

NOTE: This is the second discussion draft of possible rules on public access to electronic appellate court records. The first draft was reviewed by JATS at its October 14, 2014 meeting. At that meeting, JATS provided the following general direction with respect these possible rules and asked staff to revise the draft accordingly:

- **The rules should not reduce the level of electronic access currently being provided to appellate court records;**
- **If electronic access to particular appellate court records is not currently being provided, the rules should treat those records in the same way as they are treated under the trial court rules on access to electronic records;**
- **The rules should reflect the general assumption that electronic access to appellate court records will be provided through a centralized mechanism, such as the California courts website, rather than being provided by each individual appellate court.**

As with the first discussion draft, this draft uses as its base the trial court rules on public access to electronic trial court records (California Rules of Court, rules 2.500-2.507). In this draft, underlining shows additions to those trial court rules, strikeouts show deletions from trial court rules, and **yellow highlighting** shows changes from the first discussion draft. Following some sections are notes describing particular issues or proposed modifications to the trial court rules. Also following some sections are questions that JATS may want to consider.

Article 6. Public Access to Electronic Appellate Court Records

Rule 8.80. Statement of purpose

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Rule ~~2.500~~ 8.80. Statement of purpose

(a) Intent

The rules in this ~~chapter~~ article are intended to provide the public with reasonable access to ~~trial appellate~~ court records that are maintained in electronic form, while protecting privacy interests.

(b) Benefits of electronic access

Improved technologies provide courts with many alternatives to the historical paper-based record receipt and retention process, including the creation and use of court records maintained in electronic form. Providing public access to ~~trial appellate~~ court records that are maintained in electronic form may save the courts and the public time, money, and effort and encourage courts to be more efficient in their operations. Improved access to ~~trial appellate~~ court records may also foster in the public a more comprehensive understanding of the ~~trial appellate~~ court system.

(c) No creation of rights

The rules in this ~~chapter~~ article are not intended to give the public a right of access to any record that they are not otherwise entitled to access. The rules do not create any right of access to ~~records that are sealed by court order or confidential as a matter of law records~~.

Advisory Committee Comment

The rules in this ~~chapter~~ article acknowledge the benefits that electronic court records provide but attempt to limit the potential for unjustified intrusions into the privacy of individuals involved in litigation that can occur as a result of remote access to electronic court records. The proposed rules take into account the limited resources currently available in the ~~trial appellate~~ courts. It is contemplated that the rules may be modified to provide greater electronic access as the courts' technical capabilities improve and with the knowledge gained from the experience of the courts in providing electronic access under these rules.

NOTE:

Subdivision (c): This subdivision was modified to reflect the definitions of sealed and confidential records in rule 8.45.

Rule ~~2.501~~ 8.81. Application and scope

(a) Application

The rules in this ~~chapter~~ article apply only to ~~trial-court~~ records of the Supreme Court and Court of Appeal.

(b) Access by parties and attorneys

The rules in this ~~chapter~~ article apply only to access to court records by the public. They do not limit access to court records by a party to an action or proceeding, by the attorney of a party, or by other persons or entities that are entitled to access by statute or rule.

Rule ~~2.502~~ 8.82. Definitions

As used in this ~~chapter~~ article, the following definitions apply:

- (1) “Court record” is any document, paper, ~~or exhibit,~~ transcript, or other thing filed ~~by the parties to in~~ an action or proceeding; any order, ~~or judgment, or opinion~~ of the court; and any ~~item listed in Government Code section 68151(a), excluding any reporter’s transcript for which the reporter is entitled to receive a fee for any copy~~ court minutes, index, register of actions or docket. The term does not include the personal notes or preliminary memoranda of ~~justices, judges or other judicial branch personnel~~.
- (2) “Electronic record” is a computerized court record, regardless of the manner in which it has been computerized. The term includes both a ~~document record~~ that has been filed electronically and an electronic copy or version of a record that was filed in paper form. The term does not include a court record that is maintained only on microfiche, paper, or any other medium that can be read without the use of an electronic device.
- (3) “The public” means an individual, a group, or an entity, including print or electronic media, or the representative of an individual, a group, or an entity.
- (4) “Electronic access” means computer access to court records available to the public through both public terminals at the courthouse and remotely, unless otherwise specified in the rules in this ~~chapter~~ article.

- (5) Providing electronic access to electronic records “to the extent it is feasible to do so” means that electronic access must be provided to the extent the court determines it has the resources and technical capacity to do so.
- (6) “Bulk distribution” means distribution of all, or a significant subset, of the court’s electronic records.

NOTES:

Subdivision (1): Staff is suggesting several modifications to the definition of “court record”:

- **Incorporating language from the definition of “record” in rule 8.45, part of the appellate rules on sealed and confidential records. Rule 8.45, and rule 2.550 in the trial court rules on sealed records, include the following definition: “Record’ means all or part of a document, paper, exhibit, transcript, or other thing filed or lodged with the court.” Staff suggests that the definition of “court record” in proposed rule 8.82, like rule 8.45, include references to transcripts or other things filed with the court. This would clarify that the rules in this article cover transcripts and things such as electronic audio or video recordings that are filed with the court.**
- **Deleting the reference to items being filed “by the parties to” an action or proceeding. In appellate proceedings, some items, such as clerk’s and reporter’s transcripts and amicus curiae letters or briefs, are not filed by the parties but are part of the public court records (see, for example, rules 8.150, 8.200(c), 8.336(g), 8.409(c), 8.487(d), 8.500(g), 8.520(f) and 8.622(e)).**
- **Adding a reference to opinions to make it clearer that these are encompassed within court records.**
- **Replacing the cross reference to Government Code section 68151(a) with a provision that specifically identifies court minutes, indexes, and registers of actions or dockets as court records. Government Code section 68151(a) only applies to trial court records. This section, in turn, references Government Code section 68152(g), which also applies only to trial court records. Because of both the internal cross-reference and the inapplicability of both the referenced code sections to appellate court records, staff’s view is that including the reference to Government Code section 68151(a) in the definition of appellate court records is likely to create confusion. Staff reviewed both the referenced code sections (copies of which are attached). Most of the records listed in these code sections are either items that would be filed in the court, and so would be covered by the first clause of this proposed definition of court records, or are orders**

or judgments, and so would be covered by the second clause of this definition. The exceptions appear to be minutes, indexes, and registers of actions or dockets (Gov. code sec. 68152(g)(11), (14)-(15), and (16), respectively). To make this proposed rule simpler and clearer, staff suggest replacing the cross reference to Government Code section 68151(a) with a provision explicitly including these specific items in the definition of court record.

- Moving the provision that excludes any reporter's transcript for which the reporter is entitled to receive a fee for any copy from this definition of court records to rule 8.83(c) below, which identifies electronic records that may only be accessed at the courthouse. Staff is suggesting this change for two reasons: (1) to avoid creating an impression that reporter's transcripts cannot be received or retained by the courts in electronic format; and, at the same time (2) to keep the access to any such transcripts that are in electronic form the same as the access now available for such transcripts that are in paper form – at the courthouse only.

Subdivision (5): This definition is moved here from rule 2.503/8.83(d) below.

Subdivision (6): This definition is moved here from rule 2.503/8.83(g) below.

QUESTION

How should “court record” be defined for purposes of this rule?

- Are the modifications to the trial court definition of court records suggested by staff acceptable?
- The definition of “court records” in the trial court rule and this draft rule includes all “documents” filed in a case, but does not currently include any specific references to the types of documents that are typically filed in appellate proceedings, such as petition, briefs, and appellate records or supporting documents. Should references to such appellate documents be added? Note: Joseph Lane suggested not adding such specific references.

Rule ~~2.503~~ 8.83. Public access

(a) General right of access

All electronic records must be made reasonably available to the public in some form, whether in electronic or in paper form, except ~~those that are sealed by court order or made confidential by law~~ records.

NOTE:

This subdivision was modified to reflect the definitions of sealed and confidential records in rule 8.45.

(b) Electronic access required to extent feasible

(1) Electronic access, both remote and at the courthouse, will be provided to the following court records, except sealed or confidential records, to the extent it is feasible to do so:

(A) Dockets or registers of actions, which must include the following information:

- i. Date case commenced;
- ii. Case number;
- iii. Case type;
- iv. Case title;
- v. Party names;
- vi. Party type;
- vii. Date of each activity; and
- viii. Description of each activity.

(B) Calendars, which must include the following information:

- i. Date of court calendar;
- ii. Time of calendared event;

iii. Case number; and

iv. Case title.

(C) Opinions.

(D) The following Supreme Court records:

i. Results from the most recent Supreme Court weekly conference;

ii. Briefs in cases argued in the Supreme Court since 2010;

iii. Supreme Court minutes from the preceding 3 years.

(2) If a court that maintains the following records in civil cases in addition to those listed in (1) in electronic form, must provide electronic access to them these records, except those listed in (c), must be provided both remotely and at the courthouse, to the extent it is feasible to do so:

~~(1) Registers of actions (as defined in Gov. Code, § 69845), calendars, and indexes in all cases; and~~

~~(2) all records in civil cases, except those listed in (c)(1)–(9).~~

NOTES

The trial court rule requires courts, to the extent feasible, to provide electronic access, both remote and at the courthouse, to the following records in all cases if these records are in electronic format:

- Registers of actions (as defined in Gov. Code, § 69845);
- Calendars; and
- Indexes. . .

Rule 2.507 specifies what information must be included in these records and what information must not be included.

Remote electronic access is currently available on the California courts website to some appellate court records beyond those available under the trial court rules, including opinions and certain Supreme Court records (see the list of the appellate records currently available that was distributed with the material for JATS October 14 meeting). Per JATS direction, the draft of subdivision (b) above is

intended to reflect the additional appellate court records that are already available. The draft of (b)(1)(C) includes opinions among those records that are made available remotely and (D) includes the results of the most recent Supreme Court conference, briefs in cases argued in the Supreme Court since 2010, and Supreme Court minutes for the last 3 years. Not included in the proposed rule are the issue and case summaries provided by the Supreme Court, as these appeared to be outside of definition of court records.

Based on the discussion at JATS October 14 meeting regarding the current technological limitations on making additional information available, staff added back into the subdivision title and added to the draft of subdivision (b)(1) a reference to providing these records “to the extent feasible.”

The draft of (b)(1) also incorporates from rule 2.507 the specifics of what must be included in the electronically accessible registers of actions and calendars, but it does not identify information that must not be included in these records.

Also based on the discussion at JATS October 14 meeting, staff has modified the draft of subdivision (b)(2) to eliminate the reference to the court providing electronic access to these records. The draft now states that electronic access to these records will be provided, but does not specify who will provide this access.

QUESTIONS

1. Should these e-access rules include a provision, such as (b)(1), addressing electronic access to appellate court records that are now available remotely via the California courts website or should this be left implicit/embedded in what is provided on the website?
Things to consider:
 - a. Is it important that a provision addressing this topic be in the rules to provide the public with assurance that there will be electronic access to these records?
 - b. Is it important that a provision addressing this topic be in the rules to provide parallelism to the trial court rules?

- 2. If this topic is addressed in the rules, are the additional records that (b)(1)(C) and (D) would require be made accessible remotely the correct ones to be added to this rule?**
 - a. Are the results from the most recent Supreme Court weekly conference court records that should be included in this provision?**
 - b. Are the case or issue summaries currently available on the Supreme Court website court records that should be included in this provision?**
 - c. Are there any other appellate court records that, if in electronic format, should be made accessible remotely as well as at the courthouse?**
- 3. Should this rule specify, as does rule 2.507 in the trial court rules, what information must NOT be included in records to which bulk access is permitted? If so:**
 - a. Should this provision apply just to the calendars and docket or to opinions as well?**
 - b. What information should the rule specify should not be included in these records? Rule 2.507 prohibits the inclusion of the following information in the trial court calendars, indexes, and registers of action that are subject to bulk distribution:**
 - Social security numbers;
 - Any financial information;
 - Arrest warrant information;
 - Search warrant information;
 - Victim information;
 - Witness information;
 - Ethnicity;
 - Age;
 - Gender;
 - Government-issued identification card numbers (i.e., military);
 - Driver's license number; and
 - Date of birth

4. Should subdivisions (b)(2) specify by whom/how the records will be made available?

(c) Courthouse electronic access only

If a court that maintains the following records in the following proceedings in addition to those listed in (b) in electronic form, must provide electronic access to them these records must be provided at the courthouse, to the extent it is feasible to do so, but may provide remote electronic access only may not be provided to these records governed by (b):

(1) Any reporter's transcript for which the reporter is entitled to receive a fee; and

(2) Records in addition to those listed in (b) in the following proceedings:

- (1A) Records in Proceedings under the Family Code, including proceedings for dissolution, legal separation, and nullity of marriage; child and spousal support proceedings; child custody proceedings; and domestic violence prevention proceedings;
- (2B) Records in Juvenile court proceedings;
- (3C) Records in Guardianship or conservatorship proceedings;
- (4D) Records in Mental health proceedings;
- (5E) Records in Criminal proceedings;
- (6F) Records in Civil harassment proceedings under Code of Civil Procedure section 527.6;
- (7G) Records in Workplace violence prevention proceedings under Code of Civil Procedure section 527.8;
- (8H) Records in Private postsecondary school violence prevention proceedings under Code of Civil Procedure section 527.85;
- (9I) Records in Elder or dependent adult abuse prevention proceedings under Welfare and Institutions Code section 15657.03; and

(10J) Records in a Proceedings to compromise the claims of a minor or a person with a disability.

NOTES

The trial court rule requires courts, to the extent feasible, to provide electronic access only at the courthouse to the records listed in subdivision (c) if these records are in electronic format:

Based on the discussion at JATS October 14 meeting, staff has modified the draft of subdivision (c) to eliminate the reference to the court providing electronic access to these records. The draft now states that electronic access to these records will be provided, but does not specify who will provide this access.

For the reasons discussed above in the notes relating to rule 8.82 subdivision (1), staff has also modified this draft to include any reporter's transcript for which the reporter is entitled to receive a fee among the records which, if in electronic format, may be accessed only at the courthouse.

QUESTIONS

- 1. Should subdivision (c) specify by whom/how these records will be made available?**
- 2. Are the records listed in this draft of subdivision (c) the appellate records that should only be available at the courthouse?**
 - a. Should this list include reporter's transcripts for which the reporter is entitled to receive a fee?**
 - b. Are there any additional appellate records that should be included on this list?**

(d) — "Feasible" defined

As used in this rule, the requirement that a court provide electronic access to its electronic records "to the extent it is feasible to do so" means that a court is required to provide electronic access to the extent it determines it has the resources and technical capacity to do so.

NOTE

To consolidate all of the definitions in this article, the definition of “feasible” has been moved up into the rule containing other definitions, rule 8.82.

(e) Remote electronic access allowed in extraordinary criminal cases

Notwithstanding (c)(52)(E), the presiding ~~judge~~justice of the court, or a ~~judge~~justice assigned by the presiding ~~judge~~justice, may exercise discretion, subject to (e)(1), to permit remote electronic access by the public to all or a portion of the public court records in an individual criminal case if (1) the number of requests for access to documents in the case is extraordinarily high and (2) responding to those requests would significantly burden the operations of the court. An individualized determination must be made in each case in which such remote electronic access is provided.

- (1) In exercising discretion under (e), the ~~judge~~justice should consider the relevant factors, such as:
 - (A) The privacy interests of parties, victims, witnesses, and court personnel, and the ability of the court to redact sensitive personal information;
 - (B) The benefits to and burdens on the parties in allowing remote electronic access, ~~including possible impacts on jury selection;~~ and
 - (C) The burdens on the court in responding to an extraordinarily high number of requests for access to documents.
- (2) The court should, to the extent feasible, redact the following information from records to which it allows remote access under (e): driver license numbers; dates of birth; social security numbers; Criminal Identification and Information and National Crime Information numbers; addresses and phone numbers of parties, victims, witnesses, and court personnel; medical or psychiatric information; financial information; account numbers; and other personal identifying information. The court may order any party who files a document containing such information to provide the court with both an original unredacted version of the document for filing in the court file and a redacted version of the document for remote electronic access. No juror names or other juror identifying information may be provided by remote electronic access. This subdivision does not apply to any

document in the original court file; it applies only to documents that are available by remote electronic access.

- (3) Five days' notice must be provided to the parties and the public before the court makes a determination to provide remote electronic access under this rule. Notice to the public may be accomplished by posting notice on the court's Web site. Any person may file comments with the court for consideration, but no hearing is required.
- (5) The court's order permitting remote electronic access must specify which court records will be available by remote electronic access and what categories of information are to be redacted. The court is not required to make findings of fact. The court's order must be posted on the court's Web site and a copy sent to the Judicial Council.

QUESTIONS

1. Is a provision like (e), which essentially overcomes the limitation in subdivision (c) on making most court records in criminal cases available remotely, needed in the appellate rules?
2. If such a provision is needed, should it apply only to criminal cases, or are there other types of proceedings now listed in subdivision (c) in which there might be sufficient interest that the Supreme Court or Court of Appeal might want to make all public records in these cases available remotely?

(f) **Access only on a case-by-case basis**

~~With the exception of the records covered by (b)(1), the court may only grant~~ electronic access to an electronic record may be granted only when the record is identified by the number of the case, the caption of the case, ~~or~~ the name of a party, the name of the attorney, or the date of oral argument, and only on a case-by-case basis. ~~This case-by-case limitation does not apply to the court's electronic records of a calendar, register of actions, or index~~ opinions.

(g) **Bulk distribution**

~~The court may provide~~ Bulk distribution of only its electronic records may be provided only of the records covered by (b)(1). ~~a calendar, register of~~

actions, and index opinions. “Bulk distribution” means distribution of all, or a significant subset, of the court’s electronic records.

NOTES

Subdivisions (f) and (g) in the trial court rules require that trial courts provide electronic access to records other than their calendars, registers of actions, and indexes only on a case-by-case basis.

Subdivision (f) also limits the criteria that can be used in a search for a specific case. The current electronic access to appellate records provided on the California courts website exceeds that authorized under the trial court rules in several ways (see handout on information available on California courts website):

- Opinions in both Supreme Court and Court of Appeal cases are accessible from the website in bulk;
- Supreme Court minutes, briefs in argued cases, and information about actions taken in the most recent Supreme Court conference are available from the website in bulk; and
- The website permits searches for cases based not only on the criteria permitted in the trial courts (case number, party name, and case caption), but also on attorney name for both Supreme Court and Court of Appeal cases and calendar dates for Court of Appeal cases.

Consistent with the discussion at JATS October 14 meeting, subdivisions (f) and (g) above have been drafted to try to reflect current practice. Since the records to which there is currently bulk access are the same as those to which remote access is currently available, rather than duplicating the list of specific records, staff has used a cross-reference to subdivision (b)(1) to identify the records that may be distributed in bulk. Note also that, in this draft, the definition of “bulk distribution” has been moved up into the rule containing other definitions, rule 8.82.

To reflect current practice, subdivision (f) would also allow searches for individual cases based on the name of the attorney and the date of oral argument. Note that currently searches by calendar are only available for Court of Appeal cases.

Based on the discussion at JATS October 14 meeting, staff has also modified the draft of subdivisions (f) and (g) to eliminate the

reference to the court granting access to or providing bulk distribution of these records. The draft now states that access may be granted and bulk distribution of these records may be provided, but does not specify who will grant this access or provide this distribution.

QUESTIONS

1. Are the records listed in subdivision (b)(1) the appropriate appellate records to be accessible in bulk?
2. Since bulk access to all of these records is currently provided on the California courts website, should these rules address the provision of these records in bulk or should this be left implicit/embedded in what is provided on the website? Things to consider:
 - a. Is it important that a provision addressing this topic be in the rules to provide the public with assurance that there will be bulk electronic access to these records?
 - b. Is it important that a provision addressing this topic be in the rules to provide parallelism to the trial court rules?
3. Are the criteria listed in subdivision (f) the right ones for the public to be able use to search for/access appellate cases?
4. Should the rule specify by whom/how access to these records will be granted or bulk distribution of these records provided?

(h) Records that become inaccessible

If an electronic record to which ~~the court has provided~~ electronic access has been provided is made inaccessible to the public by court order or by operation of law, the court is not required to take action with respect to any copy of the record that was made by the public before the record became inaccessible.

NOTE

Based on the discussion at JATS October 14 meeting, staff has modified the draft of subdivision (h) to eliminate the reference to the court providing access to records.

QUESTION

Should the rule specify by whom/how access to these records will be provided?

(i) Off-site access

Courts should encourage availability of electronic access to court records at public off-site locations.

Advisory Committee Comment

The rule allows a level of access by the public to all electronic records that is at least equivalent to the access that is available for paper records and, for some types of records, is much greater. At the same time, it seeks to protect legitimate privacy concerns.

Subdivision (c). This subdivision excludes certain records (those other than the register, calendar, ~~and indexes opinions,~~ **and certain Supreme Court records**) in specified types of cases (notably criminal, juvenile, and family court matters) from remote electronic access. The committees recognized that while these case records are public records and should remain available at the courthouse, either in paper or electronic form, they often contain sensitive personal information. The court should not publish that information over the Internet. However, the committees also recognized that the use of the Internet may be appropriate in certain criminal cases of extraordinary public interest where information regarding a case will be widely disseminated through the media. In such cases, posting of selected nonconfidential court records, redacted where necessary to protect the privacy of the participants, may provide more timely and accurate information regarding the court proceedings, and may relieve substantial burdens on court staff in responding to individual requests for documents and information. Thus, under subdivision (e), if the presiding ~~judge~~ justice makes individualized determinations in a specific case, certain records in criminal cases may be made available over the Internet.

Subdivisions (f) (g). These subdivisions limit electronic access to records (other than the register, calendars, ~~or indexes opinions,~~ **and certain Supreme Court records**) to a case-by-case basis and prohibit bulk distribution of those records. These limitations are based on the qualitative difference between obtaining information from a specific case file and obtaining bulk information that may be manipulated to compile personal information culled from any document, paper, or exhibit filed in a lawsuit. This type of aggregate information may be exploited for commercial or other purposes unrelated to the operations of the courts, at the expense of privacy rights of individuals.

Courts must send a copy of the order permitting remote electronic access in extraordinary criminal cases to: Secretariat, Executive Office Programs Division, ~~Administrative Office of the Courts~~ Judicial Council, 455 Golden Gate Avenue, San Francisco, CA 94102-3688 or secretariat@jud.ca.gov.

Rule 2.504. 8.84. Limitations and conditions

(a) Means of access

~~A court that maintains records in electronic form must provide~~ Electronic access to these records required under this article must be provided by means of a network or software that is based on industry standards or is in the public domain.

(b) Official record

Unless electronically certified by the court, a ~~trial~~ court record available by electronic access is not the official record of the court.

(c) Conditions of use by persons accessing records

~~A court may condition~~ Electronic access to its court records may be conditioned on:

- (1) The user's consent to access the records only as instructed by the court; and
- (2) The user's consent to the court's monitoring of access to its records.

The court must give notice of these conditions, in any manner it deems appropriate. ~~The court may deny~~ Access may be denied to a member of the public for failure to comply with either of these conditions of use.

(d) Notices to persons accessing records

The court must give notice of the following information to members of the public accessing its records electronically, in any manner it deems appropriate:

- (1) The identity of the court staff member to be contacted about the requirements for accessing the court's records electronically.
- (2) That copyright and other proprietary rights may apply to information in a case file, absent an express grant of additional rights by the holder of the copyright or other proprietary right. This notice must advise the public that:

- (A) Use of such information in a case file is permissible only to the extent permitted by law or court order; and
 - (B) Any use inconsistent with proprietary rights is prohibited.
 - (3) Whether electronic records are the official records of the court. The notice must describe the procedure and any fee required for obtaining a certified copy of an official record of the court.
 - (4) That any person who willfully destroys or alters any court record maintained in electronic form is subject to the penalties imposed by Government Code section 6201.
- (e) **Access policy**

The court must post A privacy policy must be posted on the California Courts public-access Web site to inform members of the public accessing its electronic records of the information ~~it collected~~^{ed} regarding access transactions and the uses that ~~the court may make~~ be made of the collected information.

NOTE

Based on the discussion at JATS October 14 meeting, staff has modified the draft of this rule in several places to eliminate the reference to the court providing access, setting conditions on access, or denying access to records. In the last sentence of subdivision (c) and the first sentence of subdivision (d), staff has left in references to “the court” providing notice of conditions placed on access in a manner that the court deems appropriate, as determining the means of providing such notice seemed as if it might be a function that individual courts might want to retain.

QUESTIONS

- 1. Should the rule specify by whom/how access to these records will be provided, conditions set, or access denied?**
- 2. Should individual courts be responsible for determining the manner of providing notice of conditions places on access to electronic records?**

Rule ~~2.505~~ 8.85. Contracts with vendors

(a) Contract must provide access consistent with rules

~~The court's~~ Any contract ~~between the court and~~ with a vendor to provide public access to ~~its~~ electronic ~~court~~ records must be consistent with the rules in this ~~chapter~~ article and must require the vendor to provide public access to court records and to protect the confidentiality of court records as required by law or by court order.

(b) Contract must provide that court owns the records

Any contract ~~between the court and~~ with a vendor to provide public access to ~~the court's~~ electronic ~~court~~ records must provide that the court is the owner of these records and has the exclusive right to control their use.

NOTE

Based on the discussion at JATS October 14 meeting, staff has modified the draft of this rule to eliminate the reference to the court entering into a contract with a vendor to provide access to the court's records.

QUESTIONS

1. Is a rule on this topic needed in the appellate rules?
2. **Should the rule specify with whom a vendor would be contracting?**

Rule ~~2.506~~ 8.86. Fees for electronic access

(a) Court may impose fees

The court may impose fees for the costs of providing ~~public access to copies of its~~ electronic records, under Government Code section ~~68150(f)~~ 68928. ~~On request, the court must provide the public with a statement of the costs on which these fees are based.~~

(b) Fees of vendor must be reasonable

To the extent that public access to a court's electronic records is provided exclusively through a vendor, the ~~court~~ contract with the vendor must ensure

that any fees the vendor imposes for the costs of providing access are reasonable.

NOTES:

Subdivision (a): Government code section 68150(I), which addresses trial court records in electronic format, provides “Reasonable provision shall be made for duplicating the records at cost. Cost shall consist of all costs associated with duplicating the records as determined by the court.” In the draft above, the reference to this section has been replaced with a reference to Government code section 68928, which generally addresses fees for copies of Supreme Court and Court of Appeal records, as follows: “The fee for copies of any record or document in the office of the Clerk of the Supreme Court or the clerk of a court of appeal is the prevailing commercial rate as determined by the clerk. The Supreme Court and each court of appeal may waive the charge for copies of opinions furnished to parties to the litigation and other interested persons.”

Two other changes to the trial court rule are suggested:

- Clarifying that the fees that can be charged under this provision are for making copies of electronic records. This seems consistent with the authority provided under Government code section 68928.
- Eliminating the requirement for providing a statement of costs on which the fee is based. This has not been required with respect to other copying fees charged by the appellate courts.

This draft keeps the references to “the court” imposing this fee, as staff thought that this might be a function that individual courts might want to retain.

Subdivision (b): this provision will not be necessary if it is determined that the rules need not address contracts with vendors.

Note also, based on the discussion at JATS October 14 meeting, staff has modified the draft of this rule to eliminate the reference to the court entering into a contract with a vendor to provide access to the court’s records.

QUESTIONS

- 1. Should the rule specify with whom a vendor would be contracting?**
- 2. Should individual courts be responsible for imposing fees for providing paper copies of electronic records?**

Rule 2.507. ~~Electronic access to court calendars, indexes, and registers of actions~~

(a) ~~Intent~~

~~This rule specifies information to be included in and excluded from the court calendars, indexes, and registers of actions to which public access is available by electronic means under rule 2.503. To the extent it is feasible to do so, the court must maintain court calendars, indexes, and registers of actions available to the public by electronic means in accordance with this rule.~~

(b) ~~Minimum contents for electronically accessible court calendars, indexes, and registers of actions~~

~~(1) The electronic court calendar must include:~~

- ~~(A) Date of court calendar;~~
- ~~(B) Time of calendared event;~~
- ~~(C) Court department number;~~
- ~~(D) Case number; and~~
- ~~(E) Case title (unless made confidential by law).~~

~~(2) The electronic index must include:~~

- ~~(A) Case title (unless made confidential by law);~~
- ~~(B) Party names (unless made confidential by law);~~
- ~~(C) Party type;~~
- ~~(D) Date on which the case was filed; and~~
- ~~(E) Case number.~~

~~(3) The register of actions must be a summary of every proceeding in a case, in compliance with Government Code section 69845, and must include:~~

~~(A) Date case commenced;~~

~~(B) Case number;~~

~~(C) Case type;~~

~~(D) Case title (unless made confidential by law);~~

~~(E) Party names (unless made confidential by law);~~

~~(F) Party type;~~

~~(G) Date of each activity; and~~

~~(H) Description of each activity.~~

~~(e) **Information that must be excluded from court calendars, indexes, and registers of actions**~~

~~The following information must be excluded from a court's electronic calendar, index, and register of actions:~~

~~(1) Social security number;~~

~~(2) Any financial information;~~

~~(3) Arrest warrant information;~~

~~(4) Search warrant information;~~

~~(5) Victim information;~~

~~(6) Witness information;~~

~~(7) Ethnicity;~~

~~(8) Age;~~

~~(9) Gender;~~

~~(10) Government issued identification card numbers (i.e., military);~~

~~(11) Driver's license number; and~~

~~(12) Date of birth.~~

NOTE:

The provisions from this rule have either been incorporated above in draft rule 8.83 or are discussed in connection with that draft rule.

DRAFT



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JOINT APPELLATE TECHNOLOGY SUBCOMMITTEE

MINUTES OF OPEN MEETING

December 17, 2014

3:30 PM – 4:30 PM

Teleconference

Advisory Body Members Present: Hon. Louis Mauro, Chair; Hon. Peter Siggins, Ms. Kimberly Stewart; Mr. Kevin Green; Mr. Don Willenburg; Mr. Joseph Lane; and Mr. Brian Cotta.

Advisory Body Members Absent: Mr. Frank McGuire

Others Present: Ms. Heather Anderson; Ms. Tara Lundstrom; and Ms. Julie Bagoye

OPEN SESSION

Call to Order and Roll Call

Justice Mauro called the meeting to order at 3:30 PM, and roll call was taken. He noted there were no public comments received prior to this meeting.

Approval of Minutes

The subcommittee reviewed and approved the minutes of the October 14, 2014, Joint Appellate Technology Subcommittee (JATS) meeting.

Item 1

Public Access to Electronic Records

Discussion: Heather Anderson, Senior Attorney, Judicial Council staff, Legal Services

Ms. Anderson led the discussion on the second draft of proposed rules regarding public access to electronic appellate court records. The subcommittee reviewed and approved, with specified edits, the suggested rule changes on pages 1 through 7 of the second draft, through proposed rule 8.83(b)(C) on page 7. The subcommittee suggested adding a cross-reference to the rules on sealed and confidential records in the comment to proposed rule 8.80 and researching the history of the definition of “bulk distribution” set forth in proposed rule 8.82(6). In addition, the subcommittee suggested deleting the enumerated items under proposed rule 8.83(b)(1)(A) and (B).

Future action:

- Ms. Anderson will inform Frank McGuire about the progress made at this meeting so that he will have an opportunity to comment.
- Ms. Kimberly Stewart will prepare draft language for the comment to rule 8.80 pertaining to sealed and confidential records.
- Ms. Anderson will research the definition of “bulk distribution” as set forth in proposed rule 8.82(6).
- The subcommittee will meet again in January 2015. At the next meeting the subcommittee will pick up where it left off, discussing proposed rule 8.83 again, beginning with the proposal for 8.83(b)(D) (which began on page 7 of the second draft). The subcommittee will continue this work in an effort to prepare the proposed rules for consideration by the Court Technology Advisory Committee (CTAC) and the Appellate Advisory Committee (AAC). If approved by CTAC and AAC, the proposal would be submitted to the Judicial Council Rules & Projects Committee for possible circulation for public comment during the regular spring 2015 annual comment period.

A D J O U R N M E N T

The meeting was adjourned at 4:30 PM.

Section 4.30 – Requests for Bulk Distribution of Court Records

Bulk distribution is defined as the distribution of all, or a significant subset, of the information in court records, as is and without modification or compilation.

- (a) Bulk distribution of information in the court record is permitted for court records that are publicly accessible under section 4.10.**
- (b) A request for bulk distribution of information not publicly accessible can be made to the court for scholarly, journalistic, political, governmental, research, evaluation or statistical purposes where the identification of specific individuals is ancillary to the purpose of the inquiry. Prior to the release of information pursuant to this subsection the requestor must comply with the provisions of section 4.40(c).**

Commentary

This section addresses requests for large volumes of information in court records, as opposed to requesting information from a particular case or reformulated information from several cases (see section 4.40). The section authorizes bulk distribution for information that is publicly accessible. It also sets out a method of requesting bulk distribution of information to which public access is restricted.

There are advantages to allowing bulk access to court records. Allowing the public to obtain information from court records from a third party may reduce the number of requests to the court for the records. Fewer requests mean less court staff resources devoted to answering inquiries and requests.

However, there are costs associated with making the records available. There may also be technology, as well as cost, issues in providing bulk distribution of information. For example, a court's systems may not be able to identify and separate publicly accessible information from restricted information in creating a copy of information for bulk distribution. Permitting bulk distribution of information in this circumstance assumes providing the data will not interfere with the normal operations of the court. There is also the 'cost' of reduced public confidence in the judiciary from the existence of inaccurate, stale or incorrectly linked information available through third parties but derived from court records.

In allowing bulk data to be disseminated a court should be mindful not to gather information that it does not need to fulfill its judicial role, even if those requesting bulk information are interested in obtaining this information.

Subsection (a). Bulk transfer is allowed for information that is publicly accessible under these *CCJ/COSCA Guidelines*. There is no constitutional or other basis for providing greater access to bulk requestors than to the public generally, and this section implies there should be no less access.

Consistent with section 3.20, public access, including bulk access, is not dependent upon the reason the access is sought or the proposed use of the data. Court information provided through bulk distribution can be combined with information from other sources. Information from court records may be linked with other information and may be used for purposes that are unrelated to why the information was provided to the court in the first place.

Many states that have considered the bulk data issue for information in electronic form have adopted access policies that only allow case-by-case access, one case at a time, and no bulk distribution, even of otherwise publicly accessible information. However, existing technology and software, using repeated queries and “screen scraping,” can accomplish bulk distribution from ‘one-case-at-a-time’ systems fairly rapidly. The *CCJ/COSCA Guidelines*, therefore, explicitly provides for bulk distribution in recognition of this potential.

It is significant to note that transferring information in the court record into databases that are then beyond the court’s control creates the very real likelihood that the information will, over time, become incomplete, inaccurate, stale or contain information that has been removed from the court’s records. Keeping information distributed in bulk current may require the court to provide “refreshed” information on a frequent, regular and periodic basis. This may raise issues of availability of court resources to do this. Although creating liability or penalties on the third party information provider (something beyond the scope of these *CCJ/COSCA Guidelines*) might reduce the risk of stale or incorrect information being distributed, meeting this standard still requires the court to provide updated and new information on a frequent basis.

A particular problem with bulk distribution of criminal conviction information has to do with expungement policies. If the intent of an expungement policy is to “erase” a conviction, the public policy may be impossible to implement if the information is already in another database as a result of a bulk transfer of the information. An approach needs to be devised that accommodates expungement and bulk distribution.

Potential mass access to electronic court information further highlights the question of the accuracy of the court’s records. This is particularly important for databases created by court or clerk of court employees. The potential for bulk distribution of the information in a court database will require courts and clerks to be even more vigilant about both the accuracy of their databases and the timeliness of entering information into them. Policies relating to the internal

practices of the court and clerk regarding data entry quality and accuracy are beyond the scope of this access policy.

A counter-intuitive aspect of bulk data release has to do with the linking of the information from court records with information from other sources. In order to correctly link court information with information from other sources, the information vendor must have pieces of information that allow accurate matching of court information about someone or an entity with information from other sources. This type of personal identifier information is often the most sensitive in terms of privacy. If a court were interested in minimizing the risk of bulk data it provides being incorrectly linked to information from other sources, it might provide more personal identifier information, not less, in those situations where linking is contemplated. However, courts should not be gathering information it does not need for judicial purposes. Generally, court records do not contain key linking information, for example birth dates or social security numbers, for individuals.

As noted many states that have considered the bulk data issue have adopted access policies that only allow access to one case at a time, and no bulk data access. This reduces the likelihood of “stale” information existing in databases because a query directed to the court’s database, one at a time, will be searching more current court data than a query to a database consisting of a bulk download of court information that may not be current, depending upon when the data was transferred or last updated. Not providing bulk distribution also eliminates the need to establish mechanisms to provide frequent and regular updates. If a state or individual court adopts a bulk access policy more restrictive than that in these *CCJ/COSCA Guidelines*, it might consider different bulk access rules for different types of information. For example, bulk access might be allowed for indexes, but not for the contents of the case management system or for electronic versions or images of documents filed in cases.

Subsection (b). Subsection (b) provides a process for obtaining bulk data for information not publicly accessible. One reason court records are publicly accessible is to allow the public to monitor the performance of the judiciary. One method of monitoring performance is to examine the information in a set of cases to see whether the court’s decisions across cases are consistent, predictable, fair and just. This sort of examination requires access to all information considered by the court in making its decision, as it is difficult to say ahead of time that any piece or category of information is not relevant and therefore should not be made available. This section states that the request for bulk access should be made to the court, i.e., allowing bulk access is a judiciary decision. A state or individual court that adopts an access policy should provide more detail about where and to whom a request should be delivered, who makes the decision on the request, and what the legal standard is for granting or denying the request..

Subsection (b) includes the term “journalistic.” This term is not defined in these *CCJ/COSCA Guidelines*. A state or individual court adopting an access rule should consider addressing this issue. Given the ease of “publishing” information on the Internet, the term may have broad application. However, any concern may be diminished by the reference to section 4.40(c) regarding use of the information, and protections provided for individual identifying information.

Issues Not Addressed in the CCJ/COSCA Guidelines

One issue not addressed in this section is what can be done to keep the information released in bulk in sync with the information in the court’s record. One option would be to make the requestor receiving information by bulk distribution responsible for the currency and accuracy of any information before making it accessible to clients or the public. Alternatively, the information provider could be required to inform the clients or public of the limitations of the data. Another option would be for courts to refuse to continue supplying bulk data to a certain organization, or on a certain subject, if abuses occur regarding maintenance of accuracy or currency.

Conversely, the court could ‘certify’ entities or individuals to receive bulk data based on compliance with certain practices that improved the accuracy and currency of the information they receive and the accuracy of linking the information with information from other sources. Certification might be limited to entities subject to regulation, for instance under the Fair Credit Reporting Act², at the federal or state level.

The *CCJ/COSCA Guidelines* do not address the need for, or extent of, regulation of those obtaining bulk data who, in turn, provide information from court records to others. There are federal laws³ regulating some information providers, and states may have some laws. Another approach to preventing misuse of information in court records would be through regulation of information providers who are given information from court records.

An alternative approach would be to strengthen or establish liability on the part of the information provider for errors or omissions in the information, or for disseminating information that is no longer publicly available from the court. Having obtained the information from the government would not be a defense. However, analyzing and proposing language for this sort of liability is beyond the scope of these *CCJ/COSCA Guidelines*.

Another concern with release of bulk data is the extent to which the electronic records are an atypical subset of data from all court records. The skewing arises from what is available in electronic form, versus paper form. As electronic versions of information start to become available, it generally is only in

² Fair Credit Reporting Act, 15 USC §§ 1681 et seq.

³ For example the Fair Credit Reporting Act, 15 USC §§ 1681 et seq.

complex cases or a certain class of cases. Bulk data consisting of only electronic records may, therefore, not be representative of all cases. Skewing could also be due to the fact that very little information prior to a certain date is available in electronic form. If scanning or other conversion into electronic form is not done for historical records, then the electronic record may only be the recent cases or only the newer information in older cases, depending upon how a court implements the conversion of records to electronic form.

Another consideration related to the nature of bulk release is that a “dump” of the information in electronic form creates a snapshot of the information, whereas the database from which the information is extracted is dynamic, constantly changing and growing.