

**In re creation of Wis. Stat. § 801.19,
relating to protection of information
in circuit court records**

**SUPPORTING MEMORANDUM
PETITION 14-04**

The Consolidated Court Automation Programs (CCAP) Steering Committee, a committee of the Director of State Courts Office, hereby petitions the Supreme Court to create new Wis. Stat. § 801.19, to provide protection for personal information found in court records and to establish procedures for submission of confidential information, sealing, and redaction of circuit court records. This petition is made pursuant to the court's rulemaking authority under Wis. Stat. § 751.12 and its administrative authority over all courts conferred by Article VII, § 3 of the Wisconsin Constitution.

The subject matter of this rule falls within the power of this court to regulate pleading, practice, and procedure in judicial proceedings in all courts, for the purposes of simplifying the same and of promoting the speedy determination of litigation upon its merits. Wis. Stat. § 751.12; *In the Matter of E.B.*, 111 Wis. 2d 175, 183, 300 N.W.2d 584 (1983). Although the procedures established by the rule help ensure that court records do not unnecessarily expose litigants to the risk of identity theft, the rule does not abridge, enlarge, or modify the substantive rights of any litigant.

The rule is proposed as new Wis. Stat. § 801.19. Chapter 801 may be amended by either court rule or by legislation. Cross-references are added to apply the rule in criminal and juvenile cases and to provide for redaction of transcripts. The proposed rule addresses several key areas:

- 1) Defines certain identifiers as “protected information”
- 2) Requires parties to redact those identifiers from documents filed after date of the rule
- 3) Requires parties to identify information made confidential by statutes and case law
- 4) Clarifies the process for sealing information not covered in (2) or (3)
- 5) For previously filed documents, provides for redaction only upon motion
- 6) For transcripts, provides for redaction only upon motion

BACKGROUND

In response to concerns expressed by litigants and clerks of court, the CCAP Steering Committee created a Confidentiality and Redaction Advisory Committee to make recommendations regarding protection of personal identifiers, such as social security and driver license numbers, and financial account information, such as bank account and credit card numbers.¹ This committee reviewed similar rules used in other state courts

¹ Committee members were Judge James Babler, CIO Jean Bousquet, DCA Patrick Brummond, Clerk of Circuit Court Mary Lou Mueller, Judge Gerald Ptacek, Clerk of Circuit Court Sheila

and the federal courts when drafting the attached rule. Some state courts have also codified judicial sealing procedures and provided practitioners with guidance on statutes affecting confidentiality.

All courts with redaction rules place the burden of redaction on the parties and not on the clerk of court. These rules operate prospectively, so that courts do not undertake the huge task of redacting old records.

Now is an opportune time to pursue such a rule because of the progress on statewide eFiling. Several other state courts have linked their redaction rule to their electronic filing rule, with the goal of making electronic records free of protected information. The proposed redaction rule will be circulating at the same time as the proposed electronic filing rule. Training for the bar, law office staff, judges, clerk staff, court reporters, and others will be provided as part of the electronic filing rule, so education on this rule can be part of the same publicity and training.

Some state courts are considering making more documents available online, usually for a fee, as the federal PACER system does. The Wisconsin court WCCA public website does not display documents and there are no plans to change that. Attorneys and self-represented parties who file electronically have electronic access to the documents in their own cases, but not to court documents in general. Any proposal to make court case documents available to the public over the Internet will need a thorough discussion of the many issues this will raise.

This rule was reviewed and approved by the Committee of Chief Judges, the CCAP steering committee, the PPAC planning subcommittee, and the full PPAC committee in summer 2014. The Wisconsin State Bar circulated the proposed rule to all of its standing committees. A number of interested persons submitted comments, including representatives of the Wisconsin Court Reporters Association, the Wisconsin Department of Justice, the State Public Defender, and the Wisconsin District Attorneys Association. The rule was discussed at the 2014 conference of Wisconsin Clerks of Circuit Court Association and the Wisconsin Registers in Probate Association.

DISCUSSION

1. Personal identifiers and financial account numbers to be protected

Court rules protecting personal identifiers and financial numbers are in effect in at least 20 states and the federal courts, with considerable variation in the coverage of the rules. Many rules address only a limited set of numbers, usually social security numbers and financial account numbers. The federal courts require parties to redact social security numbers and financial account numbers (use last 4 digits only), names of minor children (use initials), date of birth (use year only), and home addresses (use city and state,

Reiff, Chief Deputy Clerk James Smith, and deputy director Sara Ward-Cassady. The committee was staffed by Andrea Olson and Marcia Vandercook.

criminal cases only).² The courts in Utah and Indiana offer an extensive classification of protected information and confidential documents.³ The Nevada courts set out substantive rules governing the sealing of court documents.⁴ The Iowa courts include a list of information subject to optional redaction.⁵ Alaska court rules protect this type of information only on the court website.⁶

The Wisconsin committee looked for a middle ground geared to areas where the Wisconsin circuit courts see the most confusion. Proposed sub. (1) and (2) are generally modeled on the South Dakota rules. Subsection (1) identifies “protected information” as social security numbers,⁷ employer or taxpayer identification numbers,⁸ financial account numbers,⁹ driver license numbers,¹⁰ and passport numbers.¹¹ The proposed rule also includes a provision allowing a court to protect other identifying and account numbers if similar information is at issue in a case. The committee determined that there was no public interest served by displaying these numbers in open court case files.

The committee discussed and rejected other pieces of information that have been added to the list in some states: home address,¹² date of birth,¹³ names of minors,¹⁴ names of

² Federal Rule of Criminal Procedure 49.1; Federal Rule of Civil Procedure 5.2.

³ Utah Code of Judicial Administration 4-202; Indiana Court Rules, Administrative Rule 9.

⁴ Nevada Rules of Court, Part VII, Rule 3.

⁵ Iowa Court Rule 16.604.

⁶ Alaska Administrative Rule 37.5-37.8.

⁷ Social security numbers are protected by court rule in Arizona, Arkansas, Connecticut, Hawaii, Idaho, Illinois, Indiana, Iowa, Maryland, Minnesota, Missouri, Montana, Nevada, Ohio, South Dakota, Texas, Utah, Washington, and the federal courts. They are protected in Wisconsin family court matters by Wis. Stat. § 767.215(5).

⁸ Employer identification numbers are protected in Hawaii, Indiana, Minnesota, South Dakota, and Utah.

⁹ Financial account numbers are protected by court rule in Arizona, Arkansas, Colorado, Connecticut, Idaho, Illinois, Indiana, Iowa, Kentucky, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Dakota, Ohio, Pennsylvania, South Dakota, Utah, Washington, and the federal courts.

¹⁰ Driver license numbers are protected in Arkansas, Iowa, Missouri, Nevada, New Hampshire, Pennsylvania, and Washington. Interpretation of the federal Driver Privacy Protection Act has been the subject of litigation in the 7th Circuit and Wisconsin circuit courts. CCAP can mask driver license numbers automatically on electronically filed citations. This rule requires the parties to redact the driver license number in other cases.

¹¹ Passport numbers are not common in court files but are similar to social security numbers as a personal identifier. They are added to the list of protected information in Texas.

¹² Home addresses are protected in Arkansas, Colorado, New Hampshire, Pennsylvania, Texas, and the federal courts. The proposed Wisconsin rule does not protect home addresses. Because the Wisconsin WCCA website has been an early leader in free online court case information, the committee members are familiar with the high level of public interest in court records and the potential for confusion. Addresses are very helpful in distinguishing between people of the same name, so that a person not associated with a particular offense or civil case can establish that the

jurors,¹⁵ names of crime victims,¹⁶ medical and psychological records,¹⁷ and financial documents such as tax returns and credit card statements.¹⁸ If a party believes that information not on the list should be protected, the party must identify an appropriate statute or file a motion to seal under sec. (3).

court record is not about them. Although requests to redact addresses are fairly common, the committee determined that such requests should be handled by motion depending on the facts of the individual situation.

¹³ Birth dates of the parties are protected information in Arkansas, Idaho, Kentucky, Montana, Nebraska, South Dakota, Utah, and the federal courts. Again, the committee's experience has been that date of birth is helpful in distinguishing between people of the same name and generations of the same family and when issuing warrants. Committee members also observed that an individual's date of birth is often obtainable online from other sources.

The director of state courts "Policy on Disclosure of Public Information Over the Internet" addresses dates of birth. For the criminal court record, the WCCA website displays the full date of birth. For civil forfeiture offenses, only the month and year display. For other case types, birth date information does not display at all. The committee discussed following this policy for documents, but decided it would be too confusing for practitioners. The policy is found at <http://wcca.wicourts.gov/AB0304.xsl;jsessionid=963B601785F921D6E0E95D502667ACB4.render6>.

¹⁴ Names of minors are protected in Kentucky, Montana, New York, Utah, and the federal courts. In Wisconsin, the names of children appear on the court website only when they are parties in civil and probate cases. Otherwise, the names are stored in a protected field and do not appear online. The committee noted that names of minors are seldom raised as a problem.

¹⁵ Juror names are protected in Minnesota and Pennsylvania. They were discussed by the committee but omitted from the rule. The balance between disclosure and protection of juror names is already addressed in Wis. Stat. § 756.04 (9) and (11) and case law. The committee concluded that juror names can be protected by motion if needed, consistent with case law. See *State v. Tucker*, 2003 WI 12, 259 Wis. 2d 484, 657 N.W.2d 374; *State v. Britt*, 203 Wis. 2d 25, 553 N.W.2d 528 (Ct. App. 1995). Juror names are stored in a protected field that does not appear on the court website.

¹⁶ Crime victim names are protected in Arizona, Colorado, Minnesota, Montana, and Pennsylvania. The committee saw this as a policy issue appropriately addressed by legislation. In the meantime, victim names can be made confidential by motion if needed in particular cases. Courts should be sensitive to victim privacy. See Wis. Const. art. I, sec. 9m; Wis. Stat. ch. 950. The Judicial Council has a pending petition, 14-01, requiring that crime victims not be identified by name in appellate briefs and opinions. Crime victim names are stored in a protected field that does not display on the court website.

¹⁷ Medical and psychological records are protected in Nevada and California. The committee observed that while these records are often relevant in all kinds of court cases, many parties assume they are automatically confidential. The committee concluded that the rule should put the burden on the parties to clearly identify medical and psychological information they believe to be protected as it is submitted, and to identify any relevant statutes or move to seal where necessary.

¹⁸ Financial documents are protected by court rule in Minnesota and South Dakota, and Colorado and Alaska protect financial documents online. The committee noted that financial documents are often key pieces of evidence and form the basis of the court's decision, so protecting entire documents would be contrary to current practice and overbroad. Some financial documents in family court cases are protected by Wis. Stat. § 767.127(3).

The proposed rule is consistent with the Wisconsin public records law. Wis. Stat. § 19.36 (13) provides that certain identifying information is not subject to a public records request:

FINANCIAL IDENTIFYING INFORMATION. An authority shall not provide access to personally identifiable information that contains an individual's account or customer number with a financial institution, as defined in s. [134.97 \(1\) \(b\)](#), including credit card numbers, debit card numbers, checking account numbers, or draft account numbers, unless specifically required by law.

1. Required redaction of documents filed after the effective date of this rule

Proposed Wis. Stat. § 801.19 (2) applies to future court filings. To protect personal privacy and prevent identity theft, parties will be expected to omit protected information from documents and submit it in a confidential manner if it is material to the proceedings. The rule is intended to apply in all court proceedings, including confidential case types. A court form will be available to make this easy and uniform, similar to the current confidential petition addendum that protects social security numbers in family cases (GF-179). A prototype of the form is attached as Appendix A.

The parties to the action are solely responsible for ensuring that protected information is not filed with the court except as provided. Neither the judge nor the clerk is expected to review each pleading or document for compliance, and protected information that is not properly submitted will be accessible to the public to the same extent as the rest of the court file. 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.

If a party fails to comply with the requirements of this rule in regard to someone else's protected information, the court may impose reasonable expenses, including attorney fees and costs. Protected information is accessible to the parties, their attorneys, guardians ad litem appointed to the case, judicial officers, court staff and other agencies, unless otherwise ordered by the court.

This rule is intended to apply even in confidential proceedings such as juvenile, mental commitments, and guardianship cases. Despite their confidentiality, each of these case types has a number of people who are authorized by law to inspect the files. See, for example, Wis. Stat. § 938.396(2g), which lists 20 different situations where people will be allowed to view a typical juvenile delinquency file, and § 938.396(2g)(k), which provides that the juvenile delinquency file is open to the public for certain serious offenders. The individuals whose information appears in these cases should be given the benefit of this rule. Consistent application of the rule should also lessen confusion and make it easier to follow.

2. Identifying documents as confidential

Confidentiality of court documents is often an area of confusion for the public, lawyers, and court-related professionals. Some states have addressed this problem by publishing a list of commonly-filed documents that the court will treat as confidential without a motion because they are protected by statute, court rules, or case law.¹⁹ The committee believes that such a list would address areas of confusion for practitioners, the public, and clerks of court. In Wisconsin, the list will include documents such as presentence investigations, juror qualification questionnaires, and family financial disclosures. These states also identify confidential case types for the benefit of the public. In Wisconsin, these include mental commitments, child protection, and juvenile delinquency.

The filing party must properly identify a confidential document at the time it is filed. The clerk of circuit court or register in probate will not be required to review documents to determine confidentiality. The rule anticipates that the director of state courts office will provide guidance for litigants about which documents are automatically treated as confidential and forms and procedures to expedite use of the rule. This list will be made available from the clerk's office and on the court's website. Due to frequent legislative changes regarding confidentiality, the committee recommends that the list should not be incorporated into the rule.

3. Procedure for motions to seal

This section of the rule is intended to outline the procedures for filing of documents under seal, not the substantive law. It is not intended to expand or limit the confidentiality concerns that might justify special treatment of any document.

A party seeking to protect a court record not identified in the list created under sub. (3) must file a motion to seal the document or specific information in the document. A form will be developed to assist parties with formulating a motion that will be helpful to the court. The information to be sealed or redacted may be filed under a temporary seal until the court rules on the motion. The filing party must specify the authority for restricting public access to the information.

The court may conduct a hearing on a motion to seal a court record and may require that the moving party provide notice to the general public. The court shall determine whether there are sufficient grounds to restrict public access according to applicable constitutional, statutory, and common law. Consistent with case law and Wis. Stat. § 19.36(6), the court will use the least restrictive means that will achieve the purposes of this access rule and the needs of the requester.²⁰ If the court seals or redacts information,

¹⁹ Iowa Court Rule 16.405 (3); South Dakota Court Records Rule 15-15A-7; Utah Code of Judicial Administration 4-202.02.

²⁰ See *State v. Melton*, 2013 WI 65, ¶71-79, 343 Wis. 2d 784, 820 N.W.2d 487. Wis. Stat. § 19.16(6) provides:

(6) Separation of information. If a record contains information that is subject to disclosure under s. 19.35 (1) (a) or (am) and information that is not subject to such

the public record must contain at least the court order and the name of the person who filed the motion.

4. Permissive redaction of previously filed documents

Retrospective redaction of existing court records is not required. Personal identifiers and account numbers in documents and exhibits filed before the effective date of this rule are not protected and remain publicly available.

A person affected by the information may request redaction of protected information from an old file by motion. The person must identify the specific location of the information in the record, using a court form developed for this purpose. The clerk will perform the redaction by applying redaction software to an electronic copy of the document. The burden is on the moving party to review the redaction and bring any errors to the clerk's attention. The redacted copy will be placed in the open part of the file and the unredacted copy will be treated as confidential.

While most motions for retrospective redaction must be heard by a judicial officer, the clerk may redact an individual's social security number and passport number upon the written request of that individual.

5. Permissive redaction of transcripts

Some state courts require redaction of personal identifiers and financial account numbers in transcripts.²¹ The committee concluded that the procedures used in these states introduce delay and create a burden on the parties and court reporter that does not seem to be necessary. The committee is not aware that protected information in transcripts has been a major source of information for identity theft or invasion of privacy.

Instead, the proposed rule provides for redaction of transcripts upon the motion of a party. If confidential information becomes an issue in a particular case, the party may file a motion to redact the transcript, using the same method as redaction of previously filed documents. A form will be created to facilitate the process. The court may also order portions of the transcript to be sealed. To keep the procedure from causing delay, the motion to redact a transcript must generally be made within 30 days of the time the transcript is filed with the court.

When the electronic filing rule becomes effective, court reporters will be able to upload completed transcripts into the electronic filing system and will no longer send paper copies to attorneys or to self-represented litigants who eFile. Paper transcripts will be provided to self-represented litigants who do not eFile. Redacted transcripts follow the

disclosure, the authority having custody of the record shall provide the information that is subject to disclosure and delete the information that is not subject to disclosure from the record before release.

²¹ Redaction of transcripts is required in Iowa, Utah, and the federal courts.

same rule. Since many redactions will consist simply of omission of identifying numbers, a self-represented party may not need or want the redacted copy. The rule therefore requires the court reporter to provide a redacted copy only if the party so requests.

7. Cross-references

The rule petition includes the cross-references needed to make it clear that the same procedures apply in criminal and juvenile cases. A cross-reference has also been added to the Supreme Court Rule governing transcripts.

Conclusion

Wisconsin courts should provide litigants the opportunity to protect their personal identifiers and financial account information, as other state courts and the federal courts have done. This rule should be enacted in conjunction with the electronic filing rule, so all electronic documents going forward are adequately protected.

Respectfully submitted this 3rd day of Nov., 2014.



Judge Gerald P. Ptacek
On behalf of the CCAP Steering Committee
Director of State Courts Office

Attachment: Appendix A, Protected information form prototype

PRINT in BLACK ink

APPENDIX A

Enter the name of the county in which this case is filed.	STATE OF WISCONSIN, CIRCUIT COURT, _____ COUNTY	<i>For Official Use</i>
This form is used for all case types. Some information may not apply to your case.	Petitioner/Plaintiff: _____ First name Middle name Last name Respondent/Defendant: _____ First name Middle name Last name	Protected Information Form DRAFT for discussion
Enter the case number.	Case No. _____	

Certain information in court records is protected by § 801.19, Wis. Stat. When this information is material to the action or is required by law, it must be omitted from public court records and submitted with this form. See § 801.19, Wis. Stat., for an explanation of the responsibility and procedures for protected information. The following protected information has been omitted or redacted:

Enter the name of each party. For each party, submit all the protected information that is necessary for this action. Do NOT fill in the information if it isn't relevant to this action.

A. Name: _____
 Information to be protected: _____
 Social Security number: _____
 Employer or taxpayer ID number: _____
 Passport number: _____
 Driver license or state ID card number: _____
 Financial account numbers: _____

 Other identifiers or numbers: _____

B. Name: _____
 Information to be protected: _____
 Social Security number: _____
 Employer or taxpayer ID number: _____
 Passport number: _____
 Driver license or state ID card number: _____
 Financial account numbers: _____
 Other identifiers or numbers: _____

If there are persons who are not parties to this action but their personal information is necessary for this action, enter the name of the person and the information to be protected. Do NOT fill in the information if it isn't relevant to this action.

C. Name: _____
 Information to be protected: _____
 Social Security number: _____
 Employer or taxpayer ID number: _____
 Passport number: _____
 Driver license or state ID card number: _____
 Financial account numbers: _____

 Other identifiers or numbers: _____

The party(s) filing this form must sign and print your name and date the document.

▶ _____
 Signature

 Print or Type Name

 Date