2010 WI 67

SUPREME COURT OF WISCONSIN

NOTICE
This order is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 09-01

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

FILED

JUL 6, 2010

David R. Schanker
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 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 meet and confer provision for the discovery of electronically stored

information. Chief Justice Abrahamson and Justice Bradley dissented to the adoption of a mandatory meet and confer provision under the new Wis. Stat. § 804.01(4m).

Therefore, IT IS ORDERED that the following amendments shall be effective January 1, 2011, but are subject to revision after a public hearing to be held in the fall of 2010 and an opportunity for public comment. Any written comments on these amendments and further proposed amendments should be filed with the Clerk of the Supreme Court by August 31, 2010.[1]

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 2010:

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,

[1] Comments on these amendments regarding the discovery of electronically stored information are requested before they become effective. Send comments to the Clerk of Supreme Court, P.O. Box 1688, Madison, WI 53701-1688. An electronic copy should be emailed to clerk@wicourts.gov

the court may order the parties to confer by any appropriate means, including in person, regarding any of the following, except for discovery of electronically stored information, where parties must confer unless excused by the court:

(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 sub. (3) (a).

(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 2010:

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 Rules 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 2010:

The meaning of the term "electronically stored information" is described in the Judicial Council Note following Wis. Stat. § 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<u>, and shall describe with reasonable particularity each item</u>

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 2010:

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.

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.

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 2010:

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) (a) and (b) of the statutes are amended to read:

805.07 **(2)** (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.

SECTION 9. 805.07 (2) (c) of the statutes is created to read:

805.07 **(2)** (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 2010:

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.

IT IS FURTHER ORDERED that the Judicial Council Notes to these rules are not adopted but shall be printed for information purposes.

IT IS FURTHER ORDERED that notice of the amendments of Wis. Stat. §§ 802.10, 804.01, 804.08, 804.09, 804.12, and 805.07 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 6th day of July, 2010.

BY THE COURT:

/s/

David R. Schanker
Clerk of Supreme Court

¶1 SHIRLEY S. ABRAHAMSON, C.J. I write for two reasons.

¶2 First, I would, at this time, adopt verbatim the electric discovery rule as redrafted by the Wisconsin Judicial Council.[2] The court will have another hearing and conference on these rules in the fall of 2010.[3] That's the time to decide on any changes.

¶3 Second, because few seem to be familiar with the court's procedure in adopting rules, I want to explain the in-depth review the e-discovery rules have received from the proponent, the Judicial Council, and the court.

I

¶4 I would make no changes to the Judicial Council's amended petition now because the court decided at its April 28, 2010 open administrative conference to reconsider the Judicial

[2] The Judicial Council is created in Wis. Stat. § 758.13(1)(a). It is composed of the following 21 members (or their designees): 1 supreme court justice, 1 court of appeals judge, the director of state courts, four circuit court judges, the chairpersons of the senate and assembly committees dealing with judicial affairs, the attorney general, the chief of the legislative reference bureau, the deans of the law schools of the University of Wisconsin and Marquette University, the state public defender, the president-elect of the State Bar of Wisconsin, 3 additional members of the State Bar, one district attorney, and two citizens at large.

[3] At the April 28, 2010, open administrative conference, the court decided on a 4-3 vote to adopt the Judicial Council's amended e-discovery rule petition. A divided court (5-2) decided to modify the rule to provide a mandatory confer provision for discovery of electronically stored information, to which Chief Justice Shirley S. Abrahamson and Justice Ann Walsh Bradley dissented. See Appendix F, which sets forth the relevant part of the open conference.

Council's proposal in the fall of 2010. A date for the hearing and conference will be set soon.

¶5 I therefore would not adopt a "mandatory confer provision" at this time; I would, at this time, go along with the "discretionary confer provision" that the Judicial Council recommends.[4]

¶6 We have to keep in mind that the increasing use of electronic records is a relatively recent phenomenon and that rules governing electronic discovery are also relatively new.[5] The federal rules on e-discovery are a work in progress.[6] The seventh circuit court of appeals is conducting a pilot program on e-discovery. The Judicial Council's proposal is a start, designed to encourage courts to be more active in managing electronic discovery and production than in managing conventional discovery.[7]

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[4] See Appendix D for the Judicial Council's recommendation.

[5] In my concurring opinion in In re John Doe Proceeding, 2004 WI 65, ¶58-65, 272 Wis. 2d 208, 680 N.W.2d 792 (Abrahamson, C.J., concurring), I pointed out some of the "special problems in production of electronic information" and was critical of the majority opinion for failing to "give guidance to the judge or the parties about these unique issues."

[6] On May 10-11, the Federal Judicial Conference Advisory Committee sponsored the 2010 Civil Litigation Conference at Duke University School of Law. One session was entitled "Issues with the Current State of Discovery: Is There Really Excessive Discovery, and if so, What are the Possible Solutions?" Another session was entitled "Judicial Management of the Litigation Process: Is the Solution to Excessive Cost and Delay Greater Judicial Involvement?" A third session was entitled "E-Discovery: Discussion of the Cost Benefit Analysis of E-Discovery and the Degree to Which the New Rules are Working or Not."

[7] Judicial Council Memorandum in Support of Petition on E-Discovery at 1 (Apr. 2009).

¶7 The court will revisit this amended petition for additional comments, for yet another open hearing, and for yet another open administrative conference in the fall of 2010. After considering additional comments, the court can make any changes it thinks advisable.

¶8 The circuit court judges have not been notified personally of the proposed mandatory confer change and have not weighed in on the proposal. I want to hear from the circuit court judges who have to apply these rules before I make up my mind on the final version of the rules. Thus, I do not see any reason to debate at this time the value of changing the proposed rules.

II

¶9 I turn to the process used in adopting these rules.

¶10 The Judicial Council had an excellent committee, the Evidence and Civil Procedure Committee, representing diverse experiences in the law, studying the proposed e-discovery rules.[8]

[8] 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-Elect, 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 Committee began its work in September 2007; the proposed rules were approved by the Judicial Council.

¶11 The Court has spent a considerable amount of time studying the proposal and discussing it.

¶12 The timeline for the drafting and consideration of the e-discovery petition has been as follows:

September 2007	Judicial Council Committee begins work on the petition.
April 23, 2009	Judicial Council files petition.
Nov. 2, 2009	Court schedules public hearing.
December 2009	Court publishes notice of public hearing.
Nov. 13, 2009	Court sends letter soliciting comments.
Jan. 21, 2010	Open public court hearing and open court administrative conference.
March 19, 2010	Judicial Council files amended petition at court request.
April 13, 2010	Court sends letters soliciting comments.
April 28, 2010	Open public court administrative conference.

¶13 At its January 21, 2010 public hearing and open administrative conference, the Court considered the Judicial Council's petition. The Court had the valuable assistance of staff who prepared a two-inch ring binder filled with federal and

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

state material on e-discovery, a memorandum analyzing the proposal, and numerous comments the court received.

¶14 After a lengthy hearing and court discussion, the court voted unanimously to ask the Judicial Council to redraft the proposed rule to mirror the federal rules to the extent the Judicial Council thought feasible.[9] The Court also asked the Judicial Council to reconsider several issues, such as adding the federal commentary and additional state commentary, clawback, cost shifting, privileges, etc., and to advise the court why the Judicial Council is or is not proposing the adoption of such provisions in Wisconsin.

¶15 The Judicial Council's amended petition followed the federal rules (even more closely than the original petition) and addressed the concerns raised by the court.[10] The amended petition includes the following:

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[9] Some prefer that our amendments not mimic the federal rules. These commentators believe that there is room for improvement in the language and substance of the federal rules and that the federal rules fail to address important issues. I do not necessarily disagree with their ambitions or proposed solutions. In view of the status of electronic discovery in Wisconsin at the current time, the court concluded that there was more to be gained from uniformity with those parts of the federal rules that are recommended by the Judicial Council than from setting out on its own with a set of new electronic discovery rules unique to Wisconsin.

[10] The original proposal also followed the National Conference of Commissioners on Uniform State Laws, Uniform Rules on the Discovery of Electronically Stored Information.

The Conference of Chief Justices approved Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information (Aug. 2006).

(1) Adding new § 804.01(4m) on meet and confer;

(2) Repealing and recreating § 804.08(3), *Option to Produce Business Records*, to mirror FRCP 33(d) (the original petition had amended the section); and

(3) Repealing and recreating § 804.09(1), *Scope*, to mirror FRCP 34(b)(2)(E) (the original petition had amended the section).

(4) Like the federal rules does not include a definition of "electronically stored information" in the rules.[11]

Both the original petition and amended petition create:

§ 804.12(4m), *Failure to Provide E-Stored Information*, which mirrors FRCP 37(e);

§ 804.09(2)(b)2., *Procedure*, which mirrors FRCP 34(b)(2)(E); and

§ 805.07(2)(c), *Subpoena requiring the production of material*, which mirrors FRCP 45(d)(1)(B) and (C).[12]

¶16 For the hearing and conference in the fall of 2010, I would ask that interested persons comment specifically on issues of concern raised by some members of the court, such as the mandatory/confer provision, clawback, and cost shifting.

¶17 To assist persons who wish to comment on the e-discovery rules, I have attached selected portions of the court hearing, the court's open administrative conferences, and the Judicial Council's submissions, as Appendices as follows:

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[11] A wide variety of computer systems and rapid technological changes "counsel against a limiting or precise definition of electronically stored information." Daniel R. Murray et al., Discovery in a Digital Age: Electronically Stored Information and the New Amendments to the Federal Rules of Civil Procedure, 39 UCC L.J. 509, 511 (2007).

[12] The federal rules use the words "should," "will," and "is" in various places in the e-discovery rules. The Legislative Reference Bureau raised questions about the advisability of using the more usual Wisconsin terminology of "shall."

APPENDIX A: COURT'S REQUEST TO JUDICIAL COUNCIL TO REDRAFT PETITION TO FOLLOW THE FEDERAL RULES AND TO RECONSIDER SEVERAL ISSUES

APPENDIX B: COURT DISCUSSION OF CLAWBACK

APPENDIX C: COURT DISCUSSION OF COST SHIFTING

APPENDIX D: LETTER FROM JUDGE SANKOVITZ EXPLAINING REASONING OF JUDICIAL COUNCIL'S PROPOSED RULES

APPENDIX E: LETTER FROM JUDICIAL COUNCIL REAFFIRMING ITS POSITION ON DISCRETIONARY CONFER PROVISION

APPENDIX F: APRIL 28, 2010 OPEN ADMINISTRATIVE CONFERENCE SCHEDULING ANOTHER HEARING IN FALL 2010 ON E-DISCOVERY PROPOSAL ADOPTED

¶18 The full hearing and the conferences of January 21, 2010 and April 28, 2010, are available on the internet at the Wisconsin Eye website for the Supreme Court 2010 Session at http://wisconsineye.org/wisEye_programming/ARCHIVES-sct_2010.html.

¶19 The court's file on this proposed rule contains numerous submissions advocating for and against the proposed rule. The file is available at the Office of the Clerk of the Supreme Court, 110 East Main Street, Madison, Wis. 53701.

¶20 I write separately to explain why I adopt the proposed rules verbatim at this time and dissent from amending the proposed amended petition to provide for a mandatory confer procedure. I also write separately to explain the in-depth study given e-discovery by the Evidence and Civil Procedure Committee of the Judicial Council, the Judicial Council, and the court.

APPENDIX A

COURT REQUEST TO JUDICIAL COUNCIL TO REDRAFT PROPOSED RULES TO FOLLOW FEDERAL LAWS AND TO RECONSIDER SEVERAL ISSUES

Wisconsin Eye
January 21, 2010: Open administrative conference on Rule petition 09-01 Electronic Discovery

01.21.10 | Wisconsin State Supreme Court Open Administrative Conference and Rules Hearing (Part 4)

Open administrative conference on Rule Petition 09-01 Electronic Discovery

C.J. Abrahamson: We have an open administrative conference on 09-01, In the matter of the amendment of Wis. Stat. 802.10, 804.08, 804.09, 804.12, 805.07 relating to the discovery of electronically stored information. I don't think I have to repeat the main issues that we heard today. Dave, I do have a proposal for the court. Taking up your spot, Pat, you usually make a motion. I do not propose that we adopt this petition verbatim, I do not. That is not usually in our tradition, and I don't think we can accept this. I do think, or I would hope, in my motion that the court would look favorably upon the concept that we adopt rules relating to the discovery of electronically stored information and that I would propose we ask the proponents to come back and, as they have already indicated they are willing, to go closer to the federal rules and change the federal rules only when needed to adapt to the Wisconsin terminology of the parties and concepts like that. That we recognize and that they recognize that this is a work in progress on electronic discovery. That we hope that the council would continue this committee and add people, perhaps those who have appeared today and others who have expertise and continue to work on this. But they would bring back at least the basics into the federal form with modifications as they see fit. But the principle is, we want to stay close to the feds.

2:38
C.J. Abrahamson: That at the moment we would say, OK, don't put in for this round claw back, cost shifting, anything more about the special master or privileges. That we do ask them to take a

second look not to necessarily make it mandatory in every case, but there have been some good suggestions here about counsel advising the court whether there is electronic discovery without raising this forfeiture issue that Judge Sankovitz raised because I think the concept that both the lawyers and nonlawyers, as the case may be, and the circuit court be alerted that this is an electronic discovery case deserves some consideration.

3:41
C.J. Abrahamson: I would send it back, but my proposal is the court favor adopting discovery of electronically stored information, favor adopting as close to the feds as we can, reasonable with the state, and that this be a continuing work in progress. And the one thing they should look at would be how to alert the lawyers in court early without making it mandatory.

4:15
J. Crooks: I would be happy to second that motion.

J. Roggensack: I understand the concept and I don't have a problem at all with your concept, but I wonder if rather than telling them not to make the meet and confer mandatory if they would just relook at it as they are looking at some other things but perhaps get more input from individuals in the field who are dealing with this on a regular basis and leave it open whether after they do that they still say, nope, we don't think it should not be mandatory or yes, it should be.

C.J. Abrahamson: I could go along with that as long as it is understood that we are not.

J. Roggensack: We are not going either way.

C.J. Abrahamson: We are not ordering that we are doing mandatory that we recognize that there may be ways of handling it without going mandatory, but keep it open.

J. Ziegler: They might consider the idea of having so long as one party requests a meet and confer that it is presumed that will occur unless excused by a judge.

5:17

C.J. Abrahamson: There are lots of ways of handling it that do not make it mandatory, I agree, and I would like them to look at that.

J. Ziegler: Right.

C.J. Abrahamson: We heard at least three, from Mr. Olson, we heard another version or versions from Judge Sankovitz and others. So there are ways of doing it, it's just a matter of are any of them worthwhile, etc. Mr. Tim Edwards had another way with exceptions. So there are ways of doing this, but we're not mandating that's what they do but think about it and whether something should be done. I would add to that, which is a long motion, but it's a concept I am really presenting to the court, that they consider adding to the commentary here some practical pointers about this procedure because I think both the lawyers and pro se and the judges this is not an area that there's a lot of experience.

6:25
J. Ziegler: You know, Chief, you mention that, and that makes me think about just sort of a, there's no rule that could answer this question I don't think. But it's my understanding that, in fact, some foreign corporations, there are criminal sanctions and rules in some foreign countries that say you cannot disclose business records. And if you do, you are subject to their criminal sanctions but yet, you know, I don't know if Germany has that but Volkswagen could be sued here in our state courts so they could be subject to being in contempt of court if they don't comply with e-discovery here, but criminal sanctions in their own country for example if they do. So it's kind of an interesting quagmire that judges could end up facing that issue. What do you do with that? I don't know the answer to that. But I think there are several countries that impose obligations on not releasing certain business records.

C.J. Abrahamson: Where the crime occurred also governs the rules. I am not doing anything internationally and deciding that case. But again the American Society on International Law has had sessions on e-discovery across boundaries and global lawsuits etc. So we can handle one thing at a time, and that may raise other issues.

J. Crooks: [inaudible] . . . been serving as an ad hoc member of the committee. I like what I heard from your suggestion that there be some consideration to perhaps adding some of the other people we heard from today. I think that Mr. Foley, Mr. Edwards, and Mr. Olson were all very impressive in their knowledge and their proposals. I think it is a very good idea to at least consider perhaps adding some of those people.

C.J. Abrahamson: They have the same problem we do, that is, the Judicial Council. You try to get everybody to know what you are doing, you try to get everybody to comment to you, and yet you can't do it by, usually you can't do it by just an absolute notice to everybody, and if you send out absolute notice to everybody and everybody does it, then it's no notice because everybody is inundated. I was pleased that they are trying and using these resources.

C.J. Abrahamson: Theresa, you might share with them our list of people we send our stuff to and, I have an ulterior motive, get from them the list they use so if we're missing anyone we can do that.

C.J. Abrahamson: Theresa's got a marvelous chart which describes this and met with them and discussed with them, which is why we' got to the stage where the concept is don't change language until you really have to. You've got the LRB suggestions too, which everybody has their own idiosyncratic way of drafting, and when we are dealing with federal rules, my suggestion is that we look carefully at what the LRB says but that if it is a toss up that you stay with federal rules. I see, for example, the LRB would say "don't use 'form or forms'" because the singular includes plural or the plural includes the singular. I would not fuss with changing that from the federal rule because it looks like there is a substantive change. I think that the council ought to consider the LRB but with the concept of the federal rule, which I do not think the LRB necessarily had in mind.

Owens: I just don't want there to be a misconception that, I've had the opportunity to go back with Ms. Southwick and she's taken it to the Judicial Council in several rounds, so the provisions that the court has before it today, I believe there is agreement on where to use the federal rule. Most of the examples here do mirror the federal rules. I don't want the court to believe that there's further work to be done in these provisions unless Judicial Council is going to go back and change them further. But there are several that we now agree mirror the federal rule and that's the best one to go forward with.

11:31
C.J. Abrahamson: I would like to see those in final form, not piecemeal. And I think that if this passes, they should look again at not necessarily making this meet and confer mandatory

but considering other techniques that would get the lawyers and the court together. That's what I hear, which could be suggestive, it could be that they'll adopt one of the ideas floated in form that the lawyers should advise the court or court advise the lawyers. I don't think they'd like that because that would add burdens to automatically triggering notification in these cases. If they say that no, now is not the time, they should say that. So I'd like a clean petition with all of the language with the LRB if adopted and the feds and I think maybe additional commentary that will be informative. Many times when we adopt rules that have a federal analog we include in the publication the federal comments and then separate Wisconsin comments that explain any deviation and why there was a deviation or add Wisconsin commentary on Wisconsin procedures.

J. Roggensack: Our rules of evidence are set up that way.

C.J. Abrahamson: That's right. I think that's very helpful. You can tell where you've deviated, where they are the same, they add information, might add some information, not here, in other cases, add Wisconsin cases. I don't think that's in the picture here.

J. Crooks: I was just going to say that I think that the Judicial Council has done a marvelous job in putting all of this together, studying it, and certainly in bringing this to the attention of the court, because to be honest about it, before listening to everything today and reading everything that Theresa prepared, I really had no idea of the scope of the problem. I think this was a real service and they should not be discouraged or think that we are trying to bury this. We really want to see something done.

14:22
C.J. Abrahamson: It will come back, it should back as promptly as they can do it because some of this is not going to be very hard. At the moment we are not including claw back, cost shifting, anything more on the special master, or anything more on privileges. Did I leave out one of the key issues?

J. Roggensack: I thought we were going to leave those all as open issues for them to consider in light of the stuff they heard today which we heard today.

C.J. Abrahamson: That's right but I don't want, I for one am willing if on consideration they don't want to put it in now, to

wait. This is not mandated for my consideration. If they want to come back with something, 'fine, but I don't want that to be part of the mandate. I think we have to start incrementally.

J. Crooks: I don't know if you mentioned the special master, the referee?

C.J. Abrahamson: Referee, yes.

15:32
C.J. Abrahamson: That's my view that we start out as simply as possible, that if they want to add any of those things, the court is certainly amenable to it. I think the most discussion and maybe the easiest thing to add now is maybe something on the concept of meet and confer, but I think the others from what I heard they are working on other aspects like 502 and spoliation etc., and they are not ready on that.

J. Gableman: I would like to add that I agree with the concept as expressed by the motion. I would also note that I believe these matters are also being studied within the federal court system and whatever we can benefit from that process. I would also be remiss if I did not express my sincere appreciation for everyone who appeared here today, they have obviously put a lot of work and a lot of effort and a lot of thought into this matter. It affects different courts in our state in different ways and it's going to be a matter of requiring some subtlety to come up with a general rule that's going to strike that balance that Judge Leineweber I believe mentioned this, the efficiency of the process and the burdens that are incumbent upon its implementation. For those reasons I express general support for the motion but also would like to keep abreast of whatever the federal study yields.

C.J. Abrahamson: When was the last time they adopted anything? 2006? The feds?

Owens: Yes. But then they had their timeline rules going into effect.

C.J. Abrahamson: We should. That's why I suggested a work in progress because there are omissions in this and new things will be coming. If it wasn't like that, the Sedona Conference would have gone out of business, but they are very much in business on this. Any other comments?

17:54

C.J. Abrahamson: Is this firm enough?

J. Prosser: What is the timeframe that you had in mind?

C.J. Abrahamson: I would hope that they could do, now you know they have day jobs including the judges and including the lawyers, and so I would ask them for a reasonable timeframe but my sense is in terms of moving it into the feds and getting one clean copy would not take long. That looking at the meet and confer and seeing if they wanted to add some technique might not take long because they've obviously thought it out as well as there have been suggestions here. I think trying to do claw back, cost shifting, more on special master, more on privileges would take a longer time but they are studying it in something else so I don't really expect that so I would ask them. I would hope that it would come back 2-3 months, then it can be adopted in May and go into effect in July. That would be my timeline. Now if they can meet that, fine, if they can't, I don't know. This is not an emergency that we are not going to survive until next December without it, on the other hand, I think that it's good to get started because I think that one of the key things about this is an educational basis for both the bar and the bench. I don't know if that's realistic. Theresa, what do you think?

Owens: With the court's permission, obviously, we've shared the chart back and forth.

C.J. Abrahamson: Good.

Owens: The draft order, if I could share the contents of it with April, and then she could at least have a base document from which to work from, which would embody what I believe to be what Judicial Council would be looking for at this point. At least they'd have a document to start their discussions with.

C.J. Abrahamson: Good. I don't have any objection to that.

Owens: It's basically what's embodied in the chart right now.

C.J. Abrahamson: And move towards the feds to the extent possible.

Owens: For 804.08 and 804.09 they're proposing adoption.

20:30

J. Roggensack: My concern about giving them a draft ruling prepared is that it leaves out things on which we had a lot of testimony today from people that they said were not on committee their committee because they don't deal with people, they deal with institutions. So they didn't have this kind of input and to have a model kind of start from that they are going to work toward another or maybe a more complete petition while we identified the meet and greet and trying to be closer to the feds, I am concerned because I do think that I want them to think about claw back again in regard to what they heard today, and I want them to think about how best to approach cost savings. I talked to Magistrate Crocker today before we started, and he said cost and scope of discovery are the two biggest problems in federal court. They are ongoing and they are significant problems for them. So I wouldn't want our sending it back with an order saying this is what we were going to consider having that limit the way they view the things that I think are open questions. I think I have identified what I think are open questions. Now the conference may not share my view of what is open but I thought if that what our conversation was when the Chief made the motion.

C.J. Abrahamson: It may be our conversation but to expect them to come back on that in three months, the feds have been working on this since the year two thousand and -

J. Roggensack: I wouldn't give them any timeline.

C.J. Abrahamson: No, I am just trying to say - they came up with the rules in 2006, they are still working on them, they haven't solved the cost shifting – yet - and they haven't found scope yet. It was your opinion that I concurred to that raised the whole issue of scope in that case that came to the court. So these are not issues that are readily resolvable and that maybe 3 or 4, 5 years, maybe longer than that, maybe never. I do not want to stall this that long. I have no objection to them looking at it again, coming up with something they want to but I think we should get started. My motion is to get them started adopting something that cleans this up in ways we just said. To the extent they can get into meet and confer that looked relatively doable in a timeframe and ask council to continue working on it, continue working on anything that they don't bring us including especially claw back, cost shifting, special master, privileges. No one had a suggestion about cost shifting. Claw back they have a suggestion for because it is in the federal rules and I think that is true about privileges. I would like to see us get started with having adopted a rule

knowing it is not all inclusive. They can bring back whatever they want. I would certainly urge them to look at all of these issues. Every single one person that came here and spoke to us said this is a good start but they would like it to go further. No one said this is bad as such and to the extent it was bad it was one that everybody else has problems with that the feds have.

24:08
J. Roggensack: I think there was one point that was brought up by attorney Edwards and that is when you pick out different parts of the federal rule, the federal rules were adopted as a comprehensive unit. So when you take out one part and you don't use the other parts, you may do yourself a disservice. So I think that is a negative part of not addressing the scope of the rules as they currently stand.

J. Bradley: Maybe an alternative is to have them give us a clean copy of everything that is pretty much agreed to by everyone, and the remaining issues will be resolved down the road, heaven knows when down the road, but down the road. They should also tell us whether or not addressing J. Roggensack's concern whether or not without those main four issues or if they have a resolution on meet and confer, maybe 3 issues, whether it can be passed in that form at this time and their recommendation. Because I think that that point is well taken, if there are holes and it's not patched as a hole does that raise questions? Take a look at that, if it isn't, then I think we should move ahead.

C.J. Abrahamson: I had made the assumption that if they had brought it in without it that they had made that conclusion but I think that is a good question to ask them. That's fair enough.

25:50
C.J. Abrahamson:

Summarize:

- Bring it in clean as close to feds as possible.
- Consider the issues they haven't raised, they haven't put in like mandatory, see if they can put it in somewhere
- Consider claw back, cost shifting, privileges, and special master
- Does this stand without those factors
- Do they have any suggestions

- Consider putting in federal commentary and additional state commentary

C.J. Abrahamson: Have I covered everybody's concerns?

C.J. Abrahamson: Have I covered yours, Ann?

J. Bradley: Yes.

C.J. Abrahamson: Have I covered yours, Pat (R.)?

J. Roggensack: Yes, you have, thank you.

C.J. Abrahamson: Any other discussion:

C.J. Abrahamson: Would you ask them also for a timeline so we can figure out our needs for putting this back on also?

26:58
C.J. Abrahamson: Hearing no further discussion, those in favor of the motion say AYE? (unanimous)

C.J. Abrahamson: Opposed? (none)

APPENDIX B

COURT DISCUSSION OF CLAWBACK

Wisconsin Eye
January 21, 2010: Open administrative conference on Rule petition 09-01 Electronic Discovery

01.21.10 | Wisconsin State Supreme Court Open Administrative Conference and Rules Hearing (Part 1)

Public hearing on Rule Petition 09-01 Electronic Discovery

23:45

Judge Sankovitz:

Let's talk about clawback first. I addressed that in a letter that I sent on January 11. I am happy to just rest on the letter if we want to save some time but I am also happy to summarize our views on that and we can talk in more detail about it. There are basically three things to understand about the clawback provision. First of all generally what we are talking about is one party inadvertently discloses privileged material. That rule affirms an arrangement that the parties reached where the parties say you can have that information back and it can't be used in this litigation. That rule does not resolve the bigger question – is it a secret anymore? Is that privileged information? Is that inadvertent disclosure excused? That needs to be resolved by a separate rule. In the federal courts it was resolved with federal rule 502. 502 is not part of our proposal, it is being studied by the Judicial Council. So our view is rather than adopt a procedure rule which resolves this evidentiary issue. Let's take it head on as an evidentiary issue and if we can resolve it in a Wisconsin version of 502, great. If a case comes before the court that resolves it, great. As you know from the Harold Sampson trust case, that is an open issue. So we thought let's not resolve this as a procedural issue. That's one thing to know.

25:06
The second thing to know is without a rule parties still can protect themselves. They can enter these clawback agreements between themselves. Whether or not a court will enforce it I think depends more on whether the parties agreed to it than it

does with whether or not there is a way to protect a privilege once you let the cat out of the bag. Because it is our view of the landscape that sophisticated parties typically enter these agreements and enter them in ways that are very narrowly tailored to their particular needs that we do not need generic solution in the rule.

The final thing is that we were persuaded not to adopt a clawback rule because the language of the federal rule is so broad it does not cover just inadvertent disclosure of just electronic information, it would also cover an answer in a deposition. If someone in a deposition inadvertently disclosed a privilege under the federal rule you have a right to claw it back. We think it is way to early for Wisconsin to say that in those low volume production cases where a client's confidences can be protected that we are going to let everybody off the hook with a clawback agreement that is part of a response to electronic discovery. In electronic discovery you had a real issue, high volume production means you have to have lawyers look at everything and that's expensive and a clawback is a way of saying, you know it is so expensive that we'll just let the secrets go and we'll figure it out after we get it back. But in low volume production which is the case in 90% of civil cases filed in Wisconsin in auto accident, in mortgage foreclosure cases, contract enforcement cases, in those kind of cases we don’t have high volume production so we don't need to worry about the clawback situation. So we say let's put that off to another date when we will really face that problem.

26:54
J. Roggensack: The one thing that I thought was interesting in your provisions is that Wisconsin still doesn't have a comparable rule to Rule 26 which is the federal rule of mandatory disclosure. In those cases that you just referenced, those cases, I happen to like the rule personally because I practiced under it in federal court and I thought it saved a lot of time. In the low volume cases certainly if there were mandatory disclosure of all of the documents that the plaintiff relied on and those the defendant relied on and any data so it would be electronic, it might solve a lot of problems for the parties and the for the courts as well. Did the committee discuss perhaps enacting a mandatory disclosure rule to start out this new process that you are on?

Judge Sankovitz: We spotted that issue and quickly retreated.

J. Roggensack: Why?

Judge Sankovitz: Because we were there to try to solve the electronic discovery problem. The mandatory disclosure issue is a much larger issue.

J. Roggensack: It is and it isn't. It involves the management of litigation and the effective process of litigation. I think what the feds put in the electronic discovery in '06 but I was practicing under the mandatory disclosure so it had to come in around 1992, 1993, somewhere around there.

Judge Sankovitz: It may have been 1991.

J. Roggensack: I know it was before I became a judge. I think as we look at trying to update our processes that we apply to litigation it might be worthwhile to try to do it all as a package rather than piecemeal but the committee did not seem to think they wanted to get into this at all.

Judge Sankovitz: Two things that occur to me in the way that you describe that. One is - Is this the tail or is this the dog? In ESI it's definitely the tail and mandatory discovery is the dog. If we are talking about managing all of discovery and including ESI as a piece of that we have to have a fairly extensive process to bring all of the parties to the table and discuss all of these various aspects and figure out how ESI fits in. The second thing that occurs to me is this – I remember practicing before I was appointed in the federal courts in Wisconsin and having mandatory discovery and appreciating it in cases where there was a large volume of documents, large number of witnesses, large number of claims. I have been a judge now for 13 years. I practiced in state courts at the time it became popular and I have never had anybody complain to me that in a Wisconsin traffic accident case, in a low speed, soft tissue injury case that the courts' management of the case suffered because there wasn't mandatory disclosure.

J. Roggensack: I think it depends on what you are looking at. I practiced mostly in commercial litigation and 85% of my practice discovery was the biggest bill the client got for the whole case including the trial. So I think it's extremely important, depending on, as Justice Bradley likes to say, what lens you happen to look at it from.

29:57
Judge Sankovitz: Exactly. We tried to be careful of that. We looked at this with the expertise that Bill Gleisner brings to

this, Jay Grenig brings to this, where they to nothing, well not nothing, hardly anything but electronic discovery so they know all the ins and out and they know the very sophisticated protocols that you could put in place. Then we stepped back with the lens that Judge Leineweber looks through and that I look through and large and small claims in Milwaukee and we see that it is just rare that the problem comes up and we do not want to burden litigants with procedures that may make it more expensive for them.

J. Roggensack: I appreciate your perspective. I would suggest however that most commercial litigation doesn't come before you. That there is discovery, the clients do pay for it, and whether it is effective and efficient really bears on the people who litigate in Wisconsin though it may not bear on the courts because after a certain amount of discovery is done, those are the kind of cases where there is usually not more heat than light and once the light is on the problem you can usually get them settled as a lawyer. I am bit concerned about our approach being focused on the court's view of the problem, though it is an absolutely a very important piece of the puzzle, and I gather we will from some practicing lawyers a little bit later on.

31:18
Judge Sankovitz: Let me add this one thing then. We took this conservative approach and we decided that we needed to do these things on ESI to show that Wisconsin was not out of step with the nation on that. That's a way of saying mandatory disclosure it out there, we just decided not to take it on because we wanted to make as conservative a change as possible at this point to accomplish this incremental change that we thought was necessary.

C.J. Abrahamson: In that regard, Judge Sankovitz, I also attended numerous national meetings of lawyers, mostly lawyers not judges, who complained, both plaintiffs'' bar and defense bar and everything in between, complained about abuses of discovery, and the various techniques being used by judges across the country to remedy abuses of discovery. So of course I came back to Wisconsin and again brought this up as a topic in as many meetings as I went to, which was way too numerous as you know. Everybody said, hey you know every once and awhile you get a discovery problem case and there may be issues in any particular case and you go to the judge but we don't have discovery generally discovery problems. Don't touch it, it ain't broken. That was not in reference to e-discovery, it was in reference to everything.

32:57
Judge Sankovitz: Two thoughts occur to me on that subject. I will try to limit it to two thoughts. Justice Ziegler knows and I think Justice Gableman knows from having gone to the judicial college that we teach four hours on this subject every judicial college because how a judge manages a discovery dispute is a real reflection of how the judge manages that case as a whole and brings the case to conclusion. So the two things I will say are this. One, reason some people say its not a problem they've given up on judges. You hear that in some of the letters that were filed on this subject. Wisconsin judges are undermanaging discovery issues generally and they need some more specific mandates from the supreme court to get them to roll up their sleeves and manage these electronic discovery disputes. I would tend to agree if judges are seen as withdrawn from the issue, if they are seen as the kind of judge who when presented with a discovery issues says "A pox on both your houses" and sends them away, then it's no wonder judges aren't hearing about discovery disputes because nobody is bringing them.

C.J. Abrahamson: That's the kind of records I've been reading.

34:03
Judge Sankovitz: Yes, so to the extent that judges are undermanaging discovery issues then I think there are some changes that need to take place and I would submit that is what is being done by judicial education because the magic we try to teach at the judicial college is roll up your sleeves, get involved in that discovery dispute because as Justice Roggensack said, that's where you find out where the light is and once the light gets shown the case settles. And that's the judge's job is to resolve that case. I think that is something that can be taught. Mandating it by having every party in every case have a meet and confer and every judge roll up his sleeves at a scheduling conference to talk about electronic discovery, that will impose more burdens than it will yield benefits.

C.J. Abrahamson: Is there a middle ground? A middle ground saying that it's not required in every case but that in cases identified as complex cases, I would have said business but maybe that's not, In re John Doe was a government case that the judge when looks at the case makes a decision and does it right away.

35:21

Judge Sankovitz: I would say there is a middle ground and it already exists, it is 802.10(3)(j).

C.J. Abrahamson: What does that say?

Judge Sankovitz: I will quote it for you. The scheduling order at a scheduling conference may address the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions or unusual proof problems. That's on the menu of things a judge is to consider at a scheduling conference.

C.J. Abrahamson: And you're going to add (jm)?

Judge Sankovitz: We are going to add one there that highlights electronic discovery, although we could have squeezed it in under this one.

C.J. Abrahamson: So that's your middle ground?

Judge Sankovitz: That's our middle ground. And the middle ground says to the judge "be smart, get this issue out front" or, frankly in this area where the parties tend to be sophisticated, invite them to bring their problems to you.

C.J. Abrahamson: What about saying the lawyers in some early documents submitted to the court should label or characterize the dispute as one involving electronically stored information? Something to trigger the judge, right?

Judge Sankovitz: We could do that formulaically with these labels. Our documents already have labels on them, they are required to put a code at the top, which tells us which classification it falls into and supposedly that triggers different reactions. You know what our experience has been? In the office where the new associate has been assigned the job of drafting that complaint the new associate goes off to a file cabinet or in these days, off to the computer's, the firm's mainframe, and finds a form and says "well this looks close, I'll use this." They never change the code. Our CCAP numbers about what are cases are have this built-in discrepancy because people file a traffic accident case using the collection code from the previous complaint they used as a form. So if you have this thing labeled at the top "electronic discovery" and somebody files it and there is no electronic discovery, which is really the norm in our courts, then you have everybody looking

at this for nothing. After awhile of crying wolf when there really is no wolf to be seen, then the judges will just give up looking at it. Those formulistic responses, we don't think work with judges. What we think works for judges is constant education on how you can seize on an opportunity to settle the case. If you talk to people in the field about electronic discovery, it's a weapon for settling a case. Electronic discovery is so expensive to actually carry out that in a case where one party has a lot of documents and the other party has few, for example, Zubulake, an individual fired who is taking on a worldwide organization, in a case like that, electronic discovery becomes the lever for settlement. Well if the parties can use it, so can a smart judge. A smart judge who is confronted with a case, like Justice Roggensack outlines, will have it on his or her menu of things at the scheduling conference to ask about. "Hey do you have an electronic discovery plan? I've heard those are kind of pricey. Have you talked settlement?
(discussion continues, tape ends at 38:52)

APPENDIX C

COURT DISCUSSION OF COST SHIFTING

Wisconsin Eye
January 21, 2010: Open administrative conference on Rule petition 09-01 Electronic Discovery

01.21.10 | Wisconsin State Supreme Court Open Administrative Conference and Rules Hearing (Part 2)

8:10

Judge Sankovitz:

When we talk about cost shifting there are really talking about two different things that are in the federal rules that we decided not to adopt. One is the language of rule 26(b)(2)B. this "not reasonably accessible" language. That is the phraseology used for saying certain information isn't easy enough for the responding person to produce so in a case like that the requesting party, if it wants it, may have to pay for it. That's mated with comments from the federal advisory committee which lists 6 factors that a court should consider before deciding to shift the cost of obtaining that information from the responding party, who ordinarily bears those costs, over to the requesting party, who ordinarily doesn't. We decided not to adopt that language. There are three things we can say about that. First of all, we perceive that trial judges in Wisconsin already have that authority. In 804.01(3)(a) we have our hallmark, judges have the right to address and protect parties from discovery requests that cause an undue burden. In fact those words "undue burden" those are in the federal rule right alongside this reasonable accessibility language. So we think the legal hook is already there. In addition we have the authority under 804.01(3)(a)2. to specify the terms upon which discovery may be had. So we have that authority already to say to the requesting party this is going to be really expensive and I don't think you are going to get much benefit out of it and I do not think the responding party should bear that burden but if you really want this information, you pay for it. Those are the terms and conditions upon which discovery may be had. So we have the rule already.

The second thing we have is some case law. In the letter I submitted I cited that Vincent v. Vincent case which is a great old case and I just love it because the numbers are so small. Back in 1981 when the court of appeals decided that case it was a daunting proposition for the Ford Motor Company to produce a record of every time that any dealership in the United States had worked on the three parts of the engine that were at issue there. It would have cost the Ford Motor Company $10,000 to produce all of these documents from across the country. But the court perceived that the benefit to the plaintiff of finding that information was only $2,500 and because it found what it called a prohibited disparity it shifted the costs to the requesting party. Now the numbers today you can add three zeroes to all of them but it is the same concept and it is already in the law. This is one of the cases that I talk about with judges in that presentation which we call "New Wine and Old Bottles." That is what we are talking about with electronic discovery. So we already feel that the tools are already here and we don't need the cost shifting provisions.

In addition, understand that those 6 factors that the advisory committee adopted are now kind of written in stone. A trial judge in New York came up with those ideas without having a rule, without having a mandate. She's a very wise judge and she's certainly made a name for herself writing decisions about this subject. But that's what a Wisconsin judge could do with the same authorities that she used. In other words all of the federal law on this is persuasive authority in our courts so we already have the tools. Adding this extra language we did not think was necessary at this point, in fact, we thought it was kind of confining given the fact that as time goes on, it may be that 6 of those factors aren't necessary, it may come down to 2 and over the course of time some of those will drop out. So we thought why shackle ourselves to something we do not need given the tools that we have.

APPENDIX D

LETTER FROM JUDGE SANKOVITZ EXPLAINING REASONING OF JUDICIAL COUNCIL'S PROPOSED RULES

January 11, 2010

Wisconsin Supreme Court
16 East State Capitol
PO Box 1688
Madison, WI 53701-1688

Re: Petition No. 09-01
Proposed Amendments to Wisconsin Statutes 802.10, 804.08, 804.09, 804.14 and 805.07 (Electronic Discovery)

Dear Justices:

As the hearing on the e-discovery civil procedure amendments approaches, five questions have emerged that deserve commentary beyond what is provided in the Judicial Council petition. After speaking with some of my colleagues on the subcommittee of the Judicial Council that studied and drafted the proposed amendments, I thought it might expedite your review of the Judicial Council petition if I submitted some additional comments in writing before the hearing.

Five Questions about the Proposed Electronic Discovery Amendments

- Since we are borrowing some of the Federal Rules of Civil Procedure concerning electronic discovery, why not borrow the rest of them as well?

- Why not require parties to meet and confer about electronic discovery before the scheduling conference, and mandate that circuit courts address the issue as early as possible in litigation?

- Why not borrow the rule that seems to protect parties against inadvertent disclosure of privileged information, the so-called “clawback” rule?

- Why not borrow the rule that empowers the trial judge to appoint a special master to handle electronic discovery disputes?

- Why not include commentary along with the published rules that specifies certain factors that might justify shifting the cost of retrieving ESI to the party that requests it?

1. Why not adopt all of the federal rules concerning electronic discovery?

Not all of the federal rules concerning electronic discovery are a good fit with our current caseloads and practices in Wisconsin. As will be spelled out in detail in the answers to the other questions, a number of the federal electronic discovery rules are unnecessary in Wisconsin. Some would unnecessarily increase the costs of litigation.

In proposing the amendments set forth in the petition, the Judicial Council took a conservative approach, deciding to err on the side of fewer rules rather than more rules, for three principal reasons:

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. The Judicial Council is proposing these rules in order to stay ahead of the curve in this emerging area of the law. But in most cases these rules are not needed yet. 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. If and when electronic discovery becomes more routine in our courts, and if and when circuit courts confront greater challenges managing these cases, then we might consider adopting the full panoply of procedures that parties must follow in the more complex cases that tend to be filed in federal courts rather than state courts.

Second, many federal procedures concerning electronic discovery are embedded in more rigorous procedures, such as mandatory discovery and court-supervised discovery planning, that are not yet part of Wisconsin procedure, and in our opinion are not yet necessary to efficiently manage cases in our courts. Those who would have the court adopt the federal meet-and-confer requirement, for example, may not be considering the toll it would take on litigants in the vast majority of cases in which neither party initiates electronic discovery.

Third, our sense is that customs and practices in this field are still evolving. With time, we may see protocols develop that will obviate the need for certain rules. For example, if custom clawback agreements become standard practice, there might not be a need for the court to impose a generic clawback rule.[13]

Why not adopt the federal requirement of an electronic discovery meet-and-confer in every case, and mandate that the circuit court address electronic discovery at every scheduling conference?

If electronic discovery was routine in most cases, an across-the-board meet-and-confer requirement like Fed. R. Civ. P. 26(f) might make sense. But as things stand currently in Wisconsin, electronic discovery is not deployed in many cases at all. Thus, adopting a requirement like that contained in Rule 26(f) would impose significant added burdens on litigants while yielding little benefit. If new trends emerge and electronic discovery is pursued in more cases, then it will be time to discuss this proposal.

Why not adopt a clawback rule?

At this stage in Wisconsin's experience with electronic discovery, the clawback provision of Fed. R. Civ. P. 26(b)(5)(B) is unnecessary and potentially unwise. The absence of such a rule does not prevent parties from negotiating a clawback arrangement of their own, which, in fact, is a standard practice in this field. What's more, parties can customize the details of the procedure they intend to follow to fit their needs better than a generic rule might.

Adopting such a rule in Wisconsin might be interpreted as resolving a question that currently remains open under Wisconsin law – the extent to which an inadvertent disclosure of privileged information works as a waiver of the privilege. The court left that question open in *Harold Sampson Children's Trust v. Linda Gale Sampson 1979 Trust*, 2004 WI 57, 271 Wis. 2d 610. In footnotes 15 and 16, the court discussed the various approaches that might be taken, from strict to lenient, but the case did not require the court to decide the issue. Because this issue has not been resolved, adopting a clawback rule is either premature or a *fait accompli*, or both.

[13] I should acknowledge that some commentators prefer that our amendments not mimic the federal rules in the first place. These commentators believe that there is room for improvement in the language and substance of the federal rules, and that the federal rules fail to address important issues. I do not necessarily disagree with their ambitions or proposed solutions. However, in view of the limited need in Wisconsin for electronic discovery rules at the current time, there is more to be gained from uniformity with those parts of the federal rules that are recommended by the Judicial Council than in Wisconsin setting out on its own with a set of new electronic discover rules unique to Wisconsin.

Indeed, many advocates of a clawback provision also ask the Court to adopt Fed. R. Evid. 502, which was adopted as a response to the problem of inadvertent disclosure. The Judicial Council is currently studying Rule 502 and whether to recommend any changes to Wisconsin's evidence rules along the same lines.

Finally, it should be noted that the clawback language in Rule 26(b)(5)(B) applies to *all* information produced in discovery, not just ESI. A broad rule like this isn't justified. The volume and expense considerations that make a proposal like this tempting for ESI discovery do not apply to other kinds of discovery, for example, answers in a deposition or interrogatory answers or even documents produced in low volume (which is more typical of cases filed in the circuit courts).

Why not adopt a rule that empowers the circuit court to appoint a special master to handle electronic discovery disputes?

While I agree with the sentiment – in complex disputes, an attorney or other expert well-versed in technology can help the parties resolve their electronic discovery disputes more confidently and efficiently than most circuit judges – I don't think more rules are necessary. Circuit courts already have the authority under WIS. STAT. § 805.06 to appoint a special master. Also, circuit courts are authorized to consider such a measure by WIS. STAT. § 802.10(3)(j), which counsels circuit judges at the schedule conference to consider "[t]he need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions or unusual proof problems."

True, WIS. STAT. § 805.06 is a little dowdy and could use a makeover along the lines of the more state-of-the-art Fed. R. Civ. P. 53. But doing so on the impetus of managing electronic discovery disputes would focus the revisions too narrowly.

Some have suggested that the Court include somewhere in the amended rules an explicit reference to special masters, to serve as a reminder to circuit judges of this option. In my opinion, a reminder is unnecessary. Electronic discovery is a topic taught in judicial education, and the special master option is stressed as a part of that teaching. Furthermore, lawyers working in this field are primed to ask for a special master even if the court does not appoint one on its own initiative. And in my experience they are prepared to suggest well-qualified and reasonably-priced candidates. It has been my experience that when trial judges in Wisconsin are confronted with a complex technology question they do not resist a reasonable request for a special master. Although the appointment of a special master is relatively rare, this has more to do with how infrequently the cases require such an appointment than with any reluctance or lack of awareness on the part of the judge.

Why not make the rules and the commentary more specific about "cost-shifting"?

Some have questioned why the Judicial Council did not recommend the adoption of Rule 26(b)(2)(B), which provides:

> *Specific Limitations on Electronically Stored Information*. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.

In addition, they question why the Judicial Council did not recommend the adoption of comments like those published with this "reasonably accessible" limitation. The Advisory Committee comments to Fed. R. Civ. P. 26(b)(2)(B) specify six factors a court should consider in determining whether to shift the cost of retrieving ESI to the party who requests the ESI rather than, as is the norm, the party who must produce the ESI. The six factors are drawn from a list of seven factors devised by the trial court in one of the most well-known cases in the electronic discovery field, *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 322 (S.D.N.Y. 2003).

The additional specificity is not necessary, for three reasons. First, our civil procedure rules already empower the court to protect a party from "undue burden or expense," WIS. STAT. § 804.01(3)(a), and to order that "discovery may be had only on specified terms and conditions," WIS. STAT. § 804.01(3)(a)2. The thrust of the federal rule is to avoiding "undue burden or cost" and that is explicitly captured in our existing rule.

Second, Wisconsin's higher courts have already addressed the issue of cost shifting in a way that is consistent with the approach taken currently in electronic discovery disputes. In *Vincent & Vincent, Inc. v. Spacek*, 102 Wis. 2d 266 (Ct. App. 1981), the court authorized the circuit court to shift to the requesting party the responding party's cost of responding to a burdensome discovery request. The court found a "prohibitive disparity" between the amount in dispute, $2,200, and the $10,000 cost of complying with the discovery request (the discovery request required Ford Motor Co. to gather complaints from around the country about "any claim or complaint made against Ford between 1974 and 1979 based on a defect in engine valves, heads, or pistons in all Ford motor vehicles").

Third, decisions of federal courts in electronic discovery cases may be considered persuasive authority in Wisconsin courts, and there is little reason to doubt that if a party needs to rely on the widely-followed *Zubulake* factors to make its case, Wisconsin judges will be willing to listen, whether or not those factors are enshrined in a comment to civil procedure rules. Nor, in my opinion, is an official comment necessary to alert practitioners to these well-known and widely-applied factors.

Consistent with the conservative approach taken elsewhere in these amendments, I would recommend against adopting the language or commentary of Rule 26(b)(2)(B).

Conclusion

Thank you for the opportunity to supply this additional information. I look forward to answering additional questions you may have at the hearing on the Judicial Council's petition.

Sincerely,

Richard J. Sankovitz
Circuit Court Judge

cc: April Southwick
Hon. Edward Leineweber
Prof. Jay Grenig
William Gleisner

APPENDIX E
LETTER FROM JUDICIAL COUNCIL REAFFIRMING ITS POSITION ON DISCRETIONARY CONFER PROVISION

STATE OF WISCONSIN JUDICIAL COUNCIL

Suite 822, Tenney Building, 110 East Main Street, Madison, WI 53703-3328 (608) 261-8290

June 18, 2010

FILED

JUN 18, 2010

CLERK OF SUPREME COURT OF WISCONSIN

Hand Delivered
Clerk of the Supreme Court
Attn: Carrie Janto
110 East Main Street
Suite 215
Madison, Wisconsin 53703

Re: Petition No. 09-01

Dear Clerk of Court:

At its open administrative conference on April 28, 2010, the Wisconsin Supreme Court voted 43 to adopt the Judicial Council's amended rule change petition no. 09-01 to create and amend statutes relating to the discovery of electronically stored information, effective January 1, 2011.

The Council's amended petition included the following discretionary discovery conference provision:

> 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.

Also at the administrative conference, the court voted 5-2 to amend the above discovery conference provision proposed by the Judicial Council. As amended, discovery conferences are subject to a provision that parties must confer in all cases involving discovery of electronically stored information, unless excused by the court. The court invited the Judicial Council to comment on the specific proposed language for the amendment.

The Judicial Council referred this matter to the Evidence & Civil Procedure Committee. At its May 21, 2010 meeting, the Evidence and Civil Procedure Committee reviewed and discussed two amendment options received from court staff. At its meeting on June 18, 2010, the Judicial Council received and adopted a recommendation from the Evidence & Civil Procedure Committee to continue to support the Council's original recommendation for a discretionary discovery conference as described in s. 804.01 (4m), above. However, if the Judicial Council must select from the alternative amendments proposed by the court, the following amendment is preferable:

> 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 appropriate means, including in person, regarding any of the following, <u>except with the discovery of electronically stored information, where parties must confer unless excused by the court...</u>

Thank you and please don't hesitate to contact me if you have any questions.

Sincerely,

April M. Southwick, Attorney
Wisconsin Judicial Council

cc: Theresa Owens, Executive Assistant
Wisconsin Supreme Court

APPENDIX F

APRIL 28, 2010 — OPEN ADMINISTRATIVE CONFERENCE SCHEDULING ANOTHER HEARING IN FALL 2010 ON E-DISCOVERY PROPOSAL ADOPTED

Wisconsin Eye
April 28, 2010: Open administrative conference on Rule petition 09-01 Electronic Discovery

04.28.10 | Wisconsin Supreme Court Open Administrative Conference

Conference reconvened following a break; court session begins at 4:15 on video with discussion of LRB time line for statutory changes.

4:15

C.J. Abrahamson: We took a break. We are back, it is 3:45. Theresa will report on when we can get this, if adopted, 809.01 in the statute books.

Owens: LRB, obviously, always very accommodating; however, they would prefer to have it before the beginning of next term. They do review their statute books over the summer. The beginning of September would be the ultimate end of their review period, and so even if we looked at something the first week or second week of September, they could not guarantee it would make it, especially in light of the extensive Judicial Council notes that are being proposed.

5:10
J. Crooks: The other thing we might consider David in regard to your concern, is that people have had an opportunity to respond. This was sent out how many weeks ago?

Owens: We sent out two input letters with the initial petition and with the amended petition.

J. Crooks: The amended petition has been out how long? A couple weeks? Or a month?

Owens: Let me just see . . . The petition [amended] was filed with the court on March 19, it was automatically put up on the court's Web site. We sent out an input letter on April 13.

J. Crooks: The only response you have, as I understand it, is from John Mitby and his other partner.

Owens: Which, really, I mean, they came and they spoke and they said the only thing they found problematic was that the clause that they meet and confer was not mandatory but they did not take issue with any of the other rules.

6:10
J. Ziegler: The timing of it has to be early, right? The meet and confer? Because otherwise it's pretty useless if you allowed discovery to start.

Owens: The federal rule has 21 days, but that's where at least Judicial Council wanted to come and say OK you wanted us to take a second look at meet and confer, here's a rule that we think gets us, it is my interpretation, that gets us going, gets the attorneys in the mode of doing it, but doesn't go to the extent of doing meet and confer.

6:43
J. Ziegler: If the table is leaning toward passing something I would still respectively request that we consider that if any party requests, then it shall occur unless it's excused by a judge, and that it occur before discovery commences. Otherwise it is a way to create havoc in that case.

C.J. Abrahamson: Annette, if we could just hold for one minute because what I want to do, if I can, is decide if the court wants to go ahead and consider these or doesn't. What I hear from Pat Roggensack is that she would prefer to just stop, put it on a new . . . get hearings, or do something. What I hear from Dave Prosser and maybe Pat Crooks is adopt, have it be open for modification. My proposal, if the latter should succeed, I would ask if anyone wants changes now and that's where Annette's proposal would come in. But I don't want to start discussing that until we settle out whether we are going to do something with this now or not.

J. Ziegler: That's why I prefaced it with if that's the way the tide is rolling, then before it rolls out I want to seriously consider that.

C.J. Abrahamson: And there may be other things that people want to change at the table. But before we get into that discussion, if I can hold you, I just would like to put it to who wants to, in effect, just not deal with it now.

8:45
J. Crooks: I would put it the other way. I would make a motion that we proceed to adopt this as David suggested in principle and we then consider any amendments being offered now and that we proceed so that hopefully so this can make the books. That's my motion.

C.J. Abrahamson: With or without another hearing?

9:08
J. Crooks: Right.

C.J. Abrahamson: I should tell you that April is going to be talking about these proposals at the bar meeting in a week and half or two weeks, I guess it's a week, and we could ask her to pick up any suggestions she has which might fit with what you said and they could either write it up, etc

J. Roggensack: I am part of the State Bar presentation on electronic discovery next week, so . . .

C.J. Abrahamson: Good, both of you can do that if this passes. Any second to Pat Crooks' motion?

9:45
J. Prosser: We adopt it in principle, that's your motion?

J. Crooks: Yes, I tried to track you what you were proposing before.

J. Prosser: I really don't have any particular problem with that motion, except I for one would feel totally incompetent about drafting at the table.

C.J. Abrahamson: But we are not up to drafting at the table but when it comes if somebody wants to change discretionary to mandatory or some similar thing then you have to decide whether you are going to do that or just stick with this for the moment.

But I do not want to shut anyone out who has a very good idea that the majority might take.

10:45
J. Crooks: David, if you would like to follow what was discussed earlier and have a review of this within a couple of years, that's fine with me too. If we -

C.J. Abrahamson: Or even in the fall.

J. Crooks: Sure.

11:00
J. Prosser: I think I would want you, well, I don't know anything about this subject. I would really like almost, well literally what I proposed, I would want to put it up once more to let the public in on it. I'd like, in effect . . . if all things were equal, I would probably be with Pat Roggensack, but I don't think all things are equal, and I think the best alternative of that is to adopt what we have but give people a second shot at it at the earliest reasonable opportunity, and that's not going to come until the fall. And unless we could adopt a meet and confer provision right now, which I would be for . . .

J. Roggensack: The problem with adopting things in principle is when we are doing the rules of civil procedure for e-discovery, the devil is in the details. So that we need e-discovery rules for e-discovery, I 100% could go along with that. We do need them. The problem is, I think, you're saying you don't know enough about this, Justice Crooks doesn't know enough about this, yet we are proposing to adopt rules that have quite a lot of details.

C.J. Abrahamson: What are the details?

J. Roggensack: We would never decide a case this way without knowing the impact of what we are doing.

J. Crooks: We are relying on the people that are experts in the area. This did go back to the Judicial Council, they did confer, they did look at all of this when they made this proposal. So I am comfortable, I guess, relying on people who seem to know what they are talking about. So maybe I should not have made the motion in terms of "in principle," let's adopt it subject to change.

J. Prosser: That's what I thought, really, that you were doing.

13:00
J. Crooks: Yes. When I was saying "in principle" I was trying to leave the door open for if Annette wanted to make a motion that it be mandatory in the meet and confer provisions, I am not opposed to that, frankly, but that's not what's in it now. So my motion is, let's adopt these, but be willing to hear motions in regard to amendment.

J. Roggensack: Annette, do you have a motion that you want to make?

C.J. Abrahamson: Just a minute, just a minute, just a minute.

J. Ziegler: No because my motion is premised on the idea that if this is set to sail then before it leaves the port then I would seriously like that one modification. So if it's not sailing, then I am not worried about it.

13:48
J. Gableman: Presumably if we have another public hearing on it, we'd have another open conference to discuss what we heard that day. So I wonder what the benefit is of saying, well, we going to adopt it in principle, if we are just going to go through the process of hearing from all interested parties and then sitting around this same table talking about the details. I think that Pat Roggensack sounds a very good note of caution and I like David's idea of having one final opportunity for people to add their comments. And if we are going to do that, I wonder if it isn't just enough to say, one more hearing, one more conference, and that's it, as opposed to rushing into something. And I'll be candid too, that several of us here, if not most or all of us, do not have, have less than a comprehensive understanding of all of the details of this provision, I think to put it gently.

14:46
C.J. Abrahamson: I guess that I would say that the difference between your suggestion and Pat Crooks/Dave Prosser one is at a hearing, it will focus on particular problems, not general. So if they are mostly acceptable, fine, if it focuses in on mandatory versus discretionary or some other issue it will be focused, it will not be all of it. I cannot believe someone will come in on all of it. So that's what I think but I can understand your -

J. Gableman: Since it was David's suggestion I would like to hear from him as to if he thinks that suits the concern that he expressed by putting that proposal forward. I guess does that, how does that fit in with your idea?

J. Ziegler: But as a practical matter what rules are going to be published, what rules are going to be ready to roll? I mean, it will be this set of rules. You're blessing this. I mean, know what you are doing because you are either blessing this or you are not, or this with a modification today, or not. If there is another hearing that does not necessarily change this, I don't think, right, with the publication issue?

Owens: Right. I mean, there would be a disclaimer. I also note, you only had 3 appearances at the last public hearing.

J. Bradley: At the last public hearing? Which one?

Owens: Right, January 21st.

Owens: We had 4 presenters.

C.J. Abrahamson: All favoring it?

Owens: Yes, obviously in support. And then we had attorney Foley, attorney Edwards, attorney Olson. At least that's what is on the typed agenda.

C.J. Abrahamson: That's right.

J. Roggensack: I know that we heard from two more. Were all the ones that spoke, that were attorneys in practice, in favor of it, except for John Mitby and his partner, or were some of those other folks opposed to it as well?

Owens: Well, attorney Foley obviously does a lot of e-discovery, and he brought out some of the differences between the federal rules. He, perhaps, would have gone a little bit farther that Judicial Council did in this instance. But I think with regards to Mr. Edwards, he's with attorney Mitby and attorney Modl, and they have now come back and said its just the meet and confer, but we do not have any issues with anything else. Attorney Olson from ONLAW Trial Technologies, I'd have to look at my notes to see, but I think the purpose in another public hearing is the court would need to define what they are seeking.

J. Bradley: You recall this was filed April 2009, and January 21, 2010 we had a hearing and asked for input and we had then together all of these responses, including of course a State Bar response, but in addition, in the cover memo dated January 11, 2010, setting forth all the responses, there are 19 entries. I take that back. There were a number of responses, that is the wrong number, and information that has been provided. We had the hearing. We said, take a look at things that we made a motion for them to take a look at, they did, they came back. It seems to me that if we put this off, it is not a good way to proceed. I don't know what more we are going to find out by setting another hearing and getting another 19 entries and people testifying. Nevertheless, certainly, there are people on the court that are uncomfortable with it. That has to be discussed and we have to resolve those issues. There's no doubt about that in my mind, but I just hate to put this off again. It would have been fresher in our minds, of course, on January 21st, it's not as fresh now. If we would schedule this for October and we wouldn't decide on it, then it won't be fresh next November when we get to it. So I am in favor of the idea of passing it as presented subject to amendments, and then we talk about what the problem is and amend it or not amend it now or if you want some targeted things, but just kind of letting it lay fallow isn't without . . . .

19:55
J. Roggensack: My recollection, and I didn't bring it in and I didn't go back and read it, but my recollection of what attorney Foley provided, as well as testifying, was a very extensive document where he had significant problems with what was being proposed for e-discovery. I don't have it with me, so I don't know if my recollection is right, but I thought he provided extensive written materials about it -

C.J. Abrahamson: There were people who wanted the rule to go much further with much more detail and requirements, wanted us to adopt a number of the recommendations that come out of Sedona, etc., and they thought this did not go far enough. I don't remember people objecting to us doing anything.

J. Roggensack: No. He did not object to our doing anything, he had problems with what was proposed.

C.J. Abrahamson: He wanted to go farther.

J. Bradley: He said I am against cost-shifting, claw back and privilege.

C.J. Abrahamson: And we are not doing anything on claw back, cost-shifting, or privilege.

J. Bradley: And he also said you have to resolve questions left unanswered in Sampson, which I don't have on the tip of my tongue. Those were the major, at least in his testimony and my notes, but I know as Pat Roggensack said he did advise . . . .

21:20
C.J. Abrahamson: This does not touch a number of very tough issues. It does not. We viewed it as an ongoing process, and we didn't want to go into these. Now, I have a motion, which I will say says adopt this, have a second shot at it in the fall -

J. Ziegler: Not today?

C.J. Abrahamson: Pardon me?

J. Ziegler: No possibility of -

C.J. Abrahamson: Yes, I am not crossing out changes later but at least, this has set sail if you prefer that language. We set sail with what we got, we ask for a hearing in September, if it has to be modified it'll be modified. September or October, I don't want to bind the court.

J. Crooks: But we'll consider amendments today.

C.J. Abrahamson: But we're going to consider amendments today, but I don't want to consider amendments today until we are saying we are going to do that, OK. Does anyone else want to speak to that motion?

J. Crooks: We still need a second, Chief.

J. Bradley: I'll second it.

C.J. Abrahamson: I figured between you and Dave it was, it doesn't matter.

C.J. Abrahamson: Any other discussion? OK. Those in favor of the motion raise your hand. We are set sail. 4 to 3, Abrahamson, Bradley, Crooks and Prosser.

C.J. Abrahamson: Those opposed. Roggensack, Ziegler and Gableman.

C.J. Abrahamson: So we are sailing. Now, anyone want a change? And tell us what provision we are talking about.

J. Ziegler: All right. I think it falls under 804.01(4m), the Discovery Conference provision. Under the amended petition of the Wisconsin Judicial Council, March 19, 2010 submission, page 2, bottom roughly one-third, where it discusses section two, 804.01(4m).

C.J. Abrahamson: If you want to look at the proposed order, it is at page 2 under tab 6.

C.J. Abrahamson: What is it, a, b, c, or d?

J. Ziegler: Well, if you read the introductory language, I think that is what they deem to be the meet and confer, so it is none of what you just suggested. It says, "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 . . . " and that's the e-discovery stuff. That's the meet and confer, it strikes me. The problem I have with that is if you are going to have a expensive, time-consuming e-discovery case, you don't want to wait until e-discovery has commenced before you meet and confer. I suppose in the instance where parties know there is going to be e-discovery and they file a motion and the motion can be heard before somebody serves someone with e-discovery, this might be useful, but it also might not be, because the time limits for e-discovery will start ticking as soon as its served. So for the person who wants to meet and confer about how e-discovery will be conducted they will be subject to time limits that will start ticking, whether the court can get them on the calendar, whether all the attorneys can get there, whether they can be heard, whether the motion can be decided, and I think often times the time period for answering the e-discovery will conclude before that is all decided by a court. So initially, I was thinking, boy, if any party requests then it should occur unless a judge excuses. But then I was thinking, well, unless a party knows it's an e-discovery case in those limited circumstances that I just set forth, then they're not going to be able to request, have it heard, have it decided and all that jazz before, potentially, the time period ticks. So now I've gone full circle, and I am back to, I really, think that in the interest of assuring that this will work appropriately, e-discovery conferences, there should be a meet and confer before e-discovery, unless excused by the court. And I say that

because I think there is no other way that you are going to have that discovery request, the request by counsel to have a hearing by the court, the court to have the hearing, and the court to issue an order all before the time period has run for discovery to occur through e-discovery. So; my proposal is that there be mandatory meet and confer unless excused by a judge.

J. Bradley: I couldn't disagree more.

J. Ziegler: Surprise.

J. Bradley: Let's find common ground. The reason I disagree is based on my life experience as an attorney who did litigation and as a judge and you have some of those same life experiences. That's why we can have common ground. Mark Foley, Pat Roggensack you indicated, had a submission, and I have it here. Highlighted on the second page is the elephant in the room, big letters, bold, "the elephant in the room is the high cost of e-discovery." So that's what we want to tackle and that's what Annette is concerned about in pushing it off. I am concerned in another vein – the high cost of e-discovery when it comes to bread and butter cases throughout the courts of this state. And most of the cases we have in our circuit courts, I recall, are bread and butter cases. I remember my very first case, when I put a shingle out, was a water in the basement case. How much e-discovery do you think I would have on that? I will tell you I had zero and I would have zero on that kind of particular case today. How many cases do we have, if you would look, let's say, in Marathon County, in Washington County, in Burnett County, and you look at your statistics, how many of those are going to be collection cases from the medical center? How many of those are going to be landlord-tenant cases?

J. Ziegler: Maybe we're ships passing in the night because I'm not talking about the routine small claims or typical civil case, I am talking about an e-discovery case.

J. Bradley: That's what (4m) does. It says "At any time after commencement of an action." And so this applies, this is a rule of civil procedure that applies to all civil actions. And the cost, this is one of the things that was brought out at the hearing by the presenters and by the presenters of the Judicial Council, the cost that it would be for the people in small cases, in small towns, and in counties large and small around the state, would be exorbitant.

J. Ziegler: You are missing my proposal. My proposal relates to e-discovery, wherever you want to put that. I am not looking to increase costs for people, in fact, quite the opposite.

C.J. Abrahamson: Annette, only (b), sub (b), relates to e-discovery. Therefore, I asked you where you want to put it because you can't put it in the beginning because it relates to (a), (c), (d) and (e), relates to everything.

30:17
J. Ziegler: Maybe I misunderstood your question because you asked what I was talking about, and I said where it currently is placed is there. That is the place where it talks about meet and confer. There is no other place it talks about it. My proposal relates to e-discovery and that there shall be a meet and confer unless excused by the court. I do not think that would be too time consuming for the attorneys. That does require hearings, it requires them to meet and confer. And if they end up agreeing on all of the issues and how they are going to conduct e-discovery which might occur in the vast majority cases, good, there's no additional expense. If they don't agree on that, though, before you end up embarking on this expensive, time-consuming, difficult, potentially, task, then the court ought to get involved, and that's the point. If someone asks the court to get involved, they get involved before all of this starts ticking. I am not looking to do anything to the routine case that we often see. So wherever you want to put it is up to this table or whoever drafts it. Where is currently exists is right there. So I don't disagree with you Ann at all. I'm just saying that's where it currently exists and it isn't good enough, in my opinion.

31:45
J. Bradley: The discussion at the hearing was, as it exists right now 804.01(4m), should that introductory little sentence be made mandatory or is it going to be discretionary. That's what we were focusing on at the hearing, and, as I indicated, the idea that in every single case, which is what this covers and was the way the issue was focused at the hearing, that this would be mandatory, to me, would just be so out of proportion.

J. Ziegler: The issue for me is e-discovery.

J. Bradley: I understand your comments regarding e-discovery, it's just that it can't be, as was the center of discussion at the hearing, whether 804.01(4m), as stated, should be mandatory or not.

J. Ziegler: Well then maybe you just add the language except in e-discovery or except in subsection (b), the parties shall meet and confer unless otherwise excused by the court. We're smart enough to figure that out, I think.

J. Prosser: As I understand this, 804.01(4m) is brand new?

C.J.. Abrahamson: Yes

J. Prosser: OK. "At any time after commencement of an action, on the court's own motion or the motion of a party," so there isn't anything automatic about this. It's either the court is making a discretionary decision or one of the parties is moving for it. So if it were a case that Justice Bradley was talking about, what was your first case?

C.J. Abrahamson: Water in the basement. I am very sensitive to that. I have water in the basement.

J. Prosser: I don't think there would be a motion by any party in that case.

C.J. Abrahamson: Pardon me?

J. Prosser: I don't think there would be a motion by any party in that case.

J. Ziegler: Right, but the point is if for some reason someone did need court protection for some discovery what they perceived to be abuse or something, then they could move the court and the court could intervene, and that routinely happens when necessary, but it is the rare case. However, in e-discovery, given its particular concerns and great potential expense and other issues that people at this table don't fully understand, don't you think people ought to sit down and figure out how they are going to go about conducting e-discovery? It's so new and it's so different. What's the problem with requiring them to do that unless they ask the court and they are excused from it? I think most lawyers are going to pick up the phone and figure out if they agree. If they don't agree, then the court is going to have to get involved, but before the time starts ticking and before the discovery starts ticking. At least that preserves and requires that sort of, "Let's figure out if we can agree to agree."

C.J. Abrahamson: Why do you want to take away discretion from the trial court? This gives the trial court discretion in any particular case as to what to do.

J. Ziegler: For the very practical reason that today I get served with an e-discovery request, I have a million documents I have to get through in X amount of days. I want court intervention and I want a meet and confer before my time starts ticking. I pick up the phone and I call the judicial assistant who says "Sure we can get you on. We'll get you on, on June 15. No problem, you can have 15 minutes at 1:30 in the afternoon." Well, guess what? By then, all that discovery is due. It's not going to be very beneficial. On the other hand, if you require me to pick up the phone and say "Counsel, what do you really want and how are we going to accomplish this because I have the paper form right here, do you really need it by computer? Do you need it in PDF? What documents do you need? How should it be provided? Is someone going to come in? Who is going to bear the expense? Let's work this out." I think that works a lot better than requiring a motion.

C.J. Abrahamson: I don't want to work it out and I don't know what means you want, and this says the court "shall order." Let's go to court because I want the court to set down various rules you and I may or may not agree with, so let's call the judicial assistant. This doesn't say you have to confer without court order. It says do what you want to do is that the court shall order so you still need a court order unless you want people who are . . . .

36:51
J. Roggensack: All you have to do is, after "Anytime after commencement of this action, and then there's a comma, 'except with e-discovery where meet and confer is mandatory unless excused by the court,'" then it goes on and finishes it. That's all you would have to do.

J. Ziegler: That's exactly right.

C.J. Abrahamson: And they can't agree on things, they have to go to court anyway.

J. Roggensack: Right, but you can't serve discovery on someone until the court says you can if you've not complied with the meet and confer. You can't serve e-discovery, you can ask them other things for discovery. It's a simple thing to make that change.

C.J. Abrahamson: Dave, you have something in hand that you are waving?

J. Prosser: Where's the meet and confer in this federal rule?

Owens: 26(f). "The parties must confer as soon as practicable – and in any event at least 21 days," but that federal rule obviously cites the fact that, except in a proceeding exempted from initial disclosures – the initial disclosures is a critical part of the mandatory meet and confer. I think it is 26(f). 26(f), which is the mandatory meet and confer, also -

C.J. Abrahamson: On court order, or without court order?

J. Roggensack: Without.

Owens: - but it also talks about the initial disclosures that are required under the federal rule as well.

C.J. Abrahamson: OK. Which we may not have?

Owens: It may be a part that's missing if you are going to go that far.

C.J. Abrahamson: All right. I understand that, regardless of how you draft it, I understand that Annette wants if there is e-discovery, the parties must meet and confer. Does anyone else want to talk on that issue?

39:09
J. Bradley: I don't have in front of me the definition of e-discovery.

39:15
J. Roggensack: There is a definition. They set out to talk about it in ____ and use some other words that are not in the federal rules. [inaudible]

J. Bradley: I am putting this all through the lens of the small case and I do not want to rack up attorney fees.

C.J. Abrahamson: It is under 804.09.

J. Crooks: On page 6.

C.J. Abrahamson: Page 6.

C.J. Abrahamson: Under scope? Procedure?

J. Crooks: 804.09(2)

C.J. Abrahamson: "The meaning of the term electronically stored information is described in the Judicial Council note following Wis. Stat. Section 804.09."

J. Crooks: On page 8 is the Judicial Council note.

C.J. Abrahamson: That is what we are looking for. "The rule covers information stored in any medium, references elsewhere."

41:40
J. Crooks: On one point it says with the changes, "the rapidity of technological changes counsel against a limiting or precise definition of electronically stored information. The rule is expansive and includes any type of information that is stored electronically. A common example" and it goes on from there.

J. Bradley: What page are you reading from Pat?

J. Crooks: Page 8 on the Judicial Council note, near the bottom.

42:13
J. Roggensack: Also in the petition that was filed, it's on page 3, 804.09(1), and it is the rule they propose, which talks about the scope. "Electronically stored information includes writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any other medium."

J. Bradley: Again, I think of the small case. Let's say I want some information in your computer about possibly hospital collections. They are suing me. I want [inaudible]. I think they are mis-billing me. I want copies of their last five bills. That's stored electronically, right? Now, am I going to be required to have a mandatory meet and confer? My concern is this is not what people want, Annette I understand what your goal is, I just don't want to sweep into it more than we intend.

J. Ziegler: What's the meet and confer under your scenario? Hello, I would like the last five bills. Do I need to serve you with a formal discovery request?

J. Bradley: That could be.

J. Ziegler: Yes, you need to. No, you don't need to. Here I will provide you with paper copies. Do you need them electronically? That's exactly what I have in mind.

J. Bradley: I asked that question at the open administrative conference on January 21st and some of the back and forth of that question and answer went to my concern that I did not want an attorney to have to bill – I didn't know what it meant by meet and confer. I asked does that mean that you have to actually meet, not just confer over the phone, but just meet? They weren't sure. And then I thought, well, does it mean do I have to go over and meet you, not just confer because it says meet and confer, and have to spend .5 hours and have my attorney bill .5 hours because of that?

J. Roggensack: Federal courts have addressed that issue, it is done by telephone all the time.

J. Bradley: So confer, not meet and confer.

J. Roggensack: Well, meet by phone.

J. Bradley: I also point out, I had a discussion with an attorney. This attorney was telling me the difference in practicing in certain counties in Wisconsin as opposed to other counties. In large part, the difference was large counties and small counties, because this person was conveying this information to me, and conveying the information how in small counties there are a lot of call ups when you do that and in larger, it was this attorney's experience, in the large counties you had nothing to stop, there was no back and forth. Now I am sure that's an exaggeration for some people's experiences and consistent with other people's experiences. But my point is you and I sit around the table and we say sure you are just going to call but words are important. That's what we're all about. If we say meet and confer but we don't mean meet then let's not say meet.

J. Ziegler: Well let me just try to be practical. When is it going to be important what the words meet and confer mean? It's going to be important in the instance where someone says I'm not

giving you the documents and we can't agree upon this. Guess what? They have to go to court anyway. Whether they meet face to face or not, is not going to solve that. Question where someone says "Yes, sure, I'll send you over the last 5 bills, no problem" which is the routine case, what's it matter if it says meet and confer and whether it's done by phone or not?

J. Bradley: It matters because words matter and words matter when we put them into a law. That's why it matters.

46:23
J. Gableman: How about just putting in a comment meet and confer on time.

J. Bradley: That's fine with me. I am just saying what we talk about around the table "oh this makes sense, oh, this makes sense" but words matter.

J. Ziegler: I agree, which is why maybe we shouldn't be adopting a whole bunch of words that we don't know what they mean, with all due respect.

46:45
C.J. Abrahamson: If I may make a suggestion. This is not going to be effective until January 1, 2011. We are going to have, the court decided on a 4-to-3 vote to have another hearing on this. I would strongly urge, since this is a subject - whether it is required that a court order or it is required that the parties meet and confer electronically - I would strongly urge that, and this comes way back to the last one, I would urge that when we notice this for public hearing we put that, as an item, that we want discussion relating to electronic discovery even though (4m) deals with other types of discovery so we are focusing in on that. By the time the effective date is of January 2011 we can settle out this issue with commentary by the bar and the judges. That's what I would suggest.

48:12
C.J. Abrahamson: That met with a great acclaim. I mean, if it were going into effect July I'd say, all right, make the change if you have four votes to do that, but you don't, it's not going into effect in July. So by January 1 the court can change this and no one is out.

J. Roggensack: I don't know that you know if there's 4 votes

J. Ziegler: How do you know . . . ?

C.J. Abrahamson: I didn't say you have it, I said if.

J. Gableman: She meant that it's not going into effect this July. She said you don't have it. She meant the date.

J. Ziegler: Let's at least make a motion so we know if it goes down in flames or not.

49:00
C.J. Abrahamson: I am true to my word. I said we should take up any changes. This is a change. We put it to vote. You get 4 votes to do it, we change it as of now.

J. Ziegler: Can you read that language and either I will make the motion or you can make it and I will either second it or someone else can.

J. Roggensack: After the word "action" you say "except with e-discovery where meet and confer is mandatory unless excused by the court," and then it goes on, "on the court's own motion," just as it is here.

Owens: Discovery of electronically stored information versus e-discovery?

J. Roggensack: That's fine, that's a good suggestion.

Owens: I would have to ask Justice Roggensack to read again. I did not catch all of the phrase.

C.J. Abrahamson: That's why I asked you if you had it. You don't.

J. Roggensack: Except with discovery of electronically stored information, where meet and confer is mandatory unless excused by the court.

J. Crooks: Do you want to use the word meet? I don't know if you want to use the word meet?

. . .

J. Ziegler: Confer is fine, then Ann is going to love it.

C.J. Abrahamson: OK, so now the party does not want to confer so says let's not confer, the court makes it mandatory so you have to go to court.

J. Ziegler: Let's just let her finish the motion.

C.J. Abrahamson: Does everyone have that? At the end of the sentence, is it after "regarding any of the following"? Is that at the end that you want to put this?

J. Roggensack: No it goes after the first clause, "At any time after commencement of an action," then the insert is "except with discovery of electronically stored information, where conferring is mandatory unless excused by the court."

C.J. Abrahamson: I don't think you should say "where confer is mandatory" because people will look for where you make it mandatory. There's no place. You have to just say "except with discovery of electronically stored information, confer is mandatory unless excused by the court."

C.J. Abrahamson: And what do you mean, confer by the litigants?

J. Roggensack: You can't say it. You have to say "where" because otherwise it doesn't say what you want it to say because below it it's all discretionary. If you are going to say its mandatory you have to identify where it's mandatory.

J. Ziegler: Right.

J. Roggensack: I think you need that word in there.

J. Ziegler: I agree.

52:07
J. Bradley: I have problem with [inaudible].

C.J. Abrahamson: You have it already "except with." I am not trying to. . . .

J. Roggensack: You think "when" is better? "When" is fine. It doesn't matter to me.

J. Bradley: When does it tell you?

C.J. Abrahamson: It doesn't tell you when it's mandatory, that's your problem. This is a drafting issue, it's not a

substantive issue. I am not going to vote for it but I don't want something that doesn't make good sense either for those who want to vote for it. If it's going to become part of it, I want it to read correctly.

J. Roggensack: That's the problem with drafting at the table.

J. Ziegler: How about this? It would read "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, except for discovery of electronically stored information, where the parties must confer unless otherwise excused by the court."

C.J. Abrahamson: You may have the same trouble but it is not as obvious. But we know what you want. We can fiddle around with the wording. What you want is mandatory conferring relating to discovery of electronically stored information unless excused by the court. So the party just says let's go to court, I want to be excused instead of the party going to court and saying I want you to do it.

J. Ziegler: I think it forces people to agree a lot more than the other way forces people to agree. I think they are more likely to reach an agreement with that as the option

C.J. Abrahamson: Is there any further discussion on this? Theresa?

Owens: I am just concerned, I think one of the things brought up in the first administrative conference was, how do you know you have discovery of electronically stored information?

J. Ziegler: You call and you talk about it.

Owens: You may still have the same delay tactic going on.

J. Ziegler: Anyway, that's my motion

J. Gableman: Second.

C.J. Abrahamson: Is there any further discussion? As I say, I would favor pinpointing this for the September/October, hopefully September meeting, but those in favor raise your hand. Five would favor that. That's put in. I would not, show me as dissenting.

J. Bradley: Show me as dissenting also.

J. Prosser: Having adapted this, I would certainly be open to somebody's new language adopting the same principle with a little bit more elegant language.

J. Ziegler: That's fine. I basically framed it off of the federal rule. I am not married to that language - the concept, however . . .

C.J. Abrahamson: Would you just send a proposal around by email on just that one section?

Owens: Yes.

C.J. Abrahamson: Is there anyone else who would propose a change to this?

J. Prosser: It would seem to me, Theresa, that input from the Judicial Council on the precise language, as long as it is not inconsistent with the principles articulated here, is certainly welcome.

Owens: Should I circulate that to the petitioner prior to the court to get their input? Or simultaneous?

C.J. Abrahamson: Yes, but you know we have an issue of when the council meets, etc. We want to get this done by June 30th. So I want you to confer with April Southwick, and on the basis of that conversation, decide whether you should confer with particular members of the committee that dealt with this. It wasn't the whole council, and it had people on it that weren't members of the council. That's an assumption I made because I think Sankovitz isn't on the council. So there are people they bring in for particular projects. So I would confer with April Southwick who will tell you or suggest to you who on the committee, and/or on the council, should be consulted for the language and then deal with them. I want you to confer with them on the telephone.

J. Ziegler: But whatever you do, don't meet with them. That would be terrible.

C.J. Abrahamson: Or e-mail. That is using electronically stored information. Come back with a suggestion or suggestions, you might have 2 or 3, and get it to the court so we can do it. So this is finished except for (4m) introductory language. OK?

C.J. Abrahamson: I'll ask once again - anyone else have anything else they want to change in this? Or propose a change? (none)

¶21 ANNETTE KINGSLAND ZIEGLER, J. *(dissenting).* On April 28, 2010, the majority adopted verbatim a petition that leaves unresolved the very concerns that the rules set out to address: judicial inefficiency and the overwhelming economic burden that can result from the discovery of electronically stored information.[14] See Memorandum in Support and Petition of Wisconsin Judicial Council for an Order Amending Wis. Stat. §§ 802.10, 804.08, 804.09, 804.12, and 805.07, at 2 (Apr. 23, 2009) (identifying the "key goal[s]" of the proposed rule changes as "increas[ing] judicial efficiency in the circuit courts by improving consistency and predictability in the discovery of electronically stored information" and "reduc[ing] the economic burden on litigants that can result from discovery involving an enormous volume of electronically stored information"). For reasons that are unclear, the adopted rules depart in significant respect from the corresponding Federal Rules of Civil Procedure (Federal Rules). As a result, in

[14] This dissent concerns the court's 4-3 vote to adopt verbatim the Wisconsin Judicial Council's petition for an order amending Wis. Stat. §§ 802.10, 804.01, 804.08, 804.09, 804.12, and 805.07. Subsequent to that vote, the court voted 5-2 to amend the then-adopted § 804.01(4m) to require parties to confer on the discovery of electronically stored information unless excused by the court. I was in the majority on that second vote. The amendment to § 804.01(4m) is consistent with Federal Rule of Civil Procedure 26(f). Rule 26(f)(1) provides: "Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable——and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b)."

exchange for the rules' hasty adoption, the majority has sacrificed the guidance and benefit of a growing body of federal law and has left gaping holes in rules meant to promote efficient and cost-effective electronic discovery. For those reasons, I respectfully dissent.

¶22 Our adopted rules exclude several key provisions from the corresponding Federal Rules. A few examples are illustrative. Most significantly, the adopted rules do not provide a framework for cost-shifting. Pursuant to Federal Rule of Civil Procedure 26(b)(2)(B), "[a] party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost." If the requesting party shows good cause, the court may nonetheless order discovery, bearing in mind the burden and expense limitations provided in Rule 26(b)(2)(C). Fed. R. Civ. P. 26(b)(2)(B). The court's consideration of the Rule 26(b)(2)(C) limitations is "coupled with the authority to set conditions for discovery," which may "include payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible." Fed. R. Civ. P. 26(b)(2) advisory committee's note. In contrast, under our adopted rules, a party's duty to provide discovery of electronically stored information is the same no matter what the burden or cost. The party's lone source of recourse is moving for a protective order that, upon a showing of good cause, protects the party generally from "annoyance, embarrassment, oppression, or undue burden or

expense." Wis. Stat. § 804.01(3)(a) (2007-08). Accordingly, as compared to the Federal Rules, our adopted rules place the onus of alleviating burdensome and expensive electronic discovery on the responding party.

¶23 In addition, our adopted rules ignore the practical necessity of a "claw back" provision to resolve the costly issue of inadvertently produced privileged information. In the context of electronic discovery, in which potentially many thousands of documents are produced, it is tremendously expensive and time-consuming to preliminarily review each document to determine if it contains privileged information. Under the Federal Rules, a party that inadvertently produces privileged information may notify the receiving party, and the receiving party "must promptly return, sequester, or destroy the specified information and any copies it has" and "must not use or disclose the information" until the privilege claim is resolved. Fed. R. Civ. P. 26(b)(5)(B). The practical implications of electronic discovery demand a similar "claw back" mechanism in our rules.

¶24 Finally, our adopted rules lack even a definition of "electronically stored information"——an omission that perhaps sheds the greatest light on the haste with which these rules were adopted. The meaning of "electronically stored information" is described in the Judicial Council Notes that this court did not adopt. Accordingly, our rules leave litigants and circuit courts in the dark over this court's

definition of the very form of discovery that we are attempting to efficiently govern.

¶25 For reasons that are unclear, the adopted rules depart in significant respect from the corresponding Federal Rules. As a result, in exchange for the rules' hasty adoption, the majority has sacrificed the guidance and benefit of a growing body of federal law and has left gaping holes in rules meant to promote efficient and cost-effective electronic discovery. For those reasons, I respectfully dissent.

¶26 I am authorized to state that Justices PATIENCE DRAKE ROGGENSACK and MICHAEL J. GABLEMAN join this dissent.