



WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

Memo No. 3

TO: MEMBERS OF THE SPECIAL COMMITTEE ON REVIEW OF RECORDS ACCESS OF
CIRCUIT COURT DOCUMENTS

FROM: Don Salm, Senior Staff Attorney; Dan Schmidt, Senior Analyst; and Melissa Schmidt, Staff
Attorney

RE: Committee Options for Possible Legislation Regarding the Wisconsin Circuit Court Access
System

DATE: December 7, 2010

This Memo presents options for consideration by the Special Committee on Review of Records Access of Circuit Court Documents. These options for possible legislation were identified by committee members and approved by Chairperson Roys for inclusion in this Memo.

At its December 15, 2010, meeting, the committee will discuss these proposals and decide which, if any, of the options it wants drafted in bill draft form for consideration and possible approval at the committee's final meeting. Committee members should be prepared to discuss specific language that they may want the staff to include in the requested drafts. The options are listed by their general category (Expungement, Data Removal, Notification, Expansion, and Miscellaneous) followed by the specific options as recommended for consideration by the committee.

EXPUNGEMENT

Clarify the Definition of "Expunge" and "Expungement" Under Wisconsin Law

Under current law, it is unclear whether an expunged criminal conviction record should be reported as a conviction for various purposes, such as employment. The statutes do not define expungement. There is an Attorney General's Opinion from 1978 opining that the term "expunge" under s. 973.015, Stats., means "to strike or obliterate from the record all references to the defendant's name and identity." [67 Atty. Gen. 301 (1978).]

Under Illinois law, “expunge” means “to physically destroy records or to return the records to the petitioner, and to obliterate (remove) the petitioner’s name from any official index or public record....” “Seal” means “to physically and electronically maintain records, but to make the records unavailable to the public without a court order and to obliterate (remove) the petitioner’s name from any official index or public record.” However, as to sealed documents, law enforcement agencies and the courts will still have access to the records, as will other entities and employers allowed by law. [Instruction Guide, *How to Clear Your Illinois Criminal Record*, Illinois Office of State Appellate Defender, January 2010.]

The committee could decide to recommend a definition of expungement. In doing so, it may want to recommend how the expunged record is to be considered in various situations, such as employment or rental applications.

Prohibit Private Data Vendors from Making Expunged Records Available

Issues regarding the accuracy of private vendor court data were raised several times during committee testimony and discussion. Under current law, private data vendors have no statutory obligations on how to treat an expunged criminal record. A recommendation for a prohibition on the release of expunged data could take the form of a simple general prohibition with penalties for each individual violation or a more complex arrangement where private vendors are required to subscribe to a regularly updated expungement database similar to the current do-not-call list.

Require or Permit Judges to Expunge Misdemeanor or Ordinance Violation Records Resulting in a Dismissal or Acquittal, or Create a Presumption That These Records Should Be Expunged

Under s. 973.015, Stats., a court may order at the time of sentencing that a record be expunged if the person is under the age of 25 at the time of the commission of a crime and “the person has been found guilty in a court for violation of a law for which the maximum period of imprisonment is 6 years or less.” Under certain circumstances, a court may expunge certain Class H and Class I felony conviction records. In a recent unpublished opinion, the Wisconsin Court of Appeals held that s. 973.015, Stats., permitted the expungement of an ordinance violation. *State v. Melody P.M.*, 2010 WI App 100, 788 N.W.2d 385.

The committee could decide to recommend that: (1) expungement be permitted in cases where misdemeanors and ordinance violations result in dismissal or acquittal; (2) expungement be required for misdemeanors and ordinance violations that resulted in a dismissal or acquittal; or (3) there is a presumption in favor of expunging a misdemeanor or ordinance violation record that resulted in a dismissal or acquittal. In doing so, the committee may want to consider the following:

- What the age limit should be for a person to qualify for expungement.
- How the expungement order should be initiated. For example, the committee could recommend that: (1) a defendant be permitted to request expungement at the time of the acquittal or dismissal; or (2) the court be required to inform the defendant that he or she has the right to request expungement within a certain period of time (e.g., after one year) at the time that the acquittal or dismissal is ordered.

- What types of misdemeanors and ordinances judges would be required or permitted to expunge.
- How law enforcement would be notified of an expungement order.
- Whether the sentencing judge should be required to make a determination at the time of expungement, such as, “The person will benefit and society will not be harmed.”

Alternatively, the committee could decide to recommend legislation requiring the Director of State Courts to not place cases resulting in an acquittal or dismissal on the Wisconsin Circuit Court Access website (WCCA). The paper file of the court record would be available only at the courthouse, not on WCCA.

Lastly, to clarify that ordinance violations are expungable, the committee could also decide to recommend that s. 973.015, Stats., explicitly state that ordinance violations may be expunged.

Permit Judges to Expunge all Criminal Court Records, Subject to Judicial Discretion

As previously stated, s. 973.015, Stats., permits a judge to expunge certain criminal records committed by individuals who were under the age of 25 at the time the crime was committed and “the person has been found guilty in a court for violation of a law for which the maximum period of imprisonment is 6 years or less.” Under certain circumstances, a court may also expunge certain Class H and Class I felony conviction records. The committee could decide to recommend that a statute be enacted to clarify that judges may expunge *all* criminal court records, subject to judicial discretion. If the committee decides to recommend this option, it may want to consider whether there should be a judicial finding, such as “The person will benefit and society will not be harmed.”

Expunge Law Enforcement Records in Addition to WCCA Records

Under current law, the sentencing court is not required to notify the Department of Justice’s (DOJ) Crime Information Bureau (CIB) when it orders that a person’s record be expunged. Therefore, the public may obtain information regarding the record through CIB even though the court record has been expunged by the court. If the committee recommends this option, it could consider the following:

- How CIB is to be notified of an expungement order. The committee could decide to require the sentencing court to send a copy of the expungement order to CIB.
- What process CIB should use for expunging its records. For example, the committee could decide to require CIB to also return its disposition information related to the expunged record, or the entire record, to the person, similar to the existing fingerprint removal request procedure required under s. 165.84 (1), Stats.

Prohibit Law Enforcement From Disclosing the Historical Fact of a Conviction in an Expunged Case to Non-Law Enforcement Entities Unless Otherwise Required to do so Under Federal or State Law

As previously stated, current law does not require the sentencing court to notify CIB when it orders that a person's record be expunged. If the committee recommends this option, the committee would need to decide what law enforcement entities would be prohibited from disclosing information. For example, would only CIB be prohibited, or would police and sheriff departments also be prohibited? Also, the committee would need to consider how law enforcement agencies would be notified of the expungement. The committee may want to consider requiring the sentencing court to send a copy of the expungement order to CIB and have CIB determine the process for notifying other law enforcement agencies of the expungement.

DATA REMOVAL

Upon the Written Request, Require the Director Of State Courts to Remove any Information Relating to the Case if There was an Acquittal or a Finding of no Civil Liability, or if the Case is Dismissed, or Both From WCCA

Under s. 973.015, Stats., "the court may order *at the time of sentencing* that the record be expunged upon successful completion of the sentence...." (Emphasis added). However, many individuals who come to court may, for various reasons, be unaware about the availability of expungement at the time of sentencing.

The committee could permit individuals who have successfully completed their sentences to request expungement, regardless of whether they or their counsel failed to request it at the time of sentencing. The committee should determine whether any individual should be eligible to make this request, or only certain individuals should be eligible (e.g., a person who has a single conviction on his or her criminal record).

Alternatively, the committee could recommend that an individual be "crime-free" for a specified period of time to be eligible to request that his or her court record be expunged. If the committee chooses this option, it should consider among other items: (1) whether this duration of time should be different for different types of crime; and (2) what it means to be "crime-free."

Eliminate a Person's Conviction Record From WCCA if He or She Received Executive Clemency for the Conviction

Under current law, a person is automatically eligible for executive clemency (a pardon) from the Governor if the person was convicted of a felony in Wisconsin and five years or more have passed since the person completed the sentence.

If a person is not yet automatically eligible for executive clemency, a person may file for a waiver first for executive clemency. A person may apply for a waiver if either the person was convicted of a misdemeanor in Wisconsin or it has been less than five years since the person completed a sentence or the person is presently incarcerated.

Executive clemency does not expunge, erase, or seal a person's criminal record. When a person receives executive clemency, the Governor's office sends a copy of the executive clemency certificate along with a letter to: (1) the clerk of courts in the county of the place of conviction; (2) DOJ; and (3) the Department of Corrections. It is up to the individual county's clerk of courts to record the executive clemency on WCCA. Because executive clemency does not expunge, erase, or seal a person's criminal record, the paper file remains with the clerk of courts records and the criminal conviction record remains on WCCA.

The committee could require that convictions for which executive clemency has been granted be removed from WCCA, or be sealed or expunged.

Permit or Require the Removal of Address Information From WCCA

Currently, the results of a WCCA search will generally provide the address information of the individuals involved in a case. The committee could: (1) legislatively require the courts to remove address information from the WCCA results; or (2) direct the committee chair to send a letter to the Supreme Court requesting the Court to seriously consider removing the address information field from the WCCA results.

Issues relating to a requirement for the removal of address information include:

- There may be increased difficulty for users in identifying the individuals involved in a court action. This could result in the misattribution of cases to individuals with the same name.
- Requiring the court to take an administrative action such as address removal may be that the court could choose to ignore the requirement on the basis of the separation of powers. [See Memo No. 2 to the Members Special Committee on Review of Records Access of Circuit Court Documents.]

Replace Personal Identifying Information With "John/Jane Doe" on WCCA Records for Dismissals and Acquittals

Currently, there is no difference between the information found in a court record's paper file and its WCCA online court summary. The committee could decide that certain court records may have personal identifying information replaced with "John/Jane Doe" information. If the committee chooses this option, the original paper file would remain the same but the public would not see the identifying information when it conducts a case search on WCCA. If the committee chooses this option, it should consider: (1) whether the sentencing court should order that the identifying information be replaced with "John/Jane Doe"; (2) if so, when the sentencing court would make this determination; and (3) the process by which the convicted person could make a petition for such changes.

NOTIFICATION

Create a "Notification" Provision That a Records Search on the WCCA Website was Conducted

The Fair Credit Reporting Act includes certain requirements as to when an employer has to notify an employment applicant that a background check was conducted. 2009 Assembly Bill 340

included a requirement that any person (e.g., a potential or existing landlord or employer) requesting information from the WCCA Internet Web site inform the person who is the subject of the request that he or she sought information about that person if he or she denies that person employment, housing, or any public accommodation. The bill also specified that any person who intentionally failed to comply with this notice requirement must forfeit \$1,000 for each failure to comply. If the committee chooses this option, the committee should consider whether the penalty provision in that bill is appropriate or whether another penalty (e.g., higher or lower forfeiture amounts) should be applicable.

Require WCCA to Have an Active Button With a User Agreement Whereby the Person Agrees to a Non-Discrimination Policy

Currently, before a person may conduct a case search on WCCA, the person must click an active button that the person agrees to certain specified terms and understands the “limitations of the CCAP (Circuit Court Automated Program) case management database.” WCCA also includes a notice to employers that certain uses of a conviction record may illegally discriminate against a job applicant in violation of s. 111.335, Stats. WCCA includes additional explanatory information on its “Frequently Asked Questions” page to further articulate how to interpret search results. If the committee chooses this option, it should consider whether to give the Director of State Courts discretion to determine what this non-discrimination policy would be.

EXPANSION OF COURT DATA

Permit Defendants to Submit a Statement of Explanation for Publication on WCCA

The committee could consider permitting a defendant with information on WCCA to submit an explanation to be added to his or her court record on WCCA. The intent of this option is to allow the defendant to explain in his or her own words what happened at a given incident. Such a program may increase administrative and storage costs for the courts, as there is no similar program at this time.

Extend the Records Available on WCCA

The committee could consider expanding the information available in WCCA records. For example, this option might permit those seeking information through WCCA to see the full charges and pleadings. This option would permit at least some of those seeking information on WCCA to make a more fully informed decision relating to the matter of significance to them.

There may be significant privacy issues involved in releasing the full court records. In addition, there may be increased costs associated with the increased storage required for full records.

MISCELLANEOUS

Change Wisconsin's Public Records Law so That Court Records With a Criminal Charge That Resulted in an Acquittal or Dismissal, or Both, are not a Public Record

Under Wisconsin's public records law, records are presumed to be open to inspection and copying, with certain exceptions.¹ For example, law enforcement, court, and agency records involving children and juveniles are generally exempt from the public records law, with very limited exceptions, including news reporters who wish to obtain information for the purposes of reporting news without revealing the identity of the child or juvenile. [DOJ, *Wisconsin Public Records Law – Wis. Stat. ss. 19.31-19.39: Compliance Outline* (August 2010).] If the committee chooses this option, it may want to consider whether there should be any exceptions under which an acquittal or dismissal would be subject to the public records law.

Alter the Retention Times of Certain Court Records

Court record retention requirements under Chapter SCR 72 vary from four to 100 years following a court action with minor misdemeanor records being kept for 20 years and felony records being kept for 50 years. The committee could recommend the reduction of current records retention schedules. One option offered would recommend the automatic removal of acquittals and dismissals from WCCA after a period of six months to three years. Another option is the removal of all violations within a certain period of time based on the severity of the violation. Under this scenario, the committee would recommend a retention period for each class of misdemeanor and felony as well as acquittals and dismissals. Examples offered include 10 years retention for Class E felonies, 15 years for Class D felonies, and so forth. Such a recommendation may affect all court records or simply WCCA records. Separation of powers may again be an issue if the committee recommends legislation requiring a change to court administration.

Prepare a Letter to the Wisconsin Supreme Court Supporting Transparency in Court Records

The committee could consider sending a letter to the Wisconsin Supreme Court and to court administrators requesting that the courts make court records as accessible as is practicable under current law. This may promote full disclosure and clarity of information regarding any specific case, permitting the public to make informed decisions regarding the subject of the record.

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¹ Section 19.32 (2), Stats., defines a record as any material on which written, drawn, printed, spoken, visual, or electromagnetic information is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority.