



Judicial Council of California · Administrative Office of the Courts

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: April 29, 2011

Title

Trial and Appellate Procedure: Electronic Recordings Offered Into Evidence

Agenda Item Type

Action Required

Rules, Forms, Standards, or Statutes Affected
Amend Cal. Rules of Court, rules 2.1040 and 8.122

Effective Date

July 1, 2011

Date of Report

March 9, 2011

Recommended by

Appellate Advisory Committee
Hon. Kathryn Doi Todd, Chair

Contact

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Executive Summary

The Appellate Advisory Committee recommends amending the rule relating to electronic recordings offered into evidence in trial court proceedings to better ensure that, in the event of an appeal, there is an appropriate record of any recording offered into evidence or presented in the trial court proceedings. Currently, the California Rules of Court provide that, unless otherwise ordered by the trial judge, a party offering into evidence an electronic sound or sound-and-video recording must tender to the court a written transcript of the electronic recording. Among other things, the proposed amendments would add a requirement that a transcript of electronic recordings of deposition or other prior testimony be provided in all cases unless the court reporter takes down the content of all portions of the electronic recording that are presented or offered into evidence. These amendments are intended to improve court administration by reducing delay and costs in appellate proceedings that arise when there is no written record of electronic recordings presented or offered into evidence in the trial court, while minimizing delay and costs in the trial court associated with preparing transcripts of these electronic recordings.

Recommendation

The Appellate Advisory Committee recommends that the Judicial Council:

1. Amend rule 2.1040 of the California Rules of Court, effective July 1, 2011, to
 - a. Add a subdivision specifically addressing electronic recordings of deposition or other prior testimony that requires a transcript of such recordings to be provided in all cases unless the court reporter takes down the content of all portions of the electronic recording that are presented or offered into evidence;
 - b. With respect to other types of electronic recordings presented or offered into evidence:
 - i. Specify that transcripts need not be provided if either the proceeding is uncontested or the parties stipulate in writing or on the record that the sound portion of a sound-and-video recording does not contain any words that are relevant to the issues in the case;
 - ii. Clarify that the transcript can be prepared by the party presenting or offering the recording into evidence; it need not be a certified transcript; and
 - iii. Provide that the court may permit a party to provide the transcript or the required duplicate of the electronic recording five days after the electronic recording is offered or presented or at the close of evidence, whichever is later.
 - c. Eliminate the requirement that a transcript provided under this rule be included in the clerk's transcript in the event of an appeal, as the content of clerks' transcripts is already addressed in other rules.
 - d. Add a new advisory committee comment explaining the purpose of rule 2.1040 and providing guidance about factors that may constitute good cause to waive the requirement for a transcript and the circumstances in which it may be beneficial to have a court reporter take down the content of an electronic recording.
2. Amend rule 8.122 of the California Rules of Court, effective July 1, 2011, to clarify that a portion of a deposition presented or offered into evidence under rule 2.1040 may be included in the clerk's transcript.

The text of the proposed amendments to rules 2.1040 and 8.122 is attached at page 9.

Previous Council Action

The predecessor to rule 2.1040, rule 203.5, was adopted by the Judicial Council effective July 1, 1988. As originally adopted, this rule provided that the party offering an electronic recording into evidence was required to provide a typewritten transcript of the recording “unless otherwise ordered by the trial judge.” This provision of the rule has not been substantively amended since its adoption.

In November 1996, the Judicial Council amended rule 203.5 to require that a duplicate of the transcript be filed with the clerk to facilitate its inclusion in the clerk’s transcript on appeal. The council also amended the predecessor to rule 8.320, relating to the content of clerk’s transcripts in felony appeals, to require that these transcripts of electronic recordings offered into evidence be included in the clerk’s transcript in felony appeals. Rule 8.320 was then used as the model for rules 8.861 and 8.912, the rules regarding the contents of the clerk’s transcripts in misdemeanor and infraction appeals in the new appellate division rules, which were adopted by the council in February 2008 and took effect January 1, 2009.

Rationale for Recommendation

Rule 2.1040 of the California Rules of Court currently provides that, unless otherwise ordered by the trial judge, a party offering into evidence an electronic sound or sound-and-video recording must tender to the court a typewritten transcript of the electronic recording, and a copy of the transcript must be filed by the clerk and must be made part of the clerk’s transcript in the event of an appeal. The rules on felony, misdemeanor, and infraction appeals also specifically require that any transcript provided by a party under rule 2.1040 be included in the clerk’s transcript on appeal (see rules 8.320, 8.861, and 8.912).

The main purpose of rule 2.1040 is to ensure that an appropriate record of any electronic recording presented or offered into evidence is available in the event of an appeal in the case. However, the requirement to provide a transcript is often waived by the trial courts. When the audio portion of a recording is relevant to the case, this creates delays and increases cost in the event of an appeal. It can also create burdens for the trial court, as the trial court may be tasked with supervising the preparation of a settled statement of the content of an electronic recording or otherwise settling disputes between the parties regarding the recording’s content.

In some circumstances, there may be challenges in the trial court proceeding associated with obtaining a written record of an electronic recording offered into evidence. Depending on the quality and length of the electronic recording and the capacity of the party offering it into evidence, it may be difficult for the party to transcribe the audio portion of the recording. It is also impossible for a court reporter (if present) to take down the content of many recordings offered into evidence. In addition, there are circumstances in which an appeal is very unlikely, and thus a written record of an electronic recording offered into evidence may not be necessary.

In these circumstances, requiring a transcript of such an electronic recording may unnecessarily delay the trial court proceedings and increase burdens on litigants.

To address these problems, this proposal would make several changes to rule 2.1040. These changes are designed to better ensure that, in cases where an appeal is likely, there is an appropriate record of any recording offered into evidence or presented in the trial court proceedings, while at the same time balancing the interests of litigants and trial courts in not delaying or increasing costs in the trial court proceedings. While this proposal is recommended for adoption by the Appellate Advisory Committee, it was developed by a working group that included members of the Appellate, Civil and Small Claims, Criminal Law, and Family and Juvenile Law Advisory Committees.

Electronic recordings of deposition or other prior testimony

This proposal would add a new provision specifically addressing sound and sound-and-video recordings of deposition or other prior testimony (amended rule 2.1040(a)). The committee concluded that these electronic recordings should be treated separately from other electronic recordings for two main reasons. First, when a deposition or other testimony is electronically recorded, a written transcript of the testimony is also typically prepared. Thus, any party presenting an electronic recording of such testimony in a trial court proceeding will typically already have a transcript of that testimony, so it should not increase litigation costs or delay the trial court proceedings to require that a copy of that transcript be provided to the court. Second, under Code of Civil Procedure section 2025.510(g), if the testimony at a deposition is recorded both stenographically and by audio or video technology, the stenographic transcript is the official record of that testimony for the purpose of the trial and any subsequent hearing or appeal. This makes it critical to have the transcript of this type of electronic recording both in the trial court and in any subsequent appellate proceeding.

Under proposed new subdivision (a) of rule 2.1040, before presenting or offering into evidence an electronic recording of deposition or other prior testimony, a party would be required to lodge a transcript of the testimony with the court. To ensure that there is a record of the portion of the recording that is actually presented or offered into evidence in the trial court, this proposal would also require the party presenting or offering the electronic recording to identify on the record the page and line numbers in the transcript where the relevant testimony appears (amended rule 2.1040(a)(1)). In addition, it would require that, unless the court reporter takes down all portions of the electronic recording that are played, the party presenting or offering the electronic recording must serve and file—within five days after the recording is presented or offered or by the close of evidence, whichever is later—a copy of the cover of the transcript showing the witness name and a copy of the relevant pages of the transcript with the testimony offered or presented marked (amended rule 2.1040(a)(2)).

Other electronic recordings

For all other electronic recordings, such as 911 tapes, telephone answering machine recordings, and day-in-the-life videos, this proposal would maintain the current requirement that the party offering the electronic recording into evidence must generally provide a transcript of the recording unless the trial court judge orders otherwise. However, the proposed amendments would also establish that a transcript need not be provided either in uncontested proceedings (unless ordered by the trial judge) or where the parties stipulate that the sound portion of the recording does not contain any words relevant to the issues in the case (amended rule 2.1040(b)(3)). Because uncontested proceedings are rarely the subject of appeals, the committee concluded that it would be an unnecessary burden and expense to require a transcript of electronic recordings offered into evidence in these proceedings. Similarly, preparing a transcript would be an unnecessary burden and expense if the parties agree that there are no words on the electronic recording that are relevant to the case.

In addition, this proposal would make explicit what is implicit in the current rule: that the trial judge should only waive the requirement to provide a transcript for good cause. Examples of factors constituting good cause for such a waiver would be added to the advisory committee comment.

When a transcript is required, this proposal would clarify that the transcript may be prepared by the party presenting or offering the recording into evidence; a certified transcript is not required. This should reduce concerns about the expense of providing a certified transcript. The proposal would also authorize the trial judge to permit the party to provide the transcript five days after the electronic recording is offered or presented or at the close of evidence, whichever is later (amended rule 2.1040(b)(2)). This provision would give the party the opportunity to prepare a transcript if one is not available at the time the recording is presented or offered into evidence and should ensure that the trial court proceedings are not delayed by the lack of a transcript. In addition, this proposal would add a requirement that the party presenting or offering the recording into evidence provide the other parties with a copy of the electronic recording in case questions arise as to the accuracy of the transcript.

Advisory committee comment

To guide courts and litigants, a new advisory committee comment would be added to rule 2.1040. The comment would explain that the purpose of rule 2.1040 is to ensure that an appropriate record of any electronic recording presented or offered into evidence is available in the event of an appeal. It would also note that, while the electronic recording itself rather than a transcript is considered the evidence offered or presented in most circumstances, under Code of Civil Procedure section 2025.510(g), if the testimony at a deposition is recorded both stenographically and by audio or video technology, the stenographic transcript is the official record of that testimony for the purpose of the trial and any subsequent hearing or appeal. In addition, the comment would clarify that if only a portion of a longer electronic recording is presented or offered into evidence, the transcript and duplicate recording provided by the party

should contain only that portion of the electronic recording. Finally, the comment would provide guidance about factors constituting good cause to waive the requirement for a transcript and the circumstances in which it might be beneficial to have a court reporter take down the content of an electronic recording.

Rule 8.122

This proposal also includes a clarifying amendment to rule 8.122, relating to clerks' transcripts in civil appeals in the Court of Appeal. Rule 8.122 currently provides that the clerk must not copy or transmit to the reviewing court the original of a deposition. Under proposed new subdivision (a) of rule 2.1040, however, those portions of a deposition transcript reflecting an electronic recording presented or offered into evidence may be included in the clerk's transcript. To address concerns that these provisions might be read as inconsistent with each other, this proposal adds an exception in rule 8.122 for transcripts of portions of a deposition presented or offered into evidence under rule 2.1040.

Comments, Alternatives Considered, and Policy Implications

This proposal was circulated between December 14, 2010, and January 24, 2011, as part of the regular winter 2010 comment cycle.¹ Eleven individuals or organizations submitted comments on this proposal. Five commentators agreed with the proposal, four agreed with the proposal if modified, one disagreed with the proposal unless it was modified, and one did not indicate a position on the proposal. The full text of the comments received and the committee responses are set out in the attached comment chart at pages 13–24. The main substantive comments and the committee's responses are also discussed below.

Marking pages of deposition transcript to identify the portion presented or offered into evidence

As indicated above, this proposal would require the party presenting or offering into evidence an electronic recording of deposition or other prior testimony to serve and file a copy of the pages of the transcript where the testimony played appears (amended rule 2.1040(a)(2)). The invitation to comment included a specific request for comments about whether the party presenting or offering the recording should also be required to mark the transcript pages to reflect what testimony on each page was presented or offered.

Three commentators—the Appellate Court Committee of the San Diego County Bar Association; the Orange County Public Defender's Office; and the Rules and Legislation Committee of the Litigation Section of the State Bar of California—provided input on this question and all three supported

¹ An earlier version of this proposal was circulated between April 19 and June 18, 2010, as part of the regular spring 2010 comment cycle. Nineteen individuals or organizations submitted comments on this proposal. Eleven commentators agreed with the proposal, six agreed with the proposal if modified, one disagreed with the proposal, and one did not indicate a position on the proposal, but provided comments. The proposal was revised based on these comments and recirculated.

including this requirement in the rule. Based on these comments, the committee revised its proposal to require that the presenting or offering party mark the transcript pages submitted to identify the testimony that was presented or offered into evidence (amended rule 2.1040(a)(2)).

Standard for trial judge to waive requirement to provide transcript of recordings other than of depositions or other prior testimony

The proposal that was circulated for public comment provided that, in the case of electronic recordings other than those of deposition or other prior testimony, the trial judge could waive the requirement to provide a transcript of the recording. Two commentators—the Appellate Court Committee San Diego County Bar Association and the California Judges Association—raised concerns about the lack of guidance or criteria for the court to apply in deciding whether to waive this requirement. Based on these comments, the committee revised the proposed rule language to provide that the trial judge may waive the transcript requirement “for good cause” and revised the proposed advisory committee comment to include examples of what might constitute good cause to waive the requirement for a transcript.

Court reporters taking down electronic recordings presented or offered into evidence

This proposal retains without substantive change the language in current rule 2.1040 providing that “unless otherwise ordered by the trial judge, the court reporter need not take down” the content of an electronic recording that is presented or offered into evidence. The proposed new advisory committee comment provides an example of the type of situation in which it might be helpful to have the court reporter take down the content of an electronic recording presented or offered into evidence. Two commentators addressed these provisions. The California Court Reporter’s Association suggested deleting this portion of the proposed advisory committee comment because it might possibly provide a means to circumvent the requirement that the presenting or offering party provide a transcript of the recording. An attorney in private practice suggested that, rather than requiring the presenting/offering party to provide a transcript, it would be simpler for the court reporter to take down the recording as it is played.

The committee did not change its proposal in response to these comments. The current rule provides judges with the discretion to ask that the court reporter take down the content of an electronic recording presented or offered into evidence. The proposed advisory committee comment is not meant to expand this discretion, but simply to provide an example of situations in which the committee understands that trial judges have exercised this discretion with helpful results. Both the working group and the Appellate Advisory Committee considered and rejected the idea of modifying the rule to require that court reporters generally be required to take down electronic recordings presented or offered into evidence. The committee concluded that it would be virtually impossible for a court reporter to take down many such recordings. Essentially, this would be asking the court reporter to serve as transcriber of the electronic recording. Electronic recordings are not like live testimony; the person on the recording cannot be asked to repeat words that a court reporter was unable to hear, and it would disrupt trial court proceedings for an

electronic recording to be repeatedly stopped and “rewound” to allow for its accurate transcription in court during a trial or other hearing.

Implementation Requirements, Costs, and Operational Impacts

This proposal should reduce costs for litigants in cases in which a transcript of an electronic recording is no longer required. By reducing the number of appeals in which there is no appropriate record of an electronic recording presented or offered into evidence in the trial court, this proposal should also reduce delays and costs in appellate proceedings and reduce burdens on trial courts associated with trying to recreate a record of such an electronic recording at the time of an appeal. There may, however, be some initial delays associated with implementing the new requirements regarding transcripts in the trial courts.

Attachments

Cal. Rules of Court, rules 2.1040 and 8.122, at page 9
Comment Chart at page 13

Rules 2.1040 and 8.122 of the California Rules of Court are amended, effective July 1, 2011, to read:

1 Title 2. Trial Court Rules

2
3 Division 8. Trials

4
5 Chapter 3. Testimony and Evidence

6
7
8 Rule 2.1040. Electronic recordings presented or offered into evidence

9
10 (a) Electronic recordings of deposition or other prior testimony

11
12 (1) Before a party may present or offer into evidence an electronic sound or
13 sound-and-video recording of deposition or other prior testimony, the party
14 must lodge a transcript of the deposition or prior testimony with the court. At
15 the time the recording is played, the party must identify on the record the
16 page and line numbers where the testimony presented or offered appears in
17 the transcript.

18
19 (2) Except as provided in (3), at the time the presentation of evidence closes or
20 within five days after the recording in (1) is presented or offered into
21 evidence, whichever is later, the party presenting or offering the recording
22 into evidence must serve and file a copy of the transcript cover showing the
23 witness name and a copy of the pages of the transcript where the testimony
24 presented or offered appears. The transcript pages must be marked to identify
25 the testimony that was presented or offered into evidence.

26
27 (3) If the court reporter takes down the content of all portions of the recording in
28 (1) that were presented or offered into evidence, the party offering or
29 presenting the recording is not required to provide a transcript of that
30 recording under (2).

31
32 ~~(a)~~(b) Transcript of Other electronic recordings

33
34 (1) ~~Unless otherwise ordered by the trial judge~~ Except as provided in (2) and (3),
35 before a party may present or offering into evidence any electronic sound or
36 sound-and-video recording not covered under (a), the party must tender
37 provide to the court and to opposing parties a typewritten transcript of the
38 electronic recording. The transcript must be marked for identification. A and
39 provide opposing parties with a duplicate of the transcript electronic

1 recording, as defined in Evidence Code section 260, must be filed by the
2 clerk and must be part of the clerk's transcript in the event of an appeal. The
3 transcript may be prepared by the party presenting or offering the recording
4 into evidence; a certified transcript is not required.

5
6 (2) For good cause, the trial judge may permit the party to provide the transcript
7 or the duplicate recording at the time the presentation of evidence closes or
8 within five days after the recording is presented or offered into evidence,
9 whichever is later.

10
11 (3) No transcript is required to be provided under (1):

12
13 (A) In proceedings that are uncontested or in which the responding party
14 does not appear, unless otherwise ordered by the trial judge;

15
16 (B) If the parties stipulate in writing or on the record that the sound portion
17 of a sound-and-video recording does not contain any words that are
18 relevant to the issues in the case; or

19
20 (C) If, for good cause, the trial judge orders that a transcript is not required.

21
22 **(c) Clerk's duties**

23
24 ~~Any other~~ An electronic recording transcript provided to the jury court under this
25 rule must also be marked for identification, and a duplicate A transcript provided
26 under (a)(2) or (b)(1) must be filed by the clerk. and made part of the clerk's
27 transcript in the event of an appeal

28
29 **(b)(d) Transcription Reporting by court reporter not required**

30
31 Unless otherwise ordered by the trial judge, the court reporter need not take down
32 or transcribe the content of an electronic recording that is presented or offered
33 admitted into evidence.

34
35 **Advisory Committee Comment**

36
37 This rule is designed to ensure that, in the event of an appeal, there is an appropriate record of any
38 electronic sound or sound-and-video recording that was presented or offered into evidence in the
39 trial court. The rules on felony, misdemeanor, and infraction appeals require that any transcript
40 provided by a party under this rule be included in the clerk's transcript on appeal (see rules 8.320,
41 8.861, and 8.912). In civil appeals, the parties may designate such a transcript for inclusion in the
42 clerk's transcript (see rules 8.122(b) and 8.832(a)). The transcripts required under this rule may
43 also assist the court or jurors during the trial court proceedings. For this purpose, it may be

1 helpful for the trial court to request that the party offering an electronic recording provide
2 additional copies of such transcripts for jurors to follow while the recording is played.

3
4 **Subdivision (a).** Note that, under Code of Civil Procedure section 2025.510(g), if the testimony
5 at a deposition is recorded both stenographically and by audio or video technology, the
6 stenographic transcript is the official record of that testimony for the purpose of the trial and any
7 subsequent hearing or appeal.

8
9 **Subdivision (a)(2).** The party offering or presenting the electronic recording may serve and file a
10 copy of the cover and of the relevant pages of the deposition or other transcript; a new transcript
11 need not be prepared.

12
13 **Subdivision (b).** Note that, with the exception of recordings covered by Code of Civil Procedure
14 section 2025.510(g), the recording itself, not the transcript, is the evidence that was offered or
15 presented (see *People v. Sims* (1993) 5 Cal.4th 405, 448). Sometimes, a party may present or
16 offer into evidence only a portion of a longer electronic recording. In such circumstances, the
17 transcript provided to the court and opposing parties should contain only a transcription of those
18 portions of the electronic recording that are actually presented or offered into evidence. If a party
19 believes that a transcript provided under this subdivision is inaccurate, the party can raise an
20 objection in the trial court.

21
22 **Subdivision (b)(3)(C).** Good cause to waive the requirement for a transcript may include such
23 factors as (1) the party presenting or offering the electronic recording into evidence lacks the
24 capacity to prepare a transcript or (2) the electronic recording is of such poor quality that
25 preparing a useful transcript is not feasible.

26
27 **Subdivision (c).** The requirement to file a transcript provided to the court under (a)(2) or (b)(1) is
28 intended to ensure that the transcript is available for inclusion in a clerk's transcript in the event
29 of an appeal.

30
31 **Subdivision (d).** In some circumstances it may be helpful to have the court reporter take down
32 the content of an electronic recording. For example, when short portions of a sound or sound-and-
33 video recording of deposition or other testimony are played to impeach statements made by a
34 witness on the stand, the best way to create a useful record of the proceedings may be for the
35 court reporter to take down the portions of recorded testimony that are interspersed with the live
36 testimony.

1 Title 8. Appellate Rules

2
3 Division 1. Rules Relating to the Supreme Court and Courts of Appeal

4
5 Chapter 2. Civil Appeals

6
7 Article 1. Record on Appeal

8
9
10 Rule 8.122. Clerk's transcript

11
12 (a) * * *

13
14 (b) Contents of transcript

15
16 (1) – (3) * * *

17
18 (4) Unless the reviewing court orders or the parties stipulate otherwise:

19
20 (A) The clerk must not copy or transmit to the reviewing court the original
21 of a deposition except those portions of a deposition presented or
22 offered into evidence under rule 2.1040.

23
24 (B) * * *

25
26 (c)–(d) * * *

27
28

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Trial and Appellate Procedure: Electronic Recordings Offered Into Evidence (amend Cal. Rules of Court, rules 2.1040 and 8.122)

All comments are verbatim unless indicated by an asterisk (*).

	Commentator		Comment	Proposed Committee Response
			<p>Requiring the party to make a redundant record by marking the filed transcript, amended rule 2.1040(a)(2) will provide inherent quality assurance as to the accuracy of the record in the event of an appeal. By affording counsel an opportunity to make an accurate written record after the testimony is presented or offered, the amended rule may avoid additional pressure on counsel during trial. Although such a requirement may impose a further burden on the party in preparing the transcript, we believe this requirement will ensure a more accurate appellate record and the corresponding burden is not excessive or unwarranted.</p> <p>Subsection (b)(3)(C)</p> <p>As revised, proposed rule 2.1040(b)(3)(C) provides that a party need not tender a transcript of recordings other than depositions or other prior testimony “[i]f the trial judge orders that a transcript is not required.” Our concern is that this language includes no limitation on the trial court’s discretion to waive the transcript requirement. In criminal and juvenile cases, most recordings offered into evidence are not prior testimony or depositions and would fall under section (b) of rule 2.1040 governing “other electronic recordings.” The proposed rule, which seeks to better ensure a record of recordings in the event of an appeal, may be rendered less effective if there is no limit on the court’s discretion to waive the transcript requirement.</p>	<p>As suggested by the commentator, the committee has revised this proposed provision to provide that the trial judge may waive the requirement to provide a transcript “for good cause.” The committee has also revised the proposed advisory committee comment to include two examples of the types of circumstances that might constitute good cause to waive this requirement. Note that these are intended only as examples, not an exclusive list, as the committee believes it would be impossible to articulate a complete list of the circumstances that might constitute good cause. The committee also believes that the proposed new advisory committee comment explaining the purpose of this rule will provide helpful context to assist the trial judge in exercising this discretion.</p>

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Trial and Appellate Procedure: Electronic Recordings Offered Into Evidence (amend Cal. Rules of Court, rules 2.1040 and 8.122)

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	Commentator		Comment	Proposed Committee Response
			<p>To address this concern, our committee proposes the following revision to subsection (b)(3)(C):</p> <p>“(C) In unusual cases, if for good cause, the trial judge orders that a transcript is not required.”</p> <p>Our committee further suggests that the advisory committee comment include some guidance as to the circumstances constituting good cause for waiving the transcript requirement.</p>	
2.	Committee on Appellate Courts State Bar of California Saul Bercovitch	A	<p>The State Bar of California’s Committee on Appellate Courts (Committee) supports this proposal.</p> <p>When the previous proposal to amend rule 2.1040 was circulated for comment in spring 2010, the Committee considered that proposal and submitted comments, including a recommendation that the proposal be revised to ease the potential tension between rule 8.122(b)(4) and proposed rule 2.1040(a). The Committee appreciates that the proposal has been revised and, in conformance with our previous comments, the proposed amendments would amend rule 8.122 to ensure that the rule does not frustrate the intent that transcripts of electronic recordings of deposition transcripts be included in the clerk’s transcript.</p> <p>The Committee has reviewed and considered the remainder of the revised proposal, and has</p>	No response required

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Trial and Appellate Procedure: Electronic Recordings Offered Into Evidence (amend Cal. Rules of Court, rules 2.1040 and 8.122)

All comments are verbatim unless indicated by an asterisk (*).

	Commentator		Comment	
			<p>consulted with colleagues engaged in trial work because of the impact of the proposal on trial court proceedings.</p> <p>Electronic recordings presented or offered into evidence during trial court proceedings—especially excerpts from videotaped depositions—can pose a serious problem on appeal. In many instances, the content of these recordings is not adequately preserved in the record. The existing procedural scheme governing electronic recordings can often lead to incomplete records, which can frustrate both (a) an appellate court’s ability to adequately analyze the appellate arguments raised by the parties, and (b) the parties’ ability to make legal or factual points on appeal, even though the points they raised are supported by what actually occurred in trial court proceedings. Moreover, by the time an appeal is taken, parties may have little, if any, incentive to agree to some after-the-fact method that would ensure the content of electronic recordings is preserved in the record. This is so because, by this stage, the party which did not offer the recording into evidence may sometimes stand to benefit from testimonial gaps in the record.</p> <p>The Committee supports the proposed amendments as drafted, to better ensure that there is a sufficient record of electronic recordings for a potential appeal.</p> <p>Thank you for your consideration of our</p>	

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Trial and Appellate Procedure: Electronic Recordings Offered Into Evidence (amend Cal. Rules of Court, rules 2.1040 and 8.122)

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	Commentator		Comment	Proposed Committee Response
			comments.	
3.	California Court Reporters Association Thomas Pringle		<p>The California Court Reporters Association (CCRA) opposes the proposed changes to Rules 2.1040 and 8.122 unless modified.</p> <p>“ Rule 2.1040. Electronic recordings presented or offered into evidence “(a) Electronic recordings of deposition or other prior testimony * * *</p> <p>“(3) If the court reporter takes down the content of all portions of an electronic recording that were presented or offered into evidence, the party offering or presenting the recording is not required to provide a transcript of that recording under (2).”</p> <p>This section is ambiguous because it is not clear whether it refers to the taking of the testimony under subsection (1), previously recorded depositions, or to the official reporter taking it down in court. In other words, even though it is under Rule 2.1040, it seems to provide an exemption from providing a transcript either at the time of trial or within five days “if the court reporter takes down the content of all portions of an electronic recording that were presented or offered into evidence.”</p> <p>If the intent of this rule is as stated, “to ensure that an appropriate record of any electronic recording presented or offered into evidence is available in the trial court” for appeal purposes,</p>	<p>As suggested by the commentator, the committee has modified the proposal to clarify that (a)(3) applies when the court reporter takes down the entire contents of those portions of an electronic recording offered or presented under (a)(1). The committee notes that this provision is not intended to extend the circumstances in which a court reporter may be asked to take down the contents of an electronic recording presented or offered into evidence. As noted in the proposed advisory committee comment, under Code of Civil Procedure section 2025.510(g), if the testimony at a deposition is recorded both stenographically and by audio or video technology, the stenographic transcript is the official record of that testimony for the purpose of the trial and any subsequent</p>

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Trial and Appellate Procedure: Electronic Recordings Offered Into Evidence (amend Cal. Rules of Court, rules 2.1040 and 8.122)

All comments are verbatim unless indicated by an asterisk (*).

	Commentator		Comment		Proposed Committee Response
			<p>it is the position of CCRA that the best method for preparing the transcript is in a controlled environment, such as a quiet office, with good-quality equipment, not in a noisy courtroom with poor-quality equipment. It is also not practical for the reporter, in the courtroom, to ask for the recording to be rewound and replayed or for the recording to slow down or for those on the recording to stop talking over one another.</p> <p>CCRA requests the following modification:</p> <p>Either delete 2.1040(3) as unnecessary or make reference in (3) to subsection (1). For example, “If a court reporter has taken down, as described in subsection (1), the content of all portions of an electronic recording that were presented or offered into evidence, the party offering or presenting the recording is not required to provide a transcript of that recording under (2).”</p> <p>The other concern with a proposed change is the following Advisory Committee Comment:</p> <p>“Advisory Committee Comment * * *</p> <p>“Subdivision (d). In some circumstances it may be helpful to have the court reporter take down the content of an electronic recording.”</p> <p>The concern of CCRA with this comment is that it provides an avenue for the trial court to circumvent this rule altogether if it is “helpful”</p>		<p>hearing or appeal.</p> <p>The committee considered the suggestion that the proposed advisory committee comment accompanying subdivision (d) be deleted but ultimately declined to make this change. The current language of rule 2.1040(b), which would be relettered as subdivision (d) but remain substantively unchanged in this proposal, permits trial court judges to order that the court reporter take down an electronic recording presented or offered into evidence in a trial court proceeding. The proposed new advisory committee comment to this subdivision does not expand this existing</p>

W11-02

Trial and Appellate Procedure: Electronic Recordings Offered Into Evidence (amend Cal. Rules of Court, rules 2.1040 and 8.122)

All comments are verbatim unless indicated by an asterisk (*).

	Commentator		Comment	
			<p>to the trial court. For example, if trial counsel neglects to prepare a transcript it might then be “helpful” to the trial court to simply have the reporter take down the contents of the recording in court.</p> <p>CCRA requests the following modification:</p> <p>Either delete Advisory Committee Comment Subdivision (d) in its entirety or revise the language to strengthen rather than weaken Rule 8.122. For example, “A transcript of an electronic recording prepared by the presenting party is preferred; however, in some circumstances it may be helpful,” etc. Perhaps some modification to take away the financial incentive for trial counsel to “forget” to prepare the transcript thus making it more convenient or “helpful” to the trial court to have the reporter take down the contents of the recording in court. One suggestion might be to still require the offering party to provide the transcript even if the reporter is required to take down the content of an electronic recording. At the very least, the offering party should be required to provide the reporter with a copy of the electronic recording played whenever the reporter is required to take down the content of an electronic recording.</p> <p>The California Court Reporters Association appreciates the opportunity to comment on proposed rule changes.</p>	

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	Commentator		Comment	Proposed Committee Response
4.	California Judges Association Jordan Posamentier Legislative Counsel	AM	<p>The California Judges Association (CJA) approves of the proposal with the exception of proposed Rule 2.1040(2)(3)(c), which would give the trial court judge discretion to order that a transcript is not required. That subdivision is problematic.</p> <p>Cases arise where the court reporter’s obligation to transcribe the recording has been waived and there is no transcript of the recording. The Court of Appeal justices and research attorneys then get stuck trying to figure what the recording actually says without any help from a transcript. It can be difficult if not impossible to do without several run-throughs of the recording, given background ambient noise and poor quality recordings. It is far more effective to transcribe something from which there is already a rough draft prepared if the court wants the recording transcribed. Accuracy aside, it is also more efficient than the process of having to retrieve, set up, and listen to a recording.</p> <p>Keeping a mandatory rule keeps the burden on the parties to determine transcription accuracy or at least alert the court where problems exist. The parties are in a much better position to figure out what was said in the trial court as they were present during the process.</p> <p>CJA acknowledges that not requiring a transcript would sometimes save the courts money, but in many more cases it will result in a waste of so much appellate time, it will be</p>	<p>Please see response to the comments of the Appellate Courts Committee of the San Diego County Bar Association, above. As that commentator suggested, the committee has revised this proposed provision to provide that the trial judge may waive the requirement to provide a transcript “for good cause.” In addition the committee has revised the proposed advisory committee comment to include examples of the types of circumstances that might constitute good cause to waive this requirement. The committee also notes that a proposal that would have completely eliminated the trial judge’s authority to waive the requirement for a transcript was previously considered and circulated for public comment by the committee. There was substantial opposition to that proposal and, based on that opposition, the committee revised its proposal to maintain the trial court judge’s discretion with respect to certain electronic recordings.</p>

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			<p>costly to the courts. It should also be noted the present proposal lacks guidelines and standards with regard to this subdivision, leaving trial courts with the option of granting a waiver as a matter of course, not just in special situations where, for example, a total transcript is lengthy but the portion actually needed is quite short.</p> <p>CJA therefore respectfully requests that proposed Rule 2.1040(2)(3)(c) be rejected.</p>	
5.	Judge Paul Fogel Superior Court of Alameda County	AM	<p>Proposed amended subdivision (b) requires the party who proffers the electronic recording to provide “a copy” of the transcript to the other party/parties and the court. I have presided over several jury trials in which parties have introduced electronic recordings along with a transcript (both the recording and the transcript were admitted as exhibits; the transcript was not “filed,” as the proposed amended rule would require), and it is helpful to be able to pass out copies to jurors so they may follow along as the electronic recording is played. Frequently the quality of an electronic recording is poor (e.g., cell phone videos, 911 tapes, taped police statements), and allowing the jury to follow along as the recording is played is a good way for the jury to gain an understanding of that evidence in real time. In addition, I like to send copies into the jury room during deliberations (I usually send in copies for jurors to share).</p> <p>Our clerks and courts do not have the resources to make multiple photocopies of these</p>	<p>In response to this comment, the committee has added a provision to the advisory committee comment noting that transcripts of electronic recordings presented or offered into evidence may also assist the court or jurors in the trial court proceedings and that additional copies of the transcript may be helpful for this purpose.</p>

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			<p>transcripts for the members of the jury—our one ancient photocopier, shared by several courtroom departments, simply isn't up to the task. Nor is it fair to ask our busy courtroom clerks to spend the time making copies. It would be better, I think, to require the proffering party to bring sufficient copies of the transcript to pass out to the jury (I usually require at least 7—one for every two jurors (including the alternates).</p> <p>I suggest that you amend the rule either to require the proffering party to furnish sufficient copies of the transcript for the jurors or to include in the comment a suggestion to this effect.</p> <p>Thank you for considering my suggestion.</p>	
6.	Mark D. Gershenson Attorney at Law	AM	<p>I agree with the proposed changes except regarding Other Electronic Recordings: Often, a party in a family law case seeks to play for the court a voicemail message left by his or her former (or soon-to-be former) spouse, domestic partner, or other person, usually in conjunction with a domestic violence or child custody/visitation issue. Often such litigants are self-represented. I am concerned that the proposed rule would make it unduly burdensome for such litigants to get such sound recordings admitted into evidence. It would be much simpler for the court reporter to take down the recording as it is being played. If the recording is not audible or the words</p>	<p>The committee appreciates the concerns expressed by the commentator and believes that the amended rule proposed by the committee provides the trial court with sufficient flexibility to address those concerns. The proposal retains both the trial court's discretion to waive the requirement for a transcript for good cause and the court's discretion to order that the court reporter take down the content of an electronic recording presented or offered into evidence. The committee believes, however, that while it may be possible for a court reporter to take down the content when small portions of a recording are presented or offered into evidence, it is generally not possible for a court reporter take down the</p>

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			<p>understandable, the bench officer should simply rule it inadmissible.</p> <p>Thank you for the opportunity to comment on these proposed changes. For what it's worth, I have been practicing since 1982, and about 90 percent of my practice consists of family law.</p>	<p>content of all electronic recordings presented or offered into evidence. Essentially, this would be asking the court reporter to serve as transcriber of the electronic recording. Electronic recordings are not like live testimony; the person testifying on the recording cannot be asked to repeat testimony that a court reporter was unable to record, and it would disrupt trial court proceedings for an electronic recording being played to be repeatedly stopped and "rewound" in order to allow its appropriate transcription.</p>
7.	Orange County Bar Association John Hueston, President	A		No response required
8.	Orange County Public Defender's Office Denise Gragg Senior Assistant Public Defender	A	<p>The Orange County Public Defender's Office agrees with the proposed rule changes. They will help to ensure precision in the trial courts, by making it easier for court and counsel to provide the jury with only that evidence that has been introduced into evidence. They will also give clarity to appellate courts who are tasked with ascertaining what evidence was presented to the court below. We support not only providing the court and opposing counsel with transcripts reflecting the actual evidence introduced, but also requirements that counsel mark those transcripts to reflect the proffered testimony. This will aid court and counsel in making sure that the jury is given access only to those recordings that have been permitted into evidence, and will help appellate courts to reach decisions on the most accurate possible records. Thus, the rule change will enhance the quality</p>	<p>No response required.</p> <p>Based on this and other comments, the committee has revised the proposal to require that the presenting or offering party mark the transcript pages submitted to identify the electronically recorded testimony that was presented or offered into evidence.</p>

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	Commentator		Comment	Proposed Committee Response
			of criminal litigation at all levels.	
9.	Rules and Legislation Committee Litigation Section State Bar of California Reuben A. Ginsberg	A	The Rules and Legislation Committee agrees with the proposal. In response to the specific request for comment as to whether the party presenting or offering an electronic recording should be required to mark the transcript pages to show what testimony on each page was presented or offered (p. 2 of the invitation to comment), the committee believes that this should be required to ensure that the reviewing court can determine precisely what testimony was presented or offered.	Based on this and other comments, the committee has revised the proposal to require that the presenting or offering party mark the transcript pages submitted to identify the testimony that was presented or offered into evidence.
10.	Superior Court of Sacramento County Robert Turner ASO II	N/I	The Superior Court of California, County of Sacramento has reviewed the proposed rule changes for Trial and Appellate Procedures (W11-02) but does not have any comments to submit. Thank you for providing us with an opportunity to review the proposed changes and submit comments.	No response required.
11.	Superior Court of San Diego County Michael M. Roddy Court Executive Officer	A	No additional comments.	No response required.