



Judicial Council of California · Administrative Office of the Courts

455 Golden Gate Avenue · San Francisco, California 94102-3688

www.courts.ca.gov

REPORT TO THE JUDICIAL COUNCIL

For business meeting on October 25, 2013

Title	Agenda Item Type
Appellate Procedure: Sealed and Confidential Records	Action Required
Rules, Forms, Standards, or Statutes Affected	Effective Date
Adopt Cal. 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, 8.401, 8.407, 8.409, 8.486, 8.487, and 8.610; repeal rule 8.328	January 1, 2014
	Date of Report
	August 2, 2013
	Contact
	Heather Anderson, 415-865-7691
	heather.anderson@jud.ca.gov
Recommended by	
Appellate Advisory Committee	
Hon. Raymond J. Ikola, Chair	

Executive Summary

The Appellate Advisory Committee recommends amending the rules relating to sealed and confidential records in Court of Appeal and Supreme Court proceedings to, among other things: (1) consolidate provisions on the format, transmission of, and access to these records; (2) add provisions addressing confidential records in civil appeals and writ proceedings; and (3) establish procedures for preventing the disclosure of material from these records in briefs, petitions, and other filings. These recommendations are intended to improve the administration of justice by clarifying and filling in gaps in these rules.

Recommendation

The Appellate Advisory Committee recommends that the Judicial Council, effective January 1, 2014:

1. Adopt new article 3 in Chapter 1 of Title 8 of the California Rules of Court to serve as the location for the rules relating to sealed and confidential records in the Supreme Court and Courts of Appeal;
2. Adopt new rule 8.45 to:
 - Establish the application of the rules in new article 3;
 - Establish definitions applicable to the rules in new article 3; and
 - Consolidate provisions on the general format and transmission of, and access to, sealed and confidential records in the Supreme Court and Courts of Appeal and add provisions requiring, among other things, that confidential records include a citation to or other brief description of the authority establishing that the record is closed to inspection in the court proceeding;
3. Amend rule 8.46 to:
 - Clarify that it applies to records sealed by order of the trial court under rules 2.550–2.551 and records sealed or proposed to be sealed by order of the reviewing court but does not apply to confidential records;
 - Add cross-references to proposed new rule 8.45 for requirements relating to format and transmission of, and access to, sealed records;
 - Require that the cover of any redacted and unredacted versions of any motion or application to seal or to unseal records and any opposition or supporting documents to such an application or motion be labeled as redacted or unredacted;
 - Add new provisions allowing litigants to file redacted and unredacted versions of a brief, petition, or other filing if they need to discuss sealed material or material they are requesting be sealed in that filing;
 - Add a new provision requiring sealed or conditionally sealed material in unredacted filings to be identified; and
 - Clarify that the unredacted versions of filings must be served on any party that had access to the relevant record in the trial court or other proceedings under review;
4. Adopt new rule 8.47 to:
 - Establish requirements relating to confidential records that generally apply in all Supreme Court and Court of Appeal proceedings, including both appeals and writ proceedings, unless otherwise provided by law;
 - Incorporate a simplified version of the current procedures relating to transcripts of hearings under *People v. Marsden* (1970) 2 Cal.3d 118 that would permit the People to apply for a copy of such transcripts when the defendant raises an issue related to this hearing in the reviewing court, and add a procedure for the defendant to request that the People not be given access to such transcripts if the need to maintain confidentiality remains;

- Make these procedures applicable not only to *Marsden* transcripts, but also to transcripts of other in-camera hearings from which the People were excluded; and
 - Establish procedures applicable when a party wants to maintain the confidentiality of other records sealed by operation of law, including a procedure for filing an application or motion allowing the party to file under seal a brief, petition, or other filing that discusses such records; and
5. Repeal rule 8.328 and amend rules 8.120, 8.144, 8.320, 8.336, 8.380, 8.384, 8.385, 8.401, 8.407, 8.409, 8.486, 8.487, and 8.610 to reflect new rules 8.45 and 8.47 and the amendments to rule 8.46.

The text of the proposed rule changes is attached at pages 17–38.

Previous Council Action

The predecessor to rule 8.46 was adopted by the Judicial Council effective January 1, 2001, along with similar rules for the trial courts, to establish uniform procedures regarding records sealed by court order. Effective January 1, 2004, the Judicial Council amended these rules to clarify the factual findings that must be made to seal a record and the standard for unsealing records. Effective January 1, 2006, the Judicial Council amended the predecessor to rule 8.46 to clarify that it applies to sealed records in habeas corpus proceedings. Effective January 1, 2010, the Judicial Council relocated and renumbered this rule as 8.46 to further clarify that it is applicable in criminal and civil appeals and writ proceedings in the Supreme Court and Courts of Appeal. At the same time, the council adopted rule 8.819 to specify that rule 8.46 also governs records sealed by court order in proceedings in the superior court appellate division.

The predecessor to rule 8.328, relating to confidential records in felony appeals, was adopted by the Judicial Council effective July 1, 1990, to ensure that such records are properly included in the record on appeal in these cases and to specify the procedures for ensuring that confidential information is not disclosed. As adopted, this rule did not include provisions addressing the People’s access to *Marsden* transcripts and specified that unless otherwise ordered by the reviewing court, confidential material other than *Marsden* transcripts sent to a reviewing court could be examined only by “a judge of the reviewing court personally.” Through a combination of amendments adopted by the Judicial Council effective January 1 and July 1, 1992, this rule was modified to provide that if the defendant raises a *Marsden* issue in the opening brief and does not serve notice with this brief that the *Marsden* transcript contains confidential material not relevant to the issues on appeal, on application the reviewing court clerk must send a copy of the *Marsden* transcript to the People. To address concerns about the People’s inadvertently receiving full transcripts when a defendant failed to serve such a notice with the opening brief, effective January 1, 2004, the Judicial Council amended this rule to specifically provide that, in the event that the defendant does not file the required notice, the defendant may file an objection to the People’s application seeking the *Marsden* transcript. The Judicial Council has made no subsequent substantive changes to this rule.

The predecessor to rule 8.610(b), relating to confidential records in capital appeals, was adopted by the Judicial Council, effective March 1, 1997, as part of a set of rules designed to implement statutory changes regarding preparation of the record in capital appeals. Effective January 1, 2004, the Judicial Council amended this provision to add a requirement that records sealed under this rule must comply with rule 8.328. The Judicial Council has made no subsequent substantive changes to this provision.

Rationale for Recommendation

These recommendations 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.

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 Courts 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 categories of records in court proceedings to be closed to inspection either by the public or by certain parties in the court proceedings. Examples of such records include records in juvenile proceedings (Welf. & Inst. Code, § 827 and California Rules of Court, rule 8.401), records of the family conciliation court (Fam. Code, § 1818(b)), fee waiver applications (Gov. Code, § 68633(f)), probation reports (Pen. Code, § 1203.05), court-ordered diagnostic reports (Pen. 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, 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 such records transmitted to the reviewing court, and (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 current 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 court order (see, for example, rule 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 has been closed to inspection by court order (see, for example, rule 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)). Because different procedures apply to records sealed by court order or closed to inspection by operation of law, the inconsistent use of terms may lead to confusion about what procedures apply.

Second, gaps exist in the current rules. Rule 8.46, relating to records sealed by court order, applies in all Court of Appeal and Supreme Court proceedings, but the rules relating to confidential records apply only in capital and other felony appeals. Thus, currently no rules specifically address the appropriate handling of confidential records in writ proceedings or civil appeals. 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 confidential records may be discussed in such filings.

These recommendations are intended to improve the administration of justice by clarifying and filling in gaps in the procedures relating to sealed and confidential records in Court of Appeal and Supreme Court proceedings.

Definitions

Proposed new rule 8.45 would establish a single set of definitions applicable to all of the appellate rules relating to records that are closed to inspection. In these consolidated definitions:

- The term *confidential record* would be used to refer to those records required by statute, rule of court, or other authority to be closed to inspection. This definition is based on the current language in rules 8.46(a) (sealed records) and 8.328(a) (confidential records), which refer to “records required to be kept confidential by law.” This definition is also intended to clarify that a confidential record in this context means a record that is closed to inspection **in a court proceeding**. Some records, such as medical records, would not ordinarily be available to the public but are not closed to inspection when they are used in the context of a court proceeding.
- The term *sealed record* would be used as it is currently used in rule 8.46 to refer to those records closed to inspection by court order under rules 2.550–2.551 or rule 8.46.
- The proposed definitions of *record* and *lodged record* are taken, without change, from the current definitions of these terms in rule 8.46, relating to sealed records.
- The definition of *conditionally sealed* is based on language in current rule 8.46(e), which describes the handling of documents that are the subject of an application or motion to seal.
- The definition of *redacted version* is based on the language in current rule 8.46(g), which provides that “a record filed publicly in the reviewing court must not disclose material contained in a record that is sealed, lodged conditionally under seal, or otherwise subject to a pending motion to file under seal.”

- The definition of *unredacted version* is intended to clarify that such a version may be either a complete copy of a document that includes the sealed or confidential information that was removed from the redacted version of the document or just the portion of the document, such as the one section of a brief that discusses sealed or confidential information, that was removed from the redacted version of the document.

Consolidation of format, transmission, and access requirements

The proposed amendments would consolidate the requirements, now found in several different rules, relating to the format and transmission of and access to sealed and confidential records. (See, for example, rules 8.46(c) and (e), 8.328(b) and (c), and 8.610(b) and (d).) These consolidated provisions would, among other things, generally require that these 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” or “Confidential—May Not Be Examined Without Court Order” and include a reference to the court order sealing the record or the specific basis for the confidentiality of the record 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;
- 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; and
- Generally be listed by title (as long as doing so does not disclose the substance of the sealed record) in the publicly available alphabetical and chronological indexes of the clerk’s or reporter’s transcript, appendix, supporting documents, or other records sent to the reviewing court, but be identified as “Sealed” or “Confidential.”

Following are the main substantive differences between the proposed new provisions and the current rules:

- The proposed rules would apply in all Supreme Court and Court of Appeal proceedings, including civil writ proceedings in which the court might be reviewing the action of, and thus receiving records from, a body other than a trial court.
- In anticipation of the electronic transmission of records, the proposed rules would require that only paper copies of sealed and confidential records be placed in an envelope or other container; nonpaper records would simply be required to be kept separate from other records transmitted to the reviewing court.
- The proposed rules would require that when transmitted to a reviewing court, confidential records include a citation to or other brief description of the authority establishing that the record is closed to inspection in the court proceeding.
- The proposed rules would broaden the requirement in current rule 8.328(c)(5) that, in felony appeals, the clerk prepare and send an index of confidential materials being transmitted to the

reviewing court. Under these rules, such an index would have to be prepared in all cases (civil or criminal) in which sealed or confidential records are transmitted to a reviewing court. The index would be prepared by either the clerk or a party transmitting the records and would be transmitted and kept with the sealed or confidential records. The proposed rules would also broaden the application of the requirement that the index include the date and names of all parties present at any in-camera proceeding and their counsel to all sealed and confidential records in appellate proceedings (this requirement currently applies only to confidential records in felony appeals).

- The proposed rules would specifically address who should receive copies of sealed and confidential records. With the exception of *Marsden* transcripts, neither rule 8.328 nor rule 8.46 currently specifies who should be sent copies of such records. The proposed rules would provide for transmission of and access to such records by the party or parties who had access to the record in the trial court or other proceedings under review. This language is intended to reflect the fact that, under this proposal, the rules on confidential records would apply in civil writ proceedings in which the court may be reviewing the proceedings of a body other than a court.
- The proposed rules would give reviewing court staff in felony appeals access to sealed and confidential records without the need for a court order. Under current rule 8.328(c)(6), unless the reviewing court orders otherwise, confidential material, other than *Marsden* transcripts, that is sent to the reviewing court may be examined only by “a reviewing court justice personally.” This restriction was included in the predecessor to rule 8.328 when it was originally adopted by the Judicial Council in 1990 to protect against the disclosure of confidential material, particularly the identity of confidential informants, by court research attorneys and externs. The proposed new provision in rule 8.45 would more broadly allow sealed and confidential records to be examined by “the reviewing court.” This change is intended to eliminate questions about whether court research attorneys and administrative staff may have access to such records.
- The proposed new provisions delete the language specifically providing for access to confidential records by parties’ attorneys. Rule 8.328(c)(6) currently provides that “parties and their attorneys” who had access to confidential material in the trial court may examine that confidential material in the reviewing court. The proposed new provisions would eliminate the reference to parties’ attorneys. Under rule 1.6(15), which establishes the general definitions applicable to all of the California Rules of Court, the term *party* includes the party’s attorney of record. Therefore, when the rule indicates that a party may access confidential records, that authorization encompasses the party’s attorney. However, the rule does clarify that if only the party’s attorney, and not the party, had access to a record, only the attorney may access that record in the reviewing court proceedings.
- Under the proposed new provisions, references to sealed records in the publicly available alphabetical and chronological indexes of the clerk’s or reporter’s transcript, appendix, supporting documents, or other records sent to the reviewing court would be required to be

handled in the same manner that references to confidential records are currently handled in capital and felony appeals.

The proposed rules would also consolidate the requirements now found in several rules regarding the special handling of certain confidential records, including probation reports and records relating to requests for investigation funds in capital cases under Penal Code section 987.9 proceedings. (See, for example, rules 8.328(c)(5), 8.336(g), 8.610(b), and 8.610(d).) There are two main substantive differences between the proposal and the current rules:

- In the proposed rules, the limits on references to the proceedings in indexes and other special handling requirements that now apply only to Penal Code section 987.9 proceedings would also apply to “other proceedings the occurrence of which is not to be disclosed under the court order or applicable law.”
- In the proposed rules, records relating to Penal Code section 987.9 proceedings would have to be bound separately from any other confidential records. Currently, rule 8.610(b) requires that such records be bound separately from records relating only to Penal Code section 987.2 proceedings.

Rules on records sealed by operation of law in writ proceedings and civil appeals

The proposed rules would replace the existing rules relating to confidential records in felony and capital appeals with general rules relating to confidential records in all proceedings in the Courts of Appeal and Supreme Court, including writ proceedings. As noted in subdivision (a) of proposed new rule 8.45 and the proposed advisory committee comments to proposed new rules 8.45 and 8.47, however, special requirements may govern particular types of confidential records, and those requirements supersede the requirements in the proposed rules.

The proposed rules would also simplify the rule regarding *Marsden* transcripts. Rule 8.328 currently establishes a two-step process for determining whether a transcript of a hearing under *People v. Marsden* (1970) 2 Cal.3d 118 contains confidential material that should not be revealed to the People when the defendant raises an issue related to this hearing on appeal. Under rule 8.328(b)(4), the defendant is currently 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 file an application requesting 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, leaving the current provisions allowing the People to file an application requesting a copy of the confidential transcript and the defendant to file opposition to this application on the basis that the transcript contains confidential information that is not relevant to the issue on appeal.

In addition, the proposed rules would add a provision identifying what a defendant should do if he or she wants to raise a *Marsden* issue or an issue about one of the other covered in-camera proceedings and the need still exists to protect the confidentiality of the relevant material from that in-camera hearing—for example, if the issue is being raised in a pretrial writ proceeding and the confidential records relate to defense trial strategy. Currently, no rule addresses this circumstance, but it is the committee’s understanding that the practice is for the defendant to ask to file the relevant document under seal and ask for a protective order regarding the confidential material. This practice is recognized in case law (see *James G. v. Superior Court* (2000) 80 Cal.App.4th 275). The proposed new provision would reflect this practice by providing that the defendant may serve and file a motion or application in the reviewing court requesting an order permitting the defendant to file under seal the brief, petition, or other document that raises the issue related to the in-camera hearing and maintaining the confidentiality of the relevant material.

Use of redacted and unredacted filings to prevent disclosure

The proposed rules would add new provisions that explain what litigants must do if they need to discuss sealed or confidential 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 of the brief, petition, or other filing (a version from which all portions that disclose sealed or confidential material have been removed) would be prepared for people not permitted to access the sealed or confidential record. An unredacted version would be prepared for the court and any party permitted to access the sealed record.

The approach of using redacted and unredacted filings 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 “[i]f 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:

- For confidential records, 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 confidential material have been redacted from the public version of the brief, petition, or other filing.
- For sealed records, 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 would be permitted because, in the case of sealed records, there will already have been a judicial determination that the record at issue is required to be closed to inspection in court proceedings.

- For 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.

Following are the main substantive differences between the proposed new provisions and the current rules:

- The proposed new provisions would expand the procedure now applicable to applications to seal or unseal documents—filing or lodging both public redacted and unredacted versions of documents—to any other filing in which the litigant needs to disclose material from a sealed or confidential record.
- The proposed new provisions would distinguish between documents that disclose material from records that a court has already ordered sealed and documents that disclose material from confidential or conditionally sealed records. The main distinction is that when the record is already sealed, both the redacted and the unredacted versions of the document referencing that sealed record would be filed, whereas when the record being referenced is confidential or only conditionally under seal, the unredacted version is just lodged conditionally under seal and will generally be returned to the filing party if the court determines that the record is not confidential or the application or motion to seal the referenced record is denied.
- To ensure that unredacted versions of documents can easily be distinguished from public redacted versions, the proposed new provisions would require the covers of redacted and unredacted documents and, if applicable, the envelopes containing such documents, to include an identifying note.
- To help reviewing courts recognize what sealed, confidential, or conditionally sealed material would be disclosed if the unredacted version of a document were publicly filed, the proposed rules would require the filing party to identify the sealed, confidential, or conditionally sealed material referenced in the filing. In the case of material from a record that was already ordered sealed by either the trial or the reviewing court, the proposed rules would also require the filing party to provide a citation to the court’s sealing order. Note that under rule 8.46(c) (proposed rule 8.46(b)), if the appellate record or supporting documents to a petition, application, motion, or other filing include a record sealed by the trial court, the trial court’s sealing order must be included in the appellate record or supporting documents.

Other proposed changes

The committee is also recommending amendments to a number of rules that currently either specifically address certain confidential records or generally address the format or transmission of records to the reviewing court to add or update references to the proposed new rules on sealed and confidential records.

Comments, Alternatives Considered, and Policy Implications

Comments

Eleven individuals or organizations submitted comments on this proposal. Five commentators agreed with the proposal, one of which also made technical suggestions. Four commentators did not state a position on the proposal overall, but three of these provided input on specific portions of the proposal. Two commentators opposed the proposal.¹ The full text of the comments received and the committee's responses are set out in the attached comment chart at pages 39–59. The main substantive comments and the committee's responses are discussed below.

Definitions.

Proposal circulated for comment. In the proposal that was circulated for public comment, the term *sealed record* was used to refer to all records closed to inspection in a court proceeding, whether that closure was ordered by a court or required by statute, rule, or other law. A new term, *record sealed by operation of law*, was proposed 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 the rules. The draft invitation to comment included a specific request for input on the proposed new definitions.

Public comments. Three commentators provided input on this proposed new terminology:

- The Superior Court of San Diego County indicated that it liked term the term “sealed by operation of law”;
- Both the Superior Court of Los Angeles County and the Trial Court Presiding Judges Advisory Committee/Court Executives Advisory Committee Joint Rules Working Group (joint rules working group) expressed concern about applying a different meaning to the term *sealed record* in the trial and appellate rules and opposed the entire proposal primarily on this basis. The joint rules working group indicated that, now that the trial court sealed records rules have been in effect for 12 years, the term *sealed record* has a specific meaning to trial court clerks and judges. The group indicated that using this term to mean something different would cause confusion and impose training costs for staff and judges.

Committee response. To address these commentators' concerns, the committee revised the proposal so that the term *sealed record*, as used in the proposed amendments, retains the same meaning as it currently does in both the trial and appellate court rules relating to sealing of records. In addition, the committee revised the proposal to use the term *confidential records* rather than *records sealed by operation of law*.

¹ Based on the revisions made to the proposal following review of the public comments, one of these commentators, the Trial Court Presiding Judges Advisory Committee/Court Executives Advisory Committee Joint Rules Working Group, has withdrawn its opposition to the proposal.

Application of rules to juvenile records.

Proposal circulated for comment. The proposal that was circulated for public comment included one sentence indicating that rules 8.45–8.47 “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.”

Public comments. Three commentators submitted comments relating to the application of the proposed rules to juvenile records:

- The Office of the County Counsel of Los Angeles noted that Welfare and Institutions Code section 827 and rule 8.401 already address the confidentiality of juvenile records and suggested that the committee might want to consider exempting juvenile proceedings from these rules. In addition, the commentator also specifically noted that briefs raising *Marsden* issues are not filed publicly in juvenile proceedings.
- The Superior Court of San Diego County appeared to support application of the rules to juvenile records. It indicated that even though the court issues a protective order when it allows the release of juvenile documents, staff worry about where the records might end up. The court also indicated that it would like to see the main examples of confidential records (including juvenile records) specified somewhere in the rule.
- The joint rules working group expressed concern about applying the format requirements for sealed and confidential records to juvenile court records because doing so would require courts to incur additional costs associated with purchasing large numbers of envelopes or specially marked boxes to transmit these records to the Courts of Appeal.

Discussion and committee response. Juvenile records are subject to their own distinct confidentiality requirements under both statute and rules of court. Welfare and Institutions Code section 827 and following and rule 5.552 generally make juvenile case files confidential and specify who may access these files. Rule 8.401 provides that to protect the anonymity of juveniles involved in juvenile court proceedings, a juvenile’s first name and last initial must generally be used in appellate court filings and opinions. It also provides that the record on appeal and documents filed by the parties in appellate proceedings in juvenile cases may be inspected only by the reviewing court and appellate project personnel, the parties or their attorneys, and other persons the court may designate. Welfare and Institutions Code sections 389 and 781 and Penal Code section 1203.45 and rule 5.830 also contain provisions regarding “sealing” of juvenile records. *Sealing* in these statutes essentially means expunging these records.

Given these existing confidentiality requirements for juvenile records, the committee considered whether each of the requirements in these proposed rule amendments should apply to juvenile records:

- **The requirements to segregate confidential records transmitted to the reviewing court and place them in sealed envelopes.** The committee concluded that applying this

requirement to juvenile case files as a whole did not make sense because under Welfare and Institutions Code section 827 the entire case file is confidential. Thus, there is generally nothing to segregate. However, some records within a juvenile case file may be sealed or confidential based on authority other than section 827. For example, there may be a confidential transcript from a *Marsden* hearing or the trial court may have sealed information regarding the current location of a child. The committee concluded that records within a juvenile case file that are sealed or confidential for reasons beyond Welfare and Institutions Code section 827 et seq. should be subject to the segregation requirements.

- **The requirement to label the records as confidential and to give the basis for the confidentiality.** The committee concluded that this requirement is essentially the current practice—juvenile case files are identified as such and labeled confidential—and therefore that it was appropriate for this requirement to apply to juvenile records.
- **The requirement to submit a confidential index of the confidential documents.** The committee similarly concluded that this requirement is essentially the current practice—the clerk prepares an index of the juvenile case file and that index, like the rest of the file, is confidential—and thus that it was also appropriate to apply this requirement to juvenile records.
- **The provisions restricting access to confidential records to “the party or parties who had access to the record in the trial court or other proceedings under review.”** The committee concluded that it was appropriate to apply this requirement to juvenile records. However, it was noted that current rule 8.401(a) may be inconsistent with this requirement. Rule 8.401 currently provides that, with the exception of situations in which a person is considering filing an amicus brief, “the record on appeal and documents filed by the parties in proceedings under this chapter may be inspected only by the reviewing court and appellate project personnel, the parties or their attorneys, and other persons the court may designate.” As noted above, there are situations in which certain sealed or confidential records within a juvenile case file are closed to inspection by a party or parties to a juvenile proceeding. The committee concluded that the proposed rules on sealed and confidential records should govern access to these records.
- **The requirement to publicly file briefs raising *Marsden* issues.** The committee concluded that this requirement should not apply in juvenile cases. Under rule 8.401(a), unlike in most cases, briefs in juvenile cases are not made public. The committee concluded that briefs raising *Marsden* issues should be treated like other briefs in juvenile cases and thus should be closed to public inspection.
- **The requirements for both public redacted and unredacted versions of filings that disclose information from confidential records.** Similar to the requirements for segregating sealed and confidential records, the committee concluded that the requirements for redacted and unredacted versions of filings should apply to sealed or confidential records within juvenile case files.

With the exception of the provision on *Marsden* briefs, all of the provisions in the proposal that are applicable to confidential records include language indicating that they apply only unless otherwise provided by law. However, the public comments about juvenile records and some of the other comments seemed to raise questions about whether it is sufficiently clear that these proposed rules are not meant to supersede provisions that establish specific requirements for certain types of records. The committee concluded that it might be helpful to highlight the intent not to override specific requirements.

Based on these conclusions, the committee made the following changes to the proposal:

- Added a sentence to proposed rule 8.45(a) clarifying that where there are other laws that establish specific requirements for particular types of sealed or confidential records that differ from the requirements in rules 8.45–8.47, those specific requirements supersede the requirements in rules 8.45–8.47.
- Revised proposed rule 8.45(c)(1)(A) to provide that the requirement to place confidential records in a sealed envelope or container does not apply to a juvenile case file but does apply to records within that file that are sealed or confidential under authority other than Welfare and Institutions Code section 827 et seq.;
- Added a proposed amendment to rule 8.401 clarifying that access to records that are sealed or confidential under authority other than Welfare and Institutions Code section 827 et seq. is governed by rules 8.45–8.47;
- Revised proposed rule 8.47(b)(2)(A) and (3) to provide that the requirement to publicly file a brief raising a *Marsden* issue does not apply in juvenile cases;
- Modified the proposed labeling requirements for unredacted versions of filings in juvenile cases to add a specific requirement for juvenile cases that the filing not be labeled as “public,” but simply be labeled as “redacted version”; and
- Where the text of the proposed amendments referred to filing a “public redacted version,” striking out the word “public.”

Use of redacted and unredacted filings to prevent disclosure.

Proposal circulated for comment. The proposal that was circulated for public comment would have required the filing of a complete unredacted version of documents revealing sealed or confidential information for the court and any party permitted to access the sealed record.

Public comments. One commentator raised concerns that this proposal would require the filing of full copies of both the redacted and the unredacted briefs and petitions, which differs from the current practice in capital appeals. This commentator indicated that in capital appeals, a brief or petition with the sealed material redacted from it is publicly filed and only the portions of the brief or petition referencing sealed materials, and any sealed exhibits, are submitted under separate cover. The commentator recommended that this option be retained because it would be

very costly to submit full copies of both briefs, particularly in capital appeals, where the briefs can be quite lengthy.

Committee response. Based on these comments, the committee revised the proposal to:

- Add a definition of “unredacted version” that includes either a filing or a portion of a filing that discloses material contained in a sealed or confidential record; and
- Delete the requirement to file a “complete” unredacted version of filings.

Other alternatives considered

The committee considered proposing no amendments to the rules relating to sealed and confidential records. 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 the handling of these records, 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.

Implementation Requirements, Costs, and Operational Impacts

This proposal should impose no significant implementation burdens on either the superior or appellate courts and should improve the administration of justice in Court of Appeal and Supreme Court proceedings.

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 8.45, 8.46, 8.47, 8.120, 8.144, 8.320, 8.336, 8.380, 8.384, 8.385, 8.401, 8.407, 8.409, 8.486, 8.487, and 8.610, at pages 17–38
2. Comment chart, at pages 39–59

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, 8.401, 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 and Confidential Records

Rule 8.45. General provisions

(a) Application

The rules in this article establish general requirements regarding sealed and confidential records in appeals and original proceedings in the Supreme Court and Courts of Appeal. Where other laws establish specific requirements for particular types of sealed or confidential records that differ from the requirements in this article, those specific requirements supersede the requirements in this article.

(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 to inspection by the public or a party by order of a court under rules 2.550–2.551 or rule 8.46.
- (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.
- (5) A “confidential” record is a record that, in court proceedings, is required by statute, rule of court, or other authority except a court order under rules 2.550–2.551 or rule 8.46 to be closed to inspection by the public or a party.
- (6) A “redacted version” is a version of a filing from which all portions that disclose material contained in a sealed, conditionally sealed, or confidential record have been removed.

1 (7) An “unredacted version” is a version of a filing or a portion of a filing that discloses
2 material contained in a sealed, conditionally sealed, or confidential record.
3

4 **(c) Format of sealed and confidential records**
5

6 (1) Unless otherwise provided by law or court order, sealed or confidential records that
7 are part of the record on appeal or the supporting documents or other records
8 accompanying a motion, petition for a writ of habeas corpus, other writ petition, or
9 other filing in the reviewing court must be kept separate from the rest of a clerk’s or
10 reporter’s transcript, appendix, supporting documents, or other records sent to the
11 reviewing court.
12

13 (A) If the records are in paper format, they must be placed in a sealed envelope or
14 other appropriate sealed container. This requirement does not apply to a
15 juvenile case file but does apply to any record contained within a juvenile case
16 file that is sealed or confidential under authority other than Welfare and
17 Institutions Code section 827 et seq.
18

19 (B) Sealed records, and if applicable the envelope or other container, must be
20 marked as “Sealed by Order of the Court on (Date).”
21

22 (C) Confidential records, and if applicable the envelope or other container, must be
23 marked as “Confidential (Basis)—May Not Be Examined Without Court
24 Order.” The basis must be a citation to or other brief description of the statute,
25 rule of court, case, or other authority that establishes that the record must be
26 closed to inspection in the court proceeding.
27

28 (D) The superior court clerk or party transmitting sealed or confidential records to
29 the reviewing court must prepare a sealed or confidential index of these
30 materials. If the records include a transcript of any in-camera proceeding, the
31 index must list the date and the names of all parties present at the hearing and
32 their counsel. This index must be transmitted and kept with the sealed or
33 confidential records.
34

35 (2) Except as provided in (3) or by court order, the alphabetical and chronological
36 indexes to a clerk’s or reporter’s transcript, appendix, supporting documents, or other
37 records sent to the reviewing court that are available to the public must list each
38 sealed or confidential record by title, not disclosing the substance of the record, and
39 must identify it as “Sealed” or “Confidential”—May Not Be Examined Without
40 Court Order.”
41

42 (3) Records relating to a request for funds under Penal Code section 987.9 or other
43 proceedings the occurrence of which is not to be disclosed under the court order or
44 applicable law must not be bound together with other sealed or confidential records
45 and must not be listed in the index required under (1)(D) or the alphabetical or

1 chronological indexes to a clerk’s or reporter’s transcript, appendix, supporting
2 documents to a petition, or other records sent to the reviewing court.

3
4 **(d) Transmission of and access to sealed and confidential records**

- 5
6 (1) Unless otherwise provided by (2)–(4) or other law or court order, a sealed or
7 confidential record that is part of the record on appeal or the supporting documents
8 or other records accompanying a motion, petition for a writ of habeas corpus, other
9 writ petition, or other filing in the reviewing court must be transmitted only to the
10 reviewing court and the party or parties who had access to the record in the trial
11 court or other proceedings under review and may be examined only by the reviewing
12 court and that party or parties. If a party’s attorney but not the party had access to the
13 record in the trial court or other proceedings under review, only the party’s attorney
14 may examine the record.
- 15
16 (2) Except as provided in (3), if the record is a reporter’s transcript or any document
17 related to any in-camera hearing from which a party was excluded in the trial court,
18 the record must be transmitted to and examined by only the reviewing court and the
19 party or parties who participated in the in-camera hearing.
- 20
21 (3) A reporter’s transcript or any document related to an in-camera hearing concerning a
22 confidential informant under Evidence Code sections 1041–1042 must be transmitted
23 only to the reviewing court.
- 24
25 (4) A probation report must be transmitted only to the reviewing court and to appellate
26 counsel for the People and the defendant who was the subject of the report.

27
28 **Advisory Committee Comment**

29
30 **Subdivision (b)(5).** Examples of confidential records are records in juvenile proceedings (Welf. & Inst.
31 Code, § 827 and California Rules of Court, rule 8.401), records of the family conciliation court (Fam.
32 Code, § 1818(b)), fee waiver applications (Gov. Code, § 68633(f)), probation reports (Penal Code,
33 § 1203.05), and court-ordered diagnostic reports (Penal Code, § 1203.03). This term also encompasses
34 records closed to inspection by a court order other than an order under rules 2.550–2.551 or 8.46, such as
35 situations in which case law, statute, or rule has established a category of records that must be closed to
36 inspection and a court has found that a particular record falls within that category and has ordered that it
37 be closed to inspection. Examples include discovery material subject to a protective order under Code of
38 Civil Procedure sections section 2030.090, 2032.060, or 2033.080 and records closed to inspection by
39 court order under *People v. Marsden* (1970) 2 Cal.3d 118 or *Pitchess v. Superior Court* (1974) 11 Cal.3d
40 531. For more examples of confidential records, please see appendix 1 of the *Trial Court Records Manual*
41 at www.courts.ca.gov/documents/trial-court-records-manual.pdf.

42
43 **Subdivisions (c) and (d).** The requirements in this rule for format and transmission of and access to
44 sealed and confidential records apply only unless otherwise provided by law. Special requirements that
45 govern transmission of and/or access to particular types of records may supersede the requirements in this
46 rule. For example, rules 8.619(g) and 8.622(e) require copies of reporters’ transcripts in capital cases to be
47 sent to the Habeas Corpus Resource Center and the California Appellate Project in San Francisco, and
48 under rules 8.336(d) and 8.409(d), in non-capital felony appeals, if the defendant—or in juvenile appeals,

1 if the appellant, the respondent, or the minor—is not represented by appellate counsel when the
2 transcripts are certified as correct, the clerk must send that counsel’s copy of the transcripts to the district
3 appellate project.

4
5 **Subdivision (c)(1)(C).** For example, for juvenile records, this mark could state “Confidential—Welf. &
6 Inst. Code, § 827” or “Confidential—Juvenile Case File”; for a fee waiver application, this mark could
7 state “Confidential—Gov. Code, § 68633(f)” or “Confidential—Fee Waiver Application”; for a probation
8 report, this mark could say “Confidential—Pen. Code, § 1203.05” or “Confidential—Probation Report”;
9 and for a transcript of an in-camera hearing under *People v. Marsden* (1970) 2 Cal.3d 118, this mark
10 could say “Confidential—*Marsden* Hearing.”

11
12 **Subdivision (c)(2).** Subdivision (c)(2) requires that, with certain exceptions, the alphabetical and
13 chronological indexes to the clerk’s and reporter’s transcripts, appendixes, and supporting documents
14 must list any sealed and confidential records but identify them as sealed or confidential. The purpose of
15 this provision is to assist the parties in making—and the court in adjudicating—motions to unseal sealed
16 records or to provide confidential records to a party. To protect sealed and confidential records from
17 disclosure until the court issues an order, however, each index must identify sealed and confidential
18 records without disclosing their substance.

19
20 **Subdivision (c)(3).** Under certain circumstances, the Attorney General has a statutory right to request
21 copies of documents filed under Penal Code section 987.9(d). To facilitate compliance with such requests,
22 this subdivision requires that such documents not be bound with other confidential documents.

23
24 **Subdivision (d).** See rule 8.47(b) for special requirements concerning access to certain confidential
25 records.

26 27 28 **Rule 8.46. Sealed records**

29 30 **(a) Application**

31
32 This rule applies to sealed records and records proposed to be sealed on appeal and in
33 original proceedings, but does not apply to confidential records required to be kept
34 confidential by law.

35 36 **~~(b) Definitions~~**

37
38 ~~(1) “Record” means all or part of a document, paper, exhibit, transcript, or other thing~~
39 ~~filed or lodged with the court.~~

40
41 ~~(2) A “sealed” record is a record closed to public inspection by court order.~~

42
43 ~~(3) A “lodged” record is a record temporarily deposited with the court but not filed.~~

1 **(e)(b) Record sealed by the trial court**

2
3 If a record sealed by order of the trial court is part of the record on appeal or the supporting
4 documents or other records accompanying a motion, petition for a writ of habeas corpus,
5 other writ petition, or other filing in the reviewing court:

6
7 (1) The sealed record must ~~be filed under seal in the reviewing court and remain sealed~~
8 unless that the reviewing court orders otherwise under ~~(f)~~(e). Rule 8.45 governs the
9 form and transmission of and access to sealed records.

10
11 (2) The record on appeal or supporting documents filed in the reviewing court must also
12 include:

13
14 (A) The motion or application to seal filed in the trial court;

15
16 (B) All documents filed in the trial court supporting or opposing the motion or
17 application; and

18
19 (C) The trial court order sealing the record.

20
21 ~~(3) —The reviewing court may examine the sealed record.~~

22
23 **(d)(c) Record not sealed by the trial court**

24
25 A record filed or lodged publicly in the trial court and not ordered sealed by that court
26 must not be filed under seal in the reviewing court.

27
28 **(e)(d) Record not filed in the trial court; motion or application to file under seal**

29
30 (1) A record not filed in the trial court may be filed under seal in the reviewing court
31 only by order of ~~that~~ the reviewing court; it must not be filed under seal solely by
32 stipulation or agreement of the parties.

33
34 (2) To obtain an order under (1), a party must serve and file a motion or application in
35 the reviewing court, accompanied by a declaration containing facts sufficient to
36 justify the sealing. At the same time, the party must lodge the record under (3),
37 unless good cause is shown not to lodge it.

38
39 (3) To lodge a record, the party must ~~put the record in an envelope or other appropriate~~
40 ~~container, seal it, and attach~~ transmit the record separate from the rest of a clerk's or
41 reporter's transcript, appendix, supporting documents, or other records sent to the
42 reviewing court with a cover sheet that complies with rule 8.40(c) and labels the
43 contents as "CONDITIONALLY UNDER SEAL." If the record is in paper format, it
44 must be placed in a sealed envelope or other appropriate sealed container.
45

- 1 (4) If necessary to prevent disclosure of material contained in a conditionally sealed
2 record, any motion or application, any opposition, and any supporting documents
3 must be filed in a ~~public~~ redacted version and lodged in a complete unredacted
4 version conditionally under seal. The cover of the redacted version must identify it
5 as “Public—Redacts material from conditionally sealed record.” In juvenile cases,
6 the cover of the redacted version must identify it as “Redacted version—Redacts
7 material from conditionally sealed record.” The cover of the unredacted version must
8 identify it as “May Not Be Examined Without Court Order—Contains material from
9 conditionally sealed record.” Unless the court orders otherwise, any party that
10 already possesses copies of the records to be placed under seal had access to the
11 record in the trial court or other proceedings under review must be served with a
12 complete, unredacted version of all papers as well as a redacted version.
13
14 (5) On receiving a lodged record, the clerk must note the date of receipt on the cover
15 sheet and retain but not file the record. The record must remain conditionally under
16 seal pending determination of the motion or application.
17 (6) The court may order a record filed under seal only if it makes the findings required
18 by rule 2.550(d)–(e).
19
20 (7) If the court denies the motion or application, the clerk must not place the lodged
21 record in the case file but must return it to the submitting party unless that party
22 notifies the clerk in writing ~~within 10 days after the order denying the motion or~~
23 ~~application~~ that the record is to be filed. Unless otherwise ordered by the court, the
24 submitting party must notify the clerk within 10 days after the order denying the
25 motion or application.
26
27 (8) An order sealing the record must direct the sealing of only those documents and
28 pages or, if reasonably practical, portions of those documents and pages, that contain
29 the material that needs to be placed under seal. All other portions of each document
30 or page must be included in the public file.
31
32 (9) Unless the sealing order provides otherwise, it prohibits the parties from disclosing
33 the contents of any materials that have been sealed in anything that is subsequently
34 publicly filed records or papers.
35

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

- 37
38 (1) A sealed record must not be unsealed except on order of the reviewing court.
39
40 (2) Any person or entity may serve and file a motion, application, or petition in the
41 reviewing court to unseal a record. ~~If necessary to preserve confidentiality, the~~
42 ~~motion, application, or petition; any opposition; and any supporting documents must~~
43 ~~be filed in both a public redacted version and a sealed complete version.~~
44
45 (3) If the reviewing court proposes to order a record unsealed on its own motion, the
46 court must mail notice to the parties. Unless otherwise ordered by the court, any

1 party may serve and file an opposition within 10 days after the notice is mailed, ~~or as~~
2 ~~the court specifies.~~ and any other party may file a response within 5 days after an
3 opposition is filed.

4
5 (4) If necessary to prevent disclosure of material contained in a sealed record, the
6 motion, application, or petition under (2) and any opposition, response, and
7 supporting documents under (2) or (3) must be filed in both a redacted version and a
8 complete unredacted version. The cover of the redacted version must identify it as
9 “Public—Redacts material from sealed record.” In juvenile cases, the cover of the
10 redacted version must identify it as “Redacted version—Redacts material from
11 sealed record.” The cover of the unredacted version must identify it as “May Not Be
12 Examined Without Court Order—Contains material from sealed record.” Unless the
13 court orders otherwise, any party that had access to the sealed record in the trial court
14 or other proceedings under review must be served with a complete, unredacted
15 version of all papers as well as a redacted version. If a party’s attorney but not the
16 party had access to the record in the trial court or other proceedings under review,
17 only the party’s attorney may be served with the complete, unredacted version.

18
19 ~~(4)~~(5) In determining whether to unseal a record, the court must consider the matters
20 addressed in rule 2.550(c)–(e).

21
22 ~~(5)~~(6) The order unsealing a record must state whether the record is unsealed entirely or in
23 part. If the order unseals only part of the record or unseals the record only as to
24 certain persons, the order must specify the particular records that are unsealed, the
25 particular persons who may have access to the record, or both.

26
27 ~~(6)~~(7) If, in addition to the records ~~in the sealed envelope or container that is the subject of~~
28 the sealing order, a court has previously ordered the sealing order itself, the register
29 of actions, or any other court records relating to the case to be sealed, the unsealing
30 order must state whether these additional records are unsealed.

31
32 **(g)(f) Disclosure of nonpublic material in public records filings prohibited**

33
34 (1) A record—Nothing filed publicly in the reviewing court—including any application,
35 brief, petition, or memorandum—~~must not~~ may disclose material contained in a
36 record that is sealed, lodged conditionally under seal, or otherwise subject to a
37 pending motion to file under seal.

38
39 (2) If it is necessary to disclose material contained in a sealed record in a filing in the
40 reviewing court, two versions must be filed:

41
42 (A) A public redacted version. The cover of this version must identify it as
43 “Public—Redacts material from sealed record.” In juvenile cases, the cover of
44 the redacted version must identify it as “Redacted Version—Redacts material
45 from sealed record.”

1 recognize the First Amendment right of access to documents used at trial or as a basis of adjudication.
2 ~~The rules do not apply to records that courts must keep confidential by law. Examples of confidential~~
3 ~~records to which public access is restricted by law are records of the family conciliation court (Fam.~~
4 ~~Code, § 1818, subd. (b)) and in forma pauperis applications (Cal. Rules of Court, rule 8.26).~~ Except as
5 otherwise expressly provided in this rule 8.26, motions in a reviewing court relating to the sealing or
6 unsealing of a record must follow rule 8.54.

7
8
9 **Rule 8.47. Confidential records**

10
11 **(a) Application**

12
13 This rule applies to confidential records but does not apply to records sealed by court order
14 under rules 2.550–2.551 or rule 8.46 or to conditionally sealed records under rule 8.46.
15 Unless otherwise provided by this rule or other law, rule 8.45 governs the form and
16 transmission of and access to confidential records.

17
18 **(b) Records of Marsden hearings and other in-camera proceedings**

19
20 (1) This subdivision applies to reporter’s transcripts of and documents filed or lodged by
21 a defendant in connection with:

22
23 (A) An in-camera hearing conducted by the superior court under *People v.*
24 *Marsden* (1970) 2 Cal.3d 118; or

25
26 (B) Another in-camera hearing at which the defendant was present but from which
27 the People were excluded in order to prevent disclosure of information about
28 defense strategy or other information to which the prosecution was not
29 allowed access at the time of the hearing.

30
31 (2) Except as provided in (3), if the defendant raises a *Marsden* issue or an issue related
32 to another in-camera hearing covered by this rule in a brief, petition, or other filing
33 in the reviewing court, the following procedures apply:

34
35 (A) The brief, including any portion that discloses matters contained in the
36 transcript of the in-camera hearing and other documents filed or lodged in
37 connection with the hearing, must be filed publicly. The requirement to
38 publicly file this brief does not apply in juvenile cases; rule 8.401 governs the
39 format of and access to such briefs in juvenile cases.

40
41 (B) The People may serve and file an application requesting a copy of the
42 reporter’s transcript of and documents filed or lodged by a defendant in
43 connection with the in-camera hearing.

44
45 (C) Within 10 days after the application is filed, the defendant may serve and file
46 opposition to this application on the basis that the transcript or documents
47 contain confidential material not relevant to the issues raised by the defendant

1 in the reviewing court. Any such opposition must identify the page and line
2 numbers of the transcript or documents containing this irrelevant material.

3
4 (D) If the defendant does not timely serve and file opposition to the application, the
5 reviewing court clerk must send to the People a copy of the reporter’s
6 transcript of and documents filed or lodged by a defendant in connection with
7 the in-camera hearing.

8
9 (3) A defendant may serve and file a motion or application in the reviewing court
10 requesting permission to file under seal a brief, petition, or other filing that raises a
11 Marsden issue or an issue related to another in-camera hearing covered by this
12 subdivision and requesting an order maintaining the confidentiality of the relevant
13 material from the reporter’s transcript of or documents filed or lodged in connection
14 with the in-camera hearing.

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

18
19 (B) The declaration accompanying the motion or application must contain facts
20 sufficient to justify an order maintaining the confidentiality of the relevant
21 material from the reporter’s transcript of or documents filed or lodged in
22 connection with the in-camera hearing and sealing of the brief, petition, or
23 other filing.

24
25 (C) At the time the motion or application is filed, the defendant must:

26
27 (i) File a public redacted version of the brief, petition, or other filing that
28 he or she is requesting be filed under seal. The cover of this version
29 must identify it as “Public—Redacts material from conditionally sealed
30 record.” The requirement to publicly file the redacted version does not
31 apply in juvenile cases; rule 8.401 generally governs access to filings
32 in juvenile cases. In juvenile cases, the cover of the redacted version
33 must identify it as “Redacted version—Redacts material from
34 conditionally sealed record.”

35
36 (ii) Lodge an unredacted version of the brief, petition, or other filing that
37 he or she is requesting be filed under seal. If this version is in paper
38 format, it must be placed in a sealed envelope or other appropriate
39 sealed container. The cover of the unredacted version of the document,
40 and if applicable the envelope or other container, must identify it as
41 “May Not Be Examined Without Court Order—Contains material from
42 conditionally sealed record.”

43
44 (D) If the court denies the motion or application to file the brief, petition, or
45 other filing under seal, the clerk must not place the unredacted brief,
46 petition, or other filing lodged under (C)(ii) in the case file but must return

1 it to the defendant unless the defendant notifies the clerk in writing that it is
2 to be filed. Unless otherwise ordered by the court, the defendant must notify
3 the clerk within 10 days after the order denying the motion or application.

4
5 **(c) Other confidential records**

6
7 Except as otherwise provided by law or order of the reviewing court:

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

13
14 (2) To maintain the confidentiality of material contained in a confidential record, if it is
15 necessary to disclose such material in a filing in the reviewing court, a party may
16 serve and file a motion or application in the reviewing court requesting permission for
17 the filing to be under seal.

18
19 (A) Except as otherwise provided in this rule, rule 8.46(d) governs a motion or
20 application under this subdivision.

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

26
27 (C) At the time the motion or application is filed, the party must:

28
29 (i) File a redacted version of the brief, petition, or other filing that he or she
30 is requesting be filed under seal. The cover of this version must identify
31 it as “Public—Redacts material from conditionally sealed record.” In
32 juvenile cases, the cover of this version must identify it as “Redacted
33 version—Redacts material from conditionally sealed record.”

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

1 (4) The clerk’s and reporter’s transcripts must comply with rules 8.45–8.47 relating to
2 sealed and confidential records.

3
4 **(b) Indexes**

5
6 Except as provided in rule 8.45, at the beginning of the first volume of each:

7
8 (1) The clerk’s transcript must contain alphabetical and chronological indexes listing
9 each document and the volume and page where it first appears;

10
11 (2) The reporter’s transcript must contain alphabetical and chronological indexes listing
12 the volume and page where each witness’s direct, cross, and any other examination,
13 begins; and

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

18
19 **(c)–(f) * * ***

20
21 **Advisory Committee Comment**

22
23 **Subdivisions (a) and (b).** Subdivisions (a)(1) and (b)(1) refer to special requirements concerning sealed
24 and confidential records established by rules 8.45–8.47. Rule 8.45(c)(2) and (3) establish special
25 requirements regarding references to sealed and confidential records in the alphabetical and chronological
26 indexes to clerk’s and reporter’s transcripts.

27
28
29 **Chapter 3. Criminal Appeals**

30
31 **Article 2. Record on Appeal**

32
33
34 **Rule 8.320. Normal record; exhibits**

35
36 **(a) * * ***

37
38 **(b) Clerk’s transcript**

39
40 The clerk’s transcript must contain:

41
42 (1)–(12) * * *

43
44 (13) And, if the appellant is the defendant:

45
46 (A)–(B) * * *

1 (C) Any document admitted in evidence to prove a prior juvenile adjudication,
2 criminal conviction, or prison term. ~~If a record was closed to public inspection in~~
3 ~~the trial court because it is required to be kept confidential by law, it must~~
4 ~~remain closed to public inspection in the reviewing court unless that court~~
5 ~~orders otherwise;~~

6
7 (D)–(E) * * *

8
9 (c)–(f) * * *

10
11 **(g) — Form of record**

12
13 The clerk's and reporter's transcripts must comply with rule 8.144, 8.328, and 8.336.

14
15 **Advisory Committee Comment**

16
17 **Subdivisions (b)(13) and (d)(1)(G).** Rules 8.336(g) 8.45–8.46 addresses the appropriate handling of
18 probation officers' reports and court ordered diagnostic reports sealed and confidential records that must
19 be included in the clerk's transcript record on appeal. Examples of confidential records include probation
20 reports, Penal Code section 1203.03 diagnostic reports, records closed to inspection by court order under
21 People v. Marsden (1970) 2 Cal.3d 118 or Pitchess v. Superior Court (1974) 11 Cal.3d 531, in-camera
22 proceedings on a confidential informant, and defense expert funding requests (Pen. Code, § 987.9;
23 Keenan v. Superior Court (1982) 31 Cal.3d 424, 430).

24
25 **Subdivision (d)(1)(E).** * * *

26
27
28 **Rule 8.328. Confidential records**

29
30 **(a) — Application**

31
32 This rule applies to records required to be kept confidential by law but does not apply to
33 records sealed under rules 2.550–2.551 or records proposed to be sealed under rule 8.46.

34
35 **(b) — Marsden hearing**

36
37 (1) — The reporter's transcript of any hearing held under *People v. Marsden* (1970) 2
38 Cal.3d 118 must be kept confidential. The chronological index to the reporter's
39 transcript must include the *Marsden* hearing but list it as "CONFIDENTIAL" or the
40 equivalent.

41
42 (2) — The superior court clerk must send the original and one copy of the confidential
43 transcript to the reviewing court with the record.

44
45 (3) — The superior court clerk must send one copy of the confidential transcript to the
46 defendant's appellate counsel or, if the defendant is not yet represented by appellate
47 counsel, to the appellate project for the district.

1
2 (4) — If the defendant raises a *Marsden* issue in the opening brief, the defendant must serve
3 and file with the brief a notice stating whether the confidential transcript contains
4 any confidential material not relevant to the issues on appeal. If the defendant states
5 that the transcript contains confidential material not relevant to the issues on appeal,
6 the notice must identify the page and line numbers of the transcript containing this
7 irrelevant material.
8

9 (5) — If the defendant serves and files a notice under (4), stating that the transcript contains
10 confidential material not relevant to the issues on appeal, the People may move to
11 obtain a copy of any relevant portion of the confidential transcript. If the defendant
12 serves and files a notice under (4), stating that no such irrelevant material is
13 contained in the transcript, the reviewing court clerk must send a copy of the
14 confidential transcript to the People.
15

16 (6) — If the defendant raises a *Marsden* issue in the opening brief but does not serve and
17 file a notice under (4), on written application the People may request a copy of the
18 confidential transcript. Within 10 days after the application is filed, the defendant
19 may serve and file opposition to this application on the basis that the transcript
20 contains confidential material not relevant to the issues on appeal. Any such
21 opposition must identify the page and line numbers of the transcript containing this
22 irrelevant material. If the defendant does not timely serve and file opposition to the
23 application, the reviewing court clerk must send a copy of the confidential transcript
24 to the People.
25

26 **(e) — Other in-camera proceedings and confidential records**
27

28 (1) — Any party may apply to the superior court for an order that the record include:
29

30 (A) — A confidential, separately paginated reporter’s transcript of any in-camera
31 proceeding at which a party was not allowed to be represented; and
32

33 (B) — Any item that the trial court withheld from a party on the ground that it was
34 confidential.
35

36 (2) — The application and any ruling under (1) must comply with rule 8.324.
37

38 (3) — If the court grants an application for a reporter’s transcript of any in-camera
39 proceeding, it may order the reporter who attended the in-camera proceeding to
40 personally prepare the transcript. The chronological index to the reporter’s transcript
41 must include the proceeding but list it as “CONFIDENTIAL—MAY NOT BE
42 EXAMINED WITHOUT COURT ORDER” or the equivalent.
43

44 (4) — The superior court clerk must send the transcript of the in-camera proceeding or the
45 confidential item to the reviewing court in a sealed envelope labeled
46 “CONFIDENTIAL—MAY NOT BE EXAMINED WITHOUT COURT ORDER.”

1 **(f) Form of record**

2
3 The clerk’s and reporter’s transcripts must comply with rules 8.45–8.47, relating to sealed
4 and confidential records, and rule 8.144.

5
6 ~~(f)(g)~~ * * *

7
8 ~~(g) — Probation officer’s reports and court-ordered diagnostic reports~~

9
10 ~~A probation officer’s report or court-ordered diagnostic report included in the clerk’s~~
11 ~~transcript under rule 8.320(b)(13)(D) or (E) must appear in all only the copies of the~~
12 ~~appellate record that are sent to the reviewing court, to appellate counsel for the People,~~
13 ~~and to appellate counsel for the defendant who was the subject of the report. The reviewing~~
14 ~~court’s copy of the report must be placed in a sealed envelope marked~~
15 ~~“CONFIDENTIAL — MAY NOT BE EXAMINED WITHOUT COURT ORDER.”~~

16
17 ~~(h)~~ * * *

18
19 **Advisory Committee Comment**

20
21 **Subdivision (a).** * * *

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

28
29
30 **Chapter 4. Habeas Corpus Appeals and Writs**

31
32 **Rule 8.380. Petition for writ of habeas corpus filed by petitioner not represented by an**
33 **attorney**

34
35 **(a)** * * *

36
37 **(b) Form and content**

38
39 A petition filed under (a) need not comply with the provisions of rules 8.40, 8.204, or
40 8.486 that prescribe the form and content of a petition and require the petition to be
41 accompanied by a memorandum. If any supporting documents accompanying the petition
42 are sealed or confidential records, rules 8.45–8.47 govern these documents.

43
44 **(c)** * * *

1
2
3 **Advisory Committee Comment**

4 **Subdivision (b).** Examples of confidential records include probation reports, Penal Code section 1203.03
5 diagnostic reports, records closed to inspection by court order under *People v. Marsden* (1970) 2 Cal.3d
6 118 or *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, in-camera proceedings on a confidential
7 informant, and defense expert funding requests (Pen. Code, § 987.9; *Keenan v. Superior Court* (1982) 31
8 Cal.3d 424, 430).

9
10 **Rule 8.384. Petition for writ of habeas corpus filed by an attorney for a party**

11
12 (a) * * *

13
14 (b) **Supporting documents**

15
16 (1)–(3) * * *

17
18 (4) If any supporting documents accompanying the petition are sealed or confidential
19 records, rules 8.45–8.47 govern these documents.

20
21 (c)–(d) * * *

22
23 **Advisory Committee Comment**

24
25 **Subdivision (b)(4).** Examples of confidential records include probation reports, Penal Code section
26 1203.03 diagnostic reports, records closed to inspection by court order under *People v. Marsden* (1970) 2
27 Cal.3d 118 or *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, in-camera proceedings on a confidential
28 informant, and defense expert funding requests (Pen. Code, § 987.9; *Keenan v. Superior Court* (1982) 31
29 Cal.3d 424, 430).

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 record to
37 produce the record or a certified copy to be filed with the court. Sealed and confidential
38 records are governed by rules 8.45–8.47.

39
40 (b)–(f) * * *

41
42 **Advisory Committee Comment**

43
44 **Subdivision (a).** Examples of confidential records include probation reports, Penal Code section 1203.03
45 diagnostic reports, records closed to inspection by court order under *People v. Marsden* (1970) 2 Cal.3d
46 118 or *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, in-camera proceedings on a confidential
47 informant, and defense expert funding requests (Pen. Code, § 987.9; *Keenan v. Superior Court* (1982) 31
48 Cal.3d 424, 430).

1
2 **Subdivision (c)–(d). * * ***

3
4
5 **Chapter 5. Juvenile Appeals and Writs**

6
7 **Article 1. Appeals**

8
9 **Rule 8.401. Confidentiality**

10
11 **(a) * * ***

12
13 **(b) Access to filed documents**

14
15 (1) Except as provided in (2)–(3), the record on appeal and documents filed by the
16 parties in proceedings under this chapter may be inspected only by the reviewing
17 court and appellate project personnel, the parties or their attorneys, and other persons
18 the court may designate.

19
20 (2) Filed documents that protect anonymity as required by (a) may be inspected by any
21 person or entity that is considering filing an amicus curiae brief.

22
23 (3) Access to records that are sealed or confidential under authority other than Welfare
24 and Institutions Code section 827 is governed by rules 8.45–8.47 and the applicable
25 statute, rule, sealing order, or other authority.

26
27 **(c) * * ***

28
29
30 **Rule 8.407. Record on appeal**

31
32 **(a)–(d) * * ***

33
34 **(e) ~~Form of record~~**

35
36 ~~Except in cases governed by rule 8.416(b), the clerk’s and reporter’s transcripts must~~
37 ~~comply with rule 8.144.~~

38
39 **~~(f)~~(e) * * ***

40
41 **Advisory Committee Comment**

42
43 Rules 8.45–8.47 address the appropriate handling of sealed or confidential records that must be included
44 in the record on appeal. Examples of confidential records include records of proceedings closed to
45 inspection by court order under *People v. Marsden* (1970) 2 Cal.3d 118 and in-camera proceedings on a
46 confidential informant.

1 **Subdivision (b).** * * *

2
3
4 **8.409. Preparing and sending the record**

5
6 (a) * * *

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

9
10 The clerk’s and reporter’s transcripts must comply with rules 8.45–8.46, relating to sealed
11 and confidential records, and, except in cases governed by rule 8.416(b), with rule 8.144.

12
13 ~~(b)(c)~~ * * *

14
15 ~~(e)(d)~~ * * *

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

18
19 **Advisory Committee Comment**

20
21 **Subdivision (a).** * * *

22
23 **Subdivision (b).** Examples confidential records include records closed to inspection by court order under
24 *People v. Marsden* (1970) 2 Cal.3d 118 and in-camera proceedings on a confidential informant.

25
26 **Subdivision (d).** * * *

27
28
29 **Chapter 7. Writs of Mandate, Certiorari, and Prohibition in the Supreme Court and**
30 **Court of Appeal**

31
32 **Rule 8.486. Petitions**

33
34 (a)–(c) * * *

35
36 **(d) Sealed and confidential records**

37
38 Rules 8.46 applies if a party seeks to lodge or file a 8.45–8.47 govern records sealed and
39 confidential records or to unseal a record in proceedings under this chapter.

40
41 (e) * * *

1 **Advisory Committee Comment**

2
3 **Subdivision (a).** * * *

4
5 **Subdivision (d).** Examples of confidential records include records of the family conciliation court (Fam. Code, § 1818 (b)) and fee waiver applications (Gov. Code, § 68633(f)).

6
7
8 **Subdivision (e).** * * *

9
10
11 **Rule 8.487. Opposition and Attorney General amicus briefs**

12
13 **(a)–(b)** * * *

14
15 **(c) Supporting documents**

16
17 Any supporting documents accompanying a preliminary opposition, return or opposition,
18 or reply must comply with rule 8.486(c)–(d).

19
20 ~~(e)(d)~~ * * *

21
22 **Advisory Committee Comment**

23
24 * * *

25
26 **Subdivision (a)–(b).** * * *

27
28 **Subdivision (c).** Examples of confidential records include records of the family conciliation court (Fam. Code, § 1818 (b)) and fee waiver applications (Gov. Code, § 68633(f)).

29
30
31
32
33 **Chapter 10. Appeals From Judgments of Death**

34
35 **Article 2. Record on Appeal**

36
37 **Rule 8.610. Contents and form of the record**

38
39 **(a)** * * *

40
41 **(b) Confidential records**

42
43 Rules 8.45–8.47 govern sealed and confidential records in appeals under this chapter.

44
45 ~~(1) All documents filed or lodged confidentially under Penal Code section 987.9 or~~
46 ~~987.2 must be sealed. Documents filed or lodged under Penal Code section 987.9~~
47 ~~must be bound separately from documents filed under Penal Code section 987.2.~~

SPR13-08

Appellate Procedure: Sealed Records (Adopt California Rules of Court, rules 8.45 and 8.47; amend rules 8.46, 8.120, 8.144, 8.3210, 8.336, 8.380, 8.384, 8.385, 8.407, 8.409, 8.486, 8.487, and 8.610; repeal rule 8.328)

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

List of All Commentators, Overall Positions on the Proposal, and General Comments				
	Commentator	Position	Comment	Committee Response
1.	Appellate Court Committee San Diego County Bar Association By: Rupa G. Singh, Chair	A	We commend and support the Judicial Council's efforts to clarify and fill gaps in the procedures relating to records sealed by court order or records that, by law, are closed to inspection in court proceedings. See comments on specific provisions below.	The committee notes the commentator's support for the proposal. See response to specific comments below.
2.	Appellate Defenders, Inc., California Appellate Project - San Francisco, First District Appellate Project, and Sixth District Appellate Program By: Jonathan Soglin, Executive Director, First District Appellate Project San Francisco, California	NI	We have several comments regarding the proposed new rules governing sealed records. See comments on specific provisions below.	See response to specific comments below.
3.	California Academy of Appellate Lawyers By: Robert A. Olson, President Los Angeles, California	A	The Academy supports the detailed proposal regarding sealed records. We appreciate the careful and extensive thought put into these proposed amendments. The handling of sealed records has long been a source of potential confusion, for counsel, litigants and court staff. Weighty confidentiality interests are at stake, and may be violated even inadvertently, if a sealed record is handled improperly. We therefore make one observation: More fine-tuning may be required in the future as the detailed guidelines proposed here are implemented.	The committee notes the commentator's support for the proposal.

SPR13-08

Appellate Procedure: Sealed Records (Adopt California Rules of Court, rules 8.45 and 8.47; amend rules 8.46, 8.120, 8.144, 8.3210, 8.336, 8.380, 8.384, 8.385, 8.407, 8.409, 8.486, 8.487, and 8.610; repeal rule 8.328)

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

List of All Commentators, Overall Positions on the Proposal, and General Comments				
	Commentator	Position	Comment	Committee Response
4.	California Appellate Court Clerks Association By: Charlene Ynson, President Fresno, California	NI	No comment.	No response required
5.	Committee on Appellate Courts State Bar of California By: Kira Klatchko, Acting Chair 2012-2013 San Francisco, California	A	The Committee supports this proposal. Closing current gaps in the rules, clarifying the procedures and making them more uniform, should make it easier for litigants to avoid the unintentional disclosure of sealed materials. See comments on specific provisions below.	The committee notes the commentator's support for the proposal. See response to specific comments below.
6.	Court of Appeal Fourth District, Division One By: Hon. Judith McConnell, Presiding Justice San Diego, California	NI	We commend the Appellate Advisory Committee's efforts to clarify and fill gaps in the rules relating to confidential and sealed records. See comments on specific provisions below.	See response to specific comments below.
7.	Office of the County Counsel By: James Owen, Assistant County Counsel Los Angeles, California	NI	See comments on specific provisions below.	See response to specific comments below.
8.	Orange County Bar Association By: Wayne R. Gross, President Newport Beach, California	A	No additional comments.	The committee notes the commentator's support for the proposal.
9.	Superior Court of Los Angeles County	N	This proposal does not parallel current California Rules of Court 2.550-2.551, which	Based on this and other comments, the committee has revised the proposal to minimize substantive

SPR13-08

Appellate Procedure: Sealed Records (Adopt California Rules of Court, rules 8.45 and 8.47; amend rules 8.46, 8.120, 8.144, 8.3210, 8.336, 8.380, 8.384, 8.385, 8.407, 8.409, 8.486, 8.487, and 8.610; repeal rule 8.328)

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

List of All Commentators, Overall Positions on the Proposal, and General Comments				
Commentator	Position	Comment	Committee Response	
		<p>prescribe the definitions and procedures for sealing and handling records in the trial courts. Rules 2.550 and 2.551 are not cited in the memorandum explaining the structure of and rationale for SPR 13-08. California Rules of Court 2.550-2.551 were developed to comply with the requirements of <i>NBC Subsidiary (KNBC-TV), Inc. v. Superior Court</i> (1999) 20 Cal.4th 1178. These Rules require a tremendous amount of work by trial court staff in civil litigation, particularly in complex civil litigation. However, over the approximately 8 years that Rules 2.550-2.551 have been in effect in their present form, judges and court staff have learned to implement these rules.</p> <p>* * *</p> <p>We are particularly concerned that SPR 13-08, if adopted, will lead to a reopening and revision of Rules 2.550 and 2.551 to align those existing Rules of Court to the revisions in the appellate rules. In most counties, civil courts are struggling to operate with significantly reduced staff, increased caseloads due to fewer civil courtrooms and resulting delays. It would create a substantial burden to revise the rules governing sealed documents, which, as stated above, are a very time-intensive and staff-intensive aspect of civil litigation. In addition, in light of RUPRO’s policy of limiting rule proposals to critical rule and form proposals that are mandated by statute or case law or are otherwise deemed urgent and necessary, we</p>	<p>differences between the trial and appellate rules relating to sealed records, including using the term “sealed records” as it is used in rules 2.550-2.551. Note, however, that neither the current nor the proposed definitions or procedures in the appellate rules relating to sealed records are exactly the same as in the trial court rules. This is primarily because the trial and appellate courts are in different posture with respect to those records that were sealed by a trial court.</p> <p>It is possible that another committee may, at some point in the future, consider whether there are potential amendments in this proposal that might also be appropriate to contemplate for rules 2.550-2.551. However, it is not certain that this will occur, when it might occur, or if, upon consideration, any amendments to rules 2.550-2.551 will actually be proposed. Therefore, the committee’s view is that this proposal to amend the appellate rules should be judged on its merits, independent of possible future consideration of a possible proposal to amend the trial court rules relating to sealed records.</p>	

SPR13-08

Appellate Procedure: Sealed Records (Adopt California Rules of Court, rules 8.45 and 8.47; amend rules 8.46, 8.120, 8.144, 8.3210, 8.336, 8.380, 8.384, 8.385, 8.407, 8.409, 8.486, 8.487, and 8.610; repeal rule 8.328)

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

List of All Commentators, Overall Positions on the Proposal, and General Comments				
	Commentator	Position	Comment	Committee Response
			<p>recommend that these rule changes not go forward.</p> <p>See comments on specific provisions below.</p>	<p>See response to specific comments below.</p>
10.	Superior Court of San Diego County By: Mike Roddy, Executive Officer	A	<p>In general, we think this is a good idea.</p> <p>See comments on specific provisions below.</p>	<p>The committee notes the commentator’s support for the proposal.</p> <p>See response to specific comments below.</p>
11.	TCPJAC/CEAC Joint Rules Working Group	N ¹	<p>Given that the proposal does not achieve the intended purpose of clarity, the JRWG does not agree with going forward with this proposal.</p> <p><u>Operational impacts identified by the working group:</u></p> <p>1. Create a Potential Fiscal Impact * * *</p> <p>It is also anticipated that courts may incur additional cost to train staff. While the training seems minimal, courts facing severe staff reductions do not have the ability to take staff out of court to attend trainings. To train staff to do anything new requires overtime and courts do not have the budget.</p> <p>Judicial staff training may also be needed to understand the distinction between records that</p>	<p>The committee appreciates the input about the potential operational impact of this proposal and notes the commentator’s opposition to the proposal. Based on this and other comments, the committee has revised the proposal to minimize substantive differences between the trial and appellate rules relating to sealed records, including using the term “sealed records” as it is used in rules 2.550-2.551. Note, however, that neither the current nor the proposed definitions or procedures in the appellate rules relating to sealed records are exactly the same as in the trial court rules. This is primarily because the trial and appellate courts are in different posture with respect to those records that were sealed by a trial court.</p>

¹ Please note that, based on the revisions made to the proposal following review of the public comments, the joint rules working group withdrew its opposition to the proposal.

SPR13-08

Appellate Procedure: Sealed Records (Adopt California Rules of Court, rules 8.45 and 8.47; amend rules 8.46, 8.120, 8.144, 8.3210, 8.336, 8.380, 8.384, 8.385, 8.407, 8.409, 8.486, 8.487, and 8.610; repeal rule 8.328)

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

List of All Commentators, Overall Positions on the Proposal, and General Comments				
Commentator	Position	Comment	Committee Response	
		<p>are sealed either by court order or by operation of law.</p> <p>2. Create an Impact on Existing Automated Systems</p> <p>Courts using Sustain case management system (CMS) would have minimal impact since the proposed changes are procedural in nature.</p> <p>The impact to the court using V2 depends on the interpretation of what needs to be implemented. V2 has the functionality to seal a case but does not have the capability to mark specific documents on a case as sealed or confidential if the case is not sealed. If that is needed, there would be coding changes required in the V2 CMS.</p> <p>The proposed changes will not impact courts using the V3 case management system The V3 system does not transmit electronic record to the Court of Appeal or Supreme Court.</p> <p>Other CMS: No significant impact. Courts that have CMS tracking exhibits will need to create new definitions if their CMS have those kinds of details of exhibit statuses.</p> <p>3. Raise any Trial Court Labor or Employment Related Concerns</p> <p>No impacts identified.</p>		

SPR13-08

Appellate Procedure: Sealed Records (Adopt California Rules of Court, rules 8.45 and 8.47; amend rules 8.46, 8.120, 8.144, 8.3210, 8.336, 8.380, 8.384, 8.385, 8.407, 8.409, 8.486, 8.487, and 8.610; repeal rule 8.328)

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

List of All Commentators, Overall Positions on the Proposal, and General Comments			
Commentator	Position	Comment	Committee Response
		<p>4. Require Development of Local Rules or Forms No impacts identified. * * *</p> <p>6. Increase Court Staff Workload Minimal increase in staff workload is anticipated for courts to prepare for the clerks transcripts on appeal. The provisions cover references in indexes for both records sealed by operation of law and to records sealed by court order. Records that are sealed by operation of law would be a matter of changing the wording on the index and on the outside of the sealed envelope.</p> <p>7. Change the Responsibilities of the Presiding Judge and/or Supervising Judge No impact identified.</p> <p>8. Create an Impact on Court Security No impact identified.</p> <p>9. Create an Impact on Local or Statewide Justice Partners No impact identified.</p> <p>10. Implementation No input offered.</p> <p>11. Are there Any Other Major Fiscal or Operational Impacts No impact identified.</p>	

SPR13-08

Appellate Procedure: Sealed Records (Adopt California Rules of Court, rules 8.45 and 8.47; amend rules 8.46, 8.120, 8.144, 8.3210, 8.336, 8.380, 8.384, 8.385, 8.407, 8.409, 8.486, 8.487, and 8.610; repeal rule 8.328)

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

Scope and application of rules		
Commentator	Comment	Committee Response
State Bar of California Committee on Appellate Courts By: Kira Klatchko, Acting Chair 2012-2013 San Francisco, California	In response to the Appellate Advisory Committee's question of whether the rules should include requirements regarding the electronic filing or submission of sealed records, the Committee is concerned about requiring the electronic filing or submission of sealed records, whether by rule, local court practice, or otherwise. The Committee recognizes the possibility of human error when filing paper versions of sealed records. However, an erroneous disclosure of sealed records through electronic transmission would be magnified immeasurably, and could be irreversible, particularly if the record then becomes accessible through the Internet. The error could occur through the unintended, unwitting error by the filing party or a third-party service provider, as well as by a court. The seriousness can vary, but it could involve consequences such as the safety of a confidential witness. The Committee believes that parties should always have the option of submitting sealed records by means other than electronic transmission.	The committee appreciates this input and is not recommending any rules relating to electronic filing of sealed or confidential records at this time. However, rule 8.72 authorizes the Supreme Court and any Court of Appeal that elects to implement an e-filing project to permit electronic filing of a document by a party or trial court in any appeal or original proceeding unless the rules in this article or other legal authority expressly prohibit electronic filing, including fee waiver applications, which are confidential. Given these rules, the committee anticipates that it may consider, at a later time, whether to develop proposed rules relating to electronic filing of sealed and confidential records.
Office of the County Counsel By: James Owen, Assistant County Counsel Los Angeles, California	While clarification of the rules regarding sealed and confidential records would be helpful, the proposed amendments may cause some confusion with regard to juvenile dependency records. 1. As indicated in the "Background" section, juvenile court records are governed by Welfare and Institutions Code ("W&IC") section 827 and California Rules of Court, rule 8.401. Under the proposed amendments, these records presumably would fall under the term "records sealed by operation of law," but may also fall under "record sealed by the trial court" (e.g., a child's mental health records). However,	Based on this and other comments, the committee has made the following changes to the proposal: <ul style="list-style-type: none">• Added a sentence to proposed rule 8.45(a) clarifying that where there are other laws that establish specific requirements for particular types of sealed or confidential records that differ from the requirements in rules 8.45-8.47, those specific requirements supersede the requirements in rules 8.45-8.47• Revised proposed rule 8.45(c)(1)(A) to provide that the requirement to place confidential records in a

SPR13-08

Appellate Procedure: Sealed Records (Adopt California Rules of Court, rules 8.45 and 8.47; amend rules 8.46, 8.120, 8.144, 8.3210, 8.336, 8.380, 8.384, 8.385, 8.407, 8.409, 8.486, 8.487, and 8.610; repeal rule 8.328)

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

Scope and application of rules		
Commentator	Comment	Committee Response
	<p>records in juvenile proceedings do not fall squarely within some of the amendments for the proposed rules. For example, for records sealed by operation of law (proposed rule 8.47), if a defendant/appellant raises a Marsden issue, the brief must be filed publicly or the defendant/appellant may serve and file a motion in the reviewing court requesting permission to file under seal and request an order maintaining confidentiality. In juvenile dependency proceedings, the records are confidential and are not subject to public disclosure per W&IC section 827. * * *</p> <p>Overall, with regard to records in juvenile proceedings, it may be prudent to include in 8.45 or 8.47, or elsewhere, a statement that these rules should be read in conjunction with W&IC section 827 and rule 8.401, and where a conflict may exist, the rules specific to juvenile court records and protecting confidentiality should prevail. Or perhaps, there should be an express statement that the proposed rules specifically do not apply to juvenile proceedings, which are governed by W&IC section 827 and rule 8.401. Or, as another alternative, maybe a separate rule under Division 1, Chapter 1, Article 3, or a subsection (or addition/amendment to rule 8.401) could be added that addresses information about sealed records in juvenile proceedings and issues that arise specific to those appeals.</p>	<p>sealed envelope or container does not apply to a juvenile case file, but does apply to records within that file that are sealed or confidential under authority other than W&I Code section 827 et seq.; and</p> <ul style="list-style-type: none"> Revised proposed rule 8.47(b)(2)(A) to provide that the requirement to file publicly a brief raising a Marsden issues does not apply in juvenile cases.
Superior Court of Los Angeles County	Importantly, Rules 2.550 and 2.551 “do not apply to discovery motions and records filed or lodged in connection with discovery motions or proceedings” (Rule 2.550(a)(3)), but proposed Rule 8.45(b) does not address how sealed discovery motions should be categorized.	Neither the current rules on sealed and confidential records nor the proposed amendments to these rules specifically address motions for protective orders under the discovery act requesting that answers to interrogatories, items produced, or answers to requests for admission be “sealed” (CCP sections 2030.090, 2032.060, and 2033.080). Given the proposed

SPR13-08

Appellate Procedure: Sealed Records (Adopt California Rules of Court, rules 8.45 and 8.47; amend rules 8.46, 8.120, 8.144, 8.3210, 8.336, 8.380, 8.384, 8.385, 8.407, 8.409, 8.486, 8.487, and 8.610; repeal rule 8.328)

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

Scope and application of rules		
Commentator	Comment	Committee Response
		definitions in rule 8.45, records sealed by such a protective order would be categorized as confidential records, not sealed records.
TCPJAC/CEAC Joint Rules Working Group	<p>The sponsoring committee is seeking specific comment on whether the rules should include requirements regarding the electronic filing or submission of sealed records.</p> <p>As courts look to moving toward electronic filing or submission of records, all new or amended rules should provide guidance in this regard.</p>	The committee appreciates this input and anticipates that it may consider, at a later time, whether to develop proposed rules relating to electronic filing of sealed and confidential records.
<p>Superior Court of San Diego County</p> <p>By: Mike Roddy, Executive Officer</p>	<p>Even though our court issues a protective order when it allows the release of juvenile documents, we do worry about where they might end up. Our court likes the term "sealed by operation of law" although we would like to see the main examples of those documents (including juvenile) specified somewhere in the rule. It is in the Advisory Committee Comment, but not in the rules. In fact, the one place that used to specify that juvenile records were to be closed to public inspection would be deleted under this proposal (Rule 8.320(b)(13)(C)).</p>	<p>Based on this comment, the committee has revised the proposal to put juvenile records first in the list of examples of confidential records identified in the advisory committee comment accompanying rule 8.45.</p>

SPR13-08**Appellate Procedure: Sealed Records** (Adopt California Rules of Court, rules 8.45 and 8.47; amend rules 8.46, 8.120, 8.144, 8.3210, 8.336, 8.380, 8.384, 8.385, 8.407, 8.409, 8.486, 8.487, and 8.610; repeal rule 8.328)

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

Rule 8.45(b) - Definitions		
Commentator	Comment	Committee Response
Superior Court of Los Angeles County	<p>This proposal does not parallel current California Rules of Court 2.550-2.551, which prescribe the definitions and procedures for sealing and handling records in the trial courts. * * *</p> <p>The “Sealed Records” definitions in proposed Rule 8.45(b) do not match the “Sealed Records” definitions in current Rule 2.550. Proposed Rule 8.45(b) distinguishes between records “sealed by operation of law” and records “sealed by court order;” Rule 2.550(a) distinguishes between records sealed or proposed to be sealed by court order and “records that are required to be kept confidential by law.”</p>	Based on this and other comments, the committee has revised the proposal use the term “sealed records” as it is used in rules 2.550-2.551. Note, however, that neither the current nor the proposed definitions in the appellate rules relating to sealed records are exactly the same as in the trial court rules.
Superior Court of San Diego County By: Mike Roddy, Executive Officer	Our court likes the term "sealed by operation of law" although we would like to see the main examples of those documents (including juvenile) specified somewhere in the rule.	Based on this comment, the committee has revised the proposal to put juvenile records first in the list of examples of confidential records identified in the advisory committee comment accompanying rule 8.45.
TCPJAC/CEAC Joint Rules Working Group	<p>The sponsoring committee is seeking specific comment on whether 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</p> <p>The JRWG approves in concept, the need to have clarity in the definitions of “sealed” or “confidential” records and uniform treatment of sealed records. The JRWG, however, believes that the proposal in its current format, does not provide this clarity. * * *</p>	Based on this and other comments, the committee has revised the proposal to use the term “sealed records” as it is used in rules 2.550-2.551.

SPR13-08

Appellate Procedure: Sealed Records (Adopt California Rules of Court, rules 8.45 and 8.47; amend rules 8.46, 8.120, 8.144, 8.3210, 8.336, 8.380, 8.384, 8.385, 8.407, 8.409, 8.486, 8.487, and 8.610; repeal rule 8.328)

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

Rule 8.45(b) - Definitions		
Commentator	Comment	Committee Response
	<p>Create the Need for Additional Training, Which Requires the Commitment of Staff Time and Court Resources</p> <p>The rules related to preparation of sealed records has been a long-standing rule. The term “sealed” has specific meaning to court clerks and the proposed definitions are contrary to that meaning. This will make training more difficult. This would also make it less likely that the proposed changes will achieve the intended result of adding clarity to the process.</p> <p>For some courts “minimal time” is not minimal when there are no staff to do the work at all.</p> <p>Judicial officers’ training may be needed to understand the distinction between the new terminologies. AOC’s CJER may possibly make checklists for judges on the different levels of sealing and post them on Serranus. This will make the minute orders apparent and alleviate extra work for staff trying to ascertain what the judge meant.</p> <p>Increase Court Staff Workload * * *</p> <p>However, it is likely that more confusion will be created over which records are sealed by court order and which are sealed by operation of law and which are confidential but not sealed.</p>	

SPR13-08

Appellate Procedure: Sealed Records (Adopt California Rules of Court, rules 8.45 and 8.47; amend rules 8.46, 8.120, 8.144, 8.3210, 8.336, 8.380, 8.384, 8.385, 8.407, 8.409, 8.486, 8.487, and 8.610; repeal rule 8.328)

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

Rule 8.45(c) - Format of sealed records		
Commentator	Comment	Committee Response
Court of Appeal Fourth District, Division One By: Hon. Judith McConnell, Presiding Justice San Diego, California	Insofar as the committee has requested input on whether the rules should address the formatting of sealed records to be transmitted to an appellate court, we urge that the rules be amended to expressly provide that the sealed records be paginated based on where they would have otherwise appeared in the record (e.g., the clerk’s transcript, a party’s appendix).	The committee appreciates this input and will consider developing a proposal regarding additional formatting requirements for sealed and confidential records.
Superior Court of Los Angeles County	SPR 13-08 also does not follow the labeling requirements of Rule 2.551. Rule 2.551(e)(1) requires that a document sealed pursuant to court order be labeled: “SEALED BY ORDER OF THE COURT ON (DATE).” Proposed Rule 8.45(c)(1)(B) requires that records sealed by court order be marked “Sealed by Order of the Court on (Date) – May Not Be Examined Without Court Order.”	Based on this comment, the committee has revised the proposal to eliminate the requirement that the label on sealed records specifically indicate that these records may not be examined without a court order.
TCPJAC/CEAC Joint Rules Working Group	There may be potential fiscal impact under this proposal The amendment to rule 8.320 as it pertains to juvenile court records would require courts to incur additional costs associated with purchasing large numbers of envelopes or specially marked boxes given that most if not all of these records transmitted to the Court of Appeal are confidential, or under the new terminology “sealed by operation of law”. * * * The sponsoring committee is seeking specific comment on whether there are 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.	Based on this and other comments, the committee has revised proposed rule 8.45(c)(1)(A) to provide that the requirement to place confidential records in a sealed envelope or container does not apply to a juvenile case file, but does apply to records within that file that are sealed or confidential under authority other than W&I Code section 827 et seq.; The committee appreciates this input and will consider developing a proposal regarding additional formatting requirements for sealed and confidential records.

SPR13-08

Appellate Procedure: Sealed Records (Adopt California Rules of Court, rules 8.45 and 8.47; amend rules 8.46, 8.120, 8.144, 8.3210, 8.336, 8.380, 8.384, 8.385, 8.407, 8.409, 8.486, 8.487, and 8.610; repeal rule 8.328)

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

Rule 8.45(c) - Format of sealed records		
Commentator	Comment	Committee Response
	Court practices vary with respect to the format of sealed records. It would be helpful if the rule specified whether the sealed records should be paginated with the rest of the record or separately.	

Rule 8.45(d) - Transmission and access to sealed records		
Commentator	Comment	Committee Response
Appellate Court Committee San Diego County Bar Association By: Rupa G. Singh, Chair	<p>We suggest two minor, yet significant, modifications to proposed rule 8.45(d), "Transmission of and access to sealed records," found on page 12 of the Invitation to Comment on this proposal.</p> <p>(1) Proposed rule 8.45(d)(1) lays out general guidelines for the transmission of and access to documents, specifying that sealed documents "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 " Proposed rule 8.45, subdivisions (d)(2) through (d)(4), go on to give specific guidelines for specific types of sealed documents. Because (d)(1) is general, whereas (d)(2) through (d)(4) are specific, we believe that (d)(1) should be modified to explain that (d)(1) applies except as provided in (d)(2) through (d)(4). To that end, we proposed something along the lines of the following modification:</p> <p>(1) Unless otherwise provided by law or court order, or in (2), (3), or (4) below, a sealed record that is part of the record on appeal or the supporting documents . . .</p>	Based on this and the next comment, the committee has revised the proposal to incorporate this suggestion, with minor alterations.

SPR13-08

Appellate Procedure: Sealed Records (Adopt California Rules of Court, rules 8.45 and 8.47; amend rules 8.46, 8.120, 8.144, 8.3210, 8.336, 8.380, 8.384, 8.385, 8.407, 8.409, 8.486, 8.487, and 8.610; repeal rule 8.328)

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

Rule 8.45(d) - Transmission and access to sealed records		
Commentator	Comment	Committee Response
	<p>(2) Similarly, (d)(2) provides that "[i]f the record is ... related to any in-camera hearing ... , the record must be transmitted to and examined by only the reviewing court <i>and the party or parties who participated in the in-camera hearing.</i>" (emphasis added.)</p> <p>The prosecution (i.e., the People) generally participate in in-camera hearings regarding confidential informants, and, therefore, would seem to be covered by this provision. However, (d)(3) correctly provides that records related to in-camera hearings "concerning a confidential informant ... must be transmitted <i>only to the reviewing court.</i>" (emphasis added.) The latter is correct under Evidence Code 1042, subdivision (d), which says that the transcript of a confidential-informant proceeding must be sealed and only reviewing courts may have access to its contents. To remedy the apparent inconsistency between (d)(2) and (d)(3), we suggest modifying (d)(2) to read:</p> <p>(2) <u>Except as provided in (3)</u>, if the record is a reporter's transcript or any document related to. . .</p>	<p>Based on this and the next comment, the committee has revised the proposal to incorporate this suggestion.</p>
<p>Appellate Defenders, Inc., California Appellate Project - San Francisco, First District Appellate Project, and Sixth District Appellate Program By: Jonathan Soglin, Executive Director, First District Appellate Project San Francisco, California</p>	<p><i>Rule 8.45(d) Transmission and Access to Sealed Records.</i> Proposed new rule 8.45(d) would govern the transmission of, and access to, sealed records. The rules various provisions describe transmission and access to sealed records to the reviewing courts and parties, but there is no reference to the appellate projects or Habeas Corpus Resources Center (HCRC). Various rules already require transmission of the appellate record to the appellate projects or HCRC in criminal (including capital) and juvenile appeals. (Cal. Rules of Court, rules 8.336(f)(2) (criminal appeals); 8.409(d)(2) (juvenile appeals); 8.619(g)(2) (capital appeals); 8.622(e)(2) (capital appeals).) To</p>	<p>As the commentator notes below, proposed rule 8.45(d), as well as several other provisions in this proposal specifically indicate that they are applicable "unless otherwise provided by law." It is not possible for the rules to identify all of the statutes and rules that establish specific requirements regarding the format of, transmission of, or access to particular records. Therefore the committee has not revised the proposed rule as suggested by the commentator. However, the committee has revised the accompanying advisory committee comment to include the rules cited by the</p>

SPR13-08

Appellate Procedure: Sealed Records (Adopt California Rules of Court, rules 8.45 and 8.47; amend rules 8.46, 8.120, 8.144, 8.3210, 8.336, 8.380, 8.384, 8.385, 8.407, 8.409, 8.486, 8.487, and 8.610; repeal rule 8.328)

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

Rule 8.45(d) - Transmission and access to sealed records		
Commentator	Comment	Committee Response
	<p>ensure that the appellate projects and HCRC receive complete records, we recommend that a new subdivision (5) be added to 8.45(d) to provide that the appellate projects and HCRC have the same access as the parties who are entitled to appointed counsel:</p> <p style="padding-left: 40px;">(d)(5) For purposes of this subdivision, if a party is either represented by appointed counsel or awaiting appointment of counsel in the reviewing court, the applicable appellate project or, in a capital habeas corpus proceeding, the Habeas Corpus Resource Center, has the same right of access as the party and the party’s counsel.</p> <p>In addition, proposed subdivision (d)(1) directs the clerk to send the record to the reviewing court and any party who had access in the trial court. The qualifying language, “[u]nless otherwise provided by law or court order” is appropriate, but vague, and fails to mention specific exceptions in the rule itself: subdivisions (3), confidential informants, and (4), probation reports. Accordingly, we recommend that the first phrase of (d)(1) be modified to read:</p> <p style="padding-left: 40px;">Except as provided by (3) and (4) or other law or court order,”</p> <p>Subdivision (2) on in-camera hearings is overinclusive in providing for transmission to the party who participated in the hearing. It does not specify the exception mentioned in the very next subdivision, (3), for confidential informants. (See Evid. Code, § 1042(d) [only a court may have access to informant records].) Subdivision (2) should include an introductory phrase stating, “</p> <p style="padding-left: 40px;">Except as provided by (3) or other law or court order,”</p>	<p>commentator among the examples of laws that establish specific requirements for certain records.</p> <p>Based on this and the previous comment, the committee has revised the proposal to incorporate this suggestion, with minor alterations.</p> <p>The committee agrees with the suggestion that rule 8.46(d)(2) should note the exception specified in (3) and has incorporated this change into the proposal that it is recommending for adoption. The committee’s view is that it is not necessary to repeat the overarching exception for other laws or court orders that is already stated in the introductory paragraph of (d).</p>

SPR13-08

Appellate Procedure: Sealed Records (Adopt California Rules of Court, rules 8.45 and 8.47; amend rules 8.46, 8.120, 8.144, 8.3210, 8.336, 8.380, 8.384, 8.385, 8.407, 8.409, 8.486, 8.487, and 8.610; repeal rule 8.328)

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

Rule 8.45(d) - Transmission and access to sealed records		
Commentator	Comment	Committee Response
Office of the County Counsel By: James Owen, Assistant County Counsel Los Angeles, California	It may be helpful if the proposed amendments addressed an issue that arises in juvenile dependency appeals with regard to who may have access to the records sealed by operation of law on appeal or in filed documents. For example, if the appellant (e.g., a relative, de facto parent) was not entitled to the full juvenile court record in the trial court, and did not file a petition for disclosure under W&IC section 827 or filed such a petition and was denied access, that person presumably is not entitled to that information in the reviewing court and may be entitled only to a redacted version of the brief or only a limited portion of the appellate record. However, the current or proposed rules appear not to provide guidance in this situation. One suggestion would be to have the reviewing court make a preliminary determination if appellant is a party, who would be entitled to the record or portions of the record on appeal, and direct that the attorneys for the party be given copies of portions of the juvenile court record relevant to the appeal (see W&IC section 827(a)(1)(E)).	Based on this comment, the committee has revised the proposal to include a proposed amendment to rule 8.401 clarifying that access to records that are sealed or confidential under authority other than W&I Code section 827 et seq. is governed by rules 8.45-8.47. This would include proposed rule 8.45(d) which generally provides that only the court and parties who had access to a sealed or confidential record in the trial court may have access to such a record in the reviewing court.

Rule 8.46(b) and (e) - Unsealing records sealed by court order		
Commentator	Comment	Committee Response
Appellate Defenders, Inc., California Appellate Project - San Francisco, First District Appellate Project, and Sixth District Appellate Program By: Jonathan Soglin, Executive	<i>Rule 8.46(b)(1) and (e)(1) Unsealing a record in the reviewing court.</i> The provision in rules 8.46(b)(1) and (e)(1) permitting only the reviewing court to issue orders unsealing records may be too restrictive. In capital appeals, for instance, especially in high profile cases, trial judges sometimes seal pleadings or	The committee notes that the language of concern to the commentator is in current rule 8.46(c)(1) and (f)(1) and is included, unchanged, in this proposal. However, based on this input, the committee will consider whether to develop a proposal to clarify the authority of the trial court to unseal records during the appellate record

SPR13-08

Appellate Procedure: Sealed Records (Adopt California Rules of Court, rules 8.45 and 8.47; amend rules 8.46, 8.120, 8.144, 8.3210, 8.336, 8.380, 8.384, 8.385, 8.407, 8.409, 8.486, 8.487, and 8.610; repeal rule 8.328)

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

Rule 8.46(b) and (e) - Unsealing records sealed by court order		
Commentator	Comment	Committee Response
<p>Director, First District Appellate Project San Francisco, California</p>	<p>transcripts to prevent the media from exposing potential jurors to information that will not be admitted at trial. Once the trial is over, the need to keep those materials sealed often ceases. Record correction proceedings in capital appeals are conducted in the trial court, and appellate counsel often ask that court to unseal certain parts of the record that no longer need to be kept from public view. Unsealed records make it is easier for the parties and the court if they can be freely recited or referred to in the appellate briefing. The same principles would equally apply in non-capital cases, although the issue may not arise as frequently. Accordingly, the rule should make it clear that prior to the certification or filing of the record on appeal, trial courts retain the discretion, already accorded to them under rule 2.551(h), to unseal records sealed by trial judges.</p> <p>Less clear to us, however, is the what, if any, discretion trial courts should have to unseal records after the record on appeal has been filed or certified. On one hand, when a record has been sealed by a trial court, that court has great familiarity with the case and the sealing of the record such that the trial court is well-positioned to determine whether the record should remain sealed. This is true even after the record on appeal has been certified. (The reviewing court may not gain familiarity with the case for months or, in capital cases, years after the record has been filed.) Indeed, when the only reason a reviewing court’s record is sealed is because the record was sealed by the trial court, the reviewing court might prefer that the parties return to the trial court for a determination of whether the record should be unsealed. On the other hand, it would be troublesome if trial and appellate courts would simultaneously have authority to rule on whether the same record should remain sealed. The prospects of either forum shopping by</p>	<p>preparation process.</p>

SPR13-08

Appellate Procedure: Sealed Records (Adopt California Rules of Court, rules 8.45 and 8.47; amend rules 8.46, 8.120, 8.144, 8.3210, 8.336, 8.380, 8.384, 8.385, 8.407, 8.409, 8.486, 8.487, and 8.610; repeal rule 8.328)

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

Rule 8.46(b) and (e) - Unsealing records sealed by court order		
Commentator	Comment	Committee Response
	<p>parties or conflicting rulings by the courts are both troublesome.</p> <p>Given these opposing policy considerations, we do not have a recommended resolution, instead calling this issue to the Committee's attention for further consideration.[FN1]</p> <p>[FN1] Modifications to rule 2.551(h) might be required if trial court's lose authority to unseal record after the record on appeal is filed. But any such modification should also take into consideration whether trial courts regain authority to unseal records once the appeal is over.</p>	

Rule 8.46(d)(7) - Denial of motion to file record under seal		
Commentator	Comment	Committee Response
<p>Appellate Defenders, Inc., California Appellate Project - San Francisco, First District Appellate Project, and Sixth District Appellate Program By: Jonathan Soglin, Executive Director, First District Appellate Project San Francisco, California</p>	<p><i>Rule 8.46(d)(7) Denial of motion to file record under seal.</i></p> <p>The amended language to rule 8.46(d)(7) is potentially ambiguous. The committee proposed adding a caveat "unless otherwise ordered by the court" and also now requires notice to the "court" instead of the "clerk" of the party's desire that the record be filed:</p> <p>If the court denies the motion or application, 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 within 10 days after the order denying the motion or application that the record is to be filed. <u>Unless otherwise ordered by the court, the submitting party must</u></p>	<p>Based on this comment, the committee has revised the proposed amendment to rule 8.46(d)(7) to refer to providing notice to the "clerk." Since it was the committee's intent to reflect the court's authority to order that the notice be given either in less than 10 days or more than 10 days, the committee has not incorporated the other changes suggested by the commentator into the proposal.</p>

SPR13-08

Appellate Procedure: Sealed Records (Adopt California Rules of Court, rules 8.45 and 8.47; amend rules 8.46, 8.120, 8.144, 8.3210, 8.336, 8.380, 8.384, 8.385, 8.407, 8.409, 8.486, 8.487, and 8.610; repeal rule 8.328)

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

Rule 8.46(d)(7) - Denial of motion to file record under seal		
Commentator	Comment	Committee Response
	<p><u>notify the court within 10 days after the order denying the motion or application.</u></p> <p>The stricken phrase made it very clear that the clerk may return the conditionally sealed records unfiled if the submitting party doesn't request filing within 10 days. The replacement language could be interpreted as creating a timeliness requirement, mandating notification to the court, not just the clerk, and permitting the court to prohibit the filing of unredacted pleadings if the notification was untimely. We doubt this is what the rule intends. We recommend a modification which we believe more clearly attains the goal, we assume the committee intended, of allowing the court to provide the party with additional time. Our recommendation also retains the original requirement that the notice be to the "clerk" (rather than the "court"), to signal that notice can be made in an informal communication (such as a letter or email). Accordingly, current subdivision (d)(7) should be modified as follows:</p> <p>If the court denies the motion or application, 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 within 10 days after the order denying the motion or application that the record is to be filed. <u>Unless additional time is provided by court order, the submitting party must notify the clerk within 10 days after the order denying the motion or application.</u></p>	

SPR13-08

Appellate Procedure: Sealed Records (Adopt California Rules of Court, rules 8.45 and 8.47; amend rules 8.46, 8.120, 8.144, 8.3210, 8.336, 8.380, 8.384, 8.385, 8.407, 8.409, 8.486, 8.487, and 8.610; repeal rule 8.328)

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

Rules 8.46(f)(2) and (3) and 8.47(b)(3) – Redacted Filings		
Commentator	Comment	Committee Response
Appellate Defenders, Inc., California Appellate Project - San Francisco, First District Appellate Project, and Sixth District Appellate Program By: Jonathan Soglin, Executive Director, First District Appellate Project San Francisco, California	<i>Rule 8.46 and 8.47 - requirement of filing complete copies of redacted pleadings.</i> Proposed rules 8.46(f)(2) and (3) and 8.47(b)(3)(C)(ii) of 8.47 seem to require the filing of entire redacted and unredacted versions of pleadings containing sealed or conditionally sealed material. In complex appeals, such as capital cases in which a brief or petition can top 400 pages and in which 10-14 copies must be filed with the original, this could be very cumbersome and expensive. The current practice, at least in capital cases, is to publicly file the brief or petition with the sealed material redacted from it and to file the portions of the pleading referencing sealed materials, and any sealed exhibits, under separate cover. We recommend that this option be retained.	Based on this comment, the committee has revised the proposal to include a definition of “unredacted version” that includes either a filing or a portion of a filing that discloses material contained in a sealed or confidential record. The committee has also deleted the requirement to file a “complete” unredacted version of filings. This should allow the filing of only those portions of a long pleading that contain sealed or confidential information, but also allow the filing of complete pleading where the sealed or confidential information appears throughout the pleading.
Superior Court of Los Angeles County	SPR 13-08 also does not follow the labeling requirements of Rule 2.551* * * Proposed Rule 8.46(d)(4) prescribes a mandatory label for redacted documents, while Rule 2.551 has no such requirement.	The committee notes that these proposed labeling requirements would apply only to documents filed by litigants in the appellate courts, thus this requirement should not impact the trial courts.

Rule 8.47 – Records sealed by operation of law		
Commentator	Comment	Committee Response
Appellate Defenders, Inc., California Appellate Project - San Francisco, First District Appellate Project, and Sixth District	The proposed new rule 8.45 eliminates the discretion courts have under current rule 8.328(c)(3) (confidential records other than <i>Marsden</i> transcripts) to have the court reporter who attended an <i>in-camera</i> proceeding personally prepare the	The committee concluded that it was not necessary to include this language in the rule because the court has the inherent authority to make such an order.

SPR13-08

Appellate Procedure: Sealed Records (Adopt California Rules of Court, rules 8.45 and 8.47; amend rules 8.46, 8.120, 8.144, 8.3210, 8.336, 8.380, 8.384, 8.385, 8.407, 8.409, 8.486, 8.487, and 8.610; repeal rule 8.328)

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

Rule 8.47 – Records sealed by operation of law		
Commentator	Comment	Committee Response
Appellate Program By: Jonathan Soglin, Executive Director, First District Appellate Project San Francisco, California	<p>transcript. Current rule 8.328(c)(3) states “[i]f the court grants an application for a reporter’s transcript of any <i>in-camera</i> proceeding, it may order the reporter who attended the <i>in-camera</i> proceeding to personally prepare the transcript.”</p> <p>Although it may not be necessary to include a provision such as current rule 8.328(c)(3) in the text of the rules themselves, we recommend at least adding an Advisory Committee comment stating that trial judges retain the discretion to order the reporter who attended the <i>in-camera</i> proceeding to personally prepare the transcript. There are, for instance, very high-profile cases where trial courts struggle to prevent leaks to the media. Judges in those cases would welcome the ability to retain control over retention of information from <i>ex parte</i> proceedings.</p>	
Office of the County Counsel By: James Owen, Assistant County Counsel Los Angeles, California	<p>An issue that arises occasionally with regard to Marsden transcripts in juvenile dependency appeals is whether or not the Marsden transcript is returned to the reviewing court after it is sent to the respondent (per the appropriate procedures) and after the appeal is eventually resolved. Some direction regarding this may be useful in the proposed rule.</p>	<p>The committee appreciates this suggestion. However, this is beyond the scope of the current proposal. The committee will therefore consider this suggestion during a later rules cycle.</p>