

THIS DRAFT ORDER IS SUBJECT TO FURTHER EDITING AND MODIFICATION

SUPREME COURT OF WISCONSIN

NOTICE

This order is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 14-01

In the matter of the Petition to Create
Wisconsin Statute § (RULE) 809.86.

FILED

DRAFT

Diane M. Fremgen
Clerk of Supreme Court
Madison, WI

The Wisconsin Judicial Council (Judicial Council) has filed an administrative rule petition, pursuant to Wis. Stat. § 751.12, asking the court to create a rule requiring the use of initials in appellate briefs and in appellate court decisions in order to protect the identity of certain crime victims.

The memorandum in support of the petition recounts the history giving rise to this petition. The Wisconsin Department of Justice (DOJ) asked the Judicial Council to study this issue. The request was prompted by requests from crime victims and their advocates, who are troubled when appellate briefs and court decisions include their names along with graphic details of crimes committed against them.

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The Judicial Council referred this issue to its Appellate Procedure Committee for further study.

The petition was filed on January 21, 2014. The court discussed the matter at an open rules conference on June 25, 2014, and voted to obtain additional information from the petitioner and to schedule a public hearing. On August 5, 2014, letters were sent to interested parties, seeking input, and to the petitioner, seeking responses to certain questions. The court received a written response to its questions from the Judicial Council's Appellate Procedure Committee dated September 2, 2014. The court also received written responses from the DOJ and from the Wisconsin Coalition Against Sexual Assault, both strongly supporting the petition, and from the State Bar of Wisconsin's Appellate Practice Section, supporting the petition and recommending an amendment.

The court conducted a public hearing on September 22, 2014. The Honorable Brian Blanchard, in his capacity as Vice Chair of the Judicial Council, presented the petition on behalf of the Judicial Council together with Attorney April Southwick, Staff Attorney to the Judicial Council. Several individuals spoke in support of the petition: Attorney Jill J. Karofsky, Executive Director, DOJ's Office of Crime Victim Services; Assistant Attorney General Greg M. Weber, Director of the Criminal Appeals Unit at DOJ; Ms. Talisa Tichenor; and Attorney Rachel Monaco-Wilcox, Coordinator for LOTUS Legal Clinic, Mount Mary University. Attorney Ellen Henak spoke in

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opposition to the petition on behalf of the Wisconsin Association of Criminal Defense Attorneys.

The court discussed the matter at its open administrative rules conference following the hearing. The court requested more information but voted to immediately amend its own ~~internal procedures~~ style manual relating to court decisions in a manner consistent with the petition and recommended that the court of appeals do the same.

The court discussed the petition again on December 5, 2014. Having decided to revise its internal ~~court policies~~ style manual to avoid use of victim names in court decisions, the court concluded it would limit the proposed rule to appellate briefs.

The proposed rule prohibits the use of any part of a victim's real name. The petitioner stressed the importance of this requirement at the hearing. The privacy of a victim with an unusual first name is not protected if that name appears in an opinion or brief, particularly if other facts necessary to the opinion will make the victim's identity apparent. The court observed that other appellate rules direct the use of a first name and last initial to protect identity in confidential cases. See, e.g., Wis. Stat. §§ 809.(19)(g) and 809.81(8). The court deemed it appropriate to amend those provisions to make them consistent with the proposed rule.

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The court discussed the proposed provision entitled "protective order" whereby the court may issue an order to expand or excuse compliance with the rule. The court concluded that compliance with the proposed rule is not required if the name of the victim is relevant to the proceeding and was disinclined to require litigants to obtain court approval in such instances, instead favoring a consensual ethic. Accordingly, the court voted to revise the rule to provide that a litigant may, without leave of the court, use a victim's name in a brief if there is "good cause" to do so. The court voted 6:1 to adopt the petition, as amended,⁺ and to adopt the other changes discussed and decided by the court.

IT IS ORDERED that:

SECTION 1. 809.19 (1) (g) of the statutes is amended to read:

809.19 **(1)** (g) Reference to an individual by ~~first name and last initial~~ one or more initials or other appropriate pseudonym or designation rather than by his or her full name when the record is required by law to be confidential.

SECTION 2. 809.19 (2) (a) of the statutes is amended to read:

809.19 **(2)** (a) *Contents.* The appellant's brief shall include a short appendix containing, at a minimum, the findings or opinion of the circuit court, limited portions of the record essential to an

~~⁺Justice Ann Walsh Bradley voted against the petition. {Although she favors a rule protecting crime victim privacy she ... [her language to follow]}~~

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understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues, and a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b). If the appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix shall also contain the findings of fact and conclusions of law, if any, and final decision of the administrative agency. The appendix shall include a table of contents. If the record is required by law to be confidential, the portions of the record included in the appendix shall be reproduced using ~~first names and last initials~~ one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

SECTION 3. 809.19 (2) (b) of the statutes is amended to read:

809.19 **(2)** (b) *Certification.* An appellant's counsel shall append to the appendix a signed certification that the appendix meets the content requirements of par. (a) in the following form:

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23

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(3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using ~~first names and last initials~~ one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Signed:

Signature

SECTION 4. 809.81 (8) of the statutes is amended to read:

809.81 **(8)** CONFIDENTIALITY. Every notice of appeal or other document that is filed in the court and that is required by law to be confidential shall refer to individuals only by ~~their first name and~~

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~~the first initial of their last name~~ one or more initials or other appropriate pseudonym or designation.

SECTION 5. 809.86 of the statutes is created to read:

809.86 Rule (Identification of victims and others in briefing). (1) ~~INTENT~~DECLARATION OF POLICY. By enacting this rule, the supreme court intends to better protect the privacy and dignity interests of crime victims. It requires ~~the parties'~~appellate briefs to identify crime victims by use of identifiers, as specified in sub. (4), unless there is good cause for noncompliance. ~~In light of the increasing availability of appellate court documents through multiple sources and in addition to the specific requirements of this rule, the parties should also refrain from disclosing sensitive information or identifying personal data in other court filings, and in open court proceedings.~~The rule protects the identity of victims in appellate briefs that the courts make available online.

(2) APPLICABILITY. This section applies to appeals in the following types of cases:

- (a) Section 971.17 proceedings.
- (b) Criminal cases.
- (c) Ch. 938 cases.
- (d) Ch. 980 cases.

(e) Certiorari review of decisions or orders entered by the department of corrections, the department of health services or the

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parole commission in a proceeding or case specified in pars. (a) to (d).

(f) Collateral challenges to judgments or orders entered in a proceeding or case specified in pars. (a) to (e).

(3) DEFINITION. In this section, "victim" means 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. "Victim" does not include the person convicted of or alleged to have committed a crime at issue in the appeal or proceeding.

(4) BRIEFS. In an appeal specified under sub. (2), the briefs of the parties shall not, without good cause, identify a victim by any part of his or her name but may identify a victim by one or more initials or other appropriate pseudonym or designation.

(5) PROTECTIVE ORDER. For good cause, the court may make any order necessary to protect the identity of a victim or other person, or to excuse compliance with this section.

SECTION 6. Judicial Council Note to 809.86 of the statutes is created to read:

Judicial Council Note:

Proposed s. 809.86 addresses 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

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respect for their privacy. See Wis. Const. art. I, § 9m; Wis. Stat. § 950.01. Specifically, the rule protects the identity of victims in appellate briefs that the courts make available online. The rule does not extend to other appellate filings, including appendices, because these documents are not currently posted electronically.

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 is intended to address only matters in which the state has alleged or proved that a party in the appeal or proceeding has committed criminal conduct against one or more victims in the matter. Accordingly, sub. (2) is limited to matters in which victims of crime are most frequently referenced and identified as victims or alleged victims.

Subsection (3) provides a definition of a "victim" that includes an alleged victim. In some appeals, a party's position will be that there was in fact no victimization, and nothing in this proposed rule is intended to limit arguments to that effect.

The privacy issues addressed by the rule do not extend to a deceased victim in the same manner. Therefore, subsection (3) permits the victim of a homicide to be recognized in an appellate brief.

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Subsection (4) prohibits the use of any part of a victim or alleged victim's name except initials. Subsection (4) does not prescribe or limit the use of other pseudonyms for victims, as long as they maintain sensitivity and respect for victims.

Subsection (5) 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.

IT IS FURTHER ORDERED that the Judicial Council Note to Wis. Stat. § (RULE) 809.86 is not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule.

IT IS FURTHER ORDERED that the effective date of this order is July 1, 2015.

IT IS FURTHER ORDERED that the rule adopted pursuant to this order shall apply to proceedings commenced after the effective date of this rule and, insofar as is just and practicable, to proceedings pending on the effective date.

IT IS FURTHER ORDERED that the Wisconsin Supreme Court and the Wisconsin Court of Appeals will, no later than the effective date of this order, revise their respective style manuals in a manner consistent with Wis. Stat. § (Rule) 809.86.

IT IS FURTHER ORDERED that notice of these amendments to Wis. Stat. Ch. 809 be given by a single publication of a copy of this order in the official publications designated in SCR 80.01, including

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the official publishers' online databases, and on the Wisconsin court system's web site. The State Bar of Wisconsin shall provide notice of this order.

Dated at Madison, Wisconsin, this _____ day of _____, 2015.

BY THE COURT:

Diane M. Fremgen
Clerk of Supreme Court

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¶1 SHIRLEY S. ABRAHAMSON, C.J. (*concurring*). I favor a rule addressing victim privacy interests in appellate briefs and appellate opinions. Victim privacy interests in other proceedings and documents will be before the court in another rule petition.

¶2 I write separately because I prefer to adopt the language of the petition originally filed with the court, with a few minor revisions. The original petition, in my opinion, is substantially better than the court's order, with regard to § 809.06(4) that governs identification of victims in court opinions (as well as briefs) and with regard to § 809.06(5) that governs protective orders to protect a victim's identity or to excuse compliance with this section. As I see it, § 809.06(4) and (5) of the following order better protect the victim.

¶3 I have included in the Declaration of Policy the language of the Judicial Council explaining the Council's submission of its proposed rule.

¶4 I would have the order read as follows:

SECTION 1. 809.86 is created as follows:

(1) DECLARATION OF POLICY. Section 809.86 is created to help treat victims with fairness, dignity, courtesy, sensitivity, and respect for their privacy. It addresses victim privacy concerns that result from public access to searchable documents posted on the Wisconsin Supreme Court and Court of Appeals access website.

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Specifically, section 809.86 protects the identity of victims in appellate briefs and in appellate judicial opinions that the courts make available online. It does not extend to other appellate filings, including appendices, because these documents are not currently posted electronically.

Section 809.86 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 clerk of courts offices.

(2) APPLICABILITY. This section applies to appeals in the following types of cases:

- (a) Section 971.17 proceedings.
- (b) Criminal cases.
- (c) Ch. 938 cases.
- (d) Ch. 980 cases.

(e) 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 pars. (a) to (d).

(f) Collateral challenges to judgments or orders entered in a proceeding or case specified in pars. (a) to (e).

(3) DEFINITION. In this section, "victim" means 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. "Victim" does not include the person convicted of or alleged to have committed a crime at issue in the appeal or proceeding.

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(4) OPINION AND BRIEFS. In an appeal specified under sub. (2), the opinion or decision of the supreme court and court of appeals and the briefs of the parties shall not, without good cause, identify a victim by any part of his or her name but may identify a victim by one or more initials or other appropriate pseudonym or designation.

(5) PROTECTIVE ORDER. For good cause, the court may make any order necessary to protect the identity of a victim or other person, or to excuse compliance with this section.

¶5 I would amend §§ 809.19(1)(g), 809.19(2)(b), 809.19(2)(a), and 809.81(8) of the statutes as the court's order does. These amendments were not part of the original petition but should be added to the order for consistency and conformity.

¶6 For the reason set forth, I write separately.

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