SUPREME COURT OF WISCONSIN

No. 09-01A

In the matter of amendment of Wis. Stat. §§ 802.10, 804.01, 804.08, 804.09, 804.12, and 805.07.

FILED

NOV 10, 2010

A. John Voelker
Acting Clerk of Supreme Court
Madison, WI

On April 23, 2009, the Wisconsin Judicial Council, by Staff Attorney April M. Southwick, petitioned this court for an order amending Wis. Stat. §§ 802.10, 804.01, 804.08, 804.09, 804.12, and 805.07, relating to discovery of electronically stored information. The court held a public hearing and administrative conference on January 21, 2010. On March 19, 2010, petitioner filed an amended petition. The court held an administrative conference on April 28, 2010. Upon consideration of matters presented at the public hearing and submissions made in response to the proposed amendments, the court, on April 28, 2010, adopted the amended petition with a 4 to 3 vote. Chief Justice Shirley S. Abrahamson, Justice Ann Walsh Bradley, Justice N. Patrick Crooks, and Justice David T. Prosser, Jr. voted to adopt the petition, and Justice Patience D. Roggensack, Justice Annette Kingsland Ziegler, and Justice Michael J. Gableman dissented. The court also modified Wis. Stat. § 804.01(4m) by

adopting a mandatory confer provision, sometimes referred to as "meet and confer" even though § 804.01(4m) does not require a meeting, for the discovery of electronically stored information. Chief Justice Abrahamson and Justice Bradley dissented to the adoption of a mandatory confer provision under the new Wis. Stat. § 804.01(4m).

Following an administrative conference on June 30, 2010, the court issued an order on July 6, 2010. The court adopted the amendments, which become effective January 1, 2011, subject to revision after a public hearing to be held in the fall of 2010 and an opportunity for public comment.

The court held a public hearing and administrative conference on September 30, 2010. Upon consideration of matters presented at the public hearing and submissions made, the court discussed amendments to the confer provision regarding the discovery of electronically stored information.

Following an administrative conference on October 18, 2010, the court adopted the following amendments to Wis. Stat. § 804.01.

Therefore, IT IS ORDERED that the following amendments shall be effective January 1, 2011:

Section 1. 804.01(4m) of the statutes and accompanying 2010 Judicial Council Note are repealed.

Section 2. 804.01(2)(e) of the statutes is created to read:

804.01(2)(e) *Specific Limitations on Discovery of Electronically Stored Information*.

1. No party may serve a request to produce or inspect under s. 804.09 seeking the discovery of electronically stored information, or respond to an interrogatory under s. 804.08(3) by producing

electronically stored information, until after the parties confer regarding all of the following, unless excused by the court:

a. The subjects on which discovery of electronically stored information may be needed, when such discovery should be completed, and whether discovery of electronically stored information shall be conducted in phases or be limited to particular issues.

b. Preservation of electronically stored information pending discovery.

c. The form or forms in which electronically stored information shall be produced.

d. The method for asserting or preserving claims of privilege or of protection of trial-preparation materials, and to what extent, if any, the claims may be asserted after production of electronically stored information.

e. The cost of proposed discovery of electronically stored information and the extent to which such discovery shall be limited, if at all, under sub. (3) (a).

f. In cases involving protracted actions, complex issues, or multiple parties, the utility of the appointment by the court of a referee under s. 805.06 or an expert witness under s. 907.06 to supervise or inform the court on any aspect of the discovery of electronically stored information.

2. If a party fails or refuses to confer as required by sub. (e) 1., any party may move the court for relief under s. 804.12 (1).

3. If after conferring as required by sub. (e) (1), any party objects to any proposed request for discovery of electronically stored information or objects to any response under s. 804.08(3)

proposing the production of electronically stored information, the objecting party may move the court for an appropriate order under sub. (3).

Supreme Court Note, 2010:

Sub. (2) (e) was created as a measure to manage the costs of the discovery of electronically stored information. If the parties confer before embarking on such discovery, they may reduce the ultimate cost.

The rule does not require parties to confer before commencing discovery under ss. 804.05 (Depositions upon oral examination), 804.06 (Depositions upon written questions), 804.08 (Interrogatories to parties); or 804.11 (Requests for admission). These discovery devices, if employed before serving a request for production or inspection of electronically stored information, may lead to more informed conferences about the potential scope of such discovery.

Parties may not be able to reach consensus on how discovery of electronically stored information is to be managed. Accordingly, subs. (e) 2. and (e) 3. confer authority on the court to intervene as appropriate. In determining whether to issue an order relating to discovery of electronically stored information, the circuit court may compare the costs and potential benefits of discovery. *See Vincent & Vincent, Inc. v. Spacek,* 102 Wis. 2d 266, 306 N.W.2d 85 (Ct. App. 1981). It is also appropriate to consider the factors specified in the Advisory Committee notes to Fed. R. Civ. P. 26(b)(2)(B): (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have

existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.

IT IS FURTHER ORDERED that notice of this amendment of Wis. Stat. § 804.01 be given by a single publication of a copy of this order in the official state newspaper and in an official publication of the State Bar of Wisconsin.

Dated at Madison, Wisconsin, this 10th day of November, 2010.

BY THE COURT:

A. John Voelker
Acting Clerk of Supreme Court

¶1 ANN WALSH BRADLEY, J. *(dissenting).* I fear that the majority is using a sledgehammer to crack a nut. The problems with electronic discovery in our state's courts are few. Nevertheless, the majority responds with a statewide mandate that is all-encompassing and immediate.

¶2 Because I am concerned that this unnecessary new mandate has the potential to diminish both fairness and efficiency along with the potential of increasing the time and expense of litigation, I respectfully dissent.

I.

¶3 After almost two years of study by the Judicial Council Evidence and Civil Procedure Committee, representing expert and diverse experience in the law,[1] the Judicial Council

[1] The following persons were on the Committee: Judge Edward Leineweber, Richland County; Tom Bertz, Anderson, O'Brien, Bertz, Skrenes & Golla, Stevens Point; Jim Boll, State Bar President, Madison Gas & Electric, Madison; Al Foeckler, Cannon & Dunphy S.C., Brookfield; Kathleen Grant, Borgelt, Powell, Peterson & Frauen S.C., Milwaukee*; Prof. Jay Grenig, Marquette Law School, Milwaukee; Beth Hanan, Gass Weber Mullins LLC, Milwaukee; Catherine LaFleur, LaFleur Law Office, Milwaukee; Robert McCracken, State Bar Litigation Section, Nash Spindler Grimstad & McCracken, Manitowoc; Robin Ryan, Legislative Reference Bureau, Madison*; Chief Judge Mary Wagner, Kenosha County; Corey F. Finkelmeyer, Dep't of Justice, Madison*; William Gleisner, Law Offices of William C. Gleisner, III, Milwaukee; Marty Kohler, Kohler & Hart, Milwaukee; Richard B. Moriarty, Dep't of Justice, Madison; Judge Richard Sankovitz, Milwaukee County; Deborah M. Smith, State Public Defender's Office, Madison.*

The persons whose names have been starred are persons no longer on the Committee. The Committee began its work in September 2007.

advised that Wisconsin does not need a mandatory confer rule. It suggested that those who would have this court adopt the federal meet and confer requirement may not be considering the toll it would take on litigants in the vast majority of cases.

¶4 Explaining the rationale behind the Judicial Council recommendation, a member of the committee emphasized that there is little need for a mandatory rule in Wisconsin at this time.[2] Unlike the federal courts, Wisconsin state courts do not have many cases involving a large number of documents and electronic discovery disputes. Instead our state court dockets are dominated by the more routine mortgage foreclosures, automobile accidents, collections, and contract enforcement cases. Concern was expressed that adopting a mandatory confer rule would impose "significant added burden on litigants while yielding little benefit."[3] Accordingly, the Judicial Council recommended that the meet and confer remain discretionary, to be used by the circuit court only when needed, rather than mandated for all cases involving the discovery of electronic records.

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[2] "First, our courts have yet to see many cases involving electronic discovery. Only a handful of judges report having had to decide electronic discovery disputes. . . . Electronic discovery is expensive and warranted mainly in cases in which large numbers of documents or electronic communications are at issue. That simply isn't the case in the mortgage foreclosure, automobile accident and contract enforcement cases that dominate our civil caseloads." Rule 09-01, In the Matter of Amendment of Wis. Stat. §§ 802.10, 804.01, 804.08, 804.09, 804.12, and 805.07 (Abrahamson, C.J., dissenting, Appendix D, January 11, 2010 Letter from Judge Richard J. Sankovitz Explaining Reasoning of Judicial Council's Proposed Rules, at 2).

[3] Id. at 3.

¶5 Nevertheless, the majority thought otherwise. Instead, the rule that the majority promulgates sets up a requirement for discovery of electronic records that is all-encompassing and immediate.

¶6 It requires a mandatory confer conference in all cases involving discovery of electronic records. Because most records today are kept electronically, the mandatory confer rule encompasses the lion's share of all cases requesting discovery of a record.

II.

¶7 In moving immediately rather than cautiously, the majority fails to heed its own advice. This court advised the Judicial Council that the Wisconsin rules should follow the federal rules of civil procedure, where appropriate, and benefit from the federal experience. Realizing the need to monitor the consequences of the new federal electronic discovery rules, the Seventh Circuit Court of Appeals moved cautiously.

¶8 It established a pilot program in the northern district of Illinois and commissioned a multi-year study to explore how the principles underpinning the federal rules relating to the discovery of electronically stored information were working in practice. The report of phase one of the pilot program indicates that a majority of attorneys who responded to a survey opined that the principles underpinning the new federal

rules, which included a mandatory meet and confer, neither enhanced fairness nor increased efficiency.[4]

¶9 I likewise am not persuaded that the principles behind the federal electronic discovery rules, including the mandatory confer rule, will either enhance fairness or increase efficiency. This is especially true in a jurisdiction like Wisconsin where the mandate is unnecessary because electronic discovery issues have not posed a statewide problem.

¶10 Rather than enhancing fairness and increasing efficiency, I believe that a mandatory confer rule has the potential to diminish both. A mandate to confer can diminish

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[4] A substantial portion of the responding attorneys, forty-three percent (43%), reported that the Principles "increased" or "greatly increased" the fairness of the discovery process. Fifty-five percent (55%) stated they believed the Principles had no effect on the fairness of the discovery process, and just under three percent (3%) felt that the Principles decreased the fairness.

More than thirty-eight percent (38%) of the responding attorneys stated that the Principles increased the parties' ability to resolve e-discovery disputes without court involvement, sixty-one percent (61%) stated the Principles had no effect on this, and less than one percent (1%) stated the Principles decreased their ability to resolve e-discovery issues without court involvement.

Seventh Circuit Electronic Discovery Pilot Program, Report on Phase One, May 20, 2009-May 1, 2010, at 2-3, available at http://www.7thcircuitbar.org/associations/1507/files/05-2010%20Phase%20One%20Report%20and%20Appendix%20with%20Bookmarks.pdf (last accessed November 8, 2010).

fairness if used as a sword against unrepresented litigants. It has the potential to decrease efficiency by spawning satellite litigation regarding compliance issues.

III.

¶11 Another unfortunate consequence of this unnecessary mandate is that it will increase the cost of litigation. When the parties are represented by attorneys, the expenses associated with the mandated conference will be added to the client's bill. When one or more of the parties is self-represented, the procedure likely will be more cumbersome and costly. It is not just a matter of one person picking up the telephone to confer with another. Many adults work during the day and cannot be reached by phone at home during the day. More problematic is that the trend is moving toward more people having only a cell phone where there may be no easy way to discover the litigant's cell phone number.[5] How are they to be contacted? If a letter is sent and there is not an immediate response, what is the next step? How much added time and expense will be incurred?

¶12 Unlike the majority, I would follow the initial recommendation of the Judicial Council committee and make a meet

[5] One of every four American homes (24.5%) had only cellular telephones during the last half of 2009. Among households with both landline and cellular telephones, 25.7% received all or almost all calls on the cellular telephones. Stephen J. Blumberg, Ph.D. and Julian V. Luke, Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2009, Centers for Disease Control, released May 12, 2010, at 1, 5.

and confer discretionary. Also, unlike the majority, I would follow the lead of the Seventh Circuit and cautiously continue to test how this newly mandated procedure is working. Accordingly, I urge judges, lawyers and litigants from around the state to monitor this new mandate, and if it is not working, petition the court for change.

¶13 For the reasons set forth above, I respectfully dissent.

¶14 I am authorized to state that Chief Justice SHIRLEY S. ABRAHAMSON joins this dissent.