No. 56375

APPEAL TO THE STATE BOARD OF
DISCIPLINARY APPEALS

JERRY SCARBROUGH
Appellant

VS.

THE STATE BAR OF TEXAS
COMMISSION FOR LAWYER DISCIPLINE
Appellee

RESPONDENT JERRY SCARBROUGH'S APPENDIX

Respectfully submitted,

Michele Barber Chimene
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THE CHIMENE LAW FIRM
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COUNSEL FOR RESPONDENT
JERRY SCARBROUGH

ORAL ARGUMENT REQUESTED

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TAB A

BEFORE THE EVIDENTIARY PANEL FOR
STATE BAR DISTRICT NO. 08-5 STATE BAR OF TEXAS

COMMISSION FOR LAWYER DISCIPLINE, Petitioner	*	
	*	A0111214896
V.	*	A0111214897
JERRY W. SCARBROUGH, Respondent	*	

JUDGMENT OF PARTIALLY PROBATED SUSPENSION

Parties and Appearance

On January 14, 2015, a hearing on Petitioner's First Amended Motion for Application of Collateral Estoppel was heard. On January 16, 2015, an Order Partially Granting Petitioner's First Amended Motion for Application of Collateral Estoppel was entered. On February 19, 2015 and March 9, 2015, came to be heard the above styled and numbered cause. Petitioner, Commission for Lawyer Discipline, appeared by and through its attorney of record and announced ready. Respondent, Jerry W. Scarbrough, Texas Bar Number 17717500, appeared in person and through attorney of record and announced ready.

Jurisdiction and Venue

The Evidentiary Panel 8-5 having been duly appointed to hear this complaint by the chair of the Grievance Committee for State Bar of Texas District 8, finds that it has jurisdiction over the parties and the subject matter of this action and that venue is proper.

Professional Misconduct

The Evidentiary Panel, having considered all of the pleadings, evidence, stipulations, and argument, finds Respondent has committed Professional Misconduct as defined by Rule 1.06(W) of the Texas Rules of Disciplinary Procedure.

Findings of Fact

The Evidentiary Panel, having considered the pleadings, evidence and argument of counsel, makes the following findings of fact:

1. Respondent is an attorney licensed to practice law in Texas and is a member of the State Bar of Texas.

2. Respondent resides in and maintains his principal place of practice in Bell County, Texas.

3. In 2009, Clayton Olvera, a former business associate of Gary Purser, Sr. ("Gary Purser"), filed a lawsuit against Gary Purser and the Purser family (Helen Purser, Sue Purser, JoAnn Purser and Bubba Purser). On or about June 18, 2010, the Purser family filed a third-party petition against Melissa Deaton ("Deaton"), and Deaton hired Respondent, Jerry Scarbrough, to represent her. Deaton, through prior counsel, counter-claimed against the Purser family and, through Respondent, filed a third-party petition against Elizabeth Purser Tipton.

4. Respondent knowingly made a false statement of material fact to the 146th District Court. Throughout the litigation, Respondent responded to various discovery requests on behalf of Deaton. Opposing counsel made repeated requests to Respondent for production of any recordings involving Gary Purser. At a discovery sanctions hearing on May 27, 2011, in sworn testimony before the 146th District Court, Respondent denied having knowledge of any recordings of Gary Purser other than (1) a recording involving Gary Purser, Melissa Deaton, and Kathy Purdue, and (2) a recording involving Gary Purser, Melissa Deaton, and John Redington. However, there existed at least one additional recording, referred to as the "two good bitches" recording, involving Gary Purser, Melissa Deaton, and Denise Steele, which Respondent had previously given to an information technology professional named Shawn Richardson together with the two other recordings.

5. In prior litigation, the 146th District Court and the U.S. Bankruptcy Court for the Western District of Texas, Waco Division, made fact findings that Respondent unlawfully obstructed another party's access to evidence, specifically audio recordings of Gary Purser; altered, destroyed, or concealed audio recordings of Gary Purser; or counseled or assisted Melissa Deaton in doing so.

6. In prior litigation, the 146th District Court and the U.S. Bankruptcy Court for the Western District of Texas, Waco Division, made fact findings that Respondent knowingly disobeyed an order of the 146th District Court not to disclose medical records pertaining to Gary Purser.

7. Respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation during a telephone conversation with Gary Purser's niece, Carolyn Bolling, after Gary Purser's death. When Ms. Bolling asked Respondent whom he represented, Respondent said that he represented himself and Gary "probably more than anyone else in the world right now." Respondent did not disclose his representation of Melissa Deaton. This left Ms. Bolling with the impression that Respondent represented her deceased uncle. At no time did Respondent represent Gary Purser.

8. The Chief Disciplinary Counsel of the State Bar of Texas has incurred reasonable attorneys' fees and direct expenses associated with this Disciplinary Proceeding in the amount of $12,000.00.

Conclusions of Law

The Evidentiary Panel concludes that, based on foregoing findings of fact, the following Texas Disciplinary Rules of Professional Conduct have been violated: 3.03(a)(1), 3.04(a), 3.04(d), 8.04(a)(1) and 8.04(a)(3).

Sanction

The Evidentiary Panel, having found that Respondent has committed Professional Misconduct, heard and considered additional evidence regarding the appropriate sanction to be imposed against Respondent. After hearing all evidence and argument and after having considered the factors in Rule 2.18 of the Texas Rules of Disciplinary Procedure, the Evidentiary Panel finds that the proper discipline of the

Respondent for each act of Professional Misconduct is a Partially Probated Suspension.

Accordingly, it is ORDERED, ADJUDGED and DECREED that Respondent be suspended from the practice of law for a period of ten (10) years, beginning May 1, 2015 and ending April 30, 2025, provided Respondent complies with the following terms and conditions. Respondent shall be actively suspended from the practice of law for a period of two (2) years beginning May 1, 2015 and ending April 30, 2017. If Respondent complies with all of the following terms and conditions timely, the eight (8) year period of probated suspension shall begin on May 1, 2017, and shall end on April 30, 2025:

1. Respondent shall pay all reasonable and necessary attorney's fees and direct expenses to the State Bar of Texas in the amount of $12,000.00. The payment shall be due and payable on or before April 30, 2017, and shall be made by certified or cashier's check or money order. Respondent shall forward the funds, made payable to the State Bar of Texas, Chief Disciplinary Counsel's Office, P.O. Box 12487, Austin, TX 78711-2487 (1414 Colorado St., Austin, TX 78701).

2. Respondent shall make contact with the Chief Disciplinary Counsel's Offices' Compliance Monitor at 877-953-5535, ext. 1334 and Special Programs Coordinator at 877-953-5535, ext. 1323, not later than seven (7) days after receipt of a copy of this judgment to coordinate Respondent's compliance.

Should Respondent fail to comply with all of the above terms and conditions timely, Respondent shall remain actively suspended until the date of compliance or until April 30, 2025, whichever occurs first.

Terms of Active Suspension

It is further ORDERED that during the term of active suspension ordered herein, or that may be imposed upon Respondent by the Board of Disciplinary Appeals as a

result of a probation revocation proceeding, Respondent shall be prohibited from practicing law in Texas; holding himself out as an attorney at law; performing any legal services for others; accepting any fee directly or indirectly for legal services; appearing as counsel or in any representative capacity in any proceeding in any Texas or Federal court or before any administrative body; or holding himself out to others or using his name, in any manner, in conjunction with the words "attorney at law," "attorney," "counselor at law," or "lawyer."

It is further ORDERED that, on or before April 30, 2015, Respondent shall notify each of Respondent's current clients and opposing counsel in writing of this suspension.

In addition to such notification, it is further ORDERED Respondent shall return any files, papers, unearned monies and other property belonging to current clients in Respondent's possession to the respective clients or to another attorney at the client's request.

It is further ORDERED Respondent shall file with the State Bar of Texas, Chief Disciplinary Counsel's Office, P.O. Box 12487, Austin, TX 78711-2487 (1414 Colorado St., Austin, TX 78701) on or before May 15, 2015, an affidavit stating all current clients and opposing counsel have been notified of Respondent's suspension and that all files, papers, monies and other property belonging to all current clients have been returned as ordered herein.

It is further ORDERED Respondent shall, on or before April 30, 2015, notify in writing each and every justice of the peace, judge, magistrate, administrative judge or officer and chief justice of each and every court or tribunal in which Respondent has any matter pending of the terms of this judgment, the style and cause number of the

pending matter(s), and the name, address and telephone number of the client(s) Respondent is representing.

It is further ORDERED Respondent shall file with the State Bar of Texas, Chief Disciplinary Counsel's Office, P.O. Box 12487, Austin, TX 78711-2487 (1414 Colorado St., Austin, TX 78701) on or before May 15, 2015 an affidavit stating Respondent has notified in writing each and every justice of the peace, judge, magistrate, and chief justice of each and every court in which Respondent has any matter pending of the terms of this judgment, the style and cause number of the pending matter(s), and the name, address and telephone number of the client(s) Respondent is representing in Court.

It is further ORDERED that, on or before May 1, 2015, Respondent shall surrender his law license and permanent State Bar Card to the State Bar of Texas, Chief Disciplinary Counsel's Office, P.O. Box 12487, Austin, TX 78711-2487 (1414 Colorado St., Austin, TX 78701), to be forwarded to the Supreme Court of Texas.

Terms of Probation

It is further ORDERED that during all periods of suspension, Respondent shall be under the following terms and conditions:

3. Respondent shall not violate any term of this judgment.
4. Respondent shall not engage in professional misconduct as defined by Rule 1.06(W) of the Texas Rules of Disciplinary Procedure.
5. Respondent shall not violate any state or federal criminal statutes.
6. Respondent shall keep State Bar of Texas membership department notified of current mailing, residence and business addresses and telephone numbers.
7. Respondent shall comply with Minimum Continuing Legal Education requirements.
8. Respondent shall comply with Interest on Lawyers Trust Account (IOLTA) requirements.
9. Respondent shall promptly respond to any request for information from the

Chief Disciplinary Counsel in connection with any investigation of any allegations of professional misconduct.

10. Respondent shall make contact with the Chief Disciplinary Counsel's Offices' Compliance Monitor at 877-953-5535, ext. 1334 and Special Programs Coordinator at 877-953-5535, ext. 1323, not later than seven (7) days after receipt of a copy of this judgment to coordinate Respondent's compliance.

Probation Revocation

Upon information that Respondent has violated a term of this judgment, the Chief Disciplinary Counsel may, in addition to all other remedies available, file a motion to revoke probation pursuant to Rule 2.23 of the Texas Rules of Disciplinary Procedure with the Board of Disciplinary Appeals ("BODA") and serve a copy of the motion on Respondent pursuant to Tex.R.Civ.P. 21a.

BODA shall conduct an evidentiary hearing. At the hearing, BODA shall determine by a preponderance of the evidence whether Respondent has violated any term of this Judgment. If BODA finds grounds for revocation, BODA shall enter an order revoking probation and placing Respondent on active suspension from the date of such revocation order. Respondent shall not be given credit for any term of probation served prior to revocation.

It is further ORDERED that any conduct on the part of Respondent which serves as the basis for a motion to revoke probation may also be brought as independent grounds for discipline as allowed under the Texas Disciplinary Rules of Professional Conduct and Texas Rules of Disciplinary Procedure.

Attorney's Fees and Expenses

It is further ORDERED Respondent shall pay all reasonable and necessary attorney's fees and direct expenses to the State Bar of Texas in the amount of

$12,000.00. The payment shall be due and payable on or before April 30, 2017, and shall be made by certified or cashier's check or money order. Respondent shall forward the funds, made payable to the State Bar of Texas, to the Chief Disciplinary Counsel's Office, P.O. Box 12487, Austin, TX 78711-2487 (1414 Colorado St., Austin, TX 78701).

It is further ORDERED that all amounts ordered herein are due to the misconduct of Respondent, are assessed as a part of the sanction in accordance with Rule 1.06(Z) of the Texas Rules of Disciplinary Procedure. Any amount not paid shall accrue interest at the maximum legal rate per annum until paid and the State Bar of Texas shall have all writs and other post-judgment remedies against Respondent in order to collect all unpaid amounts.

It is further ORDERED that Respondent shall remain actively suspended from the practice of law as set out above until such time as Respondent has completely paid attorney fees and direct expenses in the amount of $12,000.00 to the State Bar of Texas.

Publication

This suspension shall be made a matter of record and appropriately published in accordance with the Texas Rules of Disciplinary Procedure.

Other Relief

All requested relief not expressly granted herein is expressly DENIED.

SIGNED this 7 day of April, 2015.

EVIDENTIARY PANEL
DISTRICT NO. 8-5
STATE BAR OF TEXAS

Lisa Richardson
District 8-5 Presiding Member

CF6-16

TAB B

ORIGINAL COPY

NO. 236,117-B

HELEN PURSER, SUE E. PURSER A/K/A SUE E. VAN ZANTEN, GARY W. PURSER, JR. JOANN M. PURSER AND ELIZABETH H. TIPTON Plaintiffs, v. DENISE STEELE, MELISSA DEATON, JERRY SCARBROUGH and JOHN REDINGTON Defendants, and MELISSA DEATON, Counter-Plaintiff, v. HELEN PURSER, SCARBROUGH and JOHN REDINGTON, Third-Party Defendants AND MELISSA DEATON, Counter-Plaintiff, v. HELEN PURSER, SUE E. PURSER A/KA/ SUE E. VAN ZANTEN, GARY W. PURSER, JR., JOANN M. PURSER AND ELIZABETH H. TIPTON, Counter-Defendants.	§	IN THE DISTRICT COURT OF SHELIA NORMAN DISTRICT COURT BELL COUNTY, TEXAS 2012 OCT 16 A 7:30 FILED 146TH JUDICIAL DISTRICT BELL COUNTY, TEXAS

FINAL JUDGMENT

At the conclusion of the evidence, the Court submitted the case to the jury. The Charge of the Court, including the jury's answers to the questions propounded therein, are incorporated into this Final Judgment for all purposes.

All claims of Helen Purser, Sue E. Van Zanten, Gary "Bubba" Purser, Jr., JoAnn Purser, and Elizabeth H. Tipton against John Redington were non-suited with prejudice during the trial, but prior to the submission of the Charge of the Court to the jury.

All claims of Melissa Deaton against Helen Purser, Sue E. Van Zanten, Gary "Bubba" Purser, Jr., JoAnn Purser, and Elizabeth H. Tipton were non-suited with prejudice during the trial but prior to the submission of the Charge of the Court to the jury. The recitation of the full and complete non-suit of all claims with prejudice that was read into the record, together with Melissa Deaton's personal consent to dismiss with prejudice that was also read into the record, is hereby incorporated into this final judgment for all purposes.

After the jury returned its unanimous verdict, Helen Purser, Sue E. Van Zanten, Gary "Bubba" Purser, Jr., JoAnn Purser, and Elizabeth H. Tipton moved for judgment.

The jury unanimously found that Jerry Scarbrough, Melissa Deaton and Denise Steele published factual statements about Helen Purser, Sue E. Van Zanten, Gary "Bubba" Purser, Jr., JoAnn Purser, and Elizabeth H. Tipton which were defamatory (as defined in the Charge of the Court), and that Jerry Scarbrough, Melissa Deaton and Denise Steele knew or should have known, in the exercise of ordinary care, were false and had the potential to be defamatory.

The jury also unanimously found, by clear and convincing evidence, that Jerry Scarbrough published factual statements about Helen Purser, Sue E. Van Zanten, Gary "Bubba" Purser, Jr., JoAnn Purser, and Elizabeth H. Tipton which were defamatory per se (as defined by

the Charge of the Court), and which statements he knew were false or which he made with a high degree of awareness that were probably false, to an extent that he in fact had serious doubts as to the truth of the statements.

The jury also unanimously found that Jerry Scarbrough, Melissa Deaton and Denise Steele acted in concert against Helen Purser, Sue E. Van Zanten, Gary "Bubba" Purser, Jr., JoAnn Purser, and Elizabeth H. Tipton in connection with the factual statements which were defamatory (as defined in the Charge of the Court).

The jury also unanimously found that Jerry Scarbrough, Melissa Deaton and Denise Steele committed fraud by misrepresentation and fraud by failure to disclose (as both such fraud claims are defined in the Charge of the Court) against Helen Purser, causing her damages of $1,500,000.00, for the loss of community property, $500,000.00, for mental anguish sustained, in the past, and $250,000.00, for mental anguish that, in reasonable probability, she will sustain in the future.

The jury also unanimously found that Jerry Scarbrough, Melissa Deaton and Denise Steele were part of a conspiracy (as that term is defined in the Charge of the Court) that damaged Helen Purser.

The jury also unanimously found, by clear and convincing evidence, that Jerry Scarbrough, Melissa Deaton and Denise Steele acted with "malice," which was defined in the Charge of the Court as a specific intent by Melissa Deaton, Denise Steele or Jerry Scarbrough, to cause substantial injury or harm to Helen Purser, Sue E. Van Zanten, Gary "Bubba" Purser, Jr., JoAnn Purser, and Elizabeth H. Tipton, or "gross negligence," which was defined by the Charge of the Court as an act or omission by Melissa Deaton, Denise Steele or Jerry Scarbrough, (a)

which when viewed objectively from the standpoint of Melissa Deaton, Denise Steele or Jerry Scarbrough at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and (b) of which Melissa Deaton, Denise Steele or Jerry Scarbrough has actual subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others, in harming Helen Purser, Sue E. Van Zanten, Gary "Bubba" Purser, Jr., JoAnn Purser, and Elizabeth H. Tipton.

The unanimous verdict of the jury totals $19,415,000.00, upon which the Court will render judgment as set forth below. Further and in addition, the Court previously granted sanctions against Melissa Deaton - for discovery abuse - in the amount of $5,000.00, in favor of Helen Purser. Also further and in addition, the Court previously granted five separate sanctions against Jerry Scarbrough – all for discovery abuse - in the respective amounts of $25,000.00, $15,959.50, $11,000.00, $1,150.00 and $1,152.00, in favor of Helen Purser. The Court finds that no portion of such sanctioned amounts have been paid by Melissa Deaton or Jerry Scarbrough; as such, the Court will hereby render judgment for the total sanctions amount of $54,261.50, against Jerry Scarbrough, and $5,000.00, against Melissa Deaton.

The Court, having considered the jury's unanimous verdict, finds that judgment should be rendered against Jerry Scarbrough, Melissa Deaton and Denise Steele, and in favor of Helen Purser, Sue E. Van Zanten, Gary "Bubba" Purser, Jr., JoAnn Purser, and Elizabeth H. Tipton as follows:

It is Ordered that Helen Purser have judgment and recover from Jerry Scarbrough, Melissa Deaton and Denise Steele, jointly and severally, in the amount of $3,060,000.00, in

connection with the (i) damages referable to willful, malicious and deliberate defamation while acting in concert, and (ii) damages referable to willful, malicious and deliberate fraud while acting in a conspiracy, for which let execution issue.

It is Further Ordered that Helen Purser have judgment and recover from Jerry Scarbrough the additional amount of $2,000,000.00, referable to exemplary damages, for which let execution issue. It is Further Ordered that Helen Purser have judgment and recover from Denise Steele $1,500,000.00, referable to exemplary damages, for which let execution issue. It is Further Ordered that Helen Purser have judgment and recover from Melissa Deaton $500,000.00, referable to exemplary damages, for which let execution issue.

It is Further Ordered that Helen Purser have judgment and recover from Melissa Deaton $5,000.00, referable to the Court's previous discovery sanctions, for which let execution issue.

It is Further Ordered that Helen Purser have judgment and recover from Jerry Scarbrough $54,261.50, referable to the Court's previous discovery sanctions, for which let execution issue.

It is Further Ordered that Sue E. Van Zanten have judgment and recover from Jerry Scarbrough, Melissa Deaton and Denise Steele, jointly and severally, in the amount of $455,000.00, in connection with the damages referable to defamation while acting in concert, for which let execution issue.

It is Further Ordered that Sue E. Van Zanten have judgment and recover from Jerry Scarbrough the additional amount of $455,000.00, referable to exemplary damages, for which let execution issue. This amount is a reduction from the jury award as mandated by Texas Civil Practice and Remedies Code Chapter 41. It is Further Ordered that Sue E. Van Zanten have judgment and recover from Denise Steele $455,000.00, referable to exemplary damages, for

which execution issue. This amount is a reduction from the jury award as mandated by Texas Civil Practice and Remedies Code Chapter 41. It is Further Ordered that Sue E. Van Zanten have judgment and recover from Melissa Deaton $250,000.00, referable to exemplary damages, for which let execution issue.

It is Further Ordered that Gary "Bubba" Purser, Jr., have judgment and recover from Jerry Scarbrough, Melissa Deaton and Denise Steele, jointly and severally, in the amount of $825,000.00, in connection with the damages referable to defamation while acting in concert, for which let execution issue.

It is Further Ordered that Gary "Bubba" Purser, Jr., have judgment and recover from Jerry Scarbrough the additional amount of $750,000.00, referable to exemplary damages, for which let execution issue. This amount is a reduction from the jury award as mandated by Texas Civil Practice and Remedies Code Chapter 41. It is Further Ordered that Gary "Bubba" Purser, Jr. have judgment and recover from Denise Steele $500,000.00, referable to exemplary damages, for which let execution issue. It is Further Ordered that Gary "Bubba" Purser, Jr. have judgment and recover from Melissa Deaton, $500,000.00, referable to exemplary damages, for which let execution issue.

It is Further Ordered that JoAnn Purser have judgment and recover from Jerry Scarbrough, Melissa Deaton and Denise Steele, jointly and severally, in the amount of $825,000.00, in connection with the damages referable to defamation while acting in concert, for which let execution issue.

It is Further Ordered that JoAnn Purser have judgment and recover from Jerry Scarbrough the additional amount of $750,000.00, referable to exemplary damages, for which let

execution issue. This amount is a reduction from the jury award as mandated by Texas Civil Practice and Remedies Code Chapter 41. It is Further Ordered that JoAnn Purser have judgment and recover from Denise Steele $500,000.00, referable to exemplary damages, for which let execution issue. It is Further Ordered that JoAnn Purser have judgment and recover from Melissa Deaton $500,000.00, referable to exemplary damages, for which let execution issue.

It is Further Ordered that Elizabeth H. Tipton have judgment and recover from Jerry Scarbrough, Melissa Deaton and Denise Steele, jointly and severally, in the amount of $750,000.00, in connection with the damages referable to defamation while acting in concert, for which let execution issue.

It is Further Ordered that Elizabeth H. Tipton have judgment and recover from Jerry Scarbrough the additional amount of $750,000.00, referable to exemplary damages, for which let execution issue. This amount is a reduction from the jury award as mandated by Texas Civil Practice and Remedies Code Chapter 41. It is Further Ordered that Elizabeth H. Tipton have judgment and recover from Denise Steele $500,000.00, referable to exemplary damages, for which let execution issue. It is Further Ordered that Elizabeth H. Tipton have judgment and recover from Melissa Deaton $250,000.00, referable to exemplary damages, for which let execution issue.

It is Further Ordered that all amounts of the judgment here rendered will bear interest at the rate of five percent (5%) per annum from date of judgment until paid.

All costs of Court spent or incurred in this cause are adjudged against Jerry Scarbrough, Melissa Deaton and Denise Steele, jointly and severally.

All writs and processes for the enforcement and collection of this judgment and costs of

Court may issue as often as necessary.

All relief requested in this case and not expressly granted is denied. This judgment finally disposes of all parties and claims and is appealable.

SIGNED ON October 12, 2012.

JUDGE PRESIDING

CERTIFIED COPY
DOCUMENT ATTACHED IS A
TRUE & CORRECT COPY
OF THE ORIGINAL ON FILE

OCT 15 2012

SHELIA F. NORMAN
DISTRICT CLERK, BELL CO., TX
BY _____ DEPUTY

TAB C

— Original —

CAUSE NO. 236,117-B

HELEN PURSER, SUE E. PURSER A/K/A SUE E. VAN ZANTEN, GARY W. PURSER, JR., JOANN M. PURSER AND ELIZABETH H. TIPTON, Plaintiffs, v. DENISE STEELE, MELISSA DEATON, JERRY SCARBROUGH and JOHN REDINGTON, Defendants, and MELISSA DEATON, Counter-Plaintiff, v. HELEN PURSER, SUE E. PURSER A/KA/ SUE E. VAN ZANTEN, GARY W. PURSER, JR., JOANN M. PURSER AND ELIZABETH H. TIPTON, Counter-Defendants.	§	IN THE DISTRICT COURT OF 146TH JUDICIAL DISTRICT BELL COUNTY, TEXAS

FILED
2012 SEP 17 PM 12:59
SHELIA NORMAN
DISTRICT COURT
BELL COUNTY, TX
BY _____ DEPUTY

CHARGE OF THE COURT

LADIES AND GENTLEMEN OF THE JURY:

1. After the closing arguments, you will go to the jury room to decide the case, answer the questions that are attached, and reach a verdict. You may discuss the case with other jurors only when you are all together in the jury room.

2. Remember my previous instructions: Do not discuss the case with anyone else, either in person or by any other means. Do not do any independent investigation about the case or

Exhibit
3

conduct any research. Do not look up any words in dictionaries or on the Internet. Do not post information about the case on the Internet. Do not share any special knowledge or experiences with the other jurors. Do not use your phone or any other electronic device during your deliberations for any reason.

3. Any notes you have taken are for your own personal use. You may take your notes back into the jury room and consult them during deliberations, but do not show or read your notes to your fellow jurors during your deliberations. Your notes are not evidence. Each of you should rely on your independent recollection of the evidence and not be influenced by the fact that another juror has or has not taken notes.

4. You must leave your notes with the bailiff when you are not deliberating. The bailiff will give your notes to me promptly after collecting them from you. I will make sure your notes are kept in a safe, secure location and not disclosed to anyone. After you complete your deliberations, the bailiff will collect your notes. When you are released from jury duty, the bailiff will promptly destroy your notes so that nobody can read what you wrote.

5. Here are the instructions for answering the questions.

   a. Do not let bias, prejudice, or sympathy play any part in your decision.

   b. Base your answers only on the evidence admitted in court and on the law that is in these instructions and questions. Do not consider or discuss any evidence that was not admitted in the courtroom.

   c. You are to make up your own minds about the facts. You are the sole judges of the credibility of the witnesses and the weight to give their testimony. But on matters of law, you must follow all of my instructions.

d. If my instructions use a word in a way that is different from its ordinary meaning, use the meaning I give you, which will be a proper legal definition.

e. All the questions and answers are important. No one should say that any question or answer is not important.

f. Answer "yes" or "no" to all questions unless you are told otherwise. A "yes" answer must be based on a preponderance of the evidence unless you are told otherwise. Whenever a question requires an answer other than "yes" or "no," your answer must be based on a preponderance of the evidence unless you are told otherwise. The term "preponderance of the evidence" means the greater weight of credible evidence presented in this case. If you do not find that a preponderance of the evidence supports a "yes" answer, then answer "no." A preponderance of the evidence is not measured by the number of witnesses or by the number of documents admitted in evidence. For a fact to be proved by a preponderance of the evidence, you must find that the fact is more likely true than not true.

g. Do not decide who you think should win before you answer the questions and then just answer the questions to match your decision. Answer each question carefully without considering who will win. Do not discuss or consider the effect your answers will have.

h. Do not answer questions by drawing straws or by any method of chance.

i. Some questions might ask you for a dollar amount. Do not agree in advance to decide on a dollar amount by adding up each juror's amount and then figuring the average.

j. Do not trade your answers. For example, do not say, "I will answer this question your

answer. Do not agree to be bound by a vote of anything less than 10 jurors, even if it would be a majority.

6. As I have said before, if you do not follow these instructions, you will be guilty of juror misconduct, and I might have to order a new trial and start this process over again. This would waste your time and the parties' money, and would require the taxpayers of this county to pay for another trial. If a juror breaks any of these rules, tell that person to stop and report it to me immediately.

7. A fact may be established by direct evidence, or by circumstantial evidence, or both. A fact is established by direct evidence when proved by documentary evidence or by witnesses who saw the act done or heard the words spoken. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved.

8. In answering questions about damages, answer each question separately. Do not increase or reduce the amount in one answer because of the instructions in or your answers to any other questions about damages. Do not speculate about what any party's ultimate recovery may or may not be. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment.

SPOLIATION PRESUMPTION

You are instructed that **Denise Steele, Melissa Deaton and Jerry Scarbrough** intentionally did not preserve or failed to produce the digital recorder when they knew or should have known that a claim had been filed and that the digital recorder in their possession or control would be material and relevant to that claim.

Under such circumstances, the failure of **Denise Steele, Melissa Deaton and Jerry Scarbrough** to preserve or produce evidence within her or his control raises the presumption that if such evidence were produced, it would operate against **Denise Steele, Melissa Deaton and Jerry Scarbrough**.

INSTRUCTION ON INVOCATION OF FIFTH AMENDMENT

During the trial you also heard evidence of Jerry Scarbrough refusing to answer certain questions on the grounds that it may tend to incriminate him. A witness has a constitutional right to decline to answer on the grounds that it may tend to incriminate him. You may, but you need not, infer by such refusal that the answers would have been adverse to the witness's interests.

AUTHORITY: *Baxter v. Palmigiano*, 425 U.S. 308, 318, 96 S.Ct. 1551, 1558, 47 L.Ed.2d 810 (1976); *Rad Services, Inc. v. Aetna Cas. and Sur. Co.*, 808 F.2d 271, 277 (3rd Cir. 1986); *Quintinsky v. Texas Mut. Ins. Co.*, No. 03-07-00299-CV, 2008 WL 1911319, *8 (Tex. App. – Austin 2008, no pet.) (mem. op., not designated for publication).

JURY QUESTIONS

QUESTION NO. 1

Do you find that Denise Steele, Melissa Deaton, or Jerry Scarbrough published alleged factual statement(s) about Helen Purser, Sue Van Zanten, Gary "Bubba" Purser, Jr., JoAnn Purser, or Elizabeth Tipton which were defamatory, and which statement(s) he/she knew was false or which he/she should have known, in the exercise of ordinary care, was false and had the potential to be defamatory?

"Publish" means intentionally or negligently to communicate the matter to a person other than Helen Purser, Sue Van Zanten, Gary "Bubba" Purser, Jr., JoAnn Purser, or Elizabeth Tipton, who is capable of understanding its meaning.

"Defamatory" means an ordinary person would interpret the statement in a way that tends to injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury or to impeach the person's honesty, integrity, virtue, or reputation. In deciding whether a statement is defamatory, you must construe the context of the statement(s) as a whole and in light of the surrounding circumstances based upon how a person of ordinary intelligence would perceive it.

"False" means that a statement is not literally true or not substantially true. A statement is not "substantially true" if, in the mind of the average person, the gist of the statement is more damaging to the person affected by it than a literally true statement would have been.

"Ordinary care" concerning the truth of the statement and its potential to be defamatory means that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances.

Answer "Yes" or "No."

ANSWER: Denise Steele Yes

Melissa Deaton Yes

Jerry Scarbrough Yes

QUESTION NO. 2

Do you find by clear and convincing evidence that Jerry Scarbrough published alleged factual statement(s) about Helen Purser, Sue Van Zanten, Gary "Bubba" Purser, Jr., JoAnn Purser, or Elizabeth Tipton which were defamatory per se, and which statements he knew were false or which he made with a high degree of awareness that were probably false, to an extent that he in fact had serious doubts as to the truth of the statement(s)?

"Publish" means intentionally or negligently to communicate the matter to a person other than Helen Purser, Sue Van Zanten, Gary "Bubba" Purser, Jr., JoAnn Purser, or Elizabeth Tipton, who is capable of understanding its meaning.

"Defamatory" means an ordinary person would interpret the statement in a way that tends to injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury or to impeach the person's honesty, integrity, virtue, or reputation. In deciding whether a statement is defamatory, you must construe the context of the statement(s) as a whole and in light of the surrounding circumstances based upon how a person of ordinary intelligence would perceive it.

A statement is defamatory per se if it tends to affect a person injuriously in her business, occupation, or office, or charges a person with illegal or immoral conduct. In making your determination, you should consider a reasonable person's perception of the statement, impression, or implication in the context of the statement as a whole, and in light of the surrounding circumstances.

"Clear and convincing evidence" is that measure or degree of proof that will produce in the mind of the jury a firm belief or conviction as to the truth of the allegations sought to be established.

"False" means that a statement is not literally true or not substantially true. A statement is not "substantially true" if, in the mind of the average person, the gist of the statement is more damaging to the person affected by it than a literally true statement would have been.

Answer "Yes" or "No."

ANSWER: Jerry Scarbrough: Yes

If you answered "Yes" to any part of Questions No. 1 or No. 2, then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 3

What sum of money, if paid now in cash, would fairly and reasonably compensate any of the named persons for their injuries, if any, that were proximately caused by the statement(s)?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

Answer separately in dollars and cents for damages, if any.

Damage to reputation sustained in the past is presumed and no proof of actual damage to reputation is required. Therefore, you must award at least nominal damages for injury to reputation in the past.

For Helen Purser, damages, if any, found by you to have been caused by:

	Denise Steele	Melissa Deaton	Jerry Scarbrough
Injury to reputation sustained in the past.	$ 25,000	$ 25,000	$ 150,000
Injury to reputation that, in reasonable probability, will be sustained in the future.	$ 25,000	$ 25,000	$ 150,000
Mental anguish sustained in the past.	$ 30,000	$ 30,000	$ 150,000
Mental anguish that, in reasonable probability, will be sustained in the future.	$ 25,000	$ 25,000	$ 150,000

For Sue Van Zanten, damages, if any, found by you to have been caused by:

	Denise Steele	Melissa Deaton	Jerry Scarbrough
Injury to reputation sustained in the past.	$ 25,000	$ 25,000	$ 50,000
Injury to reputation that, in reasonable probability, will be sustained in the future.	$ 30,000	$ 25,000	$ 50,000
Mental anguish sustained in the past.	$ 25,000	$ 25,000	$ 100,000
Mental anguish that, in reasonable probability, will be sustained in the future.	$ 25,000	$ 25,000	$ 50,000

For Gary "Bubba" Purser, Jr., damages, if any, found by you to have been caused by:

	Denise Steele	Melissa Deaton	Jerry Scarbrough
Injury to reputation sustained in the past.	$ 25,000	$ 25,000	$ 150,000
Injury to reputation that, in reasonable probability, will be sustained in the	$ 25,000	$ 25,000	$ 150,000

future.

Mental anguish sustained in the past.	$ 50,000	$ 25,000	$ 150,000
Mental anguish that, in reasonable probability, will be sustained in the future.	$ 25,000	$ 25,000	$ 150,000

For JoAnn Purser, damages, if any, found by you to have been caused by:

	Denise Steele	Melissa Deaton	Jerry Scarbrough
Injury to reputation sustained in the past.	$ 25,000	$ 50,000	$ 150,000 CMA
Injury to reputation that, in reasonable probability, will be sustained in the future.	$ 25,000	$ 25,000	$ 150,000 CMA
Mental anguish sustained in the past.	$ 25,000	$ 50,000	$ 150,000 CMA
Mental anguish that, in reasonable probability, will be sustained in the future.	$ 25,000	$ 25,000	$ 150,000 CMA

For Elizabeth Tipton, damages, if any, found by you to have been caused by:

	Denise Steele	Melissa Deaton	Jerry Scarbrough
Injury to reputation sustained in the past.	$ Ø	$ Ø	$ 150,000
Injury to reputation that, in reasonable probability, will be sustained in the future.	$ Ø	$ Ø	$ 150,000
Mental anguish sustained in the past.	$ 50,000	$ 50,000	$ 150,000
Mental anguish that, in reasonable probability, will be sustained in the future.	$ 25,000	$ 25,000	$ 150,000

QUESTION NO. 4

Did Denise Steele, Melissa Deaton, or Jerry Scarbrough act in concert with one another in making the defamatory statements in Question No. 1?

Answer "Yes" or "No."

ANSWER: Yes

QUESTION NO. 5

Did Denise Steele, Melissa Deaton or Jerry Scarbrough commit fraud against Helen Purser?

FRAUD BY MISREPRESENTATION.

"Fraud" occurs when:

(A) a party makes a material misrepresentation,

(B) the misrepresentation is made with knowledge of its falsity or made recklessly without any knowledge of the truth and as a positive assertion, and

(C) the misrepresentation is made with the intention that it should be acted on by the other party, and

(D) the other party acts in reliance on the misrepresentation and thereby suffers injury.

"Misrepresentation" means:

(A) a false statement of fact;

FRAUD BY FAILURE TO DISCLOSE.

"Fraud" also occurs when:

(A) a party fails to disclose a material fact within the knowledge of that party,

(B) the party knows that the other party is ignorant of the fact and does not have an equal opportunity to discover the truth,

(C) the party intends to induce the other party to take some action by failing to disclose the fact, and

(D) the other party suffers injury as a result of acting without knowledge of the undisclosed fact.

ANSWER:

Denise Steele:	Fraud by misrepresentation:	Yes
	Fraud by failure to disclose:	Yes
Melissa Deaton:	Fraud by misrepresentation:	Yes
	Fraud by failure to disclose:	Yes
Jerry Scarbrough:	Fraud by misrepresentation:	Yes
	Fraud by failure to disclose:	Yes

If you have answered "Yes" to any part of Question No. 5, then answer the next question. Otherwise, do not answer the next question.

QUESTION NO. 6

What sum of money, if paid now in cash, would fairly and reasonably compensate Helen Purser for her damages, if any, that resulted from such fraud?

Consider the following elements of damages, if any, and none other. In answering questions about damages, answer each question separately. Do not increase or reduce the amount in one answer because of your answer to any other question about damages. Do not speculate about what any party's ultimate recovery may or may not be. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment. Do not add any amount for interest on damages, if any.

You shall not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any.

Answer in dollars and cents, if any, separately below.

For Helen Purser:

a. Loss of community property.

ANSWER: $ 1.5 million

b. Helen Purser's mental anguish sustained in the past.

ANSWER: $ 500,000

c. Helen Purser's mental anguish that, in reasonable probability, she will sustain in the future.

ANSWER: $ 250,000

If you answered "Yes" to any part of Question No. 5, then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 7

Did Denise Steele, Melissa Deaton or Jerry Scarbrough act in concert with one another in committing fraud in Question No. 5?

Answer "Yes" or "No."

ANSWER: Yes

If you answered "Yes" to any part of Question Nos. 1, 2 or 5, then answer the following question. If you did not answer "Yes" to any of those questions, do not answer the following question.

QUESTION NO. 8

Was Melissa Deaton, Denise Steele or Jerry Scarbrough part of a conspiracy that damaged Helen Purser?

To be part of a conspiracy, more than one person must have had knowledge of, agreed to, and intended a common objective or course of action that resulted in the damages to Helen Purser. One or more persons involved in the conspiracy must have performed some act or acts to further the conspiracy.

Each co-conspirator is responsible for all acts done by any of the conspirators in furtherance of the unlawful combination.

Answer "Yes" or "No."

ANSWER: Melissa Deaton: Yes

Denise Steele: Yes

Jerry Scarbrough: Yes

Answer the following question only if you unanimously answered "Yes" to any part of Question No. 1, 2, or 5. Otherwise, do not answer the following question.

To answer "Yes" to any part of the following question, your answer must be unanimous. You may answer "No" to any part of the following question only upon a vote of ten or more jurors. Otherwise, you must not answer that part of the following question.

QUESTION NO. 9

Do you find by clear and convincing evidence that the harm to Helen Purser, Sue Van Zanten, Gary "Bubba" Purser, Jr., JoAnn Purser, or Elizabeth Tipton resulted from malice or gross negligence?

"Clear and convincing evidence" means the measure or degree of proof that produces a firm belief or conviction of the truth of the allegations sought to be established.

"Malice" means a specific intent by Melissa Deaton, Denise Steele or Jerry Scarbrough, to cause substantial injury or harm to Helen Purser, Sue Van Zanten, Gary "Bubba" Purser, Jr., JoAnn Purser, or Elizabeth Tipton.

"Gross negligence" means an act or omission by Melissa Deaton, Denise Steele or Jerry Scarbrough,

(a) which when viewed objectively from the standpoint of Melissa Deaton, Denise Steele or Jerry Scarbrough at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and

(b) of which Melissa Deaton, Denise Steele or Jerry Scarbrough has actual subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

ANSWER: Yes

Answer the following question only if you unanimously answered "Yes" to Question No. 9. Otherwise, do not answer the following question.

You must unanimously agree on the amount of any award of exemplary damages.

QUESTION NO. 10

What sum of money, if any, if paid now in cash, should be assessed against Melissa Deaton, Denise Steele, or Jerry Scarbrough, and awarded to Helen Purser, Sue Van Zanten, Gary "Bubba" Purser, Jr., JoAnn Purser, or Elizabeth Tipton as exemplary damages, if any, for the conduct found in response to Question Nos. 1, 2, or 5?

"Exemplary damages" means an amount that you may in your discretion award as a penalty or by way of punishment.

Factors to consider in award exemplary damages, if any, are:

a. The nature of the wrong.

b. The character of the conduct involved.

c. The degree of culpability of Melissa Deaton, Denise Steele or Jerry Scarbrough.

d. The situation and sensibilities of the parties concerned.

e. The extent to which such conduct offends a public sense of justice and propriety.

f. The net worth of Melissa Deaton, Denise Steele, or Jerry Scarbrough, individually.

ANSWER:

Exemplary damages, if any, found by you to be assessed to:	Denise Steele	Melissa Deaton	Jerry Scarbrough
For Helen Purser:	$ 1.5 million	$ 500,000	$ 2 million
For Sue Van Zanten:	$ 500,000	$ 250,000	$ 1 million
For Gary "Bubba" Purser, Jr.:	$ 500,000	$ 500,000	$ 2 million
For JoAnn Purser:	$ 500,000	$ 500,000	$ 2 million
For Elizabeth Tipton:	$ 500,000	$ 250,000	$ 1 million

PRESIDING JUROR.

1. When you go into the jury room to answer the questions, the first thing you will need to do is choose a presiding juror.

2. The presiding juror has these duties:

   a. have the complete charge read aloud if it will be helpful to your deliberations;

   b. preside over your deliberations, meaning manage the discussions, and see that you follow these instructions;

   c. give written questions or comments to the bailiff who will give them to the judge;

   d. write down the answers you agree on;

   e. get the signatures for the verdict certificate; and,

   f. notify the bailiff that you have reached a verdict.

Do you understand the duties of the presiding juror? If you do not, please tell me now.

Instructions for Signing the Verdict Certificate:

1. Unless otherwise instructed, you may answer the questions on a vote of 10 jurors. The same 10 jurors must agree on every answer in the charge. This means you may not have one group of 10 jurors agree on one answer and a different group of 10 jurors agree on another answer.

2. If 10 jurors agree on every answer, those 10 jurors sign the verdict. If 11 jurors agree on every answer, those 11 jurors sign the verdict. If all 12 of you agree on every answer, you are unanimous and only the presiding juror signs the verdict.

3. All jurors should deliberate on every question. You may end up with all 12 of you agreeing on some answers, while only 10 or 11 of you agree on other answers. But when

you sign the verdict, only those 10 who agree on every answer will sign the verdict.

4. There are some special instructions before Question 9 and Question 10 explaining how to answer those questions. Please follow the instructions. If all 12 of you answer those questions, you will need to complete a second verdict certificate for those questions.

Do you understand these instructions? If you do not, please tell me now.

JUDGE PRESIDING

Submitted to the Jury Sept 13, 2012
at 12:40 p.m. Army

Returned and accepted by
the Court 7:45 pm

agreed to each of the answers. The presiding juror has signed the certificate for all 12 of us.

Question 1, 2 or 5.
Questions 9 and 10.

Signature of Presiding Juror

Printed Name of Presiding Juror

TAB D

The relief described hereinbelow is SO ORDERED.

Signed August 29, 2014.

Ronald B. King
United States Chief Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

IN RE:	§	
	§	
JERRY W. SCARBROUGH,	§	CASE NO. 12-60683-RBK
	§	
DEBTOR	§	CHAPTER 7
	§	
	§	
HELEN PURSER, SUE E. PURSER, GARY W. PURSER, JR., JOANN M. PURSER, AND ELIZABETH TIPTON	§	
	§	
VS.	§	ADVERSARY NO. 12-6031-RBK
	§	
JERRY W. SCARBROUGH	§	

JUDGMENT

On February 11, 2014, came on to be heard this adversary proceeding for trial on the merits. Plaintiffs and Defendant appeared in person and by and through counsel of record and announced ready. After hearing the evidence and argument of counsel and the parties, it is the opinion of the Court that judgment should be rendered for the Plaintiffs for the reasons stated in the Opinion rendered contemporaneously herewith.

Exhibit 5

It is, therefore, **ORDERED, ADJUDGED, AND DECREED** that the judgment obtained by Plaintiffs, Helen Purser, Sue E. Purser, Gary W. Purser, Jr., JoAnn M. Purser, and Elizabeth Tipson against Defendant, Jerry W. Scarbrough, in Cause No. 236,117-B, 146th Judicial District, Bell County, Texas, dated October 12, 2012, is hereby declared nondischargeable.

It is further **ORDERED, ADJUDGED, AND DECREED** that the sanctions orders in Cause No. 236,117-B, 146th Judicial District, Bell County, Texas, against Defendant, Jerry W. Scarbrough, in favor of Plaintiff, Helen Purser, in the amount of $54,261.50 are hereby declared nondischargeable.

All costs of court are taxed against Defendant, Jerry W. Scarbrough, for which execution shall issue if not timely paid.

All relief not specifically granted herein is hereby denied.

###

TAB E

Texas Constitution art I § 19:

No citizen of this State shall be deprived of life, liberty, property, privleges or immunities or in any manner disfranchised except by the due course of the law of the land.

TAB F

U.S. Constitution amd. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense.

TAB G

U.S. Constitution, 14th Amd, Sec. 1:

"…nor shall any State deprive any person of life, liberty, or property, without due process of law…"

TAB H

CPRC 10.005:

A court shall describe in an order imposing a sanction under this chapter the conduct the court has determined violated Section 10.001 and explain the basis for the sanction imposed.

TAB J

Document:Tex. R. Prof Conduct 3.03

Tex. R. Prof Conduct 3.03

Copy Citation

This document is current through December 23, 2015

Texas Court Rules STATE RULES TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT III. ADVOCATE

Rule 3.03 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act;

(3) in an ex parte proceeding, fail to disclose to the tribunal an unprivileged fact which the lawyer reasonably believes should be known by that entity for it to make an informed decision;

(4) fail to disclose to the tribunal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(5) offer or use evidence that the lawyer knows to be false.

(b) If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. If such efforts are unsuccessful, the lawyer shall take reasonable remedial measures, including disclosure of the true facts.

(c) The duties stated in paragraphs (a) and (b) continue until remedial legal measures are no longer reasonably possible.

TAB J

Document:Tex. R. Prof Conduct 3.04

Tex. R. Prof Conduct 3.04

Copy Citation

This document is current through December 23, 2015

Texas Court Rules STATE RULES TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT III. ADVOCATE

Rule 3.04 Fairness in Adjudicatory Proceedings

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence; in anticipation of a dispute unlawfully alter, destroy or conceal a document or other material that a competent lawyer would believe has potential or actual evidentiary value; or counsel or assist another person to do any such act.

(b) falsify evidence, counsel or assist a witness to testify falsely, or pay, offer to pay, or acquiesce in the offer or payment of compensation to a witness or other entity contingent upon the content of the testimony of the witness or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:

(1) expenses reasonably incurred by a witness in attending or testifying;

(2) reasonable compensation to a witness for his loss of time in attending or testifying;

(3) a reasonable fee for the professional services of an expert witness.

(c) except as stated in paragraph (d), in representing a client before a tribunal:

(1) habitually violate an established rule of procedure or of evidence;

(2) state or allude to any matter that the lawyer does not reasonably believe is relevant to such proceeding or that will not be supported by admissible evidence, or assert personal knowledge of facts in issue except when testifying as a witness;

(3) state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused, except that a lawyer may argue on his analysis of the evidence and other permissible considerations for any position or conclusion with respect to the matters stated herein;

(4) ask any question intended to degrade a witness or other person except where the lawyer reasonably believes that the question will lead to relevant and admissible evidence; or

(5) engage in conduct intended to disrupt the proceedings.

(d) knowingly disobey, or advise the client to disobey, an obligation under the standing rules of or a ruling by a tribunal except for an open refusal based either on an assertion that no valid obligation exists or on the client's willingness to accept any sanctions arising from such disobedience.

(e) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the persons interests will not be adversely affected by refraining from giving such information.

▼ Annotations

Commentary

Comment:

1. The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedures, and the like.

2. Documents and other evidence are often essential to establish a claim or defense. The right of a party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions, including Texas, makes it an offense to destroy material for the purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. See Texas Penal Code, §§ 37.09(a)(1), 37.10(a)(3). See also 18 U.S.C. §§ 1501--1515. Falsifying evidence is also generally a criminal offense. Id. §§ 37.09(a)(2), 37.10 (a)(1), (2). Paragraph (a) of this Rule applies to evidentiary material generally, including computerized information.

3. Paragraph (c)(1) subjects a lawyer to discipline only for habitual abuses of procedural or evidentiary rules, including those relating to the discovery process. That position was adopted in order to employ the superior ability of the presiding tribunal to assess the merits of such

TAB K

Document:Tex. R. Prof Conduct 3.04

Tex. R. Prof Conduct 3.04

Copy Citation

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(b) falsify evidence, counsel or assist a witness to testify falsely, or pay, offer to pay, or acquiesce in the offer or payment of compensation to a witness or other entity contingent upon the content of the testimony of the witness or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:

(1) expenses reasonably incurred by a witness in attending or testifying;

(2) reasonable compensation to a witness for his loss of time in attending or testifying;

(3) a reasonable fee for the professional services of an expert witness.

(c) except as stated in paragraph (d), in representing a client before a tribunal:

(1) habitually violate an established rule of procedure or of evidence;

(2) state or allude to any matter that the lawyer does not reasonably believe is relevant to such proceeding or that will not be supported by admissible evidence, or assert personal knowledge of facts in issue except when testifying as a witness;

(3) state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused, except that a lawyer may argue on his analysis of the evidence and other permissible considerations for any position or conclusion with respect to the matters stated herein;

(4) ask any question intended to degrade a witness or other person except where the lawyer reasonably believes that the question will lead to relevant and admissible evidence; or

(5) engage in conduct intended to disrupt the proceedings.

(d) knowingly disobey, or advise the client to disobey, an obligation under the standing rules of or a ruling by a tribunal except for an open refusal based either on an assertion that no valid obligation exists or on the client's willingness to accept any sanctions arising from such disobedience.

(e) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

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▼ Annotations

Commentary

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1. The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedures, and the like.

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TAB L

Document:Tex. R. Prof Conduct 8.04

Tex. R. Prof Conduct 8.04

Copy Citation

This document is current through December 23, 2015

Texas Court Rules STATE RULES TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT VIII. MAINTAINING THE INTEGRETY [INTEGRITY] OF THE PROFESSION

Rule 8.04 Misconduct

(a) A lawyer shall not:

(1) violate these rules, knowingly assist or induce another to do so, or do so through the acts of another, whether or not such violation occurred in the course of a client-lawyer relationship;

(2) commit a serious crime or commit any other criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(4) engage in conduct constituting obstruction of justice;

(5) state or imply an ability to influence improperly a government agency or official;

(6) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(7) violate any disciplinary or disability order or judgment;

(8) fail to timely furnish to the Chief Disciplinary Counsels office or a district grievance committee a response or other information as required by the Texas Rules of Disciplinary Procedure, unless he or she in good faith timely asserts a privilege or other legal ground for failure to do so;

(9) engage in conduct that constitutes barratry as defined by the law of this state;

TAB M

Document:Tex. R. Prof Conduct 8.04

Tex. R. Prof Conduct 8.04

Copy Citation

This document is current through December 23, 2015

Texas Court Rules STATE RULES TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT VIII. MAINTAINING THE INTEGRETY [INTEGRITY] OF THE PROFESSION

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(3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(4) engage in conduct constituting obstruction of justice;

(5) state or imply an ability to influence improperly a government agency or official;

(6) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(7) violate any disciplinary or disability order or judgment;

(8) fail to timely furnish to the Chief Disciplinary Counsels office or a district grievance committee a response or other information as required by the Texas Rules of Disciplinary Procedure, unless he or she in good faith timely asserts a privilege or other legal ground for failure to do so;

(9) engage in conduct that constitutes barratry as defined by the law of this state;

TAB N

Document:Tex. R. Civ. P. 196

Tex. R. Civ. P. 196

This document is current through December 23, 2015

Texas Court Rules STATE RULES TEXAS RULES OF CIVIL PROCEDURE PART II. RULES OF PRACTICE IN DISTRICT AND COUNTY COURTS SECTION 9. Evidence and Discovery B. DISCOVERY

Rule **196** Requests for Production and Inspection to Parties; Requests and Motions for Entry upon Property.

196.1. ***Request for Production and Inspection to Parties.***

(a) ***Request.*** --A party may serve on another party - no later than 30 days before the end of the discovery period - a request for production or for inspection, to inspect, sample, test, photograph and copy documents or tangible things within the scope of discovery.

(b) ***Contents of Request.*** --The request must specify the items to be produced or inspected, either by individual item or by category, and describe with reasonable particularity each item and category. The request must specify a reasonable time (on or after the date on which the response is due) and place for production. If the requesting party will sample or test the requested items, the means, manner and procedure for testing or sampling must be described with sufficient specificity to inform the producing party of the means, manner, and procedure for testing or sampling.

(c) ***Requests for Production of Medical or Mental Health Records Regarding Nonparties.***

(1) ***Service of Request on Nonparty.*** --If a party requests another party to produce medical or mental health records regarding a nonparty, the requesting party must serve the nonparty with the request for production under Rule 21a.

(2) ***Exceptions.*** --A party is not required to serve the request for production on a nonparty whose medical records are sought if:

(A) the nonparty signs a release of the records that is effective as to the requesting party;

(B) the identity of the nonparty whose records are sought will not directly or indirectly be disclosed by production of the records; or

(C) the court, upon a showing of good cause by the party seeking the records, orders that service is not required.

(3) ***Confidentiality.*** --Nothing in this rule excuses compliance with laws concerning the confidentiality of medical or mental health records.

196.2. ***Response to Request for Production and Inspection.***

(a) ***Time for Response.*** --The responding party must serve a written response on the requesting party within 30 days after service of the request, except that a defendant served with a request before the defendant's answer is due need not respond until 50 days after service of the request.

(b) ***Content of Response.*** --With respect to each item or category of items, the responding party must state objections and assert privileges as required by these rules, and state, as appropriate, that:

(1) production, inspection, or other requested action will be permitted as requested;

(2) the requested items are being served on the requesting party with the response;

(3) production, inspection, or other requested action will take place at a specified time and place, if the responding party is objecting to the time and place of production; or

(4) no items have been identified - after a diligent search - that are responsive to the request.

196.3. ***Production.***

(a) ***Time and Place of Production.*** --Subject to any objections stated in the response, the responding party must produce the requested documents or tangible things within the person's possession, custody or control at either the time and place requested or the time and place stated in the response, unless otherwise agreed by the parties or ordered by the court, and must provide the requesting party a reasonable opportunity to inspect them.

(b) ***Copies.*** --The responding party may produce copies in lieu of originals unless a question is raised as to the authenticity of the original or in the circumstances it would be unfair to produce copies in lieu of originals. If originals are produced, the responding party is entitled to retain the originals while the requesting party inspects and copies them.

(c) ***Organization.*** --The responding party must either produce documents and tangible things as they are kept in the usual course of business or organize and label them to correspond with the categories in the request.

196.4. ***Electronic or Magnetic Data.*** --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.

196.5. ***Destruction or Alteration.*** --Testing, sampling or examination of an item may not destroy or materially alter an item unless previously authorized by the court.

196.6. ***Expenses of Production.*** --Unless otherwise ordered by the court for good cause, the expense of producing items will be borne by the responding party and the expense of inspecting, sampling, testing, photographing, and copying items produced will be borne by the requesting party.

196.7. ***Request or Motion for Entry upon Property.***

(a) ***Request or Motion.*** --A party may gain entry on designated land or other property to inspect, measure, survey, photograph, test, or sample the property or any designated object or operation thereon by serving - no later than 30 days before the end of any applicable discovery period -

(1) a request on all parties if the land or property belongs to a party, or

(2) a motion and notice of hearing on all parties and the nonparty if the land or property belongs to a nonparty. If the identity or address of the nonparty is unknown and cannot be obtained through reasonable diligence, the court must permit service by means other than those specified in Rule 21a that are reasonably calculated to give the nonparty notice of the motion and hearing.

(b) ***Time, Place, and Other Conditions.*** --The request for entry upon a party's property, or the order for entry upon a nonparty's property, must state the time, place, manner, conditions, and scope of the inspection, and must specifically describe any desired means, manner, and procedure for testing or sampling, and the person or persons by whom the inspection, testing, or sampling is to be made.

(c) ***Response to Request for Entry.***

(1) ***Time to Respond.*** --The responding party must serve a written response on the requesting party within 30 days after service of the request, except that a defendant served with a request before the defendant's answer is due need not respond until 50 days after service of the request.

(2) ***Content of Response.*** --The responding party must state objections and assert privileges as required by these rules, and state, as appropriate, that:

TAB O

Document(1)

1. *Tex. R. Disciplinary Proc. 2.18*
   Client/Matter: -None-

Tex. R. Disciplinary Proc. 2.18

This document is current through December 23, 2015

Texas Court Rules > ***STATE RULES*** > ***TEXAS RULES OF DISCIPLINARY PROCEDURE*** > ***PART II. THE DISTRICT GRIEVANCE COMMITTEES***

Rule 2.18 Imposition of Sanctions

The Evidentiary Panel may, in its discretion, conduct a separate hearing and receive evidence as to the appropriate Sanctions to be imposed. Indefinite Disability sanction is not an available Sanction in a hearing before an Evidentiary Panel. In determining the appropriate Sanctions, the Evidentiary Panel shall consider:

A. The nature and degree of the Professional Misconduct for which the Respondent is being sanctioned;

B. The seriousness of and circumstances surrounding the Professional Misconduct;

C. The loss or damage to clients;

D. The damage to the profession;

E. The assurance that those who seek legal services in the future will be insulated from the type of Professional Misconduct found;

F. The profit to the attorney;

G. The avoidance of repetition;

H. The deterrent effect on others;

I. The maintenance of respect for the legal profession;

J. The conduct of the Respondent during the course of the Disciplinary Proceeding;

In addition, the Respondent's disciplinary record, including any private reprimands, is admissible on the appropriate Sanction to be imposed. Respondent's Disability may not be considered in mitigation, unless Respondent demonstrates that he or she is successfully pursuing in good faith a program of recovery or appropriate course of treatment.

TAB P

Document(1)

1. *Tex. R. Disciplinary Proc. 2.24*
   Client/Matter: -None-

Tex. R. Disciplinary Proc. 2.24

This document is current through December 23, 2015

Texas Court Rules > ***STATE RULES*** > ***TEXAS RULES OF DISCIPLINARY PROCEDURE*** > ***PART II. THE DISTRICT GRIEVANCE COMMITTEES***

Rule 2.24 Appeals by Respondent or Commission

The Respondent or Commission may appeal the judgment to the Board of Disciplinary Appeals. Such appeals must be on the record, determined under the standard of substantial evidence. Briefs may be filed as a matter of right. The time deadlines for such briefs shall be promulgated by the Board of Disciplinary Appeals. An appeal, if taken, is perfected when a written notice of appeal is filed with the Board of Disciplinary Appeals. The notice of appeal must reflect the intention of the Respondent or the Commission to appeal and identify the decision from which appeal is perfected. The notice of appeal must be filed within thirty days after the date of judgment, except that the notice of appeal must be filed within ninety days after the date of judgment if any party timely files a motion for new trial or a motion to modify the judgment.

TAB Q

Document(1)

1. *Tex. R. Disciplinary Proc. 2.25*
   Client/Matter: -None-

Tex. R. Disciplinary Proc. 2.25

This document is current through December 23, 2015

Texas Court Rules > ***STATE RULES*** > ***TEXAS RULES OF DISCIPLINARY PROCEDURE*** > ***PART II. THE DISTRICT GRIEVANCE COMMITTEES***

Rule 2.25 No Supersedeas

An Evidentiary Panel's order of disbarment cannot be superseded or stayed. The Respondent may within thirty days from entry of judgment petition the Evidentiary Panel to stay a judgment of suspension. The Respondent carries the burden of proof by preponderance of the evidence to establish by competent evidence that the Respondent's continued practice of law does not pose a continuing threat to the welfare of Respondent's clients or to the public. An order of suspension must be stayed during the pendency of any appeals therefrom if the Evidentiary Panel finds that the Respondent has met that burden of proof. An Evidentiary Panel may condition its stay upon reasonable terms, which may include, but are not limited to, the cessation of any practice found to constitute Professional Misconduct, or it may impose a requirement of an affirmative act such as an audit of a Respondent's client trust account.

TAB R

Document(1)

1. *Tex. Evid. R. 401*
   Client/Matter: -None-

Tex. Evid. R. 401

This document is current through December 23, 2015

Texas Court Rules > ***STATE RULES*** > ***TEXAS RULES OF EVIDENCE*** > ***ARTICLE IV. RELEVANCY AND ITS LIMITS***

Rule 401 Test for Relevant Evidence

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action.

TAB S

Document(1)

1. *In re Weekley Homes, L.P., 295 S.W.3d 309*
   Client/Matter: -None-

In re Weekley Homes, L.P.

Supreme Court of Texas
March 31, 2009, Argued; August 28, 2009, Opinion Delivered
NO. 08-0836

Reporter
295 S.W.3d 309; 2009 Tex. LEXIS 630; 52 Tex. Sup. J. 1231

IN RE WEEKLEY HOMES, L.P., RELATOR

Prior History: *In re Weekley Homes, L.P., 295 S.W.3d 346, 2008 Tex. App. LEXIS 7083 (Tex. App. Dallas, Sept. 24, 2008)*

Core Terms

emails, electronic, discovery, trial court, party's, deleted, hard drive, storage, retrieval, documents, requesting party, responding party, computers, reasonably available, direct access, federal rule, amendments, intrusive, Warehouse, employees, requests, courts, responding, ordering, confidential, forensic, abused, images, advisory committee, responsive

Case Summary

Procedural Posture

In an action relating to a residential real estate development, the trial court ordered four employees of relator home builder to turn over their computer hard drives to forensic experts for imaging, copying, and searching for deleted emails. The court of appeals, Texas, denied the builder's petition for writ of mandamus, and the builder sought further review.

Overview

The court held that the trial court abused its discretion under *Tex. R. Civ. P. 196.4* by permitting experts for a party seeking discovery to examine the computers of the builder's employees in search of deleted emails because there was no indication that the experts were familiar with the particularities of the employees' hard drives, were qualified to search those hard drives, and that the proposed methodology for searching those hard drives was reasonably likely to yield the information sought. Guided by case law under the federal rules, the court held that providing access to information by ordering examination of a party's electronic storage device was particularly intrusive and should be generally discouraged. The rules were not meant to create a routine right of direct access. The court also held that the trial court did not abuse its discretion by ordering the production of deleted emails, even though the production request did not specifically mention deleted emails, because the scope of the requests was understood before trial court intervention and therefore there was no prejudice from the failure to follow *Tex. R. Civ. P. 196.4*.

Outcome

The court conditionally granted the writ of mandamus and ordered the trial court to vacate its order.

LexisNexis® Headnotes

Civil Procedure > ... > Discovery > Electronic Discovery > Discoverability of Electronic Information

HN1 *Tex. R. Civ. P. 192.3(b)* provides for discovery of documents, defined to include electronic information that is relevant to the subject matter of the action.

Civil Procedure > ... > Discovery > Electronic Discovery > Discoverability of Electronic Information

HN2 *Tex. R. Civ. P. 196* governs requests for production of documents, and *Tex. R. Civ. P. 196.4* applies specifically to requests for production of data or information that exists in electronic or magnetic form.

Civil Procedure > ... > Discovery > Electronic Discovery > Discoverability of Electronic Information

HN3 Emails and deleted emails stored in electronic or magnetic form (as opposed to being printed out) are clearly electronic information, within the meaning of *Tex. R. Civ. P. 196.4*.

Civil Procedure > ... > Discovery > Electronic Discovery > Discoverability of Electronic Information

HN4 See *Tex. R. Civ. P. 196.4*.

Civil Procedure > ... > Discovery > Electronic Discovery > Discoverability of Electronic Information

HN5 Email communications constitute electronic data, and their characterization as such does not change when they are deleted from a party's inbox. Thus, deleted emails are within *Tex. R. Civ. P. 196.4*'s purview.

Civil Procedure > ... > Discovery > Electronic Discovery > Discoverability of Electronic Information

HN6 *Tex. R. Civ. P. 196.4* requires specificity. Once a specific request is made the parties can, and should, communicate as to the particularities of a party's computer storage system and potential methods of retrieval to assess the feasibility of their recovery.

Civil Procedure > ... > Discovery > Electronic Discovery > Discoverability of Electronic Information

HN7 The purpose of *Tex. R. Civ. P. 196.4*'s specificity requirement is to ensure that requests for electronic information are clearly understood and disputes avoided. To ensure compliance with the rules and avoid confusion, however, parties seeking production of deleted emails should expressly request them.

Civil Procedure > ... > Discovery > Electronic Discovery > Discoverability of Electronic Information

HN8 When a specific request for electronic information has been lodged, *Tex. R. Civ. P. 196.4* requires the responding party to either produce responsive electronic information that is reasonably available to the responding party in its ordinary course of business, or object on grounds that the information cannot through reasonable efforts be retrieved or produced in the form requested. Once the responding party raises a *Tex. R. Civ. P. 196.4* objection, either party may request a hearing at which the responding party must present evidence to support the objection. *Tex. R. Civ. P. 193.4(a)*. To determine whether requested information is reasonably available in the ordinary course of business, the trial court may order discovery, such as requiring the responding party to sample or inspect the sources potentially containing information identified as not reasonably available. *Tex. R. Civ. P. 193.4(a)*. The trial court may also allow deposition of witnesses knowledgeable about the responding party's information systems. *Tex. R. Civ. P. 195.1*. Because parties' electronic systems, electronic storage, and retrieval capabilities will vary in each case, trial courts should assess the reasonable availability of information on a case-by-case basis.

Civil Procedure > ... > Discovery > Electronic Discovery > Discoverability of Electronic Information

HN9 Should a responding party to a specific request for electronic information fail to meet its burden, the trial court may order production subject to the discovery limitations imposed by *Tex. R. Civ. P. 192.4*. If the responding party meets its burden by demonstrating that retrieval and production of the requested information would be overly burdensome, the trial court may nevertheless order targeted production upon a showing by the requesting party that the benefits of ordering production outweigh the costs. *Tex. R. Civ. P. 192.4*. Like assessing the reasonable availability of information, determining the scope of production may require some focused discovery, which may include sampling of the sources, to learn more about what burdens and costs are involved in accessing the information, what the information consists of, and how valuable

it is for the litigation in light of information that can be obtained by exhausting other opportunities for discovery. To the extent possible, courts should be mindful of protecting sensitive information and should choose the least intrusive means of retrieval. And when the court orders production of not-reasonably-available information, the court must also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information. *Tex. R. Civ. P. 196.4*.

Civil Procedure > ... > Discovery > Electronic Discovery > Discoverability of Electronic Information

HN10 The Texas rules do not expressly require a good cause showing before production of not-reasonably-available electronic information may be ordered, but they do require a trial court to limit discovery when the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. *Tex. R. Civ. P. 192.4(b)*. Thus, both the federal and the Texas rules require trial courts to weigh the benefits of production against the burdens imposed when the requested information is not reasonably available in the ordinary course of business. The court sees no difference in the considerations that would apply when weighing the benefits against the burdens of electronic-information production; therefore the court looks to the federal rules for guidance.

Civil Procedure > ... > Discovery > Electronic Discovery > Discoverability of Electronic Information

HN11 Providing access to information by ordering examination of a party's electronic storage device is particularly intrusive and should be generally discouraged, just as permitting open access to a party's file cabinets for general perusal would be. While direct access to a party's electronic storage device might be justified in some circumstances, the rules are not meant to create a routine right of direct access. When allowing such access, courts should guard against undue intrusiveness.

Civil Procedure > ... > Discovery > Electronic Discovery > Discoverability of Electronic Information

HN12 Basic principles regarding direct access to a party's electronic storage device include, as a threshold matter, that the requesting party must show 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 relevant materials. Courts have been reluctant to rely on mere skepticism or bare allegations that the responding party has failed to comply with its discovery duties.

Civil Procedure > ... > Discovery > Electronic Discovery > Discoverability of Electronic Information

HN13 Even if a party requesting direct access to another party's electronic storage device makes a threshold showing, courts should not permit the requesting party itself to access the opponent's storage device; rather, only a qualified expert should be afforded such access, and only when there is some indication that retrieval of the data sought is feasible. Due to the broad array of electronic information storage methodologies, the requesting party must become knowledgeable about the characteristics of the storage devices sought to be searched in order to demonstrate the feasibility of electronic retrieval in a particular case. And consistent with standard prohibitions against fishing expeditions, 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. Courts must also address privilege, privacy, and confidentiality concerns.

Civil Procedure > ... > Discovery > Electronic Discovery > Discoverability of Electronic Information

HN14 Federal courts have been more likely to order direct access to a responding party's electronic storage devices when there is some direct relationship between the electronic storage device and the claim itself.

Civil Procedure > ... > Discovery > Electronic Discovery > Discoverability of Electronic Information

HN15 A fundamental tenet of the 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. *Tex. R. Civ. P. 191.2*. Accordingly,

prior 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 maybe 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 uncertainty in the discovery process, and raise the risk of disputes.

Civil Procedure > ... > Discovery > Electronic Discovery > General Overview

HN16 Under *Tex. R. Civ. P. 196.4*: The party seeking to discover electronic information must make a specific request for that information and specify the form of production. *Tex. R. Civ. P. 196.4*; The 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; 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 object on those grounds; The parties should make reasonable efforts to resolve the dispute without court intervention. *Tex. R. Civ. P. 191.2*.

Civil Procedure > ... > Discovery > Electronic Discovery > General Overview

HN17 Under *Tex. R. Civ. P. 196.4*: If the parties are unable to resolve a dispute, either party may request a hearing on the objection, *Tex. R. Civ. P. 193.4(a)*, at which the responding party must demonstrate that the requested information is not reasonably available because of undue burden or cost, *Tex. R. Civ. P. 192.4(b)*; If 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 *Tex. R. Civ. P. 192.4*'s discovery limitations; If 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. *Tex. R. Civ. P. 192.6(b)*. The requesting party must also pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information. *Tex. R. Civ. P. 196.4*; Finally, 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.

Civil Procedure > ... > Discovery > Electronic Discovery > General Overview

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

HN18 Mandamus relief is available when the trial court compels production beyond the permissible bounds of discovery. Intrusive discovery measures—such as ordering direct access to an opponent's electronic storage device—require, at a minimum, that the benefits of the discovery measure outweigh the burden imposed upon the discovered party. *Tex. R. Civ. P. 196.4*, *192.4*. If an appellate court cannot remedy a trial court's discovery error, then an adequate appellate remedy does not exist.

Civil Procedure > Discovery & Disclosure > General Overview

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

HN19 A party will not have an adequate remedy by appeal when a trial court's order imposes a burden on a producing party far out of proportion to any benefit that may obtain to the requesting party.

Counsel: For Relator: Craig T. Enoch, Winstead PC, Austin, TX; Joel Wilson Reese, Winstead PC, Dallas, TX; David Fowler Johnson, Winstead PC, Fort Worth, TX.

For Real Party in Interest: Christopher H. Rentzel, Robert Marvin Castle III, Bracewell & Guiliani, Dallas, TX.

Judges: **[**1]** JUSTICE O'NEILL delivered the opinion of the Court. Harriet O'Neill, Justice.

Opinion by: Justice O'Neill

Opinion

[*311] ON PETITION FOR WRIT OF MANDAMUS

In this mandamus proceeding, we must decide whether the trial court abused its discretion by ordering four of the defendant's employees to turn over their computer hard drives to forensic experts for imaging, copying, and searching for deleted emails. Because the plaintiff failed to demonstrate the particular characteristics of the electronic storage devices involved, the familiarity of its experts with those characteristics, or a reasonable likelihood that the proposed search methodology would yield the information sought, and considering the highly intrusive nature of computer storage search and the sensitivity of the subject matter, we hold that the trial court abused its discretion.

I. Background

In October 2002, relator Weekley Homes, L.P., a homebuilder, entered into an agreement with Enclave at Fortney Branch, Ltd. (Enclave), a residential real estate developer, to purchase 136 developed lots in a subdivision pursuant to a take-down schedule [1] (the Builder Contract). In November 2004, after Weekley had purchased some of the lots from Enclave pursuant to the **[**2]** Builder Contract, Enclave and HFG Enclave Land Interests, Ltd. (HFG) [2] entered into an agreement whereby Enclave would sell and convey seventy-four of the remaining developed lots to HFG (the Warehouse Contract). Under the Warehouse Contract, Enclave also assigned to HFG its rights to those seventy-four lots under the Builder Contract such that Weekley would be obligated to purchase those lots from HFG.

One day before the Warehouse Contract's execution, Weekley executed a Consent to Assignment and Estoppel Certificate (the Estoppel Certificate), in which Weekley made various express representations, warranties, and covenants to HFG about the state of Enclave's performance under the Builder Contract up to that point. According to HFG, it relied upon the Estoppel Certificate when it agreed to the terms of the Warehouse Contract.

[*312] Enclave allegedly failed to perform various obligations owed to HFG under the Warehouse Contract, and HFG sued Enclave in August 2006. Two months later, HFG subpoenaed documents from a number of third parties, including Weekley. After reviewing several of the documents Weekley produced, HFG's counsel began asking Weekley about the possible existence of other potentially responsive documents relating to the subdivision. In response, Weekley eventually produced approximately 400 additional pages of documents in March 2007. **[**4]** According to HFG, information contained in the documents led it to believe Weekley had made a number of material misrepresentations in the Estoppel Certificate relating to Enclave's performance under the Builder Contract.

In June 2007, HFG added Weekley as a defendant to its pending suit against Enclave, seeking damages for common law fraud and fraudulent inducement, statutory fraud, fraud by nondisclosure, negligence per se, and negligent misrepresentation.

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[1] In the real estate development context, a take-down schedule is an agreement between a developer and a home builder under which the homebuilder agrees to purchase a number of developed lots over a scheduled period of time. *See, e.g.,* Medallion Homes, Inc. v. Thermar Inv., Inc., 698 S.W.2d 400, 402 (Tex. App.--Houston [14th Dist.] 1985, no pet. h.), *overruled by* Ojeda De Toca v. Wise, 748 S.W.2d 449 (Tex. 1988).

[2] HFG is a lot warehouser. According to HFG,

> Lot warehousing is a sophisticated financing enterprise wherein a real estate developer (typically a business that obtains acreage, subdivides it, installs streets and utilities, thereby creating lots available for sale to homebuilders) conveys vacant lots to a lot warehouser. In turn, the lot warehouser holds the lots and then sells **[**3]** them to one or more pre-arranged homebuilders. By virtue of this agreement, the developer is assured of having money in hand for the lots on a more immediate basis than it would had it sold the lots over time on a take-down basis to the builders.

In July and December 2007, HFG served Weekley with requests for production including requests that Weekley produce a broad variety of emails [3] to and from Weekley and its employees relating to Enclave, the subdivision, and the Builder Contract. HFG specifically requested emails between Enclave and Russell Rice (Weekley's Division President), Joe Vastano (Weekley's Area President), Scott Thompson (Weekley's Project Manager for the subdivision), and Biff Bailey (Weekley's Land Acquisitions Manager) (collectively ″the Employees″), relating to Enclave and the Builder Contract. HFG received thirty-one responsive emails, one of which discussed a third-party engineering analysis (the Slope Stability Analysis) predating the Estoppel Certificate **[**5]** and Warehouse Contract and addressing the existence of multiple unsafe subdivision lots that required remedial measures. [4] Weekley produced a copy of the Slope Stability Analysis, but did not produce any additional communications to or from the Employees discussing it. Considering the safety issues HFG contends the Slope Stability Analysis highlighted, and that Weekley allegedly spent $ 92,000 to remedy those issues, HFG was unconvinced that there was only one email discussing the report.

HFG moved to compel Weekley to ″search for any emails 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, John Burchfield, **[**6]** Weekley's General Counsel, testified that ″each [Weekley] employee has an [email] inbox that's limited in size. And once you bump that size limit, you have to start deleting things off the inbox in order to be able to receive any more emails.″ Burchfield further testified that ″[Weekley] forces [employees] to clear out [their] inbox[es] on a regular basis,″ so that deleted emails will only be saved if an employee ″back[s] them up on [the employee's] own personal hard drive somehow.″ And while deleted emails are saved on backup tapes, they are only retained ″[f]or a thirty-day cycle.″ The trial court denied HFG's motion.

[*313] Based upon information learned at the hearing, HFG filed a ″Motion for Limited Access to [Weekley's] Computers″ directing its discovery efforts at the Employees' hard drives. In essence the motion would, at HFG's expense, allow any two of four named PricewaterhouseCoopers forensic experts to access the Employees' computers ″for the limited purpose of creating forensic images of the hard drives.″ According to the motion, the experts would ″make an evidentiary image of the [hard drives] using a procedure that is generally accepted as forensically sound.″ Once the images **[**7]** are created, the experts would search the images for deleted emails from 2004, the relevant year, containing twenty-one specified terms: slope stability, retaining wall, Holigan, HFG, fence, mow!, landscap!, screening wall, LSI, limited site, Alpha, entry, earnest money, Legacy, defective, lot 1, lot 8, grading, substantial completion, letter of credit, and Site Concrete. Once the responsive documents had been identified, extracted, and copied to some form of electronic media by the experts, Weekley would have the right to review the extracted data

> and designate which documents or information [Weekley] claims are not relevant, not discoverable, or are subject to any claim of privilege or immunity from which they are withheld under such claims, identifying such withheld documents by page identification number, directory and subdirectory identification, statement of claimed privilege or immunity from discovery, and brief description of the information in question as is required by *Tex. R. Civ. Pro. 193.3*.

After reviewing the extracted data, Weekley would be required to furnish HFG with any responsive documents that were not being withheld. According to the Motion, should HFG, its counsel, **[**8]** or the experts incidentally observe privileged or confidential information, the information would be maintained in strict confidence and otherwise valid privileges or confidentiality rights would not be waived. Failure to comply with the order's confidentiality provisions would subject the violator to penalties and contempt of court.

At the hearing on HFG's motion, Weekley complained about the intrusiveness of the suggested protocol, pointing out that the forensic experts would have access to private conversations, trade secrets, and privileged communications stored on the Employees' hard drives. Weekly also complained that requiring the Employees' hard drives to be ″taken out of

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[3] In some requests, Weekley asked for ″documents,″ which the requests defined to include ″electronic or email messages.″ In others, Weekley specifically asked for emails.

[4] In response to HFG's First Motion to Compel, Weekley contested the relevance of the Slope Stability Analysis contending it only discussed lots that Weekley had already purchased from Enclave pursuant to the Builder Contract and prior to the Warehouse Agreement. However, Weekley does not request mandamus relief on that basis.

commission" for imaging would be burdensome and disruptive. And Weekley complained that HFG failed to show the feasibility of "obtain[ing] data that may have been deleted in 2004" using the protocol set forth in the Motion. [5]

The trial court granted HFG's motion, and Weekley sought mandamus relief from the court of appeals. **[**9]** In a brief memorandum opinion, the court of appeals denied Weekley's petition. __S.W.3d __. We granted oral argument in this case to determine whether the trial court abused its discretion by allowing forensic experts direct access to Weekley's Employees' electronic storage devices for imaging and searching.

II. Analysis

A. *Rule 196.4*'s Application

1. Emails are electronic information

HN1 *Texas Rule of Civil Procedure 192.3(b)* provides for discovery of documents, defined **[*314]** to include electronic information that is relevant to the subject matter of the action. *See* *TEX. R. CIV. P. 192.3(b)* cmt.--1999. ***HN2*** *Rule 196* governs requests for production of documents, and *Rule 196.4* applies specifically to requests for production of "data or information that exists in electronic or magnetic form." As a threshhold matter, Weekley contends the trial court abused its discretion because HFG did not comply with *Texas Rule of Civil Procedure 196.4* governing requests for production of electronic or magnetic data. HFG responds that *Rule 196.4* does not apply because deleted emails are simply documents governed by the general discovery rules. According to HFG, *Rule 196.4* only applies to spreadsheets and statistics, **[**10]** not emails and deleted emails.

We see nothing in the rule that would support HFG's interpretation. ***HN3*** Emails and deleted emails stored in electronic or magnetic form (as opposed to being printed out) are clearly "electronic information." *See* Conference of Chief Justices, Guidelines for State Courts Regarding Discovery of Electronically-Stored Information v (2006), *available at* *http://www.ncsconline.org/images/EDisCCJGuidelinesFinal.pdf*. Accordingly, we look to *Rule 196.4* in analyzing HFG's requests.

B. *Rule 196.4*'s Requirements

1. Specificity

Weekley argues that HFG failed to comply with *Rule 196.4* because it never specifically requested production of "deleted emails." ***HN4*** *Rule 196.4* provides that, "[t]o 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." *TEX. R. CIV. P. 196.4*. As we have said, ***HN5*** email communications constitute "electronic data," and their characterization as such does not change when they are deleted from a party's inbox. Thus, deleted emails are within *Rule 196.4*'s purview and their production **[**11]** was implied by HFG's request. However, for parties unsophisticated in electronic discovery, such an implication might be easily missed. ***HN6*** *Rule 196.4* requires specificity, and HFG did not specifically request deleted emails. HFG counters that it did not know how Weekley's computer system and electronic information storage worked, and thus did not know what to ask for. But it is a simple matter to request emails that have been deleted; knowledge as to the particular method or means of retrieving them is not necessary at the requesting stage of discovery. Once a specific request is made the parties can, and should, communicate as to the particularities of a party's computer storage system and potential methods of retrieval to assess the feasibility of their recovery. [6] But even 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

[5] Weekley does not contend that the relevant computers or hard drives are unavailable, so access to the actual hard drives in use by the Employees during the relevant time period is not an issue.

[6] The federal rules recognize the importance of early communication between parties on how electronic information is stored. *See* FED. R. CIV. P. 16(b), 26(f). 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.

of discovery and before the hearing on the motion to compel. ***HN7*** The purpose of *Rule 196.4*'s specificity requirement is to ensure that requests for electronic information are clearly understood and disputes **[**12]** avoided. Because the scope of HFG's requests **[*315]** was understood before trial court intervention, Weekley was not prejudiced by HFG's failure to follow the rule and the trial court did not abuse its discretion by ordering production of the deleted emails. To ensure compliance with the rules and avoid confusion, however, parties seeking production of deleted emails should expressly request them.

Weekley additionally complains that HFG's ″Motion for Limited Access to [Weekley's] Computers″ is not a permissible discovery device. We agree with HFG, however, that the motion was, in effect, a motion to compel and the trial court properly treated it as such.

C. The Trial Court Abused Its Discretion in Allowing Access to Weekley's Hard Drives on this Record

1. The appropriate procedures under the rules

Weekley next contends that, even if a **[**13]** motion to compel may be used to access another party's hard drives, the trial court abused its discretion by permitting the experts to rummage through the Employees' computers in search of deleted emails that may no longer exist. Such an invasive procedure is only permissible, Weekley argues, when the requesting party has produced some evidence of good cause or bad faith, together with some evidence that the information sought exists and is retrievable. According to Weekley, HFG failed to make such a demonstration. HFG responds that inconsistencies and discrepancies in a party's production justify granting access to a party's hard drives. Additionally, HFG claims it was not required to show the feasibility of retrieval because it is well-settled that deleted emails can, at least in some cases, be retrieved from computer hard drives. Once again, we turn to *Rule 196.4* for guidance.

HN8 When a specific request for electronic information has been lodged, *Rule 196.4* requires the responding party to either produce responsive electronic information that is ″reasonably available to the responding party in its ordinary course of business,″ or object on grounds that the information cannot through **[**14]** reasonable efforts be retrieved or produced in the form requested. Once the responding party raises a *Rule 196.4* objection, either party may request a hearing at which the responding party must present evidence to support the objection. *TEX. R. CIV. P. 193.4(a)*. To determine whether requested information is reasonably available in the ordinary course of business, the trial court may order discovery, such as requiring the responding party to sample or inspect the sources potentially containing information identified as not reasonably available. *See* *TEX. R. CIV. P. 193.4(a)*; *cf.* *TEX. R. CIV. P. 196.7* & cmts.--1999; *accord* FED. R. CIV. P. 26(b)(2)(B) notes of the advisory committee to the 2006 amendments. The trial court may also allow deposition of witnesses knowledgeable about the responding party's information systems. *See* *TEX. R. CIV. P. 195.1*. Because parties' electronic systems, electronic storage, and retrieval capabilities will vary in each case, trial courts should assess the reasonable availability of information on a case-by-case basis.

HN9 Should the responding party fail to meet its burden, the trial court may order production subject to the discovery limitations imposed by *Rule 192.4*. **[**15]** If the responding party meets its burden by demonstrating that retrieval and production of the requested information would be overly burdensome, the trial court may nevertheless order targeted production upon a showing by the requesting party that the benefits of ordering production outweigh the costs. *TEX. R. CIV. P. 192.4*. Like assessing the reasonable availability of information, determining the scope of production may require **[*316]** some focused discovery, ″which may include sampling of the sources, to learn more about what burdens and costs are involved in accessing the information, what the information consists of, and how valuable it is for the litigation in light of information that can be obtained by exhausting other opportunities for discovery.″ FED. R. CIV. P. 26(b)(2)(B) notes of the advisory committee to the 2006 amendments; *see also* *TEX. R. CIV. P. 196.7*. To the extent possible, courts should be mindful of protecting sensitive information and should choose the least intrusive means of retrieval. And when the court orders production of not-reasonably-available information, the court ″must also order that the requesting party pay the reasonable expenses of any extraordinary steps **[**16]** required to retrieve and produce the information.″ *TEX. R. CIV. P. 196.4*.

Because HFG did not initially specifically request deleted emails as *Rule 196.4* requires, Weekley had no obligation to object in its response that deleted emails were not ″reasonably available . . . in its ordinary course of business.″ *Id.* However,

because HFG's motion to compel clarified the scope of its original request, Weekley was required in its response to HFG's motion and at the subsequent hearing to make the *Rule 196.4* showing. Our limited record does not reflect whether Weekley met its burden. [7] However, the trial court's ultimate decision to order imaging of the Employees' hard drives and forensic examination implies a finding that the deleted emails were not reasonably available and required extraordinary steps for their retrieval and production. We must decide, then, whether the measures the trial court crafted for retrieving the Employees' deleted emails were proper under the circumstances presented. Although *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, **[**17]** the federal rules and courts applying them offer some guidance.

2. The federal rules

Beginning in 2000, the federal Committee on Rules of Practice and Procedure began intensive work on the subject of computer-based discovery because of growing confusion in the area. *See* Comm. on Rules of Practice and Procedure, Summary of the Report of the Judicial Conference 22 (2005), *available at* *http://www.uscourts.gov/rules/Reports/ST09-2005.pdf*. The Committee's purpose was to ″determine whether changes could be effected to reduce the costs of discovery, to increase its efficiency, to increase uniformity of practice, and to encourage the judiciary to participate more actively in case management when appropriate.″ *Id.* at 24. In 2005, the Committee proposed amendments to the Federal Rules to better accommodate electronic discovery. *Id.* at 22. The amendments were supported by The American Bar Association Section on Litigation, the Federal Bar Council, the New York State Bar Association Commercial and Federal Litigation Section, and the Department of Justice, and most of the amendments were unanimously **[**18]** approved by the Committee. *Id.* at 25. The amendments were ultimately approved by the Judicial Conference and the United States Supreme Court, and have been in effect since December 1, 2006. Although we have not amended our rules to mirror the federal language, our rules as written are **[*317]** not inconsistent with the federal rules or the case law interpreting them.

Under Federal Rule of Civil Procedure 26(b)(2)(B), a trial court may order production of information that is not reasonably available only ″if the requesting party shows good cause.″ In determining whether the requesting party has demonstrated ″good cause,″ the court must consider, among other factors, whether

> the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

FED. R. CIV. P. 26(b)(2)(C)(iii). ***HN10*** The Texas rules do not expressly require a ″good cause″ showing before production of not-reasonably-available electronic information may be ordered, but they do require a trial court to limit discovery when

> the burden or **[**19]** expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

TEX. R. CIV. P. 192.4(b). Thus, both the federal rule and ours require trial courts to weigh the benefits of production against the burdens imposed when the requested information is not reasonably available in the ordinary course of business. We see no difference in the considerations that would apply when weighing the benefits against the burdens of electronic-information production; therefore we look to the federal rules for guidance.

HN11 Providing access to information by ordering examination of a party's electronic storage device is particularly intrusive and should be generally discouraged, just as permitting open access to a party's file cabinets for general perusal would be. The comments to the federal rules make clear that, while direct ″access [to a party's electronic storage device] might be justified in some circumstances,″ the rules are ″not meant to create a routine right of direct access.″ FED. R. CIV. P. 34 **[**20]** notes of the advisory committee to the 2006 amendments. When allowing such access, the comments to Rule 34 warn courts to ″guard against undue intrusiveness.″ *Id.*

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[7] The court reporter's record from the hearing on HFG's First Motion to Compel is absent from the record.

3. Federal case law

Since the 2006 amendments to the federal rules were promulgated, federal case law has established some ***HN12*** basic principles regarding direct access to a party's electronic storage device. As a threshold matter, the requesting party must show that the responding party has somehow defaulted in its obligation to search its records and produce the requested data. *See* 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); Diepenhorst v. City of Battle Creek, Case No. 1:05-CV-734, 2006 U.S. Dist. LEXIS 48551, at *10 (W.D. Mich. June 30, 2006) (citing In re Ford Motor Co., 345 F.3d 1315 (11th Cir. 2003)); Powers v. Thomas M. Cooley Law Sch., Case No. 5:05-CV-117, 2006 U.S. Dist. LEXIS 67706, at *14 (W.D. Mich. Sept. 21, 2006). 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, 2006 U.S. Dist. LEXIS 48551, at *9 **[**21]** (citing Simon Prop. Group LP v. MySimon, Inc., 194 F.R.D. 639, 640-641 (S.D. Ind. 2000)). Courts have been reluctant to rely on **[*318]** mere skepticism or bare allegations that the responding party has failed to comply with its discovery duties. The Scotts Co., 2007 U.S. Dist. LEXIS 43005, at *6; Powers, 2006 U.S. Dist. LEXIS 67706, at *15; [8] *cf.* Balfour Beatty Rail, Inc. v. Vaccarello, Case No. 3:06-CV-551-J-20MCR, 2007 U.S. Dist. LEXIS 3581, at *7 (M.D. Fl. Jan. 18, 2007) (denying access to responding party's hard drives where requesting party failed to demonstrate responding party's non-compliance with its discovery duties); *see also* McCurdy Group v. Am. Biomedical Group, Inc., 9 Fed. Appx. 822, 831 (10th Cir. 2001) (noting that skepticism alone is not sufficient to permit direct access to an opponent's electronic storage device).

HN13 Even if the requesting party makes this threshold showing, courts should not permit the requesting party itself to access the opponent's storage device; rather, only a qualified expert should be afforded such access, Diepenhorst, 2006 U.S. Dist. LEXIS 48551, at *7; *accord* In re Honza, 242 S.W.3d 578, 583 n.8 (Tex. App.--Waco 2008, pet. denied) (noting that ″the expert's qualifications are of critical importance when access to another party's computer hard drives or similar data storage is sought″), and only when there is some indication that retrieval of the data sought is feasible. *See* Calyon v. Mizuho Sec. USA Inc., 07 Civ. 02241 (RO) (DF), 2007 U.S. Dist. LEXIS 36961, at *17-18 (S.D.N.Y. May 18, 2007); Antioch Co. v. Scrapbook Borders, Inc., 210 F.R.D. 645, 652 (D. Minn. 2002) **[**23]** (citing Playboy Enters. v. Welles, 60 F. Supp. 2d 1050, 1055 (S.D. Cal. 1999)). Due to the broad array of electronic information storage methodologies, the requesting party must become knowledgeable about the characteristics of the storage devices sought to be searched in order to demonstrate the feasibility of electronic retrieval in a particular case. And consistent with standard prohibitions against ″fishing expeditions,″ *see, e.g.,* In re CSX Corp., 124 S.W.3d 149, 153 (Tex. 2003); Texaco, Inc. v. Sanderson, 898 S.W.2d 813, 815 (Tex. 1995), a court may not give the expert carte blanche authorization to sort through the responding party's electronic storage device. *See* Thielen v. Buongiorno USA, Inc., Case No. 1:06-CV-16, 2007 U.S. Dist. LEXIS 8998, at *7-8 (W.D. Mich. Feb. 8, 2007). Instead, courts are advised to impose reasonable limits on production. *See* In re CSX Corp., 124 S.W.3d at 152; The Scotts Co., 2007 U.S. Dist. LEXIS 43005, at *5; *see also* Ford, 345 F.3d at 1317 (noting the importance of establishing protocols for the forensic search of a party's hard drives, such as designating search terms to restrict the search). Courts must also address privilege, privacy, and confidentiality **[**24]** concerns. Calyon, 2007 U.S. Dist. LEXIS 36961, at *14; Frees, Inc. v. McMillian, Civil Action No. **[*319]** 05-1979, 2007 U.S. Dist. LEXIS 4343, *9 (W.D. La. Jan. 22, 2007).

Finally, ***HN14*** federal courts have been more likely to order direct access to a responding party's electronic storage devices when there is some direct relationship between the electronic storage device and the claim itself. *See* Cenveo Corp. v. Slater, No. 06-CV-2632, 2007 U.S. Dist. LEXIS 8281, at *4 (E.D. Penn. Feb. 2, 2007); Frees, 2007 U.S. Dist. LEXIS 4343, at *9; Ameriwood Indus., Inc. v. Liberman, No. 4:06CV524-DJS, 2006 U.S. Dist. LEXIS 93380, at *5 (E.D. Mo. Dec. 27, 2006); Balboa Threadworks, Inc. v. Stucky, Case No. 05-1157-JTM-DWB, 2006 U.S. Dist. LEXIS 29265, *12 (D. Kan. Mar. 24, 2006). For example, in *Ameriwood Industries*, Ameriwood sued several former employees claiming they improperly used

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[8] *See also* White v. Graceland Coll. Ctr. for Prof'l Dev. & Lifelong Learning, Inc., Civil Action No. 07-2319-CM, 2009 U.S. Dist. LEXIS 22068, at *13 (D. Kan. Mar. 18, 2009) (allowing direct access where requesting party's expert noted discrepancies in the metadata of certain produced emails); Matthews v. Baumhaft, Case No. 06-11618, 2008 U.S. Dist. LEXIS 42396, at *5 (E.D. Mich. May 29, 2008) **[**22]** (allowing direct access upon a showing of responding party's discovery misconduct); Ferron v. Search Cactus, L.L.C., Case No. 2:06-CV-327, 2008 U.S. Dist. LEXIS 34599, at *8 (S.D. Ohio Apr. 28, 2008) (allowing direct access where responding party ″failed to fulfill his 'duty to preserve information because of pending or reasonably anticipated litigation'″) (quoting FED. R. CIV. P. 37 notes of the advisory committee to the 2006 amendments).

Ameriwood's computers, confidential files, and confidential information to sabotage Ameriwood's business by forwarding its customer information and other trade secrets from Ameriwood's computers to the employees' personal email accounts. *2006 U.S. Dist. LEXIS 93380, at *2, *9*. Based in part on the close relationship between **[**25]** Ameriwood's claims and the employees' computer equipment, the trial court justified ″allowing an expert to obtain and search a mirror image of [the employee] defendants″ hard drives. *Id., at *6*. Similarly, in *Cenveo Corp*., Cenveo sued several former employees for improperly using its computers, confidential trade information, and trade secrets to divert business from Cenveo to themselves. *2007 U.S. Dist. LEXIS 8281, at *1*. Borrowing from *Ameriwood*, the district court authorized a similar order ″[b]ecause of the close relationship between plaintiff's claims and defendants' computer equipment.″ *Id. at *4*. Finally, in *Frees*, a former employee was sued for using company computers to remove certain proprietary information. *2007 U.S. Dist. LEXIS 4343, at *2*. Noting that the employee's computers would be ″among the most likely places [the employee] would have downloaded or stored the data allegedly missing,″ *id., at *5*, the court allowed direct access to the employee's work and home computers. *Id*.

4. HFG did not make the necessary showing

In this case, HFG's motion relied primarily upon discrepancies and inconsistencies in Weekley's production. According to HFG, Weekley only produced ″a handful **[**26]** of emails from Russell Rice, and one email from Biff Bailey,″ Weekley's Division President and Land Acquisitions Manager respectively, while producing ″no emails from the email accounts of Scott Thompson or Joe Vastano, both of whom . . . were very involved with the [s]ubdivision.″ Additionally, HFG expressed concern about the limited number of emails relating to the Slope Stability Analysis it received despite the importance of that report. Beyond Weekley's meager document production, HFG relied upon Burchfield's testimony that Weekley employees do not save deleted emails to their hard drives, and that Burchfield had ″no earthly idea . . . whether [the deleted emails are] something a forensic specialist could go in and retrieve.″

From this testimony, the trial court could have concluded that HFG made a showing that Weekley did not search for relevant deleted emails that HFG requested. But it does not follow that a search of **[*320]** the Employees' hard drives would likely reveal deleted emails or, if it would, that they would be reasonably capable of recovery. HFG's conclusory statements that the deleted emails it seeks ″must exist″ and that deleted emails are in some cases recoverable is not **[**27]** enough to justify the highly intrusive method of discovery the trial court ordered, which afforded the forensic experts ″complete access to all data stored on [the Employees'] computers.″ The missing step is a demonstration that the particularities of Weekley's electronic information storage methodology will allow retrieval of emails that have been deleted or overwritten, and what that retrieval will entail. A complicating factor is the some two-and-a-half years that passed between the time any responsive emails would have been created and the time HFG requested them. Under these circumstances, it is impossible to determine whether the benefit of the forensic examination the trial court ordered outweighs the burden that such an invasive method of discovery imposed. *Compare Honza, 242 S.W.3d at 583 n.8*.

5. This case differs from *Honza*

We understand the trial court's predicament, as state law in this area is not clearly defined and the parties' discovery postures shed more heat than light upon the situation. That being the case, the trial court apparently followed the protocol set forth in the only Texas case to address a similar situation. *See Honza, 242 S.W.3d 578*. In *Honza*, A & W Development, **[**28]** L.L.C. assigned to Wesley F. Honza and Robert A. Honza the right to purchase a tract of land under a real estate contract. *Id. at 579*. Under the terms of the assignment, A & W retained the right to purchase a portion of the assigned tract for construction of a street. *Id*. According to A & W, an earlier version of the assignment made no mention of a purchase price upon exercise of the right because the consideration negotiated for the partial assignment included what the Honzas should receive for the street. *Id*. When A & W decided to exercise its right, the Honzas demanded that A & W pay additional consideration. *Id. at 580*. A & W sued the Honzas seeking declaratory relief and alleging various theories of recovery. In the course of discovery, the Honzas produced two drafts of the partial assignment in electronic form. *Id. at 580, 583*. However, they did not produce or otherwise make available metadata [9] associated with those documents. *Id. at 580*. The

[9] According to the federal rules advisory committee, metadata is ″[i]nformation describing the history, tracking, or management of an electronic file.″ FED. R. CIV. P. 26(f) notes of the advisory committee to the 2006 amendments.

first trial resulted in a mistrial, after which A & W moved to gain access to the Honzas hard drives to obtain the metadata necessary to identify the points in time when the partial assignment draft was modified. *Id*. The trial court granted **[**29]** A & W's motion, crafting a protocol similar to the one ordered in this case. The court of appeals affirmed the trial court's order, *id. at 579*, and we denied mandamus relief.

Despite the undeniable similarities between the *Honza* order and the one presented here, there are several important distinctions concerning the contexts in which the two orders were granted. First, in *Honza*, A & W sought metadata associated with two documents that had already been shown to exist; indeed, the Honzas produced those documents in electronic form in response to discovery requests propounded before the first trial. *Id. at 580, 583*. Because the Honzas were required to preserve that evidence once it had been requested, there was a reasonable **[*321]** likelihood that a search of the Honzas' computers would reveal the information A & W sought. In this case, on the other hand, the potential for successful recovery of the Employees' deleted emails over a two-and-a-half-year period is much less **[**30]** clear.

Moreover, in *Honza* there was a direct relationship between the hard drives sought and A & W's claims. As the court of appeals noted, identification of the points in time when the partial assignment draft was modified directly concerned ″the issue of whether [the Honzas] altered the partial assignment after the parties concluded their agreement but before the document was presented for execution.″ *Id. at 580*. In contrast, although the deleted emails HFG seeks in this case might reveal circumstantial evidence that the representations Weekley made in the Estoppel Certificate were misleading, there is no claim that the Estoppel Certificate itself was tampered with. While we recognize that a more tenuous link between the electronic storage device and the claim itself is not dispositive, it is a factor trial courts should consider.

Finally, in *Honza* there was extensive testimony from A & W's expert about his experience and qualifications before access to the Honzas' computers was ordered. *Id. at 583 n.8*. 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 **[**31]** the particularities of the specific storage devices at issue, or that the search methodology would likely allow retrieval of relevant deleted emails. Absent some indication that the experts are familiar with the particularities of the 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, *Honza* does not support the trial court's order. We conclude that by ordering forensic examination of Weekley's hard drives without such information, the trial court abused its discretion. *See In re CSX Corp., 124 S.W.3d at 152*; *In re Am. Optical Corp., 988 S.W.2d 711, 714 (Tex. 1998)*.

Because the trial court abused its discretion by granting HFG's motion without the requisite showing, we need not reach Weekley's alternative arguments that the search terms the trial court ordered are overly broad, or that the trial court's order improperly requires Weekley to create the equivalent of a ″privilege log″ as to irrelevant documents that the search might produce. However, because trial courts should be mindful of protecting sensitive information and utilize the least **[**32]** intrusive means necessary to facilitate discovery of electronic information, the trial court should consider these arguments on remand.

D. Summary of *Rule 196.4* Procedure

HN15 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. *TEX. R. CIV. P. 191.2*. Accordingly, prior 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 maybe 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,″ **[*322]** failure to become familiar with relevant systems early on can greatly complicate preservation issues, increase uncertainty in the discovery process, and raise the risk of disputes. FED. R. CIV. P. 26(f) notes of the **[**33]** advisory committee to the 2006 amendments.

With these overriding principles in mind, ***HN16*** we summarize the proper procedure under *Rule 196.4*:

-- the party seeking to discover electronic information must make a specific request for that information and specify the form of production. *TEX. R. CIV. P. 196.4*.

-- The responding party must then produce any electronic information that is ″responsive to the request and . . . reasonably available to the respondingparty in its ordinary course of business.″ *Id.*

-- 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 object on those grounds. *Id.*

-- The parties should make reasonable efforts to resolve the dispute without court intervention. *TEX. R. CIV. P. 191.2*.

HN17 -- If the parties are unable to resolve the dispute, either party may request a hearing on the objection, *TEX. R. CIV. P. 193.4(a)*, at which the responding party must demonstrate that the requested information is not reasonably available because of undue burden or cost, *TEX. R. CIV. P. 192.4(b)*.

-- If the trial court determines the requested information is not reasonably available, **[**34]** 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.

-- If 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. *TEX. R. CIV. P. 192.6(b)*. The requesting party must also pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information. *TEX. R. CIV. P. 196.4*.

-- Finally, 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.

E. Is Mandamus Appropriate

HN18 Mandamus relief is available when the trial court compels production beyond the permissible bounds of discovery. *See Am. Optical, 988 S.W.2d at 714* (no adequate appellate remedy existed where the trial court ordered overly broad discovery). Intrusive discovery measures -- such as ordering direct **[**35]** access to an opponent's electronic storage device -- require, at a minimum, that the benefits of the discovery measure outweigh the burden imposed upon the discovered party. *TEX. R. CIV. P. 196.4*, *192.4*. *In re Prudential Ins. Co. of Am., 148 S.W.3d 124, 135-36 (Tex. 2004)*. ″If an appellate court cannot remedy a trial court's discovery error, then an adequate appellate remedy does not exist.″ *In re Dana Corp., 138 S.W.3d 298, 301 (Tex. 2004)*.

In this case, HFG failed to make the good-cause showing necessary to justify the trial court's order. The harm **[*323]** Weekley will suffer from being required to relinquish control of the Employees' hard drives for forensic inspection, and the harm that might result from revealing private conversations, trade secrets, and privileged or otherwise confidential communications, cannot be remedied on appeal. *See Walker v. Packer, 827 S.W.2d 833, 843 (Tex. 1992)* (noting that ***HN19*** a party will not have an adequate remedy by appeal when a trial court's order ″imposes a burden on the producing party far out of proportion to any benefit that may obtain to the requesting party″) (citing *Sears, Roebuck & Co. v. Ramirez, 824 S.W.2d 558 (Tex. 1992))*; *Gen. Motors Corp. v. Lawrence, 651 S.W.2d 732, 733 (Tex. 1983)*. **[**36]** Accordingly, Weekley is entitled to mandamus relief.

III. Conclusion

We conditionally grant the writ of mandamus and order the trial court to vacate its Order. We are confident the trial court will comply, and our writ will issue only if it does not. We note that HFG is not precluded from seeking to rectify the deficiencies we have identified.

Harriet O'Neill

Justice

OPINION DELIVERED: August 28, 2009

TAB T

Document(1)

1. *In re Harris, 315 S.W.3d 685*
   Client/Matter: -None-

In re Harris

Court of Appeals of Texas, First District, Houston

July 1, 2010, Opinion Issued

NO. 01-09-00771-CV

Reporter
315 S.W.3d 685; 2010 Tex. App. LEXIS 5122

IN RE ART HARRIS, Relator

Prior History: *In re Harris, 2010 Tex. App. LEXIS 2955 (Tex. App. Houston 1st Dist., Apr. 22, 2010)*

Core Terms

trial court, special master, discovery, appointment, hard drive, documents, electronic, emails, request for production, forensic, party's, storage, ordering, argues, electronic media, requesting party, requests, responding party, abused, issues, forensic examination, responsive, discovery request, devices, drives, orig, privileged, responded, expenses, clarify

Case Summary

Procedural Posture

Relator television correspondent filed a petition for a writ of mandamus, which sought an order directing respondent trial court to withdraw certain discovery orders against him in a defamation action brought by real party in interest grandmother.

Overview

The grandmother brought an action against the correspondent and others, alleging that television broadcasts and internet publications defamed her and harmed her efforts to seek custody and visitation of her granddaughter, who was the child of a deceased celebrity. The correspondent filed a petition for a writ of mandamus requesting that the court direct the trial court to withdraw certain discovery orders against him. The court found that the trial court abused its discretion in ordering overbroad discovery and in failing to determine whether the documents sought by the grandmother were relevant under *Tex. R. Civ. P. 192.3(a)* or reasonably calculated to lead to the discovery of evidence relevant to her claims. The record did not contain any evidence sufficient to satisfy the stringent standard for compelling production of the correspondent's electronic storage devices under *Tex. R. Civ. P. 196.4*. The grandmother failed to show that there was a direct relationship between the electronic storage devices and her claims. The trial court abused its discretion in appointing a special master because the case did not meet the ″exceptional case/good cause″ criterion of *Tex. R. Civ. P. 171*.

Outcome

The court conditionally granted the petition for a writ of mandamus and directed the trial court to withdraw its discovery orders against the correspondent.

LexisNexis® Headnotes

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN1 Mandamus relief is appropriate only if a trial court abuses its discretion and no adequate appellate remedy exists. The heavy burden of establishing an abuse of discretion and an inadequate appellate remedy is on the party resisting discovery. A trial court commits a clear abuse of discretion when its action is so arbitrary and unreasonable as to amount to a clear and prejudicial error of law.

Civil Procedure > Discovery & Disclosure > Discovery > Relevance of Discoverable Information

HN2 *Tex. R. Civ. P. 192.3(a)* allows a party to obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party.

Civil Procedure > Discovery & Disclosure > General Overview

HN3 See *Tex. R. Civ. P. 192* cmt. 1.

Civil Procedure > Discovery & Disclosure > Discovery > Undue Burdens in Discovery

HN4 See *Tex. R. Civ. P. 192.4*.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > Discovery & Disclosure > Discovery > Undue Burdens in Discovery

HN5 Determinations regarding the scope of discovery are largely within a trial court's discretion. However, the discovery rules explicitly encourage trial courts to limit discovery when the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. *Tex. R. Civ. P. 192.4(b)*.

Civil Procedure > ... > Discovery > Misconduct During Discovery > Motions to Compel

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN6 A discovery order that compels overly broad discovery well outside the bounds of proper discovery is an abuse of discretion for which mandamus is the proper remedy.

Civil Procedure > Discovery & Disclosure > General Overview

HN7 *Tex. R. Civ. P. 193* imposes a duty upon parties to make a complete response to written discovery based upon all information reasonably available, subject to objections and privileges. *Tex. R. Civ. P. 193* cmt. 1. It permits a party to object to discovery as overbroad and to refuse to comply with it entirely. *Tex. R. Civ. P. 193* cmt. 2. A central consideration in determining overbreadth is whether the request could have been more narrowly tailored to avoid including tenuous information and still obtain the necessary, pertinent information. Discovery may not be used as a fishing expedition or to impose unreasonable discovery expenses on the opposing party.

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

HN8 Mandamus relief is available when a trial court does not follow guiding rules and principles and reaches an arbitrary and unreasonable decision.

Civil Procedure > Discovery & Disclosure > Discovery > Burdens & Expenses

Civil Procedure > ... > Discovery > Electronic Discovery > Discoverability of Electronic Information

HN9 See *Tex. R. Civ. P. 196.4*.

Civil Procedure > ... > Discovery > Electronic Discovery > General Overview

HN10 *Tex. R. Civ. P. 196.4* requires a specific request to ensure that requests for electronic information are clearly understood and disputes avoided.

Civil Procedure > Discovery & Disclosure > Discovery > Burdens & Expenses

Civil Procedure > ... > Discovery > Electronic Discovery > Discoverability of Electronic Information

Civil Procedure > ... > Discovery > Misconduct During Discovery > Motions to Compel

HN11 When a specific request for electronic information has been lodged, *Tex. R. Civ. P. 196.4* requires the responding party to either produce responsive electronic information that is reasonably available to the responding party in its ordinary course of business, or object on grounds that the information cannot through reasonable efforts be retrieved or produced in the form requested. Once the responding party raises a *Rule 196.4* objection, either party may request a hearing at which the responding party must present evidence to support the objection. *Tex. R. Civ. P. 193.4(a)*. To determine whether requested information is reasonably available in the ordinary course of business, the trial court may order discovery, such as requiring the responding party to sample or inspect the sources potentially containing information identified as not reasonably available. If the responding party fails to meet its burden of production, the trial court may order production subject to the discovery limitations imposed by *Rule 192.4*.

Civil Procedure > ... > Discovery > Electronic Discovery > Discoverability of Electronic Information

HN12 Providing access to information by ordering examination of a party's electronic storage device is particularly intrusive and should be generally discouraged, just as permitting open access to a party's file cabinets for general perusal would be.

Civil Procedure > Discovery & Disclosure > Discovery > Burdens & Expenses

Civil Procedure > ... > Discovery > Electronic Discovery > Discoverability of Electronic Information

HN13 As a threshold matter, a requesting party must show that a responding party has somehow defaulted in its obligation to search its records and produce 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 can recover deleted relevant materials. Courts are reluctant to rely on mere skepticism or bare allegations that a responding party has failed to comply with its discovery duties. Even if a requesting party makes this threshold showing, courts should not permit the requesting party itself to access an opponent's storage device; rather, only a qualified expert should be afforded such access, and only when there is some indication that retrieval of the data sought is feasible. Due to the broad array of electronic information storage methodologies, a requesting party must become knowledgeable about the characteristics of the storage devices sought to be searched in order to demonstrate the feasibility of electronic retrieval in a particular case. Consistent with standard prohibitions against ″fishing expeditions,″ a court may not give an expert carte blanche authorization to sort through a responding party's electronic storage device. Instead, courts are advised to impose reasonable limits on production.

Civil Procedure > ... > Discovery > Electronic Discovery > Discoverability of Electronic Information

HN14 Federal courts are more likely to order direct access to a responding party's electronic storage devices when there is some direct relationship between the electronic storage device and the claim itself.

Civil Procedure > Discovery & Disclosure > Discovery > Undue Burdens in Discovery

HN15 If a responding party meets its burden by demonstrating that retrieval and production of requested information will be overly burdensome, the trial court may nevertheless order targeted production upon a showing by the requesting party that the benefits of ordering production outweigh the costs. *Tex. R. Civ. P. 192.4*.

Civil Procedure > ... > Discovery > Electronic Discovery > Discoverability of Electronic Information

HN16 To obtain discovery of data or information that exists in electronic or magnetic form, a requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced.

Civil Procedure > ... > Discovery > Electronic Discovery > Discoverability of Electronic Information

HN17 Direct access to a responding party's electronic storage devices is more likely to be appropriate when there is some direct relationship between the electronic storage device and the claim itself.

Civil Procedure > Discovery & Disclosure > Discovery > Undue Burdens in Discovery

HN18 *Tex. R. Civ. P. 192.4* requires a trial court to weigh the benefits of production against the burdens imposed when requested information is not reasonably available in the ordinary course of business.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > Discovery & Disclosure > General Overview

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN19 Although a trial court has broad discretion to define the scope of discovery, it can abuse its discretion by acting unreasonably.

Civil Procedure > Judicial Officers > Masters > Appointment of Masters

HN20 Parties may consent to the appointment of a special master.

Civil Procedure > Judicial Officers > Masters > Appointment of Masters

HN21 See *Tex. R. Civ. P. 171*.

Civil Procedure > Judicial Officers > Masters > Compensation of Masters

HN22 *Tex. R. Civ. P. 171* provides that a court shall award reasonable compensation to a master to be taxed as costs of suit.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > Judicial Officers > Masters > Appointment of Masters

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN23 Appointment of a master lies within the sound discretion of a trial court and should not be reversed except for a clear abuse of that discretion. However, it is improper for an order appointing a special master to cast the master in the role of advocate rather than merely referee in the underlying proceeding.

Civil Procedure > ... > Discovery > Electronic Discovery > Discoverability of Electronic Information

HN24 A forensic examiner is a computer expert whose sole purpose is to create forensic images of a particular electronic storage device and then to search the images for specified documents using a predesignated list of search terms. A forensic expert as contemplated by *Tex. R. Civ. P. 196.4* and Weekley Homes is not given any authority to conduct hearings, to make recommendations regarding what evidence should be produced, or to require the production of any particular storage device or other item of evidence.

Civil Procedure > Discovery & Disclosure > Discovery > Burdens & Expenses

HN25 *Tex. R. Civ. P. 196.4* contemplates that a requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.

Civil Procedure > Judicial Officers > Masters > Appointment of Masters

HN26 While the ″exceptional cases/good cause″ criterion of *Tex. R. Civ. P. 171* is not susceptible of precise definition, the Texas Supreme Court holds that this requirement cannot be met merely by showing that a case is complicated or time-consuming, or that the court is busy. However, courts find sufficient justification for the appointment of a master to supervise discovery questions that require extensive examination of highly technical and complex documents by a person having both a technical and a legal background.

Civil Procedure > Judicial Officers > Masters > Appointment of Masters

Civil Procedure > ... > Discovery > Electronic Discovery > General Overview

HN27 Electronic discovery is a common component of modern litigation, and its mere presence alone does not constitute a showing of good cause for appointing a special master.

Counsel: **[**1]** For Appellant: Amanda L Bush, Charles L. Babcock, Nancy Hamilton, Jackson Walker L.L.P., Houston, TX.

For Appellee: Bonnie Stern, Beverly Hills, Ca; Diana E. Marshall, Marshall & Lewis, LLP, Houston, Tx; Harry Paul Susman, Richard Wolf Hess, Susman Godfrey LLP, Houston, TX; Keith Miles Aurzada, Bryan Cave, L. L. P., Dallas, TX; L. Lin Wood, Luke A. Lantta, Bryan Cave, LLP, Atlanta, GA; Lyndal Harrington, Houston, TX; Michael Meyer, Neil C. McCabe, The O'Quinn Law Firm, Houston, TX; Teresa Stephens, North Richland Hills, TX; Walter A. Herring, Bryan Cave LLP, Dallas, Tx; Nelda Turner, Gladewater, TX.

Judges: Panel consists of Justices Keyes, Alcala, and Hanks.

Opinion by: Evelyn V. Keyes

Opinion

[*688] Original Proceeding on Petition for Writ of Mandamus

OPINION ON REHEARING

On April 22, 2010, a panel of this Court conditionally granted relator Art Harris's petition for writ of mandamus. Real party in interest Virgie Arthur filed a motion for rehearing on May 5, 2010. We deny Arthur's motion for rehearing, but we withdraw our April 22, 2010 opinion and issue this opinion in its place.

This is a petition for writ of mandamus filed by relator, Art Harris, requesting that we direct the trial court to withdraw discovery orders **[**2]** against Art Harris issued on January 27, 2009, May 11, 2009, and August 28, 2009. [1] In five issues, Harris argues that the trial court abused its discretion: (1) in ordering Harris to turn over ″electronic media″ for forensic examination when there was neither a pending request for production nor any request for production of documents with which he had not complied; (2) in ordering Harris to respond to the Special Master's questions and to assess usage and contents of other electronic media listed in the Special Master's August 17, 2009 email; (3) in refusing to apply *Texas Rule of Civil Procedure 193.3* and other discovery procedures on the treatment of privileged documents and creation of privilege logs; (4) by failing to consider *Rule 171* in appointing a special master to conduct forensic computer examinations; (5) by appointing a special master to investigate and inquire into patterns of discovery abuse, or, in the alternative, by failing to

[1] The underlying lawsuit is *Virgie Arthur v. Howard K. Stern, Bonnie Stern,* **[**3]** *Lyndal Harrington, Art Harris, Nelda Turner, Teresa Stephens, Larry Birkhead, Harvy Levin, and TMZ Productions, Inc.*, No. 2008-24181, filed April 28, 2008 in the 280th District Court of Harris County Texas, Honorable Tony Lindsay presiding. After this petition for writ of mandamus was filed, Arthur joined CBS as a defendant.

remove a special master who is acting outside the limitations and specifications stated in the order appointing him, including reading attorney-client communications.

Background

On April 28, 2008, Virgie Arthur filed the underlying proceeding against Howard K. Stern, Bonnie Stern, Lyndal Harrington, Art Harris, Nelda Turner, Teresa Stephens, Larry Birkhead, Harvey Levin, and TMZ Productions, Inc., alleging that certain syndicated television broadcasts and internet publications defamed her and harmed her efforts to seek custody and visitation of her granddaughter, who is the child of Vickie Lynn Marshall, also known as Anna Nicole Smith. Art Harris is a correspondent for *Entertainment Tonight*, and Arthur alleges in her petition that he participated in defaming Arthur through internet postings, news articles, and an interview with a relative of Vickie Lynn Marshall's that was broadcast on *Entertainment Tonight* and that Harris conspired with Howard K. Stern, Marshall's former lawyer and companion, and others to defame Arthur.

[*689] On August **[**4]** 1, 2008, Arthur served Art Harris with her First Request for Production. The requests for production instructed Harris to ″[p]roduce documents and tangible things in the forms as they are kept in the ordinary course of business″ and to ″[p]roduce electronically stored information in native format.″ The instructions in the request for production further stated that, for any electronically stored information, Harris should:

> [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, **[**5]** 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.

Arthur's request for production number one requested that Harris ″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. Arthur's request for production number two requested that Harris ″[p]roduce all documentation of the identity and/or contact information″ for the thirty-eight email addresses listed in request number one, including ″website registration information, names, physical addresses, telephone numbers, email addresses, and IP addresses.″

Request for production number three requested that Harris ″[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.″ The request then listed thirty-nine individuals or entities related to Arthur's claims against Harris and **[**6]** the other defendants in the case, including several parties' attorneys.

At this time Harris, Bonnie Stern, Lyndal Harrington, and Nelda ″Rose″ Turner were all represented by attorney William Ogden. On August 28, 2008, Harris served Arthur with his objections and responses to Arthur's document requests. Harris objected to the requested discovery based on a qualified privilege due to his status as a professional journalist, arguing that ″[t]he qualified journalist privilege . . . arises as a matter of common law and constitutional law.″ Harris ″invoke[d] the privilege and request[ed] a protective order against the production of material obtained in newsgathering.″ Harris also

objected to the requests as ″unreasonably overbroad, prohibitively expensive, and unduly burdensome″ under *Texas Rule of Civil Procedure 192.4(a)* and argued that ″the burden and expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the party's resources and the issues at stake in the litigation,″ citing *Texas Rule of Civil Procedure 192.4(b)*. Finally, he objected that the requests constituted ″an unreasonable **[*690]** and unwarranted invasion of personal privacy.″

On October **[**7]** 12, 2008, Arthur filed a motion to compel, arguing that Harris and the other defendants represented by Ogden had failed to produce relevant documents. Ogden responded on behalf of all four defendants, and a hearing was held on November 21, 2008. On December 4, 2008, Harris produced more than 300 pages of documents. [2]

On December 8, 2008, Arthur filed her Second Motion to Compel Responses to Requests for Production from Defendant Bonnie Stern. The motion stated that Arthur had served Bonnie Stern with requests for production but had not received any responsive documents from her, and it requested that the trial court compel Bonnie Stern to produce the requested documents and order her to ″make her computer hard drive available to [Arthur] for forensic examination and capture of information.″

On December 11, 2008, the trial court held another hearing on the discovery disputes. Arthur's counsel represented that Arthur had motions on discovery disputes pending for Bonnie Stern, Art Harris, Lyndal Harrington, and Rose Turner. Ogden appeared as counsel for Harris, Bonnie Stern, Lyndal Harrington, and Rose Turner. Arthur's counsel requested production of Bonnie Stern's hard drive at the hearing, arguing spoliation of the evidence based on some emails that were produced from another source. The following exchange occurred:

> [Trial Court]: Okay. So your request for production does not include her [Bonnie Stern's] **[**9]** hard drive but that's what you're asking for right now. Is that right?
>
> [Arthur]: Yes, Your Honor.
>
> [Ogden]: We have never been served with the request, discovery request to produce her hard drive which we would oppose.
>
> . . . .
>
> [Trial Court]: [P]rocedurally it seems to me a little off track for--
>
> [Arthur]: Your Honor, it's not exactly true that we haven't ever requested access to the hard drive. We contacted Mr. Ogden and the other defendants earlier in the litigation and suggested to them that the way to go, given the experts I've talked to, is to have the Court--apply to the Court for the appointment of an independent computer forensic examiner, a master. Under the rules that can be done and that person, the neutral, can examine the hard drive that needs to be examined. . . .
>
> . . . .
>
> [Trial Court]: Okay. Since we all actually know what he wants, do we really care if he files a formal request or do **[*691]** we just decide to rule on the request and save a hearing?
>
> [Ogden]: I do care because I don't think it's appropriate for anyone to go--
>
> . . . .

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[2] It is unclear when the trial court ruled on Arthur's October 12, 2008 motion. There was no written order immediately following the November 21, 2008 hearing, nor was there a transcript of the hearing. However, Arthur's second motion to compel discovery from Bonnie Stern states that the trial court granted the motion to compel on November 21, 2008 and that Arthur subsequently received a packet containing some documents from Turner and Harris. Harris represents that the second motion to compel discovery from Bonnie Stern was the only discovery motion pending at the time the trial court issued its January 27, 2009 order compelling discovery; however, at the December 11, 2008 hearing, Arthur's counsel represented that discovery requests were still pending against Harris and other defendants. During oral argument, counsel for Arthur acknowledged that there was no motion to **[**8]** compel production pending against Harris at the time of the trial court's January 27, 2009 order.

[Trial Court]: I understand that you object to producing the hard drive and to having somebody fish through it.

[Ogden]: Correct.

[Trial Court]: But do you object **[**10]** to having the Court rule one way or the other on it today even though there's no actual written request for production for that?

[Ogden]: I do respectfully because I'd like the opportunity to brief that and file a response.

After discussing the relationship between Arthur's claims against Bonnie Stern and her brother, Howard K. Stern, Arthur's counsel stated that he would ″file a motion this afternoon for an independent forensic examiner.″ [3] The trial court asked if the request was ″[f]or both computers or just Bonnie's?″ Arthur's counsel responded:

I think the--it would probably be best to proceed step by step; that is, to see if the Court would approve for Bonnie the appointment of the forensic computer examiner. If we need to utilize his or her services more down the road, then the order could be amended to do that.

I suspect we will have to because Teresa Stephens, who was very much involved in this conspiracy . . . has written the Court and has informed this counsel that all of her e-mails were on a[n] external server and they all disappeared while her computer was locked up in a back vault. That's not to suggest that our discovery dispute with Rose Turner is over because we would **[**11]** at some point probably want to approach the Court and say that she has a lot more that we've requested other than the emails that she's produced that she should produce.

Ogden left the hearing to call Bonnie Stern in order to consult with her regarding production of her hard drive to a forensic examiner. On returning to the hearing, Ogden stated that Bonnie Stern agreed to produce her hard drive to a forensic examiner to ″look for and copy any emails or exchanges between the 40 web addresses and email addresses that are listed in the request for production,″ provided that her bookkeeping business records would not be interfered with. The trial court stated that she could limit the order so that her unrelated business would not be examined, and Ogden replied, ″That sounds perfect.″

The parties then discussed whether Ogden's other clients, including Harris, would submit to forensic examination of their computers. Ogden stated on the record that he was not able to reach them, and the following exchange occurred:

[Trial Court]: All right. Well, we'll go back then to the notion that I'm granting the motion to compel **[**12]** as to one and three with regard to each of those and you all can either do it the unagreed way or the more or less agreed way after you get out of here.

[Ogden]: I'm not sure what the unagreed way is but I will--

[Trial Court]: The unagreed way is she just has to turn it over--or they, whoever they are, just have to turn it over.

[Ogden]: They--they have--they've done that to the extent they can.

[Trial Court]: No, I'm ordering the whole thing, not just what you chose to produce.

[*692] [Ogden]: When you say ″turn it over,″ you mean hand [Arthur's counsel] their computer--

[Trial Court]: No. . . . I mean that as to Request for Productions [sic] 1 and 3, it's granted. Produce.

[Ogden]: So they can--they can print those off and deliver the printed copies?

[Trial Court]: Right. . . . Or you can agree after you get out of here and get a chance to talk to them for what we are doing with Ms. Bonnie Stern's computer.

The trial court then informed the parties that it was their responsibility to select an examiner.

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[3] The record does not contain a motion for appointment of a forensic examiner.

Over the following weeks, Ogden and Arthur's counsel communicated regarding the selection of the forensic examiner. Ogden suggested Craig Ball, along with several other candidates, and the parties **[**13]** eventually selected Craig Ball. On December 17, 2008, Arthur's counsel stated in an email that he had been informed that Turner and Harrington also desired to have their computers examined by Craig Ball, and he asked "What is Art Harris's position?" Ogden's co-counsel responded that Harris had opted to produce non-privileged documents rather than agree to the independent forensic examination.

On January 2, 2009, Ogden and his firm filed an unopposed motion to withdraw as attorney for all four defendants, including Harris. On January 5, 2009, Ogden confirmed in an email that Ball was acceptable as a candidate for independent forensic examiner and stated generally in a letter that "Defendants agree to using Craig Ball as the independent forensic examiner. You may file this agreement with the Court pursuant to [Texas Rule of Civil Procedure] 11." On January 20, 2009, Arthur's counsel filed the letter from Ogden in the trial court as a Rule 11 agreement.

On January 21, 2009, the trial court granted Ogden's motion to withdraw as counsel.

On January 27, 2009, the trial court entered an "Order Compelling Production and Appointing Independent Computer Forensic Examiner," which ordered Harris **[**14]** to "produce the documents requested by [Arthur] in her Requests for Production Nos. 1 and 3 for the period of September 20, 2006 through March 14, 2008" and appointed Craig Ball as a "Special Master under the terms and conditions of the Consulting Agreement attached to this Order . . . to conduct an independent forensic examination of the relevant computer hard drives [including Harris's], external hard drives, jump drives, and other such repositories of electronic communications in the possession or control of . . . ART HARRIS . . . for the purpose of locating documents responsive to Plaintiff's Request for Production." [4]

[*693] Attached to this January 27, 2009 order was a consulting agreement, effective December 18, 2008, between Arthur's counsel's firm and Craig Ball. It identified the firm as "the Client" and stated that the client "desires to engage Ball as a

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[4] The order stated:

> On December 11, 2008, this Court heard Plaintiff's Motion to Compel Responses to Requests for Production from Defendants BONNIE STERN, ART HARRIS, AND LYNDAL HARRINGTON and determined that the motion should be granted in part and denied in part. It is therefore
>
> ORDERED, ADJUDGED and DECREED that:
>
> (1) Defendants BONNIE STERN, ART HARRIS, AND LYNDAL HARRINGTON shall produce the documents requested by plaintiff in her Requests for Production Nos. 1 and 3 for the period of September 20, 2006 through March 14, 2008.
>
> (2) At the present time, Defendants BONNIE STERN, ART HARRIS, AND LYNDAL HARRINGTON are not compelled to produce the documents requested by Plaintiff in her Request for Production No. 2.
>
> (3) To facilitate production of these documents, the Court hereby appoints Craig Ball, of Austin, Texas, as a Special Master, under the terms and conditions **[**16]** contained in the Consulting Agreement attached to this Order and incorporated herein as if fully set forth in this Order, to conduct an independent forensic examination of the relevant computer hard drives, external hard drives, jump drives, and other such repositories of electronic communications in the possession or control of Defendants BONNIE STERN, ART HARRIS, AND LYNDAL HARRINGTON, for the purpose of locating documents responsive to Plaintiff's Request for Production. The Special Master shall have discretion to employ or to modify search terms, and he is specifically instructed to:
>
> a. exclude from production email communications between Stern family members that are of a purely personal nature;
>
> b. exclude from production any files or communications relating solely to Ms. Stern's accounting business, or other unrelated businesses of Ms. Stern;
>
> c. capture electronic communications, including but not limited to e-mails, to or from DEFENDANT HOWARD K. STERN'S attorneys, which consist of the law firm of Bryan Cave/Powell Goldstein and its employees, former employees and partners, including but not limited to L. Lin Wood, Nicole J. Wade, John C. Patton, Luke Lantta, Ben Erwin, and B. **[**17]** Lyle, and the Law Offices of Eric Sauerberg, and its employees and partners including

court-appointed neutral computer forensics examiner in Cause No. 2008-24181 in the 280th Judicial District Court of Harris County, Texas on the terms and conditions set forth herein." It further specifies that

> Ball is an independent contractor who will serve as the duly-appointed neutral agent of the Court and is not an employee **[**15]** or agent of Client. Ball does not serve as legal counsel to those Client serves. . . . The obligation to compensate and reimburse Ball timely and fully under this Agreement is not contingent upon the outcome of any claim or action, upon collection of monies from third parties or upon the opinions of testimony that Ball may offer.

On February 2, 2009, Harris's new counsel filed a notice of appearance. On February 3, 2009, Harris filed a motion to clarify the January 27, 2009 order compelling production and appointing the independent computer forensic examiner. A hearing was originally set for February 6, 2009, but was continued until May 8, 2009. At this hearing, Harris's new counsel argued that the trial court had improperly included Harris in the order requiring him to produce his computer and storage devices because Harris had not agreed to surrender his computer. The trial court responded, "It doesn't have to be an agreement. It wasn't an agreement. It was the Court's order and I think I said, All right. **[*694]** We're going to have this stuff from all of these people and I think they were all the subject of the hearing and I'm not quite sure what makes you think they weren't." Harris's counsel also addressed the case *In re Weekley Homes*, [5] which was then pending before the Texas Supreme Court, and argued that there were no requests for production of documents that they had not complied with.

On May 11, 2009, the trial court entered an order denying Harris's motion to clarify. The trial court ordered Harris to "produce the relevant computer hard drives, external hard drives and jump drives ("electronic media") to Special Master Craig Ball in accordance with the Order dated January 27, 2009 and the Consulting Agreement attached thereto, except as where other procedures are specified herein." The trial court ordered Harris

> to contact the Special Master and to deliver the electronic media to him on or before May 19, 2009 at noon, under the terms specified by the Special Master. Immediately upon completion of producing a forensically sound image of the hard drive or other electronic media, as defined in this order, Special Master Ball shall return the original electronic media and computer, if applicable, to Defendant Art Harris. The Special Master shall promptly capture and produce to Defendant Harris a copy of all documents as set out in the order of January 27, 2009.

This order gave Harris fourteen days from the date he received the captured documents to produce a privilege log to the Special Master "listing all documents submitted by Special Master Ball **[**20]** to Defendant Art Harris, which Defendant Art Harris is withholding from Plaintiff and the reasons for withholding the documents from production," and it ordered

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> but not limited to M. Krista Barth, and segregate them in order for the law firm to review and assert any claim of privilege prior to production;
>
> d. capture all remaining electronic communications, including but not limited to emails to or from the persons, entities and email addresses listed in parts 1 and 3 of Plaintiff's Requests for Production, and submit them to Defendants BONNIE STERN, ART HARRIS, AND LYNDAL HARRINGTON for privilege review prior to production;
>
> (4) Within 14 days after receipt of the captured documents from Special Master, the law firm of Bryan Cave/Powell Goldstein, and Defendants BONNIE STERN, ART HARRIS, AND LYNDAL HARRINGTON shall produce a privilege log and submit it, along with the captured documents, to the Court for in camera inspection.
>
> (5) To facilitate the work of the Special Master, this Court ORDERS Defendants BONNIE STERN, ART HARRIS, AND LYNDAL HARRINGTON, at their own expense, TO CONTACT THE SPECIAL MASTER AND TO DELIVER TO HIM THE RELEVANT MEDIA within 10 days of the signing of this order, under terms to be specified by him;
>
> (6) Other than as stated in part (5) above, **[**18]** the costs of the Special Master shall be carried by the Plaintiff, until such time as the Court may determine otherwise.

[5] *In re Weekley Homes*, 295 S.W.3d 309 (Tex. 2009) **[**19]** (orig. proceeding).

that Ball ″produce all documents not listed on the privilege log to [Arthur]″ and ″maintain for the remainder of this lawsuit the electronic media and documents listed on the privilege log.″ The trial court ordered that Arthur pay the costs of the Special Master. Harris then turned over electronic media to the special master, including a Dell desktop computer with an 80 GB hard drive, a Dell laptop computer with a 160 GB hard drive, and an external 200 GB hard drive.

The special master sent emails to Harris's counsel on August 7 and August 11 raising questions regarding Harris's replacement of his hard drive [6] and requesting that Harris give him more information and produce more electronic devices. The special master also sent other defendants emails regarding Harris's electronic media that were eventually posted on Nelda Turner's blog.

On **[**21]** August 14, 2009, Harris's counsel responded by letter to the emails requesting more information and answering the special master's questions regarding the alleged replacement of the hard drive. The special master was not satisfied with this explanation and again requested more information and production of more electronic media from Harris in a series of emails from August 17, 2009 to August 23, 2009.

On August 23, 2009, Harris filed a motion to reconsider the appointment of the special master and request for protective order and stay of appointment, arguing **[*695]** that the appointment of Craig Ball as a special master was made in violation of the requirements of *Texas Rule of Civil Procedure 171*, that Harris was not properly a subject of the order compelling production of his hard drive to Ball, and that Ball acted outside the role of special master. Harris maintained that he had already produced more than three million pages of emails and that the trial court should ″stay and terminate the role of the Special Master immediately.″ Harris also argued that Ball ″has made sarcastic, editorial, and prejudicial comments about [Harris] regarding his date and his style of writing, as well as disclosing **[**22]** information gleaned from emails, some of which we believe were attorney-client communications.″

The trial court held a hearing, and, on August 28, 2009, it signed an order denying Harris's motion to reconsider. The trial court ordered that Harris ″shall within 14 days of this Order respond to Special Master Craig Ball's August 17, 2009 email inquiry and evaluate whether the electronic media mentioned in the email contains communications from the relevant time period.″ The trial court also ordered that Harris ″shall not produce the electronic media referred to in Special Master Craig Ball's August 17, 2009 email at this time″ but that ″nothing shall be deleted or destroyed from Defendant Art Harris's electronic media referred to in Special Master Craig Ball's August 17, 2009 email inquiry.″ Finally, the trial court ordered that Harris ″has until September 28, 2009, to produce a privilege log pertaining to the CD provided to [Harris's] counsel by Special Master Craig Ball on August 28, 2009, and submit it along with the captured documents to the Court for in-camera inspection.″

Harris filed this petition for writ of mandamus on September 4, 2009. We granted his motion for emergency temporary **[**23]** relief suspending the trial court's enforcement of the three disputed orders.

Standard of Review

HN1 Mandamus relief is appropriate only if a trial court abuses its discretion and no adequate appellate remedy exists. *In re CSX Corp., 124 S.W.3d 149, 151 (Tex. 2003)*. The heavy burden of establishing an abuse of discretion and an inadequate appellate remedy is on the party resisting discovery. *Id*. A trial court commits a clear abuse of discretion when its action is ″so arbitrary and unreasonable as to amount to a clear and prejudicial error of law.″ *Id*. (citing *CSR Ltd. v. Link, 925 S.W.2d 591, 596 (Tex. 1996)* (orig. proceeding)).

Orders Compelling Discovery

In his first issue, Harris argues that the trial court abused its discretion by ordering him to turn over ″electronic media″ for forensic examination when there was neither a pending request for production nor any request for production of documents with which he had not complied, he had filed a motion for a protective order, and no motion to compel production was

[6] It appears that the forensic examination shows that Harris had his hard drive replaced on December 16, 2008 or that there was some other evidence that he had deleted a large number of files.

pending against him. In his third issue, he argues that the trial court erred in refusing to apply Texas Rule of Civil Procedure 193.3 and other discovery procedures on the treatment **[**24]** of privileged documents and creation of privilege logs. We address these issues together.

A. Order to Turn Over Documents Without Pending Request for Production or Motion to Compel

Discovery in this case is governed by Texas Rules of Civil Procedure 192.3, **[*696]** 192.4, 193, and 196.4. [7] ***HN2*** Rule 192.3 allows a party to "obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party." TEX. R. CIV. P. 192.3(a). The comments to Rule 192 state, ***HN3*** "While the scope of discovery is quite broad, it is nevertheless confined by the subject matter of the case and reasonable expectations of obtaining information that will aid resolution of the dispute." TEX. R. CIV. P. 192 cmt. 1; *see also* CSX, 124 S.W.3d at 152 ("Although the scope of discovery is broad, requests must show a reasonable expectation of obtaining information that will aid the dispute's resolution.").

Rule 192.4 imposes limitations on the scope of discovery. TEX. R. CIV. P. 192.4. It states:

> ***HN4*** The discovery methods permitted by these rules should be limited by the court if it determines, on motion or on its own initiative and on reasonable notice, that:
> (a) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; or
> (b) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

Id. ***HN5*** Determinations regarding the scope of discovery are largely within the trial court's discretion. In re Colonial Pipeline Co., 968 S.W.2d 938, 941 (Tex. 1998) (citing Dillard Dep't Stores, Inc. v. Hall, 909 S.W.2d 491, 492 (Tex. 1995) (orig. proceeding)). However, the discovery rules "explicitly encourage trial courts to limit discovery when 'the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of **[**26]** the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.'" In re Alford Chevrolet-Geo, 997 S.W.2d 173, 181 (Tex. 1999) (orig. proceeding) (quoting TEX. R. CIV. P. 192.4(b)). "[A] discovery ***HN6*** order that compels overly broad discovery 'well outside the bounds of proper discovery' is an abuse of discretion for which mandamus is the proper remedy." Dillard, 909 S.W.2d at 492 (quoting Texaco, Inc. v. Sanderson, 898 S.W.2d 813, 815 (Tex. 1995) (orig. proceeding)).

HN7 Rule 193 "imposes a duty upon parties to make a complete response to written discovery based upon all information reasonably available, subject to objections and privileges." TEX. R. CIV. P. 193 cmt. 1. It permits a party to object to discovery as overbroad and to refuse to comply with it entirely. *Id*. at cmt. 2 (citing Loftin v. Martin, 776 S.W.2d 145 (Tex. 1989) (orig. proceeding)). "A central consideration in determining overbreadth is whether the request could have been more narrowly tailored to avoid including tenuous information and still obtain the necessary, pertinent information." CSX, 124 S.W.3d at 153. **[**27]** "[D]iscovery may not be used as a fishing expedition or to impose unreasonable discovery expenses on the opposing party." Alford Chevrolet-Geo, **[*697]** 997 S.W.2d at 181 (citing K Mart Corp. v. Sanderson, 937 S.W.2d 429, 431 (Tex. 1996) (orig. proceeding) (holding that not only must discovery requests be reasonably tailored to include only matters relevant to case, but discovery requests may not be used as fishing expedition or to impose unreasonable discovery expenses on opposing party)); *see also* In re Am. Optical Corp., 988 S.W.2d 711, 713 (Tex. 1998) (orig. proceeding).

Here, Arthur requested all correspondence between Harris and a list of 38 other email addresses and people, some of whom were business associates and attorneys for parties to the litigation who were not alleged to have been co-conspirators to defame Arthur. Arthur's requests also delved into information potentially protected by Harris's privilege as a journalist.

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[7] Rule of Civil Procedure 196.4 governs requests for production of "data or information that exists in electronic of magnetic form." TEX. R. CIV. P. 196.4. It is addressed in **[**25]** the next section.

After Arthur served her discovery requests on him, Harris responded by filing objections based on privilege as a journalist and scope. Harris objected to the requests as ″unreasonably overbroad, prohibitively expensive, and unduly burdensome″ under *Texas Rule of Civil Procedure 192.4(a)*, **[**28]** and he argued that ″the burden and expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the party's resources and the issues at stake in the litigation,″ citing *Texas Rule of Civil Procedure 192.4(b)*. Finally, he objected that the requests constituted ″an unreasonable and unwarranted invasion of personal privacy.″

On October 12, 2008, Arthur filed her motion to compel production from Harris, and, following a hearing on November 21, 2008, Harris produced approximately 300 pages of emails and other documents that he determined were responsive to the discovery requests. Arthur made no further motion to compel discovery from Harris, and she never served Harris with any further discovery requests. At the December 11, 2008 discovery hearing held on Arthur's motion to compel discovery from Harris's co-defendant Bonnie Stern, Arthur made only limited references to Harris, and the trial court did not address any arguments or objections raised by Harris. Arthur never established that the scope of discovery requested from Harris was required for her to establish her claims of defamation and conspiracy. Nevertheless, following the hearing on **[**29]** Arthur's motion to compel production from Bonnie Stern, the court ordered Harris to turn over his computer hard drive, external drives, and jump drives to the court-appointed ″Special Master″ and forensic examiner, Craig Ball.

Harris's February 3, 2009 motion to clarify the January 27 order made it clear that Harris wished to reassert his previous objections that the discovery ordered by the trial court was overbroad, prohibitively expensive, and unduly burdensome. The trial court denied the motion.

Because Arthur did not file a motion to compel further discovery from Harris following the November 21, 2008 hearing, Harris had no opportunity to urge his objections and motion for a protective order prior to being ordered to produce the documents sought by Arthur. We hold that in compelling discovery from Harris without requiring Arthur to identify specific discovery requests with which Harris had not complied and without having before it a motion to compel discovery from Harris, the trial court acted arbitrarily and without considering the discovery rules. *See* *TEX. R. CIV. P. 215.1*, *215.2*, *215.3*; *In re Ford Motor Co., 165 S.W.3d 315, 317 (Tex. 2005)* (holding that ***HN8*** mandamus relief is available **[**30]** when trial court does not follow guiding rules and principles and reaches arbitrary and unreasonable decision). We further hold that the trial court abused its **[*698]** discretion in ordering overbroad discovery and in failing to determine whether the documents sought by Arthur from Harris were privileged, as Harris claimed, or even whether they were relevant or reasonably calculated to lead to the discovery of evidence relevant to Arthur's claims. *See* *TEX. R. CIV. P. 192.3* (stating that ″a party may obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of the pending action″).

B. Orders to Produce Electronic Media

Also in his first issue, Harris argues that the trial court abused its discretion by ordering him to produce his electronic media for computer forensic examination because Arthur had made no request for the electronic hardware and no showing that the benefits of production outweigh the costs as required by *Rule 196.4*. He cites *In re Weekley Homes* to support his argument. [8]

Rule 196.4 provides:

> ***HN9*** 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

[8] Arthur argues that *Weekley Homes* is distinguishable from the current case because there, the supreme court addressed a trial court's order to give the opposing party's **[**31]** forensic examiner direct access to the hard drives, while this case involves production to a neutral party. However, Harris argues that Ball was, in fact, not a neutral party, and there is some confusion regarding Ball's role in this litigation, which we address later in this opinion. For purposes of our review of the trial court's order compelling Harris to produce his hard drives, it appears that Ball was in fact a forensic expert hired by and paid by Arthur's counsel, which is exactly the situation addressed in *Weekley Homes*. *See* 295 S.W.3d at 313. We conclude that *Weekley Homes* does apply here.

> 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 **[**32]** 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.

TEX. R. CIV. P. 196.4.

In *Weekley Homes*, the Texas Supreme Court held that ***HN10*** *Rule 196.4* requires a specific request ″to ensure that requests for electronic information are clearly understood and disputes avoided.″ *295 S.W.3d at 314*. It set out the appropriate procedure for requesting electronic information under the rules:

> ***HN11*** When a specific request for electronic information has been lodged, *Rule 196.4* requires the responding party to either produce responsive electronic information that is ″reasonably available to the responding party in its ordinary course of business,″ or object on grounds that the information cannot through reasonable efforts be retrieved or produced in the form requested. Once the responding party raises a *Rule 196.4* objection, either party may request a hearing at which the responding party must present evidence to support the objection. *TEX. R. CIV. P. 193.4(a)*. To determine **[**33]** whether requested information is reasonably available in the ordinary course of business, the trial court may order discovery, such as requiring the responding party to sample or inspect the **[*699]** sources potentially containing information identified as not reasonably available.

Id. at 315. If the responding party fails to meet its burden of production, the trial court may order production subject to the discovery limitations imposed by *Texas Rule of Civil Procedure 192.4*. *Id.*

The supreme court recognized that ″[p]roviding access ***HN12*** to information by ordering examination of a party's electronic storage device is particularly intrusive and should be generally discouraged, just as permitting open access to a party's file cabinets for general perusal would be.″ *Id. at 317*. It stated:

> ***HN13*** As a threshold matter, the requesting party must show 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 relevant materials.″ Courts have been reluctant to rely on mere **[**34]** skepticism or bare allegations that the responding party has failed to comply with its discovery duties. Even if the requesting party makes this threshold showing, courts should not permit the requesting party itself to access the opponent's storage device; rather, only a qualified expert should be afforded such access, and only when there is some indication that retrieval of the data sought is feasible. Due to the broad array of electronic information storage methodologies, the requesting party must become knowledgeable about the characteristics of the storage devices sought to be searched in order to demonstrate the feasibility of electronic retrieval in a particular case. And consistent with standard prohibitions against ″fishing expeditions,″ 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. Finally, ***HN14*** federal courts have been more likely to order direct access to a responding party's electronic storage devices when there is some direct relationship between the electronic storage device and the claim itself.

Id. at 317-19 (internal citations **[**35]** omitted). *Weekley Homes* further held that even ″[i]f the ***HN15*** responding party meets its burden by demonstrating that retrieval and production of the requested information would be overly burdensome, the trial court may nevertheless order targeted production upon a showing by the requesting party that the benefits of ordering production outweigh the costs.″ *Id. at 315* (citing *TEX. R. CIV. P. 192.4*).

We first address Arthur's argument that Harris waived any complaints arising under *Weekley Homes*.

1. Preservation

Arthur argues that Harris never made any arguments based on *Weekley Homes* before the trial court and, therefore, failed to preserve those complaints under *Texas Rule of Appellate Procedure 33*. She notes that *Weekley Homes* was decided on August 28, 2009, after the January 27 and the May 11 orders were signed. However, the transcript of the May 8, 2009 hearing clearly reflects that Harris's counsel did bring the *Weekley Homes* case to the attention of the trial court and that Harris reasserted similar arguments in his August 23, 2009 motion to reconsider, in which he argued, among other things, that the trial court had not followed the correct procedure and that this case was not appropriate **[**36]** to compel production of the actual hard drives.

[*700] We conclude that Harris's actions were sufficient to put the trial court on notice regarding his complaints as raised in this petition for writ of mandamus, and this issue was preserved. *See TEX. R. APP. P. 33.1*.

2. Production of Electronic Discovery

The trial court's January 27, 2009 order required Harris to produce "the relevant computer hard drives, external hard drives, jump drives, and other such repositories of electronic communications in [his] possession or control" for an "independent forensic examination." On February 3, 2009, Harris filed a motion to clarify this order, arguing that he should not have been included in the order to turn over hard drives for forensic examination. After a hearing on May 8, 2009, the trial court denied the motion to clarify. The trial court's May 11, 2009 order again ordered Harris to "produce the relevant computer hard drives, external hard drives and jump drives." Harris argues that the trial court erred in failing to follow the provisions of *Rule 196.4*, as described in *Weekley Homes*, in compelling him to produce his hard drives in the January 27 and May 11 orders. We agree.

Arthur's original requests **[**37]** for production specifically requested that Harris produce emails and other electronic communications in their native format. [9] *See TEX. R. CIV. P. 196.4*. After Harris filed objections, arguing, in part, that the requests were prohibitively expensive and unduly burdensome, Arthur filed a motion to compel Harris to comply with the discovery requests. In response, Harris produced 300 documents that were "responsive to the request and [were] reasonably available to the [him as the] responding party in [his] ordinary course of business." *See id.* Arthur did not file any other motions to compel discovery from Harris, nor did Arthur ever serve Harris with a discovery request for his hard drives. Thus, Arthur failed to follow the first step required by *Rule 196.4* and *Weekley Homes* by failing to make a specific request of the production of the hard drives themselves. *See id.* (***HN16*** "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."); *Weekley Homes, 295 S.W.3d at 314* (holding that specific request is required **[**38]** "to ensure that requests for electronic information are clearly understood and disputes avoided"). The trial court also failed to follow any of the other provisions of *Rule 196.4* as described in *Weekley Homes*. Nor, as stated above, did the trial court ever address Harris's objections to discovery. In fact, the record of the December 11, 2008 hearing does not contain any argument by Arthur's counsel that Harris's production as of the date of that hearing had been insufficient. Rather, Bonnie Stern, and not Harris, was the subject of the December 11 hearing, and, thus, here there is less than the assertion of "mere skepticism or bare allegations" that *Weekley Homes* had deemed insufficient to compel discovery of a hard drive or other electronic storage device. *See 295 S.W.3d at 317-18, 320* (holding that "conclusory statements that the deleted emails it seeks 'must exist' and that deleted emails are in some cases recoverable is not enough to justify the highly intrusive method of discovery the trial court ordered, which afforded **[*701]** the forensic experts 'complete access to all data stored on [the Employees'] computers'").

Following the trial court's January 27, 2009 order appointing a special master and forensic examination and requiring Harris to produce his hard drives and jump drives, Harris filed a motion to clarify the order, arguing that he was improperly ordered to produce the drives. In response, the trial court held a hearing on May 8, 2009 on Harris's motion to clarify, but it did not require Arthur to make any showing that Harris "has somehow defaulted in [his] obligation to search [his] records and produce the requested data" or that Harris's production had been "inadequate and that a search of [his electronic storage

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[9] Harris argues that, while Arthur's requests for production did ask for **[**39]** emails, the requests did not specify the form in which the requesting party wanted the emails produced. This argument is not supported by the record. The instructions in the requests for production stated the form in which electronic files should be produced.

devices] could recover deleted relevant materials." *See id. at 317*. Nor did Arthur offer any evidence supporting her effort to obtain the hard drives or any evidence regarding which, if any, of Harris's electronic storage devices could be expected to contain discoverable documents at the hearing on Harris's motion to clarify **[**40]** the January 27 order. *See id*.

Weekley Homes also held that ***HN17*** direct access to a responding party's electronic storage devices is more likely to be appropriate "when there is some direct relationship between the electronic storage device and the claim itself." *Id. at 317-19* (recognizing that "ordering examination of a party's electronic storage device is particularly intrusive and should be generally discouraged, just as permitting open access to a party's file cabinets for general perusal would be" and citing cases where employers sued former employees for misuse of company computers as instances where close relationship between claims and defendant's computer equipment justified production of computers themselves). Arthur made no such showing either at the December 11, 2008 hearing or at the May 8, 2009 hearing or in any motion to compel. Moreover, even if we could conclude that the record supported a finding by the trial court that Harris's electronic storage devices could be expected to contain discoverable documents and that direct access to those devices was justified by some direct relationship between the storage devices and Arthur's claims, Arthur also failed to demonstrate that **[**41]** the "particularities of [the] electronic information storage methodology [would] allow retrieval of emails that have been deleted or overwritten, and what that retrieval [would] entail." *Id. at 320*. In sum, the record does not contain any evidence sufficient to satisfy the stringent standard for compelling production of Harris's electronic storage devices.

Finally, the trial court failed to consider whether the benefits of production to Arthur outweighed the burdens of the appointment of a special master and forensics expert to obtain the information sought when ordering the production of Harris's computer hard drive, external drives, and jump drives to the court-appointed Special Master. *See* ***HN18*** *TEX. R. CIV. P. 192.4* (requiring trial courts to weigh benefits of production against burdens imposed when requested information is not reasonably available in ordinary course of business). Thus, even if Arthur had shown that the documents sought from Harris were not privileged, were relevant to her claims against Harris, and could not have been reasonably obtained other than by ordering him to turn over his hard drives, and that there was a direct relationship between the hard drives and Arthur's **[**42]** claims, which she has not, she still would not be entitled to discovery of Harris's hard drives. *See id*.

We conclude that the trial court abused its discretion not only by compelling production of overly broad discovery without **[*702]** addressing Harris's objections and without a motion to compel discovery from Harris before it, but also by issuing its even more invasive order that Harris produce his hard drives and by failing to require Arthur to make any showing that the benefit of the discovery she sought outweighed the burden and expense to Harris. Thus, we hold that the trial court abused its discretion by issuing the January 27, 2009 order compelling Harris to produce documents in response to Arthur's requests for production and to produce his hard drives and by issuing its May 11, 2009 order denying Harris's motion to clarify. *See Alford Chevrolet-Geo, 997 S.W.2d at 181* (holding that ***HN19*** although trial court has broad discretion to define scope of discovery, it can abuse its discretion by acting unreasonably).

We sustain Harris's first issue.

C. Refusal to Apply *Rule 193.3* on Treatment of Privileged Documents

In his third issue, Harris argues that the trial court abused its discretion by refusing **[**43]** to recognize the discovery procedures of *Texas Rule of Civil Procedure 193.3* in the treatment of privileged documents and the creation of privilege logs. *Rule 193.3* provides, "A party may preserve a privilege from written discovery in accordance with this subdivision." *TEX. R. CIV. P. 193.3*. It further provides that a party claiming that "material or information responsive to written discovery is privileged may withhold the privileged material or information from the response" and must provide a withholding statement describing the discovery being withheld, and it provides that the requesting party may then request that the "withholding party identify the information and material withheld." *Id*. Because we have already determined that the trial court erred in the ways set forth above, this issue is moot.

We overrule Harris's third issue

Appointment of Special Master

In his fourth and fifth issues, Harris argues that the trial court abused its discretion in appointing Craig Ball as a special master to conduct a forensic examination of Harris's computers without following *Texas Rule of Civil Procedure 171*. Arthur responds that Harris consented to the appointment of the special master, citing **[**44]** a series of emails and other negotiations between the parties that culminated in the filing of the *Rule 11* agreement on January 20, 2009 and the trial court's order of January 27, 2009. Arthur also argues that Harris's objection to the special master is barred by laches because the special master was appointed on January 27, 2009, and Harris cooperated with the special master beginning May 14, 2009, but did not seek mandamus relief until September 4, 2009.

A. Consent & Laches

HN20 Parties may consent to the appointment of a special master. *See Simpson v. Canales, 806 S.W.2d 802, 811 (Tex. 1991)* (orig. proceeding). However, the trial court's statements at the May 8, 2009 hearing that "[i]t wasn't an agreement" and that the trial court acted on her own authority in appointing Ball as special master defeat Arthur's argument that the parties consented to Ball's appointment as a special master. Moreover, the January 20, 2009 Rule 11 Agreement between Ogden and Arthur's counsel was an agreement to use Craig Ball as "the independent forensic examiner" as ordered by the trial court. It was not an agreement that a special master be appointed. And it was both executed and filed after Ogden had withdrawn **[**45]** as Harris's counsel.

[*703] Arthur also argues that delay alone is a valid ground for denying Harris's request for mandamus relief and that Harris fatally delayed in asserting his objections to the appointment of a special master. *See In re Xeller, 6 S.W.3d 618, 624 (Tex. App.--Houston [14th Dist.] 1999, orig. proceeding)* ("[J]udicial economy would have been better served if relators' [sic] had sought mandamus relief immediately after the appointment of the master."); *Owens-Corning Fiberglas Corp. v. Caldwell, 830 S.W.2d 622, 625 (Tex. App.--Houston [1st Dist.] 1991, orig. proceeding)* (holding that party may object to appointment of master either before participating in any proceeding before the master, or before parties, master, and trial court have acted in reliance on appointment).

The record, however, shows that Harris diligently sought to enforce his rights by filing a motion to clarify the January 27 order appointing Craig Ball as special master within days after it was signed by the trial court. That motion was not heard until May 8. In the hearing, Harris argued that the trial court had improperly included him in the order requiring him and several other defendants to produce their **[**46]** computers and electronic storage devises, and he raised the *Weekley Homes* case. Harris thus objected to the appointment of the special master before he complied with the May 11, 2009 order compelling him to produce three hard drives to the special master. Therefore, he did make a timely objection. *See Caldwell, 830 S.W.2d at 625-26* (holding that party timely objected to appointment of special master and did not waive its right to object when it objected to appointment several days before it participated in proceedings before special master). Furthermore, the argument of delay does not prevent Harris from asserting that the trial court erred in failing to remove the special master on the grounds that the special master has, since the production of the original three hard drives, behaved inappropriately and exceeded the scope of his authority or that he should not be compelled to produce any further electronic media to the special master.

We conclude that Harris has not waived his fourth and fifth issues.

B. Trial Court's Appointment of Craig Ball

We now consider the authority of the trial court to compel Harris to submit matters to a special master. In his fourth issue, Harris argues that **[**47]** this was not an "exceptional case" and that there was no good cause for appointment of a master, as required by *Rule 171*, governing such appointments. Harris further argues that Craig Ball cannot serve as a neutral special master because he is under contract with, paid for, and indemnified by Arthur under the consulting agreement attached to the trial court's January 27 order. In his fifth issue, Harris argues that the trial court abused its discretion in appointing the special master to read attorney-client communications and to investigate and inquire into perceived discovery abuses. In the alternative, he argues that the trial court erred in failing to remove the special master for acting outside the limitations and specifications stated in the referral order by placing himself in an adversarial position, by investigating perceived discovery abuses, by exhibiting bias and lack of impartiality, and by making highly prejudicial statements.

Much of the confusion on this issue stems from the trial court's conflation of the roles of a forensic examiner and a special master. Texas Rule of Civil Procedure 171 is the exclusive authority for the appointment of masters in Texas state **[*704]** courts. **[**48]** Simpson, 806 S.W.2d at 810. Rule 171 provides, in part:

> ***HN21*** The court may, in exceptional cases, for good cause appoint a master in chancery, who shall be a citizen of this State, and not an attorney for either party to the action, nor related to either party, who shall perform all of the duties required of him by the court, and shall be under orders of the court, and have such power as the master of chancery has in a court of equity.

TEX. R. CIV. P. 171. ***HN22*** Rule 171 also provides that "[t]he court shall award reasonable compensation to such master to be taxed as costs of suit." *Id.;* TransAmerican Natural Gas Corp. v. Mancias, 877 S.W.2d 840, 844 (Tex. App.--Corpus Christi 1994, orig. proceeding). A special master "has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties" as specified in the trial court order. TEX. R. CIV. P. 171.

"[A]ppointment of a ***HN23*** master lies within the sound discretion of the trial court and should not be reversed except for a clear abuse of that discretion." Simpson, 806 S.W.2d at 811. However, it is "improper for . . . an order [appointing **[**49]** a special master] to cast the master in the role of advocate rather than merely referee in the underlying proceeding." TransAmerican, 877 S.W.2d at 843 (citing Caldwell, 830 S.W.2d at 626 (noting impropriety of allowing master to require production of evidence regardless of whether opposing party has requested it)).

A forensic examiner in the context of electronic discovery has a much different role. Although we have found no rule or case that specifically defines "forensic examiner," ***HN24*** a forensic examiner as contemplated in *Weekley Homes* is a computer expert whose sole purpose is to create forensic images of a particular electronic storage device and then to search the images for specified documents using a predesignated list of search terms. *See* Weekley Homes, 295 S.W.3d at 313. A forensic expert as contemplated by Rule 196.4 and *Weekley Homes* is not given any authority to conduct hearings, to make recommendations regarding what evidence should be produced, or to require the production of any particular storage device or other item of evidence. In contrast to Rule 171's provision that the costs of a special master be taxed as a cost of suit, ***HN25*** Rule 196.4 contemplates that "the requesting **[**50]** party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information." TEX. R. CIV. P. 196.4. In accordance with this rule, the requesting party in *Weekley Homes* clearly contemplated paying the expenses of its forensic experts if it had been permitted access to Weekley Homes' hard drives. *See* Weekley Homes, 295 S.W.3d at 313.

Here, Arthur sought appointment of Craig Ball as an independent forensic examiner and entered a Rule 11 agreement with Ogden that Ball be the independent forensic examiner appointed. The January 27, 2009 order, however, expressly appointed "Craig Ball of Austin, Texas as a Special Master, under the terms and conditions contained in the Consulting Agreement attached to this order and incorporated herein," an agreement which provided that Ball be hired by Arthur's counsel as an independent forensic examiner. Ball's role in the litigation is in some ways similar to that of a forensic examiner as contemplated by Rule 196.4 and *Weekley Homes*. Ball is paid by Arthur's counsel, and his role as envisioned in the trial court's January 27, 2009 order at least partially conforms to the role of a forensic **[*705]** expert employed to create images **[**51]** of particular electronic storage devices and then search for specified documents using a predesignated list of search terms at the expense of the requesting party. We have already determined, however, that the discovery order to produce the hard drives was an abuse of discretion. Therefore, the question of Ball's ability to serve as a forensic expert to examine the hard drives on Arthur's behalf is moot.

However, the January 27 order also specifically conferred on Ball a number of powers extended to a special master not "related to either party" and appointed by the court "in exceptional cases" under Rule 171. *See* TEX. R. CIV. P. 171. The trial court referred to Ball as a special master and, from the time of his appointment, treated him as more than a forensic expert, allowing him to contact the parties and to make recommendations regarding the production of particular items. Thus, we next determine whether the trial court erred in the appointing Ball as a special master.

Rule 171 permits a trial court to appoint a special master "in exceptional cases, for good cause." TEX. R. CIV. P. 171. ***HN26*** While the "'exceptional cases/good cause' criterion of Rule 171 is not **[**52]** susceptible of precise definition," the supreme

court has held that ″this requirement cannot be met merely by showing that a case is complicated or time-consuming, or that the court is busy.″ *Simpson, 806 S.W.2d at 811*. However, courts have found sufficient justification for the appointment of a master to supervise ″discovery questions which require extensive examination of highly technical and complex documents by a person having both a technical and a legal background.″ *TransAmerican, 877 S.W.2d at 843* (holding that ″the technical nature of the present case and the potential help which may be provided to the trial court by a special master with geological training and expertise constitutes a sufficiently exceptional condition to justify the present appointment″); *see also Hourani v. Katzen, 305 S.W.3d 239, 247-48 (Tex. App.--Houston [1st Dist.] 2009, pet. denied)* (″The highly technical nature of the case, which involves the feasibility of constructing a driveway or bridge along the edge of a lake without damaging the lake, and the assistance which may be provided to the trial court by a special master with engineering training and expertise constitutes a sufficiently exceptional **[**53]** condition to justify the present appointment.″).

Here, the case is not of a ″highly technical nature.″ The fact that production of some of the discovery sought by Arthur might require expert forensic examination of electronic media is not sufficient to show that this is an ″exceptional case″ requiring expertise in computer forensics. ***HN27*** Electronic discovery is a common component of modern litigation, and its mere presence alone does not constitute a showing of good cause for appointing a special master. Neither party has argued that some specialized knowledge would be necessary to interpret any of the documents produced in this case.

Arthur also argues that appointment of a special master was necessary in this case because of her allegations that Harris did not produce all of the emails and other electronic documents in his possession that are responsive to her requests for production. However, Arthur made no showing to the trial court that Harris had failed to produce requested documents within the proper scope of discovery. As we have already discussed at length, Arthur did not even file a motion to compel discovery from Harris objecting to his production of documents before or after **[**54]** the December 11 hearing and filed no additional requests for production; nor did the trial court hear **[*706]** or rule on Harris's objections to Arthur's requests. Furthermore, were Arthur to show that this was an exceptional case and that examination of Harris's hard drives was necessary for her to prove her case and not unduly burdensome to Harris, a forensic examination could be performed by a forensic examiner without the power and authority of a special master.

We conclude that the record reflects that this case does not meet the ″exceptional case/good cause criterion of *Rule 171*.″ Therefore, we hold that the trial court abused its discretion in appointing Ball as a special master. *See Simpson, 806 S.W.2d at 811*. To the extent that the trial court's appointment of Ball was as a forensic examiner instead of as a master, we hold that the trial court abused its discretion by failing to comply with *Weekley Homes*, as we have explained above.

We sustain Harris's fourth and fifth issues.

In his second issue, Harris argues that the trial court abused its discretion in issuing the August 28 order compelling him to respond to the special master's August 17, 2009 email. Because we have already determined **[**55]** that the court's appointment of Craig Ball as a forensic examiner and special master was an abuse of discretion, this issue is moot.

We overrule Harris's second issue.

Conclusion

We conditionally grant the petition for writ of mandamus and direct the trial court to withdraw its discovery orders against Art Harris issued on January 27, 2009, May 11, 2009, and August 28, 2009. Any pending motions are dismissed as moot.

Evelyn V. Keyes

Justice

Respectfully submitted,

_____/s/ MB CHIMENE_____

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CERTIFICATE OF SERVICE

A true and correct copy of this Appendix was served on Julie Liddell at Julie.liddell@texasbar.com via email today, 1/19/16, as certified by my signature below.

_____/s/ MB CHIMENE_____