

**JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS**

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Report

TO: Members of the Judicial Council

FROM: Kenneth Kann, Managing Attorney, Office of the General Counsel
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DATE: November 4, 2004

SUBJECT: Appellate Procedure: Indexes of Sealed Records (amend Cal. Rules of Court, rules 31.2 and 34.1) (Action Required)

Issue Statement

Rules 31.2(b)(5) and 34.1(d) are inconsistent with Penal Code section 987.9(a) on the question whether certain documents in death penalty cases must be kept confidential when those cases are appealed.

Recommendation

Staff recommends that the Judicial Council, effective January 1, 2005, amend rules 31.2(b)(5) and 34.1(d) to conform to Penal Code section 987.9(a). The text of the proposed amendments is attached at page 3.

Rationale for Recommendation

In criminal appeals generally, rule 31.2(b)(5) requires the superior court clerk to prepare an index of all confidential materials in the appellate record and send a copy of the index to all parties. In appeals from judgments of death, rule 34.1(d) requires the clerk's and reporter's transcripts to contain indexes separately listing all sealed documents and sealed transcripts they include.

Penal Code section 987.9(a) authorizes a defendant in a capital trial to request funds for preparation of the defense but specifies that both the contents of the request and the fact that it was made must be kept confidential. The proposed amendments would correct the rules to conform to the statute in this particular, by clarifying that the indexing provisions of rules 31.2(b)(5) and 34.1(d) do not apply to confidential materials relating to a request for funds under Penal Code section 987.9(a). These materials would include an application for funds and an order on the application.

Alternative Actions Considered

There is no alternative other than to allow the conflict between the rule and the statute to continue to exist, possibly causing confusion.

Comments From Interested Parties

This proposal was not circulated for comment because it is noncontroversial.

Implementation Requirements and Costs

There are no implementation requirements or costs.

Attachments

Rule 31.2 of the California Rules of Court is amended, effective January 1, 2005.

Rule 31.2. Sealed records

(a) ***

(b) Other in-camera proceedings

(1)–(4) ***

(5) The superior court clerk must prepare an index of any material sent to the reviewing court under (4), except confidential material relating to a request for funds under Penal Code section 987.9, showing the date and the names of all parties present at each proceeding, but not disclosing the substance of the sealed matter, and send the index:

(A) to the People, and

(B) to the defendant’s appellate counsel or, if appellate counsel has not yet been retained or appointed, to the appellate project for the district.

(6) ***

(c) ***

Rule 34.1. Contents and form of the record

(a)–(c) ***

(d) Form of record

The clerk’s transcript and the reporter’s transcript must comply with rule 9, but the indexes for the clerk’s transcript must separately list all sealed documents in that transcript, and the indexes for the reporter’s transcript must separately list all sealed reporter’s transcripts with the date and the names of all parties present. The indexes must not list any confidential material relating to a request for funds under Penal Code section 987.9 or disclose the substance of any sealed matter.