STATE OF WISCONSIN

SUPREME COURT

In re:

PROPOSED AMENDMENTS TO
WISCONSIN STATUTES §§ 802.10, 804.08, 804.09, 804.12, AND 805.07.

**MEMORANDUM IN SUPPORT AND
PETITION OF WISCONSIN JUDICIAL COUNCIL
FOR AN ORDER AMENDING
WIS. STATS. § § 802.10, 804.08, 804.09, 804.12, AND 805.07**

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ON BEHALF OF THE WISCONSIN JUDICIAL COUNCIL

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The Wisconsin Judicial Council respectfully petitions the Supreme Court to create WIS. STATS. § § 802.10 (3) (jm), 804.12 (4m), and 805.07 (7), and to amend WIS. STATS. § § 804.08(3), 804.09 (1), 804.09 (2), 805.07 (2) AND 805.07 (3). This petition is directed to the Supreme Court's rule-making authority under WIS. STAT. § 751.12.

INTRODUCTION

The Judicial Council proposes amendments to the Wisconsin rules of discovery in direct response to the unavoidable increase in the discovery of electronically stored information. *See In re John Doe Proceeding*, 2004 WI 65, ¶ 61, 272 Wis.2d 208, 680 N.W.2d 792 (2004) (Abrahamson, C.J., concurring) ("most information is kept in digital form, and discovery, preservation and production of electronic information is one of the leading legal issues facing not only corporate America but also government"); Lori Enos, *Digital Data Changing Legal Landscape*, E-COMMERCE TIMES, May 16, 2000) (70% of all data are now stored in electronic form), *available at* http://www.ecommercetimes.com/story/3339.html (last accessed April 23, 2009); How Much Information? (2003) (research project showed that 92 percent of new information is stored on magnetic media), *available at* http://www2.sims.berkeley.edu/research/projects/how-much-info-2003/execsum.htm (last accessed April 23, 2009).

The proposed amendments contained herein are adapted from the Uniform Rules on the Discovery of Electronically Stored Information and the 2006 amendments to the Federal Rules of Civil Procedure.

DISCUSSION

A key goal of these proposed rule changes is to increase judicial efficiency in the circuit courts by improving consistency and predictability in the discovery of electronically stored information. The proposed rule changes are also intended to reduce the economic burden on litigants that can result from discovery involving an enormous volume of electronically stored information. While intended to address the cost and burden of discovery of electronically stored information, the proposed rules are not intended to prevent discovery regarding any matter, not privileged, which is relevant to the subject matter involved in a pending action. *See* WIS. STAT. § 804.01 (2) (a).

I. WIS. STAT. § 802.10 (3), Scheduling and Planning.

Computer systems are designed and operated for business needs that have nothing to do with litigation. The features that make systems efficient for business may make them inefficient for retrieving information for discovery. Courts must have the tools to work with litigants to manage the burden, expense and uncertainty of complying with electronic discovery requests. Therefore, the Judicial Council proposes an amendment to WIS. STAT. § 802.10 (3) to encourage courts to be more active in managing electronic discovery and production than in managing conventional discovery. The proposed amendment is intended to alert the court to the possible need to address the handling of discovery of electronically stored information early in the litigation if such discovery is expected to occur. The court's involvement early in the litigation frequently will help avoid discovery disputes later in the case. *See In re John Doe Proceeding*, 2004 WI 65, ¶

63 ("trial courts may need to be more active in managing electronic discovery and production than in managing conventional discovery or production of information").

II. WIS. STAT. § 804.08 (3), Interrogatories to Parties: Option to Produce Business Records.

WIS. STAT. § 804.08 (3) currently permits an answering party to produce business records in response to an interrogatory. The Judicial Council proposes an amendment to recognize that business records may be in electronic form. Because much business information is stored only in electronic form, the section 804.08 (3) option should be available with respect to such records as well. However, section 804.08 (3) allows a responding party to substitute access to documents or electronically stored information for an answer only if the burden of deriving the answer will be substantially the same for either party.

Under the proposed amendment to section 804.08 (3), the responding party must give the interrogating party a reasonable opportunity to examine, audit, or inspect the information.

> Depending on the circumstances, satisfying these provisions with regard to electronically stored information may require the responding party to provide some combination of technical support, information on application software, or other assistance. The key question is whether such support enables the interrogating party to derive or ascertain the answer from the electronically stored information as readily as the responding party. [1]

A party that wishes to invoke section 804.08 (3) "by specifying electronically stored information may be required to provide direct access to its electronic information system,

[1] Fed.R.Civ.P. 33(d) Advisory Committee Notes (2006 Amendment).

but only if that is necessary to afford the requesting party an adequate opportunity to derive or ascertain the answer to the interrogatory."[2]

To maintain consistency throughout the discovery rules, the term "electronically stored information" has the same broad meaning in this section as in WIS. STAT. § 804.09 (1), governing production of documents, and is amended to parallel section 804.09 (1) by recognizing the importance of electronically stored information.

III. WIS. STAT. §§ 804.09 (1) and (2), Production of Documents, etc.

The proposed amendment to WIS. STAT. § 804.09 (1) clarifies that parties may request an opportunity to test or sample materials sought under that section in addition to inspecting and copying them. This may be important for both electronically stored information and hard-copy materials. As with any other form of discovery, issues of burden and intrusiveness raised by requests to test or sample can be addressed under WIS. STAT. § 804.01. Inspection or testing of certain types of electronically stored information or of a responding party's electronic information system may raise issues of confidentiality or privacy. The addition of testing and sampling to section 804.09 (1) with regard to documents and electronically stored information is not meant to create a routine right of direct access to a party's electronic information system. "Courts should guard against undue intrusiveness resulting from inspecting or testing such systems."[3]

The form in which electronically stored information is produced can affect the cost of production as well as the usability of the produced information by the requesting party.

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[2] *Id.*

[3] Fed.R.Civ.P. 34(a) Advisory Committee Notes (2006 Amendment).

The proposed amendment to WIS. STAT. § 804.09 (2) permits the requesting party to specify the form or forms in which the electronically stored information is to be produced. The amendment also allows the producing party to object to the requested form. If the request does not specify a form for producing electronically stored information, a party may produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms. The proposed amendment clarifies that a party is not required to produce the same electronically stored information in more than one form.

Section 804.09 (2) provides that a party must produce documents as they are kept in the usual course of business or must organize and label them to correspond with the categories in the discovery request. The production of electronically stored information should be subject to comparable requirements to protect against deliberate or inadvertent production in ways that raise unnecessary obstacles for the requesting party. Section 804.09 (2) is amended to ensure similar protection for electronically stored information. The amendment to section 804.09 (2) permits the requesting party to designate the form in which it wants electronically stored information produced, including hard copy. (Production in hard copy may be important where the requesting party does not have ready access to a computer.)

The form of production is generally more important to the exchange of electronically stored information than of hard-copy materials. "Specification of the desired form or forms may facilitate the orderly, efficient, and cost-effective discovery of

electronically stored information."[4] The amendment recognizes that different forms of production may be appropriate for different types of electronically stored information. Requiring that diverse types of electronically stored information all be produced in the same form could prove impossible, and even if possible could increase the cost and burdens of producing and using the information. Thus the amendment provides that the requesting party may ask for different forms of production for different types of electronically stored information. However, in recognition of the fact that the requesting party may not have a preference, the amendment does not require that the requesting party choose a form or forms of production.

The responding party also is involved in determining the form of production. In the written response to the production request required by WIS. STAT. § 804.09, the responding party must state the form it intends to use for producing electronically stored information if the requesting party does not specify a form or if the responding party objects to a form that the requesting party specifies. Stating the intended form before production occurs may permit the parties to identify and resolve disputes before the expense of production occurs. A party responding to a discovery request by producing electronically stored information in a form of its choice, without identifying that form in advance of the production in the response required by section 804.09 (2), runs a risk that the requesting party can show the produced form is not reasonably usable, and it is entitled to production of some or all of the information in a different form.

[4] Fed.R.Civ.P. 34(b) Advisory Committee Notes (2006 Amendment).

The amendment further provides that if the form of production is not specified by agreement or court order, the responding party must produce electronically stored information either in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms. If necessary, a responding party must translate information it produces into a reasonably usable form.[5]

> Under some circumstances, the responding party may need to provide some reasonable amount of technical support, information on application software, or other reasonable assistance to enable the requesting party to use the information. The rule does not require a party to produce electronically stored information in the form in which it is ordinarily maintained, as long as it is produced in a reasonably usable form. But the option to produce in a reasonably usable form does not mean that a responding party is free to convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation. If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature.[6]

Under the proposed rule, whether or not the requesting party specifies the form of production, the same electronically stored information ordinarily need be produced in only one form.

IV. WIS. STAT. § 804.12, Failure to Make Discovery; Sanctions.

WIS. STAT. § 804.12 (4m) focuses on a distinctive feature of computer operations, the routine alteration and deletion of information that attends ordinary use.

> Many steps essential to computer operation may alter or destroy information for reasons that have nothing to do with how that information

[5] *Id.*

[6] *Id.*

> might relate to litigation. As a result, the ordinary operation of computer systems creates a risk that a party may lose potentially discoverable information without culpable conduct on its part.[7]

Under section 804.12 (4m), absent exceptional circumstances, sanctions cannot be imposed for loss of electronically stored information resulting from the routine, good-faith operation of an electronic information system. This limitation on sanctions is commonly referred to as a "safe harbor" provision.[8] A "safe harbor" provision provides a default rule, and compliance with that rule is a means to avoid sanctions for spoliation.[9]

Section 804.12 (4m) applies only to information lost due to the "routine operation of an electronic information system," the ways in which such systems are generally designed, programmed, and implemented to meet the party's technical and business needs.

> The "routine operation" of computer systems includes the alteration and overwriting of information, often without the operator's specific direction or awareness, a feature with no direct counterpart in hard-copy documents. Such features are essential to the operation of electronic information systems.[10]

Section 804.12 (4m) applies to information lost due to the routine operation of an information system only if the operation was in good faith. "Good faith in the routine operation of an information system may involve a party's intervention to modify or

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[7] Fed.R.Civ.P. 37 Advisory Committee Notes (2006 Amendment).

[8] *The Sedona Principles: Best Practices Recommendations and Principles for Addressing Electronic Document Production*. (Sedona Conference Working Group Series, Sedona, AZ), Jan. 2004, at 46-47.

[9] Thomas Y. Allman, *The Case for a Preservation Safe Harbor in Requests for E-Discovery*, 70 DEF. COUNS. J. 417, 422-23 (Oct. 2003).

[10] Fed.R.Civ.P. 37 Advisory Committee Notes (2006 Amendment).

suspend certain features of the routine operation to prevent the loss of information, if that information is subject to a preservation obligation."[11] The concept of "preservation of evidence" is already well-recognized under Wisconsin law.[12] The failure to preserve evidence, or spoliation, can result in sanctions.[13] A preservation obligation may arise from many sources, including common law, statutes, regulations, or a court order in the case.[14]

The good faith requirement of section 804.12 (4m) 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.[15] 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 a litigation hold.[16] Among the

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[11] *Id.*

[12] *See Estate of Neumann ex rel. Rodli v. Neumann*, 242 Wis.2d 205, 245, 626 N.W.2d 821 (Ct. App. 2001) ("Courts have fashioned a number of remedies for evidence spoliation. The primary remedies used to combat spoliation are pretrial discovery sanctions, the spoliation inference, and recognition of independent tort actions for the intentional and negligent spoliation of evidence"); *Sentry Ins. v. Royal Ins. Co. of Am.*, 196 Wis.2d 907, 918, 539 N.W.2d 911 (Ct. App. 1995).

[13] *Id; Jagmin v. Simonds Abrasive Co.*, 61 Wis. 2d 60, 80-81, 211N.W.2d 810 (1973) (holding that spoliation inference against party causing spoliation is inappropriate where evidence was negligently destroyed, but may be appropriate where destruction is intentional).

[14] Fed.R.Civ.P. 37 Advisory Committee Notes (2006 Amendment).

[15] *See generally Zubulake v. UBS Warburg LLC* (*Zubulake IV*), 220 F.R.D. 212, 218 (S.D.N.Y. 2003) ("Once a party reasonably anticipates ligation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents").

[16] In *Milwaukee Constructors II v. Milwaukee Metro. Sewerage Dist.*, 177 Wis.2d 523, 532, 502 N.W.2d 881 (Ct. App.1993)., the appellate court accepts the process for evaluating the details, significance and sanctions concerning allegations of destruction of evidence set forth in *Struthers Patent*

(continued)

factors bearing on a party's good faith in the routine operation of an information system are the steps a party took to comply with a court order or party agreement requiring preservation of specific electronically stored information.[17] Whether good faith would call for steps to prevent the loss of information on sources that the party believes are not reasonably accessible under WIS. STAT. § 804.01 (2) (e) depends on the circumstances of each case, including whether the party reasonably believes that the information on such sources is likely to be discoverable and not available from reasonably accessible sources.[18]

The protection provided by section 804.12 (4m) applies only to sanctions "under these rules." It does not affect other sources of authority to impose sanctions or rules of professional responsibility. The amendment restricts the imposition of sanctions.

> It does not prevent a court from making the kinds of adjustments frequently used in managing discovery if a party is unable to provide relevant responsive information. For example, a court could order the responding party to produce an additional witness for deposition, respond to additional interrogatories, or make similar attempts to provide substitutes or alternatives for some or all of the lost information.[19]

Corp. v. Nestle Co., 558 F. Supp. 747, 756 (D.N.J. 1981). *Struthers* instructs that in reviewing the conduct of the offending party, the trial court should consider not only whether the party responsible for the destruction of evidence knew, or should have known, at the time it destroyed the evidence that litigation was a distinct possibility, but also whether the offending party destroyed documents which it knew, or should have known, would constitute evidence relevant to the pending or potential litigation. *See id*. at 756, 765.

[17] Fed.R.Civ.P. 37 Advisory Committee Notes (2006 Amendment).

[18] *Id.*

[19] *Id.*

V. WIS. STAT. § 805.07, Subpoena.

The proposed amendments to WIS. STAT. § 805.07 are intended to protect third parties from the unreasonable burden of responding to subpoenas asking for electronically stored information. This section is amended to conform the provisions for subpoenas to changes in other discovery rules related to discovery of electronically stored information. Section 804.09 is amended to provide in greater detail for the production of electronically stored information. Section 805.07) (2) is amended to recognize that electronically stored information, as defined in section 804.09 (1), can also be sought by subpoena. Like section 804.09 (2), section 805.07 (2) is amended to provide that the subpoena can designate a form or forms for production of electronic data. Section 805.07 (2) is amended, like section 804.09 (2) to authorize the person served with a subpoena to object to the requested form or forms. In addition, as under section 804.09 (2), section 805.07 (7) (b)1 is amended to provide that if the subpoena does not specify the form or forms for electronically stored information, the person served with the subpoena must produce electronically stored information in a form or forms in which it is usually maintained or in a form or forms that are reasonably usable. Section 805.07 (7) (b)2 is added to provide that the person producing electronically stored information should not have to produce the same information in more than one form unless so ordered by the court for good cause.

Section 805.07 (2) is also amended, as is section 804.09 (1), to provide that a subpoena is available to permit testing and sampling as well as inspection and copying.

This change recognizes the opportunity to perform testing or sampling may be important on occasion, for documents and for electronically stored information. Because testing or sampling may present issues of burden or intrusion for the person served with the subpoena, the protective provisions of section 805.07 (3) should be enforced with vigilance when such demands are made. Inspection or testing of certain types of electronically stored information or of a person's electronic information system may raise issues of confidentiality or privacy.[20] The addition of sampling and testing to section 805.07 (2) with regard to documents and electronically stored information is not meant to create a routine right of direct access to a person's electronic information system, although such access might be justified in some circumstances. "Courts should guard against undue intrusiveness resulting from inspecting or testing such systems."[21]

VI. Comparison to the Federal Amendments.

In 2006, the Federal Rules of Civil Procedure were amended to specifically address the discovery of electronically stored information. *See* http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf (last accessed April 23, 2009) The amendments primarily included revisions and additions to Rules 16, 26, 33, 34, and 37, covering six related areas.

First, the federal amendments introduce the phrase "electronically stored information" to Rules 26(a)(1), 33, and 34, to acknowledge that electronically stored information is discoverable, and includes any type of information that can be stored

[20] Fed.R.Civ.P. 34 Advisory Committee Notes (2006 Amendment).

[21] *Id.*

electronically. However, the 2006 amendments to the federal rules avoided a "limiting or precise definition" of "electronically stored information" to avoid the possibility that the development of technology would surpass the development of amendments.[22] The Judicial Council's proposed amendment to WIS. STAT. § 804.09 (1) adds a definition of electronically stored information and provides examples. It is intended to be broad enough to cover all current types of computer-based information, yet flexible enough to encompass future changes and technological developments. The Council believes this amendment is consistent with its federal counterpart, and adequately informs parties of its meaning both now and in the future.

Second, the federal amendments require the parties to address electronically stored information early in the discovery process, recognizing that such early attention is crucial in order to control the scope and expense of electronic discovery, and avoid discovery disputes.[23] While the proposed amendment to Wis. Stat, § 802.10 is based on the federal rules, the Wisconsin rule does not include the reference to a discovery conference contained in the federal rules since Wisconsin does not require a discovery conference. However, like the federal amendments, the amendments proposed herein encourage the courts to address management of electronic discovery early by adding electronically stored information to the list of items that can be addressed by scheduling order, although it is not required. *See* WIS. STAT. § 802.10 (3) (jm).

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[22] *Id.*

[23] Fed. R. Civ. P. 26(a)(1)(B), 16(b), 26(f).

Third, the federal amendments address the format of production of electronically stored information, and permit the requesting party to designate the form or forms in which it wants electronically stored information produced. *See* Fed. R. Civ. P. 34(b). The federal rules also provide a framework for resolving disputes over the form of production, and provide that if a request does not specify a form of production, or if the responding party objects to the requested form(s), the responding party must notify the requesting party of the form in which they intend to produce the electronically stored material. These provisions are generally incorporated in the Judicial Council's proposed amendments to WIS. STAT. § 804.09 (2).

Fourth, amended Rule 26(b)(2) recognizes a distinction between information that is reasonably accessible, and that which is not. Under the new federal rule, a responding party need not produce electronically stored information from sources that it identifies as not reasonably accessible because of undue burden or cost. The proposed amendments to the Wisconsin rules also recognize a distinction and expand the rules regarding both subpoenas and protective orders to cover electronically stored information that may not be reasonably accessible. *See* WIS. STAT. §§ 804.01 (3) (a) and 805.07.

Fifth, the federal amendments set forth a claw-back procedure through which a party who has inadvertently produced work product material or privileged information may nonetheless assert a protective claim as to that material. *See* Fed. R. Civ. P. 26(b)(5). The proposed amendments to the Wisconsin rules differ from the federal rules in this aspect because the proposed rules do not contain an automatic claw-back for inadvertently disclosed work product and privileged information. The Council believes

that waiver of privilege is more properly addressed under the rules of evidence, including the attorney client privilege and the work product doctrine, than in the discovery rules.

Sixth, the federal rules provide a safe harbor provision, which instructs that, absent exceptional circumstances, a court may not impose sanctions 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.[24] The Judicial Council's proposed amendments include a substantially similar safe harbor provision in WIS. STAT. § 804.12 (4m).

VII. Enactment Of E-Discovery Provisions In State Civil Rules.

In addition to the federal rules, two primary rule models have been created for use by state courts. In August 2006, the Conference of Chief Justices ("CCJ") approved the "Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information." *See* http://www.ncsconline.org/WC/Publications/CS_ElDiscCCJGuidelines.pdf (last accessed April 23, 2009). While not binding on state courts, the guidelines are intended to provide consistency among state court rulings related to the production of electronic information in the discovery process.

In August of 2007, the National Conference of Commissioners of Uniform State Laws ("NCCUSL") approved the Uniform Rules Relating to Discovery of Electronically Stored Information. *See* http://www.law.upenn.edu/bll/archives/ulc/udoera/2007_final.htm(last accessed April 23,

2009). The Uniform Rules are based on the federal rules and are similar to the CCJ guidelines. However the Uniform Rules are intended to be adopted by the states and have the force of law. In turn, the guidelines are recommendations for individual state courts. The Uniform Rules were approved by the American Bar Association's House of Delegates at its Midyear Meeting in Los Angeles on February 6-12, 2008.

Unlike the 2006 amendments to the Federal Rules of Civil Procedure, the Uniform Rules envision a set of rules governing discovery of electronically stored information that is separate from other rules relating to civil discovery. As the Federal Rules of Civil Procedure recognize, one set of discovery rules is preferable, whether for discovery of electronically stored information or discovery of paper documents. Therefore, the Judicial Council's proposed amendments incorporate rules regarding discovery of electronically stored information into Wisconsin's existing discovery rules.

Approximately half of the states have adopted or are currently considering the adoption of rules regarding discovery of electronically stored information. A majority of those states have adopted the federal amendments or rules substantially similar to the federal rules. Only Utah has adopted the Uniform Electronic Discovery Act. For detailed information regarding the rules adopted by states regarding electronically stored information, please see http://www.krollontrack.com/library/staterules_krollontrack_jan2009.pdf (last accessed April 23, 2009).

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[24] Fed. R. Civ. P. 37(e).

PETITION

For the reasons stated, The Judicial Council respectfully requests that the Supreme Court adopt the following rules.

SECTION 1. 802.10 (3) (jm) of the statutes is created to read:

802.10 (3) (jm) The need for discovery of electronically stored information.

JUDICIAL COUNCIL NOTE:

Sub. (3) has been amended to encourage courts to be more active in managing electronic discovery. Pursuant to Wis. Stat. § 805.06, the court may also appoint a referee to report on complex and/or expensive discovery issues, including those involving electronically stored information.

SECTION 2. 804.08 (3) of the statutes is amended to read:

(3) OPTION TO PRODUCE BUSINESS RECORDS. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including electronically stored information, or from a compilation, abstract or summary based thereon, 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.

JUDICIAL COUNCIL NOTE:

The term "electronically stored information" has the same broad meaning in Wis. Stat. § 804.08(3) as in Wis. Stat. § 804.09(1). A party that wishes to invoke Wis. Stat. § 804.08(3) by specifying electronically stored information may be required to provide direct access to its electronic information system, but only if that is necessary to afford the requesting party an adequate opportunity to derive or ascertain the answer to the interrogatory.

SECTION 3. 804.09 (1) and (2) of the statutes are amended to read:

804.09 Production of documents and things and entry upon land for inspection and other purposes. (1) SCOPE. Any party may serve on any other party a request (a) to produce and permit the party making the request, or someone acting on the party's behalf,

to inspect and copy, any designated documents or electronically stored information (including writings, drawings, graphs, charts, photographs, ~~phono-records~~sound recordings, images, and other data or data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of s. 804.01(2) and which are in the possession, custody or control of the party upon whom the request is served; or (b) 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 therein, within the scope of s. 804.01(2).

JUDICIAL COUNCIL NOTE:

Wis. Stat. § 804.09(1) is amended to confirm that discovery of electronically stored information stands on equal footing with discovery of paper documents. The change clarifies that Wis. Stat. § 804.09 applies to information fixed in a tangible form and to information that is stored in a medium from which it can be retrieved and examined. A Wis. Stat. § 804.09 request for production of "documents" should be understood to encompass, and the response should include, electronically stored information unless discovery in the action has clearly distinguished between electronically stored information and "documents."

(2) PROCEDURE. (a) Except as provided in s. 804.015, the request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. 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.

(b) 1. The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. 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, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form, or if no form was specified in the request, the party shall state the form or forms it intends to use.

2. Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

a. A party shall produce documents as they are kept in the usual course of business or shall organize and label them to correspond to the categories in the request;

b. If a request does not specify a form for producing electronically stored information, a party shall produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

c. A party need not produce the same electronically stored information in more than one form.

(c) The party submitting the request may move for an order under s. 804.12 (1) 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.

SECTION 4. 804.12 (4m) of the statutes is created to read:

(4m) FAILURE TO PROVIDE 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.

JUDICIAL COUNCIL NOTE:

The "routine operation" of computer systems includes the alteration and overwriting of information, often without the operator's specific direction or awareness, a feature with no direct counterpart in hard-copy documents. Good faith in the routine operation of an information system may involve a party's intervention to modify or suspend certain features of the routine operation to prevent the loss of information, if that information is subject to a preservation obligation.

SECTION 5. 805.07 (2) and (3) of the statutes are amended to read:

805.07 (2) SUBPOENA REQUIRING THE PRODUCTION OF MATERIAL. (a) A subpoena may command the person to whom it is directed to produce the books, papers, documents, electronically stored information, or tangible things designated therein. A subpoena may specify the form or forms in which electronically stored information is to be produced. A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding party to permit inspection, copying, testing, or sampling of the materials**.**

(b) Notice of a 3rd-party subpoena issued for discovery purposes shall be provided to all parties at least 10 days before the scheduled deposition in order to preserve their right to object. If a 3rd-party subpoena requests the production of books, papers, documents, electronically stored information, or tangible things that are within the scope of discovery under s. 804.01(2)(a), those objects shall not be provided before the time and date specified in the subpoena. The provisions under this paragraph apply unless all of the parties otherwise agree.

JUDICIAL COUNCIL NOTE:

The addition of sampling and testing to Wis. Stat. § 805.07(2) with regard to documents and electronically stored information is not meant to create a routine right of direct access to a person's electronic information system, although such access might be justified in some circumstances.

(3) Protecting a person subject to a subpoena. (a) *Avoiding undue burden or expenses; sanctions.* A party or attorney responsible for issuing and serving a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court shall enforce this duty and impose an appropriate sanction, which may include lost earnings and reasonable attorney's fees, on a party or attorney who fails to comply.

(b) *Protective orders.* Upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, the court may (a) quash or modify the subpoena if it is unreasonable and oppressive or (b) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, electronically stored information, or tangible things designated therein.

(c) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises, or to producing electronically stored information in the form or forms requested. The objection shall be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply: 1. At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

2. These acts may be required only as directed in the order, and the order shall protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

SECTION 6. 805.07 (7) of the statutes is created to read:

(7) DUTIES IN RESPONSE TO A SUBPOENA. (a) *Documents.* A person responding to a subpoena to produce documents shall produce them as they are kept in the ordinary course of business or shall organize and label them to correspond to the categories in the demand.

(b) *Electronically stored information.* 1. Form of electronically stored information not specified. If a subpoena does not specify a form for producing electronically stored information, the person responding shall produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

2. Electronically stored information produced in only one form. The person responding need not produce the same electronically stored information in more than one form.

The Wisconsin Judicial Council respectfully requests that the Court publish the Judicial Council Notes to proposed WIS. STATS. §§ 804.08 (3), 804.09 (1), 804.12 (4m) and 805.07 (2).

CONCLUSION

For more than a decade, litigants and courts have confronted an increase in discovery of electronically stored information. The proposed rules are intended to provide consistency and predictability in the discovery of electronically stored information. More importantly, they are intended to reduce the economic burden on litigants that can result from discovery involving an enormous volume of electronically stored information.

Therefore, the Wisconsin Judicial Council respectfully urges this Court to amend Wis. Stats. §§ 802.10, 804.08, 804.09, 804.12, and 805.07 relating to discovery of electronically stored information.

Dated _____, 2009.

RESPECTFULLY SUBMITTED,

WISCONSIN JUDICIAL COUNCIL

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