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DIRECTOR OF STATE COURTS

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Hon. Randy R. Koschnick
Director of State Courts

August 24, 2022

Ms. Sheila Reiff
Clerk of the Supreme Court
110 East Main Street, Suite 215
Madison, WI 53701

Dear Clerk of the Supreme Court,

I am writing to comment on Rule Petition 22-03 filed by Legal Action, which proposes certain changes to Supreme Court Rule 72.01(8) concerning the retention of eviction records.

Legal Action submits important information about the effects that public records can have on individuals' lives and the opportunities available to them. Eviction records relate directly to housing and while I am sympathetic to the consequences of having past eviction cases available to prospective landlords, I am also interested in giving the public access to accurate court information while prioritizing the business needs of the court. Whether case record retention periods should be changed based on the policy issues surrounding these consequences is undoubtedly a complex decision.

In preparing these comments, members of my staff consulted with the Wisconsin Court Records Management Retention Subcommittee (Retention Subcommittee), chaired by the Hon. Kevin Martens (Milwaukee County). The Retention Subcommittee originally petitioned the Supreme Court in 1986 to create Supreme Court Rule 72 and has been the only entity to petition to modify the rule since it went into effect on May 1, 1987. As the Court decides whether the proposed changes should be made, we would like to share some historical information regarding the retention and display of circuit court records, as well as some administrative and technical considerations regarding how retention periods are implemented and managed by court system staff using the Consolidated Court Automation Programs (CCAP) case management system.

Information Regarding the Retention of Court Records in Courthouses and the Display of Court Records on the Wisconsin Circuit Court Access (WCCA) Website

Legal Action is requesting that small claims cases involving a claim for eviction that does not also contain a judgment for money be retained for only one year. To comprehend the full scope of this request, it is necessary to understand the rules and policies governing the retention of circuit court records by clerks of circuit court, as well as how these records are displayed on the Wisconsin Circuit Court Access (WCCA) website.¹

Records Retention Under Supreme Court Rule 72 and Purging Court Records

Supreme Court Rule (SCR) 72 governs the retention period for circuit court case records. Historically, retention periods have been determined based on the business needs of the court, taking into account the legal and administrative value of the records to the court and other justice system partners. It is important to note the retention periods provided in SCR 72 are only the *minimum* amounts of time clerks shall retain their records.²

When records reach their retention period, they may be “purged” (or deleted) from the CCAP case management system. Purging court records is a manual process completed by court staff that does not happen automatically once a case reaches its retention period. While clerks may purge cases when the record retention period is met, there is no requirement to immediately do so. Many counties report that purging rarely happens on a regular basis and only occurs when their busy staff experience down time. This means many cases are retained long after the retention period expires since many counties must focus staff resources on pending cases.

Until a case record is manually purged by court staff from the CCAP case management system, it may be viewed in the office of the Clerk of Circuit Court in the county courthouse by anyone who is permitted to have access to the record. Therefore, in practical terms, even if the Court adopts the one-year retention period for certain eviction actions proposed by Legal Action, many counties will continue to retain the case records long after the one-year retention period, meaning the public will be able to access these files by going to the courthouse.

Display of Court Records on Wisconsin Circuit Court Access (WCCA) Website

In addition to court records being available at the courthouse, certain case information is also available online on the Wisconsin Circuit Court Access (WCCA) website. Unlike records in the courthouse that must be manually purged from the CCAP case management system by the clerk, when a record reaches its retention period, it is automatically removed from public display on the WCCA website, even if the clerk does not purge the record from the CCAP case management system.

Whether and how long case information should appear online are complex questions that require balancing the interests of several stakeholders. To assist the Director of State Courts in making

¹ <https://wcca.wicourts.gov/>.

² See SCR 72.01.

these complex decisions, the Director's Office has always relied on the recommendations of the WCCA Oversight Committee, a large, multidisciplinary group representing a wide range of organizations and justice system partners.³

In the past, the WCCA website was programmed to have cases remain online consistent with their retention period under SCR 72. However, this policy was amended for certain case types effective in 2018 pursuant to the recommendation in the final report of the WCCA Oversight Committee that was submitted to the Director of State Courts in November 2017.⁴ The Committee spent a significant amount of time discussing the policy considerations surrounding whether certain cases should be removed from WCCA before a case reaches its retention period. The final recommendation of the Committee was that dismissed small claims cases, including eviction actions, should be removed from the WCCA website after two years or less. As Director, I decided to have the cases removed after two years. A significant factor in agreeing to remove all dismissed small claims cases after two years was knowing the records would still be retained and available in the Clerk of Court's Office for their full retention period of 20 years in most cases.⁵

Impact of Proposed Rule Change on Records Retention and Display

If the court adopts Legal Action's proposal, not only will eviction records be removed from the WCCA website after one year consistent with the new retention period⁶, but the clerk would have the authority to also purge the underlying case record after a year, which is a significant departure from current record retention practices. Currently, the existing two-year retention periods found in SCR 72 apply only to *dismissed* divorce cases and small claims cases that were never joined. The only other case files where a judgment has been granted and the retention period is comparatively short are traffic forfeitures, conservation forfeitures, and ordinance violation cases, where the retention period is five years. All other small claims cases and civil cases where a judgment was entered are retained for a minimum of 20 years. Keeping a file for only one year where a judgment of any sort has been granted would be a significant policy

³ The WCCA Oversight Committee was originally formed in 1999, and was subsequently reconvened in 2005 and 2016. Members of the 2016 Committee included Judges, Clerks of Court, District Court Administrators, a representative from the Badger State Sheriffs' Association, a District Attorney, a private attorney, legislators, and representatives from the media, Public Defender's Office, Attorney General's Office, Legal Aid Society of Milwaukee, and the Wisconsin Counties Association. More information about the Committee can be found on the Wisconsin Court System website: <https://www.wicourts.gov/courts/committees/wcca.htm>

⁴ Wisconsin Circuit Court Access Oversight Committee Final Report (Nov 2017): <https://www.wicourts.gov/courts/committees/docs/wccafinalreport2017.pdf>

⁵ The current version of SCR 72.01(8) establishes that the records retention period for dismissed small claims cases is two years only if the issue was not joined and the case was not disposed of within six months from the original return date.

⁶ The WCCA website is programmed to automatically remove cases from public display when the case retention period is met under Supreme Court Rule 72. This automatic removal will occur even if the retention period is shorter than the display period currently designated by the Director of State Courts.

change for the court system and could potentially limit access to necessary court records for parties, as discussed below.

Considerations Regarding the Technical and Administrative Concerns for Court Staff

When discussing Legal Action’s petition with the Retention Subcommittee, the committee members expressed several concerns related to the implementation of the proposed rule as written.

Increased Workload for Clerk Staff and Potential of Error

The Retention Subcommittee members were concerned with ensuring this proposed rule can be implemented accurately and consistently across counties. Clerks use the CCAP case management system to perform all aspects of case processing. The CCAP case management system is primarily driven by a series of codes clerks enter throughout the life of a case. During the pendency of the case, every document received and every event that occurs is reflected in the court record by the clerk entering the appropriate code. When a case is concluded, clerks enter specific disposition codes to close the case. It is critical that clerks enter the proper disposition code so the CCAP case management system can properly identify how long to retain the case.

Currently, SCR 72 contains similar retention periods for similar types of cases, to both encourage consistency in recordkeeping and to limit the number of choices available to court staff with the intent that the correct code will be chosen. These are the reasons why records within each case type generally have the same retention period⁷. Clerks of Court offices are extremely busy places. We have learned over the years that keeping records retention rules straightforward and retaining similar records uniformly has a significant positive impact on cases being retained correctly and consistently in each county. To implement this rule, CCAP would have to program a new series of disposition codes that distinguish eviction cases where a money judgment is entered, where one is not, and when cases are dismissed. Clerks will have to select the appropriate code based on the specific facts of the case. Having multiple options for different ways to dispose a case is onerous on clerk staff, and more subject to human error.

On page 14 of Legal Action’s Supporting Memorandum, it states that they spoke with staff in the Director’s Office who indicated that the programming changes to CCAP would be “minimal.” When my staff reviewed the Supporting Memorandum in early April 2022, they immediately contacted Legal Action to clarify that they never stated programming changes would be “minimal.” Rather, they informed Legal Action that they confirmed with CCAP that, if the proposed rule is adopted, the programming changes would be *feasible*, but certainly not minimal. Given the complexity in distinguishing between multiple types of dispositions in a single case

⁷ See, e.g., SCR 72.01(1) (Civil cases are retained for 20 years); SCR 72.01(18) (misdemeanor cases are retained for 20 years); SCR 72.01(29) (probate cases are retained for 75 years).

type, CCAP estimates it will take approximately six months of programming time to implement these changes. Additionally, the Office of Court Operations estimates it will likely need at least the same amount of time to work with CCAP to develop new codes, draft procedures, educate clerks on the changes, and provide on-going support to court staff as they implement these changes.

Lack of Clarity and Consistency in the Application of the Proposed Rule

Legal Action proposes the record retention period for all eviction cases “in which no judgment for money is entered against any party,” be one year after entry of final judgment for contested cases, stipulated dismissals, and default judgments. The clerks who serve on the Retention Subcommittee expressed concern about being required to properly identify cases “in which no judgment for money is entered against any party.” The clerks noted that many stipulated dismissals include terms for the payment of money between the parties, but where no formal judgment for money is entered. They questioned whether those cases would be retained for one year or 20 years.

If those cases would be retained for one year, the clerks noted the agreement for payment of money between parties is not monitored by the court. Unlike cases where a judgment for money is entered and the CCAP case management system restricts those cases from purging until the money judgment is satisfied, that same programming would not apply to stipulated dismissals. Therefore, if a stipulated dismissal is entered and is not paid within one year, the case record could be purged before the stipulation is satisfied, limiting the ability of the landlord to enforce collection for any remaining amount that may be owed.

The Retention Subcommittee was particularly concerned about the lack of consistency this rule would create for stipulated dismissals in all small claims cases. Stipulated dismissals would be treated differently depending on whether they contain an initial request for an eviction. If a stipulated dismissal was entered in a case that contained claims both for an eviction and for money, the case would only be retained and displayed on the WCCA website for one year. However, if a stipulated dismissal was entered in a non-eviction case that only included a claim for money, it would be retained for 20 years and display for two years. Inconsistencies such as these make records management and CCAP programming more difficult, and lead to greater unpredictability for litigants.

The Supreme Court Amended the Retention Period for Dismissed Small Claims Actions from One to Two Years in 2006

In 2006, the Director of State Courts, working with the Retention Subcommittee, filed Rule Petition 06-01 to request SCR 72.01(8) be amended to increase the retention period for dismissed small claims cases from one to two years. The primary reason for this request was to ensure the records were available for a sufficient amount of time in the event a party moves to reopen the

case under Wis. Stat. §§ 799.225 or 806.07. The Supreme Court unanimously voted to modify SCR 72.01(8) to require dismissed small claims cases be retained for two years instead of one. It is important to note the Court also added language to SCR 72.01(8) clarifying the shorter two-year retention period only applied to cases that were dismissed because the issue was not joined and the case was not disposed of by judgment or stipulation within six months from the return date. The Court still required clerks to retain other dismissed small claims cases for the full 20-year retention period. Adopting Legal Action’s proposal would reverse the Court’s order in 2006 and significantly expand the number of eviction cases with a one-year retention period.

Other Considerations – Wis. Stat. § 758.20(2)

Legal Action’s proposal to amend the retention rule for certain eviction cases would arguably conflict with Wis. Stat. § 758.20(2).⁸ Wisconsin Statute § 758.20(2)(b) requires the Director of State Courts not to remove any dismissed eviction action with no money judgment from the WCCA website sooner than two years. Put another way, the statute requires that dismissed eviction cases with no money judgment must remain on the WCCA website for at least two years. The statute clarifies that these restrictions only apply to cases that are “not closed, confidential, or sealed.”

Legal Action argues its proposed rule change does not conflict with Wis. Stat. § 758.20(2) because the records relevant to the petition are all closed cases in which a judgment has been entered. The challenge with this statute is that the word “closed” has different meanings when pertaining to court records. Courts do use the term “closed” to refer to a case that has been concluded. This is apparently the interpretation that Legal Action relies on. However, there are many instances when both the Legislature and this Court have used the word “closed” to mean a record or a hearing is not open to the public.⁹

Reading Wis. Stat. § 758.20(2)(b) in its entirety, it appears the Legislature is using the term “closed” synonymously with “confidential” and “sealed,” referring not to a case that has been concluded, but rather to a case that is restricted from public viewing. In the context of the statute, reading “closed” to mean the case is concluded does not make logical sense because an open,

⁸ Wis. Stat. § 758.20(2) was created by 2017 WI Act 317 and went into effect on April 18, 2018.

⁹ *See, e.g.*, Wis. Stat. § 19.85(1) (“Any meeting of a governmental body, upon motion duly made and carried, may be convened in closed session under one or more of the exemptions provided in this section. . . .”); Wis. Stat. § 767.853 (“Any hearing, discovery proceeding or trial relating to paternity determination shall be closed to any person other than those necessary to the action or proceeding. Any record of pending proceedings shall be placed in a closed file”); Wis. Stat. § 54.75 (“All court records pertinent to the finding of incompetency are closed but subject to access as provided in s. 51.30 or 55.22 or under an order of a court under this chapter”); *State ex rel. Bilder v. Delavan Twp.*, 112 Wis. 2d 539, 556–57, 334 N.W.2d 252 (1983) (“To overcome the legislatively mandated policy favoring open records and to persuade the circuit court to exercise its inherent authority, the party seeking to close court records bears the burden of demonstrating, with particularity, that the administration of justice requires that the court records be closed.”); SCR 12.02(1)(e) (“All papers, files, transcripts, communications and proceedings pertaining to any petition under this subsection shall be closed and remain confidential until the court has made a finding of medical incapacity.”) (Emphasis added.)

active case would never be removed from the WCCA website while it was pending, unless it was deemed confidential or sealed.

If the Legislature did intend for the required two-year display period to apply to all non-confidential, non-sealed dismissed eviction cases, then adopting Legal Action's one-year retention period means these cases would be removed from the WCCA website sooner than two years, contrary to the directive in Wis. Stat. § 758.20(2).

Conclusion

I appreciate the difficulty that an eviction record can create when an individual is trying to find new housing. That said, in my opinion, the court system should balance the competing interests of a number of different stakeholders when deciding the complex issues of how long to retain records and how long to display them online. In addition to the impact on the tenant, other important considerations should also be factored in to these policy decisions, such as the business needs of the circuit courts, the rights of opposing parties and the general public to have access to the records, and the administrative feasibility of accurately and consistently applying retention rules by court staff across the state.

As explained earlier, as a practical matter, many clerks will likely retain these eviction cases long after the one-year retention period even if the rule is changed, meaning that these records will still be available to the public in the respective county courthouses. However, because the case would automatically be removed from the WCCA website after one year, the administrative effect of this petition is essentially using the Supreme Court rule making process to replace the advisory role of the WCCA Oversight Committee and the discretion of the Director of State Courts to manage how cases are displayed on the WCCA website. Granting this request may encourage other agencies and groups to petition this Court to modify SCR 72 in order to serve their specific interests in modifying WCCA display periods rather than having retention periods determined based on the overall business needs of the court.

For these reasons, I request that the Court consider the administrative effect this change will have on court records and processes as it addresses Legal Action's rule petition.

Sincerely,

A handwritten signature in black ink, appearing to read "Randy R. Koschnick", enclosed within a large, hand-drawn oval.

Randy R. Koschnick
Director of State Courts