

LEGAL ACTION OF WISCONSIN

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November 28, 2023

Clerk of the Supreme Court

Via e-mail to clerk@wicourts.gov and hand-delivered to Clerk's office

RE: Rule Petition 22-03

Dear Honorable Justices,

FILED

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CLERK OF SUPREME COURT
OF WISCONSIN

This letter is filed in response to the Court's [October 30, 2023, request for comments](#) on the following question:

If the court adopts a modified version of the petitioner's proposed SCRs 72.01(8)(a), (9)(a), and (10)(a) that would create a retention period of "2 years after entry of final order or judgment for all eviction cases in which no judgment for money is entered against any party, including contested cases, stipulated dismissals, and default judgments," would the court be required to include an exception for cases governed by Wis. Stat. § 758.20(2)(a) in which a writ of restitution has been granted, in order to avoid a conflict with that statute?

The answer to this question is "no."

At the October 9, 2023, Open Rules Conference, the Court voted 4-3 to adopt a modified version of Rule Petition 22-03 and create a two-year retention period for eviction cases without a money judgment. Legal Action of Wisconsin, Inc. has previously discussed the interactions of Rule Petition 22-03 with Wis. Stat. § 758.20 in our [March 29, 2022, Memorandum](#); our [September 7, 2022, Response to Comments](#); and at the September 7, 2023, Public Hearing. This letter discusses these interactions in more detail and provides Legal Action's preferred methods for the Court to adopt Rule Petition 22-03 as originally proposed – a one-year retention period for eviction cases without a money judgment – without running afoul of Wis. Stat. § 758.20.

1. Adopt Rule Petition 22-03 without any changes to Wis. Stat. § 758.20

Wis. Stat. § 758.20 is directed specifically at the Director of State Courts, not the Wisconsin Supreme Court. It places no limitations on what rules this Court can promulgate. Some background and history of Wis. Stat. § 758.20 are important to understand the language and context of the law. In November of 2017, the Director's office made changes to the WCCA website to remove public access to some dismissed eviction cases after two years. [Wisconsin Circuit Court Access Oversight Committee Final Report](#), November 2017, pages 3-4. This Report was the work of a lengthy process which started in September of 2016, and resulted in these final recommendations.

In December of 2017, [2017 AB 771](#), the bill which ended up creating Wis. Stat. § 758.20 was introduced. In 2018, this bill passed the Legislature as [2017 Act 317](#), and included many other changes to Wisconsin's landlord-tenant laws. The process of drafting the bill which became Wis. Stat. § 758.20 occurred contemporaneously with the WCCA Access Oversight Committee's work in 2017. The Legislative Reference Bureau's drafting files make it clear the main proponent of Wis. Stat. § 758.20 was the main opponent to Rule Petition 22-03: Attorney Heiner Giese, legal counsel and registered lobbyist for the Rental Property Association of Wisconsin (formally the Apartment Association of Southeastern Wisconsin), the Wisconsin Realtors Association, and the Wisconsin Apartment Association. [August 24, 2023, Comments from Attorney Heiner Giese Comment](#), page 1; November 27, 2023, Comments from Attorney Heiner Giese, page 1.

Attorney Giese's original proposal for what became Wis. Stat. § 758.20 would have placed a restriction explicitly on the Wisconsin Supreme Court, and limited this Court's power to promulgate any rules regarding any civil court records, including eviction cases:

Any rule promulgated by the Supreme Court pursuant to SCR chapter 72, or otherwise, pertaining to court records may not provide for expungement or sealing or restriction via electronic access of any civil court record until at least 10 years have expired since final judgment was entered in the case.

See September 28, 2017, e-mail from Attorney Heiner Giese to Christopher Schaefer, Legislative Assistant to Representative Rob Brooks, [Drafting File for 2017 WI Act 317, 17-2582, part 4](#), pages 35-36. This proposal occurred at the same time the WCCA Oversight Panel was finalizing its recommendations to limit the display periods of some eviction records on WCCA. When the Legislative Reference Bureau drafted the section which became Wis. Stat. § 758.20, this language was changed to a restriction on the Director of State Courts, not the Wisconsin Supreme Court. The drafters at the Legislative Reference Bureau explicitly commented they would not adopt Attorney Giese's suggestion to create a restriction on this Court, stating:

I did not add language that prohibits the supreme court from promulgating a rule regarding the retention of court records. **I believe that would be an impermissible intrusion on the powers of the judicial branch** as a separate and coequal branch of government.

[Drafting File for 2017 WI Act 317, 17-2582, part 5](#), page 29 (Emphasis added).

These comments from the Legislative Reference Bureau reflect a clear understanding that the Wisconsin Legislature cannot place restrictions on this Court's ability to promulgate rules under Wis. Const. art. VII, § 3 and Wis. Stat. § 751.12. Such a restriction would be a violation of the separation of powers between the Legislature and this Court and these zones of authority are to be jealously guarded by each branch of government. The co-ordinate branches of the government ... should not abdicate or permit others to infringe upon such

powers as are exclusively committed to them by the Constitution. Each branch's core powers reflect zones of authority constitutionally established for each branch of government upon which any other branch of government is prohibited from intruding. As to these areas of authority, ... any exercise of authority by another branch of government is unconstitutional.

League of Women Voters of Wisconsin v. Evers, 2019 WI 75, ¶ 34, 387 Wis. 2d 511, 536, 929 N.W.2d 209, 221 (Internal citations omitted). One commenter has suggested this Court should defer to the Legislature “to address issues such as those brought forward by the Petitioner.” [November 27, 2023, Comments from Richard Van Der Leest](#), page 3. Attorney Giese suggests this Court and the Legislature have “shared powers,” and therefore both could potentially implement decisions on court records. [November 27, 2023, Comments from Attorney Heiner Giese](#), page 2. If the Court does agree these are “shared powers,” then it can adopt Rule Petition 22-03 as Legal Action has proposed, just as the Court did when it adopted Rule Petition 19-16 pertaining to ghostwriting and changed the language of Wis. Stat. § 802.05(2m). Sup. Ct. Order No. 19-16; [September 7, 2022, Legal Action's Response to Comments](#), page 6. Rule Petition 19-16 dealt with a change to the statutes on signing pleadings, and not a Supreme Court Rule; it therefore could be considered a “shared power.” The comments of Mr. Van Der Leest and Attorney Giese, however, cite no example of the Legislature ever placing any restriction on this Court's ability to promulgate rules.

This Court's ability to promulgate rules is not a “shared power.” Rather, it is a power which the Wisconsin Constitution places solely in the hands of this Court. Attorney Giese suggests Legal Action's arguments “that this Court can choose to overrule any action by the legislature which pertains in some fashion to public records maintained by the court system” are “totally unfounded.” [November 27, 2023, Comments from Attorney Heiner Giese](#), page 2. These comments do not discuss the clear authority Legal Action has repeatedly cited for the court to adopt Rule Petition 22-03: Wis. Const. art. VII, § 3 and Wis. Stat. § 751.12. [March 29, 2022, Memorandum in Support of Rule Petition 22-03](#), page 1; [September 7, 2022, Legal Action's Response to Comments](#), page 6. They also do not discuss the multiple examples Legal Action has cited of this Court doing exactly what Attorney Giese suggests it cannot do: modify SCR 72 and change the records retention period for court cases. Sup. Ct. Orders Nos. 93-08, 93-09, 97-03, 05-03, 06-01, 09-02, 12-05, 20-08; [September 7, 2022, Legal Action's Response to Comments](#), page 7.

The comments of Mr. Van Der Leest and Attorney Giese also do not provide citation to any authority for the Legislature to place any intrusion on this Court's “superintending and administrative authority over all courts” to promulgate rules. Far from being “totally unfounded,” the Wisconsin Constitution gives this Court broad powers – independent from the Legislature – to promulgate rules related to court records. Wis. Const. art. VII, § 3. The

Legislature has also given this Court broad statutory authority under Wis. Stat. § 751.12 to promulgate rules. The Legislature has placed no restriction on this Court’s ability to promulgate rules regarding retention of court records. If it did – as the drafters of Wis. Stat. § 758.20 correctly pointed out – this would be an “impermissible intrusion” on this Court’s powers.

If the Court agrees that Wis. Stat. § 758.20 places **permissible** intrusions on its powers, there should be a recognition the law applies only to “closed” cases. Legal Action interprets this language as meaning cases which have concluded and are “closed” (that is, “not open”) in the Circuit court. [March 29, 2022, Memorandum in Support of Rule Petition 22-03](#), pages 4-5; [September 7, 2022, Legal Action’s Response to Comments](#), pages 3-5. The Interim Director of State Courts has taken the position that the meaning of “closed” in Wis. Stat. § 758.20 is more analogous to “sealed” or “confidential.” [October 30, 2023 Supplemental Comments from the Interim Director of State Courts](#); [August 24, 2022, Comments from the Director of State Courts](#), pages 6-7. This position is contrary to how this Court has previously interpreted the meaning of “closed cases.”

Two of the only other mentions of “closed cases” in the statutes are found in the electronic filing rules at Wis. Stat. §§ 801.18 and 809.801, created by [Sup. Ct. Order No. 14-04](#) and [Sup. Ct. Order No. 20-07](#) respectively. These statutes use the term “closed cases” in the way Legal Action has proposed; not the way in which the Interim Director of State Courts has proposed. One of the only other references to “closed” cases is an oblique reference found in the guardianship statutes at Wis. Stat. § 54.75, which states “court records pertinent to the finding of incompetency are closed.” The guardianship statute does not, however, use the term “closed cases.”

This Court should follow its past interpretation of the definition of “closed cases” to align with Wis. Stat. §§ 801.18 and 809.801. If it does, then there is no conflict between Rule Petition 22-03 and Wis. Stat. § 758.20. The Court’s eventual order on Rule Petition 22-03 could explicitly adopt Legal Action’s definition and make it clear there is no conflict. The Court could therefore also adopt Legal Action’s original suggestion for a one-year retention period for eviction cases without a money judgment.

2. Adopt Rule Petition 22-03 as originally proposed with a one-year retention period and changes to Wis. Stat. § 758.20

If the Court does accept the Interim Director of State Court’s interpretation of the definition of “closed” in Wis. Stat. § 758.20, and the Court believes there is the potential for conflict, then Legal Action proposes the Court could adopt Rule Petition 22-03 as originally

proposed and also include any necessary modifications to Wis. Stat. § 758.20. Modification of the duties and powers of the office of the Director of State Courts are well within this Court's power under Wis. Const. art. VII, § 3. Indeed, this Court has repeatedly modified various provisions of Wis. Stat. § 758 over the years. Sup. Ct. Orders No. 98-01, 05-02, and 05-04. This Court clearly has the power to modify Wis. Stat. § 758.20 if it believes there are any impediments to adopting Rule Petition 22-03.

Legal Action proposes the language attached at pages six and seven, which the Court could adopt. This proposal would adopt the original language of Rule Petition 22-03 of a records retention period for eviction cases without a money judgment to one year and the proposed additional language Judicare Legal Aid suggested in [its August 17, 2022, Comments](#). It would also add language to modify Wis. Stat. § 758.20. These proposed changes to Wis. Stat. § 758.20 would eliminate all concerns of any potential conflict between SCR 72 and Wis. Stat. § 758.20. As set forth above, modification of Wis. Stat. § 758.20 is well within the powers of this Court.

Legal Action thanks the Court for its consideration of these proposals and respectfully requests the Court grant Rule Petition 22-03 – with the original proposal for a one-year retention period for eviction cases without a money judgment – under either method Legal Action proposes.

Sincerely,

LEGAL ACTION OF WISCONSIN, INC.

Electronically signed by Korey C. Lundin

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TEXT OF PROPOSED CHANGES – ONE -YEAR RETENTION PERIOD

758.20 Consolidated court automation programs.

(1) In this section, “Wisconsin Circuit Court Access Internet site” means the Internet site of the consolidated court automation programs, which is the statewide electronic circuit court case management system established under s. 758.19 (4) and maintained by the director of state courts, that provides information regarding the cases heard in the circuit courts.

(2) The director of state courts may not remove case management information from the Wisconsin Circuit Court Access Internet site for a civil case that is not a closed, confidential, or sealed case for the following periods:

~~(a) If a writ of restitution has been granted in an eviction action, a period of at least 10 years.~~

~~(b) If an eviction action has been dismissed and no money judgment has been docketed entered, a period of at least 2 1 years.~~

(3) The director of state courts shall ensure the Wisconsin Circuit Court Access Internet site provides the department of corrections access to the information required to complete the report under s. 973.25 (8).

SCR 72.01(8) Small claims case files.

All papers deposited with the clerk of circuit court in every proceeding commenced under ch. 799, stats.: ~~20 years after entry of final order or judgment for all cases, including contested cases, stipulated dismissals and default judgments, except 2 years from date of entry of judgment for cases dismissed because issue was not joined and the case was not disposed of by judgment or stipulation within 6 months from the original return date.~~

(a) 1 year after entry of final order or judgment for all eviction cases in which no judgment for money is entered against any party, including contested cases, stipulated dismissals, and default judgments;

(b) 2 years from date of entry of judgment for small claims cases, other than evictions covered by sub (a), dismissed because issue was not joined and the case was not disposed of by judgment or stipulation within 6 months from the original return date;

(c) 20 years after entry of final order or judgment for all other small claims cases not specified above in (a) or (b).

SCR 72.01(9) Small claims court record.

A history and index of proceedings: ~~20 years after entry of final order for contested cases, stipulated dismissals, and default judgments; except 2 years from the date of entry of judgment for cases dismissed because issue was not joined and the case was not disposed of by judgment or stipulation within 6 months from the original return date.~~

(a) 1 year after entry of final order or judgment for all eviction cases in which no judgment for money is entered against any party, including contested cases, stipulated dismissals, and default judgments;

(b) 2 years from date of entry of judgment for small claims cases, other than evictions covered by sub (a), dismissed because issue was not joined and the case was not disposed of by judgment or stipulation within 6 months from the original return date;

(c) 20 years after entry of final order or judgment for all other small claims cases not specified above in (a) or (b).

SCR 72.01(10) Small claims minute record.

A brief statement of in-court proceedings commenced under ch. 799, stats., generally maintained in the case file: ~~20 years after entry of final orders for contested cases, stipulated dismissals, and default judgments; except 2 years from the date of entry of judgment for cases dismissed because issue was not joined and the case was not disposed of by judgment or stipulation within 6 months from the original return date.~~

(a) 1 year after entry of final order or judgment for all eviction cases in which no judgment for money is entered against any party, including contested cases, stipulated dismissals, and default judgments;

(b) 2 years from date of entry of judgment for small claims cases, other than evictions covered by sub (a), dismissed because issue was not joined and the case was not disposed of by judgment or stipulation within 6 months from the original return date;

(c) 20 years after entry of final order or judgment for all other small claims cases not specified above in (a) or (b).