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BEST PRACTICES

Williams & Connolly's Gil Greenman and James Weingarten explain the danger of using the words ''all,'' ''any,'' and ''every'' in the context of electronically stored information (ESI) and offer some simple techniques for protection against their peril. At the heart of the problem is the very nature of ESI, and the ease with which it can be damaged, lost, altered, and destroyed.

Beware of the Use of Absolute Language Regarding Electronically Stored Information

BY GIL GREENMAN AND JAMES WEINGARTEN

''All,'' ''any,'' and ''every'' are dangerous words when describing electronically stored information (''ESI''). Lawyers use these words often, from requests for production of documents and orders governing confidential treatment of documents to court papers describing clients' documents.

Left unqualified, ''all,'' ''any,'' and ''every'' lead almost inevitably to over-promising and to exposing lawyers and their clients to criticism and even sanctions, particularly when ESI is involved.

Gil Greenman is a partner and James Weingarten is an associate at the law firm of Williams & Connolly LLP.

Source of the Danger. Understanding the reasons for the danger of absolute language begins with the nature of ESI. ESI is fragile. It exists electronically as a series of numeric codes within a file of memory. It can be damaged, lost, altered, and destroyed.[1]

[1] *See* Barbara J. Rothstein et al., *Managing Discovery of Electronic Information: A Pocket Guide for Judges*, 783 PLI/Lit 305, 315 (2008) (''Also, although the possibility that paper documents may be damaged, altered, or destroyed has always been a concern, the dynamic, mutable nature of ESI presents new challenges.''); The Philip D. Reed Lecture Series Panel Discussion, *Managing Electronic Discovery: Views from the Judges*, 76 Fordham L. Rev. 1, 7 (2007) (noting the fragile nature of ESI as a reason for requiring parties to confer regarding its preservation); Maria Perez Crist, *Preserving the Duty to*

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ESI is also everywhere. Created by many sources, it finds its way into many locations.[2]

Some Illustrations. Two points illustrate the fragility and ubiquity of ESI.

First, the original attempt by the editors of the Federal Rule of Civil Procedure to account for some of the impact of ESI in civil discovery had as one of its primary changes a provision which attempted to shield parties from the ''automatic deletion or overwriting of certain information'' via the ''ordinary operation of computers.''[3] While the limitations on this provision have received ample attention,[4] the fact that the editors began here in updating the rules illustrates the centrality of the problem of widespread storage and systematic destruction of ESI.

Second, the concept of ''backups,'' which has also received much attention, now extends far beyond tape-based disaster recovery or even deliberate-archiving systems to redundant, scrolling temporary storage in multiple media. Many companies' systems use externally-hosted spam filtering services which retain several weeks of e-mail, some of which may exist nowhere else because the filter caught them. If the host solution provider's retention policies are not carefully crafted to mimic those found on the client's e-mail servers, it is possible that e-mail that has been deleted from the client's mail server might still exist on the solution provider's servers.

Faced with a world in which ESI is both fragile and everywhere, practitioners who use the words ''all,'' ''any,'' or ''every'' to describe ESI will, almost inevitably, be describing more than they intend and some that will be destroyed absent herculean efforts. Lawyers who become acquainted with civil discovery quickly learn that ''every copy is a document,'' but this does not necessarily lead to the conclusion that every copy in every form needs to be preserved. Nor does every copy need to be collected, reviewed, or produced in every matter.

A growing chorus of decisions interpreting the Federal Rules have counseled reason and proportionality for parties handling ESI in discovery.[5]

State rules are also addressing this issue.[6]

The Burden. Lawyers' use of absolute language does not acknowledge this growing trend towards a rule of reason, and responding to such absolute language often places a burden on lawyers and clients to be detailed and well supported in their specific answers. When a client responds to a document request seeking ''every,'' ''any,'' or ''all,'' one response would be a textured description of the burden presented by a search for each and every copy. [7]

Preserve: The Increasing Vulnerability of Electronic Information, 58 S.C. L. Rev. 7 (2006).

[2] *See* Kevin F. Brady et al., *The Sedona Conference Commentary on ESI and Admissibility*, 9 Sedona Conf. J. 217, 229–30 (2008) (''One problem we are already encountering, and which is likely to worsen, relates to the vast quantities of information created and stored each day. In 2006, we created, captured and replicated enough digital information to fill all of the books ever created in the world, 3 million times.''); Bradley C. Nahrstadt, *A Primer on Electronic Discovery: What You Don't Know Can Really Hurt You*, 27 No. 4 Trial Advoc. Q. 17, 17 (2008) (''The desktop or laptop hard drive for one employee can hold 1.5 million pages or 600 boxes of documents. One company server can hold 100 million pages or the equivalent of 43 semi-truck loads of documents. One mid-sized company typically has 1.625 billion pages of documents in its possession at any one time; enough to reach from the Earth to the moon.'').

[3] Fed R. Civ. P. 26(f), advisory committee's note (2006 amends.).

[4] *See, e.g.*, John Rosenthal & Moze Cowper, *A Practitioner's Guide to Rule 26(f) Meet & Confer: A Year After the Amendments*, 783 PLI/Lit 231 (2008); Moze Cowper & John Rosenthal, *Not Your Mother's Rule 26(f) Conference Anymore*, 8 Sedona Conf. J. 261 (2007); Ronald I. Raether, Jr., *Preparing for the Rule 26(f) Scheduling Conference & Other Practical Advice in the Wake of the Recent Amendments to the Rules Governing E-Discovery*, 54-AUG Fed. Law. 22 (2007); Lee H. Rosenthal, *A Few Thoughts on Electronic Discovery After December 1, 2006*, 116 Yale L.J. Pocket Part 167, 169 (2006) (''The ordinary operation of computers—including the simple act of turning a computer on or off or accessing a particular file—can alter or destroy associated electronically stored information. Computer systems automatically create, alter, discard, or overwrite data as part of their routine operation, often without the operator's direction or awareness. Computers further complicate preservation and production because electronically stored information may be 'deleted' yet continue to exist in ways that are difficult to locate, retrieve, or review and may become progressively less accessible over time.'').

[5] *See, e.g.*, *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 364 (D. Md. 2008) (''The goal is to attempt to quantify a workable 'discovery budget' that is proportional to what is at issue in the case.''); *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 316 (S.D.N.Y. 2003) (comparing the costs and benefits of discovering the disputed evidence, with cost evaluated in light of the parties' resources, the amount in controversy, and the ''relative ability of each party to control costs''). *See also* Fed. R. Civ. P. 26(b)(2)(c)(i) (stating that discovery may be limited if ''the discovery sought is unreasonably cumulative or duplicative, or [is obtainable] from some other source that is more convenient, less burdensome, or less expensive''); Paul W. Grimm et al., *Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions*, 37 U. Balt. L. Rev. 381 (2008) (discussing rule of proportionality in preservation obligations); The Philip D. Reed Lecture Series Panel Discussion, *Managing Electronic Discovery: Views from the Judges*, 76 Fordham L. Rev. 1, 9–10 (2007) (comments of Lee H. Rosenthal, J., U.S. District Court, S.D. Tex.) (explaining that it is ''clear that the key is proportionality'' in the new e-discovery rule, because its ''good cause determination must be based on the proportionality limits that [already] have been in the rules'').

[6] For example, California's recently enacted Electronic Discovery Act includes rules providing that courts must limit the frequency and extent of e-discovery when it is possible to obtain the information from a less burdensome source, the discovery would be unreasonably duplicative, or the burden outweighs the likely benefit given the amount in controversy. *See* Electronic Discovery Act, 2009 Cal. Legis. Serv. Ch. 5 (A.B. 5) (West 2009) (codified at Cal. Civ. Proc. Code § 1985.8).

[7] Boilerplate objections are drawing criticism as violations of the spirit and text of Rule 26(g). *See, e.g.*, *Mancia*, 253 F.R.D. at 364 (finding that boilerplate objections to discovery requests did not comport with Rule 26(g)'s requirement that objections be reasonable and holding that the boilerplate language constituted waiver of legitimate objections to discovery requests); *see also A. Farber & Partners, Inc. v. Garber*, 234 F.R.D. 186, 188 (C.D. Cal. 2006), and other cases cited in *Mancia*, *supra*.

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Likewise, when considering the entry of agreed orders governing the confidentiality of produced documents, absolute language regarding duties to destroy or return ''every,'' ''any,'' or ''all'' copies should be avoided. Such language in so-called ''clawback'' agreements risks placing your client in the position of labored searching of multiple media, including legacy and disaster recovery storage.

In drafting such orders and agreements, the single addition of an exception for copies stored on backup media systems subject to destruction in accordance with standard retention policies should suffice to avoid this burden. If parties cannot agree on language, there are some creative solutions available, such as storage of confidential information on segregated systems. As a last resort, court intervention could be sought. The same effect of absolute language can exist in a wide variety of agreements regarding confidential information both in and out of litigation, such as joint defense agreements or agreements or the sharing of information among parties to transactions.

Related Future Claims. The effect of prior or subsequent litigation holds for other related matters should also be considered both in using such absolute language and in devising solutions to the problems such language creates. If a prior litigation hold resulted in the preservation of media, the unqualified use of ''all,'' ''any,'' or ''every'' in a new order or agreement would likely include that preserved material.

Finally, parties producing ESI need to consider very carefully the consequences of representations in court papers and sworn testimony from custodian witnesses that use the words ''all,'' ''any,'' or ''every.'' A party who creates the impression that ''everything'' has been produced is a party who may end up staring, red faced, at ESI that it failed to produce but landed in the case from another source.[8]

This article cannot hope to address every, or even many, of the challenges posed by ESI and absolute language. The solution of exercising caution in language should, however, assist with dangers that are known and those yet to be encountered.

[8] *See,* Gil Greenman & James Weingarten, *The Ghost and the Doppelganger: How to Tame the Two Scariest Creatures in the Paranormal World of Electronic Discovery,* (2009), forthcoming, Litigation Magazine, Winter 2010.