

## E-DISCOVERY

### SPIRIT OF COOPERATION

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With the Texas Supreme Court's Aug. 28 decision in *In Re: Weekley Homes LP*, the high court added its voice to the call for cooperation between parties in e-discovery: "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." Over the long term, perhaps the most enduring aspect of *Weekley Homes* will be its encouragement of cooperation.

Cooperation between parties and counsel to cut through the complexities and costs involved with electronic discovery to create solutions has been building momentum for some time. Texas has long been on the cutting edge of addressing issues in e-discovery, including the need for lawyers to work together and hash out differences. In 1999, Texas modified its rules of civil procedure to address e-discovery, including the general requirement of attorney conferences and the expectation of cooperation found in Rule 191.2. Similarly, after years of development, the 2006 amendments to the Federal Rules of Civil Procedure introduced express requirements for cooperative discussions.

In 2008, The Sedona Conference issued The Sedona Conference Cooperation Proclamation, seeking to "refocus litigation toward the substantive resolution of legal disputes" by changing the culture of discovery from adversarial conduct to one of cooperation and collaboration. We are involved in the think-tank, which is comprised of judges, lawyers, experts and academics whose writings are often cited in e-discovery opinions. As of Oct. 30, three Texas judges officially have signed the cooperation proclamation, along with approximately 100 judges nationwide, demonstrating the judiciary's increasing expectation that parties cooperate in e-discovery.

In *Weekley Homes*, the court reiterated its encour-

agement of cooperation in discussing the issue at hand: whether to allow a party direct access to the other side's computers. The court wrote, "The federal rules recognize the importance of early communication between parties on how electronic information is stored. . . . While 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." Throughout the opinion, the Texas Supreme Court made clear it will look to federal law for guidance as to Texas procedure in the realm of e-discovery.

Moreover, the court provided practitioners practical, commonsense guidance for navigating the turbulent e-discovery waters. The court offered a concise summary of the procedures for obtaining e-discovery under Rule 196.4. The party seeking electronic information must make a specific request for that information. The responding party must then produce any responsive electronic information that is reasonably available in the ordinary course of business. If the information is not reasonably available, the responding party must object on those grounds. The parties should make reasonable efforts to resolve the dispute without court intervention. If those are unsuccessful, either party can request a hearing at which the responding party must demonstrate that the requested information is not reasonably available because of undue burden or cost. Even if the trial court determines that the information is not reasonably available, the court may nevertheless order its production if the requesting party demonstrates that the benefits of production outweigh the burdens imposed. This framework provides many opportunities for cooperation.

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