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May 30, 2018

Advisory Committee on Rules
New Hampshire Supreme Court
1 Charles Doe Drive
Concord, NH 03301

Re: Proposed Rule ____, Protecting Crime Victims' Identity

Dear Chief Justice Lynn and Committee Members:

The following comments are submitted with respect to the above-referenced proposed rule that will be considered at the Committee's hearing on June 1. They do not address the wisdom of adopting the rule which is for the Committee to decide. Rather they (i) address whether the rule can be squared with the New Hampshire Constitution and the Court's case law on the public's right of access to judicial proceedings; and (ii) raise several additional issues the Committee should consider.

If adopted, the rule would prohibit inclusion of "a crime victim's name, address, place of employment or other personal information" in pleadings filed with the Court "unless under seal or authorized by the Court for good cause."

The rule appears to be in response to a June 8, 2017 memorandum to the Advisory Committee on Rules. (Attachment 1). The memorandum states that the Rights of Crime Victims statute gives crime victims "a right 'to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process.'" RSA 21-M:8-k,II(a). It notes that in the absence of a rule, "many briefs filed in criminal cases have identified victims by name," while a "number of other appellate courts have adopted a rule or policies" prohibiting the identification of crime victims. The memorandum cites to rules adopted by three states: Colorado Appellate Rule 32(f), North Dakota Rule 14(a) and Wisconsin Rule 809.86.

Comments to the Colorado rule state it was added in 2015 and is based on "legislative requirements" and "is consistent with longstanding court practice." The North Dakota rule was adopted in April 2007.¹ Minutes of the North Dakota Joint Procedure Committee indicate the committee was concerned "that with electronic copies of appellate material now available on the Internet, more formal steps needed to be taken to prevent the inappropriate disclosure of the identities of people involved in appellate cases." Concern also was expressed whether a

¹ The North Dakota rule also prohibits naming the "victim" "at oral argument and in opinions."

“violation of the rule would be a violation of a privacy right created by the rule.” As a result, the North Dakota rule contains this Explanatory Note: “This rule is not intended to create a separate cause of action.” (Attachment 2).

Neither the Colorado nor North Dakota rule makes reference to the status of a crime victim’s identity in the proceedings giving rise to the appeal or the records of those proceedings. In contrast, the Wisconsin rule includes a Judicial Council Note that was not adopted “but will be published and may be consulted for guidance in interpreting and applying the rule.” The Note states that the proposed rule “addresses victim privacy concerns that result from public access to searchable documents posted on the Wisconsin Supreme Court and Court of Appeals access website” And it states:

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 (emphasis added).

(Attachment 3)

As worded, the proposed rule applies only to pleadings filed with the Court. It leaves unaltered the way in which the crime victim was described or identified in the proceedings below and court and public records related to those proceedings.² As such, the rule would not limit the public’s right of access to those proceedings and records, nor would it be inconsistent with Part I, Articles 7, 8 and 22 of the New Hampshire Constitution and the case law affirming the public’s right of access to court proceedings and records. *See, e.g., Thomson v. Cash*, 117 N.H. 653, 654 (1977)(“The courts of New Hampshire have always considered their records to be public, absent some overriding consideration or special circumstance”); *Petition of Keene Sentinel*, 136 N.H. 121, 128 (1992)(“We hold that under the constitutional and decisional law of this State, there is a presumption that court records are public and the burden of proof rests with the party seeking closure or nondisclosure of court records to demonstrate with specificity that there is some overriding consideration or special circumstance, that is, a sufficiently compelling interest, which outweighs the public’s right of access to those records”); and *The Associated Press, Inc. v. State*, 153 N.H. 120, 125 (2005)(“The public right of access to court proceedings and records pre-dates the State and Federal Constitutions and is firmly grounded in the common law”).

Supreme Court Rule 16(3)(i) requires that the written “decision(s) below that are being appealed or reviewed ... shall be included with the brief.” If the decision includes “a crime victim’s name, address, place of employment or other personal information,” the rule does not state whether the appealing party should redact that information and replace it with “[a]n alias, pseudonym, appropriate designation ...” If the Committee recommends adoption of the rule, it should address this omission, as well as how a crime victim is to be identified in pleadings and records the parties submit in appendices filed pursuant to Supreme Court Rules 13(3) and 17.

² *See, e.g.,* RSA 594:14-a, Arrest Records (are “governmental records’ as defined in RSA 91-A and subject to disclosure in accordance with that chapter”).

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Finally, I suggest the Committee consider whether the rule should be modeled after the North Dakota rule and apply to oral argument and Court opinions and include a statement that it does not create a separate cause of action.

Sincerely yours,



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ATTACHMENT 1

#2017-009

MEMORANDUM

TO: Advisory Committee on Rules

FROM: Eileen Fox

DATE: June 8, 2017

RE: References to Crime Victims in Documents filed in Criminal Cases

The Supreme Court requests that the Advisory Committee on Rules consider whether a Supreme Court rule should be adopted relating to identifying crime victims in documents filed in appellate cases. RSA 21-M:8-k, Rights of Crime Victims, provides that crime victims have a right "to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process." We do not currently have a rule addressing the identification of crime victims in briefs or other documents, and, in the past, many briefs filed in criminal cases have identified victims by name. A number of other appellate courts have adopted a rule or policy requiring that briefs or other documents identify crime victims by initials or with general descriptive terms, e.g., "victim." In some instances, rules are limited to particular types of victims, such as sexual assault victims. See Colorado Appellate rule 32(f) and North Dakota Supreme Court Rule 14. Other jurisdictions require have rules that appears to apply to all types of crime. See Wisconsin Rule 809.86.

If the committee believes that the adoption of such a rule would be appropriate, this is likely to affect how we docket briefs and other documents in our case management system, and how such documents are filed

electronically. Tim or I would be happy to work with the committee to draft a rule that would accomplish the committee's objective in a manner that works with the court's technology.

ATTACHMENT 2



North Dakota Supreme Court Rules
N.D.R.App.P. 14.1?

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Effective December 15, 2011
[Go to previous version of rule.]

RULE 14. IDENTITY PROTECTION

(a) Form of Confidential References. In appellate briefs, at oral argument and in opinions, the following individuals may not be referred to by name but may be referred to by the individual's initials:

- (1) the respondent in a mental health proceeding;
- (2) the respondent and members of the respondent's family in a conservatorship or guardianship proceeding;
- (3) the respondent in a juvenile proceeding;
- (4) the child and parents in a proceeding to terminate parental rights;
- (5) a minor child;
- (6) a victim or alleged victim of a sexual offense.

(b) Modification of Electronic Opinions.

(1) Individual Names. On request, if the name of an individual eligible for protection under subdivision (a) appears in the electronic version of a specific

appellate opinion, it must be replaced by the individual's initials and the opinion annotated with the words "Modified under N.D.R.App.P. 14."

(2) Birth Dates. On request, if the full birth date of any individual appears in the electronic version of a specific appellate opinion, it may be replaced by the individual's birth year and the opinion annotated with the words "Modified under N.D.R.App.P. 14."

EXPLANATORY NOTE

Rule 14 was adopted effective March 1, 2008; March 1, 2009; December 15, 2011.

This rule is not intended to create a separate cause of action.

Paragraph (a)(5) was amended, effective March 1, 2009, to require all references to minor children in appellate material to be by the individual child's initials.

Paragraph (b)(2) was added, effective December 15, 2011, to allow persons to request removal of a full birth date from an electronic version of an appellate opinion.

Sources: Joint Procedure Committee Minutes of September 30, 2011, pages 17-18; April 26-27, 2007, pages 28-29.

Statutes Affected:

Considered: N.D.C.C. §§ 12.1-34-02, 12.1-35-03, 14-15-16, 14-20-54, 25-03.1-43, 27-20-51.

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North Dakota Supreme Court Rule 14

MINUTES OF MEETING

Joint Procedure Committee

April 26-27, 2007

RULE 14, N.D.R. App.P. - IDENTITY PROTECTION (PAGES 223-234 OF THE AGENDA MATERIAL)

Staff explained that Justice Sandstrom had proposed a new appellate rule that would protect identities of vulnerable parties in appellate proceedings. Staff said the rule would also allow the amendment of electronically published opinions to protect the identities of vulnerable parties.

Judge Kleven MOVED to adopt the proposed new Rule 14.
Judge Foughty seconded.

The Chair explained that the rule was necessary because there were no specific standards for protecting the identities of children and other vulnerable persons in appellate materials. The Chair indicated that children's names, especially, often appear in submissions to the Supreme Court in domestic matters. The Chair said that with electronic copies of appellate materials now available on the Internet, more formal steps needed to be taken to prevent the inappropriate disclosure of the identities of people involved in appellate cases.

A member asked whether the rule would create a cause of action against the courts in cases where private information is released, such as when a name is included in a brief in violation of the rule. The Chair said the clerk reviews submissions to the court and would likely instruct a party who submits a brief that violates the rule to correct it. The Chair said there was no intention to create a cause of action.

A member said that a person could argue that a release of information in violation of the rule would be a violation of a privacy right created by the rule. The member said this was especially likely to become an issue in cases where adverse counsel was responsible for releasing the information. A member suggested there could be language in the rule explaining there was no intent to create a separate cause of action.

Mr. Kuntz MOVED to add language to the explanatory note:
"This rule is not intended to create a separate cause of action."
Mr. Dunn seconded.

A member commented that as part of victim/witness legislation that had been added to the Century Code, clauses were added to state that the statutes were not intended to create separate causes of action.

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The motion CARRIED unanimously.

By unanimous consent, a reference to N.D.C.C. § 12.1-34-02 was added to the "considered" section of the explanatory note.

The motion to adopt the proposed new Rule 14 CARRIED unanimously. The amendments will be sent to the Supreme Court as part of the Annual Rules Package.

ATTACHMENT 3

Wisconsin 809.86 Rule (Identification of victims and others in briefing).

(1) **DECLARATION OF POLICY.** By enacting this rule, the supreme court intends to better protect the privacy and dignity interests of crime victims. It requires appellate briefs to identify crime victims by use of identifiers, as specified in sub. (4), unless there is good cause for noncompliance. 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) Chapter 938 cases.

(d) Chapter 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.

(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.

History: Sup. Ct. Order No. 14-01, 2015 WI 21, filed 3-2-15, eff. 7-1-15; 2017 a. 365 s. 111.

NOTE: Sup. Ct. Order No. 14-01 states, "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."

Judicial Council Note, 2015: 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 respect for their privacy. *See* Wis. Const. Article I, section 9m; Wis. Stat., s. 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.

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.