STATE OF WISCONSIN

SUPREME COURT

In re:

PROPOSED AMENDMENTS TO
WISCONSIN STATUTES §§ 802.10, 804.01, 804.08, 804.09, 804.12, AND 805.07.

**AMENDED PETITION OF WISCONSIN JUDICIAL COUNCIL
FOR AN ORDER AMENDING
WIS. STATS. § § 802.10, 804.01, 804.08, 804.09, 804.12, AND 805.07**

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ON BEHALF OF THE WISCONSIN JUDICIAL COUNCIL

March 19, 2010

The Wisconsin Judicial Council respectfully petitions the Supreme Court to create WIS. STATS. § § 802.10 (3) (jm), 804.01 (4m), 804.09 (2) (b) 2., and 804.12 (4m); to repeal and recreate WIS. STATS. § § 804.08 (3) and 804.09 (1); and to amend WIS. STATS. § § 804.09 (2), and 805.07 (2). This petition is directed to the Supreme Court's rule-making authority under WIS. STAT. § 751.12.

PETITION

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 also may appoint a referee to report on complex or expensive discovery issues, including those involving electronically stored information.

SECTION 2. 804.01 (4m) of the statutes is created to read:

804.01 (4m) DISCOVERY CONFERENCE. At any time after commencement of an action, on the court's own motion or the motion of a party, the court may order the parties to confer by any appropriate means, including in person, regarding:

(a) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to particular issues;

(b) discovery of electronically stored information, including preservation of the information pending discovery and the form or forms in which the information will be produced;

(c) the method for asserting or preserving claims of privilege or of protection of trial-preparation materials, and to what extent, if any, such claims may be asserted after production;

(d) the cost of proposed discovery and the extent to which discovery should be limited, if at all, under s. 804.01(3)(a); and

(e) in exceptional 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 discovery.

JUDICIAL COUNCIL NOTE:

Sub. (4m) was created as a measure to manage the costs of discovery. If the parties confer before embarking on discovery, they can reduce the ultimate cost of discovery. This provision was created as part of a package of revisions to address issues relating to discovery of electronically stored information, but the provision applies generally, except where specifically limited. The subsection is modeled on similar provisions in the Uniform Rules Relating to the Discovery of Electronically Stored Information, Federal Rule of Civil Procedure 26(f), and on civil procedure rules of other states. The proposal does not mandate a discovery conference in every case. In appropriate cases, it empowers a court to order parties to confer if they do not do so voluntarily. Parties who confer and feel the need for further court intervention may consider the provisions of ss. 802.10(3), 804.01(3), 805.06 and 907.06.

SECTION 3. 804.08 (3) of the statutes is repealed and recreated to read:

804.08 (3) OPTION TO PRODUCE BUSINESS RECORDS. If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records, including electronically stored information, and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by: (a) specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and (b) giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.

JUDICIAL COUNCIL NOTE:

The meaning of the term "electronically stored information" is described in the Judicial Council Note following s. 804.09.

Section 804.08 (3) is taken from F.R.C.P. 33(d). Portions of the Committee Note of the federal Advisory Committee on Civil Rules are pertinent to the scope and purpose of s. 804.08(3): "Special difficulties may arise in using electronically stored information, either due to its form or because it is dependent on a particular computer system. Rule

33(d) 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. Rule 33(d) states that a party electing to respond to an interrogatory by providing electronically stored information must ensure that the interrogating party can locate and identify it 'as readily as can the party served,' and that 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. A party that wishes to invoke Rule 33(d) 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. In that situation, the responding party's need to protect sensitive interests of confidentiality or privacy may mean that it must derive or ascertain and provide the answer itself rather than invoke Rule 33(d)."

SECTION 4. 804.09 (1) of the statutes is repealed and recreated to read:

804.09 (1) SCOPE. A party may serve on any other party a request within the scope of s. 804.01 (2):

(a) to produce and permit the requesting party or its representative to inspect, copy, test or sample the following items in the responding party's possession, custody, or control:

1. any designated documents or electronically stored information, including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any other medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or

2. any designated tangible things; or

(b) to permit entry onto designated land or property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

SECTION 5. 804.09 (2) of the statutes is renumbered 804.09 (2) (a) and amended to read:

804.09 (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, and shall describe with reasonable particularity each item or category of items to be

inspected. 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.

(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 6. 804.09 (2) (b) 2. of the statutes is created to read:

804.09 (2) (b) 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.

JUDICIAL COUNCIL NOTE:
Sections 804.09 (1) and (2) are modeled on F.R.C.P. 34(a) and (b). Portions of the Committee Note of the federal Advisory Committee on Civil Rules are pertinent to the scope and purpose of s. 804.09(1) and (2):

“Rule 34(a) is amended to confirm that discovery of electronically stored information stands on equal footing with discovery of paper documents. The change clarifies that Rule 34 applies to information that is fixed in a tangible form and to information that is

stored in a medium from which it can be retrieved and examined. . . . [A] Rule 34 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.'

"Discoverable information often exists in both paper and electronic form, and the same or similar information might exist in both. The items listed in Rule 34(a) show different ways in which information may be recorded or stored. Images, for example, might be hard-copy documents or electronically stored information. The wide variety of computer systems currently in use, and the rapidity of technological change, counsel against a limiting or precise definition of electronically stored information. Rule 34(a)(1) is expansive and includes any type of information that is stored electronically. A common example often sought in discovery is electronic communications, such as e-mail. The rule covers – either as documents or as electronically stored information-- information 'stored in any medium,' to encompass future developments in computer technology. Rule 34(a)(1) is intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments.

"References elsewhere in the rules to 'electronically stored information' should be understood to invoke this expansive approach. . . .

"Rule 34(b) 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. Rule 34(b) is amended to ensure similar protection for electronically stored information.

"The amendment to Rule 34(b) permits the requesting party to designate the form or forms in which it wants electronically stored information produced. The form of production is more important to the exchange of electronically stored information than of hard-copy materials, although a party might specify hard copy as the requested form. Specification of the desired form or forms may facilitate the orderly, efficient, and cost-effective discovery of electronically stored information. The rule recognizes that different forms of production may be appropriate for different types of electronically stored information. Using current technology, for example, a party might be called upon to produce word processing documents, e-mail messages, electronic spreadsheets, different image or sound files, and material from databases. Requiring that such 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. The rule therefore provides that the requesting party may ask for different forms of production for different types of electronically stored information.

"The rule does not require that the requesting party choose a form or forms of production. The requesting party may not have a preference. In some cases, the requesting party may not know what form the producing party uses to maintain its electronically stored information . . .

"The responding party also is involved in determining the form of production. In the written response to the production request that Rule 34 requires, 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 the production occurs may permit the parties to identify and seek to resolve disputes before the expense and work of the production occurs. A party that responds to a discovery request by simply producing electronically stored information in a form of its choice, without identifying that form in advance of the production in the response required by Rule 34(b) runs a risk that the requesting party can show that the produced form is not reasonably usable and that it is entitled to production of some or all of the information in an additional form. Additional time might be required to permit a responding party to assess the appropriate form or forms of production. . . .

" . . . [T]he 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."

SECTION 7. 804.12 (4m) of the statutes is created to read:

804.12 (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:

Section 804.12 (4m) is taken from F.R.C.P. 37(e). Portions of the Committee Note of the federal Advisory Committee on Civil Rules are pertinent to the scope and purpose of s. 804.12(4m): "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.

"[The rule] 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 suspend certain features of the routine operation to prevent the loss of information, if that information is subject to a preservation obligation. A preservation obligation may arise from many sources, including common law, statutes, regulations, or a court order in the case. The good faith requirement . . . 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. When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a 'litigation hold.' Among the factors that bear on a party's good faith in the routine operation of an information system are the steps the party took to comply with a court order in the case or party agreement requiring preservation of specific electronically stored information. . . .

"The protection provided by [this rule] applies only to sanctions 'under these rules.' It does not affect other sources of authority to impose sanctions or rules of professional responsibility.

"This rule 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."

SECTION 8. 805.07 (2) of the statutes is 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.

(c) 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. The person responding need not produce the same electronically stored information in more than one form.

JUDICIAL COUNCIL NOTE:

The amendments to s. 805.07 (2) are modeled on F.R.C.P. 45(a) and (d). Portions of the Committee Note of the federal Advisory Committee on Civil Rules are pertinent to the scope and purpose of s. 805.07(2):

"Rule 45 is amended to conform the provisions for subpoenas to changes in other discovery rules, largely related to discovery of electronically stored information. . . .

"Rule 45(a)(1)(B) is also amended, as is Rule 34(a), to provide that a subpoena is available to permit testing and sampling as well as inspection and copying. As in Rule 34, this change recognizes that on occasion the opportunity to perform testing or sampling may be important, both for documents and for electronically stored information."

The Wisconsin Judicial Council respectfully requests that the Court publish the Judicial Council Notes to proposed WIS. STATS. §§ 802.10 (3), 804.01 (4m), 804.08 (3), 804.09, 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, 804.01, 804.08, 804.09, 804.12, and 805.07 relating to discovery of electronically stored information.

Dated March 19, 2010.

RESPECTFULLY SUBMITTED,

WISCONSIN JUDICIAL COUNCIL

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