

JUDICIAL COUNCIL OF CALIFORNIA

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INVITATION TO COMMENT SPR22-26

Title

Rules: Remote Access to Electronic Records
by Appellate Appointed Counsel
Administrators, Courts of Appeal, and the
Habeas Corpus Resource Center

Proposed Rules, Forms, Standards, or Statutes

Amend Cal. Rules of Court, rules 2.515,
2.521, 2.523, and 2.540

Proposed by

Information Technology Advisory
Committee
Hon. Sheila F. Hanson, Chair

Action Requested

Review and submit comments by May 13,
2022

Proposed Effective Date

January 1, 2023

Contact

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Executive Summary and Origin

The Information Technology Advisory Committee (ITAC) proposes the Judicial Council amend rules 2.515, 2.521, 2.523, and 2.540 of the California Rules of Court¹ to authorize trial courts to provide remote access to electronic records by administrators contracted to run appellate appointed counsel programs, the Courts of Appeal, and the Habeas Corpus Resource Center. The proposal originated with a recommendation from Sixth District Appellate Program staff.

The Proposal

The proposal would amend rules 2.515, 2.521, and 2.523 to authorize remote access for administrators operating programs for appellate appointed counsel. The proposal would also amend rule 2.540 to authorize remote access by the Courts of Appeal and the Habeas Corpus Resource Center. The proposal is intended to remedy a problem causing significant inconvenience for appellate appointed counsel administrators, specifically difficulties obtaining records in person. The proposal is expected to alleviate the need for in-person requests for records at the courthouse; timely obtaining the records has been a challenge during the COVID-19 pandemic.

¹ All further references to rules are to the California Rules of Court unless otherwise noted.

The proposal originated with a recommendation from Sixth District Appellate Program (SDAP) staff. As SDAP staff explained to ITAC, the pandemic and staff shortages in trial courts have significantly impacted obtaining timely access to court records in the Sixth Appellate District. Before the pandemic, SDAP would have staff make a weekly trip to the court to retrieve any needed court records. However, with the pandemic, some trial courts are now so backlogged that retrieving the court records can take months. This has a significant impact on programs like SDAP and clients being served through them because it hinders the programs' ability to act on behalf of their clients and delays the movement of cases through the appellate courts.

Remote access by appellate appointed counsel administrators

Appellate appointed counsel administrators operate in all six appellate districts

Under rule 8.300, the Courts of Appeal are required to “adopt procedures for appointing appellate counsel for indigents not represented by the State Public Defender in all cases in which indigents are entitled to appointed counsel.”² Courts of Appeal are also required to evaluate the qualifications of appointed counsel, match appointed counsel with cases, and evaluate the performance of appointed counsel.³

Rather than administering appointed counsel programs themselves, the Courts of Appeal are authorized to “contract with an administrator having substantial experience in handling appellate court appointments to perform any of the duties prescribed.”⁴ Such appellate appointed counsel administrators are used in all six appellate districts.⁵ According to SDAP staff, criminal matters constitute the bulk of the work for appellate appointed counsel though they also handle juvenile justice, child welfare, and civil commitment cases.⁶

In addition to the appellate appointed counsel administrators that contract with the District Courts of Appeal, the California Appellate Project—San Francisco (CAP-SF) provides similar services for indigent defendants sentenced to death. CAP-SF is funded primarily through a contract with the Judicial Council and “assists in capital postconviction proceedings, supporting appointed counsel in challenging their clients’ convictions and sentences on direct appeal and

² Rule 8.300(a)(1).

³ Rule 8.300(b), (c), & (d).

⁴ Rule 8.300(e)(1).

⁵ A list of administrators, also known as appellate projects, is available at <https://www.courts.ca.gov/13714.htm> (as of March 21, 2022).

⁶ *In re J.W.* (2002) 29 Cal.4th 200, 213 (indigent parents entitled to appointed counsel); *In re Kevin S.* (2003) 113 Cal.App.4th 97, 119 (indigent minors entitled to appointed counsel); *Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 542 (conservatee entitled to appointed counsel).

through habeas corpus proceedings.”⁷ Under the California Rules of Court, CAP-SF is qualified to serve as appointed counsel in death penalty appeals.⁸

Current rules are not adequate to address remote access by appellate appointed counsel administrators

Under the current remote access rules, courts are authorized to provide counsel on appeal with remote access to electronic court records under rule 2.519. Subdivision (c) of rule 2.519 was designed to address access by counsel who are not counsel of record in the trial court. With their client’s permission, counsel who are not counsel of record may access electronic court records remotely.

However, rule 2.519 is not sufficient to address access by appellate appointed counsel administrators, whose staff may need access to court records before counsel is appointed or when appointed counsel becomes unavailable. For example:

- A potential client may contact an appellate appointed counsel administrator for help and the administrator would need access to records to determine if the client is entitled to appointed counsel.
- If a criminal defendant files an appeal following a guilty plea, which usually requires a certificate of probable cause,⁹ but no certificate has been obtained, the administrator may need to work with the defendant and view the defendant’s court records to resolve the certificate of probable cause issue before counsel can be appointed. According to SDAP staff, this happens often.
- Administrators need to view court records as part of their evaluation of the performance of appellate appointed counsel, which they are obligated to do.¹⁰
- Finally, appointed counsel may become unavailable during the appeal and, if that occurs, the administrator may need to access court records to act on behalf of the client before new counsel can be appointed or facilitate transferring information to new counsel.

⁷ California Appellate Project—San Francisco, “About CAP-SF,” <https://www.capsf.org/public/about.aspx> (as of March 21, 2022).

⁸ Rule 8.605(g).

⁹ Pen. Code, § 1237.5.

¹⁰ See rule 8.300(d) (obligation to “review and evaluate the performance of each appointed counsel to determine whether counsel’s name should remain on the list at the same level, be placed on a different level, or be deleted from the list”).

Proposed amendments to authorize remote access by appellate appointed counsel administrators

The proposal would amend rules 2.515, 2.521, and 2.523 to authorize remote access for appellate appointed counsel administrators.

Rule 2.515 provides an overview of which users may access electronic records under article 3 of chapter 2 of title 2 of the California Rules of Court, which governs remote access by specified users. The proposed amendment adds appellate appointed counsel administrators to the list of specified users.

Rule 2.523 requires verification of persons authorized to access electronic records remotely under rules 2.515 through 2.521. Subdivision (d) of rule 2.523 describes the responsibilities of certain organizations to verify the identity of users from the organizations. The proposed amendment adds appellate appointed counsel administrators to the organizations included in subdivision (d).

Rule 2.521 authorizes remote access by court-appointed persons. The proposed amendments add appellate appointed counsel administrators as a category of user that may be granted remote access under this rule. The proposed amendments split subdivision (a) into two paragraphs. Paragraph (1) and its subparagraphs contain existing language about remote access by court-appointed persons. Paragraph (2) and its subparagraphs address remote access by a person working for an appellate appointed counsel administrator. Subparagraph (B) lists the six appellate appointed counsel administrators by name. A new advisory committee comment related to subparagraph (B) is also included to note that about a list of the appellate appointed counsel administrators, including physical and web addresses and contact information, is available on the California Courts website.

The proposed amendments add appellate appointed counsel administrators to subdivisions (c) and (d) of rule 2.521 but make no other substantive changes to those subdivisions. Under the amendments, persons working for appellate appointed counsel administrators may remotely access any electronic records they would have been entitled to view at the courthouse. They are authorized to remotely access records only for purposes of fulfilling the administrator's responsibilities, are prohibited from selling electronic records, and must comply with any of the court's terms for remote access.

Remote access by Courts of Appeal

Rule 2.540 addresses remote access by government entities. Under that rule, a court may authorize remote access for persons working for specified government entities to electronic records relevant to business the government entities regularly have before the courts.¹¹ For example, a court could allow a person working for a district attorney's office to access "criminal

¹¹ Rule 2.540(b) & (c).

electronic records and juvenile justice electronic records” remotely.¹² Remote users are limited to accessing electronic records that they would have been authorized to view had they visited the courthouse.¹³ For government entities not specifically listed in rule 2.540, a court may still provide remote access if there is good cause for the court to do so.¹⁴ Adding a government entity to the list of government entities in the rule eliminates need for good cause.

The Courts of Appeal are responsible for operating programs for appellate appointed counsel under rule 8.300. However, as noted previously, that rule authorizes them to contract out the work to administrators, which all the Courts of Appeal have done. A Court of Appeal that uses a contract administrator is responsible for providing “the administrator with the information needed to fulfill the administrator’s duties.”¹⁵ Extending remote access to the Courts of Appeal under rule 2.540 should help facilitate information sharing to administrators if the administrators lack needed information. For example, if a trial court’s system was not yet capable of providing remote access to an administrator, but was capable of doing so for the Court of Appeal, the Court of Appeal then may be able to provide the information to the administrator. In addition, should a Court of Appeal choose to operate its own appointed counsel program rather than contracting with an administrator, the rule would facilitate the Court of Appeal’s meeting its rule 8.300 obligations. The proposal includes remote access to electronic records pertinent in case types in which a party is entitled to appointed counsel on appeal. The proposal is limited in the scope of case types because it is focused on appointed counsel programs. However, ITAC requests specific comments on whether additional case types should be included.

Remote access by the Habeas Corpus Resource Center

Like the California Appellate Project—San Francisco, the Habeas Corpus Resource Center (HCRC) only represents indigent defendants sentenced to death. In addition, it “recruits and trains attorneys to expand the pool of private counsel qualified to accept appointments in death penalty habeas corpus proceedings and serves as a resource to appointed counsel.”¹⁶ Unlike the appellate appointed counsel administrators described in the amendments to rule 2.521, the HCRC is a government entity. Accordingly, the proposed amendments bring the HCRC within the scope of rule 2.540, which addresses remote access by government entities. HCRC staff explained to ITAC that trial courts differ on how they categorize records in habeas corpus matters, with some using a distinct case type for habeas corpus and some including habeas corpus with the criminal case type. HCRC explained that remote access to “criminal electronic records” and “habeas corpus electronic records” would help it fulfill its obligations. Accordingly, the proposed amendments authorize courts to provide the HCRC with remote access to those case types.

¹² Rule 2.540(b)(1)(C).

¹³ Rule 2.540(b)(2).

¹⁴ Rule 2.540(b)(1)(Q). In addition, for good cause, a court may provide remote access to electronic records in case types beyond those specified.

¹⁵ Rule 8.300(e)(2).

¹⁶ Habeas Corpus Resource Center, <https://www.hcrc.ca.gov/> (as of March 21, 2022).

Alternatives Considered

Rather than adding appellate appointed counsel administrators to rule 2.521, ITAC considered drafting a separate, standalone rule for appellate appointed counsel administrators as was done in rules 2.517 through 2.522, which address remote access by specified users. Rules 2.523 through 2.528 address requirements related to remote access systems, such as security and conditions of access. ITAC considered proposing a new rule 2.523 for appellate appointed counsel administrators and renumbering existing rules 2.523 through 2.528. However, ITAC decided it would be preferable and less confusing to amend an existing rule rather than add a new rule and renumber several other rules. ITAC determined that rule 2.521, which relates to remote access by court-appointed persons, is topically similar to the proposed amendments for appellate appointed counsel administrators and proposes amending rule 2.521 to bring appellate appointed counsel administrators within its scope

ITAC had considered providing a more general definition of “appellate appointed counsel administrator” rather than listing each administrator by name, but determined that specifying the administrators by name made the rule clearer.

ITAC did not consider the alternative of the status quo to be preferable given the challenges in accessing needed records that SDAP described.

Fiscal and Operational Impacts

Courts may need to make system updates or execute new agreements to allow remote access by the new users described in the proposed amendments. Courts may need to train staff regarding which electronic records the new users described in the proposed amendments may remotely access. Under rule 2.516, courts are required to authorize remote access by specified users only to the extent it is feasible to do so. Financial and technological limitations may affect the feasibility of providing remote access. Costs and specific implementation requirements would vary across the courts depending on each court’s current capabilities and approach to providing services.

Request for Specific Comments

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

- Does the proposal appropriately address the stated purpose?
- Should rule 2.521(a)(2)(B) include both the general definition of “appellate appointed counsel administrators” as “organizations contracted with the Courts of Appeal or Judicial Council to administer programs for appointed counsel on appeal” *and* the list of current administrators by name? If not, which should be retained or omitted?
- Are there additional case types to which the Courts of Appeal and the Habeas Corpus Resource Center should have access and that should be included with the proposed amendments to rule 2.540?

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

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff on providing remote access (please identify position and expected hours of training), revising processes and procedures (please describe), modifying case management systems, modifying other systems, or implementing new systems?
- Is implementation feasible at present or in the near future? If not, what are the barriers to implementation?

Attachments and Links

1. Cal. Rules of Court, rules 2.515, 2.521, 2.523, and 2.540, at pages 8–12
2. Link A: California Rules of Court, Title 2,
<https://www.courts.ca.gov/cms/rules/index.cfm?title=two>

1 have if ~~he or she~~the person were to seek to inspect the records in person at the courthouse. Thus,
2 if ~~he or she~~the person is legally entitled to inspect certain records at the courthouse, that person
3 could view the same records remotely; on the other hand, if ~~he or she~~the person is restricted from
4 inspecting certain court records at the courthouse (e.g., because the records are confidential or
5 sealed), that person would not be permitted to view the records remotely. In some types of cases,
6 such as unlimited civil cases, the access available to parties and their attorneys is generally
7 similar to the public's but in other types of cases, such as juvenile cases, it is much more
8 extensive (see Cal. Rules of Court, rule 5.552).

9
10 For authorized persons working in a qualified legal services program, the rule contemplates
11 services offered in high-volume environments on an ad hoc basis. There are some limitations on
12 access under the rule for qualified legal services projects. When an attorney at a qualified legal
13 services project becomes a party's attorney and offers services beyond the scope contemplated
14 under this rule, the access rules for a party's attorney would apply.

15
16 **Rule 2.521. Remote access by a court-appointed person or person working for an**
17 **appellate appointed counsel administrator**

18
19 **(a) Remote access generally permitted**

20
21 (1) Remote access by a court-appointed person

22
23 (A) A court may grant a court-appointed person remote access to electronic
24 records in any action or proceeding in which the person has been
25 appointed by the court.

26
27 ~~(2)~~(B) Court-appointed persons include an attorney appointed to
28 represent a minor child under Family Code section 3150; a Court
29 Appointed Special Advocate volunteer in a juvenile proceeding; an
30 attorney appointed under Probate Code section 1470, 1471, or 1474; an
31 investigator appointed under Probate Code section 1454; a probate
32 referee designated under Probate Code section 8920; a fiduciary, as
33 defined in Probate Code section 39; an attorney appointed under
34 Welfare and Institutions Code section 5365; ~~or~~and a guardian ad litem
35 appointed under Code of Civil Procedure section 372 or Probate Code
36 section 1003.

37
38 (2) Remote access by a person working for an appellate appointed counsel
39 administrator

40
41 (A) A court may grant a person working for an appellate appointed counsel
42 administrator remote access to electronic records.

1 (B) Appellate appointed counsel administrators are organizations
2 contracted with the Courts of Appeal or Judicial Council to administer
3 programs for appointed counsel on appeal. The appellate appointed
4 counsel administrators are:

5
6 (i) Appellate Defenders, Inc.;

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8 (ii) California Appellate Project—Los Angeles;

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10 (iii) California Appellate Project—San Francisco;

11
12 (iv) Central California Appellate Program;

13
14 (v) First District Appellate Project; and

15
16 (vi) Sixth District Appellate Program.

17
18 (C) Persons “working for an appellate appointed counsel administrator”
19 under this rule include attorneys, employees, contractors, and
20 volunteers.

21
22 (D) An appellate appointed counsel administrator must designate which
23 persons it authorizes to have remote access, and must certify that the
24 authorized persons work for the appellate project.

25
26 **(b) Level of remote access**

27
28 A court-appointed person or person working for an appellate appointed counsel
29 administrator may be provided with the same level of remote access to electronic
30 records as the ~~court-appointed~~ person would be legally entitled to if ~~he or she~~ the
31 person were to appear at the courthouse to inspect the court records.

32
33 **(c) Terms of remote access**

34
35 (1) Remote access only for purpose of fulfilling responsibilities

36
37 (A) A court-appointed person may remotely access electronic records only
38 for purposes of fulfilling the responsibilities for which ~~he or she~~ the
39 person was appointed.

40
41 (B) A person working for an appellate appointed counsel administrator may
42 remotely access electronic records only for purposes of fulfilling the
43 administrator’s responsibilities.

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- (2) Any distribution for sale of electronic records obtained remotely under the rules in this article is strictly prohibited.
- (3) All laws governing confidentiality and disclosure of court records apply to the records obtained under this article.
- (4) A court-appointed person or person working for an appellate appointed counsel administrator must comply with any other terms of remote access required by the court.
- (5) Failure to comply with these rules may result in the imposition of sanctions, including termination of access.

Advisory Committee Comment

Subdivision (a)(2)(B). A list of appellate appointed counsel administrators, including physical and web addresses and contact information, is available on the California Courts website at <https://www.courts.ca.gov/13714.htm>.

Rule 2.523. Identity verification, identity management, and user access

(a)–(c) * * *

(d) Responsibilities of the legal organizations, ~~or~~ qualified legal services projects, and appellate appointed counsel administrators

- (1) If a person is accessing electronic records on behalf of a legal organization, ~~or~~ qualified legal services project, or appellate appointed counsel administrator, the organization or project must approve granting access to that person, verify the person’s identity, and provide the court with all the information it directs in order to authorize that person to have access to electronic records.
- (2) If a person accessing electronic records on behalf of a legal organization, ~~or~~ qualified legal services project, or appellate appointed counsel administrator leaves ~~his or her~~ the position or for any other reason is no longer entitled to access, the organization or project must immediately notify the court so that it can terminate the person’s access.

(e) * * *

1 **Rule 2.540. Application and scope**

2
3 (a) * * *

4
5 (b) **Level of remote access**

6
7 (1) A court may provide authorized persons from government entities with
8 remote access to electronic records as follows:

9
10 (A)–(P) * * *

11
12 (Q) California Courts of Appeal: child welfare electronic records, criminal
13 electronic records, juvenile justice electronic records, and mental health
14 electronic records.

15
16 (R) Habeas Corpus Resource Center: criminal electronic records and
17 habeas corpus electronic records.

18
19 ~~(Q)~~(S) For good cause, a court may grant remote access to electronic
20 records in particular case types to government entities beyond those
21 listed in (b)(1)(A)–(R). For purposes of this rule, “good cause” means
22 that the government entity requires access to the electronic records in
23 order to adequately perform its legal duties or fulfill its responsibilities
24 in litigation.

25
26 ~~(R)~~(T) All other remote access for government entities is governed by
27 articles 2 and 3.

28
29 (2) Subject to (b)(1), the court may provide a government entity with the same
30 level of remote access to electronic records as the government entity would
31 be legally entitled to if a person working for the government entity were to
32 appear at the courthouse to inspect court records in that case type. If a court
33 record is confidential by law or sealed by court order and a person working
34 for the government entity would not be legally entitled to inspect the court
35 record at the courthouse, the court may not provide the government entity
36 with remote access to the confidential or sealed electronic record.

37
38 (3) This rule applies only to electronic records. A government entity is not
39 entitled under these rules to remote access to any documents, information,
40 data, or other types of materials created or maintained by the courts that are
41 not electronic records.

42
43 (c) * * *