WISCONSIN LEGISLATIVE COUNCIL

REVIEW OF RECORDS ACCESS OF CIRCUIT COURT DOCUMENTS

Room 412 East
State Capitol

November 4, 2010
9:00 a.m. – 1:00 p.m.

[The following is a summary of the November 4, 2010 meeting of the Special Committee on Review of Records Access of Circuit Court Documents. The file copy of this summary has appended to it a copy of each document prepared for or submitted to the committee during the meeting. A digital recording of the meeting is available on our Web site at **http://www.legis.state.wi.us/lc.**]

Call to Order and Roll Call

Chair Roys called the committee to order. The roll was called and a quorum was present.

COMMITTEE MEMBERS PRESENT:	Rep. Kelda Roys, Chair; Rep. Donna Seidel, Vice Chair; Rep. Ed Brooks; and Public Members Colin Benedict, Mary Delaney, Robert Kinney, Bill Lueders, Mark Scarborough, Lahny Silva, Jeanine Smith, Adam Stephens, Sheila Sullivan, and Mike Tobin.
COMMITTEE MEMBERS EXCUSED:	Public Members Keith Findley and Frederic Fleishauer.
COUNCIL STAFF PRESENT:	Dan Schmidt, Senior Analyst; Don Salm, Senior Staff Attorney; and Melissa Schmidt, Staff Attorney.
APPEARANCES:	John Voelker, Director of State Courts; Tim Costello, Attorney, Krukowski & Costello; Ken Barbeau, Director of Community Programs and Services, Housing Authority, City of Milwaukee; and Lahny Silva, Attorney and Research Assistant, University of Wisconsin Law School.

Approval of the Minutes of the Committee's September 15, 2010 Meeting

Chairperson Roys moved, seconded by Representative Seidel, that the minutes of the committee's September 15, 2010 meeting be approved. The motion passed by unanimous voice vote.

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Description of Materials Distributed

Legislative Council described the materials distributed to the committee.

Presentations by Invited Speakers

John Voelker, Director of State Courts

Mr. Voelker provided an update on the Wisconsin Supreme Court's October Administrative Conference in which the Court discussed petition No. 09-07 by the Wisconsin State Bar relating to expunction of circuit court records. He said that he briefed the Court on the technical aspects of hiding or masking such information on Wisconsin Circuit Court Access (WCCA). He explained that the Wisconsin WCCA system is based on the premise that public records are public and should be open to the public with very few exceptions, but that the Court and his office have been concerned about the issue of the effects of placing on WCCA the records of persons whose cases are dismissed or who are found not guilty. He noted that a 2006 Oversight Committee, created by his office, dealt with 30+ recommendations related to making the WCCA system clearer and fairer, and had adopted all of those recommendations.

Mr. Voelker said that he told the Court, at that meeting, that this legislative study committee would be a better forum to deal with the issues in the petition because the open records and confidentiality laws are products of the Legislature. He noted that a prior Joint Legislative Council Special Committee on Expunction of Court Records failed because it first focused on expunction of criminal convictions and not on the more easily dealt with issues relating to dismissed or "not guilty" (acquittals) cases. He noted that a few of the Supreme Court Justices at the conference were concerned about doing an "end run" around the open records laws by making exceptions for any cases. He said that the Supreme Court did not resolve any issues at the conference and will not be addressing the general issue until early next year.

In response to questions from committee members, Mr. Voelker noted that: (1) the WCCA server is an inexpensive part of the Director of State Court's budget and is easy to maintain since it is the clerks who input the information into the system; (2) that even if his office had to take down WCCA for some reason there would be little cost-savings to his office since there would still be the expenses of the Wisconsin Circuit Court Automation Project (CCAP), which is the overall program designed for statewide administration of the court system in Wisconsin; and (3) that the 2006 Oversight Committee did consider the "side effects" (consequences) to persons on WCCA who were trying to rent property or become employed and that some of its recommendations adopted by the Office of the Director of State Courts were related to that concern.

Tim Costello, Attorney, Krukowski & Costello

Mr. Costello stated that he was appearing to present at least part of an employer's perspective on the issues relating to openness and availability of records on WCCA, pointing out that he has been defending employers in court on employment discrimination and related issues for 30 years. He then discussed, based on his written statement submitted to the committee, the current status of employment discrimination law and the "substantially-related" test used in determining whether a violation has occurred (found in s. 111.335, Stats.); why the "substantially-related" test is a significant balancing tool in discrimination cases; and how the doctrines in current law are applied. He then referred to his written responses, in his submitted statement, to five questions posed by Legislative Council staff relating to the

use of WCCA by employers, including what information the employer needs from WCCA and the specific reasons for needing that information; how employers use WCCA and the information in it in everyday practice; and what employers would do if the information they needed was not found on WCCA. Mr. Costello's written statement was distributed to the committee and is available on the committee website.

Mr. Costello noted that an employer can always fire an employee if the employer does its own investigation and finds that an employee is actually doing something improper that is substantially related to his or her job.

Mr. Costello noted that many people think that each case of employment discrimination is so fact intensive that, despite the statute, an employer can always find a way to get around the statute. He noted, however, that the case law has made it clear that s. 111.335, Stats., is not based on the subjective view of the employer's own thoughts, but is an objective standard (what would a reasonable person think and decide). He said that one thing the Legislature could do in this area is to better define the term "substantially related" for purposes of this statute since so many employers struggle with this concept.

Mr. Costello explained that if WCCA did not exist, employers would still check prospective employees out quite thoroughly. He noted that 70% of employers have less than 50 employees and that they would still go through that process because of the importance of a good background check to their businesses. Ms. Sullivan noted that if a third party is used to do the background checks, the employer would be covered by the Fair Credit Reporting Act and would have to give notice to the employee that such a check was done and a copy of the report. She noted that employers who use WCCA do not have to give notice or provide any information to the prospective employee on the use of WCCA. She explained that this is a barrier to making a claim by the prospective employee who is rejected because he or she has no notice that WCCA was used.

Judge Kinney referred to a situation in which a 17-year old was convicted of shoplifting and then three years later tried to get a job at a paper mill, questioning whether the current law should still apply in those circumstances, disqualifying this young individual from getting employed. He asked whether the "substantially related" standard is used at the time of the hiring decision by employers or whether it is used later to cover their original misuse of WCCA. Mr. Costello stated that the standard is used at the time of the hiring. Judge Kinney stated that the committee should make sure that an expunged record cannot be considered a conviction record under s. 111.335, Stats.

Mr. Lueders referred Mr. Costello to provisions in 2009 Assembly Bill 663, which would require that notice be given to the prospective employee or renter that WCCA or other data bases were used in the employment or rental decision (i.e., as a basis for denial of the employment or housing decision). He asked if Mr. Costello would have any problems with including such provisions in current law. Mr. Costello responded that, in many cases, notice already exists with the Fair Credit Reporting Act, and that there are many cases in which the disqualifying circumstances are found out "after the fact."

Ms. Silva asked whether employers tend to disregard arrests and convictions appearing on WCCA after a certain period of time. Mr. Costello responded that this does occur, usually in the five- to 10-year period after the arrest or conviction. He added that employers do not use acquittals or dismissals. He noted that pending an employee's arrest on a charge, an employer is only permitted by law to suspend the employee. He said many employers will suspend the employer, wait for the arrest, then do an investigation, and after a conviction, make a final employment decision.

Ms. Sullivan requested further information on whether expunged records are conviction records for purposes of WCCA, saying she vaguely recalls some legal commentary and statements in some court decisions addressing the issue. Mr. Costello said that expunctions are not conviction records for purposes of s. 111.335, Stats.

Mr. Costello concluded that he saw no need for additional changes in the WCCA law and that the current system is working quite well.

Ken Barbeau, Director of Community Programs and Services, Housing Authority, City of Milwaukee (HCAM)

Mr. Barbeau commented on the importance of WCCA to HCAM. A copy of his full statement, and the Power Point used by Mr. Barbeau, can be found at the Legislative Council website.

Mr. Barbeau noted that HCAM supported expunging "not guilty" verdicts from WCCA, but did not support expunction where a case is dismissed. He stated that the reasons for HCAM's opposition were set forth in detail in the statement. Ms. Silva asked if HCAM did not have a record of an arrest or prosecution to use as part of its decision-making in renting, what did HCAM use? He responded that the HCAM public safety may, for example, observe a renter using drugs on the property, and, if after a hearing prove this to be correct, the renter will be forced to leave. He noted that the hearing process is several layers, including, the Milwaukee city attorney's office. He said that acquittal or dismissal after these proceedings could be used to make the decision, based on, for example, a renter's documented history of disturbances. He added that this is in accordance with federal Housing and Urban Development regulations.

Mr. Lueders asked if HCAM would support the notification provisions from 2009 Assembly Bill 663, referred to above. Mr. Barbeau responded that this would be no problem for HCAM, but might very well be a problem for the smaller renters with whom HCAM works, noting that they would probably be unwilling to do this because they do not now have to provide a notice.

Mr. Scarborough requested information on the following: (1) reduction in crimes on HCAM properties as a result of HCAM's use of WCCA; and (2) information quantifying the number of potential renters who have been denied because of WCCA. Mr. Barbeau agreed to forward that information on to the committee before the next meeting.

In response to questions from committee members, Mr. Barbeau noted that HCAM usually looks at a renter's records such as those found on WCCA going back a period of three to five years and that HCAM has established it's own rules, based on flexibility in decision-making, to provide for this (e.g., HCAM may look further back than five years if the person has an arson charge). Mr. Tobin asked Mr. Barbeau what he thought about expanding the areas of record expunction to convicted persons who successfully complete treatment or diversion programs (e.g., drug or alcohol) where the district attorney signs off that the program is completed. He responded that, as a landlord, he would probably oppose such a change, but that as an individual he might not be opposed to such an expunction program. He added that he would require three years without evidence of criminality as a pre-requisite for use of such a provision.

Lahny Silva, Attorney and Research Assistant, University of Wisconsin Law School

Ms. Silva testified that the Legislature, and the committee, should take an incremental approach to changing the expunction laws and concentrate, for the time being, on expunction relating to cases that are dismissed or where there is an acquittal. A full copy of her statement, which she distributed to the committee, and the PowerPoint presentation, can be found at the Legislative Council website.

Ms. Silva noted from her research in Wisconsin, as well as from her practice, that the consequences of a criminal history of any sort: (1) costs the individual socio-economic opportunities, which may work to deprive him or her of life's basic essentials (food and shelter); and (2) costs the community the exclusion of that individual's skills and labor from the employment pool. She referred to a study in Wisconsin that indicated that a conviction decreases the employment opportunity of an individual by at least 50%, and that when race is added to the analysis, the results are much worse.

Ms. Silva noted that the committee should look at other jurisdictions to see how innovative they are in their use of expunctions, including Illinois (three-year sealing of records provision); Ohio (right to petition for expunction, but the right is not absolute); and Florida (use of expunction, sealing of records, and administrative expunction). She said that she likes an "historical model" for expunction, a model that looks at what has happened to the individual during the preceding three or seven years before something happens relating to expunction. She said that this was a window to show that the individual could act responsibly.

Discussion of Committee Assignment

The Legislative Council staff indicated that it would be preparing a memorandum, for the next committee meeting, setting forth options for possible changes to the WCCA in accordance with the committee's study charge.

Judge Kinney distributed to committee members the results of an informal survey that he and Judge Fleishauer conducted during a Wisconsin Judicial Conference held in October, asking participants at the meeting about what they thought of the State Bar petition to the Supreme Court relating to removing dismissals and acquittals from WCCA. He noted that 85% of the respondents agreed that these cases should not be on WCCA.

Other Business

There was no other business brought before the committee.

Adjournment

The meeting was adjourned at 1:00 p.m.

DLS:ksm