

STATE OF WISCONSIN

SUPREME COURT

In re:

PROPOSED CREATION OF
WISCONSIN STATUTE § (RULE) 809.86

**MEMORANDUM IN SUPPORT OF
PETITION OF WISCONSIN JUDICIAL COUNCIL
FOR AN ORDER CREATING
WIS. STAT. § (RULE) 809.86**

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ON BEHALF OF THE WISCONSIN JUDICIAL COUNCIL

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INTRODUCTION

The Wisconsin Judicial Council respectfully petitions the Wisconsin Supreme Court to create WIS. STAT. § (RULE) 809.86. This petition is directed to the Supreme Court's rule-making authority under WIS. STAT. § 751.12.

The first right enunciated in the Wisconsin Crime Victims' Bill of Rights is the right of a victim "[t]o be treated with fairness, dignity, and respect for his or her privacy by public officials, employees, or agencies."¹ However, the Rules of Appellate Procedure only require litigants to refer to someone by first name and last initial "when the record is required by law to be confidential."²

The proposed rule addresses crime victim privacy concerns that result from public access to searchable documents posted on the Wisconsin Supreme Court and Court of Appeals access website. The proposed rule is intended to protect victims' constitutional and statutory rights to be treated with fairness, dignity, courtesy, sensitivity, and respect for their privacy.³ Specifically, the proposed rule provides a measure of protection for victims by prohibiting the use of their names in appellate briefs and in appellate judicial opinions and decisions.

¹ See WIS. STAT. § 950.04.

² See WIS. STAT. § 809.19 (1) (g).

³ See Wisconsin Constitution Art. I, § 9m; WIS. STAT. § 950.01.

DISCUSSION

I. Procedural History

The Department of Justice asked the Judicial Council to study this issue and provide a recommendation to expand the current rules to protect the identity of crime victims.⁴ The request was prompted by complaints, including a case in which the appellant's brief identified a 14-year-old child sexual assault victim by her full name.⁵ At its October 21, 2011 meeting, the Judicial Council referred this issue to its Appellate Procedure Committee for further study and a recommendation.⁶

During the discussion of this issue, both the Department of Justice and the State Public Defender's office reported receiving complaints from victims regarding the fact that their identities were disclosed in an appellate document that was accessible to the public via the Internet. The complaints stemmed from detailed information about their victimization becoming generally accessible with a simple Internet search for their name.⁷

Appellate opinions are currently displayed in search results in response to a search conducted with an Internet search engine (e.g. Google, Yahoo, etc.) for any name

⁴ Email from Assistant Attorney General Rebecca R. St. John to April Southwick, Wisconsin Judicial Council (August 5, 2011) (copy on file with author).

⁵ *Id.*

⁶ See Minutes of the Wisconsin Judicial Council, dated September 21, 2012 at <http://www.wicourts.gov/courts/committees/judicialcouncil/docs/minutes1011.pdf> (last accessed January 10, 2014).

⁷ See Minutes of the Wisconsin Judicial Council's Appellate Procedure Committee, dated November 18, 2011.

mentioned in the opinion. This is true even when the party conducting the search is not looking for information regarding the case, and may not even know it exists. It is a simple fact that people depend on the Internet for a variety of information, including information about other people. Examples can include an employer conducting a search for the name a job applicant or an individual searching for the name of a new acquaintance.

The ease of access and the likelihood of accidental discovery of potentially very personal information warrants increased sensitivity regarding information that the court published on the Internet. As this court recently acknowledged in providing guidance on citing to sensitive information contained in a presentence investigation report, “Clearly it is much more difficult to remove information from the public domain once it has been included in an appellate brief.”⁸

II. Current Law

Wisconsin government records are generally open to the public.⁹ Public access to court records varies depending on the content, case, or stage of the proceeding. The public may generally request to inspect all papers required to be kept by the clerk of circuit court if the records are not confidential.¹⁰

⁸ *State v. Buchanan*, 2013 WI 31, ¶ 43, 346 Wis. 2d 735, 828 N.W.2d 847.

⁹ *See* WIS. STAT. § 19.31.

¹⁰ *See* WIS. STAT. § 59.20 (3) (a).

However, not all records are readily available. Some records are closed by state statute.¹¹ The court may also order records sealed in the interests of justice.¹² Some records are confidential at certain stages of the case, but are open at other stages.¹³

Wisconsin Consolidated Court Automation Programs (CCAP) recognizes the need for increased sensitivity regarding information that it publishes on the Internet. Pursuant to CCAP policy, certain information must be excluded from display on the Wisconsin Circuit Court Access website, including the names of crime victims.¹⁴

III. Proposed Wis. Stat. § (Rule) 809.86

The proposed rule is intended to have no effect on any aspect of circuit court proceedings.

¹¹ Examples include adoption records pursuant to WIS. STAT. § 48.93(1d); confidential informants, pursuant to WIS. STAT. § 905.10 (3); divorce judgments when set aside after reconciliation, pursuant to WIS. STAT. § 767.35(6); guardianship records, pursuant to WIS. STAT. § 54.75; juror qualification forms and supplemental information, pursuant to WIS. STAT. § 756.04 (9), (11); presentence investigation reports, pursuant to WIS. STAT. § 972.15(4); pupil records provided under subpoena for in camera inspection, pursuant to WIS. STAT. § 118.125 (2) (f); and wills deposited with the register in probate, pursuant to WIS. STAT. § 853.09 (1), (2).

¹² Examples include antitrust actions involving confidential business or trade secrets, pursuant to WIS. STAT. § 133.13 (2); restraining orders and injunctions in cases of child abuse, pursuant to WIS. STAT. § 813.122 (3) (b) 3.; family actions closed "for good cause shown," pursuant to WIS. STAT. § 767.13; and John Doe proceedings, pursuant to WIS. STAT. § 968.26.

¹³ Examples include criminal competency determinations, pursuant to WIS. STAT. § 971.14 (4) (a); criminal mental disease or defect reports, pursuant to WIS. STAT. § 971.16 (3); medical incapacity of attorney petitions, pursuant to SCR 12.02(1)(e); paternity adjudication records, pursuant to WIS. STAT. § 767.853; and search warrants, pursuant to WIS. STAT. § 968.21.

¹⁴ See Director of State Courts Policy on Disclosure of Public Information Over the Internet, Part 4., dated November 11, 2011.

The rule proposed by the Judicial Council is intended to help protect crime victims' privacy; however, it has been narrowly drafted to apply only to information that is readily available via the Internet. The proposed rule is not a rule of confidentiality or privilege. It is not intended to limit a defendant's right to a public trial, to limit the availability of any potential appellate argument or remedy, or to affect laws regarding public records or open court records that are available in the clerks of courts offices. The rule does not remove victim information from the record, nor does it alter the record as it existed prior to an appeal. The proposed rule only changes the way victim information can be readily accessed on the Internet by preventing the victim's name from being published on the Internet by its inclusion in an appellate brief or opinion.¹⁵

A. Applicability

Subsection (1) of the proposed rule limits the rule's applicability to the matters in which victims of crime are most frequently referenced and identified as victims or alleged victims. This includes section 971.17 proceedings; criminal cases; chapter 938 cases; chapter 980 cases; certiorari review of decisions or orders entered by the department of corrections, the department of health services or the parole commission in a proceeding or case specified in this subsection; and collateral challenges to judgments or orders entered in a proceeding or case specified in this subsection.

¹⁵ Not all documents filed electronically with the court are publically available via the Internet. If additional appellate documents become available in the future, the rule may need to be amended.

The Council declined to extend the rule to all cases. It only makes sense to protect the victim in cases that discuss the details of the crime. It would be too great a burden to extend the rule to civil cases when the party may not even know that someone is a crime victim and may not be able to obtain the information.¹⁶ Also, in some civil cases the victim(s) initiated the case by suing for damages, for example. There is not the same need to protect a victim who voluntarily assumes the role of party, which is unlike a criminal matter where the victim had no choice about being a subject of attention in court proceedings¹⁷

B. Definition

Subsection (2) of the proposed rule defines “victim” as “a natural person against whom a crime, other than a homicide, has been committed or alleged to have been committed in the appeal or proceeding.” The term “victim” specifically refers to a “natural person” because there is not the same need to protect corporations or other entities.

The Judicial Council’s Appellate Procedure Committee discussed limiting the rule to apply to victims of “sensitive crimes.”¹⁸ The Court of Appeals Style Manual directs

¹⁶ See Minutes of the Wisconsin Judicial Council’s Appellate Procedure Committee, dated April 19, 2013.

¹⁷ *Id.*

¹⁸ See Minutes of the Wisconsin Judicial Council’s Appellate Procedure Committee, dated February 17, 2012.

that victims of sensitive crimes should be identified by first name and last initial only.¹⁹ However, the manual does not define "sensitive crime," and the current Wisconsin statutes do not define the term.

Committee members considered creating a definition of "sensitive crime." However, members were unable to establish an objective way to determine which crimes should be labeled "sensitive."²⁰ All crime victims are entitled to privacy under the crime victims' bill of rights.²¹ Therefore, the definition of "victim" contained in the proposed rule is based on the definition of "victim" contained in the crime victims' bill of rights.²²

A driving concern behind the proposed rule is a desire to limit additional opportunities in which victims may be stigmatized by minimizing the likelihood that someone such as a potential employer, a first date, or a co-worker who enters a name in a search query on the Internet will find appellate documents that contain details of a crime in which the subject of the search is identified as the victim.²³

¹⁹ Wisconsin Court of Appeals Style Manual 43:3 (2011).

²⁰ See Minutes of the Wisconsin Judicial Council's Appellate Procedure Committee, dated March 16, 2012.

²¹ See WIS. STAT. § 950.04 (1v) (ag).

²² See WIS. STAT. § 950.02 (4).

²³ See Minutes of the Wisconsin Judicial Council's Appellate Procedure Committee, dated September 21, 2012 and February 15, 2013.

The drafting committee recognized that privacy issues addressed by the rule do not extend to a deceased victim in the same manner.²⁴ Therefore, subsection (2) permits the victim of a homicide to be recognized in an appellate opinion or brief.

C. Opinion and Briefs

Subsection (3) prohibits an opinion or decision of the supreme court and court of appeals and the briefs of the parties from identifying a victim by any part of his or her name except initials. As previously noted, the proposed rule is intended to reduce instances in which information about victimization of an identifiable person surfaces in Internet searches.²⁵ Therefore, the rule proposed at this time applies only to briefs and opinions because those are the only appellate documents publically available and searchable via the Internet.

Subsection (3) does not prescribe or limit the use of other pseudonyms for victims, as long as they maintain sensitivity and respect for victims. The drafting committee considered a number of alternate ways to identify victims, including the use of initials only, pseudonyms, Jane/John Doe, numerical identifiers (e.g. victim #1, victim #2, etc.),

²⁴ See Minutes of the Wisconsin Judicial Council's Appellate Procedure Committee, dated February 15, 2013.

²⁵ The Executive Director of the Wisconsin Department of Justice Office of Crime Victim Services reported to the committee that her office regularly receives calls from distraught victims; some even threaten suicide because the graphic details of the crime were discovered on the Internet and the victim was identified. See Minutes of the Wisconsin Judicial Council's Appellate Procedure Committee, dated March 16, 2012.

the term “victim,” and the term “complaining witness.”²⁶ The committee was particularly sensitive to the view that certain prescribed terms may not read as well, which could diminish the persuasive value of the writing. The committee ultimately determined that the best approach was to afford the parties and the court discretion to select the term that makes the most sense in each case.²⁷

D. Protective Order

Subsection (4) allows an appellate court to make any necessary order to further protect the identity of victims or to protect the identity of other persons not otherwise covered by the rule. It also allows the court to excuse compliance with this section. The committee specifically selected this language because it also allows a non-party to assert rights under this provision.²⁸

IV. Judicial Council Drafting Process

The Appellate Procedure Committee began studying the issue of protecting crime victim identity in November 2011.²⁹ The committee drafted a proposed rule and circulated it to potentially interested groups in July 2012.³⁰

²⁶ See Minutes of the Wisconsin Judicial Council’s Appellate Procedure Committee, dated March 16, 2012, April 20, 2012, September 21, 2012, and November 30, 2012.

²⁷ *Id.*

²⁸ See Minutes of the Wisconsin Judicial Council’s Appellate Procedure Committee, dated May 18, 2012.

²⁹ Appellate Procedure Committee members who worked on this project are listed in Appendix 1. The Judicial Council would like to extend a special thanks to Jill Karofsky and Marcia Vandercook who volunteered their service on the committee specifically for this project.

The committee received written comments and suggestions from a number of groups.³¹ The responses were mixed, with some parties strongly supporting the proposal and some parties adamantly opposed. Not surprisingly, victim advocacy groups were very supportive of the proposal.

The committee also received a letter in support of the proposed rule from a crime victim. She provided very moving testimony regarding her reaction after conducting a Google search for her own name. She was identified by name in an appellate opinion upholding her attacker's conviction.³² Her search results produced an opinion that contained the graphic details of the most terrifying night of her life. She has spent years trying to get her name removed from the opinion as it appears on the Internet. Unfortunately, her efforts have not been successful yet. She is still living with the knowledge that anyone, including a prospective employer or a new co-worker, who runs an Internet search for her name is going to be able to read about that very traumatic and personal event.³³

³⁰ See Appendix 2 for a list of interested parties.

³¹ Comments were received from Ian Henderson, Director of Legal and Systems Services for Wisconsin Coalition Against Sexual Assault (WCASA); Wisconsin Court of Appeal Judges; Jerome F. Buting, Buting, Williams & Stilling, S.C.; Diane M. Fremgen, Clerk of Supreme Court and Court of Appeals; Sarah E. Wood, Legal Intern with Wisconsin Coalition Against Domestic Violence (WCADV); William L. Gansner, Chairperson, State Bar Appellate Practice Section; and Ellen Henak, Wisconsin Association of Criminal Defense Lawyers (WACDL) (copies on file with author).

³² See email from T.T. to April Southwick (May 6, 2013) (copy on file with author).

³³ *Id.*

Objections to the rule, as it was originally proposed, generally centered around two provisions. First, the initial draft prohibited the use of a victim's name and instead required the use of specific alternate identifiers, including "the term 'victim,' the term 'alleged victim,' or by using pronouns, numbers, double letters or a combination thereof."³⁴ Second, the initial draft required the filing of a separate reference list indicating the alternate identifier or identifiers associated with each victim.³⁵

After the comments were received, the committee spent the 2012-2013 Council year studying the feedback and suggestions from interested parties, conducting additional research, and substantially revising the proposed rule.

The committee agreed that the reference list was cumbersome, so that requirement was deleted from the proposed rule as it is contained in the accompanying petition. The committee also agreed that the rule should not limit the parties or the court to a finite list of permissible alternate identifying terms. Therefore, the rule proposed in the accompanying petition permits a crime victim to be referenced by one or more initials, or any other appropriate pseudonym. The committee concluded that this approach provides the author with the flexibility to select a neutral and appropriate way to identify the victim without infringing on the persuasive value of the writing.

³⁴ See Wisconsin Judicial Council's Appellate Procedure Committee's Proposed Wisconsin Rules of Appellate Procedure Relating to Crime Victim Identity, dated July 27, 2012 (copy on file with author). This draft differs significantly from the rule that was ultimately recommended by the Judicial Council.

³⁵ *Id.*

The Judicial Council’s Appellate Procedure Committee unanimously approved the revised proposed rule and forwarded it to the full Judicial Council for consideration.³⁶ The full Council studied the proposal at its October 18, 2013 meeting and approved it with only one slight change.³⁷ The phrase “or other appropriate pseudonym” was added to sub. (3). While the accompanying Judicial Council Note recognized the use of other pseudonyms, the Council felt that it should be clearly stated in the text of the rule.³⁸

CONCLUSION

Internet access to appellate briefs and opinions provides an extremely useful legal resource. But the Internet can make some information very easily accessible. The legal system can reasonably limit the opportunities for official court documents to appear as a result of Internet searches, permanently and publically linking a crime victim’s name with the details of the criminal acts of another.

³⁶ Committee members Marla Stephens and Judge Maxine White were not present at the meeting.

³⁷ See Minutes of the Wisconsin Judicial Council, dated October 18, 2013 at <http://www.wicourts.gov/courts/committees/judicialcouncil/docs/minutes1013.pdf> (last accessed January 10, 2014) (Motion approved with Council members Stephens and Burnett opposed, and Council members Ott and Roggensack abstaining).

³⁸ *Id.*

To help crime victims avoid to at least some degree potential intrusions into their privacy, and the often unsuccessful struggle to remove their identifying information from the Internet, the Judicial Council urges the court to adopt proposed WIS. STAT. § (RULE) 809.86, as set forth in the petition accompanying this memorandum.

Dated January 21, 2014

RESPECTFULLY SUBMITTED,

WISCONSIN JUDICIAL COUNCIL

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Appendix 1

JUDICIAL COUNCIL -- Appellate Procedure Committee Members

Hon. Brian Blanchard, Chair
Court of Appeals – District IV

Atty. Marla Stephens
Appellate Division Director
State Public Defender's Office

Atty. Christine Rew Barden
Reinhart Boerner Van Deuren

Hon. Gerald Ptacek
Racine County Circuit Court Judge

Atty. Rebecca St. John (2011-2012)
Criminal Appeals Unit
Department of Justice

Atty. Greg Weber (2012-present)
Director of the Criminal Appeals Unit
Department of Justice

Hon. Maxine A. White
Milwaukee County Circuit Court Judge

Dennis Myers
Washington County Supervisor

Atty. Jill Karofsky (*ad hoc*)
Director of the Office of Crime Victim Services
Department of Justice

Atty. Jennifer Andrews (*ad hoc*)
Chief Staff Attorney
Court of Appeals

Prof. Meredith Ross (*ad hoc*)
Former Director of Frank J. Remington Center
University of Wisconsin Law School

Atty. Marcia Vandercook (*ad hoc*)
Circuit Court Legal Advisor
Office of Court Operations

Diane Fremgen (*ad hoc*)
Clerk of Court
Wisconsin Supreme Court and Court of Appeals

Appendix 2

Wisconsin Judicial Council
Appellate Procedure Committee
Victim Identity Project
Potentially Interested Parties
July 27, 2012

State Bar Criminal Law and Appellate Practice Sections
Attn: Salud Garcia

Court of Appeals Judges
Attn: Chief Judge Richard Brown

Wisconsin Coalition Against Domestic Violence
Attn: Teresa Meuer, Staff Attorney

Wisconsin Coalition Against Sexual Assault
Attn: Pennie Meyers, Executive Director

Wisconsin Association of Criminal Defense Lawyers
Attn: Peter McKeever, Executive Director
Attn: Michael Witt, President

Wisconsin District Attorney's Association
Attn: Diane Schlipper, Executive Director
Attn: Adam Gerol, President

Clerk of Supreme Court and Court of Appeals
Attn: Diane M. Fremgen