

JUDICIAL COUNCIL OF CALIFORNIA

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

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MEMORANDUM

Date	Action Requested
June 27, 2018	Please read before subcommittee meeting
To	Deadline
Members of the Joint Appellate Technology Subcommittee	July 2, 2018
From	Contact
Ingrid Leverett, Attorney Legal Services	Ingrid Leverett (415) 865-8031 phone Ingrid.Leverett@jud.ca.gov
Subject	
Rules Modernization: Sealed and Confidential Records, Lodged Records	

Introduction

In February, the Appellate Advisory Committee recommended circulating for public comment a proposal to amend California Rules of Court rules 8.45, 8.46, and 8.47 which govern sealed and confidential records that are submitted in reviewing courts. If adopted, the proposal would establish procedures for handling materials that are submitted electronically. Specifically, the proposed amendments would:

- Amend rule 8.46(d)(7), rule 8.46(f)(3)(D), rule 8.47(b)(3)(D), and rule 8.47(c)(2)(D) to provide for the disposition of a lodged electronic record when the court denies a motion or application to seal. The moving party would have 10 days after the denial of the application or motion to seal in which to direct the clerk to file a lodged record unsealed. Otherwise, the clerk must return the lodged record to the moving party if it is in paper form or delete the lodged record if it is in electronic form.
- Amend rule 8.45(d)(1) and rule 8.46(f)(3)(B) to add language requiring that sealed, conditionally sealed, and confidential records be transmitted to the reviewing court in a secure manner that preserves the confidentiality of the record. This requirement currently appears in rule 8.47.

- Add new subdivision (e) to rule 8.46 to clarify procedures for transmitting, conditionally sealing, and returning or deleting a record that is the subject of challenge to a trial court order denying a motion or application to seal.
- Amend rule 8.46(f)(2)(B) and (f)(3)(B), and rule 8.47(b)(3)(C)(ii) to clarify the procedure for lodging an unredacted version of a record in connection with an appellate filing by requiring that the confidential material within the record be identified as such in the filing.
- Amend rule 8.46 and rule 8.47 with other minor changes in language and punctuation intended to clarify the rules.

The Judicial Council’s Rules and Projects Committee approved the recommendation for circulation and the proposal was circulated for public comment from April 9 through June 8, 2018, as part of the regular spring cycle. (A copy of the invitation to comment is included in your meeting materials.) This memorandum discusses the public comments received in response to the proposal.

Public Comments

Five organizations submitted comments on this proposal. Two bar associations and one superior court agreed with the proposed rule amendments. Two child support organizations agreed with the proposal if modified. Both raised the same substantive issue and recommend that the same additional language be added. A chart with the full text of the comments received and draft responses is attached at pages 17-19.

The two commenters who agreed with the proposal if modified suggest that the proposed new subdivision (e) to rule 8.46 could potentially be construed as expanding the right to appeal evidentiary rulings and providing for a stay of the proceedings during the pendency of such an appeal. The commenters suggest adding language clarifying that the new subdivision (e) is not intended to expand availability of appellate review: “This paragraph is not intended to expand the scope of relief available but only to prescribe the manner of which confidential records are maintained.”

Staff Recommendation

New subdivision (e) of rule 8.46 provides:

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

record to the lodging party if it is in paper form, or (2) permanently delete the lodged record if it is in electronic form.

Staff agrees that the first sentence of subdivision (e) could be read to suggest that litigants have broader opportunities for review of orders denying a motion or application to seal a record. To clarify that this is not the intent, staff considered adding language to the text of the rule, either the language suggested by the commenters or other language. Staff also considered whether to address the issue in an Advisory Committee Comment. Because this is a point of clarification, staff recommends revising the proposal to add an Advisory Committee Comment clarifying that subdivision (e) does not expand the scope of available appellate relief, as follows:

Advisory Committee Comment

Subdivision (e). This subdivision is not intended to create appellate jurisdiction or to expand the availability of existing appellate remedies for any person aggrieved by a court's denial of a motion or application to seal a record.

The subcommittee should consider whether a modification to subdivision (e) is necessary in light of the comments and, if so, whether to recommend the proposed Advisory Committee Comment, an addition to the text of subdivision (e), or some other modification.

Subcommittee's task

Staff has prepared a draft of the report to the Judicial Council concerning this proposal, which is attached for your review and discussion. The draft report includes a summary of the public comments and staff's proposed responses.

The subcommittee's task is to:

- Discuss the public comments received on the proposal; and
- Discuss and approve or modify staff suggestions for responding to the comments, including whether to add an Advisory Committee Comment to rule 8.46, as reflected in the accompanying draft showing the text of proposed amendments to rules 8.45-8.47.

Attachments

1. Draft of report to Judicial Council
2. Text of proposed amendments to rules 8.45-8.47, with proposed amendments
3. Comment chart with draft committee responses
4. Invitation to comment



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REPORT TO THE JUDICIAL COUNCIL

For business meeting on September 21, 2018:

Title	Agenda Item Type
Rules Modernization: Electronic Sealed and Confidential Records and Lodged Records in the Court of Appeal	Action Required
	Effective Date
	January 1, 2019
Rules, Forms, Standards, or Statutes Affected	Date of Report
Amend Cal. Rules of Court, rules 8.45, 8.46, and 8.47	June 27, 2018
Recommended by	Contact
Appellate Advisory Committee	Ingrid Leverett, (415) 865-8031
Hon. Louis R. Mauro, Chair	Ingrid.Leverett@jud.ca.gov
Information Technology Advisory Committee	
Hon. Sheila F. Hanson, Chair	

Executive Summary

The Appellate Advisory Committee recommends amending the rules to establish procedures for handling sealed and confidential materials submitted electronically in the Court of Appeal. The proposed amendments encompass the court's return of lodged electronic records submitted in connection with a motion to seal that is denied. The proposal would (1) harmonize the appellate rules with parallel trial court rules governing sealed records; (2) make these appellate rules internally consistent; and (3) address the transmission and handling of records in a proceeding challenging a trial court's order denying a motion to seal.

Recommendation

The Appellate Advisory Committee and the Information Technology Advisory Committee recommend that the Judicial Council, effective January 1, 2019:

1. Amend rule 8.46(d)(7), rule 8.46(f)(3)(D), rule 8.47(b)(3)(D), and rule 8.47(c)(2)(D) to provide for the disposition of a lodged electronic record when the court denies a motion

or application to seal. The moving party would have 10 days after the denial of the application or motion to seal in which to direct the clerk to file a lodged record unsealed. Otherwise, the clerk must return the lodged record to the moving party if it is in paper form or delete the lodged record if it is in electronic form;

2. Amend rule 8.45(d)(1) and rule 8.46(f)(3)(B) to add language requiring that sealed, conditionally sealed, and confidential records be transmitted to the reviewing court in a secure manner that preserves the confidentiality of the record. This requirement currently appears in rule 8.47;
3. Add new subdivision (e) to rule 8.46 to clarify procedures for transmitting, conditionally sealing, and returning or deleting a record that is the subject of challenge to a trial court order denying a motion or application to seal;
4. Amend rule 8.46(f)(2)(B) and (f)(3)(B), and rule 8.47(b)(3)(C)(ii) to clarify the procedure for lodging an unredacted version of a record in connection with an appellate filing by requiring that the confidential material within the record be identified as such in the filing; and
5. Amend rule 8.46 and rule 8.47 with other minor changes in language and punctuation intended to clarify the rules.

Relevant Previous Council Action

The Judicial Council adopted the predecessor to rule 8.46 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 a court must make before sealing a record and the standard for their unsealing. Subsequent amendments clarified the applicability of the rule to various proceedings.

Effective January 1, 2014, the Judicial Council adopted new article 3 in Chapter 1 of Title 8 of the California Rules of Court to serve as the location for the rules concerning sealed and confidential records in the Supreme Court and Courts of Appeal. As part of new article 3, the Judicial Council adopted new rule 8.45 to establish definitions and set forth general provisions governing sealed and confidential records in the reviewing courts. At the same time, the Judicial Council adopted new rule 8.47 to establish requirements relating to confidential records in Supreme Court and Court of Appeal proceedings and amended rule 8.46 to make conforming changes and to add provisions regarding redacted and unredacted submissions.

Effective January 1, 2016, the Judicial Council amended rules 8.46 and 8.47 to add language requiring that all sealed or confidential documents that are transmitted electronically be transmitted in a secure manner.

Analysis/Rationale

The goal of the current proposal is to harmonize rules 8.45, 8.46 and 8.46 with one another and with parallel trial court rules (rules 2.550 and 2.551) that govern the handling of sealed records, including electronic records.

Rules 2.550 and 2.551 govern the handling of sealed records in the trial court. Amendments that took effect January 1, 2017, revised rule 2.551(b)(6) to provide that, unless otherwise ordered, the moving party has 10 days following an order denying a motion or application to seal to direct the court to file the lodged material unsealed. If the clerk receives no notification within 10 days of the order, the clerk must return the lodged records if in paper form or permanently delete them if lodged in electronic form. In reviewing the appellate rules on sealed and confidential records, staff and the committees identified differences between rules 8.46 and 8.47, on the one hand, and, on the other, the corresponding trial court rules discussed above. The proposed amendments are intended to address those differences and inconsistencies and to conform the appellate court rules to the trial court rules.

The current procedure for returning a lodged record when the court denies a motion or application to seal fails to accommodate records lodged in electronic form. The trial court rules account for this situation. (See rule 2.551(b)(6).) The proposed amendments to rules 8.46 and 8.47 attached to this memorandum are drafted to be uniform with the trial court rules. They provide that, after 10 days from the date on which a reviewing court denies a motion or application to seal in a reviewing court, the clerk must file the record unsealed if the lodging party so directs or, if the lodging party does not so direct, must return the record if in hard copy or delete it if electronic.

For internal consistency among the three appellate rules at issue (rules 8.45, 8.46 and 8.47), the amendments require that sealed and confidential records be transmitted in a secure manner that preserves their confidentiality (a provision in rule 8.47 and in one subdivision of rule 8.46 that is absent from rule 8.45 and from another relevant subdivision of rule 8.46). The amendments also direct that when an unredacted record is lodged with a reviewing court, the particular sealed or confidential material within the record be identified as such (an existing requirement of rule 8.46 that is absent from rule 8.47).

Finally, a new proposed subdivision (e) to rule 8.46 addresses the handling of records that are the subject of review in any appeal or original proceeding challenging a lower court's denial of a motion or application to seal. Under new proposed subdivision (e), the record at issue would remain conditionally under seal while the review proceeding was pending. After the reviewing court's decision becomes final, the clerk is required to return the record if it is in paper form, or permanently delete it if it is in electronic form.

Policy implications

The advisory committees have identified no policy implications.

Comments

Five organizations submitted comments on this proposal. Two bar associations and one superior court agreed with the proposed rule amendments. Two child support organizations agreed with the proposal if modified. Both raised the same substantive issue and recommend that the same additional language be added. A chart with the full text of the comments received and draft responses is attached at pages 17-19.

The two commenters who agreed with the proposal if modified suggest that the proposed new subdivision (e) to rule 8.46 could potentially be construed as expanding the right to appeal evidentiary rulings and providing for a stay of the proceedings during the pendency of such an appeal. The comments suggest adding language clarifying that the new subdivision (e) is not intended to expand availability of appellate review: “This paragraph is not intended to expand the scope of relief available but only to prescribe the manner of [sic] which confidential records are maintained.”

Based on this comment, the committee recommends revising the proposal to add an Advisory Committee Comment clarifying that subdivision (e) does not expand the scope of available appellate relief, as follows:

Advisory Committee Comment

Subdivision (e). This subdivision is not intended to create appellate jurisdiction or to expand the availability of existing appellate remedies for any person aggrieved by a court’s denial of a motion or application to seal a record.

Alternatives considered

The committee considered not proposing these amendments. The committee concluded that the proposed changes were necessary to (1) give guidance and direction to litigants, (2) harmonize the appellate court rules with existing trial court rules governing the same subject matter, (3) make the appellate court rules internally consistent regarding the handling of sealed and confidential records, and (4) clarify proper procedure for the handling of sealed and confidential records that are the subject of a proceeding in a reviewing court.

The committee also considered adding the language proposed by two of the commenters clarifying that the new subdivision (e) is not intended to expand the availability of appellate review. Specifically, the committee considered whether this language, or similar language, should be included within the text of the rule or, alternatively, in an Advisory Committee Comment. The committee ultimately decided to recommend the latter option because an Advisory Committee Comment carries less risk of unintended consequences than is true for an amendment that adds new language to an existing rule.

The committee considered not including reference to the issue identified by the two commenters, but concluded that the suggested guidance would be helpful.

Fiscal and Operational Impacts

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

Attachments and Links

1. Cal. Rules of Court, rules 8.45, 8.46 and 8.47.
2. Chart of comments, at pages 17-19.

1 Title 8. Appellate Rules

2
3 Division 1. Rules Relating to the Supreme Court and Courts of Appeal

4
5 Chapter 1. General Provisions

6
7 Article 3. Sealed and Confidential Records

8
9
10 Rule 8.45. General provisions

11
12 (a) – (c) * * *

13
14 (d) Transmission of and access to sealed and confidential records

15
16 (1) A sealed or confidential record must be transmitted in a secure manner that
17 preserves the confidentiality of the record.

18
19 ~~(1)~~(2) Unless otherwise provided by ~~(2)~~–~~(4)~~(3)–~~(5)~~ or other law or court order, a
20 sealed or confidential record that is part of the record on appeal or the
21 supporting documents or other records accompanying a motion, petition for a
22 writ of habeas corpus, other writ petition, or other filing in the reviewing
23 court must be transmitted only to the reviewing court and the party or parties
24 who had access to the record in the trial court or other proceedings under
25 review and may be examined only by the reviewing court and that party or
26 parties. If a party’s attorney but not the party had access to the record in the
27 trial court or other proceedings under review, only the party’s attorney may
28 examine the record.

29
30 ~~(2)~~(3) Except as provided in ~~(3)~~(4), if the record is a reporter’s transcript or any
31 document related to any in-camera hearing from which a party was excluded
32 in the trial court, the record must be transmitted to and examined by only the
33 reviewing court and the party or parties who participated in the in-camera
34 hearing.

35
36 ~~(3)~~(4) A reporter’s transcript or any document related to an in-camera hearing
37 concerning a confidential informant under Evidence Code sections 1041–
38 1042 must be transmitted only to the reviewing court.

39
40 ~~(4)~~(5) A probation report must be transmitted only to the reviewing court and to
41 appellate counsel for the People and the defendant who was the subject of the
42 report.

1 **Advisory Committee Comment**

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

4
5 **Subdivision (b)(5). * * ***

6
7 **Subdivisions (c) and (d). * * ***

8
9 **Subdivision (c)(1)(C). * * ***

10
11 **Subdivision (c)(2). * * * Subdivision (c)(3). * * ***

12
13 **Subdivision (d). * * ***

14
15 **Subdivision (d)(1)(2) and (2)(3).** Because the term “party” includes any attorney of record for
16 that party, under rule 8.10(3), when a party who had access to a record in the trial court or other
17 proceedings under review or who participated in an in-camera hearing—such as a *Marsden*
18 hearing in a criminal or juvenile proceeding—is represented by appellate counsel, the confidential
19 record or transcript must be transmitted to that party’s appellate counsel. Under rules 8.336(g)(2)
20 and 8.409(e)(2), in non-capital felony appeals, if the defendant—or in juvenile appeals, if the
21 appellant or the respondent—is not represented by appellate counsel when the clerk’s and
22 reporter’s transcripts are certified as correct, the clerk must send the copy of the transcripts that
23 would go to appellate counsel, including confidential records such as transcripts of *Marsden*
24 hearings, to the district appellate project.

25
26 **Subdivision (d)(4)(5).** This rule limits to whom a copy of a probation report is transmitted based
27 on the provisions of Penal Code section 1203.05, which limit who may inspect or copy probation
28 reports.

29
30 **Rule 8.46. Sealed records**

31
32 **(a) – (c) * * ***

33
34 **(d) Record not filed in the trial court; motion or application to file under seal**

35
36 (1) – (6) * * *

37
38 (7) If the court denies the motion or application to seal the record, ~~the clerk must~~
39 ~~not place the lodged record in the case file but must return it to the submitting~~
40 ~~party unless that party notifies the clerk in writing that the record is to be~~
41 ~~filed. Unless otherwise ordered by the court, the submitting party must notify~~
42 ~~the clerk within 10 days after the order denying the motion or application the~~
43 ~~lodging party may notify the court that the lodged record is to be filed~~

1 unsealed. This notification must be received within 10 days of the order
2 denying the motion or application to seal, unless otherwise ordered by the
3 court. On receipt of this notification, the clerk must unseal and file the record.
4 If the lodging party does not notify the court within 10 days of the order, the
5 clerk must (1) return the lodged record to the lodging party if it is in paper
6 form, or (2) permanently delete the lodged record if it is in electronic form.

7
8 (8) An order sealing the record must direct the sealing of only those documents
9 and pages or, if reasonably practical, portions of those documents and pages,
10 that contain the material that needs to be placed under seal. All other portions
11 of each document or page must be included in the public file.

12
13 (9) Unless the sealing order provides otherwise, it prohibits the parties from
14 disclosing the contents of any materials that have been sealed in anything that
15 is subsequently publicly filed.

16
17 **(e) Challenge to an order denying a motion or application to seal a record**

18
19 Notwithstanding the provisions in (d)(1)-(2), when an appeal or original proceeding
20 challenges an order denying a motion or application to seal a record, the appellant
21 or petitioner must lodge the subject record labeled as conditionally under seal in the
22 reviewing court as provided in (d)(3)-(5), and the reviewing court must maintain
23 the record conditionally under seal during the pendency of the appeal or original
24 proceeding. Once the reviewing court's decision on the appeal or original
25 proceeding becomes final, the clerk must (1) return the lodged record to the lodging
26 party if it is in paper form, or (2) permanently delete the lodged record if it is in
27 electronic form.

28
29 **(e)(f) Unsealing a record in the reviewing court**

30
31 (1) - (2) * * *

32
33 (3) If the reviewing court proposes to order a record unsealed on its own motion,
34 the court must send notice to the parties stating the reason for unsealing the
35 record. Unless otherwise ordered by the court, any party may serve and file
36 an opposition within 10 days after the notice is sent, and any other party may
37 serve and file a response within 5 days after an opposition is filed.

38
39 (4) - (7) * * *

40
41 **(f)(g) Disclosure of nonpublic material in public filings prohibited**

42
43 (1) * * *

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

(A) * * *

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

(C) * * *

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

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

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

(C) Unless the court orders otherwise, any party who had access to the conditionally sealed record in the trial court or other proceedings under review must be served with both the unredacted version of all papers as well as the redacted version. Other parties must be served with only the public redacted version.

(D) If the court denies the motion or application to seal the record, ~~the clerk must not place the unredacted version lodged under (B) in the case file but must return it to the party who filed the application or motion to~~

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

12
13 **Advisory Committee Comment**

14
15 **Subdivision (e)**. This subdivision is not intended to create appellate jurisdiction or
16 to expand the availability of existing appellate remedies for any person aggrieved
17 by a court's denial of a motion or application to seal a record.

18
19 **Rule 8.47. Confidential records**

20
21 (a) * * *

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

24
25 (1) * * *

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

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

36
37 (B) The People may serve and file an application requesting a copy of the
38 reporter's transcript of, and documents filed or lodged by a defendant
39 in connection with, the in-camera hearing.

40
41 (C) * * *

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

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

13 (A) * * *

14
15 (B) The declaration accompanying the motion or application must contain
16 facts sufficient to justify an order maintaining the confidentiality of the
17 relevant material from the reporter’s transcript of, or documents filed or
18 lodged in connection with, the in-camera hearing and sealing of the
19 brief, petition, or other filing.
20

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

22
23 (i) * * *

24
25 (ii) Lodge an unredacted version of the brief, petition, or other filing
26 that he or she is requesting be filed under seal. The filing must be
27 transmitted in a secure manner that preserves the confidentiality
28 of the filing being lodged. If this version is in paper format, it
29 must be placed in a sealed envelope or other appropriate sealed
30 container. The cover of the unredacted version of the document,
31 and if applicable the envelope or other container, must identify it
32 as “May Not Be Examined Without Court Order—Contains
33 material from conditionally sealed record.” Conditionally sealed
34 material disclosed in this version must be identified as such in the
35 filing.
36

37 (D) If the court denies the motion or application to file the brief, petition, or
38 other filing under seal, ~~the clerk must not place the unredacted brief,~~
39 ~~petition, or other filing lodged under (C)(ii) in the case file but must~~
40 ~~return it to the defendant unless the defendant notifies the clerk in~~
41 ~~writing that it is to be filed. Unless otherwise ordered by the court, the~~
42 ~~defendant must notify the clerk within 10 days after the order denying~~
43 ~~the motion or application~~ the defendant may notify the court that the

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

11
12 **(c) Other confidential records**

13
14 Except as otherwise provided by law or order of the reviewing court:

15
16 (1) * * *

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

22
23 (A)– (C) * * *

24
25 (D) If the court denies the motion or application to file the brief, petition, or
26 other filing under seal, ~~the clerk must not place the unredacted brief,~~
27 ~~petition, or other filing lodged under (C)(ii) in the case file but must~~
28 ~~return it to the lodging party unless the party notifies the clerk in~~
29 ~~writing that it is to be filed. Unless otherwise ordered by the court, the~~
30 ~~party must notify the clerk within 10 days after the order denying the~~
31 ~~motion or application~~ the party who filed the motion or application may
32 notify the court that the unredacted brief, petition, or other filing lodged
33 under (C)(ii) is to be filed unsealed. This notification must be received
34 within 10 days of the order denying the motion or application to file the
35 brief, petition, or other filing under seal, unless otherwise ordered by
36 the court. On receipt of this notification, the clerk must unseal and file
37 the lodged unredacted brief, petition, or other filing. If the party who
38 filed the motion or application does not notify the court within 10 days
39 of the order, the clerk must (1) return the lodged unredacted brief,
40 petition, or other filing to the lodging party if it is in paper form, or (2)
41 permanently delete the lodged unredacted brief, petition, or other filing
42 if it is in electronic form.

Advisory Committee Comment

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

Subdivision (c)(1). * * *

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

SPR18-06

Appellate Procedure: Electronic Sealed and Confidential Records and Lodged Records in the Court of Appeal (Amend Cal. Rules of Court, rules 8.45, 8.46, and 8.47)

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

	Commenter	Position	Comment	Committee Response
1.	California Department of Child Support Services by Kristen Donadee Assistant Chief Counsel Rancho Cordova, CA	AM	<p>The California Department of Child Support Services (Department) has reviewed the proposal identified above for potential impacts to the child support program, the local child support agencies, and our case participants. Specific feedback related to the provisions of the rules with potential impacts to the Department and its stakeholders is set forth below.</p> <p>Rule 8.46 - Sealed records</p> <p>The Department recommends clarification regarding Rule 8.46, subdivision (e), which is related to challenges to an order denying a motion or application to seal a record. Evidentiary rulings are not always subject to immediate appeals. It is unclear if this rule intends to stay the proceedings while an evidentiary ruling is appealed. Clarifying this point would be beneficial to the parties when considering whether to appeal evidentiary rulings regarding motions and applications to seal records.</p> <p>If this is not the JCC's intent, the Department respectfully suggests adding language to subsection e, which provides as follows:</p> <p>This paragraph is not intended to expand the scope of relief available but</p>	<p>The committee notes the commenter's agreement with the proposal if modified.</p> <p>The committee agrees that subdivision (e) could create uncertainty and has revised the proposal to include an Advisory Committee Comment following the text of rule 8.46, as follows:</p> <p style="text-align: center;"><u>Advisory Committee Comment</u></p> <p><u>Subdivision (e)</u>. <u>This subdivision is not intended to create appellate jurisdiction or to expand the availability of existing appellate remedies for any person aggrieved by a court's denial of a motion or application to seal a record.</u></p> <p>The committee appreciates this feedback.</p>

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

SPR18-06

Appellate Procedure: Electronic Sealed and Confidential Records and Lodged Records in the Court of Appeal (Amend Cal. Rules of Court, rules 8.45, 8.46, and 8.47)

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

	Commenter	Position	Comment	Committee Response
			<p>only to prescribe the manner of which confidential records are maintained.</p> <p>Thank you for the opportunity to provide input, express our ideas, experiences and concerns with respect to the proposed rules and form changes.</p>	
2.	California Lawyers Association, Committee on Appellate Courts of the Litigation Section San Francisco, CA	A	<p>The Committee on Appellate Courts supports this proposal and responds as follows to the Invitation to Comment’s request for specific comments.</p> <p>Does the proposal appropriately address the stated purpose? Yes, the new and revised forms achieve the stated purpose because (1) when motion to seal is denied, it requires the clerk to either return paper copies submitted, or delete electronic copies; (2) it requires sealed documents to be transmitted to the reviewing court in a secure and confidential manner; (3) it clarifies procedures for transmitting and conditionally sealing materials where the ruling denying sealing is challenged on appeal; and (4) it clarifies procedures for lodging unredacted materials in the appellate court.</p> <p>Is new subdivision (e) of rule 8.46—addressing a record that is the subject of an appeal or original proceeding challenging a trial court’s ruling denying a motion or</p>	<p>The committee notes the commenter’s support for the proposal.</p> <p>The committee appreciates this feedback.</p> <p>The committee appreciates this feedback.</p>

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

SPR18-06

Appellate Procedure: Electronic Sealed and Confidential Records and Lodged Records in the Court of Appeal (Amend Cal. Rules of Court, rules 8.45, 8.46, and 8.47)

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	Commenter	Position	Comment	Committee Response
			<p>application to seal that record—helpful, and does it provide sufficient guidance? Yes, new subdivision (e) is helpful and provides sufficient guidance.</p>	
3.	Child Support Directors Association, Judicial Council Forms Committee by Ronald Ladage, Chair	AM	<p>The Committee is concerned that Rule 8.46 subdivision (e), may be interpreted to expand the scope of relief that may be available. Assuming this is not the intent of the Rule, we suggest adding the following language to subsection (e):</p> <p style="padding-left: 40px;">This paragraph is not intended to expand the scope of relief available, but only to prescribe the manner of which confidential records are maintained.</p> <p>Thank you for the opportunity to provide input, express our ideas, experiences and concerns with respect to the proposed rules and form changes.</p>	See response to comment No. 1, above.
4.	Orange County Bar Association by Nikki P. Miliband, President	A	No specific comment.	The committee notes the commenter’s agreement with the proposal. No further response required.
5.	Superior Court of San Diego County by Mike Roddy, CEO	A	No specific comment.	The committee notes the commenter’s agreement with the proposal. No further response required.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

JUDICIAL COUNCIL OF CALIFORNIA

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INVITATION TO COMMENT

SPR18-06

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

Executive Summary and Origin

As part of the Rules Modernization Project¹, the Appellate Advisory Committee recommends amending the rules to establish procedures for handling sealed and confidential materials submitted electronically in the Court of Appeal. The proposed amendments encompass the court's return of lodged electronic records submitted in connection with a motion to seal.

Background

Relevant rule history: modernization of trial court rules re return of lodged sealed and confidential electronic records

Rules 2.550 and 2.551 govern sealed records in the trial court. Amendments that took effect January 1, 2016 (Rules Modernization phase I) included:²

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

² The Judicial Council report dated September 16, 2015 describes the phase I rule amendments. The report is available at: <https://jcc.legistar.com/View.ashx?M=F&ID=4103509&GUID=4234BC37-DBCC-4795-A932-0DC9EEF95AFF>

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.

- Defining “record” to encompass materials filed or lodged electronically (see rule 2.550(b)(1));
- Accommodating electronic records and notices in the rules governing the filing and maintenance by the court of sealed material (see rule 2.551; see also rule 3.1302 [regarding lodged material in law and motion proceedings]);
- Providing for the return of materials lodged in electronic form (see rule 2.551).³

During the next year⁴, responding to concerns that the new rule language providing for the return of materials lodged in electronic form did not necessarily require their deletion, the committees took up these rules again. They revised rule 2.551(b)(6)⁵ to provide that, unless otherwise ordered, the moving party has 10 days following an order denying a motion or application to seal to direct the court to file the lodged material unsealed. If the clerk receives no notification within 10 days of the order, the clerk must return the lodged records if in paper form or permanently delete them if lodged in electronic form. Based on responses to the invitation to comment, the committees decided not to require that courts send a separate notice of destruction before deleting electronic lodged records. The order denying the sealing motion was thought to provide sufficient notice to the moving party.

The committees also revised rule 3.1302(b) to provide that courts may continue to maintain other lodged materials but that, if they do not, they must return them by mail if in paper form or permanently delete them after notifying the lodging party if in electronic form. The committees decided to require that a notice be sent before destruction of any electronic lodged records under rule 3.1302 because the submitting party would not otherwise have notice of the destruction.

Relevant rule history: modernization of appellate rules re electronic records

The phase I rules modernization proposal included amendments to the appellate rules. As relevant here, these:

- Added definitions of “attach or attachment,” “copy or copies,” “cover,” and “written or writing” to clarify their application to electronically filed documents (see renumbered and amended rule 8.803 and amended rule 8.10);
- Added new rule 8.11 and amended rule 8.800(b) to clarify that the rules are intended to apply to documents filed and served electronically;
- Replaced references to “mail” with “send” throughout;
- Replaced references to “file-stamped” with “filed-endorsed” throughout;

³ The phase II proposal also involved technical amendments that had not been identified during phase I.

⁴ The phase II amendments are described in the Judicial Council report dated October 27, 2016. The report is available at: <https://jcc.legistar.com/View.ashx?M=F&ID=4754371&GUID=8F6F2BC1-73E4-4392-9D98-E169A95483A9>.

⁵ These amendments were also made to rule 2.577, which governs procedures for filing confidential name change records under seal.

- Added language requiring that all confidential or sealed documents transmitted electronically must be transmitted in a secure manner (see amended rules 8.45(c), 8.46(d), 8.47(b) and (c), and 8.482(g)).

The Proposal

The proposal amends rule 8.46 and rule 8.47 to:

- Provide for the disposition of a lodged electronic record when the court denies a motion or application to seal. Specifically, the moving party would have ten days after the denial of the application or motion to seal in which to notify the clerk to file a lodged record unsealed. Otherwise, the clerk must return the lodged record to the moving party if it is in paper form or delete the lodged record if it is in electronic form. The new proposed language would appear in rule 8.46(d)(7), rule 8.46(f)(3)(D), rule 8.47(b)(3)(D) and rule 8.47(c)(2)(D).
- Add a provision that material lodged in connection with a motion to seal be transmitted to the court in a secure manner that preserves confidentiality. This provision would apply when it is necessary to disclose in an appellate filing (such as a brief or petition) material that is contained in a conditionally sealed record. Existing rules require that a public redacted version be filed and that an unredacted version be lodged. Trial court rules include the requirement that the filing “must be transmitted in a secure manner that preserves the confidentiality of the filing being lodged.” (See rule 2.551(d)(1).) The proposal would extend this requirement to practice in the Court of Appeal. This requirement is already included in rule 8.47(b)(3)(C)(ii) and (c)(2)(C)(ii). The proposal adds this requirement to rule 8.46(f)(3)(B). (See attached draft amended rule.)
- Add a provision that conditionally sealed material disclosed in a lodged unredacted version of a filing must be identified as such in the filing. This proposed language would appear in rule 8.46(f)(2)(B), rule 8.46(f)(3)(B) and rule 8.47(b)(3)(C)(ii).
- Other proposed amendments are minor changes in language and punctuation intended to clarify the rules.

Alternatives Considered

The committee considered no alternatives to the proposal because the purpose of the proposed amendments is limited in scope to (i) harmonizing the appellate court rules with existing trial court rules governing the same subject matter and (ii) making internally consistent the provisions of the existing appellate court rules on the handling of sealed and confidential records.

Implementation Requirements, Costs, and Operational Impacts

The proposal is not expected to result in new costs or changes to operations in the Court of Appeal, nor to give rise to any implementation challenges.

Request for Specific Comments

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

- Does the proposal appropriately address the stated purpose?

Attachments

Proposed amendments to rules 8.46 and 8.47 (rule 8.45 is provided for context only; no changes are proposed for rule 8.45).