

JUDICIAL COUNCIL OF CALIFORNIA

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INVITATION TO COMMENT

SPR18-06

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| Title | Action Requested |
| Appellate Procedure: Electronic Sealed and Confidential Records and Lodged Records in the Court of Appeal | Review and submit comments by June 8, 2018 |
| Proposed Rules, Forms, Standards, or Statutes Amend Cal. Rules of Court, rules 8.45, 8.46, and 8.47 | Proposed Effective Date January 1, 2019 |
| Proposed by Appellate Advisory Committee Hon. Louis R. Mauro, Chair | Contact Ingrid Leverett 415-865-8031 phone Ingrid.Leverett@jud.ca.gov |

Executive Summary and Origin

As part of the Rules Modernization Project,¹ the Appellate Advisory Committee recommends amending the rules to establish procedures for handling sealed and confidential materials submitted electronically in the Court of Appeal. The proposed amendments encompass the court's return of lodged electronic records submitted in connection with a motion to seal.

Background

Existing appellate rules require Court of Appeal clerks to return records that were lodged with the court in paper form if a sealing request is denied. (See Cal. Rules of Court, rules 8.46, 8.47.) These rules do not address what must happen if the lodged material is in electronic form. Until recently, the trial courts faced this same issue. The Judicial Council revised the relevant trial court rules relating to sealed records such that they now address the disposition of electronic records lodged with the court in connection with a sealing request that is denied.

¹ The Rules Modernization Project is a collaborative effort led by the Information Technology Advisory Committee, working together with several advisory committees with subject matter expertise, to comprehensively review and modernize the California Rules of Court to be consistent with and foster modern e-business practices. Over a two-year period, this work resulted in technical rule amendments to address language in the rules that was incompatible with statutes and rules governing electronic filing and service, and substantive rule amendments to promote electronic filing, electronic service, and modern e-business practices. These rule amendments took effect January 1, 2016, and January 1, 2017.

The trial court rules also require the secure transmission of sealed and confidential records. This requirement is included only in certain narrow provisions of the parallel appellate rules.

The existing trial and appellate rules both provide that records a party is seeking to file under seal remain conditionally under seal pending the court's resolution of the sealing request. However, the appellate rules do not provide guidance on how to transmit to the reviewing court and preserve the confidentiality of records that are the subject of a challenge to a trial court's order denying a motion or application to seal.

Finally, existing appellate rules lack clarity concerning how a litigant who lodges a confidential, unredacted record with the appellate court must identify the particular material within the record that is confidential.

The proposal is intended to address these issues.

The Proposal

The purpose of the proposal is to amend the appellate rules relating to sealed and confidential records so as to (1) harmonize them with parallel trial court rules governing electronic records submitted in connection with a motion or application to seal; (2) make these appellate rules internally consistent; and (3) address the transmission and handling of records in a proceeding challenging a trial court's order denying a motion to seal.

Specifically, the proposal would:

- Provide for the disposition of a lodged electronic record when the court denies a motion or application to seal. The moving party would have 10 days after the denial of the application or motion to seal in which to notify the clerk to file a lodged record unsealed. Otherwise, the clerk must return the lodged record to the moving party if it is in paper form or delete the lodged record if it is in electronic form. The new proposed language would appear in rule 8.46(d)(7), rule 8.46(f)(3)(D), rule 8.47(b)(3)(D), and rule 8.47(c)(2)(D).
- Add language requiring that sealed, conditionally sealed, and confidential records be transmitted to the reviewing court in a secure manner that preserves the confidentiality of the record. This requirement is included in the trial court rule and in rule 8.47. The new proposed language would appear in rules 8.45(d)(1) and 8.46(f)(3)(B).
- Clarify procedures for transmitting, conditionally sealing, and returning or deleting a record that is the subject of challenge to a trial court order denying a motion or application to seal. The new proposed language appears in new subdivision (e) of rule 8.46.

- Clarify the procedure for lodging an unredacted version of a record in connection with an appellate filing by requiring that the confidential material within the record be identified as such in the filing. This proposed language would appear in rule 8.46(f)(2)(B) and (f)(3)(B), and rule 8.47(b)(3)(C)(ii).
- Make other minor changes in language and punctuation intended to clarify the rules.

Alternatives Considered

The committee considered not proposing these amendments. The committee concluded that these changes were necessary to (1) give guidance and direction to litigants, (2) harmonize the appellate court rules with existing trial court rules governing the same subject matter, and (3) make the appellate court rules internally consistent regarding the handling of sealed and confidential records.

The committee also considered whether to revise the rule governing appellate motions generally—rule 8.54—to harmonize it with parallel trial court rule 3.1302. Rule 3.1302 governs the place and manner of filing in support of noticed motions; it includes requirements for lodged materials. It provides that the trial court may retain lodged material but, if the trial court decides not to do so, requires that the trial court delete material lodged in the trial court in connection with a motion after notice of the impending deletion is sent to the lodging party. The committee did not recommend making any changes to rule 8.54.

Implementation Requirements, Costs, and Operational Impacts

If adopted, the proposal may impose some cost on the appellate court in the form of training clerks to delete lodged, unredacted electronic records in the event that the court denies a motion or application to seal and the lodging party fails to instruct the court to file an unsealed version of a record. Beyond this training cost, the proposal is not expected to result in significant new costs or changes to operations in the Court of Appeal, nor to give rise to any implementation challenges.

Request for Specific Comments

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

- Does the proposal appropriately address the stated purpose?
- Is new subdivision (e) of rule 8.46—addressing a record that is the subject of an appeal or original proceeding challenging a trial court’s ruling denying a motion or application to seal that record—helpful, and does it provide sufficient guidance?

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

- 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 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?

Attachments

Cal. Rules of Court, rules 8.45, 8.46, and 8.47

Rules 8.45, 8.46, and 8.47 of the California Rules of Court would be amended, effective January 1, 2019, 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 and Confidential Records

Rule 8.45. General provisions

(a)-(c) * * *

(d) Transmission of and access to sealed and confidential records

(1) A sealed or confidential record must be transmitted in a secure manner that preserves the confidentiality of the record.

(1)(2) Unless otherwise provided by (2)–(4) (3)–(5) or other law or court order, a sealed or confidential record that is part of the record on appeal or the supporting documents or other records accompanying a motion, petition for a writ of habeas corpus, other writ petition, or other filing in the reviewing court must be transmitted 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 and may be examined only by the reviewing court and that party or parties. If a party's attorney but not the party had access to the record in the trial court or other proceedings under review, only the party's attorney may examine the record.

(2)(3) Except as provided in (3) (4), if the record is a reporter's transcript or any document related to any in-camera hearing from which a party was excluded in the trial court, the record must be transmitted to and examined by only the reviewing court and the party or parties who participated in the in-camera hearing.

(3)(4) A reporter's transcript or any document related to an in-camera hearing concerning a confidential informant under Evidence Code sections 1041–1042 must be transmitted only to the reviewing court.

(4)(5) A probation report must be transmitted only to the reviewing court and to appellate counsel for the People and the defendant who was the subject of the report.

Advisory Committee Comment

Subdivision (a). * * *

Subdivision (b)(5). * * *

Subdivisions (c) and (d). * * *

Subdivision (c)(1)(C). * * *

Subdivision (c)(2), * * *

Subdivision (d)(1)(2) and (2)(3). Because the term “party” includes any attorney of record for that party, under rule 8.10(3), when a party who had access to a record in the trial court or other proceedings under review or who participated in an in-camera hearing—such as a *Marsden* hearing in a criminal or juvenile proceeding—is represented by appellate counsel, the confidential record or transcript must be transmitted to that party’s appellate counsel. Under rules 8.336(g)(2) and 8.409(e)(2), in non-capital felony appeals, if the defendant—or in juvenile appeals, if the appellant or the respondent—is not represented by appellate counsel when the clerk’s and reporter’s transcripts are certified as correct, the clerk must send the copy of the transcripts that would go to appellate counsel, including confidential records such as transcripts of *Marsden* hearings, to the district appellate project.

Subdivision (d)(4)(5). This rule limits to whom a copy of a probation report is transmitted based on the provisions of Penal Code section 1203.05, which limit who may inspect or copy probation reports.

Rule 8.46. Sealed records

(a)-(c) * * *

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

(1)-(6) * * *

- (7) If the court denies the motion or application to seal the record, the clerk must not place the lodged record in the case file but must return it to the submitting party unless that party notifies the clerk in writing that the record is to be filed. Unless otherwise ordered by the court, the submitting party must notify the clerk within 10 days after the order denying the motion or application the lodging party may notify the court that the lodged record is to be filed unsealed. This notification must be received within 10 days of the order denying the motion or application to seal, unless otherwise ordered by the court. On receipt of this notification, the clerk must unseal and file the record. If the lodging party does not notify the court within 10 days of the order, the clerk must (1) return the lodged record to the lodging party if it is in paper form, or (2) permanently delete the lodged record if it is in electronic form.
 - (8) An order sealing the record must direct the sealing of only those documents and pages or, if reasonably practical, portions of those documents and pages, that contain the material that needs to be placed under seal. All other portions of each document or page must be included in the public file.
 - (9) Unless the sealing order provides otherwise, it prohibits the parties from disclosing the contents of any materials that have been sealed in anything that is subsequently publicly filed.

(e) Challenge to an order denying a motion or application to seal a record

Notwithstanding the provisions in (d)(1)–(2), when an appeal or original proceeding challenges an order denying a motion or application to seal a record, the appellant or petitioner must lodge the subject record labeled as conditionally under seal in the reviewing court as provided in (d)(3)–(5), and the reviewing court must maintain the record conditionally under seal during the pendency of the appeal or original proceeding. Once the reviewing court’s decision on the appeal or original proceeding becomes final, the clerk must (1) return the lodged record to the lodging party if it is in paper form, or (2) permanently delete the lodged record if it is in electronic form.

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

(1)-(2) * * *

- (3) If the reviewing court proposes to order a record unsealed on its own motion, the court must send notice to the parties stating the reason for unsealing the record. Unless otherwise ordered by the court, any party may serve and file an opposition within 10 days after the notice is sent, and any other party may serve and file a response within 5 days after an opposition is filed.

1
2 (4)–(7) * * *

3

4 **(f)(g) Disclosure of nonpublic material in public filings prohibited**

5
6 (1) * * *

7
8 (2) If it is necessary to disclose material contained in a sealed record in a filing in
9 the reviewing court, two versions must be filed:

10
11 (A) * * *

12
13 (B) An unredacted version. If this version is in paper format, it must be
14 placed in a sealed envelope or other appropriate sealed container. The
15 cover of this version, and if applicable the envelope or other container,
16 must identify it as “May Not Be Examined Without Court Order—
17 Contains material from sealed record.” Sealed material disclosed in this
18 version must be identified as such in the filing and accompanied by a
19 citation to the court order sealing that material.

20
21 (C) * * *

22
23 (3) If it is necessary to disclose material contained in a conditionally sealed
24 record in a filing in the reviewing court:

25
26 (A) A public redacted version must be filed. The cover of this version must
27 identify it as “Public—Redacts material from conditionally sealed
28 record.” In juvenile cases, the cover of the redacted version must
29 identify it as “Redacted version—Redacts material from conditionally
30 sealed record.”

31
32 (B) An unredacted version must be lodged. The filing must be transmitted
33 in a secure manner that preserves the confidentiality of the filing being
34 lodged. If this version is in paper format, it must be placed in a sealed
35 envelope or other appropriate sealed container. The cover of this
36 version, and if applicable the envelope or other container, must identify
37 it as “May Not Be Examined Without Court Order—Contains material
38 from conditionally sealed record.” Conditionally sealed material
39 disclosed in this version must be identified as such in the filing.

40
41 (C) Unless the court orders otherwise, any party who had access to the
42 conditionally sealed record in the trial court or other proceedings under
43 review must be served with both the unredacted version of all papers as

1 well as the redacted version. Other parties must be served with only the
2 public redacted version.

- 3
- 4 (D) If the court denies the motion or application to seal the record, ~~the clerk~~
5 ~~must not place the unredacted version lodged under (B) in the case file~~
6 ~~but must return it to the party who filed the application or motion to~~
7 ~~seal unless that party notifies the clerk that the record is to be publicly~~
8 ~~filed, as provided in (d)(7) the party who filed the motion or application~~
9 ~~may notify the court that the unredacted version lodged under (B) is to~~
10 ~~be filed unsealed. This notification must be received within 10 days of~~
11 ~~the order denying the motion or application to seal, unless otherwise~~
12 ~~ordered by the court. On receipt of this notification, the clerk must~~
13 ~~unseal and file the lodged unredacted version. If the party who filed the~~
14 ~~motion or application does not notify the court within 10 days of the~~
15 ~~order, the clerk must (1) return the lodged unredacted version to the~~
16 ~~lodging party if it is in paper form, or (2) permanently delete the lodged~~
17 ~~unredacted version if it is in electronic form.~~

18

19 **Rule 8.47. Confidential records**

20 (a) * * *

21

22 (b) **Records of *Marsden* hearings and other in-camera proceedings**

23 (1) * * *

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

27 (A) The brief, including any portion that discloses matters contained in the
28 transcript of the in-camera hearing, and other documents filed or lodged
29 in connection with the hearing, must be filed publicly. The requirement
30 to publicly file this brief does not apply in juvenile cases; rule 8.401
31 governs the format of and access to such briefs in juvenile cases.

32 (B) The People may serve and file an application requesting a copy of the
33 reporter's transcript of, and documents filed or lodged by a defendant
34 in connection with, the in-camera hearing.

35 (C) * * *

- (D) If the defendant does not timely serve and file opposition to the application, the reviewing court clerk must send to the People a copy of the reporter's transcript of, and documents filed or lodged by a defendant in connection with, the in-camera hearing.
 - (3) A defendant may serve and file a motion or application in the reviewing court requesting permission to file under seal a brief, petition, or other filing that raises a *Marsden* issue or an issue related to another in-camera hearing covered by this subdivision, and requesting an order maintaining the confidentiality of the relevant material from the reporter's transcript of, or documents filed or lodged in connection with, the in-camera hearing.
 - (A) * * *
 - (B) The declaration accompanying the motion or application must contain facts sufficient to justify an order maintaining the confidentiality of the relevant material from the reporter's transcript of, or documents filed or lodged in connection with, the in-camera hearing and sealing of the brief, petition, or other filing.
 - (C) At the time the motion or application is filed, the defendant must:
 - (i) * * *
 - (ii) Lodge an unredacted version of the brief, petition, or other filing that he or she is requesting be filed under seal. The filing must be transmitted in a secure manner that preserves the confidentiality of the filing being lodged. If this version is in paper format, it must be placed in a sealed envelope or other appropriate sealed container. The cover of the unredacted version of the document, and if applicable the envelope or other container, must identify it as "May Not Be Examined Without Court Order—Contains material from conditionally sealed record." Conditionally sealed material disclosed in this version must be identified as such in the filing.
 - (D) If the court denies the motion or application to file the brief, petition, or other filing under seal, ~~the clerk must not place the unredacted brief, petition, or other filing lodged under (C)(ii) in the case file but must return it to the defendant unless the defendant notifies the clerk in writing that it is to be filed. Unless otherwise ordered by the court, the defendant must notify the clerk within 10 days after the order denying the motion or application the defendant may notify the court that the~~

1 unredacted brief, petition, or other filing lodged under (C)(ii) is to be
2 filed unsealed. This notification must be received within 10 days of the
3 order denying the motion or application to file the brief, petition, or
4 other filing under seal, unless otherwise ordered by the court. On
5 receipt of this notification, the clerk must unseal and file the lodged
6 unredacted brief, petition, or other filing. If the defendant does not
7 notify the court within 10 days of the order, the clerk must (1) return
8 the lodged unredacted brief, petition, or other filing to the defendant if
9 it is in paper form, or (2) permanently delete the lodged unredacted
10 brief, petition, or other filing if it is in electronic form.

11

12 (c) **Other confidential records**

13

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

15

16 (1) * * *

17

18 (2) To maintain the confidentiality of material contained in a confidential record,
19 if it is necessary to disclose such material in a filing in the reviewing court, a
20 party may serve and file a motion or application in the reviewing court
21 requesting permission for the filing to be under seal.

22

23 (A)-(C) * * *

24

25 (D) If the court denies the motion or application to file the brief, petition, or
26 other filing under seal, the clerk must not place the unredacted brief,
27 petition, or other filing lodged under (C)(ii) in the case file but must
28 return it to the lodging party unless the party notifies the clerk in
29 writing that it is to be filed. Unless otherwise ordered by the court, the
30 party must notify the clerk within 10 days after the order denying the
31 motion or application the party who filed the motion or application may
32 notify the court that the unredacted brief, petition, or other filing lodged
33 under (C)(ii) is to be filed unsealed. This notification must be received
34 within 10 days of the order denying the motion or application to file the
35 brief, petition, or other filing under seal, unless otherwise ordered by
36 the court. On receipt of this notification, the clerk must unseal and file
37 the lodged unredacted brief, petition, or other filing. If the party who
38 filed the motion or application does not notify the court within 10 days
39 of the order, the clerk must (1) return the lodged unredacted brief,
40 petition, or other filing to the lodging party if it is in paper form, or (2)
41 permanently delete the lodged unredacted brief, petition, or other filing
42 if it is in electronic form.

43

Advisory Committee Comment

Subdivisions (a) and (c). * * *

Subdivision (c)(1). * * *

7 **Subdivision (c)(2).** Note that when a record has been sealed by court order, rule 8.46(f)(g)(2)
8 requires a party to file redacted (public) and unredacted (sealed) versions of any filing that
9 discloses material from the sealed record; it does not require the party to make a motion or
10 application for permission to do so. By contrast, this rule requires court permission before
11 redacted (public) and unredacted (sealed) filings may be made to prevent disclosure of material
12 from confidential records.