GIESE LAW OFFICES

ATTORNEYS AT LAW

Heiner Giese
Attorney & Counselor

1230 N. Prospect Avenue
Milwaukee, WI 53202-3014
Phone: (414) 276-7988
Fax: (414) 276-8342
Email: hgiese@ameritech.net

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Sent Via Electronic Mail and Regular Mail

Clerk of Supreme Court
Attention: Deputy Clerk-Rules
P.O. Box 1688
Madison, WI 53701-1688
clerk@wicourts.gov

RE: Supplemental Comment Regarding Rule Petition 22-03, In the Matter of the amendment to SCR 72.01(8), 72.01(9), and 72.01(10), relating to retention of records in eviction cases.

Dear Clerk of Supreme Court:

This supplemental comment is submitted in response to the letter dated October 30, 2023, by Supreme Court Commissioner Timothy M. Barber stating that the Court was soliciting interested persons to submit supplemental 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?

I am legal counsel and a registered lobbyist for the Rental Property Association of Wisconsin, Inc. (formerly Apartment Association of Southeastern Wisconsin, Inc.) I am authorized to state that this supplemental comment also represents the views of two other Wisconsin organizations whose members are actively involved in housing issues, namely the Wisconsin Realtors Association and the Wisconsin Apartment Association. Collectively these organizations have several thousand members.

I. Threshold Issue: When Engaged in Rulemaking Must the Supreme Court Avoid a Conflict with a Statute?

Interestingly, this issue was before the Court in February 2020 when it considered *Rule Petition 19-16 - In the Matter of Amending Wis. Stat. § 802.05(2m) relating to Ghostwriting, A Form of Limited Scope Representation.* I was also involved in that matter on behalf of rental property owners and refer the Court to my written comment dated February 3, 2020, and the comment of Attorney James E. Goldschmidt dated February 4, 2020, on behalf of the petitioner in that matter.

A key distinction between Rule Petition 19-16 and Rule Petition 22-03 is that the former involved the role of attorneys in representing *pro bono* clients (a judicial administration issue) while the latter involves very important questions of access to public records. The following portion of my 2/3/2020 comment (p. 2) is relevant again:

> **On "shared powers" questions the courts should defer to the legislature.**
>
> A leading case which considered this entire topic in depth was *Gabler v. Crime Victims Rights Board, 2017 **WI** 67.* The principle of "exclusive and shared power" was discussed:
>
> > When delineating the Wisconsin Constitution's lines of demarcation separating governmental powers, this court has observed that "[t]he constitutional powers of each branch of government fall into two categories: exclusive powers and shared powers. Each branch has exclusive core constitutional powers into which other branches may not intrude." State v. Horn, 226 Wis. 2d 637, 643, 594 N.W.2d 772 (1999) (citing State ex rel. Friedrich v. Cir. Ct. for Dane Cty., 192 Wis. 2d 1, 13, 531 N.W.2d 32 (1995)). "This court is highly mindful of the separation of powers. It does not engage in direct confrontation with another branch of government unless the confrontation is necessary and unavoidable." State v. Moore, 2015 WI 54, ¶91, 363 Wis. 2d 376, 864 N.W.2d 827; see also Integration of Bar Case, 244 Wis. 8, 48, 11 N.W.2d 604 (1943) ("The state suffers essentially by every . . . assault of one branch of the government upon another; and it is the duty of all the co-ordinate branches scrupulously to avoid even all seeming of such." (quoting In re Goodell, 39 Wis. 232, 240 (1875)). At ¶30.

Actually, we maintain that the issues raised in Rule Petition 22-03 do not involve a "shared powers" question in a material respect. True, maintenance of court records and granting public access to same involves judicial administration functions by the office of Director of State Courts. But these are *ministerial* functions. The *substantive* question of how long to grant access to those records under Wisconsin's strong open records public policy must always be primarily a legislative decision.

Even viewing this as a shared power, the admonition in *Gabler* that the Supreme Court "does not engage in direct confrontation with another branch of government unless the confrontation is necessary and unavoidable" means that the Court should definitely fashion its ruling on Petition 22-03 to give effect to the language pertaining to a writ of restitution. Indeed, the very manner in which the Court phrases its solicitation for additional comments – *"in order to avoid a conflict with that statute"* – shows that the Court seeks comments on how to blend the 10-year statutory mandate with its decision announced at oral conference to create a retention period of 2 years for eviction cases without money judgments. When Petitioner responds further, it should not persist in its totally unfounded argument (expressed at the September 7 hearing) 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.

II. Legislative History of Wis. Stat. § 758.20

This statute was *created* by 2017 Act 317, Section 46. It was not an amendment or added provision to an existing statute. A draft of the statute before amendment appears as Section 43 of 2017 Assembly Bill 771:

SECTION 43. 758.20 of the statutes is created to read: 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 any civil case that is not a closed, confidential, or sealed case for a period of at least 10 years after the date that final judgment was entered in a case.

There was testimony on 2017 Assembly Bill 771 (enacted as Act 317) before the Assembly Committee on Housing and Real Estate https://wiseye.org/2018/01/03/assembly-committee-on-housing-and-real-estate-3/ [testimony of Rep. Rob Brooks at 4:20 concerning intent to have the Legislature instead of the Court set CCAP access time limits] [testimony of Heiner Giese at 7:21 stating that a CCAP study committee run by the office of Director of State Courts had not heard from representatives of the rental housing industry when formulating its policies.] During his testimony Rep. Brooks acknowledged the existence of the 2-year retention period for dismissed small claims cases per SCR 72.01(8). However, the draft of §758.20 in Section 43 of AB 771 had a 10 year WCCA retention requirement for "any civil case" that was not closed, etc. Rep. Brooks indicated that he believed a two year retention period for dismissed small claims or eviction cases with no money judgment would be reasonable and that a compromise would be worked out. That resulting compromise enacted in Act 317 was twofold:

1. For eviction actions (but not other small claims cases) where a money judgment has been entered the Director of State Courts has the authority to remove it from WCCA if that judgment has not been docketed within two years -- §758.20(2)(b).
2. The 10 year retention period in the AB 771 draft was retained for eviction cases "if a writ of restitution has been granted" - §758.20(2)(a).

What was the rationale for this statute from the standpoint of the rental property owners who supported it? First, landlords know that many evictions are resolved when they are dismissed with an agreement by the tenant to move voluntarily. But a money judgment for costs-only of about $200 will then hang on for 20 years. If landlords don't choose to docket those judgments, then tenants can secure future housing without having that black mark on their rental history for 20 years. Conversely, the rationale for a10 year retention of the eviction record if a writ of restitution was issued is to motivate the nonpaying tenant to vacate voluntarily and thereby avoid the black mark of an eviction filing for 10 years. This then also benefits the landlord who can avoid the hassle, delay and expense of hiring the sheriff to execute the writ. The trauma of a forced moveout also has societal costs which are thereby mitigated.

III. Proposed Text for Record Retention Rules under SCR 72.01 for Small Claims Cases

We propose that the amendments to the small claims case records retentions should be as follows for SCR 72.01(8). Similar text would be used for subsections (9) and (10) of the Rule.

> 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.:
>
> (a) 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.
>
> (b) 2 years from date of entry of final order or judgment for all eviction cases in which no judgment for money has been docketed against any party, including contested cases, stipulated dismissals, and default judgments;
>
> (c) 10 years from date of entry of judgment for all eviction cases where a writ of restitution was issued against the defendant;

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

The above changes would be consistent with the Court's colloquy at its October 9 open administrative conference during which Justice Dallet stated that setting a 2-year retention period would simply *implement* the standard set by the Legislature in § 758.20. The Court should thus also implement the 10-year statutory provision pertaining to cases with writs of restitution when amending its record retention Rules in SCR 72.01.

III. Up-to-date Legal Comment on Evictions and the Effect of Sealing Records

Most written Comments regarding Rule Petition 22-03 were received in August 2022 and the Court held a public hearing in September 2023. In November 2023 a significant and thorough article by Alan J. Borsuk and Tom Kertscher on the topic of evictions appeared in the Fall 2023 issue of the *Marquette Lawyer*: "Eviction – So Simple, So Complex, So Human." It extensively examines the eviction defense legal services provided by Legal Action of Wisconsin and the Legal Aid Society of Milwaukee and the experiences of landlords and their attorneys.

Some excerpts:

> *"Often, the most that attorneys for tenants can accomplish is to delay an eviction."* [Attorney Heiner Giese]
>
> *. . . several property owners' attorneys said that proceedings often are slower because more attorneys are involved and those attorneys use strategies for delaying outcomes. Some noted also that more property owners are calling on attorneys to represent them than in the past.*
>
> *Several attorneys said that delays in concluding cases can mean increases in lost rent for owners, and extra costs for owners to pursue cases can mean higher rents or increased security deposit requirements for all tenants, including those who pay their rent steadily.*
>
> *Not surprisingly, there are differing views on when or even whether to redact records in the eviction context, with property owners generally on one side and advocates for renters on the other. Tim Ballering heads Affordable Rental Associates, which owns 300 units generally on Milwaukee's south side. The company also manages another 350 units. Ballering said that new tenants who have had an eviction in the prior year fail to fulfill their lease obligations (to pay their rent) at significantly higher rates than other new tenants. By three years post-eviction, the track record is about the same as that of tenants without eviction records. Preventing landlords from seeing names of people who have been evicted is not only a problem for landlords, he said, but also for people who are better candidates to be reliable renters yet who may lose out in getting an apartment to someone with a past eviction.*

The *Marquette Lawyer* article cited a July 2023 *Stanford Law Review Online* article, "Lawyers Aren't Rent" by two law professors who are tenant advocates:

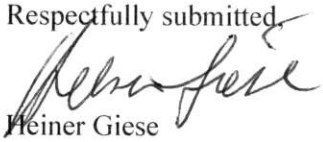
> *Here's their view . . . "Most low-income tenants facing eviction do not need a lawyer. They need rent money. . . . If we want to reduce evictions, tenant lawyers are not the best tool. Rental assistance could resolve, or even avoid the filing of, most eviction cases." The authors said that the $46 billion in federal funds made available during the height of the COVID pandemic to help people who otherwise would have been facing eviction showed how much increased rental aid could reduce eviction problems. They called the movement to provide every tenant a lawyer in eviction proceedings "misguided."*

IV. Conclusion

The Court should primarily consider the mandate of Wis. Stat. §758.20 when considering Rule changes to retention of records for eviction cases brought in Wisconsin's small claims courts. It should implement the mandate that eviction cases involving issuance of a writ of restitution must remain accessible via WCCA for at least 10 years. In coming to that decision the Court should be guided by the strong public policy declaration in Wis. Stat. § 19.31:

> **"The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied."**

Respectfully submitted,



Heiner Giese

cc: (via email only)
Atty Korey C. Lundin, Legal Action of Wisconsin