

**Cover sheet for draft rule order 14-04****6-18-15**

The following changes have been made to the draft order in response to the court’s comments in open conference on 6/10/15.

| <b>Section</b>               | <b>Issue Presented/change made</b>  |
|------------------------------|---|
| 801.19                       | <p>Is use of the term “information” limited to “protected information” in 801.19?</p> <p>Yes. Use of the term “information” in 801.19 was reviewed. The term “protected” was inserted before “information” in 7 places. (1)(b), (2)(c), (2)(f), (3)(b), (3)(c), (4)(a), (4)(d).</p> <p>The modifier is not appropriate in (1)(c) (defining redaction) or (2)(e) (“In actions affecting the family, protected information may be submitted together with the information protected by ss. 767.215 and 767.127”).</p> <p>By definition (see 801.21(2)), use of the term “information” in 801.21 is not intended to be limited to protected information – 801.21 includes sealing and redaction of other types of information by court order, for example, victim names and addresses.</p>   |
| 801.19(1)                    | <p>Should the court define “seal” in 801.19?</p> <p>Yes. A definition was added to 801.19(1)(d). It is now used in (1)(d), (1)(f) and 3(d). The committee recommends the same definition used in 801.21.</p>  |
| 801.19(2)(c).                | <p>The phrase “required by law or is necessary to the action” was modified for consistency. See 801.19(2)(c), (2)(c)1 and (2)(c)2.</p> <p>801.19(2)(c)2: The court raised questions about submission of an unredacted copy. The justices envisioned that a party would submit two copies of an exhibit, redacted and unredacted, so an unredacted original would always be available (under seal). This often occurs in complex civil or criminal litigation.</p> <p>However, in many routine cases, like small claims involving credit card bills, the court might not need an account number at all. Accordingly, the language was modified (using language from the eFiling rule on submission of original exhibits): “The court may require the submitting party to produce the original unredacted document if necessary.”</p> |
| 801.19(2)(d)<br>801.19(3)(d) | <p>The draft is amended to clarify a reference to how a clerk should certify a record that has been redacted.</p> <p>In SCR 71.04(13) (last page) the committee changed the “and” to “or” to conform to these sections.</p>   |

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| 801.19(2)(f)  | <p>This has been subdivided into 3 parts.</p> <p>Reference to “this rule” replaced with “this section”.</p> <p>The word “redacted” was inserted for clarity</p>  |
| 801.19(2)(g)  | <p>The cross-reference to par. (c) was amended for consistency to state “required by law or necessary to the action.”</p> <p>The term “publicly accessible” is added. The court and the parties should not include protected information in the open record. Sometimes, however, protected information must be included in a document, such as a QDRO for division of retirement assets. If protected information needs to be included in document, it should be disseminated appropriately.</p>   |
| 801.19(2)(i)  | <p>The parties do not always need to submit an unredacted version of the document under subd. (1)(c)2. The record on appeal will include the unredacted document IF it has been submitted to the trial court. If the trial court didn’t need it, the appellate courts shouldn’t need it either.</p>  |
| 801.19(3)(d)  | <p>Same change as in (2)(d) (certifying that record has been redacted).</p>  |
| 801.19(3)(e)  | <p>“in the same manner” deleted because it was unnecessary.</p>  |
| 801.19(4)(b)  | <p>References to the electronic filing system were retained because the voluntary e-filing program is ongoing.</p>   |
| 801.19(4)(b)  | <p>A minor change to the requirements applicable to court reporters.</p> <p>The idea is that the court reporter would be required to provide only replacement pages. If the reporter wants to replace the whole transcript, that’s OK but not required.</p>  |
| 801.19(4)(d)  | <p>Modified for consistency with (1)(c)1. and 2.</p>   |
| 801.19<br>(Protected Information Form) and new comment. | <p>Is the protected information form always needed?</p> <p>No. See 801.19(2)(c)1. The protected information form (included as Appendix A to the Petition) indicates that the protected information form is needed only when a filing contains protected information <i>that needs to be disclosed to the court</i>, for example because it is material to the proceeding. If the protected information is not relevant to a proceeding it will be redacted by the party before filing; the court will not receive it.</p> <p>The form states that it may be supplemented with additional material. A comment has been added to clarify this.</p> |

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| 801.20       | No changes. s. 801.20 pertains to filing of documents which will be treated as confidential. No motion or court order is required because the authority for their confidentiality is by statute or other rule.   |
| 801.21       | 801.21 pertains to motions to seal. This does require a court order. Only the court may order documents or information be sealed. Parties seek leave to file under seal and the clerk will maintain the information under <u>temporary</u> seal pending a court order. |
| 801.21(1)(b) | Is the definition of “seal” accurate?<br>Yes, as only the court can seal. "Seal" is defined to mean: “to order that a portion of a document or an entire document shall not be accessible to the public.”  |
| 801.21(2)    | Modified for consistency with (1)(b) and (4).  |
| 801.21(5)    | The Committee added the same description of how to handle the file that is contained in 801.19(1)(d).  |
| 801.21(6)    | The committee combined sections on sealing the record and sealing the transcript and modified the language for clarity.  |
| 801.21(7)    | Combined with former section 5 and cross-reference omitted.  |
| 801.21(8)    | Clarify language to make it clear that the court reporter doesn’t seal a transcript; the judge does that. Amend language from “court reporter maintains the transcript under seal” to “court reporter marks the transcript as sealed”.                                 |

# 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. 14-04

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In the Matter of the Petition to Create  
Wisconsin Statute § 801.19

**FILED**

**DRAFT**  
**061815**

Diane M. Fremgen  
Clerk of Supreme Court  
Madison, WI

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On November 3, 2014, the Consolidated Court Automation Programs (CCAP) Steering Committee (Committee), a committee of the Director of State Courts Office, filed this petition asking the court to create Wis. Stat. § 801.19. The ~~proposed~~ ruleproposal is intended to provide protection of certain personal information found in circuit court records, and to establish procedures for submission of confidential information and sealing and redaction of documents.

The court discussed this matter at open administrative rules conference on November 17, 2014, and voted to schedule a public hearing. On December 29, 2014, a letter was sent to interested persons, seeking input. Comments were received from the State Bar of Wisconsin on February 9, 2015, in support of the petition.

A public hearing was held on April 28, 2015. The court discussed the matter and voted unanimously to approve the petition with directions to the petitioner to make or consider certain

changes, including dividing the proposed rule into three separate rules. In the interests of judicial efficiency, the court determined that it could consider and approve the requested revisions to the proposed rule by e-mail, without further discussion. On May 29, 2015, the Committee provided the court with a revised draft responsive to the court's directions. The draft was considered by the court and was posted on the court's rules website. The court ~~then voted via e-mail to approve the revised draft~~discussed the matter again at open conference on June 10, 2015, requesting additional changes. On June 18, 2015, the Committee provided a second revised draft responsive to the court's directions. The draft was posted on the court's rules website. The court then voted by e-mail to approve the revised draft. Therefore,

IT IS ORDERED that, effective January 1, 2016:

**SECTION 1.** 48.396 (2) (ad) of the statutes is created to read:

48.396 **(2)** (ad) The provisions of ss. 801.19 to 801.21 are applicable in court proceedings under this chapter and ch. 938.

**SECTION 2.** 801.19 of the statutes is created to read:

**801.19 Protected information in circuit court records.** **(1)** DEFINITIONS. In this section:

(a) "Protected information" means any of the following contained in a circuit court record:

1. A social security number.
2. An employer or taxpayer identification number.
3. A financial account number.
4. A driver license number.
5. A passport number.

(b) "Protected information form" means a form provided by the circuit court under SCR 70.153 for the purpose of submitting protected information in the manner described by this section.

(c) "Redact" means to obscure individual items of information within an otherwise publicly accessible document.

(d) "Seal" means to order that a portion of a document or an entire document shall not be accessible to the public.

**(2) REQUIRED OMISSION OR REDACTION OF PROTECTED INFORMATION.** (a) To retain privacy and prevent misuse of personal information, no party shall, on or after January 1, 2016, submit protected information in any document filed in any action or proceeding in circuit court except in the manner provided by this section.

(b) Except as provided in par. (c), the parties to the action are solely responsible for ensuring that protected information does not appear in any document filed with the court. The court will not review each document filed by a party for compliance with this section. Protected information that is not properly submitted is accessible to the public to the same extent as the rest of the court record.

(c) A party shall omit or redact protected information from documents filed with the court unless the protected information is required by law or is necessary to the action. When protected information is provided to the court, a party shall omit or redact it from any documents filed and shall provide it to the court subject to all of the following:

1. When submitting an original document such as a pleading, a party shall omit the protected information from the document. If the

protected information is required by law or is necessary to the action, the party shall submit it separately on the protected information form.

2. When submitting a previously existing document such as an exhibit, a party shall redact all protected information from a copy of the document. The party shall submit the redacted copy for the public case file. If the protected information is required by law or is necessary to the action, the party shall submit it separately on the protected information form. The court may require the submitting party to produce the original unredacted document if necessary. ~~The party shall submit the redacted copy for the public case file.~~

3. If redaction of a document is impracticable, the document may be attached to the protected information form without redaction. Any disagreement as to proper redaction of protected information shall be decided by the court.

(d) The protected information form and attachments are not accessible to the public, even if admitted as a trial or hearing exhibit, unless the court permits access. The clerk of circuit court or register in probate may certify the ~~redacted~~ record as a true copy of an original record on file with the court by stating that information has been redacted or sealed in accordance with court rules or as ordered by the circuit court.

(e) In actions affecting the family, protected information may be submitted together with the information protected by ss. 767.215 and 767.127.

(f) 1. A party waives the protection of this section as to the party's own protected information by filing it without the protected information form.

2. If a party fails to comply with the requirements of this section, the court may, upon motion or its own initiative, seal the improperly filed documents and order new redacted documents to be prepared.

3. If a party fails to comply with the requirements of this ~~rule section~~ in regard to another person's protected information, the court may impose reasonable expenses, including attorney fees and costs, or may sanction the conduct as contempt.

(g) The court shall not include protected information in publicly accessible documents generated by the court, including judgments, orders, decisions, and notices, ~~7. except in the manner provided in par. (c) unless~~ If the protected information is required by law or is necessary to the action, it shall be maintained and disseminated in a confidential manner. Notwithstanding this section, protected information may be referred to in open court to the extent deemed necessary by the court and may be taken down by the court reporter as part of the record.

(h) 1. Protected information shall be accessible to the parties, their attorneys, guardians ad litem appointed to the case, judicial officers, and court staff as assigned, unless otherwise ordered by the court. Access to other persons and agencies shall be allowed as provided by law. The parties may stipulate in writing to allow access to protected information to any person.



2. Any person may file a motion for access to protected information for good cause. Written notice of the motion to all parties shall be required.

3. If the person seeking access cannot locate a party to provide the notice required under this section, an affidavit may be filed with the court setting forth reasonable efforts to locate the party and requesting waiver of the notice requirement. The court may waive the notice requirement if the court finds that further efforts to locate the party are not likely to be successful.

(i) On appeal, if the record assembled under s. 809.15 (1) (c) includes the redacted version of any document, it shall also contain the unredacted version if submitted under subd. (1) (c) 2. The unredacted version shall be marked as confidential. Confidential paper documents shall be submitted in a sealed envelope.

**(3) REDACTION OF PREVIOUSLY FILED DOCUMENTS.** (a) This section does not require any party, attorney, clerk, or judicial officer to redact protected information that was filed prior to January 1, 2016.

(b) For documents filed prior to January 1, 2016, a person affected may by motion request that protected information in a circuit court file be redacted as provided in this section, using a form approved by the court for this purpose. The moving party shall identify every place in the court record where the information to be protected is located. The protected information shall be submitted on or attached to a protected information form as provided in sub. (2).

(c) If the motion is granted, the clerk of circuit court or register in probate shall redact the protected information from the record at the places identified by the party. The clerk or register

is not responsible for making any other redaction. The moving party shall be responsible for verifying that the redaction is complete as requested. Replacement documents shall not be submitted to the court.

(d) The protected information form and attachments are not accessible to the public, even if admitted as a trial or hearing exhibit, unless the court permits access. The clerk of circuit court or register in probate may certify the ~~redacted~~ record as a true copy of an original record on file with the court by stating that information has been redacted or sealed in accordance with court rules or as ordered by the circuit court.

(e) The court may, on its own initiative, order redaction of protected information ~~in the same manner.~~

(f) The clerk of circuit court or register in probate may redact a person's social security number and passport number upon the written request of that person. All other requests for redaction of information already filed must be determined by the court.

**(4) REDACTION OF TRANSCRIPTS.** (a) Within 30 days of the time a transcript is filed with the circuit court, a person affected may file a motion with the circuit court to redact protected information from the transcript. The moving party shall identify by page and line every place in the transcript where the protected information is located. The protected information shall be submitted on or attached to a protected information form as provided in sub. (2). The unredacted transcript shall be publicly available while the motion and redaction are pending unless otherwise provided by law or court order. The court may order redaction after the 30-day period for good cause shown.

(b) Upon court order, the court reporter shall, without charge, redact the protected information from the transcript in accordance with the court order and with directives established by the director of state courts office. The court reporter shall file the complete redacted version of the transcript with the circuit court and shall send a notice of transcript redaction to the parties within 20 days of receiving the court order. The court reporter is not required to provide a paper copy of the redacted version of the transcript to registered users of the electronic filing system. The court reporter shall provide a redacted copy of the transcript, without charge, upon the request of a party not registered to use the electronic filing system. If the page numbers of the transcript do not change after redaction, the court reporter may choose to provide only the replacement pages ~~may be provided~~.

(c) The redacted version of the transcript shall be accessible to the public to the same extent as the rest of the court record. The original unredacted transcript shall not be accessible.

(d) The court reporter shall certify the transcript under SCR 71.04 by stating that the redacted version is a verbatim transcript of the proceedings from which protected information has been redacted, as provided in this rule and ordered by the circuit court. The protected information form and the unredacted transcript may be included with the record on appeal if the protected information is ~~material~~ necessary to the appeal or otherwise required by law. The protected information and unredacted transcript shall be marked as confidential; paper documents shall be submitted in a sealed envelope.

**Comment [MV1]:** Consistency with (1)(c)1. and 2.

(e) Except as provided in this section, a court reporter is not required to redact protected information from any transcript of a circuit court proceeding.

SECTION 3. A Comment to 801.19 of the statutes is created to read:

Comment

This section protects five specific items of personally identifiable information that sometimes appear in court filings. When submitting an original document such as a pleading, a party will omit these items from the document. If the protected information is necessary to the action or required by law to be submitted to the court, a party will submit it on a protected information form provided by the court. When submitting a previously existing document like an exhibit, a party will provide a redacted copy for the public file. If the protected information is necessary to the action, the party will submit it on the protected information form or by attaching an unredacted copy to the form. If the protected information is unnecessary to the action, the party may simply redact it without submitting the protected information to the court.

**SECTION 34.** 801.20 of the statutes is created to read:

**801.20 When documents may be filed as confidential.** (1) The director of state courts shall maintain a list of commonly-filed documents made confidential by statutes, court rules and case law, and shall make this list publicly available. Documents on the list may be submitted by a party without a motion or court order and will be automatically treated by the court as confidential.

(2) A filing party is responsible for properly identifying a document as confidential at the time it is filed. The court is not required to review documents to determine if the documents are confidential in nature.

**SECTION 54.** A Comment to 801.20 of the statutes is created to read:

Comment

Confidentiality of court documents is often an area of confusion for the public, lawyers, and court-related professionals. This problem can be addressed by publishing a list of commonly-filed documents that the court will automatically treat as confidential without a motion because they are protected by statutes, court rules, or case law. The filing party must properly identify the document at the time it is filed. Court staff are not required to review documents to determine confidentiality.

**SECTION 65.** 801.21 of the statutes is created to read:

**801.21 Motions to seal. (1)** In this section:

(a) "Redact" means to obscure individual items of information within an otherwise publicly accessible document.

(b) "Seal" means to order that a portion of a document or an entire document shall not be accessible to the public.

(2) A party seeking to protect a court record not protected by s. 801.19 or included on the list described in s. 801.20 shall file a motion to seal part or all of ~~the a~~ document or to redact specific information in a document. The motion must be served on all parties to the action. The filing party shall specify the authority for asserting that the information should be restricted from public

access. The information to be sealed or redacted may be filed under a temporary seal, in which case it shall be ~~considered sealed~~restricted from public access until the court rules on the motion.

**Comment [MV2]:** Same language as (1)(b) and (4).

(3) The court may determine if a hearing is necessary on a motion to seal or redact a court record. The court may require that the moving party provide notice to the general public by posting information at the courthouse or other location, including the time, date, and location of the hearing.

(4) The court shall determine whether there are sufficient grounds to restrict public access according to applicable constitutional, statutory, and common law. In restricting access, the court will use the least restrictive means that will achieve the purposes of this rule and the needs of the requester. The court may order that a document be redacted in the manner provided under s. 801.19. If the court seals or redacts information, the public record shall indicate that an order to seal or redact was issued and the name of the court official entering the order.

(5) A unredacted or sealed document is not accessible to the public, even if admitted as a trial or hearing exhibit, unless the court permits access. The clerk of circuit court or register in probate may certify the record as a true copy of an original record on file with the court by stating that information has been redacted or sealed in accordance with court rules or as ordered by the circuit court.

**Comment [MV3]:** Same description of how the file is handled as as 801.19(1)(d).

(56) The court may, on its own initiative, order sealing or redaction ~~in the same manner~~of any part of the court record or transcript.

**Comment [MV4]:** "In the same manner" caused confusion and seemed unnecessary so the committee struck it. The sections on sealing the record and sealing the transcript are combined.

(67) Documents filed subsequent to the sealing order that are subject to the order must be so identified by the filing party.

~~(7) The court may order all or a portion of a transcript to be sealed or redacted using the procedures set forth in this sections. 801.21.~~

Comment [RJ5]: Deleted here because it is now combined with (5)

(8) Upon court order, the court reporter shall, without charge, ~~maintain under seal or~~ redact the transcript or mark the transcript as sealed in accordance with the court order and with directives established by the director of state courts office.

(9) On appeal, if the record assembled under s. 809.15 includes a sealed document, the sealed document shall be marked as confidential. Sealed paper documents shall be submitted in a sealed envelope.

**SECTION 76.** A Comment to 801.21 of the statutes is created to read:

Comment

This ~~rule-section is intended to~~ defines the procedural prerequisites for filing of documents under seal. This ~~rule-section~~ is not intended to expand or limit the confidentiality concerns that might justify special treatment of any document. The ~~rule-section~~ is intended to make it clear that filing parties do not have the unilateral right to designate any filing as confidential and that permission from the court is required. This permission may flow from a statute or rule explicitly requiring that a particular document or portion of a document be filed confidentially or from an analysis of the facts of the case and the applicable law.

**SECTION ~~87~~.** 938.396 (2) of the statutes is renumbered 938.396 (2) (a).

**SECTION ~~98~~.** 938.396 (2) (b) of the statutes is created to read:  
938.396 (2) (b) The provisions of ss. 801.19 to 801.21 are applicable in court proceedings under this chapter and ch. 48.

**SECTION ~~109~~.** 971.027 of the statutes is created to read:  
**971.027 Protected information.** The provisions of ss. 801.19 to 801.21 are applicable in criminal cases.

**SECTION ~~1110~~.** 71.04 (13) of the Supreme Court Rules is created to read:

SCR 71.04 (13) A court reporter may certify a transcript that has been redacted in accordance with s. 801.19 or s. 801.21, stats., by stating that the redacted version is a verbatim transcript from which information has been redacted or sealed in accordance with those rules ~~and or~~ as ordered by the circuit court.

**Comment [MV6]:** Changed "and" to "or" to conform to 801.19(2)(d) and 3(d).

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

IT IS FURTHER ORDERED that the Comments to Wis. Stat. §§ 801.20 and 801.21 are not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule.

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



No. 14-04

Dated at Madison, Wisconsin, this \_\_\_\_ day of \_\_\_\_\_, 2015.

BY THE COURT:

Diane M. Fremgen  
Clerk of Supreme Court

NO. 14-04