

2001 DRAFTING REQUEST

Bill

Received: 02/16/2001

Received By: nelsorp1

Wanted: As time permits

Identical to LRB:

For: Mark Gundrum (608) 267-5158

By/Representing:

This file may be shown to any legislator: NO

Drafter: agary

May Contact:

Addl. Drafters:

Subject: Beverages - miscellaneous

Extra Copies: RCT

Submit via email: NO

Pre Topic:

No specific pre topic given

Topic:

Prohibit taking depositions in alcohol beverage cases

Instructions:

Wants to prohibit taking depositions in alcohol beverage cases under 125.07 or 125.085. See State v. Phillips decision.

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/1	agary 03/20/2001	jdyer 03/21/2001	kfollet 03/22/2001	_____	gretskl 03/22/2001	lrb_docadminS&L 08/20/2001	
	phurley 08/14/2001			_____			
				_____			

FE Sent For:

"/1" 8/30/01  
per Arg

<END>

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/1	agary 03/20/2001	jdycr 03/21/2001	kfollet 03/22/2001	_____	gretski 03/22/2001		S&L

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1?	agary	1 <sup>3</sup> / <sub>21</sub> jld	kj 3/22	ljk/jf 3/22			S&L

FE Sent For:

<END>

02/15/2001 09:24 SOCA CLERKS OFFICES MDSN → 816082823684

NO.031 0001

ATTN: Bob Nelson  
\*

OFFICE OF THE CLERK  
SUPREME COURT AND COURT OF APPEALS

110 East Main Street, Suite 215  
P. O. Box 1688  
Madison, WI 53701-1688

Telephone (608)266-1880  
Web Site: www.courts.state.wi.us

FAX (608)267-0640

FAX TRANSMITTAL COVER SHEET

TO: Rep. Gundrum  
FROM: Tricia  
DATE: 2/15  
NUMBER OF PAGES (INCLUDING THIS TRANSMITTAL SHEET) 5

COMMENTS:

Bob Nelson  
4-8522

Invoice will follow for charges of \$1 per page for long distance transmissions; \$.40 per page for local transmissions.

02/15/2001 09:24

SCCA CLERKS OFFICES MDSN -> 916092823684

NO. 031 P002



**DISTRICT II**  
**Office of the Clerk**  
**COURT OF APPEALS**  
110 E. MAIN STREET, SUITE 215  
P.O. BOX 1688  
MADISON, WISCONSIN 53701-1688  
Web Site: www.courts.state.wi.us

Cornelia G. Clark  
Clerk

January 17, 2001

To:

Hon. James R. Kieffer  
Waukesha County Courthouse  
515 W. Moreland Blvd.  
Waukesha, WI 53188

Jennifer R. Dorow  
Waukesha Co. District Attorney's Office  
515 W. Moreland Blvd. #G72  
Waukesha, WI 53188-2428

Carolyn T. Evenson, Trial Court Clerk  
Waukesha County Courthouse  
515 W. Moreland Blvd.  
Waukesha, WI 53188

Gary Bakke, President  
State Bar of Wisconsin  
P.O. Box 7158  
Madison, WI 53707-7158

Paul E. Bucher  
District Attorney  
Waukesha County Courthouse  
515 W. Moreland Blvd.  
Waukesha, WI 53188

George Brown, Executive Director  
State Bar of Wisconsin  
P.O. Box 7158  
Madison, WI 53707-7158

Mark A. Phillips  
Law Offices of Mark A. Phillips  
333 Bishops Way, Suite 122  
Brookfield, WI 53005

James M. Brennan, Chair  
Board of Governors  
State Bar of Wisconsin  
P.O. Box 7158  
Madison, WI 53707-7158

You are hereby notified that the Court has entered the following opinion and order:

---

00-3541-LV      State v. Michael J. Phillips (L.C. #00-FO-1539;  
00-3542-LV      00-FO-1540)

Before Brown, P.J.

The State petitions for leave to appeal from an order of the circuit court entered on December 12, 2000, granting the respondent's motion to compel discovery. Because this Court concludes that the State does not meet the criteria for interlocutory appeal,

02/15/2001

09:24

SCCA CLERKS OFFICES MDSN -> 816082823684

NO. 031 0003

No(s). 00-3541-LV  
00-3542-LV

WIS. STAT. RULE 809.50 (1999-2000),<sup>1</sup> the petition is denied. The respondent has filed a response to the petition and moved for attorney's fees. The motion is denied.

In the order at issue, the circuit court granted a motion to compel discovery in a forfeiture proceeding. The defendant-respondent was charged with violating Wis. STAT. § 125.07(4)(b) and 125.085(3)(b). The State objected to the discovery arguing that these proceedings are not covered by the rules of civil procedure. The court concluded that proceedings under these sections are special proceedings and civil in nature. WISCONSIN STAT. § 801.01(2), provides that the rules of civil procedure govern all civil actions and special proceedings "except where a different procedure is prescribed by statute or rule." Since the statutes under which these proceedings were brought do not prohibit depositions, they are allowed. The State sought interlocutory appeal arguing that the rules of civil procedure ~~do~~ not apply to these proceedings.

This Court agrees with the circuit court's conclusions. The State argues in its petition that the decision to allow discovery in these types of proceedings will open the door to the use of depositions in all cases where violations call for forfeiture. Such fear is unfounded. The vast majority of forfeiture prosecutions involve traffic violations and WIS. STAT. § 345.421 prohibits discovery except in limited circumstances. In this Court's view, the circuit court's holding will not result in a flood of time-consuming depositions in Ch. 125 proceedings. If it does, the legislature may remedy the situation. Consequently, there is little likelihood of success on this appeal, and the State will not suffer any irreparable harm. This Court also agrees with the circuit court's conclusion

<sup>1</sup> All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

02/15/2001

09:24

SCCA CLERKS OFFICES MDSN → R16082823694

NO. 031

0004

No(s). 00-3541-LV  
00-3542-LV

that the State's argument was not frivolous and consequently denies the motion for attorney's fees.

There is another matter which this Court wishes to address. The Court was disturbed by the tone of the response to the petition. The Court concludes that the response filed by Attorney Mark Phillips violates ch. 62 of the Supreme Court Rules, Standards of Courtesy and Decorum for the Courts of Wisconsin.

The response contains a number of inappropriate and sarcastic comments. Specifically, this Court concludes that Phillips has violated SCR 62.02(1)(a),(b),(c),(d) and (h). For example, on page 17 of the response, Phillips writes that "the State proffers its own amusing little interpretation...." Such tone is unnecessary, unprofessional and is demeaning to the profession as well as to Phillips himself. It violates SCR 62.02(1)(a) which directs lawyers to "maintain a cordial and respectful demeanor and be guided by a fundamental sense of integrity." It violates SCR 62.02(1)(b) which requires lawyers "to be civil in their dealings with one another," and it violates SCR 62.02(1)(d) because it is "uncivil, abrasive, abusive, hostile and obstructive."

A similar violation can be found at page 20, where Phillip's writes: "Just when you think the State's argument is as shallow as it can get, it manages to drain a little more from the pool." This is also an example of the lack of professionalism shown by the writer for the same reasons described above.

Another example can be found at page 21 of the response, where Phillips discusses the proper role of appellate courts. While such a discussion is proper, Phillips felt compelled to add a completely unnecessary editorial and political comment that: "Appellate courts (at least those outside the State of Florida) interpret laws; they do not

No(s). 00-3541-LV  
00-3542-LV

make them." This comment violates SCR 62.02(1)(c) and (h). This list is not exhaustive, but illustrates some of the more egregious comments contained in this response.

This Court is well aware that the standards under SCR 62.02 are not enforceable by the Office of Lawyer Regulation. SCR 62.01. This is because after being promulgated by the State Bar Bench and Bar Committee five years ago, a majority of the Board of Governors did not want sanctions. The Supreme Court adopted the idea of standards without sanctions. This Court is also aware, however, that there is a not insignificant number of lawyers who favor sanctions. If the public is to change its mind and look upon what we do as a "learned profession," then our members should act like it. We should have sanctions. This Court is fully aware of the First Amendment Right to free expression and supports it. But no person is forced to enter into the practice of law. If we voluntarily enter into a profession, we should be willing to abide by its standards of professionalism.

Therefore,

IT IS ORDERED that the petition for leave to appeal is denied without costs.

IT IS FURTHER ORDERED that the stay entered by this Court's order of December 28, 2000, is lifted, and the request for a stay pending appeal is denied as moot.

IT IS FURTHER ORDERED that respondent's motion for attorney's fees is denied.

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*Cornelia G. Clark*  
*Clerk of Court of Appeals*





State of Wisconsin  
2001 - 2002 LEGISLATURE

LRB-2552/1

ARG: ^.....

Jed

2001 BILL

A note

gen

1 AN ACT ...; relating to: pretrial discovery in prosecutions for alcohol beverage  
2 violations. ✓

*Analysis by the Legislative Reference Bureau*

Under current law, a person who violates the state's alcohol beverage laws, including underage drinking prohibitions, may be prosecuted and, if convicted, may be subject to penalties including forfeiture, fine, or imprisonment. A violation that results in a fine or imprisonment is a criminal offense, while a violation that results in a forfeiture generally is not. If a violation is punishable as a criminal offense, the proceeding is governed by the rules of criminal procedure, including criminal rules of pretrial discovery. In contrast to the rules of civil procedure, the rules of criminal procedure do not permit discovery depositions, interrogatories, requests for admissions, or extensive requests for production of documents.

Current law also prohibits civil pretrial discovery in prosecutions for traffic violations that result in forfeitures.

\* In *State v. Phillips*, case no. 00-3541-LV (Ct.App., Dist. II, January 17, 2001) (unpublished), the Court of Appeals concluded that, in a prosecution for violations relating to underage drinking that would result in forfeitures, the proceeding was civil in nature and the rules of civil procedure pertaining to pretrial discovery must be applied. The defendant could therefore compel the taking of discovery depositions.

This bill prohibits pretrial discovery under the rules of civil procedure in any prosecution for a violation of the alcohol beverage laws that may result in the imposition of a forfeiture. In a forfeiture proceeding, pretrial discovery may only be

**BILL**

conducted to the extent it would be available under the rules of criminal procedure if the matter were a criminal proceeding. Thus, in a prosecution for a violation of the alcohol beverage laws that may result in the imposition of a forfeiture, no party may conduct a discovery deposition or serve written interrogatories.

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

Fix component

renumbered 125.14(6)(a).

SECTION 1. 125.14 (6) of the statutes is ~~amended to read:~~

~~125.14 (6) FORM OF COMPLAINT PROCEDURAL (a) Form of complaint. In a prosecution for a violation of a statute relating to the sale of alcohol beverages it is not necessary to allege in the complaint, information, or indictment the kind or quantity of alcohol beverages sold or the person to whom it was sold. It is sufficient to allege generally that the defendant sold alcohol beverages at a time and place mentioned, together with a brief statement of the facts showing that the sale was a violation of this chapter.~~

SECTION 2. 125.14 (6) (b) of the statutes is created to read:

125.14 (6) (b) *Discovery*. In a prosecution for a violation of this chapter that may result in the imposition of a forfeiture, a party may not conduct pretrial discovery under ch. 804 but may conduct pretrial discovery of the same materials and information, and in the same manner, set forth in s. 971.23 as if the matter were a criminal proceeding.

(END)

D-Note

SECTION # 125.14 (6) (title) of the statutes is ~~repeated and created~~ created to read:  
125.14 (6), PROCEDURE. (CS)  
(44E)

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**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-2552/1dn

ARG:.....

JLD

The legal basis for the Court of Appeal's decision in *State v. Phillips* would allow depositions and other civil discovery to be conducted in any prosecution for an alcohol beverages violation that results in a forfeiture. The attached draft prohibits the taking of depositions and service of written discovery in prosecutions for all of these violations, not just in prosecutions for underage drinking. Is this consistent with your intent?

Also, the attached draft allows both the prosecuting party and the defendant to conduct the same limited discovery (which does not include depositions) that would be allowed in a criminal proceeding. Is this consistent with your intent, or would you like to completely prohibit discovery in forfeiture proceedings?

Aaron R. Gary  
Legislative Attorney  
Phone: (608) 261-6926  
E-mail: aaron.gary@legis.state.wi.us

**DRAFTER'S NOTE  
FROM THE  
LEGISLATIVE REFERENCE BUREAU**

LRB-2552/1dn  
ARG:jld:kjf

March 22, 2001

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Legislative Attorney  
Phone: (608) 261-6926  
E-mail: aaron.gary@legis.state.wi.us

## Barman, Mike

---

**From:** Gary, Aaron  
**Sent:** Friday, August 17, 2001 1:36 PM  
**To:** Barman, Mike  
**Subject:** FW: LRB-2552/1 - Bill Jacket

Mike,  
Could you please jacket this bill for Rep. Gundrum? Thanks. Aaron

Aaron R. Gary  
*Legislative Attorney*  
*Legislative Reference Bureau*  
608.261.6926 (voice)  
608.264.6948 (fax)  
aaron.gary@legis.state.wi.us

-----Original Message-----

**From:** Churchill, Jolene  
**Sent:** Friday, August 17, 2001 12:36 PM  
**To:** Gary, Aaron  
**Subject:** RE: LRB-2552/1 - Bill Jacket

Aaron,

Could you send us the bill jacket for this bill? We will be submitting it to the Chief Clerk's office shortly. Thanks! - Jolene (Rep.Gundrum - 19 North)

-----Original Message-----

**From:** Gary, Aaron  
**Sent:** Thursday, August 16, 2001 2:37 PM  
**To:** Churchill, Jolene  
**Subject:** RE: LRB-2552/1 - LRB Analysis

Jolene,  
I figured it out. The analysis is below. Aaron

Analysis by the Legislative Reference Bureau

Under current law, a person who violates the state's alcohol beverage laws, including underage drinking prohibitions, may be prosecuted and, if convicted, may be subject to penalties including forfeiture, fine, or imprisonment. A violation that results in a fine or imprisonment is a criminal offense, while a violation that results in a forfeiture generally is not. If a violation is punishable as a criminal offense, the proceeding is governed by the rules of criminal procedure, including criminal rules of pretrial discovery. In contrast to the rules of civil procedure, the rules of criminal procedure do not permit discovery depositions, interrogatories, requests for admissions, or extensive requests for production of documents.

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This bill prohibits pretrial discovery under the rules of civil procedure in any prosecution for a violation of the alcohol beverage laws that may result in the imposition of a forfeiture. In a forfeiture proceeding, pretrial discovery may only be conducted to the extent it would be available under the rules of criminal procedure if the matter were a criminal proceeding. Thus, in a prosecution for a violation of the alcohol beverage laws that may result in the imposition of a forfeiture, no party may conduct a discovery deposition or serve written interrogatories.

For further information see the state and local fiscal estimate, which will be printed as an appendix to this bill.

Aaron R. Gary  
*Legislative Attorney*  
*Legislative Reference Bureau*  
608.261.6926 (voice)  
608.264.6948 (fax)  
aaron.gary@legis.state.wi.us

08/20/2001

-----Original Message-----

**From:** Churchill, Jolene

**Sent:** Thursday, August 16, 2001 2:25 PM

**To:** Gary, Aaron

**Subject:** LRB-2552/1

Aaron,

Could you email me a copy of LRB 2552/1 as I would like to circulate a co-sponsorship memo ASAP? Also, is there a way you can send me the Analysis part so I can copy and paste it directly to the co-sponsorship memo. - Jolene (Rep. Gundrum - 267-5158)

08/20/2001

## Emery, Lynn

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**From:** Emery, Lynn  
**Sent:** Friday, August 31, 2001 9:52 AM  
**To:** 'wmja@execpc.com'  
**Subject:** LRB-2552/1 (attached as requested)

Lynn Emery

Lynn Emery - Program Asst. (PH. 608-266-3561)  
(E-Mail: lynn.emery@legis.state.wi.us) (FAX: 608-264-6948)

Legislative Reference Bureau - Legal Section - Front Office  
100 N. Hamilton Street - 5th Floor  
Madison, WI 53703

8/31/2001