



## STATE OF WISCONSIN JUDICIAL COUNCIL

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September 2, 2014

***Hand Delivered***

Clerk of the Supreme Court  
Attn: Deputy Clerk -- Rules  
110 East Main Street  
Suite 215  
Madison, Wisconsin 53703

Re: Rule Petition 14-01, Petition to Create Wis. Stat. § (Rule) 809.86

Dear Clerk of Court:

Please accept this letter from the Wisconsin Judicial Council's Appellate Procedure Committee in response to issues and questions raised in correspondence from Commissioner Julie Rich, dated August 5, 2014, and regarding Rule Petition 14-01. The questions posed by Commissioner Rich appear in bold italics, followed by the committee's response.

***Proposed s. 809.86 (4), entitled "protective order," provides that "[f]or 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."***

***The court perceives this provision as very broad. Please explain what is intended by "or other person" and provide examples of how this phrase might be utilized. Please also explain when it might be appropriate to excuse compliance with this section, and the procedure by which a protective order would be sought.***

The Judicial Council's Appellate Procedure Committee was originally tasked with studying potential rules to protect the identity of crime victims *and witnesses* and was asked to make a recommendation to the Judicial Council. During the course of its study, the committee determined that there was insufficient evidence to support a recommendation for a broad rule to protect the identity of all witnesses. However, members recognized that in some cases, witnesses could likely make a specific showing of good cause to withhold their identities. For example, the committee specifically noted that child witnesses may have good cause to protect their identity, especially in cases involving sensitive crimes.

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Committee members also noted that chapter 950, Wisconsin Statutes, which includes the Crime Victims' Bill of Rights, recognizes the rights of witnesses. For example, Wis. Stat. § 950.01 memorializes the legislative intent to protect crime victims and witnesses, and Wis. Stat. § 950.04(2w)(c) recognizes the right of witnesses to be protected from harm or threats of harm.

Therefore, the committee concluded that a proposed identity rule should be flexible enough to permit a court to extend protection, on a case-by-case basis, to other persons, such as witnesses, who demonstrate a need to protect their identities.

The committee also recognized that in some cases, it may be necessary and appropriate to protect the identities of family members of the victim to uphold the intent of the proposed rule.

It may be appropriate to excuse compliance with the proposed rule when the victim's name is relevant to an issue on appeal. When drafting proposed Rule 809.86(4), the committee recognized that in exceptional cases, a defendant's statutory or constitution rights might be violated if the defendant is deprived of the opportunity to state a name used by the victim. For example, if there was evidence in the record that an alleged crime victim went by the name "Murder" and that the criminal defendant was aware of this name at the time of the charged crime, the fact of the name could be pertinent to a discussion of self defense. It was the committee's intent to provide courts with sufficient discretion to address those cases. The provision also gives the court flexibility to issue an order *sua sponte* or to excuse its own compliance with the rule when the court determines that justice requires that an opinion or decision identify a victim.

Under the proposed rule, a protective order can be requested by any party or other person by filing a motion with the appellate court. The committee deliberately drafted proposed sub. (4) broadly so that a victim, witness, or other interested person can seek a protective order. The drafting committee believes that current Rule 809.14, generally governing motion practice in the appellate courts, would control motions for protective orders under the proposed rule. Rules 809.82 and 809.83 may also be applicable to provide the court with considerable discretion to enlarge or reduce time periods and sanction noncompliance.

***The proposed Judicial Council Note states that the proposed "rule does not extend to other appellate filings, including appendices, because these documents are not currently posted electronically." What is the Judicial Council's recommendation in the event these documents are posted electronically in the future?***

The drafting committee agreed by consensus that if other appellate filings are posted electronically in the future, the rule should be extended to cover them. However, the committee believes that appendices and the record on appeal should be excluded from the rule because they generally consist of documents created at the circuit court level and the committee does not support altering circuit court documents through a rule of appellate procedure. Additionally, the committee does not support extending the rule to require redaction of existing documents because it could place too great a burden on the parties.

The drafting committee studied many different options when considering the scope of the proposed rule. Although it was the minority view, at least one committee member favored extending the rule to all filings, decisions, and orders in the court of appeals and supreme court. As a compromise, members arrived at the present recommendation to include only briefs, opinions, and decisions after debating many different options. However, it was the committee's intent that as additional documents become publically available via the Internet, the rule will be extended to cover them, with the exception of appendices and records.

The Judicial Council will also be discussing the court's questions at its next meeting on September 19, 2014. If the Council has any additional comments, those will be relayed to the court at the public hearing on September 22, 2014.

Thank you and please don't hesitate to contact me if you have any additional questions.

Sincerely,

April M. Southwick, Attorney  
Wisconsin Judicial Council