

New Federal Rule of Criminal Procedure 16.1 Aims to Assist Practitioners in Disclosure and Discovery of Electronically Stored Information in Complex Cases

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On December 1, 2019, [Federal Rule of Criminal Procedure 16.1](#) (Rule 16.1 or the “Rule”) went into effect. With a focus on defense counsel’s ability to adequately prepare for trial, the Rule functions as a response to concerns regarding the manner and timing of the production of voluminous Electronically Stored Information (ESI) in complex cases. Rule 16.1 attempts to address these concerns by imposing a responsibility on the parties to discuss discovery early in the process and by providing the parties and the court flexibility to address each particular case.

Rule 16.1 contains two provisions, with Subsection (a) requiring the prosecution and defense counsel to meet “[n]o later than 14 days after the arraignment...to try to agree on a timetable and procedures for pretrial disclosure under Rule 16.” Subsection (b) authorizes the parties, separately or together, to “ask the court to determine or modify the time, place, manner or other aspects of disclosure to facilitate preparation for trial.”

Subsection (a) places on the parties an early responsibility to at least begin discussing the timing and procedure for disclosures but does not require resolution. In less complex cases, parties may simply meet for a brief discussion. In more complex cases, parties may take the opportunity to plan and attempt agreement on how best to proceed with the pretrial discovery and production of ESI in a manner that allows the receiving party opportunity to understand and digest the data ahead of trial. Subsection (b) allows the parties to make proposal to the court, requesting that the court either “determine or modify” the parameters around disclosure to aid trial preparations. Where there is no order or a rule controlling discovery already in place, parties may ask the court to prescribe a discovery order tailored to address the complexities of the ESI involved. Should there be an order or rule in place that may not meet with the complexity and needs of the case, the parties may ask for court modification.

In providing for flexibility, the Rule does not address how the parties must specifically resolve issues around voluminous and complex ESI but it is clear that the onus is on the parties to take initiative and be prescient with respect to the needs of each particular case. The new Rule underscores a client’s need for proactive and well-read counsel, who continuously informs herself of the latest

developments and trends in the Federal Rules of Practice and Procedure.

For further reading on the topic:

Congressional Rules Package 95 (Apr. 25, 2019), available [here](#).

Department of Justice, Administrative Office of the U.S. Courts, and Joint Working Group on Electronic Technology in the Criminal Justice System, *Recommendations for Electronically Stored Information Discovery Production in Federal Criminal Cases* (2012), available [here](#).

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