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LIVING DAILY WITH WEEKLEY HOMES

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INTRODUCTION

Texas led the nation in adopting a specific procedural rule addressing the discovery of electronically stored information (ESI). Tex. R. Civ. P 196.4. has been with us since 1999, and although it was a new and novel rule, there have been remarkably few appellate opinions addressing the subject.[1] After ten years, the Texas Supreme Court took the opportunity presented by *In re Weekley Homes*[2] to provide a detailed blueprint for requesting ESI. That blueprint clearly is not from a pattern book. Discovery of ESI requires custom legal carpentry, for good reasons. It takes thought, planning, and communication between opposing counsel to avoid turning discovery of ESI into a money pit. While Rule 196.4 provides a procedural framework for parties who insist on formal motion practice, the cost and delay of litigating ESI discovery issues can be significantly reduced—or eliminated altogether—with some common-sense cooperation between opposing counsel to develop a fair and proportional discovery building plan before breaking ground.

In this article, we discuss why discovery of ESI is different from the discovery of paper to which lawyers were accustomed before the 1999 amendments, and how the Texas Rules of Civil Procedure address these differences in Rule 196.4. Then we review the background facts of *Weekley Homes* and explore the Supreme Court's application of the rule. We also see how *Weekly Homes* has been applied in subsequent appellate court decisions. Finally, we look at the Court's practical advice for litigants seeking or responding to discovery of ESI and the Court's call for planning, communication, and cooperation between opposing parties in litigation.

I. Why discovery of ESI is different

We live in a world of electronic information. Almost everything we read, listen to, watch, write, or communicate to others is generated, stored, or transmitted using computer technology. In business, government, education, entertainment, and almost all other human endeavors, relatively little information is committed to paper in the first instance. Although exact statistics are difficult to come by, experts have long believed that 93 percent of all business documents are created electronically and only 30 percent are ever printed to paper.[3] While paper documents abound, almost all paper documents are printouts information from computer files. Ask yourself when you last saw a typewriter being used routinely in a business, government office, school, or even at home.

Recent statistical research confirms that we are overwhelmingly a "digital" information society. According to the University of California at San Diego's Global Information Industry Center, American consumers receive only about 8.61% of their information in print form, measured in words. Measured in time, the average American spends only .6 hour per day reading printed material. Measured in compressed bytes, print constitutes only .02% of all information media.[4] The researchers note that "[n]ew digital technologies continue to remake the American home."

> Ten years ago 40 percent of U.S. households had a personal computer, and only one-quarter of those had Internet access. Current estimates are that over 70 percent of Americans now own a personal computer with Internet access, and increasingly that access is high-speed via broadband connectivity. Adding iPhones and other 'smart' wireless phones, which are computers in all but name, personal computer ownership increases to more than 80 percent. […] The average American spends nearly three hours per day on the computer, not including time at work. [5]

The use of computers to generate, manage, and communicate information has significant consequences that go far beyond simply changing the way we write and store information. Some of these are extensions of problems that could occur in the paper document world. Others are unique to the computer world. But these consequences require us to approach the discovery of electronically stored information (ESI) differently than we approached the discovery of paper documents.

A. Volume

The first—and perhaps the most obvious—consequence of our conversion to digital information technology is an explosion in the volume of data that may be subject to discovery, or that needs to be sifted through to locate that which is subject to discovery. Two leading electronic discovery thinkers note that "[i]n a small business, whereas formerly there was usually one four-drawer file cabinet full of paper records, now there is the equivalent of two thousand four-drawer file cabinets full of such records, all contained in a cubic foot or so in the form of electronically stored information."[6]

The increase in volume is due to a number of factors. One is that electronic information systems tend to automatically replicate and store numerous copies of files in a variety of locations. The same file—or slightly different versions—may be found on several active areas of the computer hard drive, or as duplicate files maintained for backup purposes, or on archival and disaster media. A second reason for the proliferation of ESI is that users tend to distribute copies of their work far and wide, because it is so fast and easy to do. Gone are the days when one copy of an office report or memorandum was circulated to 20 or more people, each of whom checked their name off the distribution list and passed it on to the next. Today, a report or memorandum, with a few keystrokes, is replicated in the file directories or on the hard drives of every member of the organization. A third reason for the proliferation of ESI is that many human communications that used to be relatively or purely ephemeral, such as telephone calls and handwritten notes, are now routinely conducted using electronic information systems, leaving a more-or-less permanent record. The sheer volume of email, for instance, is staggering. According to the respected technology research firm Radicati Group, 247 billion email messages were sent per day in 2009, and that number will double by 2013.[7] If the average office worker sends or receives approximately 100 business-related email messages a day (a conservative estimate) and all were saved, 25,000 email messages will accumulate in that office worker's mailbox in the course of a year. In an organization with even a rudimentary electronic information system, that volume would be magnified by the system's automatic replication and backup operations, as well as users' tendency to send email to multiple recipients.

According to the respected technology research firm Radicati Group, 247 billion email messages were sent per day in 2009, and that number will double by 2013.

B. Complexity

A second important feature of ESI that distinguishes it from paper documentation, and that necessitates a different approach to discovery, is that ESI is created, maintained, and stored in complex systems, and often cannot be extracted from those systems without difficulty. Almost anyone can understand the technology of paper records—pen and ink, typewriter and filing cabinet, carbon and photocopier. While the physical file organization might have been complex, no special equipment or expertise beyond literacy in the relevant language was needed to access the information stored on paper documents. ESI, however, is the product of a complex set of relationships between physical equipment (computer drives and storage media), operating systems (providing the essential environment for translating electronic impulses into information) and the ever-growing array of application software that allows the information to be created, managed, and viewed. Without the proper elements of the system in place, ESI is just a vast assembly of positive and negative charges arranged on magnetic media. As Baron and Paul write:

> [Q]uite recently there has been an evolutionary burst in writing technology – a jagged punctuation on a 50 century-long sine wave. A quick succession of advances clustered or synced together, to emerge into a radically new and more powerful writing technology. These include digitization; real time computing; the microprocessor; the personal computer, e-mail; local and wide-area networks leading to the Internet; the evolution of software, which has "locked in" seamless editing as an almost universal function; the World Wide Web; and of course people and their technique. These constituents have swirled into an information complex, now known as the "Information Ecosystem." In such a system, the whole exhibits an emergent behavior that is much more than the sum of the parts. Critically for law, such systems cannot be understood or explained by any one person.[8]

Simply put, lawyers without information management expertise are seldom in a position to either know what they should be asking for in electronic discovery, or provide a response to a request, without an understanding of the systems with which they are dealing. Even when they have the relevant ESI, they are hard pressed to explain here it came from or lay the proper foundation for admission of the ESI as evidence.[9]

C. Preservation

One important element of the complexity of ESI that further distinguishes it from paper documentation is its essentially ephemeral nature. This is not the same as the ephemeral nature of unrecorded spoken words, which are truly gone once they are uttered, but closer to the original meaning of ephemera—information recorded for very short retention. Information systems record information in a variety of ways, almost all intended for short retention or migration to less transitory media. Electronic information systems are constantly taking in new data, moving data to various temporary storage areas, overwriting stale or duplicate data, and deleting whole files. Most of this activity is occurring at high speed and without any human intervention. Traditional

concepts of "preservation" developed for the paper world simply cannot apply.

This is not to say that "preservation" is impossible. In fact, electronic information systems are capable of storing vast amounts of information for long periods of time, and because of the complexity and replication of data within systems, almost nothing is actually lost. However, locating specific data and locking it down in a form that can be accessed for later use required prompt action, may require specialized expertise, and can be considerably more expensive than simply setting aside a box of paper documents.

D. "Dark Data"

A final factor that distinguishes electronic discovery from discovery of paper documentation is what some information scientists have dubbed "the rise of dark data." This refers to ESI that is created by information systems themselves, and not intentionally by people using the systems. "Dark data" goes beyond the email, word processing, spreadsheets, databases, videos, and other documents that users create and access routinely. The phrase "dark data" was coined recently by researchers at the University of California at San Diego, who hypothesized

> … that most data is created, used, and thrown away without any person ever being aware of its existence. Just as cosmic dark matter is detected indirectly only through its effect on things that we can see, dark data is not directly visible to people. The family auto (or automobiles) is a more typical example of dark data. Luxury and high-performance cars today carry more than 100 microcontrollers and several hundred sensors, with update rates ranging from one to more than 1,000 readings per second. One estimate is that from 35 to 40 percent of a car's sticker price goes to pay for software and electronics. As microprocessors and sensors 'talk' to each other, their ability to process information becomes critical for auto safety. For example, airbags use accelerometers, which measure the physical motion of a tiny silicon beam. From that motion, the car's acceleration is calculated, and approximately 100 times each second, this data is sent to a microprocessor, which uses the last few seconds of measurements to decide whether and at what intensity to inflate the airbag in the event of a collision. Over the life of an auto, each accelerometer will produce more than one billion measurements. Yet in a crash, only the last few data points are critical.[10]

This ESI is buried in the volume and complexity of electronic information systems, but may be highly relevant to a legal action and is entirely within the potential scope of discovery in the appropriate case. More common forms of "dark data" that have been the subject of discovery in civil litigation are the addresses of people who visit web sites, automatically recorded by web server software,[11] and the structure of complex databases from which a party needs to derive particular data.[12] Perhaps the most common form of "dark data" subject to discovery is metadata, the tracking information that computer applications and systems generate about computer files themselves, such as the date of creation or the date a file was last accessed.[13]

E. Tex. R. Civ. P. 196.4

In 1999, Texas became the first state in the nation to adopt a rule that explicitly and exclusively addressed electronically stored information as a distinct category of discoverable information. The Texas rule even predated the Federal rule amendments in that regard by more than six years. Texas Rule of Civil Procedure 196.4 states:

> To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced. The responding party must produce the electronic or magnetic data that is responsive to the request and is reasonably available to the responding party in its ordinary course of business. If the responding party cannot - through reasonable efforts - retrieve the data or information requested or produce it in the form requested, the responding party must state an objection complying with these rules. If the court orders the responding party to comply with the request, the court must also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.

Thus, Texas Rule 196.4 lays down the essential building blocks for discovery of electronically stored information. First, requests for ESI must be explicit. Second, the requesting party must explicitly state the form in which it wants production of ESI. Responding parties may object to producing ESI that is not "reasonably available … in its ordinary course of business" or may object to the requested form of production, but a court may nonetheless order production of the ESI at the requesting party's expense.

Although the rule would appear to apply to the discovery of all ESI, and ESI is now common in all types of civil litigation,

it took ten years for a case involving the application of Texas Rule 196.4 to reach the Texas Supreme Court. If that case is in any way representative of common discovery practice, this paucity of appellate interpretation of the rule was not because the rule was being applied routinely without dispute, but because lawyers were ignoring or avoiding the rule. Now that the Texas Supreme Court has spoken, that situation is likely to change.

II. The *Weekly Homes* Case

A. Background

HFG Enclave Land Interests, Inc. (HFG) was a "lot warehouser." A lot warehouser acts as a financier for real estate development by taking title to buildable lots from developers and holding them until they can be conveyed to homebuilders. Usually the builders have already been identified by the developers and are committed to buying the lots over time under a "take-down" schedule. But the lot warehousing arrangement allows the developer to get cash immediately for the lots. Enclave at Fortney Branch, Ltd. (Enclave) was a real estate developer and entered into an agreement in 2004 to sell 136 lots to homebuilder Weekly Homes, L.P. (Weekley) pursuant to a take-down schedule. Over the next two years, Weekley bought 62 of the lots, and HFG bought the remaining 74 lots from Enclave, subject to the agreement to resell them to Weekly Homes according to the take-down schedule. Immediately before the warehousing agreement was signed between HFG and Enclave, Weekley executed a "Consent to Assignment and Estoppel Certificate" which contained various representations about Enclave's performance up to that point.

HFG brought suit against Enclave in Dallas County District Court in August 2006, alleging that Enclave failed to perform various obligations owed to HFG under the agreement. HFG obtained documents from Enclave in discovery that led it to believe that Enclave and Weekly had colluded to fraudulently induce HFG into signing the warehousing agreement. In June of 2007, Enclave added Weekley Homes to the lawsuit as a defendant and served Weekley with requests for emails relating to Enclave and the subdivision, including specific requests for emails between Enclave and each of four Weekley employees (the "Employees"). Weekley produced 31 emails, one of which mentioned a "Slope Stability Analysis," discussing unsafe subdivision lots requiring remedial measures. HFG subsequently argued that there ought to have been more than one email regarding the Slope Stability Analysis, given that Weekley had to spend $92,000 fixing the problems.

HFG moved to compel Weekley to "search for any email stored on servers or back up tapes or other media, [and] any email folders in the email accounts of [the Employees]." At the hearing on HFG's motion to compel, Weekley's general counsel testified that once Weekley employees' email inboxes reach their size capacity, emails must be deleted in order to create room for receiving more email. Deleted emails were only kept on Weekley's system for a 30-day cycle. Based on Weekley's representations that no relevant deleted emails were likely to be recoverable from reasonably accessible sources, the trial court denied HFG's motion.

HFG then filed a "Motion for Limited Access to [Weekley's] Computers," requesting permission to allow forensic experts to access the employees' computers. Specifically, HFG proposed that at HFG's expense:

- Two of four designated forensic experts would access the Employees' computers "for the limited purpose of creating forensic images of the hard drives."
- The experts would "make an evidentiary image of the [hard drives] using a procedure that is generally accepted as forensically sound."
- Once the images were created, the experts would search the images for deleted emails from the relevant year with pre-specified search terms.
- Once responsive documents were identified, extracted and copied to some form of electronic media by the experts, Weekley would review the extracted data for relevance and privilege.
- After reviewing the extracted data, Weekley would produce responsive documents, plus a log identifying all documents which Weekly believed were not relevant, not discoverable, or subject to privilege.

Weekley objected on a number of grounds, including that the process was intrusive, burdensome, and most significantly, that HFG failed to show the feasibility of "obtain[ing] data that may have been deleted in 2004" using the process that HFG proposed. The trial court granted HFG's motion and Weekley sought mandamus from the court of appeals. The court of appeals denied Weekley's petition, and Weekley appealed to the Texas Supreme Court.

B. Email is ESI

During the oral argument, HFG insisted that its requests for email included deleted email, did not constitute "electronic discovery," and that Texas Rule 196.4 did not apply. In

response to repeated questions from the somewhat incredulous justices, HFG maintained that the email it was seeking should instead be considered "documents" under Tex. R. Civ. P. 193.2(b), and traditional discovery procedures should apply.

> [Attorney Rentzell] "Our position has always been that we were proceeding under 192.3(b), the Request for Documents. Initially, that's where we were. We never did get into the terrain of 196.4. We have not been asking for Excel spreadsheets, databases, tables, or anything of that nature. That's the computer data that Mr. Enoch is referring to. We have not gone that route. We've requested documents."[14]
>
> [. . .]
>
> [Justice O'Neill:] "It seems that under 196.4, it contemplates that the responding party itself goes through the data, with the plaintiff, in this instance, paying that cost."
>
> [Attorney Rentzell] "It would contemplate that, but again, from the very outset, we never believed that was the controlling rule. We've always believed we're not going after electronic data, we're going after the documents."[15]
>
> [. . .]
>
> [Justice O'Neill:] "I have just one quick question. Why is data on a hard drive not 'electronic data'?"
>
> [Attorney Rentzell] "It is electronic -- I don't think it's electronic data under 196.4 because we saw that as 'data compilations' such as tables, spreadsheets and databases as opposed to 'documents' under 192.3(b)."[16]

Oddly enough, in his opening statement, counsel for Weekley appeared to agree with his opponent on this point.

> [Attorney Enoch:] "Under 196.4, the question is, is it electronic information that needs to be found? That's metadata. That's what the court has asked for. It says, if you are looking for the electronic signatures of the pages, if you are looking for electronic information that does not appear on the document that gets printed from the electronic document, here's the process that you go look for that metadata."[17]

Weekley's objection was not that HFG failed to follow Texas Rule 196.4 when it asked for email, but that the procedure proposed by HFG and adopted by the trial court would result in the disclosure of metadata without the procedural protections of Texas Rule 196.4. Both sides appeared to agree that a request for email, by itself, was not a request to "obtain discovery of data or information that exists in electronic or magnetic form," triggering application of Texas Rule 196.4. This misapprehension required the Court to hold, as a threshold mater, that "[e]mails and deleted emails stored in electronic or magnetic form (as opposed to being printed out) are clearly 'electronic information.'"[18]

C. Specifically Requesting ESI

Texas Rule 196.4 requires that parties explicitly request electronic information and specify the form in which they want the ESI produced. In *Weekley Homes*, HFG requested "emails," but not specifically "deleted emails." Although the Court acknowledged that both emails and deleted emails are fundamentally electronic data within the purview of Texas Rule 196.4, the rule requires specificity. Had HFG specifically requested deleted emails, Weekley would have been obliged to object to their production to the extent such production was unduly burdensome.

HFG argued that it could not have anticipated the need to request deleted emails because it did not know how Weekley's electronic information storage worked, but the Court disagreed, asserting that requesting deleted emails is a "simple matter."[19] The Court ultimately concluded, however, that HFG's Motion to Compel cured any deficiency in HFG's initial request and put Weekly on notice that deleted email was being sought, explaining:

> [E]ven though it was not stated in HFG's written request that deleted emails were included within its scope, that HFG thought they were and was seeking this form of electronic information became abundantly clear in the course of discovery and before the hearing on the motion to compel. The purpose of Rule 196.4's specificity requirement is to ensure that requests for electronic information are clearly understood and disputes avoided. Because the scope of HFG's requests was understood before trial court intervention, Weekley was not prejudiced by HFG's failure to follow the rule . . .[20]

D. Responding to Requests for ESI

Once the requesting party has explicitly requested electronically stored information, the responding party has the burden to produce responsive ESI "reasonably available to the responding party in its ordinary course of business." The responding party, however, has no obligation to produce,

or object to the production, of ESI that was not specifically requested. In the words of the Court, "[b]ecause HFG did not initially specifically request deleted emails as Texas Rule 196.4 requires, Weekley had no obligation to object in its response that deleted emails were not 'reasonably available'."[21]

If the responding party cannot "through reasonable efforts" retrieve the data or information requested or produce it in the form requested, the responding party may object on those grounds. The responding party has the initial burden of demonstrating that the requested information is not reasonably available because of undue burden or cost, and trial courts assess the reasonable availability of information on a case-by-case basis. If the trial court determines the requested information is not reasonably available, the burden shifts to the requesting party to show that the benefits of production outweigh the burdens imposed.

The Court looked to Fed. R. Civ. P. 26(b)(2) and the case law developed in the federal courts for guidance on weighing the benefits against the burdens of electronic information production. Acknowledging that the language of the federal rules differs somewhat from Texas Rule 196.4, the Court nevertheless noted that the federal rules were thoroughly vetted before adoption and have gained wide acceptance, and the Texas rules are "not inconsistent with the federal rules or the case law interpreting them."[22]

> As an essential part of the balancing the potential benefits of forensic imaging and analysis against the burden and intrusion, the requesting party must demonstrate that the methodology to be employed will likely lead to the discoverable information.

To determine whether requested information is reasonably available in the ordinary course of business, and whether the costs and burdens of the proposed discovery outweigh the benefits to the litigation, the trial court may order targeted discovery, such as requiring the responding party to sample or inspect the sources potentially containing information identified as not reasonably available. The trial court may also allow depositions of witnesses knowledgeable about the responding party's information systems.[23]

F. Ordering Production of ESI

Texas Rule 196.4 does not provide express guidelines for the manner or means by which electronic information that is not reasonably available in the ordinary course of business may be ordered produced, other than to state that the requesting party must pay reasonable expenses of any extraordinary steps required to retrieve and produce the information. The court looked to the federal rules and courts applying them for guidance.[24]

A central point of contention in *Weekley Homes* was that the trial court ordered Weekley to submit to direct examination of its computers and allow technicians to make forensic images of the *all* data for later analysis to locate the deleted emails. HFG was prepared to do this at its expense, but that did not end the inquiry as to whether this was an appropriate form of production. The trial court should consider the importance of protecting sensitive information, employing the least intrusive means, and direct access to another party's electronic storage is discouraged.[25]

Looking to federal law on forensic imaging as a form of production, the Court found that the requesting party must show, as a threshold matter, that the responding party has somehow defaulted in its obligation to search its records and produce the requested data. The requesting party should also show that the responding party's production has been inadequate and that a search of the opponent's electronic storage device could recover deleted materials. Mere skepticism or bare allegations that the responding party has failed to comply with its discovery duties is generally insufficient.[26] In addition, federal courts have been more likely to order direct access to a responding party's electronic devices when there is some direct relationship between the electronic storage device and the claim itself, e.g. allegations of improperly using computers to commit tortious acts.[27]

In *Weekley Homes*, the Court found that HFG's motion "relied primarily on discrepancies and inconsistencies" in the responding party's production. While this evidence may have shown that Weekley did not perform an adequate search, "it does not follow that a search of [] hard drives would likely reveal deleted emails or, if it would, that they would be reasonably capable of recovery." The Court therefore concluded that HFG's "conclusory statements" about the existence of deleted emails did not justify the highly intrusive method of discovery that the trial court ordered, which gave forensic experts complete access to all data stored on the computers.[28]

If forensic imaging is to be allowed, courts should not permit the requesting party itself to access the opponent's storage

device. Only a qualified expert should be afforded such access. A court may not give the expert carte blanche authorization to sort through the responding party's electronic storage device. Instead, courts are advised to impose reasonable limits on production. In doing so, courts must address privilege, privacy, and confidentiality concerns.[29]

As an essential part of the balancing the potential benefits of forensic imaging and analysis against the burden and intrusion, the requesting party must demonstrate that the methodology to be employed will likely lead to the discoverable information. The experts to be employed must be knowledgeable of the characteristics of the storage devices to be searched in order to demonstrate the feasibility of electronic retrieval in a particular case.[30]

The Court held that HFG failed to make an adequate showing of feasibility, stating:

> Although Weekley does not directly challenge the qualifications of HFG's forensic experts, nothing was presented to show that the experts were qualified to perform the search given the particularities of the specific storage devices at issue, or that the search methodology would likely allow retrieval of relevant deleted emails.[31]

The Court suggested that HFG might have satisfied their burden had they shown "some indication that the experts are familiar with the particularities of the [Weekly] Employees' hard drives, that they are qualified to search those hard drives, and that the proposed methodology for searching those hard drives is reasonably likely to yield the information sought."[32]

In sum, the Texas Supreme Court vacated the trial court's order and remanded the case for further proceedings under Texas Rule 196.4, indicating that HFG may be able the cure the deficiencies in its request for discovery, if it follows the procedures and makes the required showings under the rule.

III. Courts apply *Weekley Homes*

In the short time since *Weekley Homes* was decided and this writing, the Court's decision has been cited with approval in opinions by several Texas appellate courts,[33] one federal court,[34] and two courts outside of Texas,[35] mostly for the proposition that overly intrusive discovery must be curtailed by the courts.[36]

A. *MRT, Inc. v. Vounckx*

In *MRT, Inc. v. Vounckx*,[37] the plaintiffs alleged that they had been fraudulently induced into loaning large sums of money to a Belgian technology development venture. During discovery, the plaintiffs requested several categories of relevant "documents," which were defined to include "any computer-generated, computer-stored, or electronically-stored matter" and "responsive data or information that exists in electronic or magnetic form."[38]

In depositions, the plaintiffs learned of the existence of backup media that might contain relevant emails. After an exchange of letters between counsel, the plaintiffs filed a motion to compel the defendants to search the backup media. Before hearing the motion, however, the court set a discovery deadline and a trial date. The court subsequently ordered the defendants to submit an affidavit detailing its efforts to search the backup tapes and locate responsive emails and ordered the production of specific emails referenced in correspondence between counsel. The defendants moved for reconsideration, and at an emergency hearing on the eve of trial reported that all backup tapes existing before 2000 had been destroyed, and that due to technical constraints, only nine of the remaining 103 backup tapes had been restored to the point that they could be searched, and only one had been searched. The court ordered the defendants to turn ten tapes over to the plaintiffs for analysis.

The following week, when trial was scheduled to begin, the plaintiffs requested a three-week continuance to allow them to analyze 38 additional tapes. Although the plaintiffs asserted that they were able to "unlock" the ten tapes that had already received, they had no knowledge of specific documents on the tapes or whether the tapes contained any responsive information. The trial court denied the motion for the continuance and trial began the next day.

Then plaintiffs lost after a jury trial, and appealed the trial court's denial of their electronic discovery requests and a spoliation motion. The plaintiffs claimed on appeal that the defendants misrepresented the completeness of their discovery responses and failed to object to the search of backup media, as required by Texas Rule 196.4. The appellate court disagreed. Citing *Weekly Homes*, the court held that "[b]ecause appellants did not initially specifically request production of the backup tapes or documents the resided only on IMEC's backup tapes, we conclude IMEC had no duty to object in its responses that the backup tapes or the documents contained on them were not reasonably available."[39]

The requirements of Texas Rule 196.4 are more than pleading formalities. In the words of the appellate court:

> As noted in *Weekley*, the specificity requirement of rule 196.4 is designed to ensure requests for electronic information are clearly understood and disputes avoided. [citation omitted] Acknowledging cooperation and agreements between parties and their attorneys as a fundamental tenet of our discovery rules, the *Weekley* court stated that before tendering requests for electronic information, parties should share relevant information concerning electronic systems and storage methodologies so that agreements regarding protocols may be reached and trial courts have the necessary information to rule on discovery issues when the parties cannot agree.[40]

The court noted that the plaintiff's requests for a continuance came after more than three years of litigation, on the eve of trial when key witnesses from Europe were already assembled and waiting to proceed, and that the plaintiffs could not demonstrate that further investigation of the backup media would likely result in the production of any additional relevant information.[41] There was also no evidence that the defendants knew or should have known that backup tapes dated prior to 2000 would contain discoverable data relevant to this lawsuit when they were routinely destroyed in 2003.[42]

B. In re *Art Harris*

In re *Art Harris*[43] is a Texas appellate court decision against a factual background that closely resembles *Weekly Homes*, albeit with the added flavor of tabloid scandal. Virgie Arthur is the mother of the late Anna Nicole Smith, and she unsuccessfully sought custody of her grandchild after the death of her daughter. She filed suit against tabloid media reporter Art Harris for defamation and conspiracy, also naming Howard K. Stern, Larry Birkhead, TMZ Productions, and others involved in the highly-publicized custody battle. She served Harris with a Request for Production that contained the following instructions with regard to any electronically stored information:

> [P]roduce a discovery log that details the type of information, the source of information, the discovery request to which the information corresponds, and the information's electronic ID number.
>
> [W]rite all of the electronically stored information to reasonably usable storage media, such as CD, DVD, or flash drive.
>
> [I]dentify every source containing potentially responsive information that [Harris] is not searching for production [and,] [f]or any materials that [Harris] claims no longer exist or cannot be located, provide all of the following:
>
> (1) A statement identifying the material.
>
> (2) A statement of how and when the material passed out of existence of when it could no longer be located.
>
> (3) The reasons for the material's nonexistence or loss.
>
> (4) The identity, address, and job title of each person having knowledge about the nonexistence or loss of the material.
>
> (5) The identity of any other materials evidencing the nonexistence or loss of the material or any facts about the nonexistence or loss.[44]

The plaintiff's first enumerated request was to "produce copies of all communications, including but not limited to email and other electronic communications, for the period September 2006 to present," between Harris and 38 listed email addresses. The second enumerated request was to "[p]roduce all documentation of the identity and/or contact information" for the 38 email addresses listed in request number one, including "website registration information, names, physical addresses, telephone numbers, email addresses, and IP addresses." The third enumerated request was to "[p]roduce copies of all communications, including but not limited to email and other electronic communications, for the period September 2006 to the present, between you and the following or about the following," listing 39 individuals or entities related to the action, including several of the parties' attorneys.[45]

Defendant Harris objected to the requests as overbroad, burdensome, and in violation of his journalist privilege. He moved for a protective order limiting the scope of discovery and restricting disclosure. This was followed by a motion to compel, which was not acted upon by the trial court, and the eventual production by Harris of some 300 pages of documents. A second Motion to Compel was filed against one of the other defendants, and in the course of the hearing on that motion, it appears that the co-defendant agreed to produce her hard drive for forensic examination. Over the next few weeks, attorneys for the plaintiff and co-defendants agreed on the selection of an examiner, but defendant Harris explicitly opted out of the agreement. Nevertheless, the trial court entered an order for the forensic examination that included Harris.[46]

Harris filed a motion to clarify the court's order. In arguing the motion, Harris's counsel cited *Weekley Homes*, pointing out that there was no outstanding request for production that Harris had not complied with, nor any specific request for electronic media under Texas Rule 196.4, to justify this intrusive form of discovery. The trial court denied the motion and ordered Harris to surrender his desktop computer, laptop computer, and external hard drive to the forensic examiner. Harris complied, but a series of disputes between Harris and the forensic examiner resulted in further court orders and finally a petition for a writ of mandamus regarding the orders compelling discovery, the order to produce electronic media, and the order appointing the forensic examiner as a "special master."[47]

The appellate court held that the trial court never established that the plaintiff's broad document requests were relevant to her claims of defamation or conspiracy, and that the trial court failed to rule on Harris' motion for a protective order. Under those circumstances, by compelling discovery without specific discovery requests or a motion to compel before it, the trial court acted "arbitrarily and without considering the discovery rules."[48]

On the order to produce electronic media for inspection by the forensic examiner, the appellate court held that the plaintiff at no time specifically requested production of media, and the trial court did not engage in the findings of costs and benefits required by Texas Rule 196.4. Citing *Weekly Homes* extensively, the appellate court found that plaintiff and the trial courts had failed to specifically request the media they obtained by order, had failed to address Harris' objections, and had failed to even assert "mere skepticism or bare allegations" related to the sufficiency of Harris' discovery responses to justify intrusive measures. "In sum, the record does not contain any evidence sufficient to satisfy the stringent standard for compelling production of Harris's electronic storage devices."[49]

The appellate court went further, however. Even if all the elements necessary to justify a forensic investigation had been found, the appellate court held that the trial court failed to engage in the mandatory consideration of whether the benefits of the proposed discovery outweighed the costs and burdens, particularly given the breadth of the discovery, the privilege questions, and the apparent need to appoint a forensic examiner as a "special master."[50]

Finally, on the question of the forensic examiner's appointment as a "special master," the appellate court found that this situation did not justify the application of Tex. R. Civ. P. 171, as the forensic examiner's function should be a limited to providing technical assistance in overseeing a carefully-drawn protocol, not the adjudicative role contemplated by Texas Rule 171 and limited to "exceptional cases, for good cause."[51]

IV. Living Daily with *Weekly Homes*

The *Weekly Homes* decision, particularly as amplified in *MRT* and *Harris*, rests on the notion that the discovery of electronically stored information under Rule 196.4 requires a different approach than conventional document discovery. Because of the volume, complexity, and costs associated with the discovery of ESI, counsel on both sides are required to engage in a more nuanced process than simply lobbing pattern-book discovery requests and responses at each other from respective litigation trenches. The Court in *Weekley Homes* provided detailed instructions for conducting discovery of ESI under Texas Rule 196.4 and engaging in that nuanced process. While ostensibly presented for the benefit of the *Weekley Homes* litigants and the trial court on remand, these instructions serve as a blueprint for all Texas practitioners, and indeed for federal practitioners across the country as well.

A. The *Weekly Homes* Blueprint – Cooperation

The Court in *Weekly Homes* deconstructed Texas Rule 196.4, breaking it down into eight steps.

- First, "the party seeking to discover electronic information must make a specific request for that information and specify the form of production."
- Second, "[t]he responding party must then produce any electronic information that is 'responsive to the request and ... reasonably available to the responding party in its ordinary course of business.'"
- Third "[i]f 'the responding party cannot-through reasonable efforts-retrieve the data or information requested or produce it in the form requested,' the responding party must object on those grounds."
- Fourth, "[t]he parties should make reasonable efforts to resolve the dispute without court intervention."
- Fifth, "[i]f the parties are unable to resolve the dispute, either party may request a hearing on the objection, at which the responding party must demonstrate that the requested information is not reasonably available because of undue burden or cost."

- Sixth, "[i]f the trial court determines the requested information is not reasonably available, the court may nevertheless order production upon a showing by the requesting party that the benefits of production outweigh the burdens imposed, again subject to Rule 192.4's discovery limitations."

- Seventh, "[i]f the benefits are shown to outweigh the burdens of production and the trial court orders production of information that is not reasonably available, sensitive information should be protected and the least intrusive means should be employed. The requesting party must also pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information."

- Eighth and "[f]inally, when determining the means by which the sources should be searched and information produced, direct access to another party's electronic storage devices is discouraged, and courts should be extremely cautious to guard against undue intrusion."[52]

These eight steps are greatly facilitated by cooperation – at least at the level of open communication – between the opposing parties. The justices themselves alluded to this during the oral argument in *Weekly Homes*, with Justice O'Neill expressing need for cooperation, noting that Weekley had proposed no alternative to HFG's proposal to use a "key word" search methodology.[53] In their opinion, the justices wrote, "[a] fundamental tenet of our discovery rules is cooperation between parties and their counsel, and the expectation that agreements will be made as reasonably necessary for efficient disposition of the case."[54]

The emphasis on cooperation, as opposed to adversarial conduct, in discovery is a theme that has been sounded by judges across the country. In 2008, The Sedona Conference®, a law and policy think-tank known for its pioneering work on electronic discovery, issued its *Cooperation Proclamation*. The *Proclamation* starts from the premise that a lawyer's obligation to zealously advocate on behalf of clients is not synonymous with adversarial conduct in discovery. The American system of broad discovery assumes that the parties will cooperate to gather the information needed to present their claims and defenses, and then zealously advocate in the adjudication process, once all the information is available. To do otherwise—to abuse, obstruct, or ignore discovery—hinders the adjudicatory process and impedes advocacy.[55] The Proclamation has been endorsed by more than 100 state and federal judges, cited favorably in more than a dozen court opinions, and been the subject of scores of articles in the legal press.[56]

The connection between *Weekley Homes* and the *Cooperation Proclamation* was immediately recognized by two Texas practitioners writing in the Texas Lawyer.[57] They commented that "perhaps the most enduring aspect of *Weekley Homes* will be its encouragement of cooperation."

B. The *Weekly Homes* Foundation – Early Communication

The eight-step process for obtaining discovery under Texas Rule 196.4 outlined by the *Weekley Homes* court is a formal process that assumes judicial involvement, but the Court expects that attorneys acting in good faith and in compliance with Rule Texas 196.4 will be more likely to reach agreements without judicial intervention,[58] and failing that, will present the trial court with well-founded motions in a timely manner.[59]

The process of communication starts before there is a discovery request. As the appellate court in *MRX* noted,

> Acknowledging cooperation and agreements between parties and their attorneys as a fundamental tenet of our discovery rules, the *Weekley* court stated that before tendering requests for electronic information, parties should share relevant information concerning electronic systems and storage methodologies so that agreements regarding protocols may be reached…[60]

In the federal rules, there is a mandatory conference of the parties before formal discovery requests can be issued.[61] The *Weekly Homes* court wrote, "[w]hile the Texas rules have no counterpart, early discussions between the parties or early discovery directed toward learning about an opposing party's electronic storage systems and procedures is encouraged."[62]

And again citing the federal rules, the Court wrote:

> [P]rior to promulgating requests for electronic information, parties and their attorneys should share relevant information concerning electronic systems and storage methodologies so that agreements regarding protocols may be reached or, if not, trial courts have the information necessary to craft discovery orders that are not unduly intrusive or overly burdensome. The critical importance of learning about relevant systems early in the litigation process is heavily emphasized in the federal rules. Due to the "volume and dynamic nature

> of electronically stored information," failure to become familiar with relevant systems early on can greatly complicate preservation issues, increase un-certainty in the discovery process, and raise the risk of disputes.[63]

For practitioners who are not accustomed to a "meet and confer" with opposing counsel to discuss discovery planning, several resources are available to assist with the process and diffuse some of the rivalry and lack of trust that may initially accompany such a conference. One useful tool is The Sedona Conference® "Jumpstart Outline," a questionnaire published as a work-in-progress to help counsel on both sides prepare for the "meet and confer."[64] There is a growing recognition that especially in complex cases, simply holding one perfunctory conference with opposing counsel is not enough, and a series of conferences as the parties develop their discovery plans may be needed.[65]

While some practitioners favor scheduling early depositions of record keepers and information technology officers as part of the discovery planning process, the cost and burden of deposition practice can be reduced or avoided altogether by including persons with knowledge of the information systems in the conferences. It is often said that when the lawyers disagree on e-discovery, the parties' technical people can often work the problem out informally. Several courts require or strongly suggest the identification of "e-discovery liaisons" by the parties who are expected to serve this function throughout the litigation.[66] Obviously this sort of informal exchange of information must occur with the understanding that including technical personnel in an open discussion about discovery will not become an unscheduled deposition, and appropriate protective agreements or protective orders may need to be in place before the parties can proceed.

In residential home building, one stages the plumbing and electrical work before putting up the drywall. Similarly, discovery should be staged to minimize cost and disruption, and to avoid expensive "re-dos."

C. The *Weekly Homes* Method – Staged Construction

In residential home building, one stages the plumbing and electrical work before putting up the drywall. Similarly, discovery should be staged to minimize cost and disruption, and to avoid expensive "re-dos." Texas Rule 196.4 incorporates that concept by requiring that responding parties produce all responsive ESI that is "reasonably available to the responding party in its ordinary course of business," and requiring that further discovery from sources that are not reasonably accessible be supported by a careful cost-benefit analysis. The highly-regarded *Sedona Principles* concur in this approach. Principle 8 of the *Sedona Principles* states:

> The primary source of electronically stored information for production should be active data and information. Resort to disaster recovery backup tapes and other sources of electronically stored information that are not reasonably accessible requires the requesting party to demonstrate need and relevance that outweigh the costs and burdens of retrieving and processing the electronically stored information from such sources, including the disruption of business and information management activities.[67]

In Texas Rule 196.4, this requirement of a "two-tiered" approach to discovery of ESI is coupled with mandatory assumption of costs by the requesting party. Neither the federal rules nor the *Sedona Principles* go that far, but Principle 13 of the *Sedona Principles* states:

> Absent a specific objection, party agreement or court order, the reasonable costs of retrieving and reviewing electronically stored information should be borne by the responding party, unless the information sought is not reasonably available to the responding party in the ordinary course of business. If the information sought is not reasonably available to the responding party in the ordinary course of business, then, absent special circumstances, the costs of retrieving and reviewing such electronic information may be shared by or shifted to the requesting party.[68]

This put a premium on discovery from sources that are "not reasonably accessible" and an incentive, for both sides, to avoid litigating the issue if possible.

For the requesting party, the cost shifting provision is an incentive to make the best use of information from readily accessible sources. If further discovery is required, the requesting party must be explicit and specific in its request, and prepared to show that the proposed discovery is both feasible and likely to produce information that will assist the trier of fact in deciding issues central to the litigation.

For the responding party, the objection that a source of discovery is "not reasonably accessible" is not boilerplate.

The burden of demonstrating that the costs or burdens of proposed discovery are undue rests with the objecting party, and federal courts construing the rules provision parallel to Texas Rule 196.4 have been skeptical of unsupported claims.[69]

If both parties sustain their respective burdens under Texas Rule 196.4, the court must engage in a proportionality analysis, factoring in the likelihood that the proposed discovery will help resolve issues of fact in the case; the feasibility that the methods proposed will result in the production of useful information; the costs involved, including not only monetary costs but business disruption and personal inconvenience; the availability and value of alternative discovery methods. The *Weekly Homes* court instructs trial courts if they are inclined to order such discovery, they are to take special precautions to protect privilege and confidentiality, and select the least intrusive methods.[70]

D. The *Weekley Homes* "Custom Build"

It behooves all parties, when faced with discovery of electronically stored information, to avoid the expense and disruption of litigating discovery issues under Texas Rule 196.4. The rule is there to assist the parties in thinking through the issues, and to assist the court if it must decide a motion to compel or a motion for a protective order, but it should be clear from the case law that early communication, planning, and cooperation are the building blocks of successful e-discovery.

Prof. Steven Gensler of the University of Oklahoma Law School and a member of the federal Civil Rules Advisory Committee, recently published an article proposing a memorable graphic to explain cooperation in discovery, and its relationship to the rules and judicial action.[71] He views cooperation as a target, made up of three concentric rings.

The outer ring is the communication required by the rules. The rules do not require parties to agree to everything. They are, after all, in litigation. But the rules require honest, good faith communication and civility. The next inner ring is cooperation in working out disputes without judicial intervention, but communicating openly and making reasonable assessments of how the court would rule if presented with the issue. Again, the parties are not required to agree. But they mutually benefit by developing the facts and law supporting their positions, coming to an understanding of how the court would likely resolve the issue, and resolving it themselves. The center of the target, the "Bull's Eye" of cooperative discovery, is reached when the parties come together with a creative, win-win solution to a discovery problem that gets the requesting party the information it needs without unduly burdening the responding party. This is what some Texas practitioners refer to as "rifle shot" discovery, which is why the target metaphor is particularly apt.

But in concluding our discussion of *Weekly Homes*, we will stay with the home building metaphor. Like home building, discovery required a proper foundation of communication, a good set of plans, staged construction, consideration of custom additions when and if the need arises, accurate cost estimating, and a healthy respect for the limited resources of all involved, including the court.

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1 A search of the Westlaw legal research database located only one reported Texas appellate opinion citing Tex. R. Civ. P. 196.4 dated before 2009, *In re Lowe's Companies, Inc.*, 134 S.W.3d 876 (Tex. App.–Houston [14th Dist.] 2004, no pet.).

2 295 S.W. 3d 309 (Tex. 2009).

3 *See, e.g.* Michelle C.S. Lange, *Sarbanes-Oxley Has Major Impact on Electronic Evidence*, The National Law Journal, January 2, 2003, based in part on an interpretation of Peter Lyman and Hal R. Varian, "How Much Information 2000," School of Information Management and Systems at the University of California at Berkeley, available at http://www.sims.berkeley.edu/how-much-info (accessed May 27, 2010); updated by Peter Lyman and Hal R. Varian, "How Much Information 2003," School of Information Management and Systems at the University of California at Berkeley, available at http://www.sims.berkeley.edu/how-much-info-2003 (accessed May 27, 2010).

4 Robert E. Bohn and James E. Short, "How Much Information? 2009: Report on American Consumers," Global Information Industry Center, University of California at San Diego (January 2010), p. 11-13, available at http://hmi.ucsd.edu/howmuchinfo.php (accessed May 27, 2010).

5 Robert E. Bohn and James E. Short, "How Much Information?

2009: Report on American Consumers," Global Information Industry Center, University of California at San Diego (January 2010), p. 19, available at http://hmi.ucsd.edu/howmuchinfo.php (accessed May 27, 2010).

[6] George L. Paul and Jason R. Baron, "Information Inflation: Can the Legal System Adapt?", 13 RICH. J.L. & TECH. 10 (2007), at paragraph 13, available at http://law.richmond.edu/jolt/v13i3/article10.pdf (accessed May 27, 2010).

[7] Lauren Reardon, "The Radicati Group Releases Email Statistics Report, 2009-2013," The Radicati Group, Inc., May 27, 2009, available at http://www.radicati.com/?p=3237.

[8] George L. Paul and Jason R. Baron, "Information Inflation: Can the Legal System Adapt?", 13 RICH. J.L. & TECH. 10 (2007), at paragraph 9, available at http://law.richmond.edu/jolt/v13i3/article10.pdf (accessed May 27, 2010).

[9] *See, e.g.,* In re *Vee Vinhnee*, 336 B.R. 437 (B.A.P. 9th Cir. 2005) (requiring an 11-part test for the authentication of computer-generated business records).

[10] Robert E. Bohn and James E. Short, "How Much Information? 2009: Report on American Consumers," Global Information Industry Center, University of California at San Diego (January 2010), p. 25, available at http://hmi.ucsd.edu/howmuchinfo.php (accessed May 27, 2010).

[11] *Columbia Pictures Indus. v. Bunnell*, 2007 U.S. Dist. LEXIS 46364 (C.D. Cal. June 19, 2007),

[12] *Aguilar v. Immigration & Customs Enforcement Div. of U.S. Dep't of Homeland Sec.*, 255 F.R.D. 350 (S.D.N.Y. 2008).

[13] *Id.*

[14] In re *Weekly Homes*, No. 08-0836 (Texas Sup. Ct. oral argument Mar. 31, 2009, transcript available from St. Mary's University School of Law at http://stmarytxlaw.mediasite.com/mediasite/SilverlightPlayer/Default.aspx?peid=64e08f2e160d400fa52283129c00a256 (accessed May 27, 2010), at 39:48.

[15] *Id.* at 41:30.

[16] *Id.* at 44:08.

[17] *Id.* at 3:10.

[18] In re *Weekly Homes*, *supra* note 1, at 314.

[19] *Id.* at 315.

[20] *Id.* at 314-15.

[21] *Id.* at 316.

[22] *Id.* at 317.

[23] *Id.* at 315.

[24] *Id.* at 316.

[25] *Id.* at 322.

[26] *Id.* at 317-18.

[27] *Id.* at 319.

[28] *Id.* at 319-20.

[29] *Id.* at 318.

[30] *Id.* at 318.

[31] *Id.* at 321.

[32] *Id.* at 320.

[33] *Myrad Properties, Inc. v. LaSalle Bank Nat. Ass'n*, 300 S.W.3d 746 (Tex. 2009); *In re Boxer Property Management Corp.*, No. 14-09-00579-CV, 2009 WL 4250123 (Tex. App.—Houston [14th Dist.] Sept. 3, 2009, no pet.); *In re Jacobs*, 300 S.W.3d 35 (Tex. App.—Houston [14th Dist.] 2009, orig. proceeding); *MRT, Inc. v. Vounckx*, 299 S.W.3d 500 (Tex. App.—Dallas 2009, no pet.); *In re Exmark Mfg. Co., Inc.*, 299 S.W.3d 519 (Tex. App.—Corpus Christi 2009, pet. dism'd by agr.); *In re Harris*, No. 01-09-00771-CV, 2010 WL 1612205 (Tex. App.—Houston [1st Dist.] Apr. 22, 2010), *motion for reh'g filed* May 5, 2010; *In re Houstonian Campus, L.L.C.*, No. 14-09-00631-CV, 2010 WL 1509454 (Tex. App.—Houston [14th Dist.], Apr. 16, 2010, no pet. h.).

[34] *Lanelogic, Inc. v. Great American Spirit Ins. Co.*, 2010 WL 1839294 (N.D. Tex. May 06, 2010).

[35] *Bennett v. Martin*, 2009 WL 4048111 (Ohio App. Nov 24, 2009); *Cornwall v. N. Ohio Surgical Ctr.*, 923 N.E.2d 1233, 185 Ohio App.3d 337 (Ohio App. Dec 31, 2009).

[36] *See, e.g., Lanelogic, supra* note 33 at *7 ("Most courts are reluctant to authorize direct access to an opposing party's electronic storage device.").

[37] 2009 WL 3491165 (Tex. App. -Dallas, Oct. 30, 2009).

[38] *Id.* at *3.

[39] *Id.* at *5.

[40] *Id.* at *5.

[41] *Id.* at *6.

[42] *Id.* at *7.

[43] No. 01-09-00771-CV, 2010 WL 1612205 (Tex. App.—Houston [1st Dist.] Apr. 22, 2010), *motion for reh'g filed* May 5, 2010.

[44] *Id.* at *1-2.

[45] *Id.* at *2.

[46] *Id.* at *2-5.

[47] *Id.* at *6-7.

[48] *Id.* at *10.

[49] *Id.* at *12-13.

[50] *Id.* at 13-14.

[51] *Id.* at *16-18.

[52] In re *Weekly Homes*, *supra* note 1, at 322.

[53] In re *Weekly Homes, supra* note 13, at 50:00.

[54] In re *Weekly Homes*, *supra* note 1, at 321.

[55] The Sedona Conference®, "The Sedona Conference® Cooperation Proclamation," 10 Sedona Conf. J. 331 (2009 Supp.).

[56] See http://www.thesedonaconference.org/content/tsc_cooperation_proclamation (accessed May 27, 2010) for a current list of endorsements of, and citations to, the *Cooperation Proclamation*.

[57] Mike Warnecke and Bill Morrison, *Spirit of Cooperation*, Texas Lawyer, Dec. 21, 2009, *available at* http://www.haynesboone.com/tx_lawyer_e-discovery/ (accessed May 27, 2010).

[58] Tex. R. Civ. P. 191.2.

[59] Tex. R. Civ. P. 193.4(a).

[60] *MRT*, *supra* note 36 at *5.

[61] Fed. R. Civ. P. 26(f).

[62] In re *Weekly Homes*, *supra* note 1, at 315.

[63] *Id.* at 321-22.

[64] The Sedona Conference® "Jumpstart Outline" (May 2008 Public Comment Version), available at http://www.thesedonaconference.org/dltForm?did=Questionnaire.pdf (accessed May 27, 2010).

[65] Ronald J. Hedges, *The Most Important E-Discovery Rule*, New Jersey Law Journal, May 19, 2009, available at http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202430799151 (accessed May 27, 2010).

[66] See, e.g., Seventh Circuit Pilot Program, Principle 2.02, available at http://www.7thcircuitbar.org/displaycommon.cfm?an=1&subarticlenbr=109 (accessed May 27, 2010); District of New Jersey Local Rule 26.1(d)(1) ("Counsel shall also identify a person or persons with knowledge about the client's information management systems, including computer-based and other digital systems, with the ability to facilitate, through counsel, reasonably anticipated discovery."), available at http://www.njd.uscourts.gov/LocalRules.html (accessed May 27, 2010).

[67] The Sedona Conference®, The Sedona Principles, 2d Edition (June 2007), 45-48, available at http://www.thesedonaconference.org/dltForm?did=TSC_PRINCP_2nd_ed_607.pdf (access May 27, 2010).

[68] *Id*. at 67-69.

[69] *See, e.g., Seger v. Ernst-Spencer Metals, Inc.*, 2010 WL 378113 (D. Neb. Jan 26, 2010) (rejecting claims of undue burden in discovery as overstated and conclusory).

[70] In re *Weekly Homes*, *supra* note 1, at 322.

[71] Steven S. Gensler, "A Bull's Eye View of Cooperation in Discovery," 10 Sedona Conf. J. 363 (2009 Supp.), available at http://www.thesedonaconference.org/content/tsc_cooperation_proclamation (accessed May 27, 2010).