WISCONSIN LEGISLATIVE COUNCIL
STAFF MEMORANDUM

Memo No. 2

TO: MEMBERS OF THE SPECIAL COMMITTEE ON REVIEW OF RECORDS ACCESS OF CIRCUIT COURT DOCUMENTS

FROM: Don Salm, Senior Staff Attorney

RE: Legislative and Judicial Authority

DATE: September 7, 2010

On May 7, 2010, the Joint Legislative Council created the Special Committee on Review of Records Access of Circuit Court Documents. The committee was directed to review how, and by whom, circuit court civil and criminal records may be accessed through the Wisconsin Circuit Court Access website (WCCA). The issues to be considered by the committee include: (a) the length of time a record remains accessible through WCCA; (b) whether accessibility of a record through WCCA should depend on how far a civil or criminal proceeding has progressed; and (c) whether records of proceedings that have: (1) been vacated or dismissed; or (2) resulted in acquittal or other form of exoneration should continue to be accessible through WCCA.

Before the Special Committee begins its deliberations, a threshold question from committee members may be whether the Legislature has any authority to act in a matter that is of substantial significance to the operation of the judicial branch of government (namely, access to electronic court documents and court documents in general). This Memo addresses that question.

BACKGROUND

Separation of Powers

The Wisconsin Supreme Court has held that the state's three branches of government (legislative, judicial, and executive) exercise both core powers and shared powers. When exercising shared powers, one branch of government may not unduly burden or substantially interfere with another branch. Further, an attempt by one branch to exercise the core power of another branch is impermissible, unless the branch having the core authority accedes to the intrusion as a matter of

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courtesy. In *State ex rel. Friedrich v. Circuit Court for Dane County*, 192 Wis. 2d 1, 531 N.W.2d 32 (1995), the court made the following comments:

> The doctrine of separation of powers, while not explicitly set forth in the Wisconsin constitution, is implicit in the division of governmental powers among the judicial, legislative and executive branches. "The Wisconsin constitution creates three separate coordinate branches of government, no branch subordinate to the other, no branch to arrogate to itself control over the other except as is provided by the constitution and no branch to exercise the power committed by the constitution to another."
>
> Each branch has a core zone of exclusive authority into which the other branches may not intrude....
>
> The separation of powers doctrine was never intended to be strict and absolute. Rather, the doctrine envisions a system of separate branches sharing many powers while jealously guarding certain others, a system of "separateness but interdependence, autonomy but reciprocity." …The undue burden or substantial interference must be proven beyond a reasonable doubt…. [See *Id.*, 531 N.W.2d at 36, 40; footnotes and citations omitted.]

In another case involving an alleged intrusion of the legislative branch into judicial functions, the Wisconsin Supreme Court stated:

> ...To determine whether legislation unconstitutionally intrudes upon judicial power and therefore violates the separation of powers doctrine, this court developed a three-part test. We must first determine whether the subject matter of the statute is within the powers constitutionally granted to the legislature. The second inquiry is whether the subject matter of the statute falls within powers constitutionally granted to the judiciary. If the subject matter of the statute is within the judiciary's constitutional powers but not within powers constitutionally granted to either the legislature or executive branch, the subject matter is within the judiciary's core zone of exclusive power. Any exercise of power by the legislature or executive branch within such an area is an unconstitutional violation of the separation of powers doctrine. The judiciary may recognize such an exercise of power but only as a matter of comity and courtesy, not as an acknowledgement of power.
>
> If the subject matter of the statute is within the powers constitutionally granted to the judiciary and the legislature, the statute is within an area of shared powers. Such a statute is constitutional if it does not unduly burden or substantially interfere with another branch. [See *State v. Horn*, 226 Wis. 2d 637, 594 N.W.2d 772, 776-7 (1999); citations omitted.]

STATUTORY RELATIONSHIP BETWEEN THE LEGISLATIVE AND JUDICIAL BRANCHES

Section 751.12 (1), Stats., provides that the Supreme Court must, by rules promulgated by it from time to time, regulate pleading, practice, and procedure in judicial proceedings in all courts, for the purposes of simplifying the proceedings and promoting speedy determination of litigation. The power of the Supreme Court in these matters extends to its ability to affect the work product of the Legislature; that is, the rules of the Supreme Court may modify or suspend existing statutes. [See s. 751.12 (2), Stats.]

However, the statutes reflect the shared power and interests of the judicial and legislative branches in these matters. Section. 751.12 (4), Stats., provides that the authority of the Supreme Court to affect the statutes does not "abridge the right of the Legislature to enact, modify, or repeal statutes or rules relating to pleading, practice, or procedure."

DISCUSSION

It appears that the subject of access to civil and criminal court documents, particularly through electronic means, is an area over which the legislative and judicial branches exercise shared powers. This is evidenced by the following:

1. The Director of State Courts' authority to develop and implement circuit court automated information systems, which currently includes the Circuit Court Automation Programs (CCAP), under which free electronic access to circuit court records is provided via the WCCA, was created by the Legislature in 1989 Wisconsin Act 31. That Act created s. 758.19 (4), 1989 Stats., which currently reads:

   > 758.19 **(4)** The director of state courts may develop, promote, coordinate and implement circuit court automated information systems that are compatible among counties using the moneys appropriated under s. 20.680 (2) (j). If the director of state courts provides funding to counties as part of the development and implementation of this system, the director of state courts may provide funding to counties with 1 or 2 circuit court judges for a minicomputer system only up to the level of funding that would have been provided had the county implemented a microcomputer system. In those counties with 1 or 2 circuit court judges, any costs incurred to implement a minicomputer system not funded under this subsection shall be paid by the county. Those counties may use that minicomputer system for county management information needs in addition to the circuit court automated information system use.

2. The Director of State Courts' authority to establish a funding mechanism for electronic filing of court documents under CCAP systems created under s. 758. 19, Stats., was created by the Legislature in 2007 Wisconsin Act 20. That Act created s. 758.19 (4m), Stats., which currently reads:

   > 758.19 **(4m)** The director of state courts may establish and charge fees for electronic filing of court documents under the circuit court automated

> information systems created under this section. The secretary of administration shall credit all moneys collected under this subsection to the appropriation account under s. 20.680 (2) (j).

3. The CCAP system, in part, seems to clearly come within the area of "pleading, practice, and procedure" which is central to the shared power and interests of the legislative and judicial branches under s. 751.12 (4), Stats. A clerk of court's CCAP electronic records of active court cases, and of the disposition of those cases, are the same as the records at the clerk of court's office in his or her county (or counties)--they are the official records. Electronic records under CCAP are records the clerk is required to keep under s. 59.40 (2) (b) and (c), Stats., among other provisions. "When a change is made to the underlying hard copy or electronic court record, the change is reflected at all access points to the court record." [Letter from A. John Voelker, Director of State Courts, to Mr. David R. Schanker, Clerk, Wisconsin Supreme Court, dated February 3, 2010, commenting on Supreme Court Petition 09-07.] These records include records relating to various procedural and practice matters, including items relating to the filing of claims and the docketing of judgments, for example.

It appears that the Legislature has the authority to consider and, in part, regulate the court records-related matters that are the substance of this committee's charge.

There is an additional argument for both the legislative and judicial branches being involved in this area of electronic court records. Although history, practice and, perhaps, case law may indicate that, for example, the judiciary has a more compelling legal argument, and a long-term history of protecting its interests in an area that arguably "skirts the line" of "pleading, practice, and procedure," the court cases have recognized that the three branches of government (in this case, the Legislature and judiciary) share authority, must co-exist, and must show each other a certain amount of respect and deference.

For example, in *Rules of Court Case*, 204 Wis. 501, 515, 236 N.W. 717 (1931), the Supreme Court stated that: "As to the exercise of those powers, however, which are not exclusively committed to them [the courts], there should be such generous co-operation as will tend to keep the law responsive to the needs of society." Similar sentiments were expressed in *State ex rel. Moran v. Department of Administration*, 103 Wis. 2d 311, 317, 307 N.W.2d 658, 662 (1981), in which the Court refused to order the Secretary of Administration to purchase an automated legal research system, although he had the duty to do so:

> We think it appropriate to take judicial notice of the shortfall in state revenue caused by current economic conditions. The end of the 1979-81 biennium is fast approaching. If we ordered the secretary to issue a warrant for the amounts requested, they would be charged against the appropriations for the fiscal year 1980-81. Although the total involved...is miniscule compared to the costs of operations to government...we think it a proper exercise of judicial restraint to withhold granting the writ in the instant case. This court is committed to moderation in budgeting the expenses of the judicial branch of government, just as the governor and the legislature are so committed for the executive and legislative branches. [See *Moran*, 307 N.W.2d, at p. 664.]

In *Friedrich*, cited above, the Supreme Court concluded that the Legislature and the judiciary share the power to set fees for court-appointed guardians ad litem and special prosecutors. The Court stated that the judicial branch has the ultimate authority for setting the fees, but in recognition of the shared interest of the Legislature and in recognition of a statute's presumption of constitutionality, the Court stated that any undue burden or a substantial interference with one branch of government by another must be proven beyond a reasonable doubt. The Court stated that this burden is necessary to ensure that the judiciary will order the expenditure of public funds for its own needs only when it articulates a compelling need. [See *Friedrich*, slip opinion, at pp. 15, 19, and 25.]

FINAL NOTE

In case of a conflict between legislative and judicial proposals regarding the shared power of judicial recusal, the final arbiter of course may be the Wisconsin Supreme Court. The Supreme Court can overturn legislative action either through future amendments to the statutes or, in a contested case, by determining, beyond a reasonable doubt, that the legislative action unduly burdens or substantially interferes with the authority of the judicial branch. [See, for example, legislative and judicial activity regarding ch. 756, Stats., relating to juries. In 1990, the Legislative Council established the Special Committee on Jury Service to review jury selection practice. The committee's deliberations resulted in the enactment of 1991 Wisconsin Act 271, relating to jury service as a civic duty, exemptions and excuses for jury service, jury commissioners, sources for jury lists, juror qualification forms, forfeitures for failure to attend as a juror, length of juror service, and periods of juror eligibility. The Supreme Court, apparently not satisfied with the decisions made by the Legislature, significantly amended ch. 756, Stats., in Supreme Court Order No. 96-08, 207 Wis. 2d xv (1997). The Legislature did not respond to the amendments effected by the Supreme Court.]

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