



## STATE BAR OF WISCONSIN

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### MEMORANDUM

**To:** Carrie Janto, Deputy Clerk

**From:** Patrick J. Fiedler, President

**Copy:** George Brown, Executive Director

**Date:** November 25, 2013

**Re:** Petition 13-08 Official Publications and Notice to Members; Petitions Response

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In a letter dated October 11, 2013, Commissioner Julie Rich requested a response to questions from the Court regarding the State Bar of Wisconsin's petition on official publications and notice to members.

The purpose of this petition is to give the State Bar of Wisconsin more flexibility in providing notice of Supreme Court and State Bar activities to its members. It is our intent to ensure that members receive notice of rules petitions, public hearings, orders, or State Bar related actions in the manner that is most readily accessible, complete and appropriate. To that end, the State Bar will be adding a "notices" page to its website that will be openly available to the membership as well as any member of the public should they seek that information on WisBar.org. That page will include those notices required under SCR 98.07 and other appropriate State Bar related activities.

In addition, as noted below, the *Wisconsin Lawyer* print edition is available to all members of the State Bar of Wisconsin and by subscription to the public. The electronic edition is free and open to the general public on WisBar.org and will include the same notices as the printed version plus active links to the court's website. Notice to the membership will also be provided in a timelier manner and via e-mail through the State Bar's electronic newsletter, *InsideTrack*. This publication is sent twice monthly and automatically to the entire membership for which the State Bar has an e-mail account on file. Members need not subscribe to this publication.

At the January 15, 2013 public hearing regarding petition 12-09 Publication of Supreme Court Orders, etc., Attorney Nilesh Patel provided an example of how public notices would be represented in the *Wisconsin Lawyer*. That example is attached for your review.

The State Bar's publication plan, filed with petition 13-08 as attachment A, outlines where each required notice will be published.

The following are specific responses to the Court's questions. In addition, the Bar responds to and clarifies issues related to a letter filed with the Court by Attorney Steven Levine.

**Will notice of Supreme Court orders, notice of public hearings and open conferences, etc., via the State Bar Web site be accessible only to State Bar members who log in?**

No, it will also be open to members who do not log in as well as to the general public.

SCR 98.07 requires the State Bar of Wisconsin to publish notices to its members, of Supreme Court orders adopting, amending, or repealing a rule or statute. Thus, according to the Publications Plan referenced in the amendment to proposed SCR 10.12 (3) regarding Official Publication, Notice to Members, notice of these orders will be published in the print and electronic *Wisconsin Lawyer* magazine, in the electronic *WisBar InsideTrack* e-publication distributed to all members with email addresses, and published on WisBar.org.

Access to the online *Wisconsin Lawyer* is open to the public, while access to *WisBar InsideTrack* is accessible to members only. In addition, on WisBar.org, the State Bar of Wisconsin will maintain a page that is open to the public and members who chose not to log into the website. This page will list pending Supreme Court- and State Bar-related notices with links to the related material on the Supreme Court's website. In addition, the page will include links to the Supreme Court's website listing pending petitions, orders issued, and the petitions archive.

**What is the State Bar's position on providing/giving notice to its members? To the public?**

The above response states our position regarding notices to members. While members of the public can subscribe to the print *Wisconsin Lawyer* magazine and freely view the online edition, distribution is limited. The State Bar of Wisconsin does not have an effective means to reach the public, other than those who proactively come to the State Bar's website looking for information.

**Do you anticipate a change in the level of access on the State Bar's Web site to Supreme Court orders and notices of public hearings or oral arguments?**

As described in our response to the first question, the State Bar of Wisconsin will maintain a page on the WisBar.org website that is open to the public and members who choose not to log into the website to receive such notices.

**Response to Steven Levine's letter to the court:**

Attorney Steven Levine, in his letter to the Wisconsin Supreme Court dated November 14, 2013, incorrectly states that publication of notices of Supreme Court orders adopting,

amending, or repealing rules, statutes, or policies and State Bar bylaws amendments would not appear in the *Wisconsin Lawyer* magazine.

The Publication Plan filed with the State Bar's petition 13-08 calls for publication of these notices in the print and online *Wisconsin Lawyer* magazine and in the *WisBar InsideTrack* email publication distributed automatically to the 90 percent of State Bar members with email addresses on file. In addition, publication of these notices in the online *Wisconsin Lawyer* means that anyone coming to WisBar.org, whether a lawyer or a member of the public, will find these matters through a site search and then be directed to the Wisconsin Court System's website for the most current information related to this matter.

From the attached example you can see this approach succinctly communicates the most relevant information to our members – the order number and subject, which rules and statutes it affects, the date the order was issued, the disposition of the matter, and where to find more information on the Wisconsin Court System's website.

This change accomplishes the following: 1) these notices are distributed in print and electronic format, which means members will now receive dual notice; 2) electronic dissemination means more timely notice to our members because *InsideTrack* is published twice a month rather than once a month in the print magazine; and 3) a more cost-effective approach to delivering notices to members.

In today's economy, the State Bar must spend its limited resources wisely, while delivering information in a way that appeals to those who rely on traditional print and those who want to receive their information electronically. The cost of publishing full notices of court orders is significant. In 2012, for example, approximately 46 pages of the *Wisconsin Lawyer* magazine were devoted to court orders. At a cost of approximately \$235 per page, this means an expense of \$10,810, not taking into account the cost of postage or staff time to produce these pages.

Thank you for the opportunity to clarify these matters. If you have any additional questions, please do not hesitate to contact me, Executive Director George Brown or Public Affairs Director Lisa Roys.

## Civil Procedure

### SUMMONS / COMPLAINT / AFFIDAVIT – AUTHENTICATION – TECHNICAL ERROR

**State v. Schmitt, 2012 WI App 121 (filed 3 Oct. 2012) (ordered published 28 Nov. 2012)**

**HOLDING:** The clerk's failure to authenticate an affidavit along with the summons and complaint was only a technical error, not a fundamental error resulting in lack of jurisdiction.

**SUMMARY:** The circuit court granted a judgment forfeiting Schmitt's car to the state based on drug-law violations. The state filed a forfeiture summons, complaint, and affidavit pursuant to Wis. Stat. section 961.555(2). Although the summons and complaint were properly authenticated, the clerk did not stamp the affidavit. The circuit court denied the defendant's motion to dismiss, which alleged lack of jurisdiction based on this error.

The court of appeals affirmed in an opinion written by Chief Judge Brown. Case law establishes that the summons, complaint, and affidavit "must each be authenticated as a condition precedent to jurisdiction over the forfeiture action" (¶ 3). Errors in the commencement of an action are either fundamental or technical (see ¶ 6). Here, the defect was technical.

"We are confident that, in this case, the clerk's incomplete stamping was 'beyond the control' of the State. To repeat, the record shows that the summons, complaint and affidavit were presented to the clerk at the same time as one document. The clerk failed to authenticate the affidavit. As discussed in *American Family [v. Royal Ins., 167 Wis. 2d 524, 481 N.W.2d 629 (1992)]*, this clerical error falls outside the rule that the complainant must show there was no defect in the commencement of the suit" (¶ 10). The defect was technical and Schmitt was in no way prejudiced (see ¶ 13).

"Our decision does not in any way weaken the authentication requirement in Wis. Stat. § 961.555(2)(a). Failure to comply with the authentication of the forfeiture summons, complaint and affidavit can constitute fundamental error. But where, as here, the State presents all three items, stapled together as one document, to the clerk for authentication, and the clerk errs in failing to separately authenticate the affidavit, such defect is technical, not fundamental, and will only deprive the court of jurisdiction if prejudice is shown" (¶ 16).

## Notice of Wisconsin Supreme Court Orders Adopting, Amending, or Repealing Rules, Statutes, or Policies

### Order 11-08: Legal Competence Requirements of Graduates of Law Schools in Other Nations

In the matter of the petition to amend Supreme Court Rule 40.02(2) and to create Supreme Court Rules 40.055 and 40.14(3) (i) relating to the legal competence requirements of graduates of law schools in other nations; fees.

**Order issued:** Nov. 1, 2012

**Disposition:** IT IS ORDERED that, effective Dec. 1, 2012, the supreme court rules are amended as described in the order.

### Order 12-03: Inadvertent Disclosure of Protected or Privileged Information

In the matter of the petition to amend Wis. Stats. §§ 804.01, 805.07 and 905.03 relating to inadvertent disclosure of protected or privileged information

**Order issued:** Nov. 1, 2012

**Disposition:** IT IS ORDERED that, effective Jan. 1, 2013, the following Wisconsin Statutes are amended as described in the order:

Wis. Stat. 804.01 (2) (c) – Trial preparation materials; Judicial Council Note to 804.01(2) (c); Wis. Stat. 804.01 (7) – Recovering information inadvertently disclosed; Judicial Council Note to 904.01 (7); Wis. Stat. 805.07 (2) (d) – Privileged information inadvertently produced in response to a subpoena; Judicial Council Note to 805.07 (2) (d); Wis. Stat. 905.04 (5) – Forfeiture of privilege; Judicial Council Note to 905.04 (5)

### Order 12-05: Record Retention and Electronically or Optically Stored Records

In the matter of the amendment of Supreme Court Rules 72.01, 72.03, 72.04, 72.05, and Wis. Stat. § 801.17, 807.06, 809.15 relating to record retention and electronically or optically stored records

**Order issued:** Nov. 1, 2012

**Disposition:** IT IS ORDERED that, effective Jan. 1, 2013, the following Supreme

Court Rules and the Wisconsin Statutes are amended, as described in the order:

SCR 72.01 (6) – Lien claims; SCR 72.01 (32) – Guardianship case files; SCR 72.01 (33) – Guardianship court record; SCR 72.01 (34) – Guardianship minute record; SCR 72.01 (38) – Mental health case files; SCR 72.01 (39) – Mental health court record; SCR 72.01 (40) – Mental health minute record; SCR 72.01(42m) – Juvenile delinquency, juveniles in need of protection and services and children in need of protection and services case files; SCR 72.01(43) – Juvenile court records; SCR 72.01(44) – Juvenile minute record; SCR 72.01(46) – Criminal and juvenile delinquency case exhibits, paper, and non-paper; Comment to SCR 72.01 (46) regarding exhibits; SCR 72.01 (46r) – Civil case exhibits for sexually violent person commitments under ch. 980, Stats.; SCR 72.01 (58) – Oaths of office; SCR 72.01 (60) – Naturalization records; SCR 72.03 (3) – Destruction of electronically or optically stored records; SCR 72.03 (4) – Destruction of exhibits electronically or optically stored; SCR 72.04 – Offer of title to State Historical Society of Wisconsin; SCR 72.05 (3) – Transfer of electronically or optically stored records with historical or research value to State Historical Society of Wisconsin; Wis. Stat. 801.17 (9) (c) – Maintenance of the Official Court Record by the Clerk of Court; Comment, 2008, paragraph 6, to Wis. Stat. 801.17 – Destruction of electronically stored court file by clerk of court; Wis. Stat. 807.06 – Renumbered 807.06 (1); Wis. Stat. 807.06 (2) – Electronic scanning of papers and pleadings by clerk of court; Wis. Stat. 809.15 (1) (b) – Substitution of photocopy by clerk of circuit court; Wis. Stat. 809.15 (1) (c) – Record on appeal using electronically scanned document. **WL**

#### FOR MORE INFORMATION

To locate orders, petitions, or other material relating to final orders, or other matters awaiting court action, including those scheduled for public hearings or open administrative conferences, visit the Wisconsin Court System's website at <http://www.wicourts.gov/scrules/supreme.htm>.