STATE OF WISCONSIN
SUPREME COURT

---

IN THE MATTER OF:

THE PETITION OF THE STATE BAR OF WISCONSIN
TO MODIFY CHAPTER 72 OF
THE SUPREME COURT RULES

---

**PETITION TO MODIFY CHAPTER 72 OF THE WISCONSIN SUPREME COURT RULES**

---

TO: The Honorable Justices of the Supreme Court

On June 26, 2009, the Board of Governors of the State Bar of Wisconsin, acting pursuant to the recommendation of the Criminal Law Section and the Individual Rights and Responsibilities Section, voted unanimously to petition this Court for an order revising Chapter 72 of the Wisconsin Supreme Court Rules. The reasons for this petition and a description of the proposed change are described below.

## I. The Proposed Change

The State Bar of Wisconsin seeks this change in order to codify the inherent authority of Wisconsin courts to manage their own files and determine

when they ought be made public. The proposed change would clarify the language in WIS. SCR § 72.06 to provide clearer direction to circuit court judges. The State Bar of Wisconsin includes judges, prosecutors, criminal defense attorneys and civil rights attorneys among its members.

WIS. SCR § 72.06 currently provides:

> When required by statute **or court order** to expunge a court record, the clerk of the court shall do all of the following:
> (1) Remove any paper index and nonfinancial court record and place them in the case file.
> (2) Electronically remove any automated nonfinancial record, except the case number.
> (3) Seal the entire case file.
> (4) Destroy expunged court records in accordance with the provisions of this chapter.

(Emphasis supplied.)

It is proposed that Chapter 72 of the Supreme Court Rules be modified to create WIS. SCR § 72.015, which would read as follows:

> 72.015. The time periods for retention of files referred to in rule SCR 72.01 concerning felony, misdemeanor, forfeiture and ordinance files apply to the type of case at the time of the final disposition of the case, rather than the type of case when the file was opened.

Further, it is proposed that WIS. SCR § 72.06 be edited to include as WIS. SCR § 72.06(1) the following language:

> 72.06(1). Expunction. A court may order a court record expunged under any of the following circumstances:

(a) When authorized or required to do so by statute.

(b) On the motion of any party to a case at or after the expiration of the minimum retention period as found under §72.01 for the type of case represented by the final disposition of the matter.

(c) Upon dismissal of the case, or in the event of a judgment of acquittal, if a court believes expunction is necessary and appropriate:

(1) In the interest of justice; and

(2) The court finds, either at the time of the dismissal of the case or within a reasonable period of time thereafter, that a party to the case would benefit and society would not be harmed by expunction, either at the time of the dismissal of the case or within a reasonable period of time thereafter.

Additionally, it is proposed that WIS. SCR § 72.06 be amended to include WIS. SCR § 72.06(2) reading as follows:

72.06(2). When expunging a court record, the Clerk of Court shall do all the following:

(a) Remove any paper index and non-financial court record and place them in the case file.

(b) Electronically remove any automated non-financial record, except the case number.

(c) Seal the entire case file.

(d) Destroy expunged court records in accordance with the provisions of this chapter.

(e) Notify the Department of Justice of the expunction of the court record pursuant to Wis. Stats., §165.83(2)(A).

## II. Summary

The Wisconsin Statutes prohibit discrimination based upon "arrest record" or "conviction record" in employment or licensing (WIS. STAT. § 111.321) with some exceptions (*see* WIS. STAT. § 111.335). The "arrest record" protection includes individuals who were arrested for a crime though the charges were later dismissed, or those who were acquitted of the charged offense.

Individuals, under 21 years of age, may have misdemeanor convictions expunged. WIS. STAT. § 973.015. Also, an individual who was adjudicated delinquent may petition the judge for expunction of the juvenile record, once the age of 17 is reached. WIS. STAT. § 938.355.

Fingerprint records maintained by the Wisconsin Department of Justice may be expunged for individuals arrested "and subsequently released without charge, or cleared of the offense through court proceedings[.]" WIS. STAT. § 165.84.

There is no statutory authority for expungement of a court record for an individual for whom criminal charges were dismissed or an acquittal was reached. However, as described further, a trial court has the inherent authority to

expunge a record maintained by the Clerk of Courts (as well as the record

maintained on CCAP) for any case, including those who were not convicted of a crime. This is consistent with WIS. CONST., Art. I, § 9, stating:

> Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought obtain justice freely, and without being obligated to purchase it, completely and without denial, promptly and without delay, conformably with the laws.

As described in detail below, the proposed change will codify this authority in the Supreme Court Rules to provide clear guidance to lower courts as to the scope of their authority to expunge court records. It will clearly advise trial level court judges, defense lawyers and prosecutors, that authority exists to expunge court records for individuals for whom charges were dismissed or not proven.

## III. Legal Authority

### *A. The Authority of Expunction Resides In the Inherent Authority of the Circuit Court.*

A circuit court possess the inherent authority to limit access to records in the interest of justice. *State ex rel. Bilder ex rel. v. Township of Delevan*, 112 Wis. 2d

539, 556-57, 334 N.W.2d 252 (1983). The inherent powers of a court include all of those powers which are "essential to the expedition and proper conducting of judicial business." *In re Janitor of the Supreme Court*, 35 Wis. 410, 419 (1874). This Court stated that:

> The authorities, in so far as any can be found on the subject, are to the effect that a constitutional court of general jurisdiction has inherent power to protect itself against any action that would unreasonably curtail its powers or materially impair its efficiency. A county board has no power to even attempt to impede the functions of such a court, and no such power could be conferred upon it.

*In re Court Room,* 148 Wis. 109, 121, 134 N.W. 490 (1912).

In *Latham v. Casey & King Corp.,* 23 Wis. 2d 311, 314, 127 N.W.2d 225 (1964)(internal citations omitted), this Court stated:

> The general control of the judicial business before [the court] is essential to the court if it is to function. Every court has inherent power, exercisable in its sound discretion, consistent within the Constitution and statutes, to control disposition of causes on its docket with economy of time and effort.

In addition to the powers expressly granted to the courts in the Constitution, courts have "inherent, implied and incidental powers. These terms 'are used to describe those powers which must necessarily be used' to enable the

judiciary to accomplish its constitutionally or legislatively mandated functions." *Friedrich v. Dane County Cir. Ct.,* 192 Wis. 2d 1, 16, 531 N.W.2d 32 (1995)(internal citations omitted). Inherent powers are those that "'have been conceded to courts because they are courts. Such powers have been conceded because without them they could neither maintain their dignity, transact their business, nor accomplish the purposes of their existence.'" *Jacobson v. Avestruz,* 81 Wis. 2d 240, 245, 260 N.W.2d 267 (1977) (quoting *State v. Cannon,* 196 Wis. 534, 536-37, 221 N.W. 603 (1928)).

There are generally three areas in which a court may exercise its inherent authority: (1) with regard to the internal operation of the court, (2) to regulate members of the bench and bar and, lastly, (3) to ensure that the court functions efficiently and effectively provides for the fair administration of justice. *See Davis v. City of Sun Prairie*, 226 Wis. 2d 738, 749, 595 N.W.2d 635 (1999); *Flynn v. Department of Administration*, 216 Wis. 2d 521, 550-51, 576 N.W.2d 245 (1999).

This Court, in a series of cases, has strongly suggested that courts have the inherent authority to order expunction in appropriate situations. WIS. SCR 72 was amended in 1997 by adding § 72.06, which specifically describes the steps clerks of court are to follow in expunging court records. The amendment was in response to *State v. Anderson*, 160 Wis. 2d 435, 466 N.W.2d 681 (Ct. App. 1991),

which in holding that evidence of an expunged conviction was not material to an attack on a witness's credibility also held that sealing the record was insufficient method of expungement. Instead, the Court adopted an attorney general's opinion requiring actual destruction when expungement applied. *Id.*, 160 Wis. 2d at 441-42. As a result of the addition of WIS. SCR § 72.06, court records expunged either pursuant to statute or court order are sealed and kept in the offices of clerks of court.

In *State v. Leitner*, 253 Wis. 2d 449, 472 - 473, 646 N.W.2d 341, 352 - 353 (2002), this Court held that expungement applies only to court records and not to records of agencies other than the courts. Thus, in considering whether courts have the inherent authority to order expungement, it is now clear that expungement applies only to the records of the courts themselves and does not result in the destruction of any records and requires locating the actual expunged records in the offices of the clerks of courts.

The Wisconsin Supreme Court extensively discussed the inherent authority of the circuit courts in *In the Interest E.C.*, 130 Wis. 2d 376, 387 N.W.2d 72 (1986). The issue in *E.C.* was whether courts had inherent or equitable authority to order expungement of juvenile *police* records when a juvenile delinquency petition was eventually dismissed. *Id.*, 130 Wis. 2d at 379. The

court held that circuit courts do not have the inherent authority to order expungement of *police* records, in large part because the records are under statutory control and under the authority of the chief of police.

> [W]e conclude that authority to expunge juvenile police records, which are under statutory control and under the authority of City of Milwaukee Police Chief is not essential to the existence to the orderly function of a circuit court nor is it necessary to maintain the circuit court's dignity, transact its business or accomplish the purpose of its existence.

*Id.*, 130 Wis. 2d at 387-88.

In contrast, the principles underlying the separation of powers require that courts, as a co-equal branch of government, have the power to control its own records, especially when that control does not impinge on the authority of non-judicial agencies or on the ability of non-judicial agencies to perform their duties and responsibilities.

B. *The Application of Wisconsin Open Records Law to The Supreme Court Rules.*

According to Wisconsin law, if there is a "general open records request under § 19.35(1)(a), the record custodian, keeping in mind the strong legislative presumption favoring disclosure, must determine whether the requested records are subject to an exception that may or will prevent disclosure. [...] Two general

types of exceptions may apply: statutory exceptions and common law exception." *Hemple v. City of Baraboo*, 284 Wis. 2d 162, 179 - 80, 699 N.W.2d 551, 560 (2005). "If neither a statute nor common law creates a blanket exception, the custodian must decide whether the strong presumption favoring access and disclosure is overcome by some even stronger public policy favoring limited access or non- disclosure." *Id*. at 180.

While under the common law there is a general right to inspect public records, this right is not absolute. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-599 (1978); *Youmans v. Owens*, 28 Wis. 2d 672, 681, 137 N.W.2d 470, 474 (1965). There are numerous limitations upon the right of the public to examine certain types of public records. *Youmans*, 28 Wis. 2d at 680. When the record custodian is the clerk of court, "[e]very court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes." *Nixon*, 425 U.S. at 597.

In Wisconsin, all cases that address a right to access agree that the decision as to access is one best left to the sound discretion of the circuit court; a discretion to be exercised in light of the relevant facts and circumstances of a particular case. *Id*. at 597-599 citing, *Youmans v. Owens*, 28 Wis. 2d 672, 682, 137 N.W.2d 470, 474-475 (1965), *modified on other grounds*, 28 Wis. 2d 685, 139 N.W.2d 241

(1966).

In determining whether the presumption of openness is overcome by another public policy concern, a balancing test is applied, *i.e.*, "weighing the public policies not in favor of release against a strong public policy that public records should be open for review." *Linzmeyer v. Forcey*, 254 Wis. 2d 306, 317, 646 N.W.2d 811, 814 (2002). This Court has consistently recognized there is a strong public interest in protecting the reputation and privacy of citizens that favors non-release. *Linzmeyer*, 254 Wis. 2d at 327-28; *Woznicki v. Erickson*, 202 Wis. 2d 178, 187, 549 N.W.2d 699, 703 (1996). While the Wisconsin Supreme Court has concluded that, although a person whose reputation is injured by the release of an arrest record has no cause of action for invasion of privacy, "this fact does not *ipso facto* demonstrate that it is in the public interest to release such records." *Newspapers Inc. v. Breier*, 89 Wis. 2d 417, 432, 279 N.W.2d 179, 186 (1979).

## IV. Addressing the Harm of Improper Use of Court Records By Clarifying the Court's Inherent Authority.

As this Court is aware, CCAP can be reviewed by anyone with internet access and the information contained on the website is regularly misused. CCAP publishes the original criminal case information regardless of the outcome of the case. Court records may also be open to public inspection at each county

courthouse. To allow continued access to such easily misunderstood information, especially in cases in which the case was dismissed or there was a judgment of acquittal, poses the risk that such a record could be "a vehicle for improper purposes," whether intentional or not. *Nixon*, 435 U.S. at 597.

An individual who is charged with a crime, even if charges are later dismissed faces the negative credential of a court record which shows the initial charge. Likewise, a court record remains for an individual charged with a crime who was acquitted at trial. In either instance, the negative credential remains and can be easily misunderstood or misused by landlords, license providers and employers. Princeton University sociology professor Devah Pager has summarized research on the "experimental approach to the study of criminal stigma" and found:

> The most notable in this line of research is a classic study by Richard Schwartz and Jerome Skolnick in which the researchers prepared four sets of résumés to be presented to prospective employers for an unskilled hotel job. The four conditions included: (1) an applicant who had been convicted and sentenced for assault; (2) an applicant who had been tried for assault but acquitted; (3) an applicant who had been tried for assault, acquitted, *and* had a letter from the judge certifying the applicant's acquittal and emphasizing the presumption of innocence; and (4) an applicant who had no criminal record. Employers' interest in candidates declined as a function of the severity of the criminal record, though in all three criminal conditions - even with a letter from the judge "certifying the finding of not guilty and reaffirming the legal presumption of innocence" - applicants were less likely to be considered by employers than the non-criminal control. **The findings of this study suggest that**

> ***mere contact*** **with the criminal justice system can have significant repercussions, with records of "arrest," "conviction," and "incarceration" conveying a stigma differing in degree but not kind.** Several later studies, both in the United States and in other countries, have extended Schwartz and Skolnick's design. Each of these studies reports a similar finding that, all else being equal, contact with the criminal justice system leads to worse employment opportunities.

DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN A ERA OF MASS INCARCERATION, 49 - 50 (The University of Chicago Press, 2007)(emphasis supplied).

Professor Pager goes on to note that:

> Currently, even those states prohibiting discrimination on the basis of criminal background [including Wisconsin] continue to allow employers full access to information about criminal backgrounds [as Wisconsin does, generally], despite the fact that in most cases they are not supposed to use it. This policy is somewhat incongruous, especially given that other protected categories place corresponding restrictions on access to "incriminating" information: employers are not permitted to ask the age of applicants, nor their marital status; and information about the race of applicants, while often collected for EEOC reporting requirements, is always optional.

*Id.* at 154.

This petition seeks to codify the inherent authority of the courts to control their own records, and provide a methodology for the use of such discretion, through a change to the Supreme Court Rules.

## V. Conclusion.

The State Bar of Wisconsin seeks the proposed changes in order to clarify

the authority of the trial court to exercise its "supervisory power over its own records and files" (*Nixon*, 425 U.S. at 597) in the manner described in the

proposed revised WIS. SCR § 72.06. We therefore urge the Supreme Court of Wisconsin to adopt this Petition.

Respectfully submitted, June 30, 2009.

*On Behalf of the State Bar of Wisconsin*

_____

Atty. Diane S. Diel

President, State Bar of Wisconsin

F:\ERG\State Bar IRR\SCR 72 petition BOG.wpd