WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
OCTOBER 2018

PLEASE NOTE: Cases scheduled for oral argument on Oct. 12, 2018 will be heard at the Monroe County Justice Center, 112 S. Court Street, Sparta. The other cases listed below will be heard in the Wisconsin Supreme Court Hearing Room, 231 East, State Capitol. This calendar includes cases that originated in the following counties:

Brown
Dane
Jefferson
Milwaukee
Ozaukee

WEDNESDAY, OCTOBER 10, 2018 (MADISON)

9:45 a.m.	18AP291-W	CityDeck Landing LLC v. Circuit Court for Brown County
10:45 a.m.	16AP601	Midwest Neurosciences Associates v. Great Lakes Neurosurgical Associates
1:30 p.m.	16AP2259	Stuart White v. City of Watertown

FRIDAY, OCTOBER 12, 2018 (SPARTA)

9:45 a.m.	17AP1261-CR	State v. Justin A. Braunschweig
10:45 a.m.	18AP203-W	Ezequiel Lopez-Quintero v. Michael A. Dittmann
1:30 p.m.	17AP631	Christopher Kieninger v. Crown Equipment Corporation

MONDAY, OCTOBER 29, 2018 (MADISON)

9:45 a.m.	18AP644-BA	Daniel R. Hausserman v. BBE
10:45 a.m.	16AP1631	Steadfast Insurance Company v. Greenwich Insurance Company
1:30 p.m.	16AP2514-D	Office of Lawyer Regulation v. Robert Zapf

In addition to the cases listed above, the following case is assigned for decision by the court on the last date of oral argument based upon the submission of briefs without oral argument:

16AP2148-D Office of Lawyer Regulation v. Jason C. Gonzalez

Note: The Supreme Court calendar may change between the time you receive these synopses and when the cases are heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at (608) 266-1880. If your news organization is interested in providing any camera coverage of Supreme Court argument in Madison, contact media coordinator Hannah McClung at WISC-TV, (608) 271-4321. Synopses provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT
OCTOBER 10, 2018
9:45 a.m.

2018AP291-W State ex rel. CityDeck Landing LLC v. Circuit Court for Brown County

This is a consideration of a petition asking the Supreme Court to issue a supervisory writ that would enjoin the order of the Brown County Circuit Court (Judge Thomas J. Walsh, presiding) which stayed a private arbitration proceeding regarding a construction project.

CityDeck Landing LLC (CityDeck) invokes the Supreme Court's original supervisory jurisdiction over actions of lower courts. It asks the court to determine that the circuit court exceeded its authority by issuing an order that purported to stay a private arbitration proceeding while the circuit court considered a separate, but related civil action regarding an insurance company's duty to defend two parties to the arbitration proceeding.

CityDeck contracted with Smet Construction Services Corp. (Smet) to serve as the general contractor for the construction of a 76-unit apartment building in downtown Green Bay. Smet hired numerous subcontractors to perform various parts of the work.

Disputes arose between CityDeck and Smet regarding Smet's performance of its contractual duties. Pursuant to their contract, CityDeck commenced an arbitration proceeding against Smet under the auspices of the American Arbitration Association (AAA). CityDeck made a number of claims, including that there were defects in the building. As a result of CityDeck's claims, Smet sought to bring certain subcontractors into the arbitration proceeding and to assert third-party claims against them. Three subcontractors agreed to join the arbitration and defend Smet's claims in that forum. The parties conducted extensive discovery in the arbitration and were scheduled to proceed to an evidentiary hearing in March 2018.

One of the alleged defects in the building involved the siding installation, which had been performed by GB Builders, LLC (GB Builders). Accordingly, Smet asserted that GB Builders was obligated to defend and indemnify it against CityDeck's claim regarding the siding. GB Builders tendered Smet's claim against it to its insurer, Society Insurance Co. (Society). In addition, Smet also tendered to Society the defense of CityDeck's claim against it regarding the siding on the theory that Smet was an additional insured under Society's policy to GB Builders. Both GB Builders and Society refused to join the arbitration proceeding.

On October 5, 2017, Society filed a declaratory judgment action in the Brown County circuit court, seeking a declaration of its defense and indemnity obligations. It named GB Builders, CityDeck and Smet as defendants (not the other parties to the arbitration or the arbitrator).

In late 2017 Society filed a motion with the circuit court seeking an order that would stay the arbitration until its defense obligations to GB Builders and Smet were resolved. The circuit court granted the motion on January 2, 2018, essentially on the basis that the Supreme Court had approved procedures in other situations where insurance defense/coverage issues are decided before the merits of a dispute are resolved.

After the Court of Appeals denied CityDeck's attempt to obtain relief in that court, CityDeck filed a petition for a supervisory writ in the Supreme Court. It asserts that a court can act only within the scope of the powers conferred upon it by the constitution and statutes and can exercise those powers only when they are properly invoked. It argues that the circuit court's

order staying the arbitration exceeded the court's jurisdiction and is void because the private arbitration proceeding is a "foreign" tribunal over which a Wisconsin circuit court has no jurisdiction or authority.

The following issue is presented for consideration by the Supreme Court in the context this writ proceeding: Does a circuit court exceed its jurisdiction by staying a separate arbitration proceeding involving a different dispute than the one before it, and where some of the parties to the arbitration—along with the arbitrator—are not parties in the circuit court action and have not been duly subjected to the circuit court's jurisdiction?

WISCONSIN SUPREME COURT
OCTOBER 10, 2018
10:45 a.m.

2016AP601 Midwest Neurosciences Associates v. Great Lakes Neurosurgical Associates

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha). The Court of Appeals reversed an Ozaukee County Circuit Court (Judge Paul V. Malloy, presiding) order that denied a motion by Great Lakes Neurosurgical Associates, LLC and its president, Dr. Yashdip Pannu, to stay this action and compel arbitration.

This case examines who should decide, a court or an arbitrator, whether a contract's arbitration clause is enforceable when a subsequent contract, which itself may or may not be enforceable, may negate and supersede that clause.

A group of medical practitioners established Midwest Neurosciences Associates, LLC. Great Lakes was one of its members. Midwest's operating agreement contained a noncompete provision and a clause requiring that all disputes be resolved through arbitration. Midwest later sued Great Lakes, alleging that Dr. Pannu had violated the noncompete provision. In its complaint, Midwest asked the circuit court to compel Great Lakes to submit to binding arbitration pursuant to the operating agreement. In response, Great Lakes claimed that Dr. Pannu had entered into a subsequent agreement with Midwest that: (1) superseded the noncompete provision in the operating agreement; and (2) contained no arbitration clause, so that the parties' dispute should be heard in the circuit court. The parties dispute whether the subsequent agreement was a valid contract.

The following issues are presented for review:

1. The Court of Appeals has created a conflict in the law of Wisconsin by requiring the trial court to compel a party to arbitration who has never agreed to arbitrate simply because a co-defendant is purportedly required to have an arbitrator determine arbitrability of an issue unique to it.
2. The Court of Appeals' decision in Mortimore v. Merge Technologies Inc., 2012 WI App 109, 344 Wis. 2d 459, 824 N.W.2d 155, was wrongly decided and is creating confusion in the judiciary's role in deciding motions to compel arbitration.
3. The Court of Appeals' decision here and its application of its decision in Mortimore creates a conflict with this Court's decision in Town Bank v. City Real Estate Development, LLC, 2010 WI 134, 330 Wis. 2d 340, 793 N.W.2d 476, regarding the application of merger clauses.
4. Can a contract containing a merger clause and which does not contain an arbitration clause effectively change the forum of dispute resolution when a prior, now inapplicable, agreement between the parties contained an arbitration clause?

WISCONSIN SUPREME COURT
OCTOBER 10, 2018
1:30 p.m.

2016AP2259 Stuart White v. City of Watertown

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), that affirmed a Jefferson County Circuit Court order (Judge Jennifer L. Weston, presiding).

This appeal involves whether cities and villages have the same duties to administer and enforce Chapter 90 of the Wisconsin Statutes, which regulates partition fences on farming and grazing land, as if the land were in a town.

Dr. Stuart White and Janet White own land in the City of Watertown that they use as a farm, including raising livestock. Chapter 90 requires them to maintain a partition fence between their land and neighboring residential properties. The cost and maintenance of the fence resulted in a dispute between the Whites and their neighbors. The Whites filed an action in which they asked the City to assume duties set out in Chapter 90 to resolve the dispute. The City refused.

The City sought dismissal of the Whites' complaint, arguing that Chapter 90 applies only to towns and not to cities. The circuit court disagreed, concluding that Chapter 90 is ambiguous and is most reasonably read as applying to cities as well as towns. The Court of Appeals affirmed.

The City is asking the Supreme Court to reverse the Court of Appeals' decision.

The following issues are presented for review:

1. Does the entirety of Chapter 90, the "Fences" Chapter, apply to cities and villages when the remedial and enforcement provisions of Chapter 90 do not specifically identify any application to cities and villages?
2. Is chapter 90 ambiguous because cities and villages are not identified as remedial or enforcement entities within the statute?
3. Did the state legislature intentionally omit statutory language contained within an 1875 Act when it drafted the 1878 Revised Statues?

WISCONSIN SUPREME COURT
OCTOBER 12, 2018
9:45 a.m.
(ARGUMENT HELD IN SPARTA, WI)

2017AP1261-CR State v. Justin A. Braunschweig

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), that affirmed a Jefferson County Circuit Court (Judge Randy R. Koschnick, presiding) judgment of conviction for second offense operating while intoxicated.

In September 2016, Justin A. Braunschweig was arrested in Lake Mills, Wisconsin, for operating while intoxicated (OWI) and for having a prohibited alcohol concentration (PAC). He was charged with OWI and PAC as a second offense, due to a 2011 OWI while causing injury offense that showed up on his Department of Transportation (DOT) driving record.

The State relied on the DOT's record to bring the charges; Braunschweig asked the circuit court to rule that the DOT's record was insufficient to serve as justification for the charges because the 2011 conviction had been expunged. The circuit court allowed the State to use the DOT's record to prove the existence of the prior OWI conviction, and Braunschweig was convicted of second offense OWI and PAC. He was ordered to pay a fine and serve 30 days in jail. The Court of Appeals affirmed the circuit court's judgment.

The issue on appeal centers on statutory interpretation of "convictions" under Wis. Stat. § 340.01(9r) and whether "convictions" include prior offenses that have been expunged from the court record.

The following issue is presented for review: Whether an expunged prior conviction can be used to support a conviction for operating under the influence as a second offense?

WISCONSIN SUPREME COURT
OCTOBER 12, 2018
10:45 a.m.
(ARGUMENT HELD IN SPARTA, WI)

2018AP203-W Ezequiel Lopez-Quintero v. Michael A. Dittman

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), that denied a petition for a writ of habeas corpus filed by Ezequiel Lopez-Quintero.

This case addresses whether a court may dismiss a petition for a writ of habeas corpus because the court determines that the petition, on its face, does not demonstrate that it was filed in a timely manner or whether the State, in response to such a petition, must allege that it is barred by laches, which is an equitable doctrine requiring proof of both unreasonable delay by the petitioner and prejudice to the State.

In a 2007 criminal case, the State charged Lopez-Quintero with one count of first-degree intentional homicide with a dangerous weapon. Lopez-Quintero retained two Illinois-based attorneys, Frederick Cohn and Christopher Cohen. Attorney Cohen was a member of the Wisconsin bar, and Attorney Cohn appeared pro hac vice.

Following a six-day trial in March 2008, a jury found Lopez-Quintero guilty. The circuit court subsequently sentenced him to life in prison without the possibility of parole. At the conclusion of the sentencing hearing, Attorney Cohn asked for and received clarification that although the defense had already filed a motion for a new trial, it still needed to file a Notice of Intent to Seek Postconviction Relief within 20 days. Attorney Cohn assured the court that the Notice of Intent would be filed. Neither attorney, however, ever filed the Notice of Intent or sought an extension of time to do so. Consequently, although the circuit court heard (and denied) Lopez-Quintero's motion for a new trial, he never had a direct appeal.

No further filings were made on Lopez-Quintero's behalf until early 2018, when new counsel filed a habeas petition in the Court of Appeals alleging that Lopez-Quintero's attorneys had been ineffective for failing to file a Notice of Intent or to seek an extension to do so. Lopez-Quintero alleged that he had relied entirely upon his previous attorneys and that, due to his lack of fluency in English, his limited education, and his unfamiliarity with the criminal justice system, he did not know the ramifications of the attorneys' failure to file the Notice of Intent to pursue an appeal. He asked the Court of Appeals to reinstate his direct appeal rights.

Citing State ex rel. Smalley v. Morgan, 211 Wis. 2d 795, 565 N.W.2d 805 (Ct. App. 1997), abrogated on other grounds by State ex rel. Coleman v. McCaugtry, 2006 WI 49, 290 Wis. 2d 352, 714 N.W.2d 900, the Court of Appeals denied Lopez-Quintero's habeas petition on the ground that "it comes too late." The Court of Appeals stated that Lopez-Quintero's asserted limitations could account for some of the more than nine years of delay, but they could not account for all of that delay. Thus, the petition was not timely.

Lopez-Quintero argues to the Supreme Court that the Court of Appeals' decisions in Smalley and in his case create an "irrebuttable presumption" of prejudice that improperly relieves the State of its burden to prove the prejudice element of the laches doctrine.

The following issue is presented for review: Can the Court of Appeals apply an irrebuttable presumption of prejudice and deny *ex parte* a sufficiently pled petition for writ of habeas corpus solely for untimeliness, under Wis. Stat. § 809.51(2)?

WISCONSIN SUPREME COURT
OCTOBER 12, 2018
1:30 p.m.
(ARGUMENT HELD IN SPARTA, WI)

2017AP631 Christopher Kieninger v. Crown Equipment Corporation

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), that reversed the order of summary judgment in favor of Crown Equipment Corporation entered by Dane County Circuit Court (Judge Ellen K. Berz, presiding).

This appeal involves whether Wisconsin courts must consider the federal Employee Commuting Flexibility Act (ECFA) when deciding whether Wisconsin employees who voluntarily elect to commute using their employer's vehicle are entitled to be compensated for their commuting time.

Christopher Kieninger and Dewayne Meek formerly worked for Crown Equipment as field service technicians who performed maintenance and repairs on forklifts at various job sites. They are representatives of a class of employees who currently work or have worked for Crown. In order to perform their duties, similarly situated Crown employees require tools and other supplies transported in company provided vans.

Crown says its employees are free to choose whether to commute in company vans or in their own personal vehicles. Crown employees have two options: (1) they may drive the company vans between their homes and their first and last job site each day, or (2) they may drive their personal vehicles to a Crown branch location to pick up a company van at the beginning of each day. All employees sign forms acknowledging they have these options.

Since 2013, Crown employees who drive company vans between their homes and their first and last job sites are generally not compensated for the travel time between their homes and the first 45 minutes of travel time to their first job site or for any travel time between their last job site and their homes. By contrast, employees who drive their own personal vehicles between their homes and a Crown branch location are compensated for travel time between the branch location and their first and last job sites.

The employees alleged that they drove company provided vans between their homes and their first and last job sites and that Crown's failure to compensate them for this travel time violated Wisconsin's wage law. They did not make any federal law wage claims. Crown denied any violation and alleged that such time was not compensable.

The employees and Crown both moved for summary judgment. The main dispute in circuit court was whether the legal standard from the federal ECFA applies in a Wisconsin wage law claim. Under the ECFA, which was adopted by Congress in 1996, the employees would not be entitled to compensation for their commuting time. The circuit court concluded the ECFA does apply and granted summary judgment in favor of Crown. The Court of Appeals reversed, concluding that the ECFA does not apply to Wisconsin wage law claims.

The following issues are presented for review:

1. Must Wisconsin courts consider the ECFA in the analysis of Wisconsin wage and hour law claims, specifically as it relates to the compensability of commuting time for employees who voluntarily elect to commute using their employer's vehicle?

2. If the application of ECFA is not mandatory, may Wisconsin courts nevertheless consider ECFA in the analysis of Wisconsin wage and hour claims, specifically as it relates to the compensability of commuting time for employees who voluntarily elect to commute using their employer's vehicle?

WISCONSIN SUPREME COURT
OCTOBER 29, 2018
9:45 a.m.

2018AP644-BA Daniel R. Hausserman v. Board of Bar Examiners

The Wisconsin Supreme Court is responsible for supervising the practice of law in the state and ensuring that attorneys admitted to the bar meet the high standards of conduct held by the Court.

Daniel R. Hausserman applied for admission to the Wisconsin bar in November 2015. After Hausserman passed the bar examination in February 2017, the Board of Bar Examiners (BBE) undertook the required character and fitness review, considered Hausserman's file, and issued a letter stating that the BBE intended to deny Hausserman admission to the bar.

Hausserman requested and received a hearing before the BBE in January 2018. On March 7, 2018, the BBE issued its decision and order, denying Hausserman's admission to the Wisconsin bar. The BBE concluded that Hausserman failed to establish good moral character and fitness to practice law in Wisconsin, based upon evidence that Hausserman had failed to disclose a past conviction for harassment in the third degree involving a former girlfriend, as well evidence that he had minimized instances of other unlawful conduct. The BBE found that Hausserman had not established that he possessed the trustworthiness and integrity essential to the practice of law in Wisconsin.

Hausserman appeals the BBE's decision to the Supreme Court. He argues that he has taken responsibility for his past mistakes, stating he served his punishments and sanctions. He suggests that the BBE did not consider the underlying circumstances relevant to his behavior. He argues that what occurred in his past was a brief, unfortunate, emotional episode that is not likely to recur and does not adversely reflect his ability to practice law.

The BBE disagrees, arguing that Hausserman continues to downplay the importance of his past misconduct, and that his lack of candor and failure to disclose certain instances of misconduct is concerning. The BBE believes that Hausserman's conduct is evidence of a repeated and blatant disregard for authority and the rule of law.

The Supreme Court is expected to decide whether to affirm BBE's decision to decline Hausserman's admission to the Wisconsin Bar.

The following issue is presented for review: Did applicant-petitioner, Daniel R. Hausserman, demonstrate that he has the necessary character and fitness for admission to practice law in Wisconsin pursuant to Wisconsin Supreme Court Rule ("SCR") 40.06?

WISCONSIN SUPREME COURT
OCTOBER 29, 2018
10:45 a.m.

2016AP1631 Steadfast Insurance Company v. Greenwich Insurance Company

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), that affirmed a Milwaukee County Circuit Court decision (Judge Glenn H. Yamahiro, presiding) that granted summary judgment in favor of Steadfast Insurance Company.

In June 2008, heavy rain overwhelmed Milwaukee Metropolitan Sewerage District's (MMSD) sewer system and more than 8,000 homeowners reported basement sewage backups. Between February and May 2009, four rain event lawsuits were filed against MMSD. The suits included allegations that MMSD and Veolia Water North America-Central, MMSD's contracted sewerage system operator, were negligent in the inspection, maintenance, repair, and operation of the sewer system and diversion gates prior to and during the rain event. The lawsuits were consolidated into two separate actions. United Water Services, a previous MMSD contracted sewerage system operator, was later named as a defendant in one of the suits.

Since 1998, MMSD has contracted, at separate times, with United Water Services and Veolia Water North America-Central to operate its sewerage system. These contracts obligated each company to fully indemnify MMSD for claims arising out of the operation and maintenance of the system and to obtain insurance to cover its indemnity obligations. In June 2009, MMSD called upon Steadfast Insurance Company (Veolia Water's insurance company) and Greenwich Insurance Company (United Water's insurance company) to fulfill those contractual obligations and assist MMSD in the rain event lawsuits. Steadfast fulfilled the obligation; Greenwich refused, claiming the rain events happened at a time when United Water was not under contract with MMSD.

Over the next two years, MMSD continued to request assistance from Greenwich, citing specific claims in the lawsuits regarding United Water's negligence. Greenwich eventually acknowledged there was a potential for coverage, but stated it was limited based upon the coverage provided by Steadfast. Greenwich did not provide MMSD with any defense during the rain event lawsuits.

The rain event suits settled and Steadfast reimbursed MMSD in the amount of $1.55 million for defense costs. Steadfast then sued Greenwich and another insurance company, seeking to recoup the monies that it had paid to MMSD for the defense costs. Steadfast filed for summary judgment and settled with all parties, except Greenwich.

In November 2015, Steadfast and Greenwich filed a stipulation saying that Steadfast had reasonably and necessarily incurred $1.55 million for MMSD's defense. The parties reserved their rights to argue what portion, if any, of that amount Steadfast should recover from Greenwich. The parties filed additional summary judgment motions. The circuit court granted Steadfast's motion, awarding judgment against Greenwich in the amounts of $1.55 million damages and $325,000 as attorney fees.

Greenwich Insurance Company appealed and the Court of Appeals affirmed, concluding that both Steadfast and Greenwich provided primary coverage to MMSD at different times in the rain event suits and both insurers had a duty to defend MMSD. The Court of Appeals found that Greenwich was equally responsible for MMSD's defense costs and, because Greenwich refused

to take responsibility, found the circuit court's decision that Steadfast's claim for reimbursement of the $1.55 million in defense costs was reasonable, based on the equitable subrogation doctrine.[1] The Court of Appeals also agreed with the circuit court that Steadfast was entitled to attorney's fees.

Greenwich Insurance Company has asked the Supreme Court to review the Court of Appeals' decision because of the increasing importance of pollution liability policies in the insurance market, and because of the importance of the Court of Appeals' application of the equitable subrogation doctrine. Steadfast Insurance Company argues that the Court of Appeals' decision upholds well-established Wisconsin insurance law that holds insurers accountable when they decline to defend an insured.

The following issues are presented for review:

1. When two insurers each owe a duty to defend a mutual insured under claims-made policies, and the policies each provide coverage for the same loss (costs related to the defense of an additional insured in the underlying actions) arising out of a discrete (not long-tail) claim, is the priority of coverage appropriately determined by the other insurance provisions contained in the respective policies?
2. Is a claim advanced by one insurer against another for the payment of defense costs incurred by a mutual insured, and paid by the demanding insurer when both insurers have a duty to defend, considered a claim for contribution or a subrogation claim?
3. When one insurer successfully argues that another insurer had a contemporaneous duty to defend a mutual insured, is the appropriate remedy a recovery of an allocated share of the mutually owed defense costs, or a recovery of all defense costs, regardless of other insurance provisions or the demanding insurer's own independent duty to defend the mutual insured?
4. When one insurer successfully argues that another insurer had a contemporaneous duty to defend a mutual insured, is the demanding insurer entitled to recover attorneys' fees in establishing coverage?

[1] The equitable subrogation doctrine allows for an insurer who fulfills its duty to defend and pays the cost of the defense the right to "equitable subrogation" against an insurer who breaches its duty to defend the insured. Here, when Steadfast reimbursed MMSD for defense costs, it became an equal substitution ("equitable subrogation") for MMSD. Hence, Greenwich paying Steadfast is analogous to Greenwich paying MMSD for defense costs.

WISCONSIN SUPREME COURT
October 29, 2018
1:30 p.m.

2016AP2514-D Office of Lawyer Regulation v. Robert Zapf

The Wisconsin Supreme Court is responsible for supervising the practice of law in the state and protecting the public from misconduct by lawyers.

Attorney Robert Zapf is the former Kenosha County District Attorney. After working as an assistant district attorney from 1974-80, he served as the district attorney from 1981 until 1989. He then engaged in private practice, including as criminal defense counsel, for approximately 15 years. In 2005, he was once again appointed to the position of district attorney and served in that position until his retirement in January 2017.

The facts underlying this attorney disciplinary proceeding arise out of a murder investigation and criminal case in 2014. The Office of Lawyer Regulation (OLR) alleged, and the referee found, that an officer of the Kenosha Police Department (KPD) planted evidence during the execution of a search warrant in April 2014. In late October 2014, the officer contacted a KPD detective and indicated that he may have mishandled evidence, which resulted in the evidence being catalogued as having been found in a particular backpack. The referee inferred that certain KPD supervisors knew that the officer had planted the evidence and subsequently attempted to hide that fact.

In January 2015, members of the KPD contacted District Attorney Zapf about what the officer had said about the incident. The referee inferred that District Attorney Zapf became aware from those contacts that the evidence had been planted, but did not disclose the fact that the evidence had been planted or the fact that the officer had resigned in mid-January 2015 until after one defendant had pled guilty and a second defendant was being tried.

Toward the end of the second defendant's trial, District Attorney Zapf did disclose that certain pieces of evidence had been mishandled and that the officer had resigned. After that disclosure, the defense called the officer as a witness, and he admitted on the stand that he had planted the evidence. The jury nonetheless found the second defendant guilty. Subsequently, after moving to rescind his guilty plea because of the officer's conduct, the first defendant withdrew his motion and allowed his guilty plea to stand.

The referee concluded that District Attorney Zapf had violated his obligation to turn over material exculpatory evidence to the two defendants in violation of Wis. Stat. § 971.23(1)(h), which would constitute a violation of Supreme Court Rule (SCR) 20:8.4(f). The referee also concluded that District Attorney Zapf had made a false statement of fact to the circuit court in violation of SCR 20:3.3(a)(1) when he disclosed the matter to the court during the trial of the second defendant. The referee determined that the OLR had not proven that District Attorney Zapf had falsified evidence or assisted a witness to testify falsely, in violation of SCR 20:3.4(b).

The referee recommended that the Supreme Court suspend Attorney Zapf's license to practice law in this state for a period of one year as discipline for the two violations he found. He also recommended that the court require Attorney Zapf to take 25 credit hours of continuing legal education focusing on the ethical duties of prosecutors and prohibit him from ever again working as a prosecuting attorney.

Attorney Zapf has appealed the referee's report and recommendations. His appellate brief asks the court to address the following issues:

1. Should Respondent/Appellant, former Kenosha County District Attorney Robert Zapf (Zapf), be found to have violated his duty to disclose evidence with the defense pursuant to Wis. Stat. § 981.23(1)(h), as enforced via SCR [20:8.4(f)], where the evidence at issue, a police officer's criminal conduct, placing two items at the scene of a search:
    a. was only partially revealed to Respondent before trial;
    b. involved conduct and items irrelevant to any issue in the case;
    c. was ruled not exculpatory by the trial court; and
    d. with respect to which Zapf nevertheless requested a report from the officers who alerted him and, upon receipt, timely mailed the report he received to defense counsel?

2. Should Zapf, who in calling to the attention of defense counsel and the trial court testimony introduced by the defense that unbeknownst to the witness was inaccurate, be found to have violated SCR 20:3.3(a)(1) where he accurately, if unnecessarily, qualified his statements as not based upon "personal knowledge" or "documentation" in his possession?