

AN UPDATE ON DEVELOPMENTS REGARDING THE WISCONSIN AND FEDERAL RULES GOVERNING E-DISCOVERY

It has been estimated that more than 90% of all information created today is stored electronically. This electronically stored information, or ESI, is crucial information in most business disputes.

The Federal Rules of Civil Procedure were amended in 2006 to address ESI, and additional amendments to these federal e-discovery rules have been proposed that could go into effect in late 2015. The Wisconsin Rules of Civil Procedures were amended in January, 2011, and again in January, 2013, to address ESI too. The state and federal e-discovery rules significantly broaden the concept of what constitutes a “document” for purposes of discovery and confirm that discovery of ESI in civil lawsuits stands on equal footing with discovery of paper documents.

The Wisconsin e-discovery rules for the most part parallel the federal e-discovery rules, making it easier for federal authority to be used in discovery disputes in the Wisconsin courts. But the Wisconsin rules differ slightly from the federal rules. For example, unlike Fed. R. Civ. P. 26(a), Wisconsin documents have a rule requiring mandatory initial disclosures. The drafters of the Wisconsin rules decided that certain portions of the federal e-discovery rules would be better addressed by substantive law rather than procedural rules changes.

Highlights of the January 2013 amendments to the Wisconsin e-discovery rules include:

- Wis. Stat. § 804.01(2)(c), which provides that the trial materials privilege is not automatically forfeited because of the inadvertent disclosure of ESI and that claims of forfeiture of this privilege must be considered under Wis. Stat. § 905.03(5) as if they involved privileged attorney-client communications.
- Wis. Stat. § 804.01(7), which creates a Wisconsin “clawback” rule allowing for the recovery of privileged ESI inadvertently produced in discovery and establishes the procedure to be followed in order to recover such information.
- Wis. Stat. § 805.07(2)(d), which adds ESI to the materials which may be discovered by subpoena and permits subpoenas for inspection, copying, testing or sampling of ESI.

Highlights of the proposed amendments to the federal e-discovery rules include:

- A proposed amendment to Fed. R. Civ. P. 1 which would encourage cooperation by the parties as to the efficient determination of a case, including e-discovery issues.
- A proposed amendment to Fed. R. Civ. P. 26 which would add a new “proportionality” test to the scope of allowable discovery.
- A proposed amendment to Fed. R. Civ. P. 30 which would reduce the limit on the number of depositions in a case from 10 to 5 and would reduce the maximum length of a deposition from 7 hours to 6 hours.
- A proposed amendment to Fed. R. Civ. P. 33 which would reduce the limit on the number of written interrogatories from 25 to 15.
- A proposed amendment to Fed. R. Civ. P. 36 which would limit the number of requests to admit to 25.
- A proposed amendment to Fed. R. Civ. P. 37 which would provide a uniform national standard for evaluating discovery preservation efforts and for the imposition of sanctions for failures to preserve discovery.

The public comment period for the proposed federal amendments runs until February 15, 2014. If approved, the federal amendments currently are expected to go into effect on December 1, 2015.

For more information about the state and federal e-discovery rules or ESI issues, please contact [Grant Killoran](mailto:grant.killoran@wilaw.com) at 414.276.5000, or at grant.killoran@wilaw.com.