

JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS
455 Golden Gate Avenue
San Francisco, California 94102-3688

Report Summary

TO: Members of the Judicial Council

FROM: Appellate Advisory Committee
Hon. Kathryn Doi Todd, Chair
Heather Anderson, Senior Attorney, 415-865-7691
heather.anderson@jud.ca.gov

DATE: August 9, 2006

SUBJECT: Appellate Procedure: Record on Appeal in Criminal Cases (amend Cal. Rules of Court, rules 8.320, 8.324, 8.328, 8.336, 8.340, and 8.610) (Action Required)¹

Issue Statement

In certain circumstances, a record of a juvenile adjudication may be admitted into evidence by the trial as proof of a prior “strike,” but rule 8.320 does not currently address including the record of such an adjudication in the clerk’s transcript. Rule 8.320 also provides that the reporter’s transcript must contain the oral proceedings on only certain specified defense motions, while rule 8.120 provides that all motions that are denied must be included in the clerk’s transcript. Appellate counsel generally need to review both the written motions and the record of the related oral proceedings to assess whether the denial of a motion raises an issue on appeal.

Both rules 8.160 and 8.328 are currently entitled “Sealed records” but address different subjects, which is confusing. In addition, the committee received suggestions from two attorneys who were concerned that under rule 8.328, if a criminal defendant raises a *Marsden* issue on appeal, the clerk might send the Attorney General a transcript of the *Marsden* hearing that contains confidential information not relevant to the issues on appeal.

¹ At the June 30, 2006, meeting, the Judicial Council approved the reorganization and renumbering of the California Rules of Court and Standards of Judicial Administration, effective January 1, 2007. Under the reorganization, the appellate rules that were numbered 1 et seq. have been renumbered as rules 8.1 et seq., and new format conventions have been adopted. Hence, the rule amendments are shown throughout this proposal using the new rule numbers that will become effective January 1, 2007. The rules in this proposal were renumbered as follows: rule 8.320 is former rule 31; rule 8.324 is former rule 31.1; rule 8.328 is former rule 31.2; rule 8.336 is former rule 32; rule 8.340 is former rule 32.1; and rule 8.610 is former rule 34.1.

Rule 8.336 currently requires that a copy of the record automatically be prepared for and sent to the Attorney General. In some cases, however, the district attorney is counsel for the People on appeal and should therefore receive the transcript.

Rule 8.340 contains inconsistent provisions concerning who is entitled to receive copies of augmented or corrected records. In addition, when the record is augmented to reflect some action taken by the trial court after the record is certified, the record should include any documents or proceedings that are related to that postcertification action.

Rule 8.610 currently establishes the contents of the clerk's and reporter's transcripts for appeals in capital cases by cross-referencing the provisions of rules 8.320 and 8.324 relating to records in noncapital felony appeals. This makes it more difficult for rule users to determine what must be included in such records.

Recommendation

The Appellate Advisory Committee recommends that the Judicial Council, effective January 1, 2007:

1. Amend rule 8.320, relating to the normal record in appeals of noncapital felony cases, to provide that:
 - a. Records of juvenile adjudications introduced at trial are to be included in the clerk's transcript, but that when such records have been closed to public inspection because they are required to be kept confidential by law, these records will remain closed to the public in the reviewing court; and
 - b. When the defendant is the appellant, the oral proceedings on any motion by the defendant, other than those specifically exempted, that is denied in whole or in part are included in the normal reporter's transcript;
2. Amend rule 8.324, relating to additions to the normal record in appeals of noncapital felony cases, to specify that the defendant or the People may apply to include any *written* motion in the clerk's transcript;
3. Amend rule 8.328, relating to confidential records, to:
 - a. Clarify that this rule applies to records required to be kept confidential by law, not to records sealed under rules 2.550–2.551 or records proposed to be sealed under rule 8.160; and
 - b. Clarify the procedures relating to *Marsden* hearing transcripts when the defendant raises a *Marsden* issue on appeal;

4. Amend rule 8.336, relating to preparing and sending the record in appeals of non-capital felony cases, to clarify when the Attorney General or district attorney automatically receives a copy of the record and when they must request a copy;
5. Amend rule 8.340, relating to augmenting and correcting the record in appeals of noncapital felony cases, to:
 - a. Establish uniform requirements governing who receives copies of augmentations or corrections to such records; and
 - b. Provide that if the record is augmented to include an amended abstract of judgment or other new order, the augmented record must also include any additional document or transcript related to the amended judgment or new order that any rule or order requires to be included in the record; and
6. Amend rule 8.610, relating to the record in appeals of capital cases, to replace cross-references to rules 8.320 and 8.324 with the text of the provisions from rules 8.320 and 8.324 and clarify overlapping language from these previous cross-references.

The text of the proposed amendments to the rules is attached at pages 16–25.

Rationale for Recommendation

Since records of juvenile adjudications may be admitted into evidence by the trial court as proof of a prior “strike,” the committee recommends amending rule 8.320 to provide that such juvenile records admitted by the trial court be included in the clerk’s transcript on appeal, but that the confidentiality of such documents be maintained where required by law. To ensure that necessary transcripts are provided to defendants, the committee also recommends amending rule 8.320 to require that when the defendant is the appellant, the normal reporter’s transcript include the oral proceedings on any motion by the defendant denied in whole or in part except those motions that are typically reviewed by writ proceeding.

To make it easier for readers to understand rule 8.610, the committee recommends replacing cross-references to rules 8.320 and 8.324 with the text of these provisions and clarifying overlapping language from these previous cross-references.

To make the distinction between rules 8.160 and 8.328 clearer, the committee recommends that the title of rule 8.328 be revised to refer to confidential, rather than sealed, records. In addition, to further clarify this distinction, the committee recommends that an application section be added to rule 8.328 and that references to “sealing” of records in this rule be changed to refer instead to keeping these records confidential.

To clarify the notice requirements, the committee recommends amending rule 8.328 to provide that when a *Marsden* issue is raised on appeal, the defendant must serve and file a notice stating whether there is confidential information in the *Marsden* transcript that is

not relevant to the issues on appeal. In addition, to protect against the inappropriate release of confidential information if the defendant does not file the notice, the committee recommends clarifying that the defendant may file an objection to the People's application seeking the *Marsden* transcript.

The committee recommends amending rule 8.336 to clarify that a copy of the record must be automatically prepared for and sent to the Attorney General or the district attorney, whichever is the counsel for the People on appeal, and that whichever is not counsel on appeal may request a copy. The committee also recommends amending rule 8.340 to create a single list of those who are to receive the augmented or corrected record and to clarify that any documents or a transcript relevant to the new judgment or order that would ordinarily be required to be included in the record on appeal must be included as part of an augmentation.

Alternative Actions Considered

The committee considered several alternative approaches to addressing the concerns about possible inappropriate release of confidential material in *Marsden* transcripts. The committee also made several modifications to its proposal to address the public comments received.

Comments From Interested Parties

Ten individuals or organizations submitted comments on this proposal. Four commentators agreed with the proposal, and six agreed with the proposal only if modified or agreed with parts of the proposal and opposed other parts. The committee agreed with many of the comments and incorporated the commentators' suggested changes into the proposal. The committee did not agree with the commentator who objected to amending rule 8.320 on the ground that it would increase workload without providing additional time to prepare the transcript or the commentator who suggested that rule 8.328 should not be amended to address situations in which an appealing defendant fails to notify the court that there is confidential material in a *Marsden* transcript that is not relevant to the issues on appeal.

Implementation Requirements and Costs

Depending on reporters' current practice regarding including motion proceedings in the normal transcripts in felony appeals, it may increase some reporting costs if rule 8.320 is amended to require that the oral proceedings on most defense motions that are denied be automatically included in the reporter's transcript. Amending rule 8.328 to require that defendants' appellate counsel prepare and file notices in all cases in which a *Marsden* issue is raised on appeal may also result in some additional costs to the judicial branch, since many appealing defendants are represented by appointed appellate counsel. The remaining proposed clarifications of these rules should eliminate uncertainty and thereby reduce costs.

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SUBJECT: Appellate Procedure: Record on Appeal in Criminal Cases (amend Cal. Rules of Court, rules 8.320, 8.324, 8.328, 8.336, 8.340, and 8.610) (Action Required)¹

Issue Statement

This proposal addresses several issues in the rules relating to records in criminal appeals.

Rule 8.320 currently provides that, if the defendant is the appellant, the clerk's transcript must contain any certified record of a court or the State Department of Corrections admitted in evidence to prove a prior conviction or prison term. In certain circumstances, a record of a juvenile adjudication may also be admitted into evidence by the trial as proof of a prior conviction, but there is no requirement for including the record of such an adjudication in the clerk's transcript.

Rule 8.320 also provides that the reporter's transcript must contain the oral proceedings on only certain specified defense motions that are denied. In contrast, the clerk's transcript must contain all defense motions that are denied. For appellate counsel to assess whether the denial of any of these motions raises an issue on appeal, they generally need to review not just the written motions but also the record of the related oral proceedings.

¹ At the June 30, 2006, meeting, the Judicial Council approved the reorganization and renumbering of the California Rules of Court and Standards of Judicial Administration, effective January 1, 2007. Under the reorganization, the appellate rules that were numbered 1 et seq. have been renumbered as rules 8.1 et seq., and new format conventions have been adopted. Hence, the rule amendments are shown throughout this proposal using the new rule numbers that will become effective January 1, 2007. The rules in this proposal were renumbered as follows: rule 8.320 is former rule 31; rule 8.324 is former rule 31.1; rule 8.328 is former rule 31.2; rule 8.336 is former rule 32; rule 8.340 is former rule 32.1; and rule 8.610 is former rule 34.1.

Rule 8.328 is currently titled “Sealed records,” but this rule actually addresses records that are confidential under statute or case law. Rule 8.160—which is also entitled “Sealed records”—addresses records ordered sealed by a court. Having two rules with the same title that address different subjects is confusing. In addition, the committee received suggestions from two attorneys who were concerned that under the current language of rule 8.328, if a criminal defendant raises a *Marsden* issue on appeal, the clerk might send the Attorney General a transcript of the *Marsden* hearing that contains confidential information not relevant to the issues on appeal.

Rule 8.336 currently requires that a copy of the record automatically be prepared for and sent to the Attorney General. In some cases, however, the district attorney, rather than the Attorney General, is counsel for the People on appeal and should therefore receive the transcript.

Rule 8.340 addresses augmenting and correcting the record in felony appeals. Currently, this rule contains inconsistent provisions concerning who is entitled to receive copies of augmented or corrected records. In addition, the committee received a suggestion that rule 8.340 should be amended to ensure that when the record is augmented to reflect some action taken by the trial court after the record is certified, any documents or proceedings that are related to that postcertification action also be included in the record.

Rule 8.610 currently establishes the contents of the clerk’s and reporter’s transcripts for appeals in capital cases by cross-referencing to the provisions of rules 8.320 and 8.324 relating to records in noncapital felony appeals. This makes it more difficult for rule users to determine what must be included in such records.

Rationale for Recommendation

Contents of clerk’s transcript in noncapital cases

Rule 8.320 of the California Rules of Court establishes the contents of the clerk’s and reporter’s transcripts for appeals in noncapital felony cases. Subdivision (b)(13)(C) currently provides that, if the defendant is the appellant, the clerk’s transcript must contain any certified record of a court or the Department of Corrections admitted in evidence to prove a prior conviction or prison term. In certain circumstances, a record of a juvenile adjudication may also be admitted into evidence by the trial court—for example, as proof of a prior “strike” under the three-strikes law. The committee recommends that this provision be amended to provide that where such a juvenile record has been admitted by the trial court, it must be included in the clerk’s transcript on appeal. In recognition of the fact that many juvenile records are required to be kept confidential by law, however, the proposed amendment would require that the confidentiality of such documents be maintained. To ensure that the record on appeal is complete, the amendment proposed by the committee would also broaden the records that are to be included in the clerk’s transcript to include *any* document admitted into evidence by the trial court for this purpose, not just the certified records of a court or the California Department of Corrections and Rehabilitation.

In addition, to parallel the language regarding motions in the clerk's transcript in subdivision (b)(13) the committee recommends amending rule 8.320(d) to refer to including *written* motions in the clerk's transcript.

Contents of reporter's transcript in noncapital cases

Currently, rule 8.320(c) provides that the normal reporter's transcript, when the defendant appeals from a conviction or the People appeal from an order granting a new trial in a noncapital felony case, must contain, among other things, the oral proceedings on any motion in limine and any motion for a new trial. In addition, if the appellant is the defendant, rule 8.320(c)(9) provides that the reporter's transcript must also contain oral proceedings on any motion under Penal Code section 1538.5. In contrast, rule 8.320(b)(13)(A) provides that when the defendant is the appellant, the normal clerk's transcript includes any written defense motion denied in whole or in part.

The Appellate Courts Committee of the San Diego County Bar Association suggested that when the defendant is the appellant, the reporter's transcript should include not only the oral proceedings on motions under Penal Code section 1538.5 that are denied but also any motion by the defendant that is denied in whole or in part. The types of motions that are not specifically listed in rule 8.320, and therefore that may not currently be included in the normal reporter's transcript under this rule, include severance motions; *Wheeler* motions; and motions to dismiss, strike, or invalidate a prior conviction. The San Diego County Bar committee noted that, to enable appellate counsel to assess whether the denial of any of these motions raises an issue on appeal, they need to review not just the written motions but also the record of the related oral proceedings.

Preparing reporter's transcripts in felony appeals requires the time of court reporters and these transcripts are a public expense, so transcripts of proceedings should only be included in the record if they are necessary for these appeals. It is the committee's understanding that, while rule 8.320 does not clearly indicate whether these motions should be included in the normal record, many court reporters are currently including the oral proceedings on such motions in their transcripts as part of the oral proceedings at trial or sentencing or because local rules of the Courts of Appeal require their inclusion. Thus, to the extent that needed proceedings are already being included in reporter's transcripts when the defendant is the appellant, amending this rule to make clear that these proceedings should be included in the transcript in these circumstances would not add to the workload of reporters or expand reporter's transcripts. In fact, clarifying that proceedings on defense motions that are denied are to be included when the defendant is the appellant should make it clearer that these proceedings are generally not to be automatically included in the reporter's transcript when the People are the appellant. This could lead to reduced workload and shorter transcripts in appeals by the People.

To the extent that the transcripts of certain proceedings that are needed are not currently being provided as part of the normal record on appeal, however, the defendant must either apply in the trial court to add these proceedings to the transcript or make an

augmentation request in the Court of Appeal to obtain the transcripts. Such applications and augmentation requests also require the expenditure of public resources in the form of both counsels' and the courts' time. Augmentation requests can also delay appellate proceedings.

To support the efficient use of public resources and the timely handling of appeals, rule 8.320 must strike the appropriate balance between including in the normal record transcripts of all those proceedings that *are* likely to be needed in most felony appeals and excluding those proceedings that are *not* likely to be needed in most appeals. This proposal attempts to strike that balance by modifying rule 8.320 to require that when the defendant is the appellant, with certain exceptions, the oral proceedings on any motion by the defendant denied in whole or in part be included in the normal transcript. The exceptions specified in this proposal—motions that would not be automatically included in the reporter's transcript on appeal—are motions to disqualify a judge, which are reviewable only by way of a petition for a writ of mandate (Code Civ. Proc., §170.3(d)) and motions under Penal Code section 995, which are most often reviewed by way of writ petition.

Contents of clerk's and reporter's transcripts in capital cases

Rule 8.610 establishes the contents of the clerk's and reporter's transcripts for appeals in capital cases. Currently, this rule identifies the contents of these transcripts by cross-referencing to the provisions of rules 8.320 and 8.324 relating to records in noncapital felony appeals. To make it easier for readers to understand this rule, this proposal would replace these cross-references with the text of the provisions from rules 8.320 and 8.324 and would clarify overlapping language from these previous cross-references.

Confidential records

Rule 8.160 is entitled "Sealed records." That rule applies only to records that are not confidential by law but that have been sealed on order of a trial court or that a party is seeking to have sealed by order of the appellate court to prevent their disclosure to the public. Rule 8.328 is also titled "Sealed records." The content of this rule, however, addresses records that are confidential under either statute or case law. Until 2004, the predecessor to rule 8.328—rule 33.5—was titled "Confidential in-camera proceedings." To make the distinction between rules 8.160 and 8.328 clearer, the committee is proposing that the title of rule 8.328 be revised to refer, once again, to confidential, rather than sealed, records. To further clarify this distinction, the committee is also recommending that an application section be added to rule 8.328 and that references to "sealing" of records in this rule be changed to refer instead to keeping these records confidential.

Transcripts of Marsden proceedings

Rule 8.328(a)(4)–(5) address the circumstances under which the People may obtain a copy of the transcript of a *Marsden* hearing by application and when they must file a motion to request such a transcript. Currently, these provisions state that if the defendant raises a *Marsden* issue on appeal, unless the defendant has filed a notice with the opening

brief indicating that the transcript contains confidential material that is not relevant to the issues on appeal, the clerk must provide the People with the *Marsden* transcript on application. Two attorneys raised concerns that some appointed counsel may not be aware of their obligation to file a notice under this rule. They expressed further concern that, if such counsel inadvertently fails to file the required notice, the Attorney General may receive a copy of the full transcript without the defendant's having an opportunity to object.

To clarify the requirement for notice by the defendant when a *Marsden* issue is raised on appeal, this proposal would amend rule 8.328 to state this requirement more directly and fully. It would also broaden the notice provision, requiring that the defendant indicate whether or not there is any confidential information not relevant to the issues on appeal whenever a *Marsden* issue is raised on appeal, instead of requiring notice only if there is such extraneous material in the transcript. This proposal would also require defendant to identify the irrelevant confidential information by page and line number. In addition, to protect against inadvertent release of confidential information, this proposal would specifically provide that, in the event that the defendant does not file the required notice, the defendant may file an objection to the People's application seeking the *Marsden* transcript. It is the committee's understanding that this reflects the current practice of the courts when the defendant fails to file such a notice. Under this proposal, the clerk would send a copy of the full *Marsden* transcript to the People only if the defendant filed a notice indicating there was no confidential material in the transcript not relevant to the appeal, or if the defendant did not object to the People's application to obtain the transcript.

Distribution of the record

Rule 8.336 addresses the preparation and distribution of the record in noncapital felony appeals. Currently, this rule requires that a copy of the record automatically be prepared for and sent to the Attorney General and that, if requested, a copy also be prepared for and sent to the district attorney. In some cases, however, the district attorney, rather than the Attorney General, is counsel for the People on appeal and therefore should automatically receive a copy of the record. This proposal would clarify that a copy of the record must automatically be prepared for and sent to the Attorney General or the district attorney, whichever is the counsel for the People on appeal, and that whichever is not counsel on appeal may request a copy of the record.

Rule 8.340 addresses augmenting and correcting the record in felony appeals. Currently, this rule contains various provisions regarding to whom the clerk is required to provide copies of augmented or corrected records. This proposal would simplify these requirements by creating a single list of those who are to receive the augmented or corrected record. The proposed list mirrors rule 8.336's list of those who are required to receive the original record. The requirement in rule 8.340(a) that the probation officer receive a copy of an amended abstract of judgment or other order as an augmentation to the record would be deleted as unnecessary because Penal Code section 1213 already

requires that a copy of an abstract of judgment or order granting probation be sent to the probation officer.

Augmenting the record

Rule 8.340(a) addresses augmenting the record with an amended abstract of judgment or other order when the trial court takes some action after the record has been certified. In some circumstances, additional documents, such as a new probation report, may have been filed or a new hearing held in conjunction with the trial court's action. This proposal would clarify that any such documents or a transcript of any such hearing relevant to the new judgment or order that would ordinarily be required to be included in the record on appeal must be included as part of the augmentation.

Alternative Actions Considered

The committee considered several alternative approaches to addressing the concerns about possible inappropriate release of confidential material in *Marsden* transcripts. Initially, the committee considered simply trying to clarify the obligation of defendant's appellant counsel to file the notice informing the court that there is confidential information not relevant to the issues on appeal in a *Marsden* transcript. The committee decided, however, that this approach would not sufficiently address the concerns about the release of the confidential information in the event that the notice was not filed. The committee also considered requiring that the People file a motion or an application in every case in order to obtain a copy of a *Marsden* transcript. While this approach would have protected against the inadvertent release of confidential information, the committee concluded that it would have unfairly burdened both the People and the courts.

Ultimately, the committee concluded that the approach embodied in the proposed amendments to rule 8.328—which strengthens the notice requirement and provides for release of transcripts in which the defendant indicates there is no confidential material not relevant to the appeal, but also establishes an application procedure in the event that the notice is not filed—would balance the concerns.

As indicated below, the committee also made several modifications to its proposal to address the public comments received.

Comments From Interested Parties

The proposal was circulated for public comment during the Spring 2006 comment cycle. Ten individuals or organizations submitted comments on this proposal. Four commentators agreed with the proposal and the remaining six agreed with the proposal only if modified or agreed with parts of the proposal and opposed other parts. The committee agreed with many of the comments and incorporated the suggested changes into the proposal. Some of the proposed amendments received several substantive comments; these are discussed below. The full text of all the comments received and the committee's responses is attached at pages 26–40.

Rule 8.320

Three commentators opposed or recommended modifying the proposed amendments to rule 8.320, which would expand the defense motions that are automatically included in the record on appeal when the defendant is the appellant.

As circulated for public comment, this proposal would have excluded from the normal reporter's transcripts the oral proceeding on motions under Penal Code section 1050. Administrative Presiding Justice Roger W. Boren of the Court of Appeal, Second Appellate District, suggested that the proceedings on continuance motions that were denied should *not* be excluded from the normal record and thus that the reference to Penal Code section 1050 should be stricken from the proposal. He noted that while some denials of continuance motions might be challenged by writ, defendants on appeal frequently challenge the trial court's failure to grant a continuance and that currently the oral proceedings on defense motions for continuance are usually contained in the trial transcript. Based on this comment, the committee has eliminated the reference to Penal Code section 1050 from the proposal.

The State Bar of California's Committee on Appellate Courts indicated that it agreed that the proceedings currently provided as part of the normal reporter's transcript in non-capital felony appeals do not include all proceedings likely needed by defendant's appellate counsel. That committee was divided, however, as to whether the proposed amendment to rule 8.320(c) would result in too many motion proceedings being included in the normal reporter's transcript. Instead, it identified 11 types of motions that the members all agreed should be included in the normal transcript. This list is helpful, and the committee considered recommending that rule 8.320 be amended to incorporate these 11 items into rule 8.320's list of proceedings that are to be included in the normal reporter's transcript. However, the committee ultimately decided not to recommend this approach because it would make rule 8.320 very long and unwieldy.

Mr. Michael M. Roddy, executive officer of the Superior Court of San Diego County objected to the amendment to rule 8.320 on the basis that it would increase workload but not increase the time within which to complete the preparation of the record. It is the committee's understanding that, while the current rule language is not clear about whether these proceedings should be included in the normal reporter's transcript, court reporters are already including many motion proceedings in their transcripts as part of the oral proceedings at trial or sentencing or because local rules of the Courts of Appeal require their inclusion in the reporter's transcript. Based on this understanding, the committee does not believe that this rule change will create a large volume of additional work for court reporters. In some cases, this clarification might actually reduce the proceedings that are being transcribed, as reporters may currently be including more motion proceedings in some transcripts than are necessary, particularly when the People are the appellant. To the extent that reporters are not currently including necessary proceedings in the transcript, this clarification of the rule should avoid situations in which a party must apply to the trial court to add these proceedings to the record or seek to augment the record in the Court of Appeal. The committee also notes that if the trial court

orders additions to the record under rule 8.324, the reporter will receive notice of these additions late in the record preparation period and the rule does not provide the reporter with any additional time to prepare the transcript of these proceedings.

Mr. Roddy also commented on the proposed amendment to rule 8.320(b)(13)(C), which would require that juvenile records that were admitted into evidence to prove a “prior” be included in the clerk’s transcript. He noted that although these records are admitted in the trial proceedings, they are typically treated as confidential and segregated from the rest of the trial court file. Based on this comment, the committee modified its proposal to add a provision clarifying that if a record is closed to public inspection in the trial court because it is required to be kept confidential by law, it must remain closed to public inspection in the reviewing court unless that court orders otherwise.

Rule 8.328

The State Bar of California’s Committee on Appellate Courts objected to the fundamental concept of the proposed amendments to rule 8.328(b), relating to *Marsden* transcripts. First, the committee members questioned whether the amendments are warranted because (1) they believe it is rare for a transcript of *Marsden* proceedings to contain confidential material that is not relevant to the issues on appeal, and (2) there does not appear to be an actual problem resulting in the People’s receipt of copies of transcripts containing confidential material not relevant to the issues on appeal. Second, they object to defendant’s counsel being required to file a notice when there is no confidential information in a *Marsden* transcript that is not relevant to the appeal. Finally, they also object to the proposal to add new procedures addressing situations in which defendant’s counsel do not file the required notice.

It is the advisory committee’s understanding, based on input from representatives of the appellate projects and the Attorney General’s Office, that there are circumstances in which appellate counsel do not currently include with their brief the required notice indicating that there is confidential information in a *Marsden* transcript that is not relevant to the issues the defendant has raised on appeal. Despite this failure to provide notice, the advisory committee shares the State Bar Committee’s understanding that the People are not, in fact, currently receiving copies of transcripts that contain confidential information that is irrelevant to the appeal. The committee understands, however, that this is because courts are typically following the procedures proposed in subdivision (b)(6) when notice is not provided. Therefore, adding subdivision (b)(6) to this rule would simply be amending the rule to more accurately reflect current practice.

The State Bar committee is correct that proposed subdivision (b)(4) would broaden the current notice requirement; instead of filing a notice only if a *Marsden* transcript contains confidential information that is not relevant to the issues on appeal, defendants would be required to submit a notice in every case in which they raise a *Marsden* issue in the opening brief. The committee believes that this will have at least two beneficial effects: (1) it should help regularize the practice of submitting such notices, thereby encouraging compliance, and (2) if counsel do not comply, the courts will know that this is an

inadvertent error, rather than an affirmative statement that there is no confidential information in the transcript that is irrelevant to the issues on appeal.

It is the committee's hope that by clarifying the notice requirement these amendments will reduce the circumstances in which appellate counsel fail to file the notice. The committee acknowledges, however, the potential that some counsel could rely on the availability of the procedure in proposed subdivision (b)(6) in deciding not to file the notice. Nonetheless, the committee does not believe that this will create new burdens on the courts since, as indicated above, the committee understands that the procedure outlined in subdivision (b)(6) is simply reflective of current court practice when counsel fail to file the required notice.

Rules 8.336 and 8.340

As circulated for public comment, the proposed amendment to rule 8.336(f)(2) would have required that the record be sent to the appellate project if the defendant was not represented by "private" counsel. Two commentators—Administrative Presiding Justice Boren of the Court of Appeal, Second Appellate District and the State Bar's Committee on Appellate Courts—objected to this proposed provision. Both commentators pointed out that this would result in the projects receiving the record even when counsel has been appointed to represent the defendant. Based on these comments, the committee has amended the proposal to delete the reference to "private" counsel in this provision, so that the appellate project would only receive the record when the defendant was not yet represented by any counsel.

The State Bar Committee also pointed out a related concern about the proposed amendments to rule 8.340. As circulated for public comment, the proposed amendments to this rule would have replaced individual lists of those who are supposed to receive record augmentations and corrections with a requirement that the same people who had received the original record should get any augmentation or correction. The State Bar Committee noted that, under that proposed rule, if the defendant were not represented at the time the record was certified, but subsequently obtained counsel, the newly appointed counsel would not be entitled to receive the augmented or corrected record. Based on these comments, the committee revised its proposed amendments to include in rule 8.340 a specific list, modeled on the list in rule 8.336, of those to whom augmentations and corrections are to be sent.

Finally, one commentator, Ms. Cheryl Kanatzar, deputy executive officer of the Superior Court of Ventura County, suggested that when the Attorney General or district attorney is not the counsel for the People on appeal, he or she should be required to request any desired copy of the clerk's transcript under rule 8.336(c)(3) as soon as possible so the clerks can prepare that copy along with the other copies of the record that they must prepare. The committee discussed this suggestion at some length, but ultimately decided not to recommend this change. It is the committee's understanding that such requests from the Attorney General are rare, since the Attorney General's office most likely obtains a copy of the record from the district attorney's office. When the Attorney

General does make such a request, however, it may come later in the process. Prohibiting the Attorney General from requesting the record directly from the trial court clerk in those circumstances will simply result in the Attorney General seeking to augment the record in the Court of Appeal. This is a lengthier process which takes additional resources and may delay the appellate proceedings without resulting in any diminishment in the burden placed on the clerk or reporter to prepare the additional copies requested by the Attorney General.

Implementation Requirements and Costs

Depending on reporters' current practices regarding including motion proceedings in the normal transcripts in felony appeals, there may be some increases in reporting costs if rule 8.320 is amended to require that, when the defendant is the appellant, the oral proceedings on most defense motions that are denied be automatically included in the reporter's transcript. This may be offset, however, by reductions in other reporting costs, as well as by reductions in costs associated with applications in the trial courts to add material to the record and augmentation requests in the Courts of Appeal.

Amending rule 8.328 to require that defendants' appellate counsel prepare and file notices in all cases in which a *Marsden* issue is raised on appeal may also result in some additional costs to the judicial branch, since many appealing defendants are represented by appointed appellate counsel. To the extent that these requirements result in notices being filed in more cases, these potential additional costs may also be offset by reductions in court costs associated with handling requests to release *Marsden* transcripts.

The remaining proposed clarifications of these rules should eliminate uncertainty and thereby reduce costs.

Recommendation

The Appellate Advisory Committee recommends that the Judicial Council, effective January 1, 2007:

1. Amend rule 8.320, relating to the normal record in appeals of noncapital felony cases, to provide that:
 - a. Records of juvenile adjudications introduced at trial are to be included in the clerk's transcript, but that when such records have been closed to public inspection because they are required to be kept confidential by law, these records will remain closed to the public in the reviewing court; and
 - b. When the defendant is the appellant, the oral proceedings on any motion by the defendant, other than those specifically exempted, that is denied in whole or in part are included in the normal reporter's transcript;

2. Amend rule 8.324, relating to additions to the normal record in appeals of noncapital felony cases, to specify that the defendant or the People may apply to include any written motion in the clerk's transcript;
3. Amend rule 8.328, relating to confidential records, to:
 - c. Clarify that this rule applies to records required to be kept confidential by law, not to records sealed under rules 2.550–2.551 or records proposed to be sealed under rule 8.160; and
 - d. Clarify the procedures relating to *Marsden* hearing transcripts when the defendant raises a Marsden issue on appeal;
4. Amend rule 8.336, relating to preparing and sending the record in appeals of noncapital felony cases, to clarify when the Attorney General or district attorney automatically receives a copy of the record and when they must request a copy;
5. Amend rule 8.340, relating to augmenting and correcting the record in appeals of noncapital felony cases, to:
 - e. Establish uniform requirements governing who receives copies of augmentations or corrections to such records; and
 - f. Provide that if the record is augmented to include an amended abstract of judgment or other new order, the augmented record must also include any additional document or transcript related to the amended judgment or new order that any rule or order requires to be included in the record; and
6. Amend rule 8.610, relating to the record in appeals of capital cases, to replace cross-references to rules 8.320 and 8.324 with the text of the provisions from rules 8.320 and 8.324 and clarify overlapping language from these previous cross-references.

The text of the proposed amendments to the rules is attached at pages 16–25.

Attachments

Rules 8.320, 8.324, 8.328, 8.336, 8.340, and 8.610 of the California Rules of Court are amended, effective January 1, 2007, to read:²

1 **Rule 8.320. Normal record; exhibits**

2
3 (a) ***

4
5 (b) **Clerk’s transcript**

6
7 The clerk’s transcript must contain:

8
9 (1)–(12) ***

10
11 (13) And if the appellant is the defendant:

12
13 (A) Any written defense motion denied in whole or in part, with supporting
14 and opposing memoranda and attachments;

15
16 (B) If related to a motion under (A), any search warrant and return and the
17 reporter’s transcript of any preliminary examination or grand jury
18 hearing;

19
20 (C) Any ~~certified record of a court or the Department of Corrections~~
21 document admitted in evidence to prove a prior juvenile adjudication,
22 criminal conviction, or prison term. If a record was closed to public
23 inspection in the trial court because it is required to be kept confidential
24 by law, it must remain closed to public inspection in the reviewing court
25 unless that court orders otherwise; and

26
27 (D) The probation officer’s report.

28
29 (c) **Reporter’s transcript**

30
31 The reporter’s transcript must contain:

32
33 (1)–(7) ***

34
35 (8) The oral proceedings at sentencing, granting or ~~denial~~ denying of probation, or
36 other dispositional hearing;

² These recommended amendments have been made to the version of this rule adopted by the Judicial Council at its June 30, 2006, business meeting and reflect the text that will be in effect on January 1, 2007. Any amendments adopted as part of this proposal will be incorporated into the text of the rule that goes into effect on January 1, 2007.

1 (9) And if the appellant is the defendant:
2

3 (A) The oral proceedings on any defense motion ~~under Penal Code section~~
4 ~~1538.5~~ denied in whole or in part except motions for disqualification of a
5 judge and motions under Penal Code section 995;
6

7 (B) The closing arguments; and
8

9 (C) Any comment on the evidence by the court to the jury.
10

11 **(d) Limited normal record in certain appeals**
12

13 If the People appeal from a judgment on a demurrer to the accusatory pleading, or if
14 the defendant or the People appeal from an appealable order other than a ruling on a
15 motion for new trial, the normal record is composed of a reporter's transcript of any
16 oral proceedings incident to the judgment or order being appealed and a clerk's
17 transcript containing:
18

19 (1)–(2) ***
20

21 (3) Any written motion or notice of motion granted or denied by the order
22 appealed from, with supporting and opposing memoranda and attachments;
23

24 (4)–(6) ***
25

26 **(e)–(g) *****
27
28

29 **Rule 8.324. Application in superior court for addition to normal record**
30

31 **(a) *****
32

33 **(b) Application by either party**
34

35 Either the People or the defendant may apply to the superior court for inclusion in
36 the record of any of the following items:
37

38 (1) In the clerk's transcript: any written defense motion granted in whole or in
39 part or any written motion by the People, with supporting and opposing
40 memoranda and attachments;
41

42 (2) ***
43

44 **(c)–(d) *****
45

1 **Rule 8.328. ~~Sealed~~ Confidential records**

2
3 **(a) Application**

4
5 This rule applies to records required to be kept confidential by law but does not
6 apply to records sealed under rules 2.550–2.551 or records proposed to be sealed
7 under rule 8.160.

8
9 **~~(a)~~ (b) *Marsden* hearing**

- 10
11 (1) The reporter’s transcript of any hearing held under *People v. Marsden* (1970)
12 2 Cal.3d 118 must be ~~sealed~~ kept confidential. The chronological index to the
13 reporter’s transcript must include the *Marsden* hearing but list it as “~~SEALED~~
14 CONFIDENTIAL” or the equivalent.
- 15
16 (2) The superior court clerk must send the original and one copy of the ~~sealed~~
17 confidential transcript to the reviewing court with the record.
- 18
19 (3) The superior court clerk must send one copy of the ~~sealed~~ confidential
20 transcript to the defendant’s appellate counsel or, if the defendant is not yet
21 represented by appellate counsel ~~has not yet been retained or appointed~~, to the
22 appellate project for the district.
- 23
24 (4) If the defendant raises a *Marsden* issue in the opening brief, ~~the reviewing~~
25 ~~court clerk must send a copy of the sealed transcript to the People on written~~
26 ~~application, unless the defendant has~~ must serve and file with the brief a
27 notice stating whether ~~that~~ the confidential transcript contains any confidential
28 material not relevant to the issues on appeal. If the defendant states that the
29 transcript contains confidential material not relevant to the issues on appeal,
30 the notice must identify the page and line numbers of the transcript containing
31 this irrelevant material.
- 32
33 (5) If the defendant serves and files a notice under (4), stating that the transcript
34 contains confidential material not relevant to the issues on appeal, the People
35 may move to obtain a copy of any relevant portion of the ~~sealed~~ confidential
36 transcript. If the defendant serves and files a notice under (4), stating that no
37 such irrelevant material is contained in the transcript, the reviewing court clerk
38 must send a copy of the confidential transcript to the People.
- 39
40 (6) If the defendant raises a *Marsden* issue in the opening brief but does not serve
41 and file a notice under (4), on written application the People may request a
42 copy of the confidential transcript. Within 10 days after the application is
43 filed, the defendant may serve and file opposition to this application on the
44 basis that the transcript contains confidential material not relevant to the issues
45 on appeal. Any such opposition must identify the page and line numbers of the

1 transcript containing this irrelevant material. If the defendant does not timely
2 serve and file opposition to the application, the reviewing court clerk must
3 send a copy of the confidential transcript to the People.
4

5 **(b) (c) Other in-camera proceedings and confidential records**
6

- 7 (1) Any party may apply to the superior court for an order that the record include:
8
9 (A) A ~~sealed~~ confidential, separately paginated reporter's transcript of any
10 in-camera proceeding at which a party was not allowed to be
11 represented; and
12
13 (B) Any item that the trial court withheld from a party on the ground that it
14 was confidential.
15
16 (2) The application and any ruling under (1) must comply with rule 8.324.
17
18 (3) If the court grants ~~the~~ an application for a reporter's transcript of any in-
19 camera proceeding, it may order the reporter who attended the in-camera
20 proceeding to personally prepare the transcript. The chronological index to the
21 reporter's transcript must include the proceeding but list it as "~~SEALED~~"
22 "CONFIDENTIAL—MAY NOT BE EXAMINED WITHOUT COURT
23 ORDER" or the equivalent.
24
25 (4) The superior court clerk must send the transcript of the in-camera proceeding
26 or the confidential item to the reviewing court in a sealed envelope labeled
27 "CONFIDENTIAL—MAY NOT BE EXAMINED WITHOUT COURT
28 ORDER." The reviewing court clerk must file the envelope and store it
29 separately from the remainder of the record.
30
31 (5) The superior court clerk must prepare an index of any material sent to the
32 reviewing court under (4), except confidential material relating to a request for
33 funds under Penal Code section 987.9, showing the date and the names of all
34 parties present at each proceeding, but not disclosing the substance of the
35 sealed matter, and send the index:
36
37 (A) To the People; and
38
39 (B) To the defendant's appellate counsel or, if the defendant is not yet
40 represented by appellate counsel ~~has not yet been retained or appointed,~~
41 to the appellate project for the district.
42
43 (6) Unless the reviewing court orders otherwise, confidential material sealed sent
44 to the reviewing court under (4) may be examined only by a reviewing court

1 justice personally; but parties and their attorneys who had access to the
2 material in the trial court may also examine it.

3
4 **(e) (d) Omissions**

5
6 If at any time the superior court clerk or the reporter learns that the record omits
7 material that any rule requires to be included and that this rule requires ~~sealed~~ to be
8 kept confidential:

- 9
10 (1) The clerk and the reporter must comply with rule 8.340(b); and
11
12 (2) The clerk must comply with the provisions of this rule requiring ~~sealing~~ that
13 the record be kept confidential and prescribing which party's counsel, if any,
14 must receive a copy of sealed material.

15
16 **Advisory Committee Comment**

17
18 **Subdivision (b) (c).** Subdivision ~~(b)~~ (c)(5) requires the clerk to prepare and send to the parties an index of
19 any confidential materials sent to the reviewing court, showing the date and the names of all parties
20 present. The purpose of this provision is to assist the parties in making—and the court in adjudicating—
21 motions to unseal portions of the record. To protect confidentiality until a record is unsealed, however,
22 the index must endeavor to identify the sealed matter without disclosing its substance.

23
24
25 **Rule 8.336. Preparing, certifying, and sending the record**

26
27 **(a)–(b) *****

28
29 **(c) Clerk's transcript**

- 30
31 (1) Except as provided in (a) or (b), the clerk must begin preparing the clerk's
32 transcript immediately after the notice of appeal is filed.
33
34 (2) Within 20 days after the notice of appeal is filed, the clerk must complete
35 preparation of an original and two copies of the clerk's transcript, one for
36 defendant's counsel and one for the Attorney General or the district attorney,
37 whichever is the counsel for the People on appeal.
38
39 (3) On request, the clerk must prepare an extra copy for the district attorney or the
40 Attorney General, whichever is not counsel for the People on appeal.
41
42 (4) If there is more than one appealing defendant, the clerk must prepare an extra
43 copy for each additional appealing defendant represented by separate counsel.
44

1 (5) The clerk must certify as correct the original and all copies of the clerk's
2 transcript.

3
4 (d) ***

5
6 (e) **Extension of time**

7
8 (1) The superior court may not extend the time for preparing the record.

9
10 (2) The reviewing court may order one or more extensions of time for preparing
11 the record, not exceeding a total of 60 days, on receipt of:

12
13 (A) An affidavit showing good cause; and

14
15 (B) In the case of a reporter's transcript, certification by the superior court
16 presiding judge, or a court administrator designated by the presiding
17 judge, that an extension is reasonable and necessary in light of the
18 workload of all reporters in the court.

19
20 (f) **Sending the transcripts**

21
22 (1) When the clerk's and reporter's transcripts are certified as correct, the clerk
23 must promptly send:

24
25 (A) The original transcripts to the reviewing court, noting the sending date
26 on each original;

27
28 (B) One copy of each transcript to ~~each defendant's~~ appellate counsel for
29 each defendant represented by separate counsel and to the Attorney
30 General or the district attorney, whichever is counsel for the People on
31 appeal; and

32
33 (C) One copy of each transcript to the district attorney or Attorney General if
34 requested under (c)(3).

35
36 (2) If the defendant's is not represented by appellate counsel ~~has not been retained~~
37 ~~or appointed~~ when the transcripts are certified as correct, the clerk must send
38 that defendant's counsel's copy of the transcripts to the district appellate
39 project.

40
41 (g)-(h) ***

1 **Rule 8.340. Augmenting or correcting the record in the Court of Appeal**

2
3 **(a) Subsequent trial court orders**

4
5 (1) If, after the record is certified, the trial court amends or recalls the judgment or
6 makes any other order in the case, including an order affecting the sentence or
7 probation, the clerk must promptly certify and send a copy of the amended
8 abstract of judgment or other order—as an augmentation of the record—to:

9
10 (A) The reviewing court, the probation officer, the defendant,

11
12 (B) The defendant’s appellate counsel for each defendant represented by
13 separate counsel, and the Attorney General or the district attorney,
14 whichever is counsel for the People on appeal; and

15
16 (C) The district attorney or Attorney General, whichever is not counsel for
17 the People on appeal, if he or she requested a copy of the clerk’s
18 transcript under 8.336(c)(3).

19
20 (2) If there is any additional document or transcript related to the amended
21 judgment or new order that any rule or order requires be included in the
22 record, the clerk must send this document or transcript with the amended
23 abstract of judgment or other order. The clerk must promptly copy and certify
24 any such document, and the reporter must promptly prepare and certify any
25 such transcript.

26
27 **(b) Omissions**

28
29 (1) If, after the record is certified, the superior court clerk or the reporter learns
30 that the record omits a document or transcript that any rule or order requires to
31 be included, the clerk must promptly copy and certify the document or the
32 reporter must promptly prepare and certify the transcript. Without the need for
33 a court order, the clerk must promptly send the document or transcript—as an
34 augmentation of the record—to ~~the reviewing court, the defendant’s appellate~~
35 ~~counsel, and the Attorney General~~ to all those who are listed under (a)(1).

36
37 **~~(c) Defendant’s appellate counsel not yet retained or appointed~~**

38
39 ~~If the defendant’s appellate counsel has not yet been retained or appointed, the clerk~~
40 ~~must send to the district appellate project any document or transcript added to the~~
41 ~~record under (a) or (b).~~

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- (H) The judgment or order appealed from and any abstract of judgment or commitment;
 - (I) Any motion for new trial, with supporting and opposing memoranda and attachments;
 - (J) Any transcript of a sound or sound-and-video recording furnished to the jury or tendered to the court under rule 2.1040;
 - (K) Any application for additional record and any order on the application;
 - (L) Any written defense motion or any written motion by the People, with supporting and opposing memoranda and attachments;
 - (M) If related to a motion under (L), any search warrant and return and the reporter's transcript of any preliminary examination or grand jury hearing;
 - (N) Any document admitted in evidence to prove a prior juvenile adjudication, criminal conviction, or prison term;
 - (O) The probation officer's report; and
 - ~~(P)~~ (P) Any other document filed or lodged in the case, including each juror questionnaire, whether or not the juror was selected.
- (2) The record must include a reporter's transcript containing:
- ~~(A)~~ (A) ~~All items listed in rule 8.320(e)~~ The oral proceedings on the entry of any plea other than a not guilty plea;
 - (B) The oral proceedings on any motion in limine;
 - ~~(B)~~ (C) ~~All items listed in rule 8.324(b)(2), whether or not requested~~ The voir dire examination of jurors;
 - (D) Any opening statement;
 - (E) The oral proceedings at trial;
 - (F) All instructions given orally;
 - (G) Any oral communication between the court and the jury or any individual juror;

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- (H) Any oral opinion of the court;
- (I) The oral proceedings on any motion for new trial;
- (J) The oral proceedings at sentencing, granting or denying of probation, or other dispositional hearing;
- (K) The oral proceedings on any motion under Penal Code section 1538.5 denied in whole or in part;
- (L) The closing arguments;
- (M) Any comment on the evidence by the court to the jury;
- (N) The oral proceedings on motions in addition to those listed above; and
- ~~(C)~~ (O) Any other oral proceedings in the case, including any proceedings that did not result in a verdict or sentence of death because the court ordered a mistrial or a new trial.

(3)-(4) ***

(b)-(d) ***

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Appellate Procedure: Record on Appeal in Criminal Cases

(amend Cal. Rules of Court, rules 8.320 [formerly rule 31], 8.324 [formerly rule 31.1], 8.328 [formerly rule 31.2], 8.336 [formerly rule 32], 8.340 [formerly rule 32.1], and 8.610 [formerly rule 34.1])

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
1.	Saul Bercovitch State Bar of California Committee on Appellate Courts 180 Howard Street San Francisco, CA 94105-1639	A N	Y	<p>The Committee supports part of this proposal and opposes part of this proposal, as detailed below.</p> <p><u>Contents of clerk’s transcript in non-capital cases</u> The Committee supports the proposed amendments to subdivision (b)(13)(C) of rule 8.320 (formerly rule 31).</p> <p><u>Contents of the clerk’s and reporter’s transcripts in capital cases</u> The Committee supports the proposed amendments to rule 8.610 (formerly rule 34.1).</p> <p><u>Motion proceedings included in the normal reporter’s transcript in non-capital cases</u> The Committee recognizes that the proceedings currently provided as part of the normal reporter’s transcript in non-capital felony appeals do not include all proceedings likely needed by defendant’s appellate counsel. The Committee is divided as to whether the current proposal to amend rule 8.320(c) (formerly rule 31) is broader than necessary in terms of which motion proceedings should be included in the normal reporter’s transcript. The Committee does agree, however, that the contents of the reporter’s transcript should be expanded to</p>	<p>No response needed.</p> <p>No response needed.</p> <p>The committee did not make any changes in its proposal in response to this comment. The committee concluded that it would be cumbersome to list all of these specific motion proceedings in the rule as items that must automatically be included in the record. Instead, as in the proposal circulated for public comment, the committee concluded that it was preferable for the rule to identify</p>

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Appellate Procedure: Record on Appeal in Criminal Cases

(amend Cal. Rules of Court, rules 8.320 [formerly rule 31], 8.324 [formerly rule 31.1], 8.328 [formerly rule 31.2], 8.336 [formerly rule 32], 8.340 [formerly rule 32.1], and 8.610 [formerly rule 34.1])

			<p>include at least the following oral proceedings of motions when decided in whole or in part against the appellant: (1) jury voir dire whenever a motion under <i>People v. Wheeler</i> (1978) 22 Cal.3d 258 has been decided adversely to the appellant; (2) hearings held pursuant to <i>People v. Marsden</i> (1970) 2 Cal.3d 118 (with special requirements that the transcripts be sealed); (3) proceedings to determine the competence of the appellant; (4) motion to suppress identification; (5) motion to suppress statements of the appellant; (6) motion to permit or preclude impeachment of the defendant or witness with prior offenses; (7) motion for severance or joinder; (8) motion for change of venue; (9) motion for discovery of police officer records; (10) motion for self-representation; and (11) in limine motions. This list is adapted from Local Rule 4 of the First Appellate District and Local Rule 1 of the Second Appellate District.</p> <p><u>Confidential records</u> The Committee supports the proposed change in the title of rule 8.340 (formerly rule 32.1), and proposed new subdivision (a) of rule 8.328 (formerly rule 31.2).</p> <p><u>Transcripts of Marsden proceedings</u> The Committee opposes the language of what would become subdivisions (b)(4) and (b)(5) of rule 8.238 (formerly rule 31.2), and new</p>	<p>any motions that should not automatically be included in the record.</p> <p>No response needed.</p> <p>It is the committee's understanding, based on input from representatives of the appellate projects and the</p>
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Appellate Procedure: Record on Appeal in Criminal Cases

(amend Cal. Rules of Court, rules 8.320 [formerly rule 31], 8.324 [formerly rule 31.1], 8.328 [formerly rule 31.2], 8.336 [formerly rule 32], 8.340 [formerly rule 32.1], and 8.610 [formerly rule 34.1])

			<p>subdivision (b)(6).</p> <p>The Committee believes that it is rare for a transcript of <i>Marsden</i> proceedings to contain confidential material that is not relevant to the issues on appeal. As far as the Committee is aware, there does not appear to be an actual problem resulting in the People’s receipt of copies of transcripts containing confidential material not relevant to the issues on appeal. Given the apparent absence of any problem that needs to be solved, the Committee does not believe the proposed new procedure is warranted.</p> <p>The Committee also believes that the proposed procedure would create new issues that do not exist under the current procedure. The proposed language of subdivision (b)(4) would add a <i>new</i> requirement that appellant’s counsel file a notice stating that the confidential transcript does <i>not</i> contain confidential material not relevant to the issues on appeal. This would change counsel’s obligation under the current rule, which requires notice only when the transcript <i>does</i> contain such confidential material. Moreover, proposed subdivision (b)(6) would undercut the purpose of the proposed language of subdivision (b)(4), which would require counsel to provide notice one way or the other. Proposed subdivision (b)(6) may have the unintended effect of causing the opposition to</p>	<p>Attorney General’s Office, that there are circumstances in which appellate counsel do not currently include with their brief the required notice indicating that there is confidential information in a <i>Marsden</i> transcript that is not relevant to the issues the defendant has raised on appeal. Despite this failure to provide notice, the advisory committee shares the State Bar Committee’s understanding that the People are not, in fact, currently receiving copies of transcripts that contain confidential information that is irrelevant to the appeal. It is our understanding, however, that this is because courts are typically following the procedures proposed in subdivision (b)(6) when notice is not provided. Therefore, adding subdivision (b)(6) to this rule would simply be amending the rule to more accurately reflect current practice.</p> <p>The State Bar committee is correct that proposed subdivision (b)(4) would broaden the current notice requirement; instead of filing a notice only if a <i>Marsden</i> transcript contains confidential information</p>
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Appellate Procedure: Record on Appeal in Criminal Cases

(amend Cal. Rules of Court, rules 8.320 [formerly rule 31], 8.324 [formerly rule 31.1], 8.328 [formerly rule 31.2], 8.336 [formerly rule 32], 8.340 [formerly rule 32.1], and 8.610 [formerly rule 34.1])

			<p>the People’s application seeking the <i>Marsden</i> transcript to become the regular method of notifying the court of any transcripts that do contain confidential material not relevant to the <i>Marsden</i> issue. Creating such a procedure would essentially excuse an attorney from performing his or her obligations under subdivision (b)(4) of the rule.</p> <p>The Committee supports the idea of clarifying the requirements of rule 8.340 (formerly rule 32.1), and believes that stating those requirements more directly may obviate the need for the proposed opposition procedure. In lieu of the amendments that have been proposed, the Committee suggests that subdivisions (a)(4) and (a)(5) (proposed subdivisions (b)(4) and (b)(5)) be amended to read as follows:</p> <p>“(4) If the defendant raises a <i>Marsden</i> issue in the opening brief, the reviewing court clerk must send a copy of the sealed transcript to the People on written application, unless the defendant has served and filed with the brief a notice that the transcript <u>the defendant must serve and file with the brief a notice if the transcript</u> contains confidential material not relevant to the issues on appeal.</p>	<p>that is not relevant to the issues on appeal, defendants would be required to submit a notice in every case in which they raise a <i>Marsden</i> issue in their opening brief. The committee believes that this will have at least two beneficial effects: (1) it should help make the notice requirement more apparent to counsel, thereby encouraging compliance; and (2) if counsel do not comply, the courts will know that this is an inadvertent error, rather than an affirmative statement that there is no confidential information in the transcript that is irrelevant to the issues on appeal.</p> <p>It is the committee’s hope that by clarifying the notice requirement, these amendments will reduce the circumstances in which appellate counsel fail to file the notice. We acknowledge, however, the potential that some counsel could rely on the availability of the procedure in proposed subdivision (b)(6) in deciding not to file the notice. Nonetheless, the committee does not believe that this will create new burdens on the courts since, as indicated above, it is our</p>
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Appellate Procedure: Record on Appeal in Criminal Cases

(amend Cal. Rules of Court, rules 8.320 [formerly rule 31], 8.324 [formerly rule 31.1], 8.328 [formerly rule 31.2], 8.336 [formerly rule 32], 8.340 [formerly rule 32.1], and 8.610 [formerly rule 34.1])

				<p><u>The notice must identify the portions of the transcript containing this confidential material.</u></p> <p>(5) If the defendant serves and files a notice under (4), the People may move to obtain a copy of any relevant portion of the sealed <u>confidential</u> transcript.</p> <p><u>Distribution of the record</u> The Committee agrees that rule 8.336 (formerly rule 32) should be amended to clarify that a copy of the record must automatically be prepared for and sent to counsel for the People on appeal, and that either the Attorney General or the district attorney, whichever is not counsel on appeal, may also request a copy. The Committee believes that language similar to the language proposed for subdivision (c)(3) should be used throughout the rule, to bring to the attention of the clerk that the People may be represented by either the Attorney General or the district attorney. The Committee therefore suggests that the amendment to rule 8.336(c)(2) (formerly rule 32) be modified to read:</p> <p>“Within 20 days after the notice of appeal is filed, the clerk must complete preparation of an original and two copies of the</p>	<p>understanding that the procedure outlined in (b)(6) is simply reflective of current court practice when counsel fail to file the required notice.</p> <p>Agree; suggested change has been incorporated into the proposal.</p>
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SPR06-05

Appellate Procedure: Record on Appeal in Criminal Cases

(amend Cal. Rules of Court, rules 8.320 [formerly rule 31], 8.324 [formerly rule 31.1], 8.328 [formerly rule 31.2], 8.336 [formerly rule 32], 8.340 [formerly rule 32.1], and 8.610 [formerly rule 34.1])

			<p>clerk’s transcript, one for defendant’s counsel and one for the <u>Attorney General or the district attorney, whichever is</u> counsel for the People on appeal.”</p> <p>Similarly, the Committee suggests that rule 8.336(f)(1)(B) (formerly rule 32) retain the reference to the Attorney General, and add a reference to the district attorney, so rule 8.336(f)(1)(b) (formerly rule 32) would read:</p> <p>“One copy of each transcript to each defendant’s appellate counsel and to the <u>Attorney General or the district attorney, whichever is</u> counsel for the People on appeal.”</p> <p>The Committee does not support the proposed amendment to rule 8.336(f)(2) (formerly rule 32). Under the proposed amendment, the clerk would be required to send the record to the district appellate project if the defendant “is not represented by private appellate counsel.” If read literally, the proposed amendment would seem to require that the record be sent to the district appellate project even if the defendant is represented by appointed counsel.</p> <p>The Committee does not support the proposed</p>	<p>Agree; suggested change has been incorporated into the proposal.</p> <p>Agree; the committee has amended the proposal to delete the reference to “private” counsel, so that the appellate project would only receive the record when the defendant was not yet represented by any counsel.</p> <p>Agree. The committee has revised</p>
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SPR06-05

Appellate Procedure: Record on Appeal in Criminal Cases

(amend Cal. Rules of Court, rules 8.320 [formerly rule 31], 8.324 [formerly rule 31.1], 8.328 [formerly rule 31.2], 8.336 [formerly rule 32], 8.340 [formerly rule 32.1], and 8.610 [formerly rule 34.1])

				<p>amendments to rule 8.340 (formerly rule 32.1) that would insert a cross-reference to rule 8.336(f) (formerly rule 32), instead of a list of those to whom the clerk is required to provide copies of augmented or corrected records, and would add a sentence with a cross reference to rule 8.336(f) (formerly rule 32) at the end of current rule 8.336(d) (formerly rule 32). The Committee prefers the stand-alone rule to the cross-reference (which would be similar to the approach taken with the proposed amendments to rule 8.610 [formerly rule 34.1] in this proposal). Beyond that drafting issue, however, there is a technical problem with the proposed cross-reference, when combined with the proposed deletion of rule 8.340(c) (formerly rule 32.1). Currently, rules 8.340(a) and (b) (formerly rule 32.1) cover “defendant’s appellate counsel” and rule 8.340(c) (formerly rule 32.1) covers the district appellate project “if the defendant’s appellate counsel has not yet been retained.” By deleting all of those references and instead requiring that the augmented or corrected record be sent to all those who <u>received</u> the record under rule 8.336(f) (formerly rule 32) , the proposed amendments would not address the circumstance in which defendant’s appellate counsel has been appointed or retained <u>after</u> the original record was sent to the district appellate project under rule 8.336(f) (formerly rule 32), but before the record was augmented or</p>	<p>the proposal to include a separate list of those to whom augmentations to the record must be sent.</p>
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				<p>corrected. Under a literal reading of the proposed amendments, the augmented or corrected record in that circumstance would still be sent to the district appellate project.</p> <p><u>Augmenting the record</u> The Committee supports the proposed amendment to rule 8.340 (formerly rule 32.1), subdivision (a), that clarifies that any additional document or transcript of such hearing relevant to the new judgment or order that would ordinarily be required to be included in the record on appeal must be included as part of the augmentation.</p>	No response needed.
2.	Justice Roger W. Boren Administrative Presiding Justice Court of Appeal, Second Appellate District 300 South Spring Street Los Angeles, CA 90013	AM	N	<p>Rule 8.320(c)(9)(A) (formerly rule 31)</p> <p>(A) The oral proceedings on any <u>defense motion under Penal Code section 1538.5</u> denied in whole or in part <u>except motions for disqualification of a judge and motions under Penal Code sections 995 or 1050</u>;</p> <p>Reason: While some denials of continuance motions might be challenged by writ, defendants on appeal frequently challenge the trial court’s failure to grant a continuance. Currently, oral proceedings on defense motions for continuance are usually contained in the trial transcript. Under this proposed rule, reporters might not include these proceedings, which would necessitate applications to the superior</p>	Agree; suggested change has been incorporated into the proposal.

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			<p>court under Rule 8.324 (formerly rule 31.1) if appellate counsel is aware that a motion was made and denied. Since nothing precludes a defendant from appealing on this ground, and appellate counsel must be able to determine whether the denial of such a motion constitutes an issue on appeal, reporter’s transcripts of the proceedings on continuance motions that were denied should <i>not</i> be excluded from the normal record.</p> <p>Rule 8.336(f)(1)(B) (formerly rule 32)</p> <p>(B) One copy of each transcript to each defendant’s appellate counsel <u>for each defendant separately represented</u> and to the Attorney General <u>counsel for the People on appeal</u>; and [...]</p> <p>Reason: To clarify that the clerk needs to send only one record if appellate counsel represents more than one defendant.</p> <p>Rule 8.336(f)(2) (formerly rule 32)</p> <p>(2) If the defendant’s <u>is not represented by private</u> appellate counsel has not been retained or appointed when the transcripts are certified as correct, the clerk must send <u>defendant’s</u> counsel’s copy of the transcripts to the district appellate project.</p> <p>Reason: The district appellate project should</p>	<p>Agree in concept, but recommend using the following slightly different language that mirrors language from 8.336(c)(4) (formerly rule 32)—“for each defendant represented by separate counsel.”</p> <p>Agree; the committee has amended the proposal to delete the reference to “private” counsel, so that the appellate project would only receive the record when the defendant was not yet represented by any counsel.</p>
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				distribute the transcripts under this circumstance whether the defendant has retained or appointed counsel.	
3.	Ms. Mary Carnahan Criminal Division Program Manager Solano County Superior Court 530 Union Avenue, Suite 200 Fairfield, CA 94533	A	N	No specific comment.	No response needed.
4.	Ms. Deena Fawcett President California Appellate Court Clerks Association Court of Appeal, Third Appellate Dist. 900 N Street, Room 400 Sacramento, CA 95814-4869	A	Y	No specific comment.	No response needed.
5.	Mr. Dennis A. Fischer Certified Appellate Specialist 1448 15 th Street, #206 Santa Monica, CA 90404	AM	N	The proposed expansion of rule 8.320(c)(9)(A) (formerly rule 32) is long overdue yet, in my view, quite modest in effect as much of this record already is included in some districts. A good argument could be made that courts and counsel find Penal Code § 995 hearings useful in addressing trial issues and, on rare occasion, a ruling on a Penal Code §1050 motion is pertinent to an appellate argument (I have one pending now); even as to disqualification, if presented as a due process issue, CCP § 170.3(d) does not bar appellate review (Brown, 6 Cal 4 th).	No response needed.

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				P.S. Rule 8.336(c)(2) and (f)(1)(B) (formerly rule 32) use different language for the same purpose. “Defendant’s appellate counsel” is clearer than “defendant’s counsel...on appeal.”	Agree; the committee has revised the proposal to remove any references to defendant’s counsel on appeal.
6.	Ms. Janet Garcia Manager, Planning & Research Unit Los Angeles County Superior Court 111 North Hill Street Los Angeles, CA 90012	A	Y	No specific comment.	No response needed.
7.	Ms. Cheryl Kanatzar Deputy Executive Officer Ventura County Superior Court 800 South Victoria Avenue Ventura, CA 93009	AM	Y	Rule 8.336(c)(3) (formerly rule 32): Request as timely as possible (within a reasonable time frame) so clerks can prepare along with other copies.	The committee discussed this suggestion at some length, but ultimately decided not to recommend this change. It is the committee’s understanding that such requests from the Attorney General are rare, since the Attorney General’s office most likely obtains a copy of the record from the district attorney’s office. When the Attorney General does make such a request, however, it may come later in the process. Prohibiting the Attorney General from requesting the record directly from the trial court clerk in those circumstances will simply result in the Attorney General seeking to augment the record in the Court of Appeal. This is a lengthier process which takes additional resources and may delay

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					the appellate proceedings without resulting in any diminishment in the burden placed on the clerk or reporter to prepare the additional copies requested by the Attorney General.
8.	Ms. Julie M. McCoy President, Orange County Bar Ass'n. P.O. Box 17777 Irvine, CA 92623-7777	A	Y	No specific comment.	No response needed.
9.	Mr. Mike Roddy Executive Officer San Diego County Superior Court 220 West Broadway San Diego, CA 92101	AM	Y	1) Disagree with the proposed changes as drafted because they would include motion proceedings in the normal reporter's transcript in non-capital cases. This increases the workload required, but does not increase the time within which to complete the preparation of the record.	1) It is the committee's understanding that, while the current rule language is not clear about whether these proceedings should be included in the normal reporter's transcript, court reporters are already including many motion proceedings in their transcripts as part of the oral proceedings at trial or sentencing or under local rules of the appellate districts. Based on this understanding, the committee does not believe that this rule change will create a large volume of additional work for court reporters. In some cases, this clarification might actually reduce the proceedings that are being transcribed, as reporters may currently be including more motion proceedings in some

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				<p>2) The proposed amendment to CRC 8.320 (formerly rule 31) would require records of juvenile adjudications that are introduced in a criminal trial be included in the clerk's transcript on appeal. Juvenile adjudications are usually confidential. Although the Court does release information from a juvenile case file to a DA for use as a prior strike in a criminal trial, the court generally issues a protective order that requires any information from the juvenile case</p>	<p>transcripts than are necessary, particularly when the People are the appellant. To the extent that reporters are not currently including necessary proceedings in the transcript, this clarification of the rule should avoid situations in which a party must apply to the trial court to add these proceedings to the record or seek to augment the record in the Court of Appeal. The committee also notes that if the trial court orders additions to the record under rule 8.324 (formerly rule 31.1), the reporter will receive notice of these additions late in the record preparation period and the rule does not provide the reporter with any additional time to prepare the transcript of these proceedings.</p> <p>2) The committee has revised its proposal to clarify that if a record was closed to public inspection in the trial court because it is required to be kept confidential by law, it must remain closed to public inspection in the reviewing court unless that court orders otherwise.</p>
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				file be kept in a confidential envelope in the criminal case file. There seems to be a trend away from confidentiality of records in the juvenile justice system, especially for serious offenses, and the proposed amendment of CRC 8.320 (formerly rule 31) would continue that trend.	
10.	Ms. Carmela F. Simoncini Chair, Appellate Court Committee of the San Diego County Bar Association Appellate Defenders, Inc. 555 West Beech Street, Suite 300 San Diego, CA 92101	AM	Y	<p>This committee generally supports the proposed revisions to the rules regarding the record on appeal in criminal cases. The proposed revisions to rule 8.320 (formerly rule 31), responsive to previous suggestions by this committee, should reduce the delay caused by augmentation requests considerably. However, we offer the following comment regarding the proposed revision to rule 8.328 (formerly rule 31.2).</p> <p>Rule 8.328 (formerly rule 31.2) Confidential Records</p> <p>In Rule 8.328 (b)(4) (formerly rule 31.2), the word “confidential” at the end of the paragraph appears to be surplusage, if the term “irrelevant” appears to have been intended. <u>We suggest the following revision so the paragraph would read:</u></p> <p>(4) If the defendant raises a <i>Marsden</i> issue in the opening brief, the defendant must serve and file with the brief a notice</p>	Agree; suggested change has been incorporated into the proposal.

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				<p>stating whether or not the confidential transcript contains any confidential material not relevant to the issues on appeal. If the defendant states that the transcript contains confidential material not relevant to the issues on appeal, the notice must identify the portions of the transcript containing this confidential <u>irrelevant</u> material.</p> <p>We noticed a double negative in rule 8.328 (b)(5) (formerly rule 31.2), and determined that the order of the two sentences would make more logical sense if reversed. <u>We suggest the following:</u></p> <p>(5) If the defendant serves and files a notice under (4), stating that the transcript contains confidential material not relevant to the issues on appeal, the People may move to obtain a copy of any relevant portion of the confidential transcript. If the defendant serves and files a notice under (4) stating that no such irrelevant material is contained in the transcript, the reviewing court clerk must send a copy of the confidential transcript to the People.</p>	<p>Agree; suggested change has been incorporated into the proposal.</p>
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