



Judicial Council of California · Administrative Office of the Courts

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: October 26, 2012

Title	Agenda Item Type
Appellate Procedure: Contents of the Normal Record in Criminal Appeals	Action Required
Rules, Forms, Standards, or Statutes Affected	Effective Date
Amend Cal. Rules of Court, rules 8.320, 8.867, and 8.920	January 1, 2013
Recommended by	Date of Report
Appellate Advisory Committee Hon. Kathryn Doi Todd, Chair	August 14, 2012
	Contact
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Executive Summary

The Appellate Advisory Committee recommends amending three appellate rules to add items to the normal record in certain criminal appeals that are routinely needed for appellate review in these cases. These changes are proposed to save litigants and courts the time and costs associated with making and considering requests to augment the record and preparing and transmitting supplemental clerk's or reporter's transcripts to the reviewing court.

Recommendation

The Appellate Advisory Committees recommends that the Judicial Council, effective January 1, 2013:

1. Amend rules 8.320, 8.867, and 8.920 of the California Rules of Court to require that the normal record in criminal appeals by the People from a judgment on a demurrer to the accusatory pleading, or by the defendant or the People from an appealable order other than a ruling on a motion for new trial, includes the following:

- a. Any court minutes relating to the judgment or order being appealed and:
 - If there was a trial in the case, any court minutes of proceedings at the time the original verdict is rendered in felony and misdemeanor cases or the original judgment is rendered in infraction cases and any subsequent proceedings; or
 - If the original judgment of conviction is based on a guilty plea or nolo contendere plea, any court minutes of the proceedings at the time of entry of such plea and any subsequent proceedings;
 - b. If the appellant is the defendant, all probation officers' reports and, in felony cases, any court-ordered diagnostic reports required under Penal Code section 1203.03(b);
 - c. If the appeal is from an order after judgment in a felony case or arises from a misdemeanor or infraction case in which the appellant has opted to have a record of the oral proceedings, a reporter's transcript (or other form of the record) of the oral proceedings from:
 - The original sentencing proceeding; and
 - If the original judgment of conviction is based on a guilty plea or nolo contendere plea, the proceedings at the time of entry of such plea;
2. Amend rules 8.867 and 8.920 to clarify that an official electronic recording may be used as the record of the oral proceedings in misdemeanor and infraction appeals under certain circumstances and, in rule 8.867, to correct a cross-referencing error to the rule on such official electronic recordings;
 3. Make other nonsubstantive changes to the organization of rules 8.320 and 8.867 to make them easier to read; and
 4. Amend the advisory committee comment accompanying rule 8.320 and add advisory committee comments to accompany rules 8.867 and 8.920 to indicate that the trial court clerk may include additional minutes in the clerk's transcript beyond those identified in the rule if that would be more cost-effective.

The text of the amended rules is attached at pages 9–13.

Previous Council Action

The Judicial Council adopted the predecessor rules to rule 8.320, regarding the contents of the record in criminal appeals in the Court of Appeal, as part of the original Rules for the Supreme Court and District Courts of Appeal, effective September 1, 1928. From the beginning, these rules provided for a more limited record in appeals other than those from the judgment or an

order on a motion for a new trial, requiring, for example, only those minutes pertaining to the motion or order being appealed in these appeals while requiring “all minutes of the court pertaining to the action” in appeals from the judgment or from an order on a motion for a new trial. Effective July 1, 1943, the Judicial Council adopted a new set of Rules on Appeal. The new rule relating to limited records in these appeals required the inclusion of “any reporter’s transcript of the oral proceedings incident to the order appealed from.” Effective January 1, 1984, the Judicial Council amended this rule to require that the record in these appeals also include any abstract of judgment. Although the Judicial Council has subsequently adopted amendments that reorganized and renumbered this rule, the content of the provisions regarding the limited record in these appeals has remained substantively the same.

The Judicial Council adopted the predecessor to rules 8.867 and 8.920, regarding the content of the record on appeal in certain criminal appeals in the superior court appellate division, effective July 1, 1936. Like the rules for appeals in the Court of Appeal, this rule provided for a more limited record in appeals other than those from the judgment or an order on a motion for a new trial, requiring, for example, only those minutes pertaining to the motion or order being appealed in these appeals while requiring all minutes of the court “pertaining to the action” in appeals from the judgment or from an order on a motion for a new trial. Effective January 1, 2009, the Judicial Council repealed all of the rules relating to the superior court appellate division and replaced them with new rules. New rules 8.867 and 8.920 were modeled on rule 8.320(d).

Rationale for Recommendation

This proposal originated from a suggestion submitted by the Appellate Court Committee of the San Diego County Bar Association.

Rule 8.320 addresses the contents of the normal record in felony appeals. Subdivision (d) of this rule provides for a limited record in certain kinds of felony appeals—those where the People are appealing from a judgment on a demurrer to the accusatory pleading or where the defendant is or the People are appealing from an appealable order other than a ruling on a motion for new trial. Rules 8.867 and 8.920 similarly address the contents of the record in these types of appeals in misdemeanor and infraction cases, respectively. All of these rules currently provide that the normal contents of the record in these appeals contain only those court minutes and reporter’s transcript (or other form of the record) of those oral proceedings relating to the judgment or order appealed. In addition, probation officers’ reports are not required to be included in the limited records for these appeals.

Some of the most common types of appeals covered by these provisions are appeals from sentencing following probation revocation, from compensatory victim restitution orders, and from orders affecting custody credits. It is the committee’s understanding that, in these cases, there are materials not currently included in the limited normal record that both the parties and

the reviewing court routinely need to appropriately address the appeal. For appeals of postconviction orders, materials routinely needed include the court's minutes relating to the original conviction and the reporter's transcript (or other form of the record of the oral proceedings) relating to the sentencing on that conviction. When the appellant is the defendant, it is the committee's understanding that probation officers' reports and, in felony cases, any court-ordered diagnostic reports required under Penal Code section 1203.03(b) are also routinely needed.

Both the First and Second Appellate Districts of the Court of Appeal have adopted local rules that provide for automatic augmentation of the record in probation revocation appeals. The First Appellate District's local rule 6 requires that the record in these cases include reporter's transcripts of: (1) the original sentencing proceeding at which probation was imposed; (2) the proceedings at the time of entry of a guilty plea or nolo contendere plea if the original judgment of conviction is based on such plea; and (3) the proceedings at which probation is revoked and the defendant is sentenced. The Second Appellate District's local rule 1, subdivision (6) similarly requires these proceedings be included in the reporter's transcript, but also requires augmentation of the clerk's transcript to include documents relating to these proceedings.

In all other districts of the Court of Appeal and in all other proceedings covered by rules 8.320, 8.867, and 8.920, because these materials are not currently required to be included in the normal record in these appeals, parties must routinely file and the court must routinely consider motions to augment the record with these materials. Preparing and considering these motions takes time for both the parties and the Courts of Appeal and superior court appellate divisions. It also increases public expenses for attorneys representing the parties and for the courts, including Court of Appeal expenses associated with appointed counsel in felony cases. If the Courts of Appeal and superior court appellate divisions routinely grant these augmentation requests, it does not save trial courts any record preparation costs not to have included these materials in the original clerk's or reporter's transcript, and it may actually cost the courts more to separately prepare and transmit to the reviewing court supplemental clerk's or reporter's transcripts at a later time.

The proposed rule amendments are intended to provide significant cost savings and efficiencies by reducing costs associated with preparing and considering augmentation requests and preparing and transmitting supplemental clerk's or reporter's transcripts to the reviewing court. The amendments would change the rules relating to what must be in the normal record in these appeals to require inclusion of the following:

- Any court minutes relating to the judgment or order being appealed and:
 - If there was a trial in the case, any court minutes of proceedings after the original verdict is rendered in felony and misdemeanor cases or after the original judgment is rendered in infraction cases; or

- If the original judgment of conviction is based on a guilty plea or nolo contendere plea, any court minutes of the proceedings at the time of entry of such plea and any subsequent proceedings;
- If the appellant is the defendant, all probation officers' reports and, in felony cases, any court-ordered diagnostic reports required under Penal Code section 1203.03(b); and
- If the appeal is from an order after judgment in a felony case or arises from a misdemeanor or infraction case in which the appellant has opted to have a record of the oral proceedings, a reporter's transcript (or other form of the record) of the oral proceedings from:
 - The original sentencing proceeding; and
 - If the original judgment of conviction is based on a guilty plea or nolo contendere plea, the proceedings at the time of entry of such plea.

A revised or new advisory committee comment accompanying each of these rules would indicate that the trial court clerk is free to include additional minutes in the clerk's transcript if this would be more cost-effective.

The proposed amendments to rules 8.867 and 8.920 would also clarify that, as in other appeals in misdemeanor and infraction cases, an official electronic recording may be used as the record of the oral proceedings in these limited types of appeals under certain circumstances and, in rule 8.867, would correct a cross-referencing error to the rule on such official electronic recordings. In addition, to make rules 8.320 and 8.867 easier to read, the amendments include some nonsubstantive changes to the rules' organization.

Comments, Alternatives Considered, and Policy Implications

Comments

This proposal was circulated for public comment between April 17 and June 20, 2012, as part of the regular spring 2012 comment cycle. Nine individuals or organizations submitted comments on this proposal. Seven commentators agreed with the proposal, although some of these also suggested changes to the proposal, and two agreed with the proposal if modified. The full text of the comments received and the committee responses are set out in the attached comment chart at pages 14–24. The main substantive comments and the committee's responses are also discussed below.

Limiting rule amendments to probation revocation appeals

The committee considered and specifically sought public comment on whether, like the local rules of the First and Second Appellate Districts of the Court of Appeal, the proposed amended rules should focus only on requiring additional materials in the record for probation revocation appeals. Only one commentator provided specific input on this issue and that commentator indicated that the additional materials are needed not only in probation revocation appeals, but in appeals from compensatory victim restitution orders and orders affecting custody credits (other common types of appeals covered by these rules). None of the commentators suggested that the

proposed amendments should be limited to probation revocation appeals. Based both on these comments and the committee's understanding from member experiences that the additional materials to be included in the record under this proposal are routinely needed in other types of appeals covered by these rules, the committee decided not to recommend that the amended rules focus only on requiring additional materials in the record for probation revocation appeals.

Including all court minutes or only specified minutes

The proposed amendments would require that, in addition to any court minutes relating to the judgment or order being appealed, the record in these cases also include any minutes of the proceedings at and subsequent to the time that the original verdict or judgment is rendered or at and subsequent to the time that a guilty or nolo contendere plea is entered. The committee considered and specifically sought public comment on whether, as originally suggested by the Appellate Court Committee of the San Diego County Bar Association, these rules should instead require that the normal record in these cases include all court minutes. The San Diego County Bar committee suggested that requiring all minutes would reduce burdens on trial court clerks associated with having to identify, as the current rules now require, those minutes that "relate to the judgment or order appealed from" (e.g., all proceedings relating to probation violations or changes in the terms of probation in a probation revocation appeal) and would also reduce inconsistencies and errors in what is included in or left out of the clerk's transcripts.

The input received by the Appellate Advisory Committee on this issue was mixed. Before the committee circulated the proposal for public comment, it sought input on this issue from the Judicial Council's Criminal Law Advisory Committee and the Trial Court Presiding Judges Advisory Committee/Court Executive Officers Advisory Committee Joint Rules Working Group (joint working group). The Criminal Law Advisory Committee's view was that it is not necessary to include all court minutes in the record for the limited appeals covered by these rules. That committee suggested that it would be sufficient to have the minutes relating to the judgment or order being appealed and any minutes relating to proceedings after the verdict was rendered. Members of that committee also suggested that the time and cost for the trial courts associated with locating and copying minutes for the record on appeal would likely vary from court to court, depending on the level of automation of the individual court's system for identifying such minutes; in some courts, they suggested, including all court minutes in a case would be the simplest and most cost-effective approach, while in others the burden of including all or a limited portion of the minutes would be about the same. The joint working group generally supported the approach of requiring that, in addition to any court minutes relating to the judgment or order being appealed, the record in these cases also include any minutes of the proceedings after the original verdict is rendered or at the time of entry of a guilty or nolo contendere plea and any subsequent proceedings. Members of the joint working group suggested, that if, in a particular court or case, it would be less burdensome to include all minutes, a clerk is always free to include more in the record on appeal than the minimum specified in the rules.

Four of the commentators on the proposal that was circulated for comment —the Appellate Court Committee of the San Diego County Bar Association, the Committee on Appellate Courts of the State Bar of California, three of the district appellate projects, and the Court of Appeal, Fourth Appellate District, Division One—specifically suggested that the proposal should be modified to require inclusion of all court minutes in the record on appeal. One other commentator also generally supported being more inclusive in terms of what is required in the record. These commentators suggested that, in addition to the reasons previously given by the San Diego County Bar committee (reducing burdens on trial court clerks associated with having to identify those minutes that “relate to the judgment or order appealed from” and reducing inadvertent omissions that require augmentation requests), requiring inclusion of all minutes would make the rules themselves simpler and that the additional minutes would help counsel better understand the history of the case.

The Appellate Advisory Committee weighed all of this input in formulating its recommendation. From this input, the committee’s understanding is that, while they may be helpful on occasion, court minutes other than those already required or included in the proposed rule amendments are not routinely needed in the record in these appeals. The main issue appears to be whether, when all costs are weighed, it is more cost-effective to include some minutes in the record that are not necessary for the appeal. These costs include:

- The cost of training trial court staff to identify the minutes that must be included in the record on appeal;
- The cost of trial court staff time for identifying the required minutes;
- The trial courts’ cost for copying the minutes;
- The cost to counsel and the reviewing courts of preparing and considering augmentation requests when needed minutes are inadvertently left out of the record;
- The cost to trial courts of preparing and sending supplemental records to the reviewing court; and
- The cost of storing appellate records.

Since the bulk of these potential costs fall on the trial courts, it is the committee’s view that, in the midst of the extreme financial crisis facing the courts, and the trial courts in particular, the best approach is to allow the trial courts to determine whether it is most cost-effective for them to include all the minutes in the record or only those minutes that are necessary for these appeals. The committee also understands, based on input from the joint working group, that trial court clerks can currently choose to include all court minutes in these records if that approach is most cost-effective for their court. The committee is therefore recommending that, as circulated for public comment, the rules list the specific minutes that must, at a minimum, be included in the clerk’s transcript, but also include an advisory committee comment that specifically acknowledges that trial court clerks may include additional minutes if that would be more cost-effective.

Alternatives

In addition to the alternatives considered in connection with the public comments, the committee considered not recommending any change to rule 8.320. However, the committee concluded that it was preferable to recommend these amendments at this time to save litigants and courts the time and costs associated with making and considering requests to augment the record and preparing and transmitting supplemental clerk's or reporter's transcripts to the reviewing court.

Implementation Requirements, Costs, and Operational Impacts

The recommended rule amendments will require changes in current trial court procedures relating to what material is included in the normal record on appeal in the cases covered by these rules. This is likely to require some additional training for trial court staff. However, as indicated above, the intent of these rule amendments is to reduce overall costs and increase efficiency by:

- Reducing public expenses for attorneys representing the parties associated with preparing augmentation requests, including Court of Appeal expenses associated with appointed counsel in felony cases;
- Reducing costs for the Courts of Appeal and superior court appellate divisions in considering these augmentation requests;
- Reducing trial court costs associated with preparing and transmitting supplemental clerk's or reporter's transcripts to the reviewing court; and
- Potentially reducing trial court costs associated with identifying the minutes that must be included in the record on appeal.

Relevant Strategic Plan Goals and Operational Plan Objectives

This proposal will further the Judicial Council's Strategic Plan Goal: III. Modernization of management and administration and Operational Plan Objective: 5. Develop and implement effective trial and appellate case management rules, procedures, techniques, and practices to promote the fair, timely, consistent, and efficient processing of all types of cases.

Attachments

1. Cal. Rules of Court, rules 8.320, 8.867, and 8.920, at pages 9–13
2. Comment chart, at pages 14–24

Rules 8.320, 8.867, and 8.920 of the California Rules of Court are amended, effective January 1, 2013, to read:

Title 8. Appellate Rules

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

Chapter 3. Criminal Appeals

Article 2. Record on Appeal

Rule 8.320. Normal record; exhibits

(a)–(c) * * *

(d) Limited normal record in certain appeals

If the People appeal from a judgment on a demurrer to the accusatory pleading, or if the defendant or the People appeal from an appealable order other than a ruling on a motion for new trial, the normal record is composed of:

(1) Clerk's transcript

~~a reporter's transcript of any oral proceedings incident to the judgment or order being appealed and a~~ clerk's transcript containing:

~~(1)(A)~~ The accusatory pleading and any amendment;

~~(2)(B)~~ Any demurrer or other plea;

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

~~(4)(D)~~ The judgment or order appealed from and any abstract of judgment or commitment;

~~(5)(E)~~ Any court minutes relating to the judgment or order appealed from; and

(i) If there was a trial in the case, any court minutes of proceedings at the time the original verdict is rendered and any subsequent proceedings; or

(ii) If the original judgment of conviction is based on a guilty plea or nolo contendere plea, any court minutes of the proceedings at the time of entry of such plea and any subsequent proceedings;

- 1 (A) The complaint, including any notice to appear, and any amendment;
 2
 3 (B) Any demurrer or other plea;
 4
 5 (C) Any motion or notice of motion granted or denied by the order appealed from, with
 6 supporting and opposing memoranda and attachments;
 7
 8 (D) The judgment or order appealed from and any abstract of judgment or
 9 commitment;
 10
 11 (E) Any court minutes relating to the judgment or order appealed from; and
 12
 13 (i) If there was a trial in the case, any court minutes of proceedings at the time the
 14 original verdict is rendered and any subsequent proceedings; or
 15
 16 (ii) If the original judgment of conviction is based on a guilty plea or nolo
 17 contendere plea, any court minutes of the proceedings at the time of entry of
 18 such plea and any subsequent proceedings;
 19
 20 (F) The notice of appeal; and
 21
 22 (G) If the appellant is the defendant, all probation officer's reports.
 23
 24 (2) *Record of the oral proceedings in the trial court*

25
 26 If an appellant wants to raise any issue which requires consideration of the oral
 27 proceedings in the trial court;:

- 28
 29 (A) ~~a~~A reporter's transcript, a transcript prepared under rule ~~8.866~~ 8.868, an official
 30 electronic recording under rule 8.868, or a ~~settled~~ statement on appeal under rule
 31 8.869 summarizing any oral proceedings incident to the judgment or order being
 32 appealed.
 33
 34 (B) If the appeal is from an order after judgment, a reporter's transcript, a transcript
 35 prepared under rule 8.868, an official electronic recording under rule 8.868, or a
 36 statement on appeal under rule 8.869 summarizing any oral proceedings from:
 37
 38 (i) The original sentencing proceeding; and
 39
 40 (ii) If the original judgment of conviction is based on a guilty plea or nolo
 41 contendere plea, the proceedings at the time of entry of such plea.
 42

43 **Advisory Committee Comment**

44
 45 **Subdivision (1)(E).** This rule identifies the minutes that must be included in the record. The trial court
 46 clerk may include additional minutes beyond those identified in this rule if that would be more cost-
 47 effective.

1
2 **Subdivision (1)(G).** Rule 8.862(c) addresses the appropriate handling of probation officers' reports that
3 must be included in the clerk's transcript under (1)(G).
4
5

6
7 **Chapter 5. Appeals in Infraction Cases**
8

9 **Article 2. Record in Infraction Appeals**
10

11 **Rule 8.920. Limited normal record in certain appeals**
12

13 If the People appeal from a judgment on a demurrer to the complaint, including any notice to
14 appear, or if the defendant or the People appeal from an appealable order other than a ruling on a
15 motion for new trial, the normal record is composed of:
16

17 (1) *Record of the documents filed in the trial court*
18

19 A clerk's transcript or original trial court file containing:
20

21 (A) The complaint, including any notice to appear, and any amendment;
22

23 (B) Any demurrer or other plea;
24

25 (C) Any motion or notice of motion granted or denied by the order appealed from, with
26 supporting and opposing memoranda and attachments;
27

28 (D) The judgment or order appealed from and any abstract of judgment;
29

30 (E) Any court minutes relating to the judgment or order appealed from; and
31

32 (i) If there was a trial in the case, any court minutes of proceedings at the time the
33 original judgment is rendered and any subsequent proceedings; or
34

35 (ii) If the original judgment of conviction is based on a guilty plea or nolo
36 contendere plea, any court minutes of the proceedings at the time of entry of
37 such plea and any subsequent proceedings; and
38

39 (F) The notice of appeal.
40
41

1 (2) *Record of the oral proceedings in the trial court*

2
3 If an appellant wants to raise any issue that requires consideration of the oral proceedings
4 in the trial court;

5
6 (A) ~~a~~A reporter's transcript, a transcript prepared under rule 8.918 8.917, an official
7 electronic recording under rule 8.917, or a ~~settled~~ statement on appeal under rule
8 8.915 8.916 summarizing any oral proceedings incident to the judgment or order
9 being appealed.

10
11 (B) If the appeal is from an order after judgment, a reporter's transcript, a transcript
12 prepared under rule 8.917, an official electronic recording under rule 8.917, or a
13 statement on appeal under rule 8.916 summarizing any oral proceedings from:

14
15 (i) The original sentencing proceeding; and

16
17 (ii) If the original judgment of conviction is based on a guilty plea or nolo
18 contendere plea, the proceedings at the time of entry of such plea.

19
20 **Advisory Committee Comment**

21
22 **Subdivision (1)(E).** This rule identifies the minutes that must be included in the record. The trial court
23 clerk may include additional minutes beyond those identified in this rule if that would be more cost-
24 effective.

SPR12-03

Appellate Procedure: Contents of normal record in criminal appeals (amend Cal. Rules of Court, rules 8.320, 8.867 and 8.920)

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

	Commentator	Position	Comment	Committee Response
1.	Appellate Court Committee San Diego County Bar Association By: Kate Mayer Mangan, Chair	AM	<p>As noted in the Invitation to Comment, our committee proposed this revision and continues to support the modification as a whole. In our review of the proposal, however, we were concerned by one change from our proposal. In the Judicial Council’s proposed change, rule 8.320(d)(1)(E) requires the clerk to include “[a]ny court minutes relating to the judgment or order appealed from” Our original suggestion was to require the inclusion in the clerk’s transcript of <i>all</i> court minutes. We believe such an approach is appropriate for several reasons.</p> <p>First, our members remain concerned about the burden placed on clerks to determine which minutes are sufficiently “related” to the judgment or order appealed from. The clerks would have to be trained to determine the proper scope of related minutes. Most importantly, the clerks would have to expend considerable time on each appeal to discern which minutes are related. From the clerks’ perspective, it would be unquestionably easier and faster to simply include every court minute in a file. It seems likely that the training and resources spent determining which minutes to include would undermine any potential cost savings.</p> <p>Second, even assuming that a clerk would most often correctly select the relevant court minutes, it is inevitable that appellate counsel will want additional minutes added to the record beyond</p>	<p>It is the committee’s understanding, based on input from the Trial Court Presiding Judges Advisory Committee/Court Executives Advisory Committee Joint Rules Working Group, that trial court clerks can currently choose to include all court minutes in these clerk’s transcripts if that approach is most cost effective for the trial court. Given that the costs associated with preparing the clerk’s transcript fall mainly on the trial courts, the committee concluded that it would be best not to disturb the trial court’s current authority to assess what would be the most cost effective approach. The committee therefore declined to recommend that the rule be amended to require inclusion of all minutes, but recommends adding an advisory committee comment accompanying these rules that specifically indicates the trial court clerk can include additional minutes in the clerk’s transcript if that would be most cost effective.</p>

SPR12-03

Appellate Procedure: Contents of normal record in criminal appeals (amend Cal. Rules of Court, rules 8.320, 8.867 and 8.920)

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	Commentator	Position	Comment	Committee Response
			<p>those that the clerk deemed to be related. Appellate counsel would then have to file a motion to augment to add those additional minutes to the record. Thus, the current proposal would add to counsel’s time spent on a case. Further, the consideration of these motions to augment would increase the burden on the Courts of Appeal. Resolving these motions to augment would also slow down the time for completion of the appeal.</p> <p>Our members recognize that a rule requiring the inclusion of all court minutes in the clerk’s transcript would result in larger records containing potentially irrelevant court minutes. We considered this effect, and its related cost, but ultimately decided it would be less of a burden than the alternative, cumulative burden on the courts and counsel. We believe that a rule requiring all court minutes to be included would be in the best interest of superior court clerks, appellate counsel, and the Courts of Appeal.</p>	
2.	Committee on Appellate Courts State Bar of California By: Paul R. Johnson, Chair	A	<p>The Committee on Appellate Courts supports this rule change. We agree that it will reduce the need for routine motions to augment the record, which burden both the courts and counsel.</p> <p>The Committee has reviewed the general benefits of more inclusive, but perhaps often over-inclusive default records, on the one hand, versus less inclusive records and ones that leave more to the discretion of clerks, on the other. The Committee believes it is not practical —</p>	The committee appreciates this input.

SPR12-03**Appellate Procedure: Contents of normal record in criminal appeals** (amend Cal. Rules of Court, rules 8.320, 8.867 and 8.920)

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	Commentator	Position	Comment	Committee Response
			<p>either for appointed counsel or for the courts — to have clerks make discretionary calls on what should or should not be included. The prevailing view of Committee members is that in criminal appeals, fuller records are almost always a good thing.</p> <p>Therefore, while believing that the proposed change is for the better, a majority of the Committee would have gone further and adopted the proposal referenced on page 3 of the Invitation to Comment, which was made by the San Diego County Bar Association, and which would have the normal record in these appeals include all minutes rather than only those from the entry of the verdict or a guilty or nolo contendere plea. The Committee believes that in addition to the reasons advanced by the San Diego County Bar Association, such a rule change would assist appointed counsel new to the case in understanding its history. Even though in the nature of probation revocation appeals, and the like, the underlying proceedings are not the subject of the appeal itself, there are instances where review of what took place is desirable, such as when there is a question as to whether there had been ineffective assistance of counsel.</p>	<p>See response to comments of the Appellate Courts Committee of the San Diego County Bar Association above.</p>
3.	<p>Court of Appeal, Fourth Appellate District, Division One By: Judith D. McConnell, Presiding Justice</p>	A	<p>We strongly support the proposed amendments to Rules 8.320(d), 8.867, and 8.920 to expand the scope of the normal record in certain criminal appeals, as these proposed amendments will avoid the delays caused by having to</p>	<p>See response to comments of the Appellate Courts Committee of the San Diego County Bar Association above.</p>

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	Commentator	Position	Comment	Committee Response
			<p>augment the record to include needed materials, as well as the expenditure of resources by the parties and the court. In addition, we believe that it is a better idea to keep these rules as simple to implement as possible and thus urge that the proposed changes be revised to require the inclusion of all minute orders in the appellate record.</p> <p>Based on similar efficiency considerations, it would be helpful if the records for all cases in which a <i>Pitchess</i> hearing has been held included the materials relating to those hearings. Appellate counsel almost always request augmentation of the record to include such materials in such cases, which delays their processing and requires significant court staff time and attention. For this reason, we suggest that the Committee also consider amending Rule 8.320(b) and (c) to require the inclusion of <i>Pitchess</i> hearing transcripts and documents as part of the record for all cases in which such a hearing has been conducted.</p>	<p>The committee appreciates this suggestion. Since this issue was not addressed in the proposal that was circulated comment, the committee will not make a recommendation to the council about this issue at this time, but will consider it in the upcoming committee year.</p>
4.	<p>First District Appellate Project, Appellate Defenders, Inc. and California Appellate Project – San Francisco By: Mat Zwerling, Executive Director</p>	A	<p>We strongly agree with the proposed changes and have one suggestion.</p> <p>The drafting committee has requested comments on the following concerns, which we address in turn. <i>“Does the proposal appropriately address the stated purpose?”</i> With the exception of the scope of the inclusion of minutes, discussed below, we believe the</p>	<p>The committee appreciates this input.</p>

SPR12-03

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	Commentator	Position	Comment	Committee Response
			<p>proposal does appropriately address its stated purpose.</p> <p><i>“Are the additional materials that would be included in the normal record under this proposal routinely needed in the substantial majority of the felony, misdemeanor, and infraction cases covered under this proposal?”</i></p> <p>This additional record is routinely needed in post-judgment appeals in order to determine whether the disposition is in accordance with the judgment and/or plea bargain. The proposal obviates the need for costly and time-consuming augmentation in most cases.</p> <p><i>“Are there differences in the materials that are routinely needed in the record for probation revocation appeals and for appeals from restitution orders or the other types of appeals covered by these rules that warrant the rules having separate provisions on the contents of the record in these appeals?”</i></p> <p>We believe these materials are needed in all post-judgment appeals. For example, in restitution appeals, a full record of the plea is necessary in order to ascertain whether the restitution order is consistent with the plea bargain. This concern – consistency of the disposition with the plea bargain – also pertains in credits appeals. In addition, in credits appeals as complete a record as possible is necessary to assist in determining the appellant’s dates in custody. We do not see any substantial difference in the record needs for these different</p>	<p>The committee appreciates this input.</p> <p>The committee appreciates this input.</p>

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Appellate Procedure: Contents of normal record in criminal appeals (amend Cal. Rules of Court, rules 8.320, 8.867 and 8.920)

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			<p>types of appeals to warrant having separate provisions, with the concomitant risk of confusion that might result.</p> <p><i>“Would it be less burdensome for court staff to include all of the minutes relating to a proceeding in the record rather than having to search for specific minutes?”</i></p> <p>Not only would it be less burdensome, but we believe that the additional minutes should be included for substantive reasons as well. In our experience, it is difficult for superior court clerks to ascertain which documents are necessary, and for consistency and ease the inclusion of all minutes of the action would significantly decrease the burden on them. This is of particular import at a time when the state budgetary process foreshadows further cuts in the trial courts.</p> <p>Inclusion of all minutes, rather than just those of the plea and sentencing, would also better fulfill the appellate need for an overview of the action to determine whether the post-judgment order comports with the determinations made in prior proceedings, the appellant’s custody status, etc. (See our comment on the previous question.) It would also provide further cost savings in the many cases in which this additional record would otherwise have to be requested by means of augmentation.</p> <p>Finally, for the reasons stated above, if the committee decides that inclusion of all minutes</p>	<p>See response to comments of the Appellate Courts Committee of the San Diego County Bar Association above.</p> <p>The committee appreciates this suggestion and has modified the proposal to incorporate this change.</p>

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			is not warranted, we strongly urge that the rule at minimum include the minutes <i>of the verdict</i> , in addition to the minutes of proceedings <i>after the verdict</i> .	
5.	Michael Fischer Attorney Santa Monica	A	<p>I write to briefly lend my endorsement to SPR 12-03, regarding the proposed amendments to California Rules of Court, rules 8.320, 8.867 and 8.920. The Second District Court of Appeal’s local rules prescribing automatic augmentation of postconviction minutes, documents and transcripts work very well for criminal appellate attorneys charged with identifying and raising all appellate issues of arguable merit, and can be a substantial time-saver when an appellate record allowing counsel to present postconviction issues is readily available. In this way the Court of Appeal for the Second District avoids the time and resources expended on augmentation requests which other appellate districts incur routinely. I have recently encountered problems along these lines in other courts, such as a recent one in the Appellate Division of the Los Angeles County Superior Court where some minute orders needed for my consideration had been omitted; I even had one Second District appeal where the reporter's transcript did not comply with our local rule in that respect. So, in my mind, the closer we come to “automatic” inclusion of materials, the better it is for appellate counsel and the Courts of Appeal.</p> <p>But that certainly must be true for the trial court</p>	The committee appreciates this input.

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			<p>clerks and reporters as well. Why should a busy superior court clerk working an appeal file have to decide which documents should be included in a clerk's transcript? Why shouldn't a court reporter just automatically transcribe and provide for the reporter's transcript any postconviction proceedings that bear on sentencing, probation revocation, restitution issues, and of course custody credits? So I think the San Diego County Bar's Appellate Court's Committee is right to suggest that the systemic burden would be no greater, and perhaps less costly, to just include everything as long as these issues remain cognizable on appeal.</p> <p>I am in no position to answer directly the overall question of cost savings. But if the San Diego Bar committee is correct that the trade off involved in court clerks not having to search for documents, but providing them automatically (which should not be a matter of considerable expense for training), comes out even, the fact that most criminal appeals involve court-appointed attorneys whose time must be compensated surely argues for adopting the rule in its broadest sense. When I served on the Appellate Advisory Committee, I often found the San Diego committee's detailed suggestions thoughtful and useful in considering other proposals, and surely the Committee can call on the various project directors for confirmation of the benefits suggested for the proposal in this instance. As the Second District long ago concluded, it takes just a couple of avoidable</p>	

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			augmentation requests a month (and all of the court time at both the appellate and trial levels required to process them) to see how, as in the past, being too penny-wise can turn pound-foolish.	
6.	Orange County Bar Association By: Dimetria Jackson, President	A	No additional comments.	The committee appreciates this input.
7.	San Diego County District Attorney’s Office By: Craig Fisher, Deputy District Attorney	AM	<p>We suggest modifying Rule 8.320 to add subdivision (d)(1)(H) stating: “If the People appeal from the modification or reduction of the offense or punishment (Pen. Code, sec. 1238(a)(6)) or the imposition of an unlawful sentence (Pen. Code, sec. 1238(a)(8)), all probation reports and any court-ordered diagnostic report required under Penal Code section 1203.03(b).”</p> <p>Many of our People’s appeals involve sentencing issues. As with the proposal to include probation reports in a defendant’s “limited” appeal, it would save time and costs to also include such materials in the clerk’s transcript for a People’s “limited” appeal based on claimed errors under Penal Code section 1238(a)(6) and (a)(8).</p>	The committee appreciates this suggestion. Since this issue was not addressed in the proposal that was circulated comment, the committee will not make a recommendation to the council about this issue at this time, but will consider it in the upcoming committee year.
8.	TCPJAC/CEAC Joint Rules Working Group	A	<p>The TCPJAC/CEAC Joint Rules Working Group agrees with the proposed changes.</p> <p>Operational impacts identified by the working group:</p>	The committee appreciates this input.

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			<p>Potential Fiscal Impact The courts may incur some additional costs associated with copying extra pages of minutes for the record. The inclusion of more sets of minutes in the record of appeal may increase the physical case file size, thus increasing trial court’s costs and need for additional physical storage space of the paper file.</p> <p>Implementation The proposal asks whether two months from Judicial Council approval of this proposal (January 1, 2013) until its effective date provides sufficient time for implementation. The TCPJAC/CEAC Joint Rules Working Group believes that because courts are struggling to provide core services with fewer resources, proposals should not require early implementation unless statutorily mandated. New rules and forms should be adopted with an expectation they will be fully implemented within a 6 month/one year time frame, unless there are compelling reasons to implement sooner.</p> <p>Other Impact This proposal will create cost savings associated with preparing and considering augmentation requests. Efficiencies will also be achieved with preparing supplemental clerk’s or reporter’s transcripts to the reviewing court. The proposal is trying to make it easier for court staff to identify what minutes to include in the record by requiring that they all be included.</p>	

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9.	Superior Court of San Diego County By: Mike Roddy, Executive Officer	A	No additional comments.	