery of Documentary Materials in Criminal Cases ¶ 1. See also U.S. Attorney’s Office Best Practices for Electronic Discovery of Documentary Materials in Large Cases (W.D. Wash. Sept. 2005) (“no later than the Local Rule 16 discovery conference the U.S. Attorney’s Office will discuss with all defense counsel whether electronic discovery of documentary materials is appropriate in the case and, if so, what arrangements should be made”).
- 34 See generally, *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354 (D. Md. 2008). FED. R. CIV. P. 26(b)(2)(C) states that: “On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:  
 (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;  
 (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or  
 (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.”
- 35 See Best Practices for Electronic Discovery of Documentary Materials in Criminal Cases (emphasis added).
- 36 *Id.* ¶ 4 (emphasis added). See also U.S. Attorney’s Office Best Practices for Electronic Discovery of Documentary Materials in Large Cases ¶ 7 (W.D. Wash. Sept. 2005) (“At the Local Rule 16 discovery conference, we will discuss and consider in good faith possible cost-sharing measures in handling voluminous discovery, such as jointly-commissioned Bates numbering, scanning, and/or ‘objective coding’ of documentary materials by outside vendors; provided, however, that our ability to enter into cost-sharing agreements may be limited by our budget constraints and/or the Department of Justice requirement that we allocate litigation expenditures only for mandatory obligations”).



While the development of proportionality principles related to e-discovery in criminal matters could produce a more efficient and effective discovery process in some instances, it may also create unique issues in the application of the Rule 26(b)(2)(C) “factors” to determine whether or not discovery of certain ESI should be limited – issues quite distinct from those confronted in civil matters. For example, a factor such as “the importance of the issues at stake in the action” may be disproportionately significant in a criminal case where the “issue at stake” may be an individual’s liberty. Additional questions arise: How does one measure proportionality? By the seriousness of the alleged crime? How does one measure the relative value of the case – potentially one’s liberty – against the burden or expense of the proposed discovery? And, from the government’s point of view, at what point does the preservation, collection, searching, and production of ESI become so expensive that it is unable to prosecute potential crimes?

### **Conclusion**

It is ironic that e-discovery in criminal matters, where defendants enjoy enhanced constitutional protections, is relatively ungoverned by clear procedural rights and remedies – at least on the face of the Federal Rules of Criminal Procedure – despite the complexities and challenges attendant to discovery involving ESI. However, certain civil litigation principles relating to the discovery of ESI are now beginning to influence criminal matters. Defense counsel and prosecutors would be prudent to monitor these developments and consider pro-actively applying the e-discovery principles and practices that civil litigators live with every day.