PLI Current

The Journal of PLI Press

Vol. 9 (2025)

E-Discovery in Government Investigations: Insights into Effective Strategies for Government Investigations

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Introduction and Government Enforcement Priorities

Government investigations have evolved significantly, and agencies have adopted more sophisticated approaches to enforcement. This article identifies seven areas where deliberate planning, proactive negotiation, and cross-functional collaboration can help legal teams meet government expectations while preserving defensibility and strategic advantage for subsequent civil litigation. The choices made—in building relationships with the government, negotiating protocols for electronically stored information (ESI), selecting vendor teams, or leveraging artificial intelligence (AI)—lay the foundation for defensible, efficient, and adaptable legal strategies.

Regulators have increasingly demanded greater cooperation during investigations, particularly when it comes to the preservation, review, and production of ESI. During the Biden Administration, the Monaco Memorandum explicitly linked declinations of prosecution or reduced penalties to the timeliness, completeness, and transparency of a company's cooperation in investigations. For example, the Monaco Memorandum said companies seeking full cooperation credit must disclose "all relevant, non-privileged facts about individual misconduct swiftly and without delay." [1] The Memorandum further specified that a "robust compliance program" would be able to collect all work-related data, including ephemeral and encrypted messages, from an employee's personal cell phone or from third-party messaging.[2]

Contrary to expectations of leniency, the Trump Administration's Department of Justice (DOJ) has maintained a tough stance in some areas. In the summer of 2025, the DOJ revised its Corporate Enforcement Policy with changes that emphasized the importance of self-disclosure. The DOJ highlighted that self-disclosure would avoid "burdensome, years-long investigations that inevitably end in a resolution process in which the company feels it must accept the fate the Department has ultimately decided."[3] Following the Foreign Corrupt Practices Act (FCPA) enforcement action pause,[4] the DOJ's first FCPA settlement[5] under the Trump Administration appears to

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[1] Lisa Monaco, *Further Revisions to Corporate Criminal Enforcement Policies* (Sept. 15, 2022), https://www.justice.gov/d9/pages/attachments/2022/09/15/2022.09.15_ccag_memo.pdf.

[2] *Id.*

[3] Matthew R. Galeotti, Acting Assistant Att'y Gen., *Remarks at SIFMA's Anti-Money Laundering and Financial Crimes Conference* (May 12, 2025), https://www.justice.gov/opa/speech/head-criminal-division-matthew-r-galeotti-delivers-remarks-sifmas-anti-money-laundering.

[4] The enforcement pause was mandated by President Trump's February 10, 2025, Executive Order. Exec. Order No. 14,209, Pausing Foreign Corrupt Practices Act Enforcement to Further American Economic and National Security, 90 Fed. Reg. 9588 (Feb. 10, 2025), https://www.whitehouse.gov/presidential-actions/2025/02/pausing-foreign-corrupt-practices-act-enforcement-to-further-american-economic-and-national-security/.

[5] Indictment, United States v. Rovirosa, No. 4:25-cr-00415 (S.D. Tex. Aug. 6, 2025), ECF No. 1.

align with its goal of eliminating cartels.[6]

Most recently, Assistant Attorney General Abigail Slater, of the DOJ Antitrust Division, announced the "Comply with Care" initiative.[7] The initiative targets "gamesmanship" and what it describes as "problematic tactics" such as "delay" and "privilege abuses," as well as practices such as the deletion of chat messages. Such tactics are allegedly used by companies to limit the Antitrust Division's ability to investigate potential antitrust concerns. Assistant Attorney General (AAG) Slater said: "[p]rivilege abuses are grounds for enforcement actions and sanctions motions."[8] To address these concerns, a task force has been established that "will work with colleagues across the Division to tackle abuses that arise in our investigations and take decisive action to address them."[9]

Against this backdrop, we consider how decisions made during a government investigation can shape the landscape for any follow-on civil litigation. Counsel should approach responses to Civil Investigative Demands or government subpoenas not only as a compliance exercise, but also as an opportunity to strategically position the company for any follow-on civil litigation. Missteps at the investigation stage can limit a company's future litigation options and strategy.

Seven Practical Tips and Strategies to Consider in Government Investigations

Assume Future Civil Litigation

In the past, most investigations concluded quickly without enforcement or downstream civil litigation. That is increasingly rare, especially for publicly traded

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[6] The indictment charged two Mexican businessmen for alleged involvement in a bribery scheme in connection with more than $2.5 million in contracts with a Mexican state-owned oil company and its subsidiary. A separate motion stated that one of the two businessmen charged had ties to Mexican cartel members.

[7] Abigail Slater, Assistant Att'y Gen., *Remarks to the Ohio State University Law School* (Aug. 29, 2025), https://www.justice.gov/opa/speech/assistant-attorney-general-gail-slater-delivers-remarks-ohio-state-university-law-school.

[8] *Id.*

[9] *Id.*

companies. Aided by AI and other modern tools, investigators are becoming more selective in opening investigations in the first instance, and enforcement agencies often view Civil Investigative Demands (CIDs) as a way to assure themselves that action is warranted and to build their case for eventual litigation. To the extent a company receives a very narrow or targeted CID, that may suggest that the company is not the target of the investigation and, therefore, that the investigation is less likely to lead to downstream litigation. Additionally, "buying peace" with the government is no guarantee of avoiding civil litigation.

For publicly traded companies, even a limited settlement with a government enforcement agency or regulator has the potential to lead to shareholder litigation. Furthermore, state attorneys general may pursue federal or state-based claims if they did not join in the federal government settlement. Accordingly, e-discovery in government investigations should not occur in isolation. Decisions made during an investigation—whether related to custodians, search terms, or privilege calls—inevitably shape what is discoverable or defensible in later civil litigation. For example, a decision made during an investigation to share a privileged communication with the government could potentially result in a subject matter waiver with respect to other adverse parties. Similarly, a custodian included during the investigation phase will presumptively be a custodian in the civil litigation phase unless the litigation narrows or otherwise changes the scope of the topics previously sought during the investigation.

Build a Relationship with the Government

In the era of video calls, it is tempting to say the art of relationship building has been lost. Although relationship building is different than it once was, it is still possible. The informal chit chat that occurred before in-person meetings can still be done on a video call. Rather than sitting in silence with cameras off, counsel could turn their cameras on. Most people find it harder to be aggressive and/or belligerent to an actual face than to a black box on a screen.

For those who are skeptical that relationships can be built on video calls, there is always the adage: actions speak louder than words. Counsel can build trust through traditional tools such as employing clear communication, complying with agreed-upon deadlines, providing information on a rolling basis, and responding to reasonable requests for additional information or clarification. To the extent counsel creates a paper trail of a strong record of compliance and cooperation, it helps build the record demonstrating the company's full compliance and cooperation as expected under the recent policy shifts.

Further, relationship building can mitigate new enforcement efforts, such as some of those likely to be brought under the DOJ's "Comply with Care" initiative. Indeed, AAG Slater explicitly stated that "Parties and counsel that respond promptly, provide the required information, and proactively communicate with Division staff demonstrate that they approached the issues thoughtfully" and as a result, such "[e]arly communication sets the tone for the rest of the investigation and paves the way for a smooth, efficient process."[10]

Implement a Legal Hold Strategy and Anticipate Potential Discovery of the Hold

While in most cases legal holds are protected from discovery by the attorney-client privilege and attorney work product doctrine, there is an emerging trend where some courts have allowed discovery into the issuance of legal hold notices. This is especially true when the court finds a pattern of abusive practices. For example, in *EEOC v. Formel D USA, Inc.*,[11] the court ordered the production of a legal hold notice and document retention policies after finding that the defendant failed to suspend automatic deletion of emails and mobile content. Notably, the magistrate judge found the legal hold notice was not protected by the attorney-client privilege because it provided "forceful instructions" rather than legal "advice." [12]

Similarly, in *Doe LS 340 v. Uber Technologies*,[13] the district court required the disclosure of factual details about litigation holds, such as the date the holds issued, names of recipients, and scope of sources searched, finding that "'the basic details surrounding the litigation hold' are not protected by the attorney-client privilege and the work product doctrine."[14]

Accordingly, as companies work with counsel to issue litigation hold notices, thought should be given to the potential discoverability of such hold notices. Companies should carefully document "basic facts" surrounding the hold notices. If possible, these should be available not only through the provision of the hold notice

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[10] Slater, *supra* note 7.

[11] EEOC v. Formel D USA, Inc., No. 23-11479, 2024 WL 4172527, at *5 (E.D. Mich. Sept. 12, 2024).

[12] *Id.* (citing Bagley v. Yale Univ., 318 F.R.D. 234, 240 (D. Conn. 2016) (emphasis omitted)).

[13] Doe LS 340 v. Uber Technologies, 710 F. Supp. 3d 794 (N.D. Cal. 2024).

[14] *Id.* 802.

itself. Other factual aspects of the hold notice may be discoverable, such as the list of sources covered by the hold notice. As such, these too should be drafted with an eye towards potential discoverability. *See Doe LS 340*, 710 F. Supp. 3d at 803-804 (court granting in part a request "for Uber to disclose information about the ESI sources it has preserved, specifically, what sources of ESI it preserved, when each source was preserved, when each ESI source was used, what each source was used for, and the general types of information housed or contained in each source.").

Negotiate ESI Protocols Proactively

Counsel should negotiate ESI protocols and production logistics as early as possible in any investigation. Not only does this advance the relationship-building discussed earlier, but it also gives the company more control over what it must produce. Moreover, enforcement agencies and regulators expect and encourage the use of advanced analytics in review workflows. It has been a long time since the DOJ Antitrust Division first issued guidance acknowledging the acceptability of technology assisted review (TAR), provided that the process is transparent, well-documented, and capable of being validated.[15] Today, the SEC similarly provides that "the proposed use of file de-duplication methodologies or computer assisted review or technology assisted review (TAR) during the processing of documents must be discussed with and approved by the legal and technical staff of the Division of Enforcement (ENF)."[16]

While TAR may limit the ultimate number of documents subject to review and production, the single biggest thing counsel can do to limit the burden of e-discovery in an investigation is to limit the number of custodians. Relatedly, counsel should take care to limit the scope of the custodial sources. Limiting the number of custodians and the scope of custodial sources has dual benefits. Not only does it limit the discovery burden during the investigation, but it will also likely limit the burden in any follow-on civil litigation. Specifically, a smaller custodian list decreases the burden associated

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[15] *See e.g.*, U.S. Dep't of Just., Antitrust Div., Model Agreement, https://www.justice.gov/file/969586/dl?inline=. *See also*, U.S. Dep't of Just., Antitrust Div. Updated Model Second Request, issued November 28, 2016 (noting that the "revised Model also reflects current e-discovery practice and requirements, including instructions on the use of predictive coding and search terms.").

[16] U.S. Sec.& Exch. Comm'n, Data Delivery Standards, https://www.sec.gov/divisions/enforce/datadeliverystandards.pdf.

with any refresh productions requested by the plaintiff during follow-on litigation. With the increasing use of shared drives, SharePoint sites, document management systems, and other shared document repositories—many of which may contain information that overlaps with email—reducing the number of custodial sources and negotiating to exclude sources expected to have high deduplication rates can make the collection and processing stages of discovery more efficient and lower hosting costs for companies.

Further, counsel should look at the local rules and federal district court or state court ESI protocol and protective order templates in jurisdictions where follow-on civil litigation is likely (such as the jurisdiction in which the company is headquartered) and consider those during the negotiation of the ESI protocols applicable to the investigation. Negotiating for the inclusion of a specific ESI provision offers little value if that provision is seldom accepted within the relevant jurisdiction(s).

Consider trying to ensure that investigation productions can be reused in their current production format in follow-on civil litigation. This may mean including (or at least preserving for future production in an overlay) additional metadata fields that are typically required in civil litigation but not requested by a regulator during an investigation. Doing so may be particularly beneficial for non-standard data sources where obtaining additional metadata at a later stage could require the initial data collection to be repeated. Making these decisions, or at the least being aware of these considerations, during the investigation requires only fractionally more thought and time but could save significant time and cost in follow-on litigation if rerunning productions is avoided.

Counsel should also consider how to limit the burden associated with modern data types, particularly linked data files. Enforcement agencies are sophisticated and frequently request the collection and production of all links in produced documents. An effective strategy to reduce the burden associated with this request is to limit the number of sources scraped for links, thereby lessening the overall collection and review burden.

Protect the Company's Attorney-Client Privilege and Work Product Protections

It is imperative that counsel take steps to ensure robust protection of the company's attorney-client privilege and work product protection for documents inadvertently produced during a government investigation. As the scale of document production continues to increase, it is impossible to make productions that do not include at least a few errors with respect to privilege determinations. A relatively small error rate with

respect to privilege determinations can result in a comparatively large number of privileged documents being inadvertently produced when the size of current productions is considered.

Typically, during investigations, counsel enter into confidentiality agreements rather than court-ordered Federal Rule of Evidence 502(d) orders to address potential inadvertent production issues.[17] Counsel should enter into a confidentiality agreement that includes Rule 502(d)-like protections, perhaps even by explicitly referencing Rule 502(d). Rule 502(d) protections are preferred over Federal Rule of Evidence 502(b) protections because Rule 502(d) states that production of documents protected by the attorney-client privilege and/or the work product doctrine does not waive privilege in either the specific litigation in which they were produced or any other federal or state proceeding. Whereas Rule 502(b) provides that production of privileged material "does not operate as a waiver" if the responding party demonstrates: (1) the disclosure was inadvertent; (2) the producing party took "reasonable steps" to prevent disclosure; and (3) the producing party promptly took reasonable steps to rectify the error. Put another way, Rule 502(d) permits a producing party to clawback a privileged document without making a specific showing of inadvertence, reasonable steps, and promptness. By contrast, Rule 502(b) requires a specific showing that meets those three prongs that in practice "can require substantial effort and documentation."[18] Accordingly, language commensurate with Rule 502(d) protections should be sought whenever possible.

Rule 502(d)-like protections could be particularly valuable to companies facing multiple similar concurrent investigations where documents produced in one investigation are also likely to be reproduced in other investigations.

Choosing the Right Vendor Team and Creating Documentation

Government investigations and subsequent civil litigation can span years, with early e-discovery decisions having long-term implications. The workflows, review

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[17] While it is generally possible to get a Federal Rule of Evidence 502(d) Order in an investigation by using the appropriate federal district court's miscellaneous docket, typically this route is not used because it would require public disclosure of the investigation on the court's docket.

[18] The Sedona Conference, *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1, 150–51 (2018).

protocols, and production strategies adopted during an investigation will define the company's options in subsequent litigation. Choosing the right vendor team in light of the complexity of the matter can yield significant benefits.

Counsel should collaborate with vendors to develop a playbook tailored to the company and the matter at hand. An effective playbook serves two purposes: (1) it provides a basis for automating workflows to find efficiencies; and (2) it documents decisions. The playbook creates a shared language between legal and technical teams, streamlining communication and ensuring consistency in task execution, ultimately saving the client money and decreasing the risk of errors. A second purpose of the playbook is to record key decisions, such as the negotiation, interpretation, and application of search terms, determination of responsiveness criteria, and application of privilege standards. The playbook should also document workflows and decisions regarding all aspects of the collection, processing, review, and production process. This record can be referenced in future litigation, preventing the need to redo work, defend undocumented choices, or face inconsistent outcomes across matters.

Ultimately, the vendor team the company chooses, and the processes established, are not just about managing the current investigation, they are about preserving flexibility and defensibility for future matters. And where data is often reused and repurposed, alignment with the vendor can facilitate that reuse.

Use AI Defensively

Companies should anticipate that federal enforcement agencies and regulators will use AI solutions to review produced documents. On July 23, 2025, the White House issued "Winning the AI Race: America's AI Action Plan," an ambitious strategy to solidify U.S. leadership in AI. The plan outlines over 90 federal actions to accelerate AI adoption, streamline permitting for data infrastructure, promote international AI export, and dismantle certain regulatory guardrails put in place under Executive Order 14110. Even if the government does not employ AI, private plaintiffs are likely to do so. Companies, therefore, should make efforts to know what commercially available AI tools may surface in their document productions. Companies need not rely on AI alone, but using these tools can provide insight into the documents that investigators may focus on first.

Companies can use the initial Civil Investigative Demands (CID) as a roadmap to the government's case. It can be used to draft AI prompts to quickly surface potentially important documents even before production and potentially even while custodians are being negotiated. Such actions could help inform the custodian selection strategy. Put succinctly, using early fact development can allow a company to assess weaknesses early

and craft an investigation strategy that minimizes those weaknesses and provides maximum optionality during follow-on litigation.

Conclusion

Government investigations today often involve high volumes of data and tight production schedules. Companies, and their counsel, should adopt a strategic approach to e-discovery that addresses both immediate investigative needs and potential future litigation demands. Decisions made during an investigation can impact options available in subsequent litigation. The seven factors discussed above—ranging from relationship building to effectively protecting privilege—can guide legal teams in shaping an effective e-discovery strategy. By developing a thoughtful e-discovery strategy, legal teams can meet immediate government investigation requirements and position companies, and their counsel, for success in any future litigation.

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