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NEW WISCONSIN RULES OF CIVIL PROCEDURE GOVERNING E-DISCOVERY AND ELECTRONICALLY STORED INFORMATION

It is estimated that more than 90% of all information created today is stored electronically.

The Federal Rules of Civil Procedure were amended in 2006 to address such electronically stored information, or "ESI". Effective January 1, 2011, the Wisconsin Rules of Civil Procedures also are being amended to address ESI and confirm that discovery of ESI stands on equal footing with discovery of paper documents.

The Wisconsin rules have been changed to parallel the federal e-discovery rules and make it easier to utilize existing federal authority in discovery disputes in the Wisconsin courts. But Wisconsin did not adopt the 2006 federal amendments in their entirety. The new Wisconsin rules take a slightly different approach than the federal amendments in two ways: First, some federal rules do not have Wisconsin counterparts. For example, unlike FRCP Rule 26(a), Wisconsin's new rules make no provision for mandatory disclosure. Second, the drafters of the new Wisconsin rules thought some portions of the federal amendments should be addressed by substantive Wisconsin law, rather than by a procedural rules change.

The new Wisconsin ESI rules are:

- Wis. Stat. § 802.10(3)(jm) (the Wisconsin counterpart to FRCP 16)

This rule is being enacted to encourage courts to be more active in managing electronic discovery. It adds the need for discovery of electronically stored information to the issues that a trial court may address in issuing a scheduling order.

- Wis. Stat. § 804.01(2)(e) (the Wisconsin counterpart to FRCP 26)

This rule is being enacted to help manage the costs of discovery of ESI. It creates a "meet and confer" obligation, and states that no requests for production or inspection of ESI under Wis. Stat. § 804.09 (or responses to interrogatories by production of ESI under Wis. Stat. § 804.08(3)) can be issued until after the parties confer on a number of discovery issues. However, it does not require parties to confer before commencing other types of discovery.

- Wis. Stat. § 804.08(3) (the Wisconsin counterpart to FRCP 33(d))

This rule gives parties the option to produce electronic business records in lieu of an answer to an interrogatory. It specifies that ESI is among the types of business records that a business may provide in response to an interrogatory. But, this is an option; it is not mandatory.

- Wis. Stat. §§ 804.09(1) and (2) (the Wisconsin counterpart to FRCP 34)

These rules are the heart of the new electronic discovery rules. They govern the formulation of electronic discovery requests and responses and establish the scope and procedures regarding the discovery of ESI. They treat ESI the same as paper documents.

- Wis. Stat. § 804.12(4m) (the Wisconsin counterpart to FRCP 37)

This rule provides a “safe harbor” for the good faith, routine deletion of ESI and gives limited “immunity” from certain spoliation sanctions.

- Wis. Stat. § 805.06 (the Wisconsin counterpart to FRCP 53)

This is not a new rule, but rather its use in ESI matters is suggested by the comments to the new Wisconsin rules. It allows for the use of discovery referees or “special masters” to handle complex and/or expensive discovery issues, including those involving ESI.

- Wis. Stat. § 805.07 (the Wisconsin counterpart to FRCP 45)

This rule adds ESI to the types of materials which may be discovered by subpoena.

For more information about these new amendments to the Wisconsin Rules of Civil Procedure, contact Grant Killoran at O’Neil Cannon at 414.291.4733 or grant.killoran@www.wilaw.com.