

# The Clause

*A Quarterly Publication of the Boards of Contract Appeals Bar Association*

## The President's Message

I hope you all have had restful and relaxing summer and are refreshed and ready to tackle new challenges. The BCABA program year thus far has been remarkably successful. As I noted in earlier communications, our Spring BCABA/GW Colloquium, "*Alternative Dispute Resolution in Government Procurement: New Horizons*," held at the GW Law School Moot Court Room in April, was a truly wonderful seminar. The May Annual BCA Judges' Reception, which we co-sponsor every year, likewise was simply outstanding.

Below are brief descriptions of the remaining BCABA programming for this year.

### Executive Policy Forum

We look forward to our soon upcoming BCABA Executive Policy Forum, to be held from noon to 2 P.M. on Wednesday, September 6, 2007, at Arnold & Porter LLP in Washington, D.C. This year's Forum ("*A Comparative Look at the ASBCA, CBCA, and PSBCA: Technology and Electronic Filing, Rules of Procedure, and Other Differences Among the Federal Boards*") will take a close look at the procedural rules of the three federal BCAs, the technology needs of the Boards, electronic filing issues, and other issues facing the Boards. This is the first BCABA Executive Policy Forum since the creation of the CBCA, and it will provide a real opportunity for candid discussion and comparison of the new CBCA Interim Rules (published in the Federal Register on July 5, 2007) along with the rules of both the ASBCA and PSBCA, as well as for a discussion of any differences in how the Boards implement their respective mandates.

Each year, due to our desire for an optimally productive session, we limit eligibility for attendance at the Executive Policy Forum to designated representatives of each of the BCABA Gold Member Firms, to all BCABA Government members, and to our BCA Judges. For those of you who are eligible and interested and have not already reserved your places, **please RSVP immediately to me at Richard.Walters@gsa.gov.**

### 2007 Annual Program

Please mark your calendars and plan to join us at our BCABA Annual Program, to be held all day on **Thursday, October 25, 2007.**

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## Staying Inside the Bounds

by

David M. Nadler\*

[Note: Reprinted with permissions from *Federal Computer Week*.]

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council recently proposed amending the Federal Acquisition Regulation to add FAR Subpart 3.10: “Contractor Code of Ethics and Business Conduct.” Although a few agencies have policies in that area, the new rule would extend that ethics rule throughout the civilian and defense agencies and set consistent standards for avoiding improper business practices and for displaying an agency inspector general’s fraud hotline poster.

Among other things, the new rule would:

- Establish as policy that contractors should have a code of ethics and business conduct.
- Require contractors that receive awards of more than \$5 million with performance periods of 120 days or more to publish a written code of ethics and business conduct within 30 days after the contract award. Within 90 days after the award, those contractors must also establish an ethics and compliance program and an internal control system consistent with the company’s size and volume of government business.
- Require contractors that receive awards of more than \$5 million to display an agency inspector general’s fraud hotline poster at work locations in the United States and on the company’s Web site, if the company has a site to provide to employees.
- Provide remedies for noncompliance, including the withholding of contract payments or loss of award fee.
- Require a flow-down provision that would apply to subcontracts at the same dollar level it would apply to the prime contract. The new rule would apply only to contracts performed in the United States and would not apply to commercial item awards.

Those provisions in the new rule apparently are a reaction to that scandals that have rocked the procurement community. The rule is consistent with recent legislative initiatives intended to address the standards of conduct for government contractors and to make the acquisition process more transparent. Indeed, the stated policy of the new rule begins with the admonition that “government contractors must conduct themselves with the highest degree of integrity and honesty.”

The new rule would set minimum standards for a compliance plan, but it would apply only to contracts above a certain dollar threshold and exclude commercial item awards. However, because all government contractors are now potential enforcement targets, companies should voluntarily implement a compliance plan as a safeguard against misconduct and overzealous lawmakers, investigators and prosecutors.

The primary requirement for a code of conduct and compliance program would not apply until the company has contracts that meet the \$5 million threshold. It appears that the \$5 million level was established to avoid the potential cost effects of the requirements on small businesses. Similarly, commercial item procurements are excluded because the ethics programs and hotline posters are not standard commercial practices. However, under the proposal, all contractors, regardless of their size or the nature of the procurement, would be required to have “a satisfactory record of integrity and business ethics” to be considered a responsible company eligible for a government contract.

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## **Staying Inside the Bounds (cont'd):**

Inspectors general and the Justice Department routinely investigate alleged fraud that involves procurements of commercial items, including sales under the General Services Administration schedule contract program, and improprieties related to lower dollar value contracts. Indeed, the government often seems to lack a sense of proportion. An impropriety in a contract valued at less than \$5 million could result in damages far in excess of that amount under the trebling and penalty provisions of the False Claims Act. Of course, the penalties can be more severe if the matter is criminal and implications even more profound if the company is publicly traded.

The fact that a government compliance plan may be inconsistent with a company's commercial practices is precisely why such a plan should be implemented. It is often those differences and the failure to appreciate the unique rules applicable to government contracting that inadvertently give rise to liability.

The formation last year of a special Justice Department task force to investigate and prosecute procurement fraud is a stark reminder that all contractors need to take aggressive measures to avoid becoming government targets. Indeed, a company's compliance plan is typically among the first documents requested in an investigative subpoena, regardless of the contract's amount.

A code of ethics is important, but investigators are looking for more than platitudes. The proposed rule is based on a comprehensive plan for internal controls to ensure compliance with the code of ethics and the unique requirements of government contracting. According to the proposal, an effective internal control system has procedures to facilitate timely discovery and disclosure of improper conduct in connection with government contracts and mechanisms to ensure that corrective measures are promptly instituted and carried out. Such a system also has an internal reporting mechanisms, such as a hotline, for reporting of suspected improper conduct, internal and external audits, disciplinary action for improper conduct, prompt reporting of such conduct to the government and cooperation with any government investigation regarding the matter.

By having a compliance plan, a company shows it understands and takes seriously its obligations as a government contractor. A plan can also support a company's defense in an investigation into whether the impropriety was caused by the actions of a wayward employee who deviated from stated corporate policy, or whether it is a systemic problem with managers who act in reckless disregard of the law.

All Companies that sell to the government should consider having a comprehensive compliance program. No one, however, can legislate morality, and no amount of compliance efforts can stop someone intent on breaking the rules. Such a program will be effective only if it is consistent with a culture that recognizes and rewards compliance as a core value, and regularly trains its employees on their special obligations as a government contractor. The program must be implemented and constantly reinforced by managers who set an example with their conduct in every facet of the business and in all dealings with the government.

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## **Bored of Contract Appeals (a.k.a. The Editor's Column)**

by  
Peter A. McDonald  
C.P.A., Esq.  
(A nice guy . . . basically.)

We lead off with a timely article by Dave Nadler concerning the proposed rule on contractor ethics (FAR Subpart 3.10). Somewhat related, Dr. Criss discusses the ins and outs of establishing a corporate compliance committee. Kristen Nimsger's article is a timely update on the Federal rules related to electronic discovery. Lastly, we have a review of the new *Government Contract Changes* text by Professor Nash and Steve Feldman. Also note that the **BCABA Annual Meeting Registration Form** is included at the end.

Although *The Clause* itself is not copyrighted, we will reprint, with permission, previously published and copyrighted articles that deserve further exposure and welcome those and other original articles that will be of interest to government contracts practitioners. But remember: Don't take all this government contract stuff too seriously. As usual, we received some articles that were not suitable for publication, such as: "Adventures in Inventory Management!"; "ASBCA Gets IT Support—Judges Stunned!!"; and "DCAA Heaps Praise on Contractors in Iraq!!".

### **President's Message (cont'd from Page 1):**

We have reserved a wonderful space at the M Street Hotel, 1143 New Hampshire Avenue, NW, Washington, D.C., which has undergone a \$20 million renovation and is now a truly first-class facility. This year's program promises to be among our very best, ever.

We have lined up for you an amazing day of top notch panels that will give you all the latest information on some very important subjects, including:

- "The E-Train is Coming -- Electronic Discovery at the Boards of Contract Appeals,"
- "It's a Small, Small World – Hot Topics in Foreign Source Acquisition and Foreign Restrictions,"
- "Finding the Battleground on Battle Front Claims: Formulating, Defending and Litigation War Zone Disputes"
- "Pushing the Envelope: Legal Ethics at Work in Board Practice"
- "Judges Panel – A New Day Dawning at the Boards?"

In addition, we are indeed privileged this year to have as our Luncheon Keynote Speaker the Hon. Paul R. Michel, Chief Judge of the United States Court of Appeals for the Federal Circuit.

The Association is applying to the Virginia Bar for CLE credit (seeking 6 hours of VA CLE, including .5 hours of Ethics) for this program, and we will keep you advised regarding our application.

Please **SAVE THE DATE** and **register for the Program as soon as possible. Program Registration forms have been disseminated to our listserv and are posted on Jerry Walz's Public Contract website. They also may be downloaded from our website. As we did last year, we are accepting major credit cards for Annual Program tuition and BCABA dues.**

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## Establishing a Compliance Committee

by

Dr. Ralph M. Criss\*

[Reprinted with permission from the National Contract Management Association, *Contract Management*, Vol. 47, Issue 7, July 2007.]

This article is a follow-on of “Contract Compliance for Government Contractors,” from the December 2006 issue of *Contract Management*.<sup>1</sup> In that article, we explored what compliance means to a government contractor and some of the elements of a solid compliance program. This article will examine one of those elements — the compliance committee. We will look at the committee’s roles, responsibilities, and what should be expected of a committee. In a future article, we will explore how a compliance committee conducts itself. As with the first article, we will focus on committees in government contractor organizations. The discussion in this series of articles is intended to take a working-level approach. The intent is not to discuss how programs work on a broad basis, but how to deal with the implementation of government contract compliance through a hands-on approach.

The first thing we should do is define a compliance committee. In general, the committee is made up of selected senior managers of an organization that are charged with bridging the knowledge gap between what people in the organization inherently know as right and wrong, and what is proper behavior within the context of the organization. Each of us comes to a job with our own understandings about what behaviors are proper and those that are not. Since we are each unique individuals, there are at least some differences of opinion that can reasonably exist about right and wrong in a given set of circumstances. Across large organizations, the differences between what people believe to be right and wrong can be great. To establish the boundaries for right and wrong, organizations create policies and procedures to set limits. The people in an organization need to have a way to put their notions of right and wrong together with the organization’s policies and procedures. We typically rely on managers supervisors, and training to accomplish this level of knowledge. Without some overarching guiding force, however, the merger of policy and personal knowledge is haphazard and not uniform. Given the serious consequences of ethics-related legislation today, relying on luck is not a good idea.

The next serious issue is who the committee reports to. The purpose of the committee is to be objective and advise management when things are not going as they should. A committee cannot be compromised by a lack of authority. Similarly, the ability of managers to take action cannot be compromised. The committee must not place its most senior decision-makers in a compromising position by making them complicit in committee recommendations; particularly if they are bad recommendations. The situation is analogous to the issues regarding quality and safety. On the one hand, if you bury the ones who are functionally responsible for quality and safety in the organization, they will not receive the attention they deserve. On the other hand, if given too much authority, safety and quality will prevent the organization from taking a balanced approach to all elements of business; and eventually, even safety and quality will suffer. Compliance is the same way. Those managers who are charged with making the types of decisions that require balancing the competing needs of various functions need to be able to put the recommendations of a compliance committee in perspective with the realities of running a successful organization. Including the CEO on an executive committee or a business-line president as a member of a subordinate compliance committee may compromise their ability to make rational decisions that are truly in the best interests of all. He or she may get caught up in the mechanics of the committee. Having the committee report to each of these business leaders probably makes more sense in most companies.

As mentioned earlier, the difference between personal knowledge and organizational policy is a gap in knowledge. A compliance committee is not going to personally engage each member of the organization; but  
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## **Establishing a Compliance Committee (cont'd):**

for the dissemination of formal knowledge, hierarchal structures provide the best framework to ensure that all people get the same message. A compliance committee properly placed, charged, and managed in an organization can give the right focus bring the right knowledge, and cause the right training to be brought on the areas of the organization that need attention. It should become clear that a compliance committee may not be a single box on the organization chart. It be necessary to have more than one committee; we will discuss that notion further in this article.

### **Why a Compliance Committee?**

Compliance committees are necessary for government contractors to give focus and direction to the people in their organization. Left to their own devices, people will do what they think is best or at least right. It would be analogous to driving through an open field without the advantage of roads. With a road, you can see where you need to be and you might be able to see how to get there. Most people would understand that you need to get to a destination without hitting someone else. But without roads, stop signs, and speed limits, accidents would be inevitable.

We can look at the Darlene Druyan case as an example. While not as naïve an example as the earlier analogy, and there is certainly much that can be said about personal ethics, the Druyan case is illustrative. The agency's analysis indicated that from an organizational perspective, Druyan had operated for too long a period without oversight and accountability.<sup>2</sup> Certainly, she made some wrong personal choices, but the organization might have recognized that it created a situation that allowed someone to exercise noncompliant behaviors and go unchecked. Further, whatever reporting systems that would allow someone, even an anonymous someone, to come forward, were also broken.

[The] Druyan example at first blush appears to be an agency issue. But remember the action that brought all the other issues to the forefront involved a major defense contractor. Criticisms can be levied at Michael Sears and his employer. An effective compliance program should have raised red flags. Action probably would have been taken long before the contractor would have found itself in [the] position they were in.

An organization's compliance committee exists just to avoid this kind of problem. Certainly an executive committee should have existed. It would have kept the executive management informed and focused.

The mechanics of how a compliance committee operates are similar irrespective of where it exists in an organization. The main duties include focusing on values and reviewing behaviors, assigning tasks and reviewing results, and being visible to the workforce.

### **Focus on Values and Review Behaviors**

The committee must focus their attention on the behaviors that have been displayed. Compliance is a behavior-based activity and the success of a compliance program is based on the behaviors solicited and displayed. Ultimately, it is hoped that people's attitudes will contain the appropriate propensities toward proper behavior, but the type of intervention required to change attitudes directly is beyond the scope and capabilities of most compliance committees. Policies or modifications to policies that a committee might recommend need to be behavior-based.

### **Assign Tasks and Review Results**

A compliance committee will want to look into at least some issues in depth. In some cases, the

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## **Establishing a Compliance Committee (cont'd):**

committee itself may choose to take on a project. Most committee members are not in a position to single-handedly research or conduct a detailed study of a compliance issue. Rather, a staff member will need to be assigned and in many cases a working group will need to be formed. When the committee assigns work to a staff member or working group, two things must happen — (1) results must be reported to the committee, and (2) the committee must follow-up on the progress of the assignment. Otherwise, the committee will be sending a message that it doesn't care. The net result of that message is worse than not looking into an issue at all.

Based on a new proposed FAR change,<sup>3</sup> addressing the contractor code of ethics and business conduct, internal controls would be a good topic for a compliance committee to address. The proposed language will require positive internal controls to ensure compliance with a company's ethics program. Should a company not have a program and have over \$5 million in government awards, creating such a program should be a first order of business.

### **Be Visible to the Workforce**

The members of the compliance committee need to be visible to the workforce. People need to know that management is serious about ensuring the proper behaviors occur. The need to know that doing the right thing is important to the company and the committee. The need to know that the committee actually meets, discusses compliance-related issues, and takes action when appropriate.

Next, we will discuss the elements of a compliance committee to include structure, charter and purpose, the organizational level, and use of working groups.

### **Structure**

#### **Who Should be on the Committee?**

Committee membership should include functional leadership with the experience, background, and knowledge to be able to identify potential compliance issues for the company and have the ability to be able to suggest solutions for real problems. Further, the members need to have the authority to be able to carry out their decisions and be recognized as an authority by others in the organization. An executive compliance committee should report to the organization's most senior executives. Typically, a compliance committee needs representation from legal, human resources, procurement and contracting, operations or manufacturing, finance, internal audit, sales and marketing, and other appropriate functional leaders. Committees that operate at subordinate levels of the organization need to include similar representatives.

In very large corporations, the compliance committee may be larger and my find that it will need a smaller, higher-level organization to help guide the actions of the compliance committee. In those cases, you may have a corporate compliance committee who reports to an executive committee.

#### **Who Should Not Be on the Committee?**

Those who lack experience or judgment in the most sensitive matters of the corporation should be excluded. They may be considered for more appropriate working group-type assignments.

A controversial opinion is that chief executive management should not be part of the committee. If they are common members, they should not be voting members. The logic is that they are responsible for decision-making at the highest levels of the corporation and should consider compliance committee recommendations in making their decisions. To participate in the recommendation process of the committee means the

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## **Establishing a Compliance Committee (cont'd):**

corporate executive decision-maker complicit in the actions of the committee. Such complicity could take away from the very independent decision-making a chief executive is supposed to have. The counterargument is by including the chief executive in the committee discussions, he or she can better understand the issues and take action. There is no clear cut answer; each company will have to make the decision that best suits them.

Compliance committee members must take their responsibility seriously. The need to set the example for the rest of the organization by being visible in their role and walking the talk.

### **Purpose and Charter**

Compliance committees need a purpose and a charter. The purpose statement is the one-liner the focuses the whole deal. Everyone, either on or off the committee, should be able to read the purpose statement and understand what the committee does. A charter is a more complex document that sets the rules about who is on the committee, why they are there, and what they are to do. The charter sets the reporting guidelines and any rules regarding voting on issues. As a basis for developing the charter, the committee needs to consider it around the federal sentencing guidelines.<sup>4</sup>

### **The Organizational level**

#### The Executive Compliance Committee

This committee is comprised of some of the most senior managers in the organization. The exact composition will depend on the corporate structure and industry. As a minimum, there should be legal counsel, human resources, contracts and procurement, operations, and finance representatives on the committee. This committee is small. It is designed for very large organizations to inform the CEO and his or her staff of the issues reported by the subordinate committees, such as a corporate or operational level committee.

#### Lower-Level Committee

A corporate committee is a larger committee and is represented by all the functional management. Their roles and responsibilities include interpreting the implications of laws and regulations as they relate to corporate compliance and guide the creation of policy to put those laws and regulations into practice. They monitor the behaviors of the organization through audits, investigations, studies, and communications (to include hot line reports) to observe if behaviors are consistent with corporate policy. They report issues and concerns and make recommendations to senior executive management either directly or through an executive committee, if one exists. They are visible to members of the organization through training events, direct communications, and by typifying the behaviors expected of every member of the organization.

Depending on the organizations, there may need to be similar committees at various operating or project levels. The project level committees will have a narrower focus and should have a reporting link to the next higher level committee.

### **Different Purposes and Interlocking Membership**

The executive or corporate level committees will deal with issues concerning the entire corporation. A lower-level committee will concern itself with the same type of issues but will be concerned with the closer and more immediate effects. However, the different committees should not operate independently.

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## **Establishing a Compliance Committee (cont'd):**

There needs to be a reporting mechanisms from the “field” to the “headquarters.” Conversely, the headquarters will have to share information downward with the field. One of the easiest and most direct means of accomplishing this is to have one or two interlocking members. That is, one or two members that sit on each committee. While they may be official members of one committee, they can be at-large members on the other. Even still, with interlocking membership, there still needs to be formal reporting between the committees.

The compliance committee for a subordinate organization will have its own charter and operating guidelines. Their action horizon would be more focused on the day-to-day activities at their level and may in large part act as an execution arm of the executive-level committee.

### **Use of Working Groups**

One of the pitfalls of a compliance committee is that they may feel the need to take action or investigate issues to the detriment of long-term benefit of the committee. Working groups should be part of the committee’s strategy, particularly for the executive level committees.

Working groups can be sponsored or headed by a committee member, but a working group can focus on issues without jeopardizing the oversight function of the committee. Working groups can be standing or ad hoc, depending on what needs to be investigated or actioned. If the committee implements an action, such as a training program or new policy, working group members can be used to follow up with employees and check to see if the desired new behaviors are occurring. Typical assignments for working groups would be planning for training sessions, doing sensing sessions with employees, or investigating a potential or perceived compliance problem. Other functional experts can be assigned to working groups to fill expertise gaps. Finally, working groups can provide technical information on functional areas to increase the knowledge and understanding of the committee members.

Working groups are not substitutes for making the committee visible or for delivering messages that need to be sent by senior management. They are not police and should not be used to clandestinely find out information.

### **Conclusion**

A compliance committee’s most important function is to keep leadership informed and to serve as a guiding light to employees. Leadership needs to know its impediments to keeping the organization’s people in compliance with its policies; what challenges are facing employees to maintaining the proper work behaviors; and what needs to be done to make sure people can follow the rules.

It is not enough to hire qualified people and set them loose in the organization. They need to know what behaviors are considered acceptable by leadership, and that leadership will expect them to exhibit those acceptable behaviors. People also need to believe that leadership will support them in meeting the behavioral standards and that there is somewhere to go to get clarification if they don’t understand what to do. They also need somewhere to go to report noncompliant behaviors, even if they are a result of a mistake.

When leadership finds errors or mistakes that have been made, they must take actions to correct the behaviors, guide the person, and take remedial action, when necessary. The compliance committee bridges the gap between the people doing the work and people leading them.

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\* - Dr. Ralph M. Criss, DBA, CPCM, CPM, is a director of contract management for Fluor.

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**Establishing a Compliance Committee (cont'd):**

**Endnotes**

<sup>1</sup> - Ralph M. Criss, "Contract Compliance for Government Contractors," *Contract Management* (December 2006): 14-20.

<sup>2</sup> - *The Case Study of Darlene Druyan*, Report of the Defense Science Board Task Force on Management Oversight in Acquisition Organizations, Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics (March 2005): 6-10.

<sup>3</sup> - *Federal Acquisition Regulation: FAR Case 20006-007*, Contractor Code of Ethics and Business Conduct, Federal Register (February 16, 2007): 7588-90.

<sup>4</sup> - 2006 Sentencing Guideline Manual, U.S. Sentencing Commission, www.ussc.gov, 1-12.

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**President's Message (cont'd from Page 5):**

This year, we have initiated a Government Gold program for those Government offices having five or more BCABA members. The program provides Government folks benefits parallel to those offered to our Gold Medal Member Firms. The BCABA Board has thus structured tuition for the Annual Program as follows:

Non-Members:	\$175
BCABA Members:	\$150
Attendees from Gold Medal Member Firms:	\$135
Government Gold (agency office registering 5 or more Government members):	\$135

**BONUS!! – For an additional \$10 added to the tuition price, attendees will receive BCABA membership for 2007-2008.** (Regular membership for those not attending the Annual Program is \$45 for private practice attorneys and \$30 for Government employees.)

**If you have any questions about the program or registration, please call our President Elect/Annual Program Chair, Michael Littlejohn at (703)790-8750.**

**The Clause**

*The Clause*, BCABA’s on-line publication, as you will see is truly remarkable for its depth and the wide variety of topics covered. Pete McDonald, the Editor, would like to remind you that, because we publish it online, there are no limitations imposed on article length or on the numbers of articles that can be included in an issue. The quality of our articles has been consistently good and, because of its web-based distribution, contributing an article for publication in *The Clause* is worthy of your serious consideration. Pete would also appreciate hearing from anyone who would like to assist in editing *The Clause*. Pete can be reached at [Pete.McDonald@rsmi.com](mailto:Pete.McDonald@rsmi.com) .

**The BCABA Website**

Please monitor the BCABA Website (<http://www.bcaba.org>) for information on all our future BCABA programs.

Our “user friendly” website continues to be upgraded and updated. Our **Members-Only Page** not only contains the online BCABA Directory, with the mailing and e-mail addresses and telephone and fax numbers for all of our members, but now holds all of our **archived issues of *The Clause***, and a number of other helpful **resource links and documents**, including program materials from this year’s Trial Practice (continued on page 16)

**The ESI Revolution:  
Preparing for E-Discovery  
in Light of the New Federal Rules**  
by  
Kristin M. Nimsger\*

[Note: Reprinted with permission from *The Federal Lawyer*, Vol. 54, No. 6, July 2007.]

On December 1, 2006, significant changes to the Federal Rules of Civil Procedure affecting the legal discovery of electronically stored information (ESI) finished their journey through the rule-making process and became law. These amendments, including revisions to Rules 16, 26, 33, 34, 37, and 45 — along with a related amendment to Form 35 — are the most significant changes to the Federal Rules in recent memory. The new rules are specifically instructive on several issues related to electronic discovery, including data preservation, data accessibility, and designations of privilege. As with any modification to a legal rule or development of common law, attorneys practicing in the digital age are obligated to familiarize themselves with these changes to the Federal Rules and should prepare for their impact on the practitioner's day-to-day life. This article explores some of the key amendments to the rules and provides an overview of best practices for meeting the electronic data management challenges that the changes implicate.

### **Understanding the Changes to the Rules**

The amendments to the Federal Rules of Civil Procedure that went into effect in December 2006 underscore the reality of electronically stored information in modern litigation. Rather than expanding the scope of discovery, the amendments largely confirm that pre-existing discovery obligations extend to electronically stored information.<sup>1</sup> For example, whereas Rule 34(a) has previously allowed for the discovery of “data compilations,” the amended rule now specifically directs that parties may obtain discovery of “electronically stored information,” including data compilations “stored in any medium from which information can be obtained.” Thus, the revised language answers any lingering questions about whether discovery extends to all forms of electronic documents and data.

Similarly, Rule 37(f) appears to limit sanctions related to electronic discovery, but this newly added provision arguably does little more than to implicitly reaffirm that preservation obligations extend to electronically stored information. The so-called safe-harbor from sanctions directs courts not to impose sanctions for a party's inability to produce ESI that has been lost as a result of “routine operation of an electronic information system” that is carried out in “good faith.” However, the rule does not expressly define the terms “routine operation of an electronic information system” or “good faith,” thereby leaving much room for advocacy. Moreover, even when information is lost because of a party's “good faith routine operation of a computer system,” the amendment allows for sanctions under the Federal Rules in “exceptional circumstances,” the definition of which remained to be determined by the construing case law. In fact, Rule 37(f) only limits sanctions issued pursuant to the Federal Rules of Civil Procedure; the rule does not alter the court's ability to impose sanctions derived from inherent or other sources of authority.

Yet, even though the scope of material that is discoverable remains largely unaltered, expectations regarding the acceptable level of preparations for discovery have been heightened. Among the changes that were made are the amendments to Rule 26(f), requiring early discussion of “any issues relating to disclosure of discovery of electronically stored information,” and Rule 16(b), calling for the results of such discussions to be reported to the judge. Rule 26(f) specifically directs the parties to meet as soon as practicable, but no later than 21 days before a scheduling conference is set to occur or a scheduling order is due under Rule 16(b). Topics for discussion at the Rule 26(f) pre-trial conference include the following:

*(continued on next page)*

## **The ESI Revolution (cont'd):**

- scope and timing of discovery;
- format or formats for production of material;
- issues relating to claims of privilege or protection of material prepared for trial;
- document preservation efforts;
- search strategies;
- collection processes;
- processing technology;
- keyword lists;
- factors affecting the accessibility of information that is otherwise discoverable; and
- cost allocation.

These rules underscore the fact that e-discovery efforts cannot be deferred until a party has received notice of a discovery request. Pre-trial discovery conferences can no longer be written off as pointless exercises or limited to five-minute procedural meetings. Instead, parties must be prepared to discuss several in-depth issues and reach decisions that may affect the entire discovery process, if not the outcome of the matter itself.

Early engagement in discovery issues not only is required by the rules but also is in the best interests of the parties, because it ensures that they do not reach discovery agreements that may harm them later, or do not reflect the technical realities of a client's data storage and management. By directing counsel and the court to address electronic discovery matters early on, savvy parties are afforded the opportunity to evaluate their own data locations and accessibility and to have a clear picture of the scope of the future e-discovery needs of the case. Moreover, parties can arm themselves with this practical knowledge early in the process, and, indeed, inform their advocacy, thereby gaining credibility with the court, and providing an opportunity for counsel to begin steering electronic discovery decisions in the client's favor.

### **Working with Corporate Information Technology Staff to Take Stock of the Current Data Landscape**

Given the full slate of topics for discussion at the Rule 26(f) conference and the limited protection from sanctions afforded by Rule 37(f), at a minimum, competent representation will require attorneys to familiarize themselves with the intricacies of their clients' use of computers as well as their networking and storage processes before litigation is even contemplated. To streamline those efforts, a corporation's information technology (IT) staff should help to educate counsel with regard to the following information:

- all of the company's operating systems, software applications, and hardware formerly and currently in use;
- the flow of data into, within, and out of the company;
- disk or tape labeling conventions, file name customs, and location-saving rules;
- corporate documentation retention policies and the current enforcement status of those policies; and
- corporate policies regarding employees' use of company computers and data.

In addition to gaining the critical information about the company's document retention policies, backup tape recycling schedules, and system architecture that IT staff can convey, the lawyer may find it prudent to engage a third-party IT specialist or legal liaison or expert who can facilitate communication between corporate departments and also offer advice and information about best practices or issues involving management of e-discovery within the litigating entity. Working with legal counsel and IT staff, these experts can be critical to managing the collection of electronically stored information and facilitating review and production of responsive data later in litigation.

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## **The ESI Revolution (cont'd):**

### **The Need to take a Step Back**

Even though it is important for client and counsel to strive to gain an understanding of the client's existing corporate data landscape, unless proper measures are in place, gaining this understanding can be an exercise in futility. Corporate data protocols and infrastructures are rarely static. Instead, as a company grows, IT personnel come and go, business acquisitions are completed, and new divisions are integrated, organizations are likely to adopt a hodgepodge of divergent server configurations; department-specific legacy applications and hardware; and varying policies related to data use and storage and records management. Rather than attempting to keep up with inconsistent and piecemeal systems and processes, corporations and their legal counsel would be wise to take a step back and devise a thoughtful data management program.

A corporate data management program should include a policy related to records management that is legally defensible, a standardized set of network and data storage protocols, and a plan for responding to requests for e-discovery. When litigation and the need for discovery arises, these data management policies and processes will enable counsel to navigate the organization's data infrastructure, identify routine data destruction or recycling processes that should be suspended, issue preservation notices to relevant individuals, and collect desktop computers and other pertinent data storage devices. Even though perfectly managed practices currently remain somewhat rare, some organizations are now finding that investments in this type of planning and process development yield not only efficiency gains and cost savings but also mitigate substantial risk related to the discovery of electronically stored information. It seems clear that, if momentum remains on its current trajectory, adopting best practices for data management may become a routine part of life for the company that is frequently involved in litigation.

Additions to Rule 45(d) also clarify that most of the discovery provisions provided in the Federal Rules extend to subpoenaed and party respondents alike. Businesses that fail to preserve discoverable documents and data after getting a subpoena may be found in contempt of court pursuant to Rule 45(e) or liable for spoliation. Accordingly, sound data management should not be seen only as a job for plaintiffs and defendants. Businesses at risk of being subpoenaed for electronically stored information in their possession or control are wise to follow the same data management practices suggested for litigants.

Rules changes aside, there are good business reasons for being prepared for e-discovery. Parties that implement ongoing data management and litigation response protocols can reduce legal costs, expedite collection and review, and gain a strategic edge over their legal opponents who are not as well prepared.

### **Assembling a Data Management Team and Assessing Existing Policies Related to Records Retention**

In light of the limited protection from spoliation sanctions afforded by Rule 37(f), businesses should ensure that any activities involving document destruction are carried out only as a part of a defensible ongoing records retention program.

When implementing or revamping a records retention policy, the data management team must take into account a variety of legal and business needs. In collaboration with a data management team — consist of security, IT, human resources, records management, and executive management — counsel should begin to develop this policy by gaining a thorough understanding of the company's business practices and processes in order to improve their understanding of what information the firm is currently retaining, where it is being stored, and why it is being kept. The data management team should also evaluate any legacy or backup data the company is currently maintaining and assess whether there is an ongoing legal or other business purpose for keeping the data.

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## **The ESI Revolution (cont'd):**

Legitimately reducing the amount of data the business maintains will minimize discovery costs and liabilities down the road. On the other hand, there is a fine line between overzealous data destruction policies and prudent records management practices. Even in the absence of a current regulatory requirement or obligation to preserve information that may be needed for litigation, companies may have a good reason for keeping certain types of information — such as personnel records, client databases, document templates, product development plans, or historical budget and financial statistics — for internal reference or to bolster its own claims and defenses in case of future litigation. There may also be a good reason to keep backup data for a limited time period in case of a computer disaster.

### **Standardizing Network and Data Storage Protocols**

How information is maintained can be just as important as what is maintained. Consistent practices for accessing, storing, and archiving information are critical to any data management program. To that end, backup tape labeling conventions as well as file encryption and other security protocols should be standardized across the company. Similarly, the organization's networks should be configured consistently throughout various departments and geographic locations. For example, an organization should have a standardized methodology for the way it sets up its department servers, e-mail servers, and file and print servers containing home directories or personal shares. A consistent server configuration should ideally be implemented as a matter of course as the company grows and evolves. However, organizations should also bring existing networks into conformity with the standard configuration. This process should ordinarily be accomplished by triage, beginning with critical business units, as identified by counsel and the data management team. When litigation arises, instead of attempting to navigate an interconnected web of unique configurations that are specific to individual departments, users, and offices, counsel can move swiftly to implement a targeted litigation hold to preserve information for key individuals in various locations and departments throughout the company.

### **Developing a Litigation Response Plan**

Absent the duty to preserve records, there is ordinarily nothing improper about following a routine records retention policy.<sup>2</sup> However, to avoid compromising discoverable information, every data management program should also contemplate processes for suspending any scheduled document recycling or destruction practices upon notice of a preservation obligation.<sup>3</sup> A positive step that can demonstrate “good faith” in the “routine operation” of an information system — and leverage the limited protection from sanctions afforded by Rule 37(f) — is the creation and use of a litigation response plan. Upon receiving notice of a litigant's duty to preserve documents, the firm should have in place a plan that provides guidance for collecting and preserving pertinent information. This plan should, for example, outline processes for halting the recycling of backup tapes and issuing and monitoring preservation notices. The plan should also specify how desktop information will be collected and by whom. To ensure that the plan can be executed as designed, designated members of the data management team should also maintain a corporate data directory, including a record of past and present operating system and application software, document retention and backup rotation procedures and schedules, and contact information for an assigned point person in each business department.

### **Conclusion**

The Federal Rules of Civil Procedure make clear that parties cannot wait to receive a discovery request before planning for discovery. Parties who wait will run the serious risk of miscalculating their collection obligations, overlooking potential sources of discoverable data, compromising their preservation duties, losing favor with the court, and yielding very real tactical advantages to more sophisticated opponents. In addition to a thorough familiarity with changes to federal and applicable state rules, counsel would be wise to stay abreast of the growing body of case law related to e-discovery. Even though procedural rules provide a high-level

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## **The ESI Revolution (cont'd):**

road map for parties and their counsel, common law continues to explore the practical application of these rules to the unique nuances of electronically stored information. As court continue to apply provisions, electronic discovery is likely to become an increasingly important aspect of enterprise risk management. Corporations and their legal counsel must work together to assess their companies' electronic discovery liabilities and to formulate appropriate data management plans.

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- Kristen M. Nimsger serves as the vice president, legal technologies for Kroll Omtrack, Inc. She is the author of *Electronic Evidence and Discovery: What Every Lawyer Should Know*, which helps practicing attorneys understand electronic evidence issues. Prior to joining Kroll Omtrack in 2001, Nimsger practiced law in the areas of complex product liability litigation and property and casualty insurance defense. She earned her J.D. *cum laude* from William Mitchell College of Law in St. Paul, Minnesota.

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### **Endnotes**

<sup>1</sup> - In fact, rather than expanding the scope of discovery, the changes to the rules arguably impose, or at least reaffirm, some limits. For example, Rule 26(b)(2)(B) — an entirely new addition — allows a producing party to not produce ESI that is deemed legally inaccessible (an area of law that is sure to provide fodder for great debate) unless the requesting party can demonstrate good cause for production in spite of the burden and cost.

<sup>2</sup> - *U.S. v. Arthur Andersen*, 374 F.3rd 281, 297 (5th Cir. 2004).

<sup>3</sup> - “Even valid purging programs need to be put on hold when litigation is reasonably foreseeable.” *Rambus Inc. v. Infineon Techs. AG*, 2004 WI 383590 (E.D. Va Feb. 26, 2004) amended by 220 F.R.D. 264 (E.D.Va 2004); *see also Broccoli v. Echostar Communications Corp.*, 229 F.R.D. 506 (D. Md. 2005).

## **President's Message (cont'd from page 11):**

Seminar and BCABA/GW Law Colloquium.

### **Quarterly Meeting**

Please join us at the remaining quarterly meeting of our BCABA Board of Governors, which is scheduled to be held at the offices of Holland & Knight LLP, 2099 Pennsylvania Avenue, N.W., Washington, D.C., on Thursday, September 20, 2007. Reservations are needed, so that we may make adequate arrangements for the numbers who will attend.

I am hopeful that you will not only participate in our stimulating activities but will become more involved in their planning. Your ideas and your help are always welcome. Feel free to get in touch with me or with any of our officers or Board members. My e-mail address at the Civilian Board of Contract Appeals is [Richard.Walters@gsa.gov](mailto:Richard.Walters@gsa.gov).

Let me hear from you.

Best regards,

*Hon. Richard C. Walters*  
President

## Government Contract Changes, 3<sup>rd</sup> Ed.

by

Ralph C. Nash, Jr., and Steven W. Feldman

*Reviewed*

by

*Peter A. McDonald*

*C.P.A., Esq.*

*RSM McGladrey*

[Reprinted with permission from the National Contract Management Association, *Contract Management*, Vol. 47, Issue No. 9, September 2007. ]

Professor Ralph Nash needs no introduction to government contract practitioners as he has authored numerous well-known textbooks, one of which originally appearing in 1975 was *Government Contract Changes*. A Second Edition was published in 1989, for which there were loose-leaf supplements in 1991 and 1993. This is the Third Edition, in which Professor Nash teamed with Steven Feldman, a senior attorney with the U.S. Army Corps of Engineers.

Let's begin with a few general comments. The 1989 Second Edition was a very hefty volume with a binder of metal posts. The Third Edition, however, is a two-volume comfortably bound set, and each volume is about an inch and a half thick. Second, in topical organization and format, the Third Edition is almost identical to the Second Edition. The text has been updated, of course, to incorporate regulatory, legislative and judicial changes, and includes some noteworthy commentary (this writer was surprised to discover some of his own referenced in the text). Although some text from the Second Edition has been deleted and some new text has been added, much of the analysis is the same as the Second Edition, and this leads to my final point. As with the Second Edition, the materials are very comprehensive, and encompass more territory than anyone could reasonably expect to cover in their government contract careers. This all-inclusive attribute is the Third Edition's primary appeal, as practitioners will want such a richly detailed reference readily available when researching unfamiliar issues.

Experience has shown that most government contract claims arise under the Changes clause (those didn't know this haven't handled very many claims). However, comparatively few such claims make it to litigation. Most claims arising under the Changes clause settle, particularly where contractors are able to adequately substantiate their compliance with actual or constructive changes. This is why it is so beneficial to have a reference that authoritatively details the many requirements related to the various kinds of changes.

There are six parts (sections) in the Third Edition, four in the Volume 1 and two in Volume 2. The first part, consisting of three chapters, broadly discusses the historical development and purposes of the Changes clause. Part 2 (*Workings of the Changes Clause*), has four chapters which cover more specific topics, such as the format and coverage of the Changes clause as well as the contractor's duty to proceed.

The most brief section, Part 3 (*Special Changes Clauses*), addresses changes under cost reimbursement contracts and value engineering clauses. On the other hand, Part 4 (*Constructive Changes*) is the largest. Its six chapters address in depth such topics as constructive changes (Chapter 10), contract interpretations (Chapter 11), government interference (Chapter 12), defective specifications (Chapter 13), failure to disclose information (Chapter 14), and acceleration of performance (Chapter 15). Because claims under the Changes clause typically involve one (or more) of these subjects, this will likely be the most heavily used portion of the text.

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## **Government Contract Changes, 3<sup>rd</sup> Ed., (cont'd):**

Volume 2 has only two sections: Part 5 (*Pricing Equitable Adjustments*) and Part 6 (*Pricing Adjustments and Contract Modifications*). Part 5 deals with the quantum aspects of a changes clause claim, such as repricing changed work (chapter 16), delay costs (chapter 17), particular types of changes as in defective specifications and accelerated performance (chapter 18), and methods of proving quantum (chapter 19).

The accounting rules applicable to the cost measurement of contract changes are addressed at length in Chapter 19. The most significant developments in this area are the decisions that reinforced the requirement for contractors to prove their damages using actual costs. For this reason, the Third Edition is of great utility not only to attorneys, but also to contracting officers, contractors, and accountants that must properly resolve complex quantum determinations.

Part 6 has three chapters that largely concern procedural requirements, and for that reason may primarily interest attorneys: *Notice of Requests for Equitable Adjustment* (Chapter 20); *Price Adjustment Procedures* (Chapter 21); and *Price Negotiation and Contract Modifications* (Chapter 22)

Like the Second Edition, the Third Edition has a case table, abbreviation key and index. The Third Edition expands these features with a List of Figures (Appendix A) and a "Table of Laws and Rules." The former is very handy when searching for specific reference materials scattered throughout the text, while the latter is just as useful for locating the discussions on particular laws or regulations.

For those who do not have the Second Edition (and few do), government contract administrators, attorneys, accountants, program managers, and others will find the Third Edition to be a very worthwhile resource because, sooner or later, matters under the Changes clause will inevitably arise.

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\* - Peter A. McDonald, an attorney-C.P.A., is a director in the Government Contracts practice of RSM McGladrey in Bethesda, Maryland.

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