



WISCONSIN CIVIL JUSTICE COUNCIL, INC.

Promoting Fairness and Equity in Wisconsin's Civil Justice System

AB 773 Improves Wisconsin's Civil Discovery Rules

Wisconsin's discovery reform legislation, AB 773, would provide a number of significant improvements to the state's civil discovery code. One of AB 773's key improvements is that it sets forth a clear standard with respect to a party's duty to preserve electronically stored information (ESI). ESI or "e-discovery" often plays a major role in modern civil discovery, and one for which existing preservation obligations may be overly costly and impractical for many businesses. AB 773 addresses this concern by clarifying that a party is generally not required to preserve certain types of ESI that is unduly burdensome, duplicative, or unavailable absent another party's showing of "substantial need" for the information. This approach is consistent with statutes and court rules in other states regarding the treatment of ESI.¹

The dramatic growth in the volume of ESI produced by businesses and other entities has led to a corresponding increase in the burdens associated with preserving and producing such information for litigation purposes. In addition, judges have developed *ad hoc* preservation rules governing the preservation of ESI, creating an absence of clear requirements. This situation has led to costly litigation over preservation issues, further increasing business's preservation-related costs.

AB 773 helps alleviate these costly burdens, which may be exploited by some litigants to leverage an unjust settlement, by stating that a party is not, absent a showing of "substantial need," required to preserve the following types of ESI:

- 1) *Data that cannot be retrieved without substantial additional programming or without transforming the data into another form before search and retrieval can be achieved.*

This provision protects a party from the burden of preserving ESI where that business would need to invest time and resources to develop a new program just to retrieve the information so that it could be used to benefit an adverse party in litigation against the business. For example, a business should not have to invest tens or hundreds of thousands of dollars in designing new software for the purpose of facilitating e-discovery against the business as part of a lawsuit.

¹ See, e.g., Ala. Rules of Civ. Proc. Rule 26(b)(2)(A) ("A party need not provide discovery of electronically stored information from sources that the party identifies to the requesting party as not reasonably accessible because of undue burden or cost."); Alaska Rules of Civ. Proc. Rule 26(b)(2)(B) (same); Ariz. Justice Court Rules of Civ. Proc. Rule 122(f)(1) (same); D.C. Super. Ct. Rules of Civ. Proc. Rule 26(b)(2)(B) (same); Hawaii Rules of Civ. Proc. Rule 26(b)(1)(B) (same); Idaho Rules of Civ. Proc. Rule 26(b)(1)(B) (same); Mich. Court Rules of 1985 Rule 2.302(B)(6) (same); Minn. Rules of Civ. Proc. Rule 26(b)(2) (same); Mont. Rules of Civ. Proc. Rule 26(b)(2)(B) (same); N.D. Rules of Civ. Proc. Rule 26(b)(1)(B)(ii) (same); Ohio Rules of Civ. Proc. Rule 26(B)(4) (same); S.C. Rules of Civ. Proc. Rule 26(b)(6) (same); Tenn. Rules of Civ. Proc. Rule 26.02(1) (same); Me. Rules of Civ. Proc. Rule 26(b)(6) (same); Va. Sup. Ct. Rule 4:1(b)(7) (same); Wyo. Rules of Civ. Proc. Rule 26(b)(2)(B); see also Del. Chancery Court Rule 45(d)(1) ("Absent a showing of good cause, the person responding need not produce the same documents or electronically stored information in more than one form."); Okla. Stat. Ann. tit. 12, § 3234(B)(e)(3) ("a party need not produce the same electronically stored information in more than one form").

2) *Backup data that are substantially duplicative of data that are more accessible elsewhere.*

This provision protects a business from the burden of preserving ESI in multiple formats where it would be duplicative to do so. For example, a business should not be required to keep its old ESI on 100,000 floppy disks where the same data may be kept more conveniently on a DVD or a small flash drive.

3) *Legacy data remaining from obsolete systems that are unintelligible on successor systems.*

This provision protects a business from the burden of preserving ESI on obsolete hardware or other systems the business no longer uses. For example, a business should not be required to maintain a warehouse full of old computers from the 1980s created for a system it discontinued using long ago.

4) *Any other data that are not available to the producing party in the ordinary course of business.*

This provision protects a business from the burden of having to produce ESI that is not available to the business without incurring substantial hardship. For example, a business should not be responsible for data stored on old computers it discarded in its ordinary course of business to produce ESI in a lawsuit filed many years later.

AB 773 is consistent with approaches taken in other states in adopting specific rules with respect to the preservation of certain types of ESI.² Wisconsin's federal court practice also requires the parties' discovery plan to consider the "reasonable accessibility of electronically stored information and the burdens and expense of discovery of electronically stored information."³ AB 773 is consistent with the spirit of this provision by presuming that ESI that is not reasonably accessible does not need to be produced unless good cause is shown.

² See, e.g., Del. Federal Court Rules, Notice of Default Standard for Discovery, Including Discovery of Electronically Stored Information (exempting 12 specific categories of ESI absent a showing of "good cause," including "Deleted, slack, fragmented, or other data only accessible by forensics," temporary files, "Data in metadata fields that are frequently updated automatically," "Voice messages," call logs for mobile devices, servers or networks, and "Data remaining from systems no longer in use that is unintelligible on the systems in use"); N.C. 10 Jud. Dist. Civil Super. Ct. Rule 5.1(c)(2) (enumerating "Exempted Categories of Electronically Stored Information" that need not be preserved absent a showing of "good cause," which include "Random access memory (RAM), temporary files, or other ephemeral data that are difficult to preserve without disabling the operating system," "On-line access data," "Data in metadata fields," "Back-up data that are duplicative," "Instant messages," "Electronic mail or pin-to-pin messages sent to or from mobile devices," and "Other electronic data stored on a mobile device").

³ See E.D. Wis. Federal Court Rules, Civil Law Rule 26(a)(1).