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All the best,

Leonard Bucklin

Leonard Bucklin

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❖ The following is a PowerLitigation™ article of Leonard Bucklin. This article was adapted for LawyerTrialForms™ from his three- volume text of discovery, litigation, and trial advice, titled *Building Trial Notebooks*, available directly from James Publishing or through Amazon.com.

#TIP4545-Avoid Word “All” in ESI.

In ESI discovery, don't say "all."

"All." Responding to requests for discovery: the greatest risk of unintentional mis-certification of what has been produced by you to the adverse party is the use of the word "all."

"All." Requesting discovery, using the word "all" generates cost-driven objections. Plus you do not want tons of "all."

§ 1. "All" when you are the producing party.

Unintentional mis-certification of what has been produced by you results from the use of the word "all."

Today's ESI storage has many copies floating around in the electronic soup, with changes in content, metadata, or file names and paths. Except in cases of one individual suing another individual over a personal injury, it is *usually impossible or economically impracticable* to drill down deep or wide enough to represent that *all* ESI storage has been identified and searched in a method that has in fact resulted in retrieval and production of *all* relevant documents and data.

You simply cannot find "all" — except where the total electronic storage is very limited. So do not certify you have produced "all" ESI containing a subject, or within date limitations, etc. You probably have not produced "all" the ESI on the subject, or existing within date limitations, et cetera.

Counsel are being sanctioned for certifying he/she has produced "all," but after that certification the client or an adverse expert has found additional relevant ESI. Don't incur the wrath of the court. Don't use the word "all" when you say you are producing what you are producing.

For a responding party a better approach to the word "all" is to use the following checklist style format for drafting a response to a request for production of ESI.

Response to Request for Production of ESI

The materials produced in response to the request are attached. They were produced with the following methodology.

- After litigation was reasonably anticipated, the identifying factors and process that were used to identify the ESI to be preserved were: _____.
- The method and the technology used for preserving the information after litigation was reasonably anticipated was: _____.

- The size and scope of the storage, including where it was and is now, of the ESI that was preserved, is: _____.
 - The search method and the technology used for searching within the preserved ESI for relevant information was: _____.
 - The manner in which the data was reviewed by the undersigned was:_____.
 - The format of the attached materials, used for this production is:_____.
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§ 2. “All” when you are the requesting party.

The greatest cost driver in electronic discovery is the use of the word "all."

For a requesting party, there is a better approach than requesting "all," because:

- ✓ You do not want to be buried in tons of documents.
- ✓ You do not want to start a war of expensive reciprocal discovery of “all.”

You do want to target discovery to obtain only the ESI documents that add the greatest value to the litigation.

As a requesting party, knowledge of your adversary's ESI systems will form the foundation for you to target discovery to obtain only the ESI documents that add the greatest value to the litigation. After you have the knowledge of what the adversary's system is like and the size and scope of potential documents, then make a specific request.

In most cases in litigation, usually, for a requesting party a better approach than the word "all" is to specify what you want. A simple way to do that follows.

Specify the ESI you want..

- ✓ Specify the specific identifiers of the ESI to be produced. (E.g., by type of electronic data or document, by drive location, by person (creating, sending, receiving, reviewing, etc.), by date, by specific metadata identifiers, by specific content key words, et cetera.)
 - ✓ Specify whether you want only one copy only to be produced, or all copies and backups of the apparent same ESI, or only certain copies or backups. (E.g., do you want the other side to search backup tapes that probably contain the same information that is being produced?)
 - ✓ Specify the format to be used for the production to you.
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