

Cover sheet for draft rule order 14-04**5-28-15**

The Committee has made and approved the following changes to the draft order in response to the court's comments.

Section	Change made
structural change	<p>The Committee considered ways to make the rule easier to understand, either by adding subheadings to 801.19(2) or by creating more statute sections. The Committee determined that the option of more sections would offer more clarity.</p> <p>The rule has been divided into 3 separate sections:</p> <ul style="list-style-type: none"> • 801.19: redaction: definitions, omission or redaction of protected information, redaction of previously filed documents, redaction of transcripts • 801.20: confidential documents • 801.21: sealing
48.396(2) 938.396(2) 971.027	Cross-references: language simplified, made applicable to 801.19 (protected information), 801.20 (confidential documents), 801.21 (sealing)
801.19(1)	Definitions: The Committee considered adding a definition for “documents”, but the word is freely used throughout the court-related statutes without a definition. The statutes also use the words “pleadings” [too specific] and “papers” [outdated]. “Document” seems like the best choice.
801.19(1)6.	The Committee struck 6., which added “similar information protected by court order”, in response to questions/concerns at the hearing. If the circuit court wants to order redaction of some other specific item of information, it can do so using the motion practice for sealing.
801.19(1) 801.21(1)	The Committee added definitions for “redact” and “seal” to clarify that redaction applies to specific pieces of information, while sealing is used for portions or all of a document. “Information” is used to refer to specific items of information.
801.19(2) title	The Committee added “Omission or” redaction to the title of the section, since both are discussed. “Or redact” has been added to (2)(c).
801.19(2)(c)1.,2.	In these sections, “pleading” is used as an illustration of an original document and “exhibit” is used as an illustration of a previously existing document to help practitioners understand what is intended. The sentences have been rephrased to make it clear these are examples.

801.19(2)(c).	The Committee deleted the references to the last four digits of a number string.
801.19(2)(d)	The Committee added that the clerk may certify a redacted copy of the court record, parallel to section (3)(d).
801.19(2)(f)	The Committee has confirmed that words (person/party) used are appropriate and have specific meanings. “Party” is used where a litigant has a right or responsibility under the rule. “Person” is used where a non-party may act to protect their own interests. Inclusion of corporations is intended because they have bank account and credit card numbers protected by the rule. “Individual” is no longer used in the rule.
801.19(3)(e)	Consistent use of “court” rather than “judge or court commissioner”.
801.19(4)(a)	All references to sealing have been moved to a new and separate section, 801.21.
801.20	A new section, 801.20, is created to govern filing of documents made confidential by statutes, court rules or case law.
801.21	A new section, 801.21, is created to govern sealing and redaction of information not covered by 801.19 or 801.20. Title re-worded as “Motions to seal.”
801.21(2)	Concept of redaction has been included in this section so court can order a party to obscure or omit a specific item of information, such as the name or address of a victim or witness, using the procedure set out in this section.
801.21(3)	Clarifies that the trial court has the discretion to determine if a hearing on the motion to seal is necessary.
801.21(5)	The rule clarifies that the circuit court may seal or redact on its own motion, parallel to 801.19(3)(e).
801.21(7)	The rule clarifies that the circuit court may seal part of all or transcript by following procedures of this section.
801.21(8)	The Committee created a new section noting the court reporter may seal or redact a transcript as ordered by the court, using existing guidance from the court reporter manual published by the director’s office.
SCR 71.04(13)	Cross-reference to 801.21 added for how court reporter redacts or seals a transcript. Redundant language from 801.19(4) removed.

Not added:	The Committee considered the court's questions in three other areas.
801.19(3)	The proposed rule does not impose a time limit on retroactive redaction: this was not intended by the committee. The committee does not expect high volume for redaction requests of old documents.
801.21(2)	How to submit a document under seal along with the initial pleading: Now that there is a separate section addressing sealing of documents, this is more clear.
801.21(2)	The Committee recommends against establishing a specific time limit for court action and recommends that this be handled as a matter of ordinary motion practice. See 802.08 (no court time limit to decide motions for summary judgment); SCR 70.36 (pending matters to be heard within 90 days). The Committee considered adding that "A motion to seal shall be promptly heard", but decided that such a standard would raise more questions than it would answer.

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

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

Committee edits 5-28-15

FILED

DRAFT

Diane M. Fremgen
Clerk of Supreme Court
Madison, WI

On November 3, 2014, the Consolidated Court Automation Programs (CCAP) Steering Committee, a committee of the Director of State Courts Office, filed this petition asking the court to create Wis. Stat. § 801.19. The proposed rule 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. After discussing the matter, the court voted to adopt the petition, as amended. 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) ~~Protected information. The provisions of ss. 801.19 to 801.21 are applicable in In-court~~ proceedings under this chapter and ch. 938, ~~a party submitting documents or exhibits containing protected information as defined in s. 801.19 (1) shall submit them in the manner provided in that section.~~

Comment [MV1]: Language of the cross-references has been simplified. As revised, the rule is now covered in 3 separate statutory sections regarding: redaction, submission of confidential information, and sealing.

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

801.19 Protection of information in circuit court records. (1) DEFINITIONS. In this section:

Comment [MV2]: The word "document" is freely used throughout the court-related statutes without a definition. The statutes also use "pleadings" and "papers", but document seems like the best choice.

(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.

~~6. Similar information deemed protected by court order.~~

Comment [MV3]: Omit. If the court needs to order redaction of some other identifier, it can do so under 801.21.

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

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

Comment [MV4]: "Redact" is the term most commonly used for blacking out a single item of information.

(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

Comment [MV5]: The term "document" is freely used throughout the court-related statutes without a definition. The statutes also use "pleadings" and "papers", but document seems like the best choice.

document ~~or exhibit~~ filed in any action or proceeding in circuit court except in the manner provided by this section.

Comment [MV6]: “Document” is now used exclusively throughout the rule. “Information” used to refer to particular items of information.

(b) Except as provided in par. (c), the parties to the action are solely responsible for ensuring that protected information does not appear ~~on a pleading or other~~ in any document filed with the court. The court will not review each ~~pleading or~~ 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 information is required by law or is material to the proceedings. When protected information is provided to the court, a party shall omit or redact it from any documents filed and provide it to the court subject to all of the following:

1. When submitting an pleading or other original document such as a pleading, a party shall omit the protected information from the document. ~~Protected information formatted as a string of digits may be identified by providing the last four digits, in a manner that indicates that information has been redacted.~~ If the protected information is necessary to the action, the party shall submit it separately on the protected information form.

Comment [MV7]: “Pleading” is intended as an illustration of an original document, so this phrasing is better.

2. When submitting ~~an exhibit or other~~ a previously existing document such as an exhibit, a party shall redact all protected information from a copy of the document. ~~Protected information formatted as a string of digits shall be obscured except for the last four digits.~~ If the protected information is necessary to the action,

Comment [MV8]: Last 4 digits deleted at the court’s suggestion.

Comment [MV9]: “Exhibit” is intended as an illustration of a previously existing document, so this phrasing is better. Exhibits are where protected information is most likely to be inadvertently revealed.

the party shall submit it separately on the protected information form. The party shall submit the redacted copy for the public case file ~~and attach an unredacted copy to the protected information form.~~

Comment [MV10]: Redundant.

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.

Comment [MV11]: Parallel provision to (3)(d).

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

(f) A party waives the protection of this section as to the ~~person's~~ party's own information by filing it without the protected information form. 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 documents to be prepared. If a party fails to comply with the requirements of this rule in regard to another ~~individual's~~ person's protected information, the court may impose reasonable expenses, including attorney fees and costs, or sanction the conduct as contempt.

Comment [MV12]: "Party" used where a litigant has a right or a responsibility with respect to the information. "Person" used for non-party, including corporations. "Individual" not used.

Comment [MV13]: Corporate credit cards and employer ID numbers should be eligible for redaction.

(g) The court shall not include protected information in documents generated by the court, including judgments, orders, decisions, and notices, except in the manner provided in par. (c).

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. The unredacted version shall be marked as confidential. Confidential paper documents shall be submitted in a sealed envelope.

(53) 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 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 redacted version of the record shall be accessible to the public to the same extent as the rest of the court record. The information submitted on or attached to the protected information form shall not be accessible to the public and the original unredacted document shall be sealed. 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.

Comment [MV14]: Parallel provision to (2)(d).

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

Comment [MV15]: Consistent use of "court" throughout.

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

(46) 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 ~~or to seal information in from~~ the transcript. The moving party shall identify by page and line every place in the transcript where the protected information ~~or information to be sealed~~ is located. The 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 ~~or sealing~~ after the 30-day period for good cause shown.

(b) Upon court order, the court reporter shall, without charge, redact the protected information ~~or seal a portion off 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

Comment [MV16]: Sealing of transcripts moved to sealing section.

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, only 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 ~~be sealed~~ not be accessible.

Comment [MV17]: Consistent with definition section.

(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 information is material 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.

(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. 801.20 of the statutes is created to read:

~~(3)~~ 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) The filing party is responsible for properly identifying ~~the 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 34. A Comment to 801.~~19~~ (3)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 5. 801.21 of the statutes is created to read:

~~(4)801.21 Submitting documents under~~Motions to seal. (1) In 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.

(a2) A party seeking to protect a court record not listed protected by s. 801.19 or included on the list described in ~~under sub. (3)~~s. 801.20 shall file a motion to seal part or all of the document or to redact specific information in ~~the a~~ document. The motion must be served on all parties to the action. The filing party

Comment [MV18]: Case law uses various terms for this concept (sealing, confidentiality, and closure of public records), but the motion is generally called a motion to seal.

Comment [MV19]: Re-worded for clarity.

Comment [MV20]: Concept of redaction has been included in this section so court can order a party to obscure or omit a specific item of information, such aa the name or address of a victim or witness, using the procedure set out in this section.

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 until the court rules on the motion.

~~(b3)~~ The court may determine if ~~conduct~~ 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.

~~(e4)~~ The court shall determine whether there are sufficient grounds to ~~prohibit~~ 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 ~~access~~ rule and the needs of the requester. The court may order that a document be redacted in the manner provided under ~~sub. (2) (e)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) The court may, on its own initiative, order sealing or redaction in the same manner.

~~(d6)~~ 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 section.

Comment [MV21]: The committee considered specifying a time period for decision on the motion to seal, but preferred to remain consistent with ordinary motion practices as provided in ch. 802. See 802.08 (no court time limit to decide motions for summary judgment); SCR 70.36 (certification of status of pending cases, no pending matter submitted more than 90 days ago).

Comment [MV22]: Added at the court's suggestion to establish that the court has discretion on whether or not a hearing should be required.

Comment [MV23]: Consistency with sub. (1).

Comment [MV24]: Parallel to 801.19(3)(e).

Comment [MV25]: Sealing of transcripts moved here.

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

Comment [MV26]: Parallel provision to 801.19(4)(b). Guidance on sealing a transcript is provided in the court reporter manual published by the director of state courts office, sec. 7.7.

(e9) 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 64. A Comment to 801.~~19~~~~(4)~~21 of the statutes is created to read:

Comment

This rule is intended to define the procedural prerequisites for filing of documents under seal. This rule is not intended to expand or limit the confidentiality concerns that might justify special treatment of any document. The rule 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 57. 938.396 (2) of the statutes is renumbered 938.396 (2) (a).

SECTION 68. 938.396 (2) (b) of the statutes is created to read:

938.396 (2) (b) ~~Protected information. In~~ The provisions of ss. 801.19 to 801.21 are applicable in court proceedings under this chapter and ch. 48, ~~a party submitting documents or exhibits~~

~~containing protected information as defined in s. 801.19 (1) shall submit them in the manner provided in that section.~~

SECTION 79. 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, ~~a party submitting documents or exhibits containing protected information as defined in s. 801.19 (1) shall submit them in the manner provided in that section.~~

SECTION 810. 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 ~~protected~~ information has been redacted or sealed in accordance with ~~that rule~~those rules and as ordered by the circuit court. ~~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. 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 paper 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, only replacement pages may be provided.~~

Comment [MV27]: Cross-reference to new section added.

Comment [MV28]: Language removed because it's specific to redaction only and redundant with 801.19(4).

IT IS FURTHER ORDERED that the rule adopted pursuant to this order shall apply to proceedings commenced after the effective date

of this rule and, insofar as is just and practicable, to proceedings pending on the effective date.

IT IS FURTHER ORDERED that the Comments to Wis. Stat. § 801.19 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 this creation of Wis. Stat. § 801.19 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.

Dated at Madison, Wisconsin, this ____ day of _____, 2015.

BY THE COURT:

Diane M. Fremgen
Clerk of Supreme Court

NO. 14-04