

Memorandum

SUPREME COURT OF WISCONSIN
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DATE: May 12, 2020

TO: Judges, Court Commissioners, Clerks of Circuit Court, Juvenile Clerks, and District Court Administrators

FROM: Amber Peterson, Legal Advisor

SUBJECT: Guidance Related to Marsy's Law – Wisconsin Constitution Art. I, § 9m

Introduction

On April 7, 2020, Wisconsin voters ratified an amendment to [Article I, Section 9m](#) of the Wisconsin Constitution that provides additional rights to victims of crime in both adult and juvenile cases. The rights provided in this amendment, also known as Marsy's law, "shall vest at the time of victimization and be protected by law in a manner no less vigorous than the protections afforded to the accused." Art. I, § 9m(2). However, this section of the constitution is "not intended and may not be interpreted to supersede a defendant's federal constitutional rights. . ." Art. I, § 9m(6). The changes became effective May 4, 2020, when the Wisconsin Elections Commission certified the election results.

This memo summarizes some of the constitutional rights granted to victims under Art. I, Sec. 9m that most significantly impact the courts and provides suggestions for how to implement these changes. It is important to note there are a lot of unanswered questions with Marsy's law given the vague language in the amendment, including a lack of specificity for who is responsible for guaranteeing these rights. Many of these unanswered questions will only be clarified over time by legislative changes and interpretation by circuit courts, appellate courts, and the Crime Victims Rights Board. In the meantime, courts are encouraged to work with their local justice system partners to decide how best to implement these changes in each county.

For a brief summary of all of the rights provided under Marsy's law, see the [Marsy's Law Update](#) provided by the Office of Judicial Education and posted on CourtNet.

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Definition of “Victim”

New Constitutional Definition – Art. I, § 9m(1)	Statutory Definition – Wis. Stat. § 950.02(4)(a)
<p>(1) (a) In this section, notwithstanding any statutory right, privilege, or protection, “victim” means any of the following:</p> <ol style="list-style-type: none"> 1. A person¹ against whom an act is committed that would constitute a crime if committed by a competent adult. 2. If the person under subd. 1. is deceased or is physically or emotionally unable to exercise his or her rights under this section, the person's spouse, parent or legal guardian, sibling, child, person who resided with the deceased at the time of death, or other lawful representative. 3. If the person under subd. 1. is a minor, the person's parent, legal guardian or custodian, or other lawful representative. 4. If the person under subd. 1. is adjudicated incompetent, the person's legal guardian or other lawful representative. <p>(1) (b) “Victim” does not include the accused or a person who the court finds would not act in the best interests of a victim who is deceased, incompetent, a minor, or physically or emotionally unable to exercise his or her rights under this section.</p>	<p>(4) (a) “Victim” means any of the following:</p> <ol style="list-style-type: none"> 1. A person against whom a crime has been committed. 2. If the person is specified in subd. 1. is a child, parent, guardian or legal custodian of the child. 3. If a person specified in subd. 1. is physically or emotionally unable to exercise the rights granted under s. 950.04 or art. I, section 9m, of the Wisconsin constitution, a person designated by the person specified in subd. 1. or a family member of the person specified in subd. 1. 4. If a person specified in subd. 1. is deceased, any of the following: <ol style="list-style-type: none"> a. A family member of the person who is deceased. b. A person who resided with the person who is deceased. 5. If a person specified in subd. 1. has been adjudicated incompetent in this state, the guardian of the person appointed for him or her. <p>(4) (b) “Victim” does not include the person charged with or alleged to have committed the crime.</p>

Impact on the Courts

Judges and commissioners may receive motions to find that a person is not acting in the best interest of a victim who is deceased, incompetent, a minor, or physically or emotionally unable to exercise his or her rights. If the court grants the motion, it should appoint a GAL or other appropriate person to act on the victim’s behalf.

Marsy’s law creates a definition of “victim” in the Wisconsin Constitution. Prior to Marsy’s law, “victim” was only defined in Wis. Stat. § 950.02(4)(a). Although the definition provided in Art. I, § 9m(1) of the constitution is very similar to the definition provided in Wis. Stat. § 950.02(4), a significant difference is that the definition of “victim” under Marsy’s law now excludes “a person who the court finds would not act in the best interests of the a victim who is deceased,

¹ “Person” is defined as including “all partnerships, associations and bodies politic or corporate.” Wis. Stat. § 990.01(26). Prior to Marsy’s law, victims’ rights and services were provided to partnerships, associations, and corporations and Marsy’s law does not create a change to this practice.

incompetent, a minor, or physically or emotionally unable to exercise his or her rights under this section.” Art. I, § 9m(1)(b).

Given this new language, judges and commissioners may be asked to determine whether someone representing a victim is able to act in the victim’s best interests. If the court determines the person will not act in the victim’s best interests, the court will have to appoint a guardian ad litem or other appropriate person to represent the victim’s best interests. This situation may be common in child sexual assault or abuse cases where the non-offending is siding with the defendant and not acting in the child victim’s best interests.

Right to Privacy

New Constitutional Provision – Art. I, § 9m(2)(b)	Old Constitutional Provision – Art. I, § 9m	Statutory Provision – Wis. Stat. § 950.04(1v)(ag)
<p>(2) . . . victims shall be entitled to all of the following rights. . .</p> <p>(b) To privacy.</p>	<p>This state shall treat crime victims, as defined by law, with fairness, dignity and respect for their privacy.²</p>	<p>(1v) Victims of crime have the following rights:</p> <p>(ag) To be treated with fairness, dignity, and respect for his or her privacy by public officials, employees, or agencies. This paragraph does not impair the right or duty of a public official or employee to conduct his or her official duties reasonably and in good faith.</p>

Impact on the Courts
<ol style="list-style-type: none"> 1) There is still no statutory authority that makes victim names and victim impact statements automatically confidential. Judges and commissioners may receive more motions to seal victim names and other victim-related information. 2) Victim addresses are confidential under statute and should be provided to the court using the Confidential Crime Victim(s) Information (CR-247) form. 3) Clerks should continue to <u>not</u> include victim names in court minutes that appear on WCCA (CCAP).

The right to victim privacy previously existed under Art. I, § 9m of the constitution. Marsy’s law made it a standalone, self-executing³ right. Wis. Stat. § 950.04(1v)(ag) also provides that crime

² The Wisconsin Supreme Court determined this language is a “statement of purpose that describes the policies to be promoted by the State and does not provide an enforceable, self-executing right. . .” *Schilling v. State Crime Victims Rights Bd.*, 2005 WI 17, ¶ 28.

³ See Art. I, § 9m(3).

victims have the right to “be treated with fairness, dignity, and respect for his or her privacy by public officials, employees, or agencies.”

Confidentiality of Victim Names and Case Law on Sealing Court Documents

The exact definition and extent of this right to “privacy” is unclear. In general, the basic rule in Wisconsin is that government records are presumed to be open. Wis. Stat. § 19.31; *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 683 (1965). In addition to the public records law, Wis. Stat. § 59.20(3) requires clerks of circuit court to open for examination “all books and papers required to be kept in his or her office,” which includes criminal court records that may contain a victim’s name.⁴ In order to overcome the “absolute right” of examination of court records, the Wisconsin Supreme Court has recognized three exceptions that allow a document to be closed to the public:

- 1) There is a statute authorizing the sealing of otherwise public records;
- 2) There is a showing that disclosure of the record would infringe on a constitutional right; or
- 3) The court exercises its “inherent power to preserve and protect the exercise of its judicial function . . .” after the party seeking to close the court records demonstrates, with particularity, that the administration of justice requires that the court records be closed.

State ex. rel. Bilder v. Delavan Township, 112 Wis. 2d 539, 554-56 (1983).

With the exception of victim addresses, which are discussed below, there is no statute that explicitly makes information like victim names or victim impact statements (VIS) confidential in circuit court proceedings.⁵ Without specific statutory authority, under *Bilder* and general public records law,⁶ victim names and VIS should not be treated as automatically confidential by parties and clerks.

Instead, according to Wis. Stat. § 801.21(2)⁷, if parties are seeking to protect a court record not protected under statutes, they will have to file a motion to seal or redact the document. The

⁴ The statutory mandate that case files be open is generally a stronger guarantee of public access than the public records law. See *State v. Stanley*, 2012 WI App 42, ¶ 31.

⁵ In contrast, Wis. Stat. § 809.86(4) prohibits victims’ full names from appearing in briefs, petitions for review, and responses to petitions for review filed with the Wisconsin Court of Appeals and Supreme Court.

⁶ See, e.g., *Hathaway v. City of Green Bay School District*, 116 Wis. 2d 388, 392 (1984) (public records should be open to inspection unless there is an exception provided in statute or common law, or an overriding public interest in nondisclosure).

⁷ Wis. Stat. § 801.21 applies to criminal cases. Wis. Stat. § 971.027.

information to be sealed or redacted may be filed under a temporary seal, in which case it shall be restricted from public access until the court rules on the motion. *Id.* Accordingly, if parties would like victim information kept confidential, it is recommended that courts require parties to file motions to seal victim information in each case. The court will then have to determine whether the victim information should be sealed based on existing law.

Confidentiality of Victim Addresses

In contrast to victim names which are not confidential under statute, there are statutes related to victim notification that make victim addresses confidential in court files.⁸ The Wisconsin Director of State Courts Office has a standardized court form, **Confidential Crime Victim(s) Information (CR-247)**⁹, that can be used to maintain victim addresses in a confidential manner by the court so the addresses do not appear on documents that are otherwise public records.

This Confidential Crime Victim(s) Information form is not intended to be a “Victim Key” that removes victim names from court files and replaces them with anonymous identifies such as “Victim 1” or “Victim A.” If counties choose to develop these types of victim keys intended to remove victim names from the court file, these forms should be filed with a motion to seal and reviewed by the judge.

⁸ See Wis. Stats. §§ 302.113(9g)(g)3., 302.114(6)(e), and 973.09(3m)(c).

⁹ This [form](#) is available under the criminal forms tab on the [Wisconsin Court System website](#).

Right to Notification of Proceedings

New Constitutional Provision – Art. I, § 9m(2)(g)	Old Constitutional Provision – Art. I, § 9m	Statutory Provision – Wis. Stat. § 950.04(1v)(g)
<p>(2) . . . victims shall be entitled to all of the following rights. . .</p> <p>(g) Upon request, to reasonable and timely notification of proceedings.</p>	<p>This state shall ensure that crime victims have all of the following privileges and protections as provided by law:</p> <p>. . . notification of court proceedings</p>	<p>(1v) Victims of crime have the following rights:</p> <p>(g) To have reasonable attempts made to notify the victim of hearings or court proceedings, as provided under ss. 302.113(9g)(g)2. [clerk to provide notice of petition for release to extended supervision, non-life sentence], 302.114(6) [clerk to provide notice of petition for release to extended supervision, life sentence], 938.27(4m) [DA or corp. counsel to provide notice in juvenile cases] and (6) [notice in interstate compact proceedings], 938.273(2) [DA or corp. counsel to provide notice in juvenile cases], 971.095(3) [DA shall provide notice of court proceedings] and 972.14 (3)(b) [DA shall provide notice of right to give victim impact statement].</p> <p><i>See also</i> Wis. Stat. § 950.04(1v)(f), (gm), (um), (v), (vg), (vm), (w), (x), (xm), (y), (yd), and (ym).</p>

Impact on the Courts

- 1) Counties should discuss who will provide notice of proceedings that are not already specified by law, deciding whether it will be the Victim/Witness Office or another agency.
- 2) Clerks of circuit court are still responsible for providing victims notice of certain proceedings specified under existing law. (See below for more detail.)
- 3) Victims may request or “opt in” to exercise their constitutional rights at any point in the case, including asking the court directly.

Marsy’s law gives victims the right to request “reasonable and timely” notification of proceedings. Art. I, § 9m(2)(g).

Definition of “Proceeding”

Marsy’s law modified the previous language from the right to receive notice of “court proceedings” to simply the right to receive notice of “proceedings,” suggesting a broader right to notice for any proceeding in a criminal case, even if it does not happen in a courtroom.

However, Marsy's law does not provide a definition of "proceeding," so the exact scope of the right to receive notice of proceedings is unclear.

Requesting to Exercise / "Opting In" to a Right

Marsy's law allows victims to request, or "opt in," to exercise several rights, including the right to receive notice of proceedings, the right to attend proceedings, and the right to be heard at proceedings.¹⁰ There is no specific procedure provided for how a victim must opt in, which means victims can arguably request to opt in and exercise their rights at any time and in a variety of ways. Accordingly, court officials should be aware they may receive direct requests from victims to exercise their rights at any point in the case, regardless of whether the victim previously exercised the same right.

Who is Responsible for Providing Notice of Proceedings

Marsy's law does not specify who is responsible for providing notice of proceedings. Courts are encouraged to meet with their justice system partners to decide who will provide victims with notice of proceedings that are not already covered by other laws. Some Victim/Witness Offices are working to implement procedures that will inform victims of this right to notice as early as possible in the case by including information on the documents law enforcement provide to victims when they respond to a call.

To assist in providing notice to victims, the Office of Court Operations will examine whether CCAP can be used to directly notify victims of court proceedings using the notice recipient feature in CCAP Case Management. If this is possible, Court Operations will work with DA's and Clerk's Offices to develop and implement a procedure for providing notice of proceedings.

Marsy's law does not alter the already-existing responsibility of clerks of circuit court to provide victims notice of the following:

- 1) Defendant's petition to modify a bifurcated sentence [sentence adjustments] under Wis. Stat. § 302.113(9g)(g)2.;
- 2) Defendant's petition for release to extended supervision if serving a lifetime sentence under Wis. Stat. § 302.114(6);
- 3) Defendant's motion to modify probation under Wis. Stat. § 973.09(3m)(b); and
- 4) Defendant's post-conviction motion for DNA testing under Wis. Stat. § 974.07(4)(a).

Clerks should continue to follow their current procedures to comply with these victim notification requirements.

¹⁰ In contrast, Ch. 950 does not require victims to request or "opt in" to exercise most of their rights, including the right to receive notice of and attend hearings.

Right to Attend All Proceedings

New Constitutional Provision – Art. I, § 9m(2)(e)	Old Constitutional Provision – Art. I, § 9m	Statutory Provision – Wis. Stat. § 950.04(1v)(b)
<p>(2) . . . victims shall be entitled to all of the following rights. . .</p> <p>(e) Upon request, to attend all proceedings involving the case.</p>	<p>This state shall ensure that crime victims have all of the following privileges and protections as provided by law:</p> <p>. . . the opportunity to attend court proceedings unless the trial court finds sequestration is necessary to a fair trial for the defendant</p>	<p>(1v) Victims of crime have the following rights:</p> <p>(b) To attend court proceedings in the case, subject to ss. 906.15 [exclusion of witnesses] and 938.299 (1) [exceptions to closed juvenile proceedings]. . .</p> <p><i>See also</i> Wis. Stat. § 950.04(1v)(nn), (nt), and (nx).</p>

Impact on the Courts
<ol style="list-style-type: none"> 1) Counties should meet and discuss who will provide notice of this right to victims. It will likely be included in the materials the Victim/Witness Office provides to victims, but it is important to make sure the information is being provided. 2) Because victims now have the right to attend “all proceedings involving the case,” courts may want to avoid holding proceedings off the record, in chambers, or in another manner that will make it difficult for a victim to attend.

Marsy’s law gives victims the right to request to attend all proceedings involving the case. Art. I, § 9m(2)(e).

Similar to the language regarding the right to notice, the previous language regarding the right to attend was modified from “court proceedings” to “proceedings,” again, suggesting a broader right to attend any proceeding in the case, even if it does not happen in the courtroom. However, again, Marsy’s law does not provide a definition of “proceeding.” To best protect a victim’s right to be present at all proceedings, courts may want to avoid holding hearings or meetings that take place off the record, in chambers, or in any other manner that makes it difficult, if not impossible, for the victim to be present.

Who is Responsible for Providing Notice of the Right and “Opting In”

Marsy’s law does not specify who is responsible for notifying victims of their right to attend all proceedings involving the case. Although notice of this right will likely be included in the materials the Victim/Witness Office provides to victims, it is still important for courts to meet with their justice system partners to ensure the information is being provided to victims.

As discussed above, victims may request, or “opt in,” to exercise this right to attend proceedings at any point in the case, regardless of whether they have previously appeared at any other proceeding.

Implication for Certain Types of Proceedings

This provision of Marsy’s law has generated a lot of discussion and concern regarding certain practices. Under the new law, victims arguably have the right to be present at *any* proceeding, including events that historically may have occurred outside of the courtroom, within short time frames, or off the record. Because there is no definition of “proceeding,” there is no clear answer for how to address some of these situations.

Although nothing in Marsy’s law prohibits a court from continuing to hold a proceeding if the victim has not yet received notification, courts should make sure that every reasonable effort has been to notify victims of their right to appear if the court is going to proceed. If a proceeding is held before the victim can be notified and the victim later states that he/she would have liked to be present and heard, the court can encourage the victim to provide a written statement to the court and the court can decide whether to modify its decision based on the information provided by the victim.

Until there is further clarification of the law, courts and other justice system partners should do their best to promote the victim’s right to be notified and present at most, if not all, proceedings related to the case. Courts may want to examine and modify any local practices that make it difficult for victims to be present at and participate in certain proceedings, while still taking into account the rights of the defendant.

Below is a list of some of the proceedings that have been identified as the most problematic in terms of providing victims with notice and the opportunity to be present and heard:

1. Proceedings with short timelines, such as bail hearings¹¹ or temporary physical custody hearings in juvenile cases.
2. Bail or other proceedings that happen outside of the courtroom or in chambers.
 - a. With regard to *Riverside* hearings, one position is that if the court is simply making a probable cause determination, that is arguably not a “proceeding”

¹¹ Art. I, § 9m(2)(e) is seemingly in conflict with Wis. Stat. § 971.095(3) which provides the district attorney’s responsibility to provide notice of court proceedings to victims does not apply to a proceeding held before the initial appearance to set conditions of release under ch. 969 [bail and other conditions of release].

under Marsy's law, but if the court is also setting the conditions of release, that would implicate the victim's rights and arguably constitute a "proceeding."

3. Scheduling meetings/conferences that happen off the record with attorneys, judges, clerks, and/or judicial assistants.
 - a. Under Marsy's law, even scheduling meetings could constitute a "proceeding" that the victim is entitled to receive notice of, attend, and make a statement at. As will be discussed below, victims have a right to be heard at any proceeding during which their rights are implicated. Scheduling future hearings may implicate a victim's right to timely disposition of the case.
 - b. An example of a potential solution to address requests for adjournment is to require the DA's Office to indicate whether the victim has been notified of the proposed adjournment and whether the victim objects. If the victim objects, the judge can include the victim in the discussion of the adjournment decision.

Sequestration of Victims

The amendment in Marsy's Law related to victim appearance removed previous language that allowed the court to sequester victims if the court found sequestration necessary to a fair trial for the defendant. Wisconsin Statute § 906.15(2)(d) still provides that a victim in a criminal or juvenile case may be excluded if the court finds exclusion "is necessary to provide a fair trial for the defendant or a fair fact-finding hearing for the juvenile." However, this section of the statute could be modified in the future a result of efforts to harmonize existing statutes and Marsy's law.

Right to be Heard at All Proceedings Implicating a Victim's Rights

New Constitutional Provision – Art. I, § 9m(2)(i)	Old Constitutional Provision – Art. I, § 9m	Statutory Provision – Wis. Stat. § 950.04(1v)(m)
<p>(2) . . . victims shall be entitled to all of the following rights. . .</p> <p>(i) Upon request, to be heard in any proceeding during which a right of the victim is implicated, including release, plea, sentencing, disposition, parole, revocation, expungement, or pardon.</p>	<p>This state shall ensure that crime victims have all of the following privileges and protections as provided by law:</p> <p>. . . the opportunity to make a statement to the court at disposition</p>	<p>(1v) Victims of crime have the following rights:</p> <p>(m) To provide statements concerning sentencing, disposition, or parole, as provided under ss. 304.06(1)(e), 38.32(1)(b)1g., 938.335(3m)(ag), and 972.14(3)(a).</p> <p><i>See also</i> Wis. Stat. § 950.04(1v)(nn), (nt), (nx), and (z).</p>

Impact on the Courts
<ol style="list-style-type: none"> 1) Victim/Witness Offices will provide notice of this right to victims. 2) Judges and court commissioners could consider asking at every proceeding that implicates the victim's rights: "Is there a victim present who would like to be heard?"

Marsy's law gives victims the right to request to be heard at any proceedings during which a right of the victim is implicated, including release, plea, sentencing, disposition, parole, revocation, expungement, or pardon. Art. I, § 9m(2)(i). Even though the previous constitutional provision only guaranteed the right to "make a statement at disposition," several provisions under Wis. Stat. § 950.04(1v) direct the court or other authorities to hear the victim at almost all of the proceedings enumerated under the Marsy's law amendment.¹²

Determining if a Victim Would Like to be Heard

Marsy's law does not explicitly require the court to determine if a victim would like to be heard. However, because victims can "opt in" to exercise their rights at any time during a case, judges and court commissioners may consider asking: "Is there a victim present who would like to be heard?" toward the end of each proceeding, before a decision is rendered. This is one way to help ensure that victims can exercise this right, especially if the victim is not working directly with the Victim/Witness Office. If the court adopts this practice, Court Operations recommends that judges and commissioners not simply ask: "Is there a victim present?" Some victims may want to attend the hearing anonymously and not have the court and/or defendant know they are present.

¹² See Wis. Stat. § 950.04(1v)(m), (nn), (nt), (nx), and (z).

Receiving a Statement from the Victim

The method of being heard is not specified in Marsy’s law, suggesting that it is appropriate for the court to accept verbal or written statements from victims. Written statements could be filed by the victim directly, or through the DA’s Office. Victims should be informed by the court and/or the DA’s Office that if they submit a written statement, it will be sent to the defense so as to not constitute an *ex parte* communication. The statement will also be considered an open record, unless sealed by the court, either on the prosecutor’s or the court’s own motion.

Addressing a Victim Who Would Like to Be Heard

To maintain control over the statements made in court, judges and commissioners may want to educate victims on the purpose of a particular hearing and explain what types of information will be most relevant for that proceeding. (E.g., at a bond hearing, ask what types of conditions the victim would like to see ordered.) Even if the court does not rule in a way the victim finds favorable, by explaining the purpose of the particular hearing and the legal requirements for the court, judges and commissioners can potentially help the victim feel better about an adverse decision.

Right to Restitution

New Constitutional Provision – Art. I, § 9m(2)(m)	Old Constitutional Provision – Art. I, § 9m	Statutory Provision – Wis. Stat. § 950.04(1v)(q)
<p>(2) . . . victims shall be entitled to all of the following rights. . .</p> <p>(m) To full restitution from any person who has been ordered to pay restitution to the victim and to be provided with assistance collecting restitution.</p>	<p>This state shall ensure that crime victims have all of the following privileges and protections as provided by law:</p> <p>. . . restitution</p>	<p>(1v) Victims of crime have the following rights:</p> <p>(q) To restitution, as provided under ss. 938.245(2)(a)5. [juvenile deferred prosecution], 938.32(1t) [juvenile consent decree], 938.34(5) [juvenile adjudged delinquent], 938.345 [JIPS case], 943.212 [fraud on hotel/restaurant keeper, etc.], 943.23(6) [operating vehicle w/out owner’s consent], 943.245 [worthless checks], 943.51 [retail theft] and 973.20 [restitution in criminal cases].</p> <p>(r) To a judgment for unpaid restitution, as provided under ss. 895.035(2m) [parental liability for acts of a minor child] and 973.09(3)(b) [defendant off probation].</p>

Impact on the Courts

Though Marsy's law does not specify who is responsible for assisting victims with collecting restitution, if not doing so already, Clerk of Circuit Court Offices may want to consider certifying unpaid restitution debt to the Wisconsin Department of Revenue in order to assist victims with collection of restitution.

Marsy's law expands the previous right of victims to receive restitution by stating victims are entitled to "full restitution from any person who has been ordered to pay restitution to the victim and to be provided with assistance collecting restitution." Art. I, § 9m(2)(m).

"Full" Restitution

One of the significant challenges with implementing this section of Marsy's law is that "full" restitution is not defined. It is unclear whether full restitution means that courts must always order the maximum amount of restitution allowed under statute, when applicable.¹³ If there is a statutory cap, parties could potentially request the judge to order restitution in an amount above what the statute allows, arguing that the statutory cap is unconstitutional under Marsy's law. Conversely, "full" restitution may simply mean that victims are entitled to be paid the full amount of what is ordered by the court before this right is satisfied. For now, this phrase will continue to be ambiguous until addressed and clarified by the appellate courts, the Crime Victims Rights Board, or potentially future legislative changes.

Assistance Collecting Restitution

Another factor making this section difficult to implement is that Marsy's law neither specifies who is responsible for assisting victims in collecting restitution, nor does it define what constitutes "assistance." Is "assistance" accomplished by the Victim/Witness or Clerk of Circuit Courts Office providing information on different collection methods, such as a civil judgment or garnishment? Or are victims entitled to actual assistance with collecting the restitution owed by having a government agency, such as the Wisconsin Department of Corrections or the Clerk of Circuit Courts Office, certify the unpaid restitution debt to the Wisconsin Department of Revenue? Again, these questions will only be answered over time.

Though not currently required by statute, several Clerks of Circuit Court Offices already certify unpaid restitution debt to the Department of Revenue under Wis. Stat. § 973.20(10)(b). The Office of Court Operations encourages any Clerks of Circuit Court Offices who are not currently collecting restitution on behalf of victims to consider taking this step.

¹³ See, e.g., Wis. Stat. § 938.245(2)(a)5. which sets limits for restitution amounts ordered in juvenile deferred prosecution cases for parents and juveniles under 14 years of age; Wis. Stat. 938.34(5)(c) which sets the limits for restitution amounts ordered in juvenile delinquency cases when the juvenile is under 14 years of age.

Enforcement of Victim Rights

New Constitutional Provision – Art. I, § 9m(4)	Old Constitutional Provision – Art. I, § 9m	Statutory Provision – Wis. Ch. 950
<p>(4) (a) In addition to any other available enforcement of rights or remedy for a violation of this section or of other rights, privileges, or protections provided by law, the victim, the victim's attorney or other lawful representative, or the attorney for the government upon request of the victim may assert and seek in any circuit court or before any other authority of competent jurisdiction, enforcement of the rights in this section and any other right, privilege, or protection afforded to the victim by law. The court or other authority with jurisdiction over the case shall act promptly on such a request and afford a remedy for the violation of any right of the victim. The court or other authority with jurisdiction over the case shall clearly state on the record the reasons for any decision regarding the disposition of a victim's right and shall provide those reasons to the victim or the victim's attorney or other lawful representative.</p> <p>(4) (b) Victims may obtain review of all adverse decisions concerning their rights as victims by courts or other authorities with jurisdiction under par. (a) by filing petitions for supervisory writ in the court of appeals and supreme court.</p>	<p>The legislature shall provide remedies for the violation of this section.</p>	<p>950.04 (1v) Victims of crime have the following rights:</p> <p>(zx) To complain to the department of justice concerning the treatment of crime victims, as provided under s. 950.08(3) [DOJ mediation services], and to request review by the crime victims rights board of the complaint, as provided under s. 950.09(2).</p> <p>950.105 Standing. A crime victim has a right to assert, in a court in the county in which the alleged violation occurred, his or her rights as a crime victim under the statutes or under article I, section 9m, of the Wisconsin Constitution. This section does not preclude a district attorney from asserting a victim's statutory or constitutional crime victim's rights in a criminal case or in a proceeding or motion brought under this section.</p> <p>950.11 Penalties. A public official, employee or agency that intentionally fails to provide a right specified under s. 950.04 (1v) to a victim of a crime may be subject to a forfeiture of not more than \$1,000.¹⁴</p>

¹⁴ The Wisconsin Supreme Court determined that Wis. Stat. § 950.11 and Wis. Stats. §§ 950.09(2)(a), (c), and (d) and (3) cannot constitutionally apply to judges. *Gabler v. Crime Victims Rights Board*, 2017 WI 67, ¶ 50.

Impact on the Courts

- 1) Judges may receive more frequent filings from victims alleging the victim's rights have been violated.
- 2) If a filing is received, the judge must "act promptly" and afford a remedy, clearly stating the reason for the decision on the record and must provide the reasons to the victim.
- 3) If victims are not satisfied with the circuit court's decision, they may file a petition for supervisory writ with the appellate court.

Right to Seek Enforcement in Circuit Court

Victims previously had a right to standing and the ability to assert a violation of their rights in circuit court under § 950.105. Marsy's law creates a new constitutional provision that allows victims to assert and seek enforcement of their rights guaranteed under the constitution, or any applicable law, in circuit court. Art. I, § 9m(4)(a). The court "shall act promptly on such a request and afford a remedy for the violation of any right of the victim" *Id.* The court "shall clearly state on the record the reasons for any decision regarding the disposition of a victim's right and shall provide those reasons to the victim or the victim's attorney. . ." *Id.*

Procedure for Seeking Enforcement in Circuit Court

Marsy's law does not provide a specific procedure for victims or the courts to follow when victims assert their rights under the constitution. For now, it is recommended that victims write a letter to the circuit court judge assigned to the criminal case that specifically outlines the rights the victim feels have been violated. The Office of Court Operations will work with the Records Management Forms Committee to determine if a standardized court form should be created for victims to file. Although victims can arguably assert that a right has been violated verbally in court, courts may want to consider requiring victims to provide a written statement so other agencies, such as the DA's Office or law enforcement, have the opportunity to review the alleged violations in writing.

It is not clear whether the court is required to hold a hearing when a complaint is filed. Judges are encouraged to exercise their discretion for how best to proceed. At minimum, Art. I, § 9m(4)(a) requires the court to decide the matter promptly, to provide the reasons for its decision on the record, and to provide its decision to the victim or the victim's attorney. This language implies the decision could be made verbally at a hearing or provided in writing. If a complaint filed by the victim asserts that the judge on the case violated the victim's rights, the judge will have to decide whether he/she is able to decide the issue fairly and impartially.

Judges will also have to determine what remedy is appropriate. There are no examples of remedies provided in Marsy's law, so courts will have to provide remedies that are best tailored to address the specific complaint.

Right to Seek Enforcement in Appellate Court

If victims are not satisfied with the circuit court's decision, Marsy's law creates a new section that allows victims to obtain review of all adverse decisions by filing petitions for supervisory writ in the court of appeals and supreme court. Art. I, § 9m(4)(b).

Procedure for Seeking Enforcement in Appellate Court

Again, Marsy's law does not provide a specific procedure for victims or courts to follow when seeking enforcement with the appellate court. For now, victims will likely have to work with an attorney to file a supervisory writ with the court of appeals. The Office of Court Operations will discuss whether to create a form with the Records Management Forms Committee.

It is not clear whether a victim's petition for supervisory writ would stay the criminal proceedings in circuit court. Judges will have to use their discretion to decide whether to proceed with the criminal case while the supervisory writ is being decided by the appellate court. To make this decision, judges can consider whether the outcome of the supervisory writ could affect the outcome of the criminal case. (E.g., If the victim alleges a violation of privacy as a result of a ruling in a *Shiffra/Green* motion, the decision of the appellate court could potentially affect the outcome of the criminal case. In contrast, if a victim alleges the DA's Office did not provide proper notification of a particular hearing, the decision of the appellate court likely would not affect the outcome of the criminal case.)

Rights Not Guaranteed Under Marsy's Law

Victim is Not a Party

Marsy's law provides that "[t]his section is not intended and may not be interpreted to supersede a defendant's federal constitutional rights or to afford party status in a proceeding to any victim." Art. I, § 9m(6). Because victims are specifically not afforded party status in criminal cases, this means victims should not be added as a party in CCAP for purposes of eFiling and should not have electronic access to the criminal case file, even if the victim hires an attorney. Victims and their attorneys can access the court file by making a request to view the file with the Clerk of Circuit Courts Office.

Right to an Attorney

Marsy's law does not specifically provide victims the right to have a court-appointed attorney, even if they want to assert their rights under section (4). Victims may hire an attorney at their own expense to represent their interests. Victims do have standing to assert their rights under the constitution and Wis. Stat. § 950.105.

Future Implementation Efforts

Even though Marsy's Law went into effect in May 4, 2020, a lot of work is still being done to fully implement this law.

Court System Efforts

The Office of Court Operations will continue to work with judges, court commissioners, clerks, and other justice system partners to address issues as they arise and to develop procedures to further implement Marsy's law. Some potential future changes may include:

- 1) Working with DOJ and DA's Offices to create a form that can be filed with the court notifying the court that the victim wishes to be notified of every court proceeding.
- 2) Notifying victims of court proceedings using the notice recipient feature in CCAP.
- 3) Creating a banner that appears in CCAP and on Judicial Dashboard indicating there is a victim in a particular case that wishes to receive notice of court proceedings.
- 4) Developing a form for victims to file with the circuit court alleging their rights have been violated.
- 5) Developing a supervisory writ victims can file with the appellate court regarding a circuit court's decision.

If you have any questions or suggestions for improvements, please contact **Amber Peterson in the Office of Court Operations** (amber.peterson@wicourts.gov or 608-267-7764).

Wisconsin Department of Justice Efforts

The Wisconsin Department of Justice is exploring what statutory changes will need to be made to Chapter 950 (Rights of Victims and Witnesses of Crime) and other statutes to bring current law in conformity with the rights provided in Marsy's law.

Additionally, DOJ is working with DA's Offices, Victim/Witness Offices, and law enforcement around the state to provide uniform information and resources regarding the implementation of Marsy's law.