

# JUDICIAL COUNCIL OF CALIFORNIA

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## INVITATION TO COMMENT

**SPR16-04**

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<b>Title</b> Appellate Procedure: Transcripts of <i>Marsden</i> Hearings	<b>Action Requested</b> Review and submit comments by June 14, 2016
<b>Proposed Rules, Forms, Standards, or Statutes</b> Amend advisory committee comment to Cal. Rules of Court, rule 8.45	<b>Proposed Effective Date</b> January 1, 2017
<b>Proposed by</b> Appellate Advisory Committee Hon. Raymond J. Ikola, Chair	<b>Contact</b> Heather Anderson, 415-865-7691 heather.anderson@jud.ca.gov

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### Executive Summary and Origin

Based on a suggestion received from the assistant clerk/administrator of a Court of Appeal, the Appellate Advisory Committee is proposing to amend the advisory committee comment accompanying the rule that addresses transmission of confidential records to clarify that a copy of the confidential transcript of any in-camera hearings conducted by the superior court under *People v. Marsden* (1970) 2 Cal.3d 118 must be transmitted to the defendant's appellate counsel or, if not yet appointed, the district appellate project.

### Background

Prior to January 1, 2014, there was a specific rule, rule 8.328 of the California Rules of Court, that addressed the handling of the confidential reporter's transcripts of in-camera hearings conducted by the superior court under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden* transcripts). Among other things, this rule provided that the superior court clerk was required to send one copy of the *Marsden* transcript to the defendant's appellate counsel or, if the defendant is not yet represented by appellate counsel, to the appellate project for the district.

Effective January 1, 2014, the appellate rules relating to sealed and confidential records were amended. Rule 8.328 was repealed and replaced with rules 8.45 – 8.47, which address sealed and confidential records in general. These amendments were not intended to change the practice of sending a copy of any *Marsden* transcripts to the defendant's appellate counsel or, if the defendant is not yet represented by appellate counsel, to the appellate project for the district.

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

Transmission of confidential transcripts is now addressed in rule 8.45, which generally addresses access to and transmission of sealed and confidential records. Rule 8.45(d)(2) provides that a reporter's transcript or any document related to any in-camera hearing from which a party was excluded in the trial court, such as a *Marsden* hearing, must be transmitted to the reviewing court and to the party or parties who participated in the in-camera hearing. The term "party" includes any attorney of record for that party and, thus, when a party who participated in an in-camera hearing, such as a defendant in a *Marsden* hearing, is represented by appellate counsel, the confidential transcript of that hearing must be transmitted to that party's appellate counsel. Rule 8.336(g), which was not substantively modified in 2014, also provides that one copy of the reporter's transcript in a felony appeal must be sent to appellate counsel for each defendant represented by separate counsel and that if the defendant is not represented by appellate counsel when the transcripts are certified as correct, the clerk must send that defendant's counsel's copy of the transcripts to the district appellate project.

### **The Proposal**

The committee understands that, despite there being no intent to change the existing practice, the repeal of former rule 8.328 has resulted in some confusion about whether a copy of any *Marsden* transcripts must be sent to the defendant's appellate counsel. In some cases, this confusion has resulted in appellate counsel having to file a motion to obtain the necessary copy of a *Marsden* transcript. To eliminate any confusion about this, the committee is proposing an amendment to the advisory committee comment accompanying rule 8.45 addressing subdivision (d) and clarifying the continuing requirement to send a copy of any *Marsden* transcripts must be sent to the defendant's appellate counsel or, if the defendant is not yet represented by appellate counsel, to the appellate project for the district.

The committee is also proposing a few non-substantive changes to the comment regarding 8.45(c) and (d) that would correct a cross-referencing error, provide a more specific citation to another rule provision, and clarify that a reference to "transcripts" encompasses both clerk's and reporter's transcripts.

### **Alternatives Considered**

The committee considered whether to propose an amendment to rule 8.47 to add language specifically requiring the superior court clerk to send one copy of a *Marsden* transcript to the defendant's appellate counsel or, if the defendant is not yet represented by appellate counsel, to the appellate project for the district. Ultimately, the committee decided not to propose such an amendment because rule 8.45 already requires this same result. The committee was concerned that adding another provision separately addressing *Marsden* transcripts could result in rule 8.45 being interpreted in a way that is not consistent with the original intent. However, the committee would appreciate input on whether such an amendment to rule 8.47 would be preferable to the proposed amendment to the advisory committee comment accompanying rule 8.45.

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

This proposal should not impose significant implementation requirements on the courts and should result in decreased costs associated with motions by counsel to receive a copy of any *Marsden* transcripts.

### **Request for Specific Comments**

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

- Whether the proposal appropriately addresses the stated purpose.
- Whether it would be preferable to amend rule 8.47 to add language specifically requiring the superior court clerk to send one copy of a *Marsden* transcript to the defendant's appellate counsel or, if the defendant is not yet represented by appellate counsel.

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 (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems.
- Would 2 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?

## **Attachment**

Cal. Rules of Court, rule 8.45, at pages 4–5

The advisory committee comment to rule 8.45 of the California Rules of Court would be amended, effective January 1, 2017, to read:

1  
2 **Title 8. Appellate Rules**  
3

4 **Division 1. Rules Relating to the Supreme Court and Courts of Appeal**  
5

6 **Chapter 1. General Provisions**  
7

8 **Article 3. Sealed and Confidential Records**  
9

10  
11 **Rule 8.45. General provisions**  
12

13 **(a) Application \* \* \***  
14

15 **(b) Definitions \* \* \***  
16

17 **(c) Format of sealed and confidential records \* \* \***  
18

19 **(d) Transmission of and access to sealed and confidential records**  
20

- 21 (1) Unless otherwise provided by (2)–(4) or other law or court order, a sealed or  
22 confidential record that is part of the record on appeal or the supporting documents  
23 or other records accompanying a motion, petition for a writ of habeas corpus, other  
24 writ petition, or other filing in the reviewing court must be transmitted only to the  
25 reviewing court and the party or parties who had access to the record in the trial  
26 court or other proceedings under review and may be examined only by the reviewing  
27 court and that party or parties. If a party’s attorney but not the party had access to the  
28 record in the trial court or other proceedings under review, only the party’s attorney  
29 may examine the record.  
30
- 31 (2) Except as provided in (3), if the record is a reporter’s transcript or any document  
32 related to any in-camera hearing from which a party was excluded in the trial court,  
33 the record must be transmitted to and examined by only the reviewing court and the  
34 party or parties who participated in the in-camera hearing.  
35
- 36 (3) A reporter’s transcript or any document related to an in-camera hearing concerning a  
37 confidential informant under Evidence Code sections 1041–1042 must be transmitted  
38 only to the reviewing court.  
39
- 40 (4) A probation report must be transmitted only to the reviewing court and to appellate  
41 counsel for the People and the defendant who was the subject of the report.

The advisory committee comment to rule 8.45 of the California Rules of Court would be amended, effective January 1, 2017, to read:

**Advisory Committee Comment**

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

**Subdivision (b)(5).** \* \* \*

**Subdivisions (c) and (d).** The requirements in this rule for format and transmission of and access to sealed and confidential records apply only unless otherwise provided by law. Special requirements that govern transmission of and/or access to particular types of records may supersede the requirements in this rule. For example, rules 8.619(g) and 8.622(e) require copies of reporters’ transcripts in capital cases to be sent to the Habeas Corpus Resource Center and the California Appellate Project in San Francisco, and under rules 8.336 ~~(d)~~(g)(2) and 8.409(e)(2), in non-capital felony appeals, if the defendant—or in juvenile appeals, if the appellant or the respondent—is not represented by appellate counsel when the clerk’s and reporter’s transcripts are certified as correct, the clerk must send that counsel’s copy of the transcripts to the district appellate project.

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

**Subdivision (c)(2).** \* \* \*

**Subdivision (c)(3).** \* \* \*

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

**Subdivision (d)(1) and (2).**

Because the term “party” includes any attorney of record for that party, under rule 8.10 (3), when a party who had access to a record in the trial court or other proceedings under review or who participated in an in-camera hearing—such as a defendant in a Marsden hearing—is represented by appellate counsel, the confidential record or transcript must be transmitted to that party’s appellate counsel.

. Under rules 8.336(g)(2) and 8.409(e)(2), in non-capital felony appeals, if the defendant—or in juvenile appeals, if the appellant or the respondent—is not represented by appellate counsel when the clerk’s and reporter’s transcripts are certified as correct, the clerk must send that counsel’s copy of the transcripts, including confidential records such as transcripts of Marsden hearings, to the district appellate project.

**Subdivision (d)(4).** \* \* \*