

JUDICIAL COUNCIL OF CALIFORNIA

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INVITATION TO COMMENT

SPR16-02

Title	Action Requested
Appellate and Trial Court Procedure: Privacy in Documents	Review and submit comments by June 14, 2016
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Adopt Cal. Rules of Court, rules 1.201, 8.41, and 8.90; amend rule 1.20; revise form MC-120	January 1, 2017
Proposed by	Contact
Appellate Advisory Committee Hon. Raymond J. Ikola, Chair	Susan R. McMullan, 415-865-7990 susan.mcmullan@jud.ca.gov

Executive Summary and Origin

Based on concerns about privacy protection raised by appellate justices and individuals whose identity or personal information has been revealed in appellate opinions, the Appellate Advisory Committee proposes new rule 8.90 to provide guidance on the use of names in appellate court opinions. The rule would clarify that a reviewing court has discretion to use the first name and last initial—or in certain circumstances, initials only—of specific categories of individuals such as victims in criminal cases, wards in guardianship proceedings, and patients in mental health proceedings. In addition to listing these specific categories of individuals, the rule would clarify that a reviewing court has discretion to use this technique to protect the identity of persons in other circumstances in which personal privacy interests support not using the person’s full name.

To better highlight existing requirements for protecting the privacy of social security and financial account numbers in filed documents, the Appellate Advisory Committee also proposes adopting new rule 8.41 to cross-reference these requirements, which appear in title 1 of the California Rules of Court, and moving these existing requirements from rule 1.20(b) to new rule 1.201 (Protection of privacy). Because *Confidential Reference List of Identifiers* (form MC-120) includes two references to rule 1.20(b), the advisory

The proposals have not been approved by the Judicial Council and are not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. These proposals are circulated for comment purposes only.

committee recommends a technical change to that form to substitute the new rule number.

Background

Current rule 8.401 protects the anonymity of juveniles involved in juvenile proceedings in the appellate courts. The rule requires that in documents filed in such proceedings, a juvenile must be referred to by first name and last initial; but if the first name is unusual or other circumstances would defeat the objective of anonymity, the initials of the juvenile may be used. (Cal. Rules of Court, rule 8.401(a)(1).) Concerning appellate opinions, the rule provides as follows:

In opinions that are not certified for publication and in court orders, a juvenile may be referred to either by first name and last initial or by his or her initials. In opinions that are certified for publication in proceedings under this chapter, a juvenile must be referred to by first name and last initial; but if the first name is unusual or other circumstances would defeat the objective of anonymity, the initials of the juvenile may be used. (Cal. Rules of Court, rule 8.401(a)(2).)

The California Style Manual also addresses protective nondisclosure of the identity of juveniles and victims of sex crimes in appellate opinions. Section 5:9, part of the chapter on editorial polices followed in official reports, provides, in relevant part:

The Supreme Court has issued the following policy statement to all appellate courts: “To prevent the publication of damaging disclosures concerning living victims of sex crimes and minors innocently involved in appellate court proceedings it is requested that the names of these persons be omitted from all appellate court opinions whenever their best interests would be served by anonymity.
Cal. Style Manual, § 5:9

Because these current provisions focus on only certain types of individuals and information—juveniles, victims of sex crimes, and social security and financial account numbers—appellate opinions may include other information that raises privacy concerns. Many individuals whose names and personal information appear in appellate court opinions have contacted Judicial Council staff with concerns about their privacy and requests to “remove” the opinions or redact their names or other information. Many of these individuals have expressed concern about the effect of information in the opinions on their current or future employment.

Privacy interests have also been recently addressed by the new rules presented in article 6 (Public Access to Electronic Appellate Court Records; rule 8.80 et seq.). The statement of

purpose for these rules provides: “The rules in this article are intended to provide the public with reasonable access to appellate court records that are maintained in electronic form, while protecting privacy interests.” (Cal. Rules of Court, rule 8.80(a).) A “record” includes “any . . . opinion of the court.” (Cal. Rules of Court, rule 8.82(1).) Except for the docket, calendar, and opinion, in 10 categories of cases there is to be no remote access to electronic records. (Cal. Rules of Court, rule 8.83(c)(2).) Remote access can be authorized in “extraordinary” cases by the presiding justice (Cal. Rules of Court, rule 8.83(d)), but when this access is authorized, specified identifying information must be redacted from the records. (Cal. Rules of Court, rule 8.83(d)(2).) The Advisory Committee Comment for rule 8.83 states: “The rule allows a level of access by the public to all electronic records that is at least equivalent to the access that is available for paper records and, for some types of records, is much greater. At the same time, it seeks to protect legitimate privacy concerns.”

The proposed rules are consistent with the balanced approach taken in the new rules on access to appellate court electronic records.

Finally, rule 1.20, which is applicable to all courts, contains provisions designed to protect the privacy of social security numbers and financial account numbers. Subdivision (b) of this rule generally requires parties and attorneys to leave out or redact these numbers from all filings.¹ Subdivision(b)(4) provides that, on a showing of good cause, a court may order a party filing a document containing redacted identifying numbers to file, along with the redacted document, a confidential reference list that shows the complete identifying number and the corresponding reference or abbreviation for each number, using *Confidential Reference List of Identifiers* (form MC-120) for that purpose. The proposal would move rule 1.20(b) to a separate location in title 1 and provide a cross-reference to it in the appellate rules.

The Proposal

Rule 8.90

The committee proposes a new rule designed to protect the identity of certain categories of individuals when they are parties or referred to in appellate opinions and to confirm that a reviewing court has discretion to refer to these individuals by first name and last initial or by initials only. Proposed new rule 8.90 lists categories of individuals in proceedings in which new rule 8.83 limits electronic access to records. Rule 8.83 does not permit remote electronic access to records (other than records such as opinions, calendars, dockets, and indexes) in criminal cases, juvenile court cases, family law cases, mental health proceedings, and other specified proceedings. Public access to these electronic appellate court records is available at the courthouse only. (Cal Rules of Court,

¹ If a social security number or financial account number is required in a pleading or other paper filed in the public file, only the last four digits of that number may be used. (Cal. Rules of Court, rule 1.20(b)(1) and (2).)

rule 8.83(c)(2).) The advisory committee believes that the same privacy considerations that limit remote access to records in these proceedings support privacy protections to specified categories of individuals in these proceedings when they are referred to in appellate court opinions. Proposed new rule 8.90(b) would therefore clarify that it is within the discretion of the reviewing court to refer to by first name and last initial—or, if the first name is unusual or other circumstances would defeat the objective of privacy interests, by initials only—the individuals whose privacy interests are at risk in these proceedings, such as victims in criminal cases, wards in guardianship proceedings, and patients in mental health proceedings.

Rules 1.20, 1.201, and 8.41

As noted above, current rule 1.20(b) requires redacting or excluding social security numbers and financial account numbers in filed documents. The committee is concerned, however, that because of the current location of this provision, many people who file documents that include social security numbers or financial account numbers may be unaware of these requirements. Furthermore, rule 1.20 is entitled “Filing” and in a chapter entitled “Service and Filing,” which may not alert rule users to the requirements relating to privacy protection.

This proposal would move the content of rule 1.20(b), with minor, nonsubstantive changes, to new rule 1.201.² The new rule would be entitled “Protection of privacy” (the same as the subdivision heading of current 1.20(b)), which should make the requirements easier for rule users to locate. In addition, it would be moved to chapter 7, Form and Format of Papers, where users would be more likely notice the requirements for redacting this information from papers. The committee also proposes new rule 8.41 to cross-reference to rule 1.201 in order to make its provisions more apparent to those filing documents in appellate courts.

In addition, a technical change would be made to the form that filers use, if ordered by the court to file a confidential reference list of identifiers for each redacted identifier. Form MC-120 would be revised to replace the reference to rule 1.20(b) with new rule 1.201. Current form MC-120 is designed to be filed in superior court, even though rule 1.20 applies to all courts and provides that a court, on a showing of good cause, may order a party filing documents containing the specified identifiers to file a confidential reference list using form MC-120. The committee is interested in comments about whether the form should be revised for use in appellate courts also or a separate, new form should be adopted for use in appellate courts.

² The subdivision titled “Scope” would be moved to the end of rule 1.201 and shortened slightly without changing its meaning.

Alternatives Considered

The advisory committee discussed other means to increase privacy protections of individuals who are named in appellate court opinions and to protect other sensitive information. The committee is in the process of considering whether there are technological means to reduce the likelihood that a simple internet search of a person's name will return an appellate opinion in which the person is mentioned. The advisory committee is also considering whether to recommend additional education for appellate justices and appellate judicial staff attorneys about ways to minimize the use of names in opinions to protect privacy, where appropriate and possible to do so. The committee's view is that the proposed rule amendments and these potential additional approaches would be complementary, rather than mutually exclusive.

Implementation Requirements, Costs, and Operational Impacts

The proposal would require judicial, court staff, and attorney training in expanding the use of first names and initials or referring to an individual's status—instead of a victim's or witness's name—when writing briefs and appellate opinions.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?
- Is there a need for form MC-120 or a similar form to be filed in appellate courts?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so please quantify.
- What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems.
- Would two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?

Attachments and Links

1. Cal. Rules of Court, rules 1.20, 1.201, 8.41, and 8.90, at pages 6–9
2. Form MC-120, at page 10

Rules 1.201, 8.41, and 8.90 of the California Rules of Court would be adopted and rule 1.20 would be amended, effective January 1, 2017, to read:

1 **Rule 1.20. Effective Date of Filing**

2
3 **(a) ~~Effective date of filing~~**

4
5 Unless otherwise provided, a document is deemed filed on the date it is received by
6 the court clerk.

7
8 **~~(b) Protection of privacy~~**

9
10 **~~(1) — Scope~~**

11
12 ~~The requirements of this subdivision that parties or their attorneys must not~~
13 ~~include, or must redact, certain identifiers from documents or records filed~~
14 ~~with the court do not apply to documents or records that by court order or~~
15 ~~operation of law are filed in their entirety either confidentially or under seal.~~

16
17 **~~(2) — Exclusion or redaction of identifiers~~**

18
19 ~~To protect personal privacy and other legitimate interests, parties and their~~
20 ~~attorneys must not include, or must redact where inclusion is necessary, the~~
21 ~~following identifiers from all pleadings and other papers filed in the court's~~
22 ~~public file, whether filed in paper or electronic form, unless otherwise~~
23 ~~provided by law or ordered by the court:~~

24
25 ~~(A) — Social security numbers. If an individual's social security number is~~
26 ~~required in a pleading or other paper filed in the public file, only the~~
27 ~~last four digits of that number may be used.~~

28
29 ~~(B) — Financial account numbers. If financial account numbers are required~~
30 ~~in a pleading or other paper filed in the public file, only the last four~~
31 ~~digits of these numbers may be used.~~

32
33 **~~(3) — Responsibility of the filer~~**

34
35 ~~The responsibility for excluding or redacting identifiers identified in (b)(2)~~
36 ~~from all documents filed with the court rests solely with the parties and their~~
37 ~~attorneys. The court clerk will not review each pleading or other paper for~~
38 ~~compliance with this provision.~~

39
40 **~~(4) — Confidential reference list~~**

41
42 ~~If the court orders on a showing of good cause, a party filing a document~~
43 ~~containing identifiers listed in (b)(2) may file, along with the redacted~~
44 ~~document that will be placed in the public file, a reference list. The~~

1 reference list is confidential. A party filing a confidential reference list must
2 use ~~Confidential Reference List of Identifiers~~ (form MC-120) for that
3 purpose. The confidential list must identify each item of redacted
4 information and specify an appropriate reference that uniquely corresponds
5 to each item of redacted information listed. All references in the case to the
6 redacted identifiers included in the confidential reference list will be
7 understood to refer to the corresponding complete identifier. A party may
8 amend its reference list as of right.

9
10
11 **Rule 1.201. Protection of privacy**

12
13 **(a) Exclusion or redaction of identifiers**

14
15 To protect personal privacy and other legitimate interests, parties and their
16 attorneys must not include, or must redact where inclusion is necessary, the
17 following identifiers from all pleadings and other papers filed in the court's public
18 file, whether filed in paper or electronic form, unless otherwise provided by law or
19 ordered by the court:

20
21 (1) Social security numbers. If an individual's social security number is required
22 in a pleading or other paper filed in the public file, only the last four digits of
23 that number may be used.

24
25 (2) Financial account numbers. If financial account numbers are required in a
26 pleading or other paper filed in the public file, only the last four digits of
27 these numbers may be used.

28
29 **(b) Responsibility of the filer**

30
31 The responsibility for excluding or redacting identifiers identified in (a) from all
32 documents filed with the court rests solely with the parties and their attorneys.
33 The court clerk will not review each pleading or other paper for compliance with
34 this provision.

35
36 **(c) Confidential reference list**

37
38 If the court orders on a showing of good cause, a party filing a document
39 containing identifiers listed in (a) may file, along with the redacted document that
40 will be placed in the public file, a reference list. The reference list is confidential.
41 A party filing a confidential reference list must use *Confidential Reference List of*
42 *Identifiers* (form MC-120) for that purpose. The confidential list must identify
43 each item of redacted information and specify an appropriate reference that

1 uniquely corresponds to each item of redacted information listed. All references in
2 the case to the redacted identifiers included in the confidential reference list will be
3 understood to refer to the corresponding complete identifier. A party may amend
4 its reference list as of right.

5
6 **(d) Scope**

7
8 The requirements of this rule do not apply to documents or records that by court
9 order or operation of law are filed in their entirety either confidentially or under
10 seal.

11
12
13 **Article 2. Service, Filing, Filing Fees, Form, and ~~Number of~~**
14 **Documents-Privacy**

15
16 **Rule 8.41. Protection of privacy in documents and records**

17
18 The provisions on protection of privacy in rule 1.201 apply to documents and records
19 under these rules.

20
21
22 **Article 7. Privacy**

23
24 **Rule 8.90. Privacy in opinions**

25
26 **(a) Application**

27
28 This rule provides guidance on the use of names in appellate court opinions.
29 Where other laws establish specific requirements for protecting privacy that differ
30 from the provisions in this rule, those specific requirements supersede the
31 provisions in this rule.

32
33 **(b) Persons protected**

34
35 To protect personal privacy interests, in all opinions, it is within the discretion of
36 the reviewing court to refer to by first name and last initial—or, if the first name
37 is unusual or other circumstances would defeat these objectives, by initials only—
38 the following:

39
40 (1) Children in all proceedings under the Family Code and protected persons in
41 domestic violence–prevention proceedings;

42
43 (2) Juveniles in juvenile court proceedings;

CONFIDENTIAL

MC-120

ATTORNEY OR PARTY WITHOUT ATTORNEY: _____ STATE BAR NO.: _____ NAME: FIRM NAME: STREET ADDRESS: CITY: _____ STATE: _____ ZIP CODE: _____ TELEPHONE NO.: _____ FAX NO.: _____ E-MAIL ADDRESS: ATTORNEY FOR (name): _____	<i>FOR COURT USE ONLY</i>
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
SHORT TITLE:	
CONFIDENTIAL REFERENCE LIST OF IDENTIFIERS <input type="checkbox"/> _____ AMENDED	CASE NUMBER:
TO COURT CLERK: THIS LIST IS CONFIDENTIAL	

INSTRUCTIONS FOR FILER

To protect personal privacy and other legitimate interests, parties and their attorneys must not include, or must redact where inclusion is necessary, social security numbers and financial account numbers from all pleadings and other papers filed in the court's public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the court. (Cal. Rules of Court, rule 1.201.) If the court orders on a showing of good cause, a party may file, along with the redacted pleading or paper that will be placed in the public file, this *Confidential Reference List of Identifiers*. The list must identify each identifier that has been redacted from the pleading or paper in the public file and specify an appropriate reference that uniquely corresponds to each item of redacted information listed. All references included in the list will be understood to refer to the corresponding complete identifier. Additional pages may be attached to this form as necessary.

REFERENCE LIST

	COMPLETE IDENTIFIER <i>Use this column to list the social security and financial account numbers that have been redacted from the document that is to be placed in the public file.</i>	CORRESPONDING REFERENCE <i>Use this column to list the reference or abbreviation that will refer to the corresponding complete identifier.</i>	LOCATION <i>Use this column to identify the document or documents where the reference appears in place of the identifier.</i>
1.			
2.			
3.			
4.			
5.			
6.			

Additional pages are attached. Number of pages attached: _____