

# THE BAR ADVISOR

## TECHNOLOGY FOR THE TRIAL BAR

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### Electronic Discovery Alert

December 12, 2009

## “Protecting Sensitive Information”: The Texas Supreme Court Weighs in on E-Discovery

The Supreme Court of Texas recently turned its attention to e-discovery issues in *In re Weekley Homes, L.P.*, 2009 WL 2666774 (Tex. Aug. 28, 2009). This case, which involved a real estate contract dispute, came before the Texas Supreme Court in the form of a mandamus proceeding. Defendant Weekley was seeking relief from a district court order requiring Weekley to turn over four computer hard drives to Plaintiff HFG’s forensic experts for imaging, copying, and searching for deleted emails regarding an element of the contract dispute.

This case addresses a number of e-discovery issues, starting with the court encouraging parties to share information regarding electronic systems and storage in order to facilitate agreements about protocols for obtaining information and to allow for efficient disposition of the case.

In determining the appropriate rule to apply in *Weekley*, the court quickly dismissed HFG’s contention that Texas Rule of Civil Procedure 196.4, which governs requests for

production of electronic or magnetic data, does not apply to emails and deleted email because the court saw nothing in the rule to support HFG’s contention. The court also dismissed Weekley’s contention that HFG had failed to comply with Rule 196.4 because HFG never specifically requested production of “deleted emails”, as the court determined that the request for deleted emails was implied by HFG’s request for electronic data and the fact that HFG was seeking such information became clear through the course of discovery. The court did point out, however, that when parties are seeking deleted emails, they should specifically request them in order to ensure compliance with the rules and to avoid confusion.

In its application of Rule 196.4, the court described the obligations of a responding party to either produce requested electronic information or object on grounds that the information cannot through reasonable efforts be retrieved or produced in the form requested. According to the court, trial courts should assess the reasonable availability of information on a case-by-case basis be-

cause of variances between electronic systems, electronic storage, and retrieval capability. The court also noted that if a trial court orders production of electronic information such court “should be mindful of protecting sensitive information and should choose the least intrusive means of retrieval”.

While the limited record before the court did not reflect whether Weekley met its burden of showing that the information could not through reasonable efforts be retrieved or produced in the form requested, the court inferred that the trial court must have decided that the deleted emails were not reasonably available and required extraordinary steps for retrieval and production because the trial court had ordered imaging of Weekley employees’ hard drives and forensic examination.

In the absence of specific Texas rules on the subject, the court looked to the federal rules for guidance regarding the means by which a court may order production of electronic information that is not reasonably available in the ordinary course of business. Per Federal Rule of Civil Procedure 26(b)(2)(B), a trial court may order production of such information only “if the requesting party shows good cause.” Among the factors a court should consider in the finding of “good cause” are: the burden or expense of the proposed discovery, the needs of the case, the amount in controversy, and the importance of discovery in resolving the issues. As the court noted, the Texas rules do not expressly require a “good cause” showing, but the Texas rules do require that a trial court limit discovery when the burden or expense of the proposed discovery outweighs the likely benefit of production. TEX.R.CIV.P. 192.4(b).

According to the court, “providing access to information by ordering examination of a party’s electronic storage device is particularly intrusive and should be generally discouraged” but might be justified in some circumstances. Federal case law has shown that, as a threshold matter, the requesting party must show that the responding party defaulted in its obligation to search records and produce the requested information. *The Scotts Co. v. Liberty Mut. Ins. Co.*, Civil Action 2:06-CV-899, 2007 U.S. Dist. LEXIS 43005, at \*5 (S.D. Ohio June 12, 2007). 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 relevant materials.” *Diepenhorst v. City of Battle Creek*, Case No. 1:05-CV-734, 2006 U.S. Dist. LEXIS 48551, at \*9 (citing *Simon Prop. Group LP v. MySimon, Inc.*, 194 F.R.D. 639, 640-641 (S.D.Ind.2000)). Mere skepticism or bare allegations that a party has not complied with its discovery duties are not enough. *The Scotts Co.*, 2007 U.S. Dist. LEXIS 43005, at \*6.

If the above-described threshold requirement is met, a qualified expert, rather than the requesting party itself, should be given access. Also, the requesting party must become knowledgeable about the storage devices sought in order to demonstrate the feasibility of electronic retrieval for the specific case and in order to avoid “fishing expeditions”. Finally, according to the federal courts, direct access to a party’s electronic storage devices typically requires “some direct relationship between the electronic storage device and the claim itself”.

The court concluded that HFG did not make the necessary showings to warrant access to Weekley’s electronic storage devices by simply claiming that Weekley produced no emails from employees who were very involved in the construction and only a limited number of emails relating to the Slope Stability Analysis, an issue in the case. HFG also relied on testimony that Weekley employees do not save deleted emails to their hard drives. While, according to the court, it would be possible to conclude from HFG’s showing that Weekley did not search for the relevant deleted emails that were requested, it does not necessarily follow that a search of the hard drives would likely reveal deleted emails or that the emails could reasonably be recovered.

HFG's "missing step" was a demonstration that Weekley's electronic storage methodology would allow retrieval of deleted emails and what that retrieval would require, and with the complicating factor of two years and a half years having passed between the creation of the emails at issue and the time they were requested, the court noted that it was impossible at that point to determine whether the benefit of forensic examination outweighed the burden of such an invasive discovery method.

The court noted that a lack of clearly defined state law on the issues related to e-discovery created a problem, and the trial court chose to follow the protocol set forth in the only Texas case to address a similar situation. See *In re Honza*, 242 S.W.3d 578 (Tex.App.-Waco 2008, pet. denied). However, the court described important distinctions between the *Weekley* case and *Honza*. In *Honza*, the requested electronic data was metadata associated with existing documents unlike in *Weekley*, in which there was no evidence that the documents that HFG requested even existed. Additionally, in *Honza*, there was a direct relationship between the hard drives sought and the claims at issue, whereas in *Weekley*, the requested emails, if found, might only reveal circumstantial, and not direct, evidence. Finally, while in *Honza* there was "extensive testimony" regarding the expert's qualifications, the computer forensics experts in *Weekley* were not shown to be specifically qualified to search the Weekley employees' hard drives and retrieve the relevant information that may be contained therein.

The *Weekley* decision is insightful as it addresses various aspects of e-discovery. The court emphasized the need for cooperation among parties in formulating discovery plans to allow for "efficient disposition" of the case and also seemed particularly mindful of the sensitivity associated with allowing access to another party's electronic storage device. The court saw potential harm in allowing a party's experts access to the other party's hard drives, and the lack of a good-cause showing that such access was warranted led the court to grant mandamus relief.

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