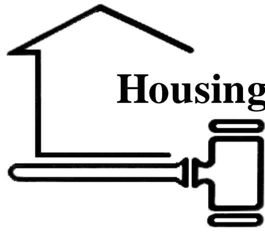

Housing and Development Law Inst

THE COUNSELLOR

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Calendar of Events:

HDLI's 2007 Spring CLE Conference April 26-27, 2007 Washington, D.C.

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ARE YOU READY FOR THE NEW FEDERAL DISCOVERY RULES FOR EMAILS AND OTHER ELECTRONIC INFORMATION STORED IN YOUR COMPUTERS?

Rules Promise a More Extensive and Expensive Discovery Process

By Lisa L. Walker
HDLI Executive Director

The Legal Ethics session that was part of HDLI's 2006 Spring Conference highlighted the emerging "e-discovery" rules, relating to the identification and production of electronically-stored documents and information.[1] At least Arkansas, Delaware, Kansas, Mississippi, New Jersey, Texas, and Wyoming already have enacted e-discovery rules on a local level.[2] As of December 1, 2006, those of us practicing in federal courts across the country will have to understand and follow the new federal rules on the production of electronic media.[3] These rules are the culmination of five years of study of electronic discovery disputes coming before federal magistrate judges and of collaboration with e-discovery experts. More than ever before, counsel has to be mindful of the inadvertent production of documents protected by privilege or work-product, requiring even more comprehensive document research efforts and privilege reviews. *We all should immediately create or revise our document retention policies to be compliant with these new e-discovery rules.*

GET READY EARLY! The new rules contemplate the identification of electronically stored information as early as the initial disclosures, which means a longer and more *expensive* discovery process. When we are discussing electronic data, we are referring to a long list of potential *new* forms of information, such as: e-mails, voicemails, draft and final versions of word processing documents in forms that include their metadata, *Microsoft Outlook*® and other calendar entries, Microsoft PowerPoint® and other electronic presentations, and Microsoft Excel® and other electronic spreadsheets. It also will include other information stored or transmitted via agency or firm telephone systems, personal wireless cellular telephones, Blackberry® and other wireless devices, as well as other electronic voice and data communications devices.

The sheer volume of information stored electronically in our PCs, laptops, Blackberries®, and other gadgets is daunting. For

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[1] Ethics and other written materials from HDLI's 2006 Spring Conference are available for purchase for a very reasonable price. Contact Tim Coyle of HDLI at hdli@hdli.org or (202) 289-3400 for more details.

[2] District of Arkansas, Eastern and Western, Local Rule 26.1; District of Delaware, Default Standards for Discovery of Electronic Documents; District of Kansas, Electronic Discovery Guidelines; Mississippi Court Order 13 (May 29, 2003) amending Mississippi Rule of Civil Procedure 26; District of New Jersey, Local Rule 26.1;Texas Rule of Civil Procedure 193.3(d) (privilege not waived by production) and Rule 196.4 (electronic or magnetic data); District of Wyoming, Local Rule 26.1

[3] The new federal rules may be accessed on line at http://www.uscourts.gov/rules EDiscovery_w_Notes.pdf. Useful Committee Notes may be accessed on line at http://www.uscourts.gov/rules/Reports/ST09-2006.pdf.

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President's Message

A RETROSPECTIVE: It's Been a Great Year!

Dear Members:

As I have completed my first term as HDLI President and look forward to my second two-year term, I reflect upon HDLI's many accomplishments and challenges. Like for most of you, 2006 was a very challenging and equally rewarding year for HDLI. Despite precarious funding issues facing our industry and the resultant impact on our membership levels, HDLI continues to grow. We are pleased to announce the addition of four new members to HDLI's Board of Directors: Rudolf Montiel, Executive Director of Housing Authority of the City of Los Angeles, Raymond C. Buday, Jr., Executive Director of Marietta Housing Authority, Barbara Holston, Executive Director of Fort Worth Housing Authority, and Rod Solomon, an attorney in the Washington office of Hawkins, Delafield & Wood, LLP. We are honored that each of these new board members brings years of experience, expertise, and new blood to our organization. HDLI bids a heart-felt goodbye to retiring board members Barbara Huppee of Kansas and Mickey McInnish of Alabama. We appreciate their dedicated service. Most of all, HDLI appreciates YOUR loyal membership. We know that you have choices of where to spend your resources, and we are thankful that you have chosen to continue to support our mission. We truly could not do it without you.

With your continued financial and intellectual support, HDLI hosted two well-attended and timely educational legal CLE conferences this year: the Spring Conference entitled "*NAVIGATING THE NEW WORLD OF AFFORDABLE AND PUBLIC HOUSING: Legal Strategies for Conquering New Financing, Management, and Operational Rules,"* and the Fall Conference entitled *"PUBLIC HOUSING AND SECTION 8: Strategies to Avoid Legal Pitfalls in a Changing Regulatory Environment."* As is our practice, we assembled a host of national speakers who discussed cutting-edge issues that we all need to know. If you missed either of these conferences, you can still purchase the written binder of materials so that you don't have to "reinvent the wheel" on so many important issues. The end product that you enjoy at our conferences is the result of months of planning by our hard working and dedicated staff and board members, and the careful preparation of our speakers. Many thanks to all who made this year's conferences successful. I would be remiss if I did not acknowledge the great depth of participation in our Spring Conference by more than a dozen HUD attorneys and staff from across the country. This took place under the leadership of former General Counsel, Keith Gottfried, whom HDLI was sad to see resign this Fall. General Counsel Gottfried, who also participated all day in our first General Counsel Forum in January, was an unusually accessible leader who, unfortunately, left before he was able to accomplish many initiatives that would have been good for our industry. We bid a fond farewell to Mr. Gottfried, and hope that his predecessor will follow his lead.

HDLI also completed several on-site fair housing trainings for the industry this year. Our Executive Director and General Counsel, who developed HDLI's fair housing training and conducted the trainings, trained hundreds of executive, legal, and line staff of the Orlando Housing Authority, the Public Housing Authority Directors Association (PHADA), the Pacific Northwest Regional Council and Nebraska Chapter of NAHRO, the St. Mary's County (MD) Housing Authority. If you haven't taken a look at the Basic and Advanced sample training programs in our training flyer (copy enclosed in this issue), why not do so today? Given the increase in fair housing complaints, particularly in the area of reasonable accommodations and HUD 504 audits, training your agency staff is no longer a luxury, but a

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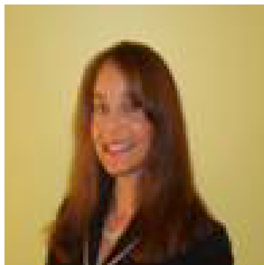

Lisa L. Walker, Esq.

A Letter from the Executive Director and General Counsel

HAPPY NEW YEAR! What a busy 2006 it was at HDLI. HDLI President Mattye Jones gives an overview in her President's Message of last year's accomplishments. We were able to provide you the publications, conferences, training, and other services last year because you remained faithful members and sponsors of HDLI. For that, we at are HDLI are very thankful.

Going into 2007, we have big plans for continued success. We plan to bring in a more diverse membership that will add additional dimensions to our intellectual discussions and networking.

Those of you who have contributed to the list serve – both in queries and answers – thank you! Our list serve is a great resource, and since our opportunities for in-person contact are relatively few during the year, I encourage you all to continue sharing information via the list serve in 2007.

Finally, we want to hear from you! Do you have an anecdote that you can share of how membership in HDLI has helped you do your job? Maybe an article or case write up helped you with an issue with which you were grappling. Maybe a fellow HDLI member shared his/her form document or opinion with you. Maybe meeting a colleague or government official at one of HDLI's events helped you. Please send me an e-mail at lwalker@hdli.org letting me know.

Have a Blessed and Successful 2007!

President's Message Continued

necessity. None of us has the resources to defend litigation that might have been avoided through proper training. Feedback over the years has also gleaned that staff appreciate the investment in their professional growth.

HDLI kicks off its second General Counsel Forum in Tampa, Florida January 19, 2007. We are happy to offer this unique opportunity for attorneys functioning as in-house or outside general counsel to meet round-table style to hash out important issues facing their role as general counsel and the agency at large. We initiated this event in January of this year, and with the generous support of Saxon Gilmore who hosted a wonderful waterfront cocktail reception for our attendees, the opportunity for networking and sharing of ideas was invaluable.

Again this year, our *Authority, Counsellor, Messenger,* and *Index to HUD Regulations* publications delivered timely and important information concerning important case law, regulations, and other legal developments within our industry. Make sure that you are circulating these publications to your office mates and colleagues to keep them ahead of the curve. Additionally, our organization sent formal white letters to HUD on the issues of eminent domain and domestic violence during the course of the year. Rather than join in, or duplicate, the advocacy efforts made by other industry groups, HDLI lends a different voice to issues not always addressed by the other groups. We represent YOUR interests - - the legal concerns of housing officials. The directors of the Board endeavor to remain focused on the core delivery of service to which the members have become accustomed.

In addition to our publications, conferences, trainings, and advocacy this year, HDLI also completed a major marketing effort, and we are trying more earnestly than ever to spread the good news about HDLI's unsurpassed networking, educational, and advocacy services. HDLI is focusing on our traditionally valued PHA and law firm members, but also is reaching out to other stakeholders in the industry who can both add another dimension to the discussions at our conferences and also benefit by our unique services - landlords, managers, developers, financial institutions, and others working in the public and affordable housing field. Please help us in recruiting interested individuals with whom you work.

I join my fellow board members and staff in our commitment that HDLI will continue to strive to pursue your interests and provide you with timely information and exceptional service. We look forward to an even better 2007!

CASE CORNER

The following recently-reported cases are full of interesting issues:

EVICTION - Mental Disability

New York City Hous. Auth. v. Jackson, 2005-1082 Q C., 2006 NY Slip Op 52265U; 2006 N.Y. Misc. LEXIS 3570 (Sup. Ct. N.Y., App. Term Nov. 17, 2006)

COURT: Supreme Court of New York, Appellate Term, Second Department

FACTS: An occupant of a public housing unit resided with his mother, the tenant of record, for only one month before her death. The occupant made no attempt to place his name on the lease. The PHA never knew of or implicitly approved of his residency. After the mother died, the occupant wanted succession rights. The PHA took the position that after the mother died, the son's tenancy terminated, and his status was nothing more than a licensee. After the PHA commenced a holdover proceeding to remove an occupant, adult protective services moved for the appointment of a guardian *ad litem* based on a psychiatric evaluation of the occupant. The trial court granted the motion and appointed an experienced attorney as guardian *ad litem*. The guardian *ad litem* negotiated a binding stipulation of settlement on the occupant's behalf, whereby the occupant agreed to, among other things, a final judgment of possession in favor of the PHA and a stay of execution of the warrant until a future date. After the expiration of the initial stay, protective services petitioned for another appointment of a guardian pursuant to the state mental health code and obtained another stay of eviction, which also was granted. The court appointed an agency, Self Help, as guardian of occupant's personal needs and property management, and extended the stay of eviction for 90 days from the issuance of the commission to the guardian. Almost two years after receiving its commission, Self Help moved to vacate the stipulation and final judgment, and sought a stay to permit it to file an action to compel the PHA to issue occupant a lease. The trial court denied the motion, concluding that there was no basis to vacate the stipulation.

ISSUE: Whether the trial court erred in refusing to vacate the stipulation.

HOLDING/RATIONALE: Yes. In a terse opinion, the majority voted to vacate the stipulation on the ground that, by entering into the stipulation, the guardian *ad litem* inadvisedly waived the occupant's arguably meritorious defenses. The court found that, in light of the court's "continuing obligation to supervise the guardian *ad litem*'s work,", its ultimate responsibility for the guardian's determinations, and its responsibility, in particular, for overseeing settlements of proceedings involving those who are unable to defend themselves. The majority also referenced, without identifying, "the existence of arguably meritorious defenses to this proceeding." The dissent argued that the occupant offered no valid excuse for his failure to honor the terms of the stipulation, nor did he allege any basis for invalidating the stipulation. With the benefit of a seasoned attorney as guardian ad litem, occupant entered into a binding stipulation of settlement whereby he agreed to vacate the premises. Nothing in the record suggests that the stipulation was coerced or the product of fraud, collusion, mistake or accident. The dissent found that the occupant was unable to make a "reasonable showing" that he was in the apartment with the PHA's knowledge or permission, and having failed to pay use and occupancy after his mother's death, the occupant was not entitled to a grievance hearing on whether he had succession rights. Indeed, the dissent argues that it is Self Help which acted in derogation of its fiduciary obligation as guardian. For almost two years following its appointment, Self Help neither objected to the so-ordered stipulation, nor did it resolve its ward's living situation. Instead, it waited until long after the expiration of the stay of eviction to rush into court and obtain yet another stay of eviction. Other than occupant's incapacity and his bald assertion that the PHA was aware of his presence, Self Help cites to nothing to justify placing the occupant ahead of the line of the thousands of eligible individuals awaiting public housing. Indeed, implicit in the majority's opinion is that the rule of law must yield to an incapacitated individual's interest in avoiding homelessness.

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CASE CORNER CONTINUED

FAIR HOUSING

Chi. Lawyers' Comm. for Civ. Rights Under the Law v. ,.No. 06 C 0657, 2006 U.S. Dist. LEXIS 82973 (N.D. Ill. Nov. 14, 2006)

COURT: U.S. District Court for the Northern District of Illinois

FACTS: A Chicago civil rights group filed suit under Section3604 (c) of the Fair Housing Act seeking monetary, declaratory, and injunctive relief against Craigslist, an internet provider that posts more than 10 million items of "user-supplied information" about various products and services, which included the listings of housing units for sale and rent. This case gained wide interest, as amicus briefs were filed on behalf of the defendant by Amazon, AOL, eBay, Google and others, and by a number of civil rights groups on behalf of the plaintiff. The plaintiff alleged that Craigslist published discriminatory housing advertisements on its website that indicated a preference, limitation, or discrimination, or an intention to make a preference, limitation, or discrimination, on the basis of race, color, national origin, sex, religion and familial status. Some examples of the Craigslist listings at issue include: *"African Americans and Arabians tend to clash with me so that won't work out;" "Neighborhood is predominantly Caucasian, Polish and Hispanic;" "NO MINORITIES;" "Non-Women of Color NEED NOT APPLY;" "looking for gay latino;" and "This is not in a trendy neighborhood -- very Latino."* Plaintiff claimed that these listings violate fair housing act provisions which do not permit the publishing of discriminatory advertisements. Craigslist moved for summary judgment, contending that Plaintiff's claims are barred based on the immunity afforded under the Communications Decency Act to providers of interactive computer services.

ISSUE: Whether the Communications Decency Act (CDA) provides Craigslist and other internet providers immunity from violations under the Fair Housing Act?

HOLDING/RATIONALE: Yes. Section 230(c)(1) of the CDA contains "Protection for Blocking and Screening of Offensive Materials." The CDA provisions state that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." The court found that Craigslist was a "provider of an interactive computer service" because it operated a website that multiple users had accessed to create allegedly discriminatory housing notices. These notices, in turn, were "information" that originated, not from defendant, but from "another information content provider," namely the users of defendant's website. As a "provider of an interactive computer service" that served as a conduit for information provided by another information content provider, cannot be treated as a publisher.

NEGLIGENCE - Fireman's Rule

Foster v. Newark Hous. Auth., No. A-1614-05T2, 2006 N.J. Super. LEXIS 315 (N.J. Super. Nov. 21, 2006)

COURT: Superior Court of New Jersey, Appellate Division

FACTS: In the course of his duties, a city police detective was shot three times in an apartment located in a public housing complex. The detective filed suit against the PHA, alleging that its failure to lock the door to the building was negligent and permitted his attacker, who was not a tenant, to gain entrance into the building and then into the apartment where the shooting occurred. Applying the state tort claims act, the trial court ruled that the Housing Authority's conduct was not palpably unreasonable because the detective was a police officer conducting a criminal investigation with knowledge that the trespasser might be on the property. The detective argued that the tort claims act did not apply because of the PHA's status as a landlord.

ISSUE 1: Whether the state tort claims act bars the detective's claims.

HOLDING/RATIONALE 1: No. The court held that. despite the PHA's status as a landlord, the tort claims act applied. However, the court found that the detective had a viable cause of action based on the dangerous condition of the Housing Authority's property.

ISSUE 2: Whether the Fireman's Rule is subject to the tort claims act, or provides a separate cause of action.

HOLDING/RATIONALE 2: The court held that while the beginning language of the first section of the state Firefighters' Act, which states that "[i]n addition to any other right of action or recovery otherwise available under law," the covered officer may sue suggests an independent cause of action outside the TCA, the second section of that statute stating "limitations accorded under law shall continue to apply" included the tort claims act. The court found that the Fireman's Rule had been completely abrogated, leaving no common law impediment to suit. The court held that an officer whose negligence suit is permitted by the Firefighters' Act must still comply with all the applicable provisions of the tort claims act.

continued on next page

CASE CORNER CONTINUED

RENT - Adjustments

Park Props. Assocs., L.P. v. United States, No. 04-1757C, 2006 U.S. Claims LEXIS 345 (Ct. Fed. Cl. Nov. 17, 2006)

COURT: Court of Federal Claims.

FACTS: This case is a successor to *Statesman II Apartments, Inc. v. United States*, 66 Fed. Cl. 608 (2005) and *Cuyahoga Metro. Hous. Auth. v. United States*, 57 Fed. Cl. 751, 753-55 (2003). Certain landlords sued the Government alleging that, in 1994, Congress unlawfully repudiated their HAP contracts by enacting legislation which altered the determination of rent subsidies and limited rent adjustments for units which experienced no turnover. They sought contract damages of $ 2.75 million, alleging breach of that portion of the HAP contracts which entitles them to automatic annual rent adjustments. The landlords contended that the legislation abrogated provisions of the HAP contracts which required automatic annual adjustment of rents and provided adjustments without regard to whether the same tenants occupied units. The Government asserted that the contracts were not breached and that claims for adjustments for years outside the Tucker Act limitations period were barred. The landlords countered that the statute of limitations did not apply since the lack of annual adjustments constituted a continuing claim.

ISSUE 1: Whether the landlords' claims survived limitations under a continuing claim theory.

HOLDING/RATIONALE 1: No. The continuing claims doctrine did not apply since the legislative enactment was a single act, rather than a series of independent, distinct wrongs.

ISSUE 2: Whether the legislation breached the HAP contracts.

HOLDING/RATIONALE 2: Yes. The court In passing the legislation the government repudiated the rent subsidy contracts, which repudiation eventually ripened into a breach of those contracts, at least to the extent that it precluded required rent adjustments from being made.

RESIDENT COMMISSIONER

McQuade v. King County Hous. Auth., No. 05-35037, 2006 U.S. App. LEXIS 26692 (9th Cir. Oct. 25, 2006)

COURT: U.S. Court of Appeals for the Ninth Circuit

FACTS: Two public housing residents sued their housing authority seeking damages for being refused the resident commissioner position on the board of commissioners. The residents sued under Section 3 of the Housing and Urban Development Act, 12 U.S.C. § 1701u ("Section 3"), the statute that encourages employment and other economic opportunities for residents of projects and activities that receive Federal housing and community development assistance. The residents did not contend that Section 3 directly required the PHA to appoint one of them to the seat; rather; they argued that the refusal to do so was discrimination in violation of 24 C.F.R. § 135.76(i), promulgated pursuant to Section 3.

ISSUE: Whether public housing residents have a private right of action under Section 3.

HOLDING/RATIONALE: No. No private cause of action exists under Section 3. Positions on the board of a public housing authority are not "training and employment opportunities generated by development assistance."

SECTION 8 – Criminal history

Snow v. Portland Hous. Auth., No. CV-06-71. 2006 Me. Super. LEXIS 244 (Me. Super. Nov. 8, 2006)

COURT: Superior Court of Maine.

FACTS: A Section 8 tenant was convicted of multiple crimes prior to when the PHA ran its background check. A landlord who rented to the tenant claimed that the PHA made representations to her that the tenant had not been convicted of any crimes even though the landlord expressly stated that she would not rent to an individual with a criminal background. The landlord also claimed that the PHA confirmed on several occasions that the tenant's record was clean. The PHA denies that it ever represented that the tenant's record was clean and that the landlord ever said she would not agree to rent to anyone with a criminal record. The landlord sued the PHA for misrepresentation, based upon respondeat superior liability for the representations of its employees. The PHA responded that it is not liable for the representations of the employee. The landlord countered that her suit is permissible under the "bad faith" exception under the state immunity law, and that the PHA had purchased "personal or advertising" insurance that covers the alleged torts committed by PHA in this case.

continued on next page

CASE CORNER CONTINUED

ISSUE: Whether the landlord's claims are barred by sovereign immunity.

HOLDING/RATIONALE: Yes. The court noted that under state law government employees are immune from personal civil liability for any intentional act or omission within the course and scope of employment; provided that such immunity does not exist in any case in which an employee's actions are found to have been in bad faith. However, the landlord was seeking to evoke this law to show that the PHA as an entity was not immune because of an employee's bad faith. The court found that the state law was applicable only to waiver of immunity for *individual employees,* not for the government entity itself. The court also recognized that immunity can be waived through the purchase of insurance that covers the acts central to the suit. However, the court did not interpret the PHA's insurance coverage to apply to the misrepresentations alleged in this lawsuit.

SECTION 8 - Fraud

Dowling v. Bangor Hous. Auth., 2006 ME 136 (Sup. Jud. Ct. Mn. Nov. 28, 2006)

COURT: Supreme Judicial Court of Maine

FACTS: During the course of participating in the Section 8 program, a Section 8 tenant signed a document entitled "Things You Should Know," stating that paying any amounts outside the lease provisions is considered fraud, and that if she is required to pay any amounts outside the rent, she must obtain a written explanation for such charges. The document also notified the tenant of her obligation to report any fraud or abuse to the housing authority. Even though the tenant knew that the Section 8 program requires that all utilities be included in the rent, she later entered into a side agreement with her landlord, unknown to the PHA, where she paid an additional monthly amount equivalent to the cost of her electric bill, in exchange for which she was able to move into a better mobile home than the one she initially contracted to rent. The side agreement was in effect from September of 2003 until May of 2004 without the PHA's knowledge. It wasn't until the landlord began eviction proceedings that the tenant informed the PHA of the side agreement. Thereafter, the PHA took steps to terminate her benefits for fraud for her violation of the information disclosure requirements of 24 CFR 982.551(b). The tenant received a grievance hearing, where the termination was affirmed. During the course of investigation, the PHA interviewed the landlords' son who stated that the tenant initiated the side agreement. A PHA employee recorded the son's statement in her notes, which the PHA relied upon at the grievance hearing. The PHA did not produce the PHA employee who authored the notes for cross-examination at the hearing.

ISSUE 1: Whether the PHA's failure to produce the PHA employee who authored the notes for cross-examination at the hearing violated the tenant's due process rights.

HOLDING/RATIONALE 1: No. The tenant failed to object at the hearing, so she failed to preserve the argument for appeal.

ISSUE 2: Whether the tenant was guilty of misrepresentation.

HOLDING/RATIONALE 2: Yes. The tenant falsely represented to the PHA that she was complying with Section 8 eligibility requirements by continuing to benefit from the program without disclosing her participation in an unapproved side agreement with her landlord; that she had actual knowledge that she was not complying with the program by participating in the side agreement for several months; that she secretly participated in the side agreement in order to obtain better housing and/or in order to avoid moving again; and that in reliance on its understanding that Dowling was complying with Section 8 requirements, the Authority continued to subsidize Dowling's rent.

ISSUE 3: Whether the PHA's sanction of termination was excessive.

HOLDING/RATIONALE 3: No. the Authority had the power to terminate Dowling's subsidy for either her failure to supply information about the side agreement or for her participation in it, and certainly for both. The dissenting opinion in the case, concerned about the majority's reliance on uncorroborated hearsay (the employee's notes) as evidence that the tenant initiated the side agreement, would have remanded the case back to the PHA to determine the merit of this ultimate sanction.

SECTION 8 – Moderate Rehabilitation

Urban Developers LLC v. City of Jackson Miss., 468 F.3d 281 (5th Cir. Oct. 24, 2006)

COURT: U.S. Court of Appeals for the Fifth Circuit

FACTS: This case flows from the Hurricane Katrina disasters. A developer purchased a low income housing complex in Mississippi. At the time of purchase the complex received Section 8 mod rehab funding and subsidies under two mod rehab contracts. Although

continued on next page

CASE CORNER CONTINUED

both mod rehab contracts required the express, written consent of the PHA as a precondition of assignment, such written consent was never given. However, the developer did receive oral approval for the assignment from several representatives of the PHA, including its assistant executive director.

In the midst of Katrina, twenty-two ground-level units in the complex flooded, and, in light of the Governor-declared state of emergency, the city ordered the distribution of vouchers to the complex's tenants with instructions that they should move out of the complex. Indeed, under the mistaken belief that the complex had been condemned, PHA representatives told the residents that they couldn't use the vouchers at the same complex. The developer sued the city, housing authority, and other parties, claiming illegal takings and breach of contract. After the trial court found for the developer and a jury awarded it more than $1 million in damages, the defendants appealed.

ISSUE 1: Whether the developer's constitutional or federal takings and due process claims were ripe for review.

HOLDING/RATIONALE 1: No. The Fifth Circuit reversed all judgments against the city on the ground that

ISSUE 2: Whether the housing authority was liable for breach of contract.

HOLDING/RATIONALE 2: No. Without written permission, the Mod Rehab contracts were not properly assigned from the owner to the developer.

ISSUE 3: Whether the housing authority's officers were immune from tort liability because their issuance of housing choice vouchers to the developer's tenants occurred during a declared state of emergency.

HOLDING/RATIONALE 3: Yes. The city's acts, albeit based upon their somewhat questionable reliance on erroneous statements, were discretionary acts under the state Tort Claims Act.

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RECENT HUD NOTICES

Following are some of the important recent HUD Notices that appear in the Federal Register, along with a brief description.

RECENT HUD PIH NOTICES
(Office of Public and Indian Housing)

Notice	Date Issued	Subject	Substance	Effective Date
PIH 2006-12	2/3/06	Disaster Voucher Program (DVP)- Families Displaced by Hurricanes	Continuation of temporary rental assistance. HUD has waived all requirements related to income eligibility and tenant contribution for families participating under the DVP for the statutory maximum term of 18 months.	2/28/07
PIH 2006-35	9/25/06	Operating Fund Program Final Rule	Transition Funding and Guidance on Demonstration of Successful Conversion to Asset Management to Discontinue the Reduction of Operating Subsidy Participation Extension of Stop Loss Deadline to April 15, 2007	9/30/07
PIH 2006-33	9/6/06	Operating Fund	Changes in Financial Management and Reporting Requirements for Public Housing Agencies Under the New Operating Fund Rule (24 CFR Part 990); Interim Instructions	9/30/07
PIH 2006-36	9/26/06	Unit status categories and their respective sub-categories	Guidance on Unit Status Categories in the Development Sub-module of the Office of Public and Indian Housing (PIH) Information Center (PIC) and Revised Form HUD-50058 Reporting Recommendations	9/30/07
PIH 2006-37	9/28/06	Disaster Voucher Program	Changes to Disaster Voucher Program Operating Requirements Participation Family Eligibility and Initial Lease Terms	9/30/07

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OTHER RECENT HUD NOTICES

Notice	Date Issued	Subject	Substance	Effective Date
H 2006 - 12	9/12/06	Closing Costs Paid By HUD	Supersedes Notice H 2005 - 12, and announces a new and simplified policy on closing costs payable by the Department on sales of single-family properties owned by HUD. This change is intended to align HUD home sale policies with the industry practices.	9/30/07
H06-11	8/8/06		Guidance on HUDs policy and procedure regarding the prepayment of HUD-insured/ held mortgages pursuant to the National Housing Act. This Notices does not apply to projects insured under Section 233(f) of the National Housing Act because that section of the Act contains its own provisions governing prepayment approval. This Notice supersedes all prior directives on the subject.	8/31/07
HUD Form 50066		Domestic Violence Certification Form	A family member must complete and submit this certification, or the information that may be provided in lieu of the certification, within 14 business days of receiving the written request for this certification by the PHA, owner or manager. The certification or alternate documentation must be returned to the person and address specified in the written request for the certification. If the family member has not provided the requested certification or the information that may be provided in lieu of the certification by the 14th business day or any extension of the date provided by the PHA, manager and owner, none of the protections afforded to victims of domestic violence, dating violence or stalking (collectively “domestic violence”) under the Section 8 or public housing programs apply.	5/31/07

TODAY’S POSITIVE QUOTATION

President John F. Kennedy’s definition of happiness:
“The full use of your powers along lines of excellence.”

RULES FOR EMAILS AND OTHER ELECTRONIC INFORMATION... Continued

example, as Kenneth Withers noted in his recent insightful law review article containing an anthology of how courts have dealt with e-discovery issues and the impact of the new federal rules, each e-mail message is likely to be replicated on several locations on both the sender's and recipient's hard drive, as well as on network email servers and their backup media. One message becomes multiplied exponentially. *See* "*Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure"* by Kenneth J. Withers, 4 Nw. J. of Tech. & Intell. Prop. 171 (Spring 2006). The foregoing law review article, which I commend to you, is accessible online *at* http://www.law.northwestern.edu/journals/njtip/v4/n2/3.

A key concern is the number of "deleted" documents which were never really deleted. While some of us may still assume that we permanently are deleting the existence of a document or file by hitting the "delete" key on our keyboard, we really are doing nothing more than changing the document's name and eliminating reference to it in the operating system's list of active files. *Id.* As some have found out the hard way, "deleted" files can be easily recovered, and pressing the "delete" key does nothing for the dozens, scores, or hundreds of replicants existing elsewhere on the system, on the network, or on backup media. *Id.* This process has been described by a computer forensics expert as a "witness protection program for bad documents." *Id.* Add to the mix the hoards of backup data. Daily backups containing only incremental changes from the day before are kept for a week or more. Weekly backups are kept for months, and monthly backups are kept for years. *Id.* And then there are the disaster recovery backup tapes that are likely stored offsite in drafty warehouses miles away from the office. It is easy to see how the cost of finding, restoring, and sifting through all of this electronic data can be very costly. And then, there's the privilege review and when it is appropriate to "litigation hold," that is when a party intervenes or puts a "hold" on the routine operation of an information system, such as automatic document destruction mechanisms, when the party is under a duty to preserve information because of pending or reasonably anticipated litigation.

The E-Discovery Amendments

Primarily, the new e-discovery rules are found in the amendments to Federal Rules 26, 33, 34, and 45, as well as in new Rule 37(f) regarding safe harbors to sanctions. These rules deal with the effects of the general expansion of the definition of discoverable materials to include "electronically stored information." One shortcoming in the new rules is that they fail to define "electronically stored information." We thus are left to rely upon the commonly understood definition: information or data created by the use of a computer. The new e-discovery rules take us all into an abyss that few of us are ready to face, creating an even bigger opportunity for IT experts. Indeed, the Committee Notes to amended Rule 26(f) discuss the potential for depositions of persons with specialized knowledge of a party's computer systems.

Revisions to Rule 26 (initial disclosures, etc.)

The general rules on discovery disclosures and discovery conferences have been revised to include electronically stored information within the scope of the initial disclosures due to be made without need for a formal request. Thus, the new rule requires parties to discuss early-on in the litigation, even before the Rule 26(f) scheduling conference, issues relating to preserving discoverable information, the form of production, and the assertion of privilege. (Rule 16 is also amended to include provisions for disclosure or discovery of electronically stored information at the settlement conference.) Rule 26 is revised in pertinent part as follows:

> Rule 26. General Provisions Governing Discovery; Duty of Disclosure
> [. . .]
> (a) Required Disclosures; Methods to Discover Additional Matter.
> (1) *Initial disclosures*. Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:
> (A) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information;
> (B) a copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;
> [. . .]
>
> (b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
> [. . .]

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RULES FOR EMAILS AND OTHER ELECTRONIC INFORMATION... Continued

(2) Limitations.
(A) By order, the court may alter the limits in these rules on the number of depositions and interrogatories or the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.
(B) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.
[. . .]
(5) Claims of Privilege or Protection of Trial Preparation Materials.
(A) Information withheld. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.
(B) Information produced*.* If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.
[. . .]
(f) Conference of Parties; Planning for Discovery. Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E) or when otherwise ordered, the parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), to discuss any issues relating to preserving discoverable information, and to develop a proposed discovery plan that indicates the parties' views and proposals concerning:
(1) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement as to when disclosures under Rule 26(a)(1) were made or will be made;
(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;
(3) any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;
(4) any issues relating to claims of privilege or of protection as trial-preparation material, including - if the parties agree on a procedure to assert such claims after production - whether to ask the court to include their agreement in an order;
(5) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and
(6) any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c).

Revisions to Rule 33 (cost shifting)

We rely upon Rule 33(d) to, *inter alia,* make persons seeking information through interrogatories get that information by reviewing and analyzing documents to get their answers. We rely upon the argument that the burden of ascertaining the information is the same for both parties. The amendment to Rule 33(d) adopts this convention for electronically produced documents. However, Mr. Withers rightly points out in his article the difficulty of determining that the cost of record analysis is roughly the same for either party, since one would have to consider uneasily-quantifiable overhead costs of maintaining the necessary computer

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RULES FOR EMAILS AND OTHER ELECTRONIC INFORMATION... Continued

hardware and software, the cost of training personnel, and the cost of potential business disruption, security compromise, and privilege issues involved in having a party opponent occupying the client's IT department. 4 Nw. J. of Tech. & Intell. Prop. 171 (Spring 2006). These issues bode toward avoiding this option with respect to the production of electronic information. Rule 33(d) is revised as follows:

> Rule 33. Interrogatories to Parties
>
> (d) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records, including electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts, or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.
>
> [. . .]

Revisions to Rule 34 (production of documents, etc.)

The federal rule we rely upon to request production of documents and other tangible things also has been revised to include electronically stored information. The requestor may specify the form or forms in which electronically stored information is to be produced; although there is a split in decisions deciding whether a party can request both paper and electronic data. *See infra*, p. ______. Rule 34 is revised as follows:

> Rule 34. Production of Documents, Electronically Stored Information, and Things and Entry Upon Land for Inspection and Other Purposes
>
> (a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, copy, test, or sample any designated documents or electronically stored information - including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained - translated, if necessary, by the respondent into reasonably usable form, or to inspect, copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).
>
> [. . .] '(b) Procedure. The request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced. Without leave of court or written stipulation, a request may not be served before the time specified in Rule 26(d).
>
> The party upon whom the request is served shall serve a written response within 30 days after the service of the request. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, stating the reasons for the objection. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. If objection is made to the requested form or forms for producing electronically stored information—or if no form was

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> specified in the request—the responding party must state the form or forms it intends to use. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.
>
> Unless the parties otherwise agree, or the court otherwise orders,
> (i) a party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request; and
> (ii) if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained, or in a form or forms that are reasonably usable; and
> (iii) a party need not produce the same electronically stored information in more than one form.
> [. . .]

New Rule 37(f) (sanctions and safe harbors)

Rule 37(f), which is entirely new, recognizes that we cannot be expected to preserve all of the data that we generate, and provides a safe harbor for the unintentional loss of electronic information when a party is *in good faith* following an established document retention policy. While the rule provides a safe harbor under this circumstance, it also leaves available other remedies to alleviate the adverse impact of the loss. New Rule 37(f) reads as follows:

> Rule 37. Failure to Make Disclosures or Cooperate in Discovery; Sanctions
>
> (f) Electronically stored information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

Again, this rule addresses "lost" information. Essentially, if a party is operating under the "routine, good-faith operation" of an established electronic information system, and during that operation information is lost, then the party may avail itself of the safe harbor provisions. Of course, this rule does not define and leaves open what constitutes "routine" and "good faith operation." However, the Committee Notes state that "good faith" in the routine operation of an information system may involve a party's intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation. In plain English, this means, for example, that you have to deviate from your agency/firm's usual document destruction policy (e.g., e-mails destroyed after 60 days), if you have a preservation obligation.

The Committee Notes also discuss the "routine operation" of computer systems as including the alteration and overwriting of information, often without the operator's specific direction or awareness, and point out that this is a feature with no direct counterpart in hard-copy documents. Moreover, the "absent exceptional circumstances" language means that judges have discretion to determine when a party's actions resulting in the loss of electronically stored information is sanctionable.

Firms and agencies that fail to establish electronic data retention policies will not be able to avail themselves of this safe harbor. So, like we have for our paper records, we should all be leaning on our IT departments to assist us in prioritizing the establishment of internal policies for retaining and managing our electronic records. Be sure to consult your state and/or local document retention laws, and be mindful of HUD's federal document retention regulations applicable to your programs documents. Make sure that all of your employees are trained on the policies, and that they understand the ramifications of creating electronic data that one day may have to be produced. An employee's ignorance can be very costly! And worse yet, an employee's willful disregard of document preservation obligations can result in what could be quite substantial fines assessed against your agency/firm.

Importantly, as the rule is currently written, it may be argued that third parties who are served with subpoenas *duces tecum* for electronically stored information under Rule 45 (*see* below) do not receive the benefit of the safe harbor provisions of Rule 37 because it only is directed toward "a party." If you are ever such a third party, you might argue that the word "party" means party served with the subpoena. Unfortunately, the Committee Notes do not shed any additional light on this subject.

According to the Committee Notes, "good faith" in the routine operation of an information system may involve a party's intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation. Committee Notes p. 41. The good faith

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requirement of Rule 37(f) means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve*. Id.* When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a "litigation hold." *Id.*

Finally, keep in mind that Rule 37(f) is not a "get out of jail free" card. The Committee Notes also make clear that the protection provided by Rule 37(f) applies only to sanctions "under these rules." While the rule restricts the imposition of "sanctions," it does not prevent a court from ordering the responding party to produce an additional witness for deposition, respond to additional interrogatories or questionnaires, or make similar attempts to provide substitutes or alternatives for some or all of the lost information.

Revisions to Rule 45 (subpoenas)

Rule 45, the rule on subpoenas, is revised to capture the content of the foregoing rules. It provides that a subpoena may specify the form or forms in which electronically stored information is to be produced. It also provides that, if a subpoena does not specify the form or forms for producing electronically stored information, the person responding to a subpoena must produce the information in a form or forms in which the person ordinarily maintains it, or in a form or forms that are reasonably usable. Rule 45 is revised as follows:

> Rule 45. Subpoena
> (a) Form; Issuance.
> (1) Every subpoena shall
> [. . . .]
> (C) command each person to whom it is directed to attend and give testimony or to produce and permit inspection, copying, testing, or sampling of designated books, documents, electronically stored information, or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and
> [. . . .]
> A command to produce evidence or to permit inspection, copying, testing, or sampling may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately. A subpoena may specify the form or forms in which electronically stored information is to be produced.
> [. . . .]
> (c) Protection of Persons Subject to Subpoenas.
> [. . . .]
> (2) (A) A person commanded to produce and permit inspection, copying, testing, or sampling of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.
> (B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection, copying, testing, or sampling may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to producing any or all of the designated materials or inspection of the premises—or to producing electronically stored information in the form or forms requested. [. . . .]
> [. . . .]
> (d) Duties in Responding to Subpoena.
> [. . . .]
> (1) (A) [. . . .]
> (B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable
> (C) The person responding to a subpoena need not produce the same electronically stored information in more than one form.
> (D) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for such discovery.
> (2) (A) [. . . .]
> (B) If information is produced in response to a subpoena that is subject to a claim of privilege or of

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> protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The person who produced the information must preserve the information until the claim is resolved.

Objections

When faced with a request to produce electronically-stored information, available are objections for not producing electronic data. You may object on the basis that the information is "not reasonably accessible," taking into account the expense and burden may be involved in making the data accessible before it can be determined whether it is relevant to the lawsuit. Rule 26(b)(2)(B). Commentators point out that this is fundamentally different from the "undue burden" consideration of existing Fed. R. Civ. P. 26(B)(2), which assumes that the discovery being sought is relevant, and the benefits and burdens of production being weighed are known or can reasonably be estimated. Withers, J., 4 Nw. J. of Tech. & Intell. Prop. 171. When dealing with electronic information stored on inaccessible media or in inaccessible formats, the benefits and burdens are far more speculative. *Id.*

To substantiate this objection, you have to establish that producing the information results in an undue burden or excessive cost. While most paper-based information can be easily read and understood by laypeople, all electronically stored information must be rendered intelligible by the use of technology - computers, operating systems, and application software. *Id.* To the extent that the appropriate technology is readily available to render the electronically stored information intelligible, it is considered "accessible." *Id.* However, much of the electronically stored information that may be subject to discovery is not easily rendered intelligible with the computers, operating systems, and application software available in every-day business and personal environments. *Id.* Savvy IT professionals have to take on that effort. Thus, some electronically stored information may be considered "not reasonably accessible" due to the cost and burden associated with rendering it intelligible. Other objections may include that the information is not reasonably accessible because the request is not sufficiently specific, that the quantity of information is available from other sources, or you can challenge the importance and/or usefulness of the information.

A requestor must make a credible threshold showing that relevant email or backup messages are likely to be found. Without such a threshold showing, the requestor will be made to bear the cost of rendering the backup media accessible. *Byers v. Illinois State Police*, 53 Fed. R. Serv. 3d 740 (N.D. Ill. 2002). Some courts require a sampling of the files in order to determine potential relevancy. Instead of putting the defendant to the expense of restoring the entire collection of backup files before making a relevance determination, the judge can order a random sampling of a few of the backup tapes to determine both the cost of restoration and the rough statistical likelihood that relevant information could be found from those sources. *McPeek v. Ashcroft*, 202 F.R.D. 31 (D.D.C. 2001).

Clawback agreements

Consider how likely the event of our inadvertently producing privileged information embedded into a thread of a facially benign e-mail exchange. It could happen to any of us. Amended Rule 26(b)(5)(B) contains clawback provisions for e-data. A party who has produced privileged or work product electronic data can notify any party recipient of the data and state the basis for the claim that it's privileged. After notice, any party receiving the allegedly privileged material must return, sequester or destroy the specified information, must retrieve any copies shared with non-parties (e.g., experts) and may not use or destroy the allegedly privileged information until the claim of privilege is resolved under applicable law.

Court Decisions

I have uncovered a fair number of reported decisions regarding e-discovery. Given space constraints, I summarize many of the important ones below with the case citations:

Access to personal computers and data.
Ball v. Versar, Inc., 2005 WL 4881102 (S.D. Ind. Sept. 23, 2005)

Allocating Costs – Archived database. Circuit Court reversed trial court's sanction for plaintiff's failure to produce a database maintained by a non-party contractor because the trial court failed to consider the logistical difficulties of doing so, which would have involved the purchase of a mainframe

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computer or paying the non-party an estimated $30 million to maintain an archived version of the database.
Procter & Gamble Co. v. Haugen, 427 F.3d 727 (10th Cir. 2005).

Allocating costs – back-up data. When the requesting party fails to make a credible threshold showing that relevant email messages were likely to be found in back-up data, the requesting party has to bear the cost of rendering the backup media accessible.
Byers v. Illinois State Police, 53 Fed. R. Serv. 3d 740 (N.D. Ill. 2002).

Allocating Costs – Legacy computer systems. Although data on certain legacy (outdated) computer systems was "inaccessible" without incurring costs, those costs should remain with the responding party.
Xpedior Creditor Trust v. Credit Suisse First Boston (USA), Inc., 309 F.Supp.2d 459 (S.D.N.Y. 2003)

Claw-back agreements.
Hopson v. The Mayor and City Council of Baltimore, 232 F.R.D. 228 (D. Md. 2005)

Discovering information about an opponents e-document retention system. Court adopted plaintiff's questionnaire to ascertain information about the defendant's electronic records management system, even after agreeing that the questionnaire amounted to interrogatories exceeding the limit. Court based its holding on its power to grant leave to serve additional interrogatories.
Treppel v. Biovail Corp., 233 F.R.D. 363 (S.D.N.Y. 2006)

Limiting searches of electronic data . A defined search strategy, including the use of specific search terms, is appropriate in electronic discovery.
Treppel v. Biovail Corp., 233 F.R.D. 363 (S.D.N.Y. 2006)

Metadata, calculations, and other relevant spreadsheet items. After defendant produced Excel spreadsheets showing reduction-in-force calculations in a static image format, as opposed to "native format" which would also contain the mathematical formulae behind the spreadsheets, text that exceeded cell size, and metadata, the court determined that the defendant should have preserved and produced the spreadsheets "as they are kept in the ordinary course of business" or in native format—or taken other measures to preserve and produce non-apparent information contained within the electronic files, as it was reasonable to assume that the calculations, text, and metadata would be relevant and material to the claims raised in the lawsuit.
Williams v. Sprint/United Management Co., 230 F.R.D. 640 (D.Kan. 2005).

"Quick peek" agreements. Requesting party would pay the cost of hiring an expert to recover the defendant's emails and would perform an initial review to identify those that it considered responsive. The defendant would then review those designated documents to determine whether any were privileged, at which point it could object to their actual production.
Murphy Oil USA, Inc. v. Fluor Daniel, Inc., 52 Fed. R. Serv. 3d 168 (E.D. La. 2002).

Requesting both paper and e-documents. Some courts require production of both hard paper documents and e-documents; others do not.
Williams v. Owens-Illinois, 665 F.2d 918 (9th Cir. 1982) (denying request for e-data as supplement to paper discovery)
Anti-Monopoly, Inc. v. Hasbro, Inc., 1995 WL 649934 (S.D.N.Y. 1995) (allowing both paper and e-data)
McNally Tunneling Corp. v. City of Evanston, 2001 WL 1568879 (N.D. Ill. Dec. 10, 2001) (denying request for e-data as supplement to paper discovery)
In re Honeywell International, Inc., 230 F.R.D. 293 (S.D.N.Y. 2003) (allowing request because paper production was insufficient because documents were not produced as kept in the usual course of business)

Sampling . Instead of putting the defendant to the expense of restoring the entire collection of backup tapes before making a relevance determination, the judge ordered a random sampling of a few of the tapes to determine both the cost of restoration and the rough statistical likelihood that relevant information could be found from those sources.
McPeek v. Ashcroft, 202 F.R.D. 31 (D.D.C. 2001).

Sanctions – adverse jury instruction. Court found that defendants failed to take any measures to preserve emails until five months after the suit was filed, despite knowledge of the lawsuit and a discovery request. Court found that the defendant did not act in bad faith in deleting the emails, but that such actions were "grossly negligent." Finding that simple negligence is the threshold of culpability, the court found that sanctions were appropriate and denied the plaintiff's request to have key issues in the case "deemed conclusively established," because the plaintiff did not make a compelling case as to the likely significance of the emails. Accordingly, the court concluded that the appropriate sanction was an adverse-inference jury instruction.
MasterCard International, Inc. v. Moulton, 2004 WL 1393992 (S.D.N.Y. 2004).

Sanctions - fine. After a blanket data-preservation order was entered early on, for at least two years the defendant continued its routine practice of deleting email messages more than sixty days old and delayed informing the court about it for an

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additional four months. Court found that eleven of the company's highest placed officers and supervisors violated not only the court order, but also the company's stated policy for electronic records retention and fined the defendant $250,000 per employee, for a total of $2,750,000, and precluded the defendant from calling any of the eleven employees as witnesses at trial.
United States v. Philip Morris USA Inc., 327 F. Supp. 2d 21 (D.D.C. 2004).

Scanned documents. After parties agreed early on paper production and a per-page price for photocopying, defendant did not disclose that the documents had been scanned, were being "blown back" to paper form at a cost below that of photocopying, and were available in electronic form for considerably less money. Court required paper production at lower cost of the "blow backs," and ordered that the electronic versions also be produced, at the nominal cost of duplicating compact disks. Court rejected defendant's request for plaintiff to contribute to the cost of scanning the documents
In re Bristol-Myers Squibb, 205 F.R.D. 437 (D.N.J. 2002)

TEST #1: The 8-Factor Test for Cost Allocation:
1. the specificity of the discovery request;
2. the likelihood of discovering material data;
3. the availability of those data from other sources;
4. the purposes for which the responding party maintains those data;
5. the relative benefits to the parties of obtaining those data;
6. the total costs associated with production;
7. the relative ability and incentive for each party to control its own costs; and
8. the resources available to each party.

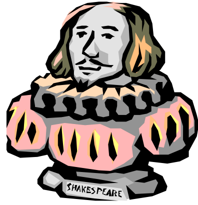
Court required the plaintiffs to pay for the recovery and production of the defendants' extensive email backups, except for the cost of screening for relevance and privilege.
Rowe Entertainment, Inc. v. William Morris Agency, Inc., 205 F.R.D. 421 (S.D.N.Y. 2002).

TEST #2: The 7-factor Test for Cost Allocation:
Court held that the presumption that each party bears its own costs in discovery applied with full force in electronic discovery when the information being sought comes from reasonably accessible sources. Only when the information being sought comes from sources that are not reasonably accessible may cost shifting be considered, and then only with the application of a seven-factor test:
1. the extent to which the request is tailored to discover relevant data;
2. the availability of those data from other sources;
3. the total cost of production, relative to the amount in controversy;
4. the total cost of production, relative to the resources available to each party;
5. the relative ability and incentive for each party to control its own costs;
6. the importance of the issues at stake in the litigation; and
7. the relative benefits to the parties in obtaining those data.

Court allocated 75% of the costs to plaintiffs and only 25% to the defendant.
Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2003)

TEST #3: Modified *Zubulake* 8-factor test
1. the likelihood of discovering critical information;
2. the availability of such information from other sources;
3. the amount in controversy as compared to the total cost of production;
4. the parties' resources as compared to the total cost of production;
5. the relative ability of each party to control costs and its incentive to do so;
6. the importance of the issues at stake in the litigation;
7. the importance of the requested discovery in resolving the issues at stake in the litigation; and
8. the relative benefits to the parties of obtaining the information.
Wiginton v. CB Richard Ellis Inc. , 229 F.R.D 568 (N.D. Ill. 2004).

It is likely that this evolution in the rules will result in further litigation to interpret the practical meaning and effect of these rules. HDLI will continue to monitor and report on how courts interpret these rules. The Federal Judicial Center publishes a website with links to articles, PowerPoint slide presentations, sample forms and orders, and other items of interest on electronic discovery. These materials may be downloaded at:
http://www.fjc.gov/public/home.nsf/autoframe?openform&url_l=/public/home.nsf/inavgeneral?openpage&url_r=/public/home.nsf/pages/196.
Additionally, the ABA recently advertised for sale "The Electronic Evidence and Discovery Handbook: Forms, Checklists, and Guidelines" By Sharon D. Nelson, Bruce A. Olson, and John W. Simek. It costs $129, and would seem to be well worth the investment. You may find more information at:
http://www.abanet.org/abastore



SHAKESPEARE'S REVENGE

"The first thing we do, let's kill all the lawyers."
-- William Shakespeare

Did you ever want to one-up somebody who told you a bad lawyer joke? Here's the ammunition . . .

A Russian, a Cuban, an American and a Lawyer are in a train. The Russian takes a bottle of the Best Vodka out of his pack; pours some into a glass, drinks it, and says: "In USSR, we have the best vodka of the world, nowhere in the world you can find vodka as good as the one we produce in Ukrain. And we have so much of it, that we can just throw it away..." Saying that, he opens the window and throws the rest of the bottle through it. All the others are quite impressed. The Cuban takes a pack of Havanas, takes one of them, lights it and begins to smoke it saying: "In Cuba, we have the best cigars of the world: Havanas, nowhere in the world there is so many and so good cigar and we have so much of them, that we can just throw them away...". Saying that, he throws the pack of Havanas through the window. One more time, everybody is quite impressed. At this time, the American just stands up, opens the window, and throws the Lawyer through it...

The Lawyer's Motto: "Insofar as manifestations of functional deficiencies are agreed by any and all concerned parties to be imperceivable, and are so stipulated, it is incumbent upon said heretofore mentioned parties to exercise the deferment of otherwise pertinent maintenance procedures." In Other Words: "If it ain't broke, don't fix it."

A doctor, an engineer, and a lawyer go out hunting in the woods one day. Each of them brings along his hunting dog, and they spend most of the morning arguing about which of the dogs is the smartest. Early in the afternoon, they discover a clearing in the forest. In the middle of the clearing is a large pile of animal bones. Seeing the bones, the doctor turns to the others and says, "I'm going to prove to you two that my dog is the smartest. Watch this!" He then calls his dog over and says, "Bones! See the bones? Go get 'em!" The dog rushes over to the pile, rummages around for a bit, and then proceeds to build a replica of the human skeleton, perfect down to the last detail. The doctor grins smugly; after all, his dog has just build a *human* skeleton from *animal* bones.

The engineer, however, is totally unimpressed. "That's nothing," he says. "Watch this." He calls his dog over, and points out the pile. "Bones! Get the bones!" The dog rushes over, tears down the skeleton, and in its place builds a perfect replica of the Eiffel Tower. It even has a little French flag waving at the top. The doctor is forced to agree that the engineer's dog is, in fact, smarter than his own. The lawyer, however, is still not impressed. "My dog is smarter," he says. "Watch." He then calls his dog over, points to the pile, and says simply "Bones." The dog rushes over to the pile, tears down the tower, eats half the bones, buries the other half, and takes the rest of the afternoon off.

Two lawyers are in a bank, when, suddenly, armed robbers burst in. While several of the robbers take the money from the tellers, others line the customers, including the lawyers, up against a wall, and proceed to take their wallets, watches, etc. While this is going on lawyer number one jams something in lawyer number two's hand. Without looking down, lawyer number two whispers, "What is this?", to which lawyer number one replies, "it's that $50 I owe you."

HDLI WELCOMES ITS NEWEST BOARD MEMBERS:

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SAVE THE DATE!

HDLI 2007 Spring Legal Conference

April 26-27, 2007
Washington Marriott Hotel
Washington, D.C.

Come and enjoy a welcome cocktail reception!

More details coming soon . . .

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