

# Judicial Council of California • Administrative Office of the Courts

455 Golden Gate Avenue · San Francisco, California 94102-3688  
[www.courts.ca.gov/policyadmin-invitationstocomment.htm](http://www.courts.ca.gov/policyadmin-invitationstocomment.htm)

---

## INVITATION TO COMMENT

**SPR13-08**

---

Title	Action Requested
Appellate Procedure: Sealed Records	Review and submit comments by June 19, 2013
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Adopt California Rules of Court, rules 8.45 and 8.47; amend rules 8.46, 8.120, 8.144, 8.320, 8.336, 8.380, 8.384, 8.385, 8.407, 8.409, 8.486, 8.487, and 8.610; repeal rule 8.328	January 1, 2014
Proposed by	Contact
Appellate Advisory Committee	Heather Anderson,
Hon. Raymond J. Ikola, Chair	<a href="mailto:heather.anderson@jud.ca.gov">heather.anderson@jud.ca.gov</a> , 415-865-7691

---

### Executive Summary and Origin

This proposal is intended to improve the administration of justice in appellate court proceedings by clarifying and filling gaps in the procedures relating to records sealed by court order or records that, by law, are closed to inspection in court proceedings. It would, among other things, establish and use consistent terminology in the appellate rules for records closed to inspection; consolidate provisions on the format, transmission of, and access to these records; add provisions addressing records that are closed to inspection by operation of law in civil appeals and writ proceedings; and establish procedures for preventing the disclosure of material from these records in briefs, petitions, and other filings. This proposal originated from a referral made by the staff of the California Supreme Court and suggestions from the California Appellate Court Clerks Association and members of the Appellate Advisory Committee.

### Background

California Rules of Court, rule 8.46, addresses records sealed by court order in all Court of Appeal and Supreme Court proceedings. This rule establishes requirements for the format, transmission of, and access to these records and procedures for requesting that records be sealed or unsealed by order of the court. Rules 8.328 and 8.610 address confidential records—records that are required by law to be closed to inspection in court proceedings—in felony appeals to the Court of Appeal and appeals to the Supreme Court in capital cases, respectively. These rules also contain provisions relating to the format, transmission of, and access to these records in covered proceedings. In addition, many statutes, rules, and court decisions require particular records or

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

categories of records to be closed to inspection in court proceedings either by the public or by certain parties in the court proceedings. Examples of such records include records of the family conciliation court (Fam. Code, § 1818 (b)), records in juvenile proceedings (Welf. & Inst. Code, § 827, and California Rules of Court, rule 8.409), fee waiver applications (Gov. Code, § 68633(f)), probation reports (Penal Code, § 1203.05), court-ordered diagnostic reports (Penal Code, § 1203.03), and transcripts of in-camera proceedings under *People v. Marsden* (1970) 2 Cal.3d 118 and *Pitchess v. Superior Court* (1974) 11 Cal.3d 531. Appendix 1 of the *Trial Court Records Manual*, at [www.courts.ca.gov/documents/trial-court-records-manual.pdf](http://www.courts.ca.gov/documents/trial-court-records-manual.pdf), contains more examples of records required by law to be closed to inspection in court proceedings.

For several reasons, it is sometimes unclear (1) how particular records that a party believes should be closed to inspection by the public or another party should be formatted or transmitted to the reviewing court, (2) who should receive copies of these records, or (3) whether or how a party can discuss these records in a brief, petition, or other filing in a particular appellate court proceeding. First, the appellate rules, as well as some statutes, use inconsistent terminology to refer to records that are closed to inspection. For example, sometimes the term “confidential” is used to identify records that by law must be closed to inspection (see, for example, rule 8.46(a) and rule 8.328(a)), but sometimes this term is used to refer generally to information that is closed to inspection, whether closure is required by law or ordered by a court (see, for example, 8.46(f)). Sometimes, “sealed record” is used as a defined term to mean a record that would ordinarily be open to the public but that a court has ordered closed to inspection (see, for example 8.46(b)(2)). Other times, the term “seal” is used as a verb to refer generally to the process of preventing disclosure of records that are required to be closed to inspection either by law or by court order (see, for example, rule 8.610(b)). The inconsistent use of terms may lead to confusion about what procedures apply.

Second, gaps exist in the current rules. Whereas rule 8.46, relating to records sealed by court order, applies in all Court of Appeal and Supreme Court proceedings, the rules relating to “confidential records” apply only in criminal appeals. Thus, currently no rules applicable to writ proceedings or civil appeals specifically address the appropriate handling of records that, by law, are closed to inspection. In addition, although rule 8.46 generally provides that parties may not disclose the contents of any materials that have been sealed in any subsequent filing, it does not address whether or how a party may discuss such material in briefs, petitions, or other filings in the reviewing court. Nor do the rules generally address whether or how records that are closed to inspection by operation of law may be discussed in such filings.

## **The Proposal**

This proposal is intended to improve the administration of justice by clarifying and filling gaps in the procedures relating to sealed records in Court of Appeal and Supreme Court proceedings. The main amendments proposed are discussed below, and all the amendments are attached at pages 7–43. In addition, in the attachment, each amendment is followed by drafters’ notes that describe the proposed change and may provide information about the origin of the language.

These notes are intended only to help readers understand these proposed amendments and will not be included in the final version of the rules presented to the Judicial Council for adoption.

- **Definitions:** This proposal would establish a single set of definitions applicable to all of the appellate rules relating to records that are closed to inspection. In these definitions, the term “sealed record” would be used to refer to all records closed to inspection in a court proceeding, whether that closure is ordered by a court or required by statute, rule, or other law. A new term, “record sealed by operation of law,” would be used to refer to those records required by statute, rule of court, or other authority to be closed to inspection, replacing the term “confidential record” throughout these rules.
- **Consolidation of format, transmission, and access requirements:** This proposal would consolidate the requirements relating to format and transmission of and access to records closed to inspection either by court order or by operation of law. These consolidated provisions would, among other things, generally require that these sealed records:
  - Be kept separate from the rest of a clerk’s or reporter’s transcript, appendix, supporting documents, or other records sent to the reviewing court;
  - Be marked as “Sealed—May Not Be Examined Without Court Order” and include the specific basis for the sealing, either by reference to the court order sealing the record or by citation to or other brief description of the statute, rule of court, case, or other authority that establishes that the record must be closed to inspection;
  - Be accompanied by an index of the sealed records; and
  - Be transmitted and accessible only to the reviewing court and the party or parties who had access to the record in the trial court or other proceedings under review.
- **Rules on records sealed by operation of law in writ proceedings and civil appeals:** This proposal would replace the existing rules relating to confidential records in felony and capital appeals with general rules, applicable to all proceedings in the Court of Appeal and Supreme Court, establishing procedures for records sealed by operation of law. As noted in the proposed advisory committee comments to proposed new rules 8.45 and 8.47, special requirements may govern particular types of records sealed by operation of law. Those requirements supersede the requirements in the proposed rules. Thus the proposed rules specifically provide that they apply only unless otherwise provided by law.
- **Use of redacted and unredacted filings to prevent disclosure:** This proposal would add new provisions to the rules that would explain what litigants must do if they need to discuss sealed material or material they are requesting be sealed in a brief, petition, or other filing in the reviewing court. Under these proposed rules, to prevent inappropriate disclosure of such material, a redacted public version (a version from which all portions that disclose sealed material have been removed) of the brief, petition, or other filing would be prepared for people not permitted to access the sealed record. A complete unredacted version would be prepared for the court and any party permitted to access the sealed record. This approach is modeled on the procedures now in rule 8.46(e)(4) and (f)(2) for applications or motions to

seal or unseal records, which provide for the use of redacted and unredacted versions of the motion or application, any opposition, and any supporting documents “if necessary to prevent disclosure.” Depending on the type of record at issue, the proposed rules would establish different procedures regarding filing or lodging of the redacted and unredacted versions:

- In the case of records sealed by operation of law, a party would be required to file an application or motion in the reviewing court requesting permission to file redacted and unredacted versions of the brief, petition, or other filing. This filing would allow the court to determine both whether the authority cited by the party requires that the record at issue be closed to inspection in the court proceeding and whether only those portions of the filing that would reveal sealed material have been redacted from the public version of the brief, petition, or other filing.
  - In the case of records sealed by court order, a party would be authorized to file redacted and unredacted versions of a brief, petition, or other filing that reveals sealed material without seeking the prior permission of the reviewing court. This is because, in such circumstances, there will already have been a judicial determination that the record at issue is required to be closed to inspection in court proceedings.
  - In the case of records that are the subject of a pending motion or application to seal (“conditionally sealed records”), a party would be required to file the redacted version and lodge the unredacted version of the brief, petition, or other filing. If the court does not grant the application or motion to seal the record, unless the party notifies the court otherwise, the unredacted version of the filing would be returned to the party.
- **Other proposed changes:**
    - **Simplifying the rule on *Marsden* transcripts:** Rule 8.328 currently establishes a two-step process for determining whether there is confidential material in a transcript of a hearing under *People v. Marsden* (1970) 2 Cal.3d 118 that should not be revealed to the People when the defendant raises an issue related to this hearing on appeal. Under subdivision (b)(4), the defendant is required to serve and file a notice stating whether the confidential transcript contains any confidential material not relevant to the issues on appeal. This notice is then used to determine whether the clerk can send the People a copy of the full hearing transcript. However, subdivision (b)(6) also provides that if the defendant does not serve and file this required notice, the People may request a copy of the confidential transcript and the defendant may serve and file opposition to this application on the basis that the transcript contains confidential information that is not relevant to the issue on appeal. It is the committee’s understanding that defendants rarely submit the notice now required by rule 8.328(b)(4). Therefore, this notice requirement has been eliminated from proposed new rule 8.47.
    - **Adding and updating cross-references:** This proposal would amend a number of rules that currently either specifically address certain records or generally address the format or transmission of records to add or update references to the proposed new rules on records sealed by either court order or operation of law.

## **Alternatives Considered**

The committee considered proposing no amendments to the rules relating to records that are closed to public inspection. However, the committee concluded that clarifying and filling the gaps in these rules would assist litigants and help both litigants and courts avoid problems associated with records that are sealed either by court order or by operation of law—problems, such as being inappropriately formatted, transmitted, or referred to in reviewing court proceedings.

The committee also considered (1) always requiring that a party wishing to file redacted and unredacted versions of a brief, petition, or other filing seek advance approval of the reviewing court; and (2) always permitting the filing of such redacted and unredacted versions without requiring advance approval. The committee was concerned about potentially adding to the workload of the appellate courts and increasing expenses for both courts and litigants if applications or motions to file redacted versions were required in all circumstances. It was also concerned about respecting and reflecting the current practices of the reviewing courts. After gathering information about current practices, the committee concluded that recommending a mixed approach—requiring advance approval in the case of filings that would reveal material sealed by operation of law and not requiring advance approval in the case of filings that would reveal material sealed by court order—best balanced these concerns.

In addition, the committee considered whether the rules should include additional requirements regarding the format of sealed records transmitted to the reviewing court, such as requirements concerning whether the records should be paginated based on where they would be in the clerk’s transcript, appendix, supporting documents, or other records transmitted to the reviewing court if they were not sealed or whether they should be gathered together and consecutively paginated following all of the documents that are not sealed. The committee decided not to include such requirements in the proposal based on its understanding that practices vary in different districts. However, the committee would appreciate input on this issue.

## **Implementation Requirements, Costs, and Operational Impacts**

This proposal should impose no significant implementation burdens on either the superior or appellate courts and should provide significant cost savings for the Supreme Court and Courts of Appeal.

## Request for Specific Comments

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

- Does the proposal reasonably achieve the stated purpose?
- Would this proposal have an impact on public's access to the courts? If a positive impact, please describe. If a negative impact, what changes might lessen the impact?
- Are the definitions of records "sealed by operation of law" and "sealed by court order" sufficiently clear, and do they encompass the appropriate types of records?
- Are there consistent practices with respect to the format of sealed records, such as whether sealed records should be consecutively paginated with the rest of the record or separately paginated, that should be incorporated in requirements concerning the form of sealed records in rule 8.45?
- Should the rules include requirements regarding the electronic filing or submission of sealed records?

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

- Would the proposal provide costs savings? If so, please quantify. If not, what changes might be made that would provide savings, or greater savings?
- What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- If this proposal would be cumbersome or difficult to implement in a court of your size, what changes would allow the proposal to be implemented more easily or simply in a court of your size?

Rules 8.45 and 8.47 of the California Rules of Court would be adopted; rules 8.46, 8.120, 8.144, 8.320, 8.336, 8.380, 8.384, 8.385, 8.407, 8.409, 8.486, 8.487, and 8.610 would be amended; and rule 8.328 would be repealed, effective January 1, 2014, to read:

**Title 8. Appellate Rules**

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

**Chapter 1. General Provisions**

**Article 3. Sealed Records**

**Rule 8.45. General provisions**

**Rule 8.46. Sealed Records sealed by court order**

**Rule 8.47. Records sealed by operation of law**

**Rule 8.45. General provisions**

**(a) Application**

The rules in this article govern records sealed either by court order or by operation of law in appeals and original proceedings in the Supreme Court and Courts of Appeal.

**DRAFTERS' NOTE**

This provision is intended to clarify the application of these rules to records sealed by court order (what is currently defined as "sealed records") and records sealed by operation of law (what is currently defined as "confidential records").

**(b) Definitions**

As used in this article:

(1) "Record" means all or part of a document, paper, exhibit, transcript, or other thing filed or lodged with the court.

(2) A "lodged" record is a record temporarily deposited with the court but not filed.

(3) A "sealed" record is a record that is closed either by court order or by operation of law to inspection by the public or a party.

(4) A "conditionally sealed" record is a record that is filed or lodged subject to a pending application or motion to file it under seal.

1  
2       (5) A record that is “sealed by operation of law” is a record that, in court  
3       proceedings, is required by statute, rule of court, or other authority except a  
4       court order under rules 2.550–2.551 or rule 8.46 to be closed to inspection by  
5       the public or a party.

6  
7       (6) A record that is “sealed by court order” is a record that is not sealed by  
8       operation of law but is closed to inspection by order of a court under under  
9       rules 2.550–2.551 or rule 8.46.

10  
11       (7) A “redacted version” is a version of a filing from which all portions that  
12       disclose material contained in a sealed or conditionally sealed record have  
13       been removed.

#### 14 15 **DRAFTERS’ NOTES**

16 This provision is intended to provide definitions for terms used in the rules on sealed records.  
17 One goal of having a single definitions section is to help clarify the distinction between records  
18 ordered closed by a court order, which the rules currently refer to as “sealed records,” and  
19 records required to be closed by law, which the rules currently refer to as “confidential records.”

- 20  
21 1. **Subdivisions (b)(1) and (2)** The definitions of “record” and “lodged record” in (1) and (2)  
22 are taken, without change, from the current definitions of these terms in rule 8.46 (former  
23 8.160), relating to sealed records.  
24  
25 2. **Subdivision (b)(3)** The definition of “sealed record” in (3) is partially based on the current  
26 definition of this term in rule 8.46, which provides that a “‘sealed’ record is a record closed to  
27 public inspection by court order.” However, the definition has been expanded in two ways:  
28       • To also encompass records sealed by operation of law—what is currently referred to as  
29       “confidential records”; and  
30       • To also encompass records that a court has ordered closed to inspection by a party (this  
31       same change would be recommended for the trial court rules relating to sealed records).  
32  
33 3. **Subdivision (b)(4)** The definition of “conditionally sealed” in (4) is based on language in  
34 current rule 8.46(e), which describes the handling of documents that are the subject of an  
35 application or motion to seal.  
36  
37 4. **Subdivision (b)(5)** The definition of “sealed by operation of law” in (5) is based on the  
38 current language in rules 8.46(a) (sealed records) and 8.328(a) (confidential records), which  
39 refer to “records required to be kept confidential by law.” Currently, there may be some  
40 confusion created by the terminology used in various rules and statutes to refer to records  
41 that are closed to inspection. Sometimes, the term “sealed” is used as an adjective to refer  
42 to a record that a court has ordered closed, but sometimes the term “seal” is used as a verb  
43 to refer generally to the process of placing in an envelope records that, either by court order  
44 or law, are closed to inspection. Sometimes the term “confidential” is used to identify records  
45 that by law must be closed to inspection, but sometimes this term is used to refer generally  
46 to information that is closed to inspection. To make the rules clearer, this proposal would  
47 use the new term “record sealed by operation of law” instead of the term “confidential  
48 record” throughout. This definition is also intended to clarify that a record “sealed by



1 operation of law” in this context means a record that is closed to inspection *in a court*  
2 *proceeding*. Some records, such as medical records, would not ordinarily be available to the  
3 public but are not closed to inspection when they are used in the context of a court  
4 proceeding.  
5

- 6 5. **Subdivision (b)(6)** The definition of sealed “by court order” is intended to clarify that records  
7 are not closed to inspection (made confidential or required to be sealed) by any statute, rule,  
8 or other authority and thus would ordinarily be open to inspection, but have been closed only  
9 by order of a court.  
10  
11 6. **Subdivision (b)(7)** The definition of “redacted version” is based on the language in current  
12 rule 8.46(g), which provides that “a record filed publicly in the reviewing court must not  
13 disclose material contained in a record that is sealed, lodged conditionally under seal, or  
14 otherwise subject to a pending motion to file under seal.”  
15  
16

17 **(c) Form of sealed records**  
18

19 (1) Unless otherwise provided by law or court order, sealed records that are part  
20 of the record on appeal or the supporting documents or other records  
21 accompanying a motion, petition for a writ of habeas corpus, other writ  
22 petition, or other filing in the reviewing court must be kept separate from the  
23 rest of a clerk’s or reporter’s transcript, appendix, supporting documents, or  
24 other records sent to the reviewing court.  
25

26 (A) If the records are in paper format, they must be placed in a sealed  
27 envelope or other appropriate sealed container.  
28

29 (B) Records sealed by court order, and if applicable the envelope or other  
30 container, must be marked as “Sealed by Order of the Court on (Date)—  
31 May Not Be Examined Without Court Order.”  
32

33 (C) Records sealed by operation of law, and if applicable the envelope or  
34 other container, must be marked as “Sealed (Basis)—May Not Be  
35 Examined Without Court Order.” The basis must be a citation to or other  
36 brief description of the statute, rule of court, case, or other authority that  
37 establishes that the record must be closed to inspection in the court  
38 proceeding.  
39

40 (D) The superior court clerk or party transmitting sealed records to the  
41 reviewing court must prepare a sealed index of these materials. If the  
42 sealed records include a transcript of any in-camera proceeding, the  
43 index must list the date and the names of all parties present at the hearing  
44 and their counsel. This index must be transmitted and kept with the  
45 sealed records.

1  
2       (2) Except as provided in (3) or by court order, the alphabetical and chronological  
3       indexes to a clerk’s or reporter’s transcript, appendix, supporting documents,  
4       or other records sent to the reviewing court that are available to the public  
5       must list each sealed record by title, not disclosing the substance of the sealed  
6       record, and must identify it as “Sealed—May Not Be Examined Without  
7       Court Order.”

8  
9       (3) Records relating to a request for funds under Penal Code section 987.9 or  
10       other proceedings occurrence of which is not to be disclosed under the sealing  
11       order or applicable law must not be bound together with other sealed records  
12       and must not be listed in the index required under (1)(D) or the alphabetical or  
13       chronological indexes to a clerk’s or reporter’s transcript, appendix,  
14       supporting documents to a petition, or other records sent to the reviewing  
15       court.

16  
17 **DRAFTERS’ NOTES**

18  
19 1. **Subdivision (c)(1)** This provision is intended to consolidate the requirements for the format  
20 of sealed records transmitted to the reviewing court now found in several rules relating to  
21 both sealed and confidential records. (See, for example, rule 2.551(e)(1), part of the trial  
22 court rules on sealed records, “If the trial court grants an order sealing a record, the clerk  
23 must substitute on the envelope or container for the label required by (d)(2) a label  
24 prominently stating ‘SEALED BY ORDER OF THE COURT ON (DATE),’ ”; rule 8.46(e)(3),  
25 “the party [requesting that a record be sealed] must put the record in an envelope or other  
26 appropriate container, seal it, and attach a cover sheet that complies with rule 8.40(c) and  
27 labels the contents as ‘CONDITIONALLY UNDER SEAL’”; rule 8.328(c)(4), “The superior  
28 court clerk must send the transcript of the in-camera proceeding or the confidential item to  
29 the reviewing court in a sealed envelope labeled ‘CONFIDENTIAL-MAY NOT BE  
30 EXAMINED WITHOUT COURT ORDER.’ The reviewing court clerk must file the envelope  
31 and store it separately from the remainder of the record.”)

32  
33 The main differences between the proposed new provision and the current rules are:

- 34  
35 • The proposed new provision would require only records that are in paper format to be  
36 placed in envelopes or other containers. In anticipation of the electronic transmission of  
37 records, proposed subdivision (d)(1) generally requires that sealed records be labeled as  
38 sealed and kept separate from other records transmitted to the reviewing court. If a court  
39 is using electronic copies of records, this method of handling can be accomplished  
40 without placing the sealed records in an envelope or other container.  
41  
42 • The proposed new provision would require that records sealed by operation of law  
43 include a citation to or other brief description of the authority establishing that the record  
44 is closed to inspection in the court proceeding. This proposed change is in response to a  
45 suggestion from the California Appellate Court Clerks Association that *Marsden*  
46 transcripts be specifically identified as such, but would much more broadly require  
47 identification of the legal basis for closing the record to inspection.

- 1  
2  
3  
4  
5  
6  
7  
8  
9
- The proposed new provision would broaden the current requirement in rule 8.328(c)(5) that the clerk prepare and send an index of confidential materials being transmitted to the reviewing court in criminal appeals. Under this proposal, either the clerk or a party transmitting sealed records, whether sealed by court order or operation of law, must prepare such an index. The proposal would maintain the current requirement that this index include the date and names of all parties present at any in-camera proceeding and their counsel and would provide that this index be transmitted with and kept with the sealed records.

- 10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25
2. **Subdivision (c)(2)** This provision is intended to consolidate the requirements now found in several rules regarding references to confidential records in indexes. (See, for example, rule 8.328(b)(1), “The chronological index to the reporter’s transcript must include the *Marsden* hearing but list it as ‘CONFIDENTIAL’ or the equivalent;” rule 8.328(c)(3) for confidential proceedings other than *Marsden* proceedings, “The chronological index to the reporter’s transcript must include the proceeding but list it as ‘CONFIDENTIAL-MAY NOT BE EXAMINED WITHOUT COURT ORDER’ or the equivalent;” 8.328(c)(5), “The superior court clerk must prepare an index of any material sent to the reviewing court under (4), . . . showing the date and the names of all parties present at each proceeding, but not disclosing the substance of the sealed matter;” and 8.610(d), “The clerk’s transcript and the reporter’s transcript must comply with rule 8.144, 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.”)

26  
27  
28  
29  
30  
31  
32  
33  
34

The main difference between this proposed new provision and the current rules is that the proposed new provision covers references in indexes to both records sealed by operation of law (what is currently referred to as “confidential records”) and to records sealed by court order (what is currently referred to as “sealed records”). Currently, no rule provides courts and litigants with direction concerning references in indexes to records sealed by court order. Under this proposed provision, references in indexes to records sealed by court order would be required to be handled in the same manner as references to records sealed by operation of law.

- 35  
36  
37  
38  
39  
40  
41  
42  
43  
44
3. **Subdivision (c)(3)** This provision is intended to consolidate the requirements now found in several rules regarding the special handling of confidential records relating to Penal Code section 987.9 proceedings. (See, for example 8.328(c)(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”; rule 8.610(b), “Documents filed or lodged under Penal Code section 987.9 must be bound separately from documents filed under Penal Code section 987.2”; and rule 8.610(d), “The indexes must not list any confidential material relating to a request for funds under Penal Code section 987.9.”)

45  
46

There are two main differences between this proposed provision and the current rules:

- 47  
48  
49  
50  
51
- *The proposed new provision would expand the application of these special handling requirements.* Under this proposed provision, the limits on references to the proceedings in indexes and other special handling requirements would apply not only to Penal Code section 987.9 proceedings but also to “other proceedings whose occurrence is not to be disclosed under the sealing order or applicable law.” The thought was that if for any

1 other proceedings in which not only the content of the proceeding is closed to inspection  
2 but even the fact that the proceedings took place is not to be revealed, these  
3 proceedings should be treated in the same manner as Penal Code section 987.9  
4 proceedings.  
5

- 6 • *The proposed new provision expands the requirement that records of Penal Code*  
7 *section 987.9 not be bound with other records.* Rule 8.610(b) requires that records  
8 relating to Penal Code section 987.9 proceedings must be bound separately from  
9 records relating to Penal Code section 987.2 proceedings. This proposed new provision  
10 would expand this constraint to require that records relating to Penal Code section 987.9  
11 proceedings be bound with no other sealed records.  
12  
13

14 **(d) Transmission of and access to sealed records**  
15

- 16 (1) Unless otherwise provided by law or court order, a sealed record that is part of  
17 the record on appeal or the supporting documents or other records  
18 accompanying a motion, petition for a writ of habeas corpus, other writ  
19 petition, or other filing in the reviewing court must be transmitted only to the  
20 reviewing court and the party or parties who had access to the record in the  
21 trial court or other proceedings under review and may be examined only by  
22 the reviewing court and that party or parties. If a party’s attorney but not the  
23 party had access to the record in the trial court or other proceedings under  
24 review, only the party’s attorney may examine the record.  
25
- 26 (2) If the record is a reporter’s transcript or any document related to any in-  
27 camera hearing from which a party was excluded in the trial court, the record  
28 must be transmitted to and examined by only the reviewing court and the  
29 party or parties who participated in the in-camera hearing.  
30
- 31 (3) A reporter’s transcript or any document related to an in-camera hearing  
32 concerning a confidential informant under Evidence Code sections 1041–1042  
33 must be transmitted only to the reviewing court.  
34
- 35 (4) A probation report must be transmitted only to the reviewing court and to  
36 appellate counsel for the People and the defendant who was the subject of the  
37 report.  
38

39 **DRAFTERS’ NOTES**  
40

41 **Subdivisions (d)(1) and (2)** These provisions are intended to establish a general rule  
42 concerning transmission of and access to sealed records sent to the reviewing court: that these  
43 records should be sent to and accessible by only the reviewing court and the party or parties  
44 who had access to the records in the trial court or other proceeding under review. The language  
45 of (d)(1) is based on the language of current rule 8.328(c)(6), relating to confidential records  
46 other than *Marsden* transcripts, which provides that “[u]nless the reviewing court orders

1 otherwise, confidential material sent to the reviewing court . . . may be examined only by a  
2 reviewing court justice personally; but parties and their attorneys who had access to the material  
3 in the trial court may also examine it.” The proposed provision is also consistent with the general  
4 approach in current rule 8.46, relating to sealed records, and rule 8.610(b), relating to  
5 confidential records in capital appeals. Rule 8.46(c)(3) currently provides that “[t]he reviewing  
6 court” may examine records sealed by the trial court, and 8.46(e)(4) provides that when a party  
7 is asking that a record be sealed in the reviewing court, “any party that already possesses  
8 copies of the records to be placed under seal” must be served with a complete, unredacted  
9 version of all papers. Rule 8.610(b) currently provides that copies of confidential documents  
10 must be provided “to the Supreme Court” and that transcripts of confidential in-camera  
11 proceedings must be sent “to counsel for parties present at the proceedings.”  
12

13 The proposed new language and the current language of rule 8.328(c)(6) differ in several ways:  
14

- 15 • *The proposed new provision would specifically address transmission of sealed records.* Rule  
16 8.328(b), relating to *Marsden* transcripts, specifies that copies of these transcripts must be  
17 sent to the reviewing court and to counsel for the defendant; however, neither rule 8.328 nor  
18 rule 8.46 otherwise specifies who should be sent copies of sealed records. This proposed  
19 new provision would specify that copies be sent to the reviewing court and the party or  
20 parties who had access to the sealed records in the proceeding under review.  
21
- 22 • *The proposed new provision would give the reviewing court in felony appeals broader*  
23 *access to sealed records.* Under current rule 8.328(c)(6), confidential material sent to the  
24 reviewing court may be examined only by “a reviewing justice personally.” The proposed  
25 new provision would more broadly allow sealed records to be examined by “the reviewing  
26 court.” This change is intended to eliminate questions about whether court research  
27 attorneys and administrative staff may have access to records sealed by operation of law. It  
28 is also consistent with the language currently used in both rule 8.46(c)(3) and 8.610(b)  
29 quoted above. Please note, however, that the history of rule 8.328(c) indicates that the  
30 committee that originally recommended adoption of the predecessor to rule 8.328(c)  
31 specifically intended that research attorneys and other court staff NOT have access to this  
32 confidential material because of concerns about disclosure of this information.  
33
- 34 • *The proposed new provision does not specifically provide for access by parties’ attorneys.*  
35 As noted above, rule 8.328(c)(6) provides that “parties and their attorneys” who had access  
36 to confidential material in the trial court may examine that confidential material in the  
37 reviewing court. The proposed new provision would eliminate the reference to parties’  
38 attorneys. Under rule 1.6 (15), which establishes the general definitions applicable to all of  
39 the California Rules of Court, the term “party” includes the party’s attorney of record.  
40 Therefore, when the rule indicates that a party may access sealed records, that  
41 authorization encompasses the party’s attorney. However, the rule does clarify that if only  
42 the party’s attorney, and not the party, had access to a record, only the attorney may access  
43 that record in the reviewing court proceedings.  
44
- 45 • *The proposed new provision encompasses records from proceedings outside the trial court.*  
46 This proposed new provision would apply not only in criminal appeals, but in all Supreme  
47 Court and Court of Appeal proceedings, including civil writ proceedings in which the court  
48 might be reviewing the action of a body other than a trial court. The rule was therefore  
49 drafted to provide that any party who had access to the sealed record in the “proceedings  
50 under review” may access those records in the reviewing court.

- 1  
2 • *The proposed new provision contains no requirement that the court reporter who attended*  
3 *an in-camera proceeding personally prepare the transcript.* Current rule 8.328(c)(3), which  
4 relates to confidential records other than *Marsden* transcripts, provides that “[i]f the court  
5 grants an application for a reporter’s transcript of any in-camera proceeding, it may order the  
6 reporter who attended the in-camera proceeding to personally prepare the transcript.” This  
7 requirement would be eliminated.  
8

9 **Subdivisions (d)(3) and (4)** would identify special requirements relating to the transmission of  
10 and access to certain records that are sealed by operation of law:  
11

- 12 • The language of paragraph (3) is based on Evidence Code section 1042(d), relating to  
13 confidential informants, which provides, in relevant part: “Any transcription of the  
14 proceedings at the in camera hearing, as well as any physical evidence presented at the  
15 hearing, shall be ordered sealed by the court, and only a court may have access to its  
16 contents.”  
17
- 18 • The language of paragraph (4) is based on current rule 8.336(g), relating to preparing,  
19 certifying, and sending the record in felony appeals, which provides, in relevant part: “A  
20 probation officer’s report or court-ordered diagnostic report included in the clerk’s transcript  
21 under rule 8.320(b)(13)(D) or (E) must appear in only the copies of the appellate record that  
22 are sent to the reviewing court, to appellate counsel for the People, and to appellate counsel  
23 for the defendant who was the subject of the report.”  
24  
25

### 26 Advisory Committee Comment

27

28 **Subdivision (b)(5).** Examples of records that are sealed by operation of law in court proceedings are  
29 records of the family conciliation court (Fam. Code, § 1818(b)), records in juvenile proceedings (Welf. &  
30 Inst. Code, § 827 and California Rules of Court, rule 8.409), fee waiver applications (Gov. Code,  
31 § 68633(f)), probation reports (Penal Code, § 1203.05), and court-ordered diagnostic reports (Penal Code,  
32 § 1203.03). This term also encompasses situations in which case law has established a category of records  
33 that must be closed to inspection and a court has found that a particular record falls within that category  
34 and has ordered that it be sealed. Examples include records sealed under *People v. Marsden* (1970) 2  
35 Cal.3d 118 or *Pitchess v. Superior Court* (1974) 11 Cal.3d 531. For more examples of records sealed by  
36 operation of law, please see appendix 1 of the *Trial Court Records Manual* at  
37 [www.courts.ca.gov/documents/trial-court-records-manual.pdf](http://www.courts.ca.gov/documents/trial-court-records-manual.pdf).  
38

39 **Subdivisions (c) and (d).** The requirements in this rule for format and transmission of and access to  
40 sealed records apply only unless otherwise provided by law. Special requirements that govern  
41 transmission of and/or access to particular types of records may supersede the requirements in this rule.  
42

43 **Subdivision (c)(1)(C).** For example, for a fee waiver application, this mark could state “Sealed—Gov.  
44 Code, § 68633(f)” or “Sealed—Fee Waiver Application”; for a probation report, this mark could say  
45 “Sealed—Pen. Code, § 1203.05” or “Sealed—Probation Report”; and for a transcript of an in-camera  
46 hearing under *People v. Marsden* (1970) 2 Cal.3d 118, this mark could say “Sealed—*Marsden* hearing.”  
47

48 **Subdivision (c)(2).** Subdivision (c)(2) requires that, with certain exceptions, the alphabetical and  
49 chronological indexes to the clerk’s and reporter’s transcripts, appendixes, and supporting documents  
50 must list any sealed records, but identify them as sealed. The purpose of this provision is to assist the

1 parties in making—and the court in adjudicating—motions to unseal sealed records or to provide sealed  
2 records to a party. To protect sealed records from disclosure until the court issues an order, however, each  
3 index must identify sealed records without disclosing their substance.

4  
5 **Subdivision (c)(3).** Under certain circumstances, the Attorney General has a statutory right to request  
6 copies of documents filed under Penal Code section 987.9(d). To facilitate compliance with such requests,  
7 this subdivision requires that such documents not be bound with other sealed documents.

8  
9 **Subdivision (d).** See rule 8.47(b) for special requirements concerning access to certain sealed records.

10  
11 **DRAFTERS' NOTES**

- 12  
13 **1. Subdivision (b)(5)** The language of this comment is based on the second-to-last sentence  
14 of the comment to current rule 8.46, relating to sealed records, which provides: “Examples of  
15 confidential records to which public access is restricted by law are records of the family  
16 conciliation court (Fam. Code, § 1818, subd. (b)) and in forma pauperis applications (Cal.  
17 Rules of Court, rule 3.26).” The citation for fee waiver applications has been updated, and  
18 additional examples of records sealed by operation of law in the criminal case context have  
19 been added.  
20  
21 **2. Subdivision (c)(2)** The language of this comment is based on the comment to current rule  
22 8.328(c), relating to confidential records in criminal appeals, which provides: “Subdivision  
23 (c)(5) requires the clerk to prepare and send to the parties an index of any confidential  
24 materials sent to the reviewing court, showing the date and the names of all parties present.  
25 The purpose of this provision is to assist the parties in making—and the court in  
26 adjudicating—motions to unseal portions of the record. To protect confidentiality until a  
27 record is unsealed, however, the index must endeavor to identify the sealed matter without  
28 disclosing its substance.” The language of this comment has been revised to reflect the  
29 broader application of the proposed new provision to both records sealed by operation of  
30 law and by court order and to proceedings other than criminal appeals.  
31  
32 **3. Subdivision (c)(3)** The language of this comment is based on the comment to current rule  
33 8.610(b), which provides: “Under the third sentence of (b)(1), copies of sealed documents  
34 must be given only to the Supreme Court and to the defendant concerned ‘[u]nless  
35 otherwise ordered.’ The qualification recognizes the statutory right of the Attorney General  
36 to request, under certain circumstances, copies of documents filed confidentially under  
37 Penal Code section 987.9(d). To facilitate compliance with such requests, the second  
38 sentence of rule 8.610(b)(1) requires such documents to be bound separately from  
39 documents filed confidentially under Penal Code section 987.2.” The language of this  
40 comment has been revised to reflect the broader prohibition in the proposed new rule to  
41 binding records filed under Penal Code section 987.9 with any other sealed records.  
42  
43

44 **Rule 8.46. Sealed ~~r~~Records sealed by court order**

45  
46 **(a) Application**

47  
48 This rule applies to ~~sealed~~ records sealed by order of the trial court under rules  
49 2.550–2.551 and records proposed to be sealed by order of the reviewing court on

1 appeal and in original proceedings, but does not apply to records ~~required to be kept~~  
2 ~~confidential by~~ sealed by operation of law.

3  
4 **DRAFTERS' NOTE**

5  
6 This provision would be modified to reflect the new term "sealed by operation of law" in  
7 proposed new rule 8.45(b).

8  
9  
10 ~~(b)~~ **Definitions**

11  
12 ~~(1) "Record" means all or part of a document, paper, exhibit, transcript, or other~~  
13 ~~thing filed or lodged with the court.~~

14  
15 ~~(2) A "sealed" record is a record closed to public inspection by court order.~~

16  
17 ~~(3) A "lodged" record is a record temporarily deposited with the court but not~~  
18 ~~filed.~~

19  
20 **DRAFTERS' NOTE**

21  
22 This provision would be deleted because the definitions would be in proposed new rule 8.45(b).

23  
24  
25 ~~(e)~~**(b) Record sealed by the trial court**

26  
27 If a record sealed by order of the trial court is part of the record on appeal or the  
28 supporting documents or other records accompanying a motion, petition for a writ  
29 of habeas corpus, other writ petition, or other filing in the reviewing court:

30  
31 (1) The sealed record ~~must be filed under seal in the reviewing court and remain~~  
32 ~~sealed unless that the reviewing court orders otherwise under (f)(e). Rule 8.45~~  
33 governs the form and transmission of and access to sealed records.

34  
35 (2) The record on appeal or supporting documents filed in the reviewing court  
36 must also include:

37  
38 (A) The motion or application to seal filed in the trial court;

39  
40 (B) All documents filed in the trial court supporting or opposing the motion  
41 or application; and

42  
43 (C) The trial court order sealing the record.  
44



1           (3) ~~The reviewing court may examine the sealed record.~~

2  
3 **DRAFTERS' NOTES**

- 4  
5 1. **Subdivision (b), first paragraph, and (2)** These provisions would be modified to reflect that  
6 rule 8.46 applies not only in appeals, but in all proceedings in the reviewing court, including  
7 writ proceedings.  
8  
9 2. **Subdivision (b)(1) and (3)** These provisions would be modified to reflect that proposed new  
10 rule 8.45 would govern the form and transmission of and access to sealed records.  
11

12  
13 **(d)(c) Record not sealed by the trial court**

14  
15           A record filed or lodged publicly in the trial court and not ordered sealed by that  
16 court must not be filed under seal in the reviewing court.  
17

18 **(e)(d) Record not filed in the trial court; motion or application to file under seal**

- 19  
20           (1) A record not filed in the trial court may be filed under seal in the reviewing  
21 court only if the record is sealed by operation of law or by order of that the  
22 reviewing court; it must not be filed under seal solely by stipulation or  
23 agreement of the parties.  
24  
25           (2) To obtain an order under (1), a party must serve and file a motion or  
26 application in the reviewing court, accompanied by a declaration containing  
27 facts sufficient to justify the sealing. At the same time, the party must lodge  
28 the record under (3), unless good cause is shown not to lodge it.  
29  
30           (3) To lodge a record, the party must ~~put the record in an envelope or other~~  
31 ~~appropriate container, seal it, and attach~~ transmit the record separate from the  
32 rest of a clerk's or reporter's transcript, appendix, supporting documents, or  
33 other records sent to the reviewing court with a cover sheet that complies with  
34 rule 8.40(c) and labels the contents as "CONDITIONALLY UNDER SEAL."  
35 If the record is in paper format, it must be placed in a sealed envelope or other  
36 appropriate sealed container.  
37  
38           (4) If necessary to prevent disclosure of material contained in a conditionally  
39 sealed record, any motion or application, any opposition, and any supporting  
40 documents must be filed in a public redacted version and lodged in a complete  
41 unredacted version conditionally under seal. The cover of the public redacted  
42 version must identify it as "Public—Redacts material from conditionally  
43 sealed record," and the cover of the unredacted version must identify it as  
44 "May Not Be Examined Without Court Order—Contains material from

1 conditionally sealed record.” Unless the court orders otherwise, any party that  
2 already possesses copies of the records to be placed under seal had access to  
3 the record in the trial court or other proceedings under review must be served  
4 with a complete, unredacted version of all papers as well as a redacted  
5 version.

- 6
- 7 (5) On receiving a lodged record, the clerk must note the date of receipt on the  
8 cover sheet and retain but not file the record. The record must remain  
9 conditionally under seal pending determination of the motion or application.
- 10
- 11 (6) The court may order a record filed under seal only if it makes the findings  
12 required by rule 2.550(d)–(e).
- 13
- 14 (7) If the court denies the motion or application, the clerk must not place the  
15 lodged record in the case file but must return it to the submitting party unless  
16 that party notifies the clerk in writing ~~within 10 days after the order denying~~  
17 ~~the motion or application~~ that the record is to be filed. Unless otherwise  
18 ordered by the court, the submitting party must notify the court within 10 days  
19 after the order denying the motion or application.
- 20
- 21 (8) An order sealing the record must direct the sealing of only those documents  
22 and pages or, if reasonably practical, portions of those documents and pages,  
23 that contain the material that needs to be placed under seal. All other portions  
24 of each document or page must be included in the public file.
- 25
- 26 (9) Unless the sealing order provides otherwise, it prohibits the parties from  
27 disclosing the contents of any materials that have been sealed in anything that  
28 is subsequently publicly filed records or papers.

29

30 **DRAFTERS’ NOTES**

31

32 **Subdivision (d)(3)** This provision would be modified, like proposed rule 8.45(d)(1), to generally  
33 require that records proposed to be sealed be kept separate from other records transmitted to  
34 the reviewing court. It would also maintain the current requirement that if a court is using paper  
35 copies of records, the records be placed in a sealed envelope or other container.

36

37 **Subdivision (d)(4)** To assist the court in identifying what should and should not be made  
38 publicly available, this provision would be modified to require that redacted and unredacted  
39 versions of applications or motions to seal be clearly labeled as such.

40

41

42

1 **(f)(e) Unsealing a record in the reviewing court**

2  
3 (1) A ~~sealed~~ record sealed by court order must not be unsealed except on order of  
4 the reviewing court.

5  
6 (2) Any person or entity may serve and file a motion, application, or petition in  
7 the reviewing court to unseal a record. ~~If necessary to preserve confidentiality,~~  
8 ~~the motion, application, or petition; any opposition; and any supporting~~  
9 ~~documents must be filed in both a public redacted version and a sealed~~  
10 ~~complete version.~~

11  
12 (3) If the reviewing court proposes to order a record unsealed on its own motion,  
13 the court must mail notice to the parties. Unless otherwise ordered by the  
14 court, any party may serve and file an opposition within 10 days after the  
15 notice is mailed, or as the court specifies, and any other party may file a  
16 response within 5 days after an opposition is filed.

17  
18 (4) If necessary to prevent disclosure of material contained in a sealed record, the  
19 motion, application, or petition under (2) and any opposition, response, and  
20 supporting documents under (2) or (3) must be filed in both a public redacted  
21 version and a complete unredacted version. The cover of the public redacted  
22 version must identify it as “Public—Redacts material from sealed record,” and  
23 the cover of the unredacted version must identify it as “May Not Be Examined  
24 Without Court Order—Contains material from sealed record.” Unless the  
25 court orders otherwise, any party that had access to the sealed record in the  
26 trial court or other proceedings under review must be served with a complete,  
27 unredacted version of all papers as well as a redacted version. If a party’s  
28 attorney but not the party had access to the record in the trial court or other  
29 proceedings under review, only the party’s attorney may be served with the  
30 complete, unredacted version.

31  
32 ~~(4)(5)~~ In determining whether to unseal a record, the court must consider the  
33 matters addressed in rule 2.550(c)–(e).

34  
35 ~~(5)(6)~~ The order unsealing a record must state whether the record is unsealed  
36 entirely or in part. If the order unseals only part of the record or unseals the  
37 record only as to certain persons, the order must specify the particular records  
38 that are unsealed, the particular persons who may have access to the record, or  
39 both.

40  
41 ~~(6)(7)~~ If, in addition to the records ~~in the sealed envelope or container that is the~~  
42 subject of the sealing order, a court has previously ordered the sealing order  
43 itself, the register of actions, or any other court records relating to the case to

1 be sealed, the unsealing order must state whether these additional records are  
2 unsealed.

#### 3 4 **DRAFTERS' NOTES**

5  
6 **Subdivision (e)(2)** To make this paragraph shorter and easier to understand, the provisions  
7 regarding redacted and unredacted motions, applications, and other papers would be moved to  
8 new paragraph (e)(4).  
9

10 **Subdivision (e)(4)** The first sentence of this provision is based on the last sentence of current  
11 subdivision (e)(2). To make the language consistent with the language in subdivision (d)(4), the  
12 reference to preserving confidentiality would be replaced with a reference to preventing  
13 disclosure of material contained in a sealed record. In addition, this provision would be modified  
14 to encompass any opposition filed by a party under (e)(3). Also consistent with (d)(4), new  
15 language would be added requiring redacted and unredacted versions of papers to be clearly  
16 labeled and specifying who is to be served with redacted and unredacted versions of papers.  
17

18 **Subdivision (e)(7)** This provision would be modified to eliminate the reference to records  
19 placed in envelopes or other containers. Consistent with proposed rule 8.45(d)(1), this revised  
20 rule would simply refer to records transmitted to the reviewing court.  
21  
22

#### 23 **(g)(f) Disclosure of nonpublic material in public records filings prohibited**

24  
25 (1) ~~A record~~ Nothing filed publicly in the reviewing court—including any  
26 application, brief, petition, or memorandum—must not ~~may~~ disclose material  
27 contained in a record that is sealed by court order, lodged conditionally under  
28 seal, or otherwise subject to a pending motion to file under seal.  
29

30 (2) If it is necessary to disclose material contained in a record sealed by court  
31 order in a filing in the reviewing court, two versions must be filed:  
32

33 (A) A public redacted version. The cover of this version must identify it as  
34 “Public—Redacts material from sealed record”; and  
35

36 (B) A complete, unredacted version. If this version is in paper format, it  
37 must be placed in a sealed envelope or other appropriate sealed  
38 container. The cover of this version, and if applicable the envelope or  
39 other container, must identify it as “May Not Be Examined Without  
40 Court Order—Contains material from sealed record.” Sealed material  
41 disclosed in this version must be identified and accompanied by a  
42 citation to the court order sealing that material.  
43

44 (C) Unless the court orders otherwise, any party who had access to the  
45 sealed record in the trial court or other proceedings under review must  
46 be served with both the complete, unredacted version of all papers as

1 well as the redacted version. Other parties must be served with only the  
2 public redacted version. If a party’s attorney but not the party had access  
3 to the record in the trial court or other proceedings under review, only  
4 the party’s attorney may be served with the complete, unredacted  
5 version.

6  
7 (3) If it is necessary to disclose material contained in a conditionally sealed  
8 record in a filing in the reviewing court:

9  
10 (A) A public redacted version must be filed. The cover of this version must  
11 identify it as “Public—Redacts material from conditionally sealed  
12 record”; and

13  
14 (B) A complete, unredacted version must be lodged. If this version is in  
15 paper format, it must be placed in a sealed envelope or other appropriate  
16 sealed container. The cover of this version, and if applicable the  
17 envelope or other container, must identify it as “May Not Be Examined  
18 Without Court Order—Contains material from conditionally sealed  
19 record.” Conditionally sealed material disclosed in this version must be  
20 identified.

21  
22 (C) Unless the court orders otherwise, any party who had access to the  
23 conditionally sealed record in the trial court or other proceedings under  
24 review must be served with both the complete, unredacted version of all  
25 papers as well as the redacted version. Other parties must be served with  
26 only the public redacted version.

27  
28 (D) If the court denies the motion or application to seal the record, the clerk  
29 must not place the unredacted version lodged under (B) in the case file  
30 but must return it to the party who filed the application or motion to seal  
31 unless that party notifies the clerk that the record is to be publicly filed,  
32 as provided in (d)(7).

33  
34 **DRAFTERS’ NOTES**

35  
36 **Subdivision (f)** is intended to explain what litigants must do if they need to refer to material in  
37 records sealed by court order or conditionally sealed records in a filing in the reviewing court.  
38 The language of this provision is based on rule 8.46(e)(4), relating to applications or motions to  
39 seal records, which provides that “[i]f necessary to prevent disclosure, any motion or application,  
40 any opposition, and any supporting documents must be filed in a public redacted version and  
41 lodged in a complete version conditionally under seal. Unless the court orders otherwise, any  
42 party that already possesses copies of the records to be placed under seal must be served with  
43 a complete, unredacted version of all papers as well as a redacted version.” Similar language  
44 also appears in rule 8.46(f), relating to unsealing sealed records, and rule 2.551(b) and (h) in  
45 the trial court rules relating to sealed records.

1  
2 There are several differences between the proposed new language and the current language of  
3 rule 8.46(e)(4):  
4

- 5 • *The proposed new provision would expand the redaction procedure to encompass all*  
6 *documents that disclose material contained in sealed or conditionally sealed records.*  
7 Currently, with the exception of documents relating to requests to seal or unseal records, the  
8 rules relating to sealed records do not specifically address what litigants are supposed to do  
9 when they need to disclose material from a sealed or conditionally sealed record in a filing,  
10 such as a brief. The rules are clear that a document filed publicly in the reviewing court must  
11 not disclose material contained in a sealed or conditionally sealed record, but the rules do  
12 not go on to explain how to prevent such disclosure when litigants need to discuss such  
13 material in a filing. This proposed new provision would apply the same procedures specified  
14 for applications to seal or unseal documents—filing/lodging both public redacted and  
15 unredacted versions of documents—to any other filing in which the litigant needs to disclose  
16 material from a sealed record.  
17
- 18 • *The proposed new provision distinguishes between documents that disclose material from*  
19 *records that a court has already ordered sealed and documents that disclose material from*  
20 *conditionally sealed records.* The main distinction in the proposed procedures is that when  
21 the record is already sealed, both the redacted and the unredacted versions of the  
22 document referencing that sealed record would be filed, whereas when the record being  
23 referenced is only conditionally under seal, the unredacted version is just lodged  
24 conditionally under seal and will generally be returned to the filing party if the application or  
25 motion to seal the referenced record is denied.  
26
- 27 • *The proposed new provision requires the covers of redacted and unredacted documents*  
28 *and, if applicable, the envelopes containing such documents, to include an identifying note.*  
29 To ensure that unredacted versions of documents can easily be distinguished from public  
30 redacted versions, this proposed provision would require that the cover of the redacted  
31 version be labeled as public and that the cover of the unredacted version include a note  
32 similar to the note required on the underlying sealed record. If the documents are in paper  
33 format, this provision would also require that the envelope or other container in which the  
34 document is placed include such a note.  
35
- 36 • *The proposed new procedure would require sealed or conditionally sealed material in*  
37 *unredacted documents to be identified.* To help reviewing courts recognize what sealed or  
38 conditionally sealed material would be disclosed if the unredacted version of a document  
39 were publicly filed, this proposal would require the filing party to identify the sealed or  
40 conditionally sealed material referenced in the filing. In the case of material from a record  
41 that was already ordered sealed by either the trial or the reviewing court, the proposal would  
42 also require the filing party to provide a citation to the court's sealing order. Note that under  
43 rule 8.46(c) (proposed rule 8.46(b)), if the appellate record or supporting documents to a  
44 petition, application, motion, or other filing include a record sealed by the trial court, the trial  
45 court's sealing order must be included in the appellate record or supporting documents.  
46  
47  
48

1 **Advisory Committee Comment**

2  
3 This rule and rules 2.550–2.551 for the trial courts provide a standard and procedures for courts to use  
4 when a request is made to seal a record. The standard is based on *NBC Subsidiary (KNBC-TV), Inc. v.*  
5 *Superior Court* (1999) 20 Cal.4th 1178. The sealed records rules apply to civil and criminal cases. They  
6 recognize the First Amendment right of access to documents used at trial or as a basis of adjudication.  
7 ~~The rules do not apply to records that courts must keep confidential by law. Examples of confidential~~  
8 ~~records to which public access is restricted by law are records of the family conciliation court (Fam.~~  
9 ~~Code, § 1818, subd. (b)) and in forma pauperis applications (Cal. Rules of Court, rule 3.60). Except as~~  
10 otherwise expressly provided in this rule 8.46, motions in a reviewing court relating to the sealing or  
11 unsealing of a record must follow rule 8.54.

12  
13 **DRAFTERS' NOTE**

14 The examples in this advisory committee comment of records sealed by operation of law would  
15 be moved to the advisory committee comment to proposed new rule 8.45(b)(5).

16  
17  
18 **Rule 8.47. Records sealed by operation of law**

19  
20 **(a) Application**

21  
22 This rule applies to records sealed by operation of law but does not apply to records  
23 sealed by court order under rules 2.550–2.551 or rule 8.46 or to conditionally sealed  
24 records under rule 8.46. Unless otherwise provided by this rule or other law, rule  
25 8.45 governs the form and transmission of and access to records sealed by operation  
26 of law.

27  
28 **DRAFTERS' NOTE**

29 This provision is based on the language of current rule 8.328(a), relating to confidential records  
30 in felony appeals, which provides that “[f]his rule applies to records required to be kept  
31 confidential by law but does not apply to records sealed under rules 2.550–2.551 or records  
32 proposed to be sealed under rule 8.46.” The language has been modified to reflect the proposal  
33 to replace the term “confidential record” with the term “sealed by operation of law” and to update  
34 the cross-reference to the rule on records sealed by court order. In addition, a cross-reference  
35 to proposed new rule 8.45 has been added.

36  
37  
38 **(b) Records of Marsden hearings and other in-camera proceedings**

39  
40 (1) This subdivision applies to reporters’ transcripts of and documents filed or  
41 lodged by a defendant in connection with:

42  
43 (A) An in-camera hearing conducted by the superior court under *People v.*  
44 *Marsden* (1970) 2 Cal.3d 118; or  
45

1           (B) Another in-camera hearing at which the defendant was present but from  
2           which the People were excluded in order to prevent disclosure of  
3           information about defense strategy or other information to which the  
4           prosecution was not allowed access at the time of the hearing.

5  
6       (2) Except as provided in (3), if the defendant raises a *Marsden* issue or an issue  
7       related to another in-camera hearing covered by this rule in a brief, petition, or  
8       other filing in the reviewing court, the following procedures apply:

9  
10       (A) The brief, including any portion that discloses matters contained in the  
11       transcript of the in-camera hearing and other documents filed or lodged  
12       in connection with the hearing, must be filed publicly.

13  
14       (B) The People may serve and file an application requesting a copy of the  
15       reporter’s transcript of and documents filed or lodged by a defendant in  
16       connection with the in-camera hearing.

17  
18       (C) Within 10 days after the application is filed, the defendant may serve and  
19       file opposition to this application on the basis that the transcript or  
20       documents contain confidential material not relevant to the issues raised  
21       by the defendant in the reviewing court. Any such opposition must  
22       identify the page and line numbers of the transcript or documents  
23       containing this irrelevant material.

24  
25       (D) If the defendant does not timely serve and file opposition to the  
26       application, the reviewing court clerk must send to the People a copy of  
27       the reporters transcript of and documents filed or lodged by a defendant  
28       in connection with the in-camera hearing.

29  
30       (3) A defendant may serve and file a motion or application in the reviewing court  
31       requesting permission to file under seal a brief, petition, or other filing that  
32       raises a *Marsden* issue or an issue related to another in-camera hearing covered  
33       by this subdivision and requesting an order maintaining the confidentiality of  
34       the relevant material from the reporter’s transcript of or documents filed or  
35       lodged in connection with the in-camera hearing.

36  
37       (A) Except as otherwise provided in this rule, rule 8.46(d) governs a motion  
38       or application under this subdivision.

39  
40       (B) The declaration accompanying the motion or application must contain  
41       facts sufficient to justify an order maintaining the confidentiality of the  
42       relevant material from the reporter’s transcript of or documents filed or



1 lodged in connection with the in-camera hearing and sealing of the  
2 brief, petition, or other filing.

3  
4 (C) At the time the motion or application is filed, the defendant must:

5  
6 (i) File a public redacted version of the brief, petition, or other filing  
7 that he or she is requesting be filed under seal. The cover of this  
8 version must identify it as “Public—Redacts material from  
9 conditionally sealed record”; and

10  
11 (ii) Lodge a complete, unredacted version of the brief, petition, or  
12 other filing that he or she is requesting be filed under seal. If this  
13 version is in paper format, it must be placed in a sealed envelope  
14 or other appropriate sealed container. The cover of the complete,  
15 unredacted version of the document, and if applicable the  
16 envelope or other container, must identify it as “May Not Be  
17 Examined Without Court Order—Contains material from  
18 conditionally sealed record.”

19  
20 (D) If the court denies the motion or application to file the brief, petition,  
21 or other filing under seal, the clerk must not place the unredacted  
22 brief, petition, or other filing lodged under (C)(ii) in the case file but  
23 must return it to the defendant unless the defendant notifies the clerk  
24 in writing that it is to be filed. Unless otherwise ordered by the court,  
25 the defendant must notify the court within 10 days after the order  
26 denying the motion or application.

27  
28 **DRAFTERS’ NOTES**

29  
30 1. **Subdivision (b)(1)** This proposed provision would articulate the types of confidential  
31 records covered by this rule, including:

- 32 • Reporter’s transcripts of *Marsden* hearings and other in-camera hearings in criminal  
33 cases from which the People were excluded in order to prevent disclosure to the  
34 prosecution of information about defense strategy or other information to which the  
35 prosecution was not allowed access at the time of the hearing.  
36 • Documents filed or lodged by a defendant in connection with *Marsden* or other covered  
37 in-camera hearings.

38 The intent is to identify and apply a consistent procedure to those records in criminal  
39 proceedings, such as records of *Marsden* hearings, in which the underlying justification for  
40 protecting the confidentiality of the material may no longer be present at the time of the  
41 appellate proceeding so that the defendant may choose to publicly disclose information from  
42 the in-camera proceeding.

43  
44 2. **Subdivision (b)(2)** This proposed provision would generally provide that, if a defendant  
45 raises an issue relating to a covered in-camera hearing in a document filed publicly in the  
46 reviewing court, the People are entitled to access to the relevant portion of the confidential

1 records. The procedure outlined in this subdivision is based on current rule 8.328(b), relating  
2 to records of *Marsden* proceedings in felony appeals, which provides, in relevant part:

- 3
- 4 (4) If the defendant raises a *Marsden* issue in the opening brief, the defendant must serve  
5 and file with the brief a notice stating whether the confidential transcript contains any  
6 confidential material not relevant to the issues on appeal. If the defendant states that  
7 the transcript contains confidential material not relevant to the issues on appeal, the  
8 notice must identify the page and line numbers of the transcript containing this  
9 irrelevant material.
- 10
- 11 (5) If the defendant serves and files a notice under (4), stating that the transcript contains  
12 confidential material not relevant to the issues on appeal, the People may move to  
13 obtain a copy of any relevant portion of the confidential transcript. If the defendant  
14 serves and files a notice under (4), stating that no such irrelevant material is contained  
15 in the transcript, the reviewing court clerk must send a copy of the confidential  
16 transcript to the People.
- 17
- 18 (6) If the defendant raises a *Marsden* issue in the opening brief but does not serve and  
19 file a notice under (4), on written application the People may request a copy of the  
20 confidential transcript. Within 10 days after the application is filed, the defendant may  
21 serve and file opposition to this application on the basis that the transcript contains  
22 confidential material not relevant to the issues on appeal. Any such opposition must  
23 identify the page and line numbers of the transcript containing this irrelevant material.  
24 If the defendant does not timely serve and file opposition to the application, the  
25 reviewing court clerk must send a copy of the confidential transcript to the People.

26

27 There are several differences between this proposed provision and rule 8.328(b):

- 28
- 29 • *The proposed new provision would make clear that, except as provided in (3), a brief*  
30 *raising a Marsden issue must be filed publicly.* Although it is implicit in the current rule  
31 that briefs raising *Marsden* issues are publicly filed, it is not explicit and, given other  
32 proposed new provisions allowing for redacted briefs, could be confusing.
  - 33
  - 34 • *The proposed new provision would eliminate the current requirement that a defendant*  
35 *who raises a Marsden issue serve and file with the brief a notice stating whether the*  
36 *confidential transcript contains any confidential material not relevant to the issues on*  
37 *appeal.* Rule 8.328(b) now contains a two-step process for determining whether to  
38 release the full *Marsden* transcript to the People or only limited portions relevant to the  
39 issues on appeal: (1) the defendant is supposed to serve and file the notice described  
40 above; (2) if the defendant fails to file this notice, the People must file an application  
41 requesting the transcript, and the defendant may then object to the release of any  
42 portions of the transcript that are confidential and not relevant to the issues on appeal. It  
43 is the working group's understanding that the initial notice required under rule 8.328 is  
44 typically not filed. This proposal would therefore simplify the rule by eliminating this step.
  - 45
  - 46 • *The proposed new provision would expand the Marsden transcript procedure to*  
47 *encompass other confidential records in criminal cases and other proceedings in the*  
48 *reviewing courts.* Rule 8.328(b) addresses only reporters' transcripts of *Marsden*  
49 proceedings in felony appeals; it does not address other records that are sealed by  
50 operation of law or apply to other proceedings in the Supreme Court or Court of Appeal

1 (rule 8.328(c) addresses other confidential records in felony appeals). As noted above,  
2 this rule would apply not only to *Marsden* transcripts, but also to transcripts of other in-  
3 camera hearings and documents filed in connection with these hearings. In addition,  
4 because the rule would be placed in the chapter of the appellate rules that generally  
5 apply to all proceedings in the Supreme Court or Court of Appeal, this procedure would  
6 apply not only in felony appeals, but also in other proceedings, including habeas corpus  
7 proceedings, other writ proceedings, and petitions for review proceedings in the  
8 Supreme Court.  
9

- 10 3. **Subdivision (b)(3)** This proposed provision would indicate what a defendant should do if he  
11 or she wants to raise an issue about one of the covered in-camera proceedings and the  
12 need still exists to protect the confidentiality of the relevant material from that in-camera  
13 hearing—for example if the issue is being raised in a pre-trial writ proceeding and the  
14 confidential records relate to defense trial strategy. Currently, no rule articulates what  
15 litigants should do if they need to refer to records sealed by operation of law in filed  
16 documents, but it is the working group’s understanding that the practice is for the defendant  
17 to ask to file the relevant document under seal and for a protective order regarding the  
18 confidential material. This practice is recognized in case law (see *James G. v. Superior*  
19 *Court* (2000) 80 Cal.App.4th 275). This provision would reflect this practice by providing that  
20 the defendant may serve and file a motion or application in the reviewing court requesting  
21 an order permitting the defendant to file under seal the brief, petition, or other document that  
22 raises the issue related to the in-camera hearing and maintaining the confidentiality of the  
23 relevant material.  
24
- 25 4. **Subdivision (b)(3)(A)** This subdivision would specifically provide that, except as otherwise  
26 provided, the motion or application to file a brief, petition, or other document under seal  
27 would be governed by the general rule regarding requests to seal documents in the  
28 reviewing court, rule 8.46(d). Among other things, applying the general rule on sealing to  
29 these motions or applications would mean that:  
30
- 31 • If necessary to prevent disclosure, the motion or application seeking to file the brief,  
32 petition, or other document under seal would have to be filed in a public redacted version  
33 and lodged in a complete version conditionally under seal.  
34
  - 35 • The court could permit the filing of the brief, petition, or other document under seal only if  
36 it made the findings required under rule 2.550(d)–(e).  
37
- 38 5. **Subdivisions (b)(3)(B)–(D)** These subdivisions would provide that the defendant must  
39 simultaneously (1) file the application or motion to seal; (2) file a redacted version of the  
40 brief, petition, or other filing the defendant is asking to file under seal; and (3) lodge the  
41 unredacted version of the brief, petition, or other filing. If the court then denies the  
42 application or motion to seal, unless the defendant requests otherwise within the specified  
43 period, the court will return the unredacted brief, petition, or other filing to the defendant and  
44 will make its decision in the matter based on the redacted brief, petition, or other document  
45 that was filed.  
46  
47  
48

1 **(c) Other records sealed by operation of law**

2  
3 Except as otherwise provided by law or order of the reviewing court:

4  
5 (1) Nothing filed publicly in the reviewing court,—including any application,  
6 brief, petition, or memorandum—may disclose material contained in a record  
7 sealed by operation of law, including a record that, by law, a party may choose  
8 be kept confidential in reviewing court proceedings and that the party has  
9 chosen to keep confidential.

10  
11 (2) To maintain the confidentiality of material contained in a record sealed by  
12 operation of law, if it is necessary to disclose such material in a filing in the  
13 reviewing court, a party may serve and file a motion or application in the  
14 reviewing court requesting permission for the filing to be under seal.

15  
16 (A) Except as otherwise provided in this rule, rule 8.46(d) governs a motion  
17 or application under this subdivision.

18  
19 (B) The declaration accompanying the motion or application must contain  
20 facts sufficient to establish that the record is required by law to be closed  
21 to inspection in the reviewing court and to justify sealing of the brief,  
22 petition, or other filing.

23  
24 (C) At the time the motion or application is filed, the party must:

25  
26 (i) File a public redacted version of the brief, petition, or other filing  
27 that he or she is requesting be filed under seal. The cover of this  
28 version must identify it as “Public—Redacts material from  
29 conditionally sealed record”; and

30  
31 (ii) Lodge a complete, unredacted version of the brief, petition, or other  
32 filing that he or she is requesting be filed under seal. If this version  
33 is in paper format, it must be placed in a sealed envelope or other  
34 appropriate sealed container. The cover of the complete,  
35 unredacted version of the document, and if applicable the envelope  
36 or other container, must identify it as “May Not Be Examined  
37 Without Court Order—Contains material from conditionally sealed  
38 record.” Material from a record sealed by operation of law  
39 disclosed in this version must be identified and accompanied by a  
40 citation to the statute, Rule of Court, or case establishing that the  
41 record is required by law to be closed to inspection in the  
42 reviewing court.

1           (D) If the court denies the motion or application to file the brief, petition, or  
2 other filing under seal, the clerk must not place the unredacted brief,  
3 petition, or other filing lodged under (C)(ii) in the case file but must  
4 return it to the lodging party unless the party notifies the clerk in writing  
5 that it is to be filed. Unless otherwise ordered by the court, the party  
6 must notify the court within 10 days after the order denying the motion  
7 or application.  
8

9 **DRAFTERS' NOTES**

10 The rules of court do not currently provide guidance on how to ensure that material from records  
11 sealed by operation of law is not disclosed in reviewing court proceedings. The intent of  
12 subdivision (c) is to provide such guidance. Because the law regarding different records varies  
13 in terms of the circumstances in which the record is closed to inspection, how the confidentiality  
14 is maintained, and how someone can seek or obtain access to the record, this proposed  
15 provision specifically applies only unless otherwise provided by law or court order.  
16

17 **Subdivision (c)(1)** This proposed provision would generally provide that if a record is sealed by  
18 operation of law in reviewing court proceedings, including if a party has the power to choose to  
19 keep a record confidential in such proceedings and chooses to do so, then nothing filed publicly  
20 in the reviewing court may disclose material from that record. The language is modeled on rule  
21 8.46(g) (proposed 8.46(f)) which provides: "A record filed publicly in the reviewing court must  
22 not disclose material contained in a record that is sealed, lodged conditionally under seal, or  
23 otherwise subject to a pending motion to file under seal."  
24

25 **Subdivision (c)(2)** This proposed provision would provide that if it is necessary to discuss  
26 material from a record sealed by operation of law in a filing in the reviewing court, in order to  
27 maintain the confidentiality of the material, a party may request permission for the filing to be  
28 under seal. This provision would require that the party file an application or a motion requesting  
29 permission to file redacted and unredacted versions of the brief, application, or other filing  
30 containing the material from the sealed record. The application or motion procedure would allow  
31 the reviewing court to verify that the record at issue is required by law to be closed to inspection  
32 in the reviewing court proceedings and also to assure that the level of redaction in the brief,  
33 petition, or other filing is appropriate. The language of 8.47(c)(2), like the language in proposed  
34 8.47(b)(3) relating to applications or motions to seal a filing that raises an issue regarding a  
35 *Marsden* or *Marsden*-like in-camera hearing, is based on the current rules relating to  
36 applications for court orders to seal or unseal records. Like the procedure in proposed rule  
37 8.47(b)(2), this proposed provision would:  
38

- 39 • *Require the covers of redacted and unredacted documents and, if applicable, the the*  
40 *envelopes containing such documents to include an identifying note.* To ensure that  
41 unredacted versions of documents can easily be distinguished from public redacted  
42 versions, this proposed provision would require that the cover of the redacted version  
43 indicate that it is public and the cover of the unredacted version indicate that it may not be  
44 examined without a court order. If the documents are in paper format, this provision would  
45 also require that the envelope or other container in which the document is placed include  
46 such a note.  
47
- 48 • *Require confidential material in unredacted documents to be identified.* To help reviewing  
49 courts recognize what confidential material would be disclosed if the unredacted version of a

1 document were publicly filed, this proposal would require the filing party to identify the  
2 confidential material referenced in the filing. The proposal would also require the filing party  
3 to provide a citation to the statute, Rule of Court, or case that establishes that the record is  
4 required by law to be closed to inspection in the reviewing court.

5  
6  
7 **Advisory Committee Comment**  
8

9 Note that there may be special requirements that govern particular types of records sealed by operation of  
10 law that supersede the requirements in this rule.

11  
12 **Subdivision (c)(1).** The reference in this provision to records that a party may choose be kept confidential  
13 in reviewing court proceedings is intended to encompass situations in which a record may be subject to a  
14 privilege that a party may choose to maintain or choose to waive.

15  
16 **Subdivision (c)(2).** Note that when a record has been sealed by court order, rule 8.46(f)(2) requires a  
17 party to file redacted (public) and unredacted (sealed) versions of any filing that discloses material from  
18 the sealed record; it does not require the party to make a motion or application for permission to do so. By  
19 contrast, this rule requires court permission before redacted (public) and unredacted (sealed) filings may  
20 be made to prevent disclosure of material from records that were sealed by operation of law.

21  
22  
23 **Article 34. Applications and Motions; Extending and Shortening Time**

24  
25 **Article 45. E-filing**

26  
27 **Chapter 2. Civil Appeals**

28  
29 **Article 2. Record on Appeal**

30  
31 **Rule 8.120. Record on appeal**

32  
33 \* \* \*

34  
35 **Advisory Committee Comment**  
36

37 Rules 8.45–8.47 address the appropriate handling of records sealed by court order or sealed by operation  
38 of law that are included in the record on appeal. Examples of records sealed by operation of law include  
39 records of the family conciliation court (Fam. Code, § 1818 (b)) and fee waiver applications (Gov. Code,  
40 § 68633(f)).

41  
42 **DRAFTERS' NOTE**

43 This advisory committee comment would be added to provide a cross-reference to the proposed  
44 new rules regarding sealed records and examples of records sealed by operation of law.  
45  
46  
47

1 **Rule 8.144. Form of the record**

2  
3 **(a) Paper and format**

4  
5 (1)–(3) \* \* \*

6  
7 (4) The clerk’s and reporter’s transcripts must comply with rules 8.45–8.47  
8 relating to sealed records.

9  
10 **(b) Indexes**

11  
12 Except as provided in rule 8.45, at the beginning of the first volume of each:

13  
14 (1) The clerk’s transcript must contain alphabetical and chronological indexes  
15 listing each document and the volume and page where it first appears;

16  
17 (2) The reporter’s transcript must contain alphabetical and chronological indexes  
18 listing the volume and page where each witness’s direct, cross, and any other  
19 examination, begins; and

20  
21 (3) The reporter’s transcript must contain an index listing the volume and page  
22 where any exhibit is marked for identification and where it is admitted or  
23 refused. The index must identify each exhibit by number or letter and a brief  
24 description of the exhibit.

25  
26 **(c)–(f) \* \* \***

27  
28 **Advisory Committee Comment**

29  
30 **Subdivisions (a) and (b).** Subdivisions (a)(1) and (b)(1) refer to special requirements concerning  
31 sealed records established by rules 8.45-8.47. Rule 8.45(c)(2) and (3) establish special  
32 requirements regarding references to sealed records in the alphabetical and chronological indexes  
33 to clerk’s and reporter’s transcripts.

34  
35 **DRAFTERS’ NOTE**

36 These provisions would be amended to include cross-references to the proposed new rules  
37 regarding sealed records.

1 Chapter 3. Criminal Appeals

2  
3 Article 2. Record on Appeal

4  
5  
6 Rule 8.320. Normal record; exhibits

7  
8 (a) \* \* \*

9  
10 (b) Clerk’s transcript

11  
12 The clerk’s transcript must contain:

13  
14 (1)–(12) \* \* \*

15  
16 (13) And, if the appellant is the defendant:

17  
18 (A)–(B) \* \* \*

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

25  
26 (D)–(E) \* \* \*

27  
28 DRAFTERS’ NOTE

29 This sentence would be deleted because the access to records sealed by operation of law  
30 would be covered in proposed new rule 8.45(d), and the proposed amendments to rule 8.336  
31 would require that the clerk’s transcript comply with rule 8.45.

32  
33  
34 (c)–(f) \* \* \*

35  
36 ~~(g) Form of record~~

37  
38 ~~The clerk’s and reporter’s transcripts must comply with rule 8.144, 8.328, and 8.336.~~

39  
40 DRAFTERS’ NOTE

41 This provision would be deleted because a provision concerning the form or the record would be  
42 added to rule 8.336 regarding preparing, certifying, and sending the record.



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45

**Advisory Committee Comment**

~~Subdivisions (b)(13) and (d)(1)(G).~~ Rules 8.336(g) 8.45–8.46 addresses the appropriate handling of probation officers’ reports and court-ordered diagnostic reports sealed records that must be included in the clerk’s transcript under (b)(13)(D) or (E) record on appeal. Examples of records sealed by operation of law include probation reports, Penal Code section 1203.03 diagnostic reports, records sealed under *People v. Marsden* (1970) 2 Cal.3d 118 or *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, in-camera proceedings on a confidential informant, and defense expert funding requests (Pen. Code, § 987.9; *Keenan v. Superior Court* (1982) 31 Cal.3d 424, 430).

**Subdivision (d)(1)(E).** \* \* \*

**DRAFTERS’ NOTE**

This advisory committee comment would be amended to include a cross-reference to the proposed new rules regarding sealed records and examples of records sealed by operation of law.

~~**Rule 8.328. Confidential records**~~

~~**(a) Application**~~

~~This rule applies to records required to be kept confidential by law but does not apply to records sealed under rules 2.550–2.551 or records proposed to be sealed under rule 8.46.~~

~~**(b) Marsden hearing**~~

~~(1) The reporter’s transcript of any hearing held under *People v. Marsden* (1970) 2 Cal.3d 118 must be kept confidential. The chronological index to the reporter’s transcript must include the *Marsden* hearing but list it as “CONFIDENTIAL” or the equivalent.~~

~~(2) The superior court clerk must send the original and one copy of the confidential transcript to the reviewing court with the record.~~

~~(3) The superior court clerk must send one copy of the confidential transcript to the defendant’s appellate counsel or, if the defendant is not yet represented by appellate counsel, to the appellate project for the district.~~

~~(4) If the defendant raises a *Marsden* issue in the opening brief, the defendant must serve and file with the brief a notice stating whether the confidential transcript contains any confidential material not relevant to the issues on~~

1 appeal. If the defendant states that the transcript contains confidential material  
2 not relevant to the issues on appeal, the notice must identify the page and line  
3 numbers of the transcript containing this irrelevant material.  
4

5 ~~(5) — If the defendant serves and files a notice under (4), stating that the transcript~~  
6 ~~contains confidential material not relevant to the issues on appeal, the People~~  
7 ~~may move to obtain a copy of any relevant portion of the confidential~~  
8 ~~transcript. If the defendant serves and files a notice under (4), stating that no~~  
9 ~~such irrelevant material is contained in the transcript, the reviewing court clerk~~  
10 ~~must send a copy of the confidential transcript to the People.~~

11  
12 ~~(6) — If the defendant raises a *Marsden* issue in the opening brief but does not serve~~  
13 ~~and file a notice under (4), on written application the People may request a~~  
14 ~~copy of the confidential transcript. Within 10 days after the application is~~  
15 ~~filed, the defendant may serve and file opposition to this application on the~~  
16 ~~basis that the transcript contains confidential material not relevant to the issues~~  
17 ~~on appeal. Any such opposition must identify the page and line numbers of the~~  
18 ~~transcript containing this irrelevant material. If the defendant does not timely~~  
19 ~~serve and file opposition to the application, the reviewing court clerk must~~  
20 ~~send a copy of the confidential transcript to the People.~~

21  
22 ~~(e) — Other in-camera proceedings and confidential records~~  
23

24 ~~(1) — Any party may apply to the superior court for an order that the record include:~~  
25

26 ~~(A) — A confidential, separately paginated reporter’s transcript of any in-~~  
27 ~~camera proceeding at which a party was not allowed to be represented;~~  
28 ~~and~~  
29

30 ~~(B) — Any item that the trial court withheld from a party on the ground that it~~  
31 ~~was confidential.~~  
32

33 ~~(2) — The application and any ruling under (1) must comply with rule 8.324.~~  
34

35 ~~(3) — If the court grants an application for a reporter’s transcript of any in-camera~~  
36 ~~proceeding, it may order the reporter who attended the in-camera proceeding~~  
37 ~~to personally prepare the transcript. The chronological index to the reporter’s~~  
38 ~~transcript must include the proceeding but list it as “CONFIDENTIAL MAY~~  
39 ~~NOT BE EXAMINED WITHOUT COURT ORDER” or the equivalent.~~  
40

41 ~~(4) — The superior court clerk must send the transcript of the in-camera proceeding~~  
42 ~~or the confidential item to the reviewing court in a sealed envelope labeled~~  
43 ~~“CONFIDENTIAL — MAY NOT BE EXAMINED WITHOUT COURT~~

1 ORDER.” The reviewing court clerk must file the envelope and store it  
2 separately from the remainder of the record.

3  
4 (5) — The superior court clerk must prepare an index of any material sent to the  
5 reviewing court under (4), except confidential material relating to a request for  
6 funds under Penal Code section 987.9, showing the date and the names of all  
7 parties present at each proceeding, but not disclosing the substance of the  
8 sealed matter, and send the index:

9  
10 (A) — To the People; and

11  
12 (B) — To the defendant’s appellate counsel or, if the defendant is not yet  
13 represented by appellate counsel, to the appellate project for the district.

14  
15 (6) — Unless the reviewing court orders otherwise, confidential material sent to the  
16 reviewing court under (4) may be examined only by a reviewing court justice  
17 personally; but parties and their attorneys who had access to the material in  
18 the trial court may also examine it.

19  
20 **(d) — Omissions**

21  
22 If at any time the superior court clerk or the reporter learns that the record omits  
23 material that any rule requires to be included and that this rule requires to be kept  
24 confidential:

25  
26 (1) — The clerk and the reporter must comply with rule 8.340(b); and

27  
28 (2) — The clerk must comply with the provisions of this rule requiring that the  
29 record be kept confidential and prescribing which party’s counsel, if any, must  
30 receive a copy of sealed material.

31  
32 **Advisory Committee Comment**

33  
34 **Subdivision (c).** Subdivision (c)(5) requires the clerk to prepare and send to the parties an index of any  
35 confidential materials sent to the reviewing court, showing the date and the names of all parties present.  
36 The purpose of this provision is to assist the parties in making and the court in adjudicating motions to  
37 unseal portions of the record. To protect confidentiality until a record is unsealed, however, the index  
38 must endeavor to identify the sealed matter without disclosing its substance.

39  
40 **DRAFTERS’ NOTE**

41 This rule would be deleted because the content would be covered in proposed new rules 8.45  
42 and 8.47, and the proposed amendments to rule 8.336 would require that the clerk’s and  
43 reporter’s transcripts comply with rules 8.45–8.47.

1 **Rule 8.336. Preparing, certifying, and sending the record**

2  
3 (a)–(e) \* \* \*

4  
5 **(f) Form of record**

6  
7 The clerk’s and reporter’s transcripts must comply with rules 8.45–8.47, relating to  
8 sealed records, and rule 8.144.

9  
10 **DRAFTERS’ NOTE**

11 This provision concerning the form or the record would be moved out of rule 8.320, relating to  
12 the contents of the record, and into this rule relating to preparing the record. In addition, the  
13 provision would be updated to include a cross-reference to the proposed new rules on sealed  
14 records.

15  
16  
17 ~~(f)(g)~~ \* \* \*

18  
19 ~~(g) **Probation officer’s reports and court-ordered diagnostic reports**~~

20  
21 ~~A probation officer’s report or court-ordered diagnostic report included in the~~  
22 ~~clerk’s transcript under rule 8.320(b)(13)(D) or (E) must appear in all only the~~  
23 ~~copies of the appellate record that are sent to the reviewing court, to appellate~~  
24 ~~counsel for the People, and to appellate counsel for the defendant who was the~~  
25 ~~subject of the report. The reviewing court’s copy of the report must be placed in a~~  
26 ~~sealed envelope marked “CONFIDENTIAL—MAY NOT BE EXAMINED~~  
27 ~~WITHOUT COURT ORDER.”~~

28  
29 **DRAFTERS’ NOTE**

30 This provision would be deleted because the content would be covered in rules 8.45, and  
31 proposed new subdivision (f) would require that the clerk’s and reporter’s transcripts comply  
32 with rules 8.45–8.47.

33  
34  
35 (h) \* \* \*

36  
37 **Advisory Committee Comment**

38  
39 **Subdivision (a).** \* \* \*

40  
41 **Subdivision (f).** Examples of records sealed by operation of law include probation reports, Penal Code  
42 section 1203.03 diagnostic reports, records sealed under *People v. Marsden* (1970) 2 Cal.3d 118 or  
43 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, in-camera proceedings on a confidential informant, and  
44 defense expert funding requests (Pen. Code, § 987.9; *Keenan v. Superior Court* (1982) 31 Cal.3d 424,  
45 430).

1  
2 **DRAFTERS' NOTE**

3 This advisory committee comment would be amended to include examples of records sealed by  
4 operation of law.  
5  
6

7 **Chapter 4. Habeas Corpus Appeals and Writs**  
8

9 **Rule 8.380. Petition for writ of habeas corpus filed by petitioner not represented by**  
10 **an attorney**

11  
12 (a) \* \* \*

13  
14 (b) **Form and content**  
15

16 A petition filed under (a) need not comply with the provisions of rules 8.40, 8.204,  
17 or 8.486 that prescribe the form and content of a petition and require the petition to  
18 be accompanied by a memorandum. If any supporting documents accompanying the  
19 petition are sealed by court order or by operation of law, rules 8.45–8.47 govern  
20 these documents.  
21

22 (c) \* \* \*

23  
24 **DRAFTERS' NOTE**

25 This rule would be amended to include cross-references to the proposed new rules regarding  
26 sealed records.  
27

28  
29 **Advisory Committee Comment**  
30

31 **Subdivision (b).** Examples of records sealed by operation of law include probation reports, Penal Code  
32 section 1203.03 diagnostic reports, records sealed under *People v. Marsden* (1970) 2 Cal.3d 118 or  
33 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, in-camera proceedings on a confidential informant, and  
34 defense expert funding requests (Pen. Code, § 987.9; *Keenan v. Superior Court* (1982) 31 Cal.3d 424,  
35 430).  
36

37 **DRAFTERS' NOTE**

38 This advisory committee comment would be added to provide examples of records sealed by  
39 operation of law.  
40  
41  
42

1 **Rule 8.384. Petition for writ of habeas corpus filed by an attorney for a party**

2  
3 (a) \* \* \*

4  
5 (b) **Supporting documents**

6  
7 (1)–(3) \* \* \*

8  
9 (4) If any supporting documents accompanying the petition are sealed by court  
10 order or by operation of law, rules 8.45–8.47 govern these documents.

11  
12 (c)–(d) \* \* \*

13  
14 **DRAFTERS’ NOTE**

15 This rule would be amended to include cross-references to the proposed new rules regarding  
16 sealed records.

17  
18  
19 **Advisory Committee Comment**

20  
21 **Subdivision (b)(4).** Examples of records sealed by operation of law include probation reports, Penal  
22 Code section 1203.03 diagnostic reports, records sealed under *People v. Marsden* (1970) 2 Cal.3d 118 or  
23 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, in-camera proceedings on a confidential informant, and  
24 defense expert funding requests (Pen. Code, § 987.9; *Keenan v. Superior Court* (1982) 31 Cal.3d 424,  
25 430).

26  
27 **DRAFTERS’ NOTE**

28 This advisory committee comment would be added to provide examples of records sealed by  
29 operation of law.

30  
31  
32 **Rule 8.385. Proceedings after the petition is filed**

33  
34 (a) **Production of record**

35  
36 Before ruling on the petition, the court may order the custodian of any relevant  
37 record to produce the record or a certified copy to be filed with the court. Sealed  
38 records are governed by rules 8.45-8.47.

39  
40 (b)–(f) \* \* \*

41  
42 **DRAFTERS’ NOTE**

43 This rule would be amended to include cross-references to the proposed new rules regarding  
44 sealed records.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46

**Advisory Committee Comment**

**Subdivision (a).** Examples of records sealed by operation of law include probation reports, Penal Code section 1203.03 diagnostic reports, records sealed under *People v. Marsden* (1970) 2 Cal.3d 118 or *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, in-camera proceedings on a confidential informant, and defense expert funding requests (Pen. Code, § 987.9; *Keenan v. Superior Court* (1982) 31 Cal.3d 424, 430).

**Subdivision (c)–(d).** \* \* \*

**DRAFTERS' NOTE**

This advisory committee comment would be amended to provide examples of records sealed by operation of law.

**Chapter 5. Juvenile Appeals and Writs**

**Article 1. Appeals**

**Rule 8.407. Record on appeal**

**(a)–(d)** \* \* \*

~~**(e) Form of record**~~

~~Except in cases governed by rule 8.416(b), the clerk's and reporter's transcripts must comply with rule 8.144.~~

~~**(f)(e)**~~ \* \* \*

**DRAFTERS' NOTE**

This provision would be deleted because a provision concerning the form or the record is already in rule 8.409 regarding preparing and sending the record.

**Advisory Committee Comment**

Rules 8.45–8.47 address the appropriate handling of records sealed by court order or by operation of law that must be included in the record on appeal. Examples of records sealed by operation of law include records of proceedings sealed under *People v. Marsden* (1970) 2 Cal.3d 118 and in-camera proceedings on a confidential informant.

**Subdivision (b).** \* \* \*

1 **DRAFTERS' NOTE**

2 This advisory committee comment would be added to provide a cross-reference to the proposed  
3 new rules regarding sealed records and examples of records sealed by operation of law.  
4  
5

6 **8.409. Preparing and sending the record**

7  
8 (a) \* \* \*

9  
10 **(b) Form of record**

11  
12 The clerk's and reporter's transcripts must comply with rules 8.45–8.46, relating to  
13 sealed records, and, except in cases governed by rule 8.416(b), with rule 8.144.  
14

15 ~~(b)(c)~~ \* \* \*

16  
17 ~~(e)(d)~~ \* \* \*

18  
19 ~~(d)(e)~~ \* \* \*

20  
21 **DRAFTERS' NOTE**

22 This rule would be updated to include a cross-reference to the proposed new rules on sealed  
23 records.  
24

25  
26 **Advisory Committee Comment**

27  
28 **Subdivision (a).** \* \* \*

29  
30 **Subdivision (b).** Examples of records sealed by operation of law include records sealed under *People v.*  
31 *Marsden* (1970) 2 Cal.3d 118 and in-camera proceedings on a confidential informant.  
32

33 **DRAFTERS' NOTE**

34 This advisory committee comment would be amended to provide examples of records sealed by  
35 operation of law.  
36  
37  
38



1 Chapter 7. Writs of Mandate, Certiorari, and Prohibition in the Supreme Court  
2 and Court of Appeal  
3

4 **Rule 8.486. Petitions**  
5

6 (a)–(c) \* \* \*

7  
8 (d) **Sealed records**  
9

10 Rules ~~8.46~~ applies if a party seeks to lodge or file a 8.45–8.47 govern records sealed  
11 record by court order or by operation of law or to unseal a record in proceedings  
12 under this chapter.  
13

14 (e) \* \* \*

15  
16 **DRAFTERS' NOTE**

17 This rule would be updated to include a cross-reference to the proposed new rules on sealed  
18 records.  
19

20  
21 **Advisory Committee Comment**  
22

23 **Subdivision (a).** \* \* \*

24  
25 **Subdivision (d).** Examples of records sealed by operation of law include records of the family  
26 conciliation court (Fam. Code, § 1818 (b)) and fee waiver applications (Gov. Code, § 68633(f)).  
27

28 **Subdivision (e).** \* \* \*

29  
30 **DRAFTERS' NOTE**

31 This advisory committee comment would be amended to provide examples of records sealed by  
32 operation of law.  
33  
34

35 **Rule 8.487. Opposition and Attorney General amicus briefs**  
36

37 (a)–(b) \* \* \*

38  
39 (c) **Supporting documents**  
40

41 Any supporting documents accompanying a preliminary opposition, return or  
42 opposition, or reply must comply with rule 8.486(c)–(d).

1  
2 ~~(e)~~ **(d)** \* \* \*

3  
4 **DRAFTERS' NOTE**

5 This rule would be updated to clarify that supporting documents to an opposition or reply must  
6 comply with the same format requirements as supporting documents to the petition, which  
7 includes compliance with the proposed new rules on sealed records.

8  
9  
10 **Advisory Committee Comment**

11  
12 **Subdivision (a)–(b).** \* \* \*

13  
14 **Subdivision (c).** Examples of records sealed by operation of law include records of the family  
15 conciliation court (Fam. Code, § 1818 (b)) and fee waiver applications (Gov. Code, § 68633(f)).

16  
17 **DRAFTERS' NOTE**

18 This advisory committee comment would be amended to provide examples of records sealed by  
19 operation of law.

20  
21 **Chapter 10. Appeals From Judgments of Death**

22  
23 **Article 2. Record on Appeal**

24  
25 **Rule 8.610. Contents and form of the record**

26  
27 **(a)** \* \* \*

28  
29 **(b)** ~~Confidential~~ Sealed records

30  
31 Rules 8.45–8.47 govern records sealed by court order or by operation of law in  
32 appeals under this chapter.

33  
34 ~~(1) All documents filed or lodged confidentially under Penal Code section 987.9~~  
35 ~~or 987.2 must be sealed. Documents filed or lodged under Penal Code section~~  
36 ~~987.9 must be bound separately from documents filed under Penal Code~~  
37 ~~section 987.2. Unless otherwise ordered, copies must be provided only to the~~  
38 ~~Supreme Court and to counsel for the defendant to whom the documents~~  
39 ~~relate.~~

40  
41 ~~(2) All reporter's transcripts of in-camera proceedings must be sealed. Unless~~  
42 ~~otherwise ordered, copies must be provided only to the Supreme Court and to~~  
43 ~~counsel for parties present at the proceedings.~~

44  
45 ~~(3) Records sealed under this rule must comply with rule 8.328.~~

1 **DRAFTERS' NOTE**

2 The content of this provision would be deleted and replaced with a cross-reference to the  
3 proposed new rules on sealed records because those rules would cover the handling of these  
4 records.

5  
6 (c) \* \* \*

7  
8 **(d) Form of record**

9  
10 The clerk's transcript and the reporter's transcript must comply with rules 8.45–  
11 8.47, relating to sealed records, and rule 8.144, ~~but the indexes for the clerk's~~  
12 ~~transcript must separately list all sealed documents in that transcript, and the~~  
13 ~~indexes for the reporter's transcript must separately list all sealed reporter's~~  
14 ~~transcripts with the date and the names of all parties present. The indexes must not~~  
15 ~~list any confidential material relating to a request for funds under Penal Code~~  
16 ~~section 987.9 or disclose the substance of any sealed matter.~~

17  
18 **DRAFTERS' NOTE**

19 The content of this provision would be deleted and replaced with a cross-reference to the  
20 proposed new rules on sealed records because those rules would cover the format of indexes to  
21 transcripts containing records sealed by operation of law.

22  
23  
24 **Advisory Committee Comment**

25  
26 **Subdivision (a).** \* \* \*

27  
28 **Subdivision (b).** Examples of records sealed by operation of law include probation reports, Penal Code  
29 section 1203.03 diagnostic reports, records sealed under *People v. Marsden* (1970) 2 Cal.3d 118 or  
30 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, in-camera proceedings on a confidential informant, and  
31 defense expert funding requests (Pen. Code, § 987.9; *Keenan v. Superior Court* (1982) 31 Cal.3d 424,  
32 430). ~~Under the third sentence of (b)(1), copies of sealed documents must be given only to the Supreme~~  
33 ~~Court and to the defendant concerned “[u]nless otherwise ordered.” The qualification recognizes the~~  
34 ~~statutory right of the Attorney General to request, under certain circumstances, copies of documents filed~~  
35 ~~confidentially under Penal Code section 987.9(d). To facilitate compliance with such requests, the second~~  
36 ~~sentence of rule 8.610(b)(1) requires such documents to be bound separately from documents filed~~  
37 ~~confidentially under Penal Code section 987.2.~~

38  
39 **Subdivision (d).** ~~Subdivision (d) requires that the master indexes of the clerk and reporter's transcripts~~  
40 ~~separately list all documents and transcripts each contains that were filed in sealed form under subdivision~~  
41 ~~(b). The purpose of this provision is to assist the parties in making—and the court in adjudicating—~~  
42 ~~motions to unseal portions of the record. To protect confidentiality until a record is unsealed, however,~~  
43 ~~each index must endeavor to identify the sealed matter it lists without disclosing its substance.~~

44  
45 **DRAFTERS' NOTE**

46 This advisory committee comment would be amended to reflect the changes to the rule and to  
47 provide examples of records sealed by operation of law.