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## WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

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Memo No. 3

TO: MEMBERS OF THE SPECIAL COMMITTEE ON EXPUNCTION OF CRIMINAL RECORDS

FROM: Don Dyke, Chief of Legal Services, and William Ford, Senior Staff Attorney

RE: Initial Issues for Committee Consideration

DATE: November 9, 2006

This Memo identifies a number of issues relating to expunction of records of criminal proceedings.<sup>1</sup> The Memo assumes that the threshold questions of whether it is desirable public policy to provide for the expunction of criminal records under some circumstances and whether the current expunction law is in need of revision or clarification have been answered affirmatively (although, obviously, those are decisions for the Special Committee). The purpose of the Memo is to assist the committee, if it decides to develop draft legislation relating to expunction, in providing an initial set of drafting instructions to enable the preparation of draft legislation for further consideration by the committee.

Because of the wide variety and interrelationship of expunction issues, a focused, systematic committee discussion of the issues could be challenging. While several approaches are possible, this Memo proposes: to consider, first, what is meant by “expunction,” both in a technical sense and a more general, consequential sense; to consider, second, to whom and when does expunction apply (i.e., expunction criteria); and to consider, third, what procedures should be followed to obtain expunction.

A note on terminology--at the Special Committee’s September 28, 2006 meeting, there was discussion concerning the possible use of terminology such as “sealing” the record or “dismissal” of a case, in place of “expunction.” This Memo continues to refer to “expunction,” recognizing that, depending on decisions the committee makes, it may be appropriate to substitute different terminology.

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<sup>1</sup> And records of state and municipal civil forfeiture proceedings, if the Special Committee decides to allow expunction of those records.

## **I. WHAT IS MEANT BY “EXPUNCTION,” INCLUDING THE CONSEQUENCES OF EXPUNCTION?**

**A. What effect should expunction have on case-related records<sup>2</sup> and access to those records, including, but not limited to, court records, law enforcement records, district attorney records, Department of Transportation (DOT) records, and Department of Justice (DOJ) records?**

*Comment:* Currently, if a conviction is expunged, the clerk of court removes any paper index and nonfinancial court record and places them in the case file; electronically removes any automated nonfinancial record, except the case number; seals the entire case file; and destroys the expunged court records in accordance with the provisions of ch. SCR 72, relating to retention and maintenance of court records. Section SCR 72.06. In addition, the record of the conviction is removed from the Wisconsin Circuit Court Access (WCCA) website (but not, beginning this year, from the Circuit Court Automation Programs--CCAP--database, to which judges have access). The response to a request for the record on the WCCA is that no record has been found; no reference is made to the fact that the record was expunged. [Director of State Courts, Policy on Disclosure of Public Information over the Internet, Appendix 1.] However, information on the Crime Information Bureau (CIB) computerized criminal history database that relates to a conviction that has been expunged is not removed. Also, related records maintained by law enforcement, prosecutors, and other state agencies are not affected by expunction.<sup>3</sup>

*What effect should expunction have on physical and electronic records? Should there be consistency in the treatment of publicly accessible case-related records once the court record has been expunged? Should parties other than the general public such as prosecutors, law enforcement, and the courts continue to have access to otherwise expunged records?*

**B. For what purposes, if any, should records relating to an expunged case be used in future court proceedings?**

*Comment:* Currently, the court record relating to an expunged case cannot be considered at a subsequent sentencing,<sup>4</sup> is not available for repeater sentence enhancement, and cannot be used to attack the credibility of the person whose record was expunged if he or she is called as a witness in a subsequent court proceeding. [*State v. Anderson*, 160 Wis. 2d 435, 466 N.W.2d, 681 (1991); *State v. Leitner*, 253 Wis. 2d 449, 646 N.W.2d 341 (2002); and SM-36, final paragraph of Comment 5, WI JI-Criminal.]

*Should the use of expunged court records in future court proceedings be expanded, limited, or clarified? For example, should the law specify whether prior expunged convictions can be considered when setting bail in a subsequent proceeding and whether evidence of an expunged crime is admissible*

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<sup>2</sup> “Case-related records” is used in a broad sense to include not only the court records relating to a conviction, but also arrest and charging records.

<sup>3</sup> An exception is expunged records of convictions under s. 942.08 (2) (b), (c), or (d), Stats., relating to certain invasion of privacy violations. Upon expunction, related records are removed from the Department of Corrections sex offender registration database. See ss. 301.45 (1p) and (7) (e) 2. and 3. and 973.015 (1) (b), Stats.

<sup>4</sup> However, a court may consider at a subsequent sentencing the facts underlying an expunged conviction; for example, information contained in law enforcement or prosecution records.

*under s. 904.04 (2), Stats., if offered for a purpose other than to prove the character of the person, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident?*

**C. What should be the effect of expunction on inquiries by employers and others regarding criminal (or civil) records?**

**Comment:** Current law does not prohibit an employer from asking a prospective employee whether the employee has ever been convicted of a crime, including one where the record has been expunged, nor does it allow the prospective employee to decline to answer “yes” to the question when an expunged conviction is involved.

*Should the law prohibit inquiries regarding expunged convictions in various contexts (or, alternatively, should the law somehow be structured so that a person is able to truthfully answer “no” when asked about a crime conviction if the conviction has been expunged)?*

**II. UNDER WHAT CIRCUMSTANCES DOES EXPUNCTION APPLY (EXPUNCTION CRITERIA)?**

**A. For which offenses should case records be eligible for expunction?**

**Comment:** Under s. 973.015, Stats., a person found guilty of a misdemeanor may have the case record expunged. (Note that the record must be expunged if a person successfully completes the sentence for a violation of s. 942.08 (2) (b), (c), or (d), Stats., relating to certain invasion of privacy, or “peeping Tom” violations if the person was under 18 when the violation was committed.) The current statute does not provide for expunction in cases of municipal ordinance violations, state civil forfeitures, or felonies. Note, too, that for municipalities where a municipal court has been established, municipal ordinance violations will not appear on the WCCA; in jurisdictions with no municipal court, cases involving municipal ordinance violations will appear on the WCCA because those cases are handled in circuit court.

*Should cases eligible for expunction be limited, expanded, or unchanged? If expanded, should state civil forfeiture and municipal ordinance violations be included? Should certain felonies be included? If limited, should the types of misdemeanors for which expunction is, or is not, available be specified?*

**B. Should there be an age limit on expunction eligibility?**

**Comment:** Current expunction law limits eligibility for expunction to those who are under the age of 21 when the misdemeanor is committed. (Section 973.015 (1) (a), Stats.) For mandatory expunction of specified invasion of privacy violations, the violator must have been under the age of 18 when the violation was committed.

*Should age of commission be a criterion for expunction? If so, should the current age limitation be revised?*

**C. Should expunction apply only in cases of conviction?**

Comment: Current expunction law applies when a person has been found guilty of a misdemeanor. However, case information for arrests or charges that ultimately result in no conviction are generally publicly available on the WCCA and the CIB. As the Special Committee learned at its September 28 meeting, the WCCA is altering its executive case summaries for more prominence and clarification on case outcome. See Recommendation 4 and Executive Case Summary examples in Appendix 2 of the Final Report of the Wisconsin Circuit Court Access Oversight Committee, March 2006.

*Should expunction or a limitation on public access be extended to case records that do not involve a conviction? If so, which cases should be included? If cases that do not involve a conviction are addressed, should an approach short of “expunction” be considered; e.g., elimination of publicly accessible electronic records? Should an “actual innocence” procedure be developed to allow expunction in all criminal (or civil) cases in which actual innocence can be proved?*

D. Should expunction be available for first offenses only?

Comment: Current expunction law does not strictly limit the availability of expunction to first offenses only. However, several of the limitations on expunction eligibility effectively limit in practice its availability to first offenses only. These limitations include the age limitation (under 21), court determination that the person will benefit and society will not be harmed by the expunction, and successful completion of the sentence including no conviction for a subsequent offense, no probation or revocation, and satisfaction of probation conditions.

*Should expunction be available for first offenses only? If expunction is expanded to include situations other than convictions, should the first offense criterion apply only to expunction of case records of a conviction?*

E. What other expunction criteria should apply?

Comment: In addition to age, offense, and conviction criteria, current law requires the court to determine that the person will benefit and society will not be harmed by expunction and that the person successfully completes the sentence. A person successfully completes the sentence if he or she has not been convicted of a subsequent offense and, if the person was on probation, the probation was not revoked and the conditions of probation were satisfied.

*Should any additional criteria be imposed for expunction eligibility, for example, passage of time since successful completion of sentence?*

**III. WHAT PROCEDURE SHOULD APPLY FOR OBTAINING EXPUNCTION?**

Comment: Under the current expunction statute, the court may order at the time of sentencing that the record be expunged if the court finds the defendant was convicted of a misdemeanor, the defendant was under age 21 at the time the offense was committed, and the defendant will benefit and society will not be harmed by the expunction. Section 973.015, Stats. [Under s. 973.015 (1) (b), the court must order expunction at the time of sentencing upon successful completion of the sentence if the offense was a violation of s. 942.08 (2) (b), (c), or (d) and the defendant was under the age of 18 when the violation was committed.]

Regarding the current statute, it has been noted:

The court should consider disposition under s. 973.015 and make a record of its decision, whenever the defendant requests it. The court may also consider disposition under this section on its own motion but need not consider it in every case where there is no request by the defendant or counsel.

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Except for stating the standard “the person will benefit and society will not be harmed,” s. 973.015 contains no guidelines for the judge to apply in deciding whether to order special disposition. Since the statute says only that the court “may order” special disposition at the time of sentencing, the [Wisconsin Criminal Jury Instructions] Committee concluded that the decision lies entirely within the discretion of the sentencing judge, applying those standards that are generally applicable to the sentencing decision.

[s. SM-36 Comments 1 and 4, Wis. JI-Criminal.]

At the Special Committee’s September 28 meeting, it was suggested that s. 971.36, relating to deferred judgment in certain first offense drug possession cases, might serve as a useful model for expunction procedure. Section 961.47 provides as follows:

**961.47 Conditional discharge for possession or attempted possession as first offense.** (1) Whenever any person who has not previously been convicted of any offense under this chapter, or of any offense under any statute of the United States or of any state or of any county ordinance relating to controlled substances or controlled substance analogs, narcotic drugs, marijuana or stimulant, depressant or hallucinogenic drugs, pleads guilty to or is found guilty of possession or attempted possession of a controlled substance or controlled substance analog under s. 961.41 (3g) (b), the court, without entering a judgment of guilt and with the consent of the accused, may defer further proceedings and place him or her on probation upon terms and conditions. Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided. Upon fulfillment of the terms and conditions, the court shall discharge the person and dismiss the proceedings against him or her. Discharge and dismissal under this section shall be without adjudication of guilt and is not a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime, including the additional penalties imposed for 2nd or subsequent convictions under s. 961.48. There may be only one discharge and dismissal under this section with respect to any person.

(2) Within 20 days after probation is granted under this section, the clerk of court shall notify the department of justice of the name of the individual

granted probation and any other information required by the department.  
This report shall be upon forms provided by the department.

See, also, ss. 971.37 to 971.40, Stats., relating to deferred prosecution.

Note that case information on deferred judgments under s. 961.47 and on deferred prosecutions is included on the WCCA. See WCCA Oversight Committee Final Report, March 2006, at pp. 22 to 28 for examples of WCCA case summaries in this regard.

*Should current expunction procedure be clarified or revised? Should a procedure for expunction be available at a time other than sentencing? Should any procedural or substantive changes to expunction law be prospective only (e.g., applicable only to offenses occurring on or after the effective date of the revised law)? If any changes in expunction law are made applicable to prior convictions, what steps should be taken to minimize workload on the courts?*

DD:WF:jal