



# JUDICIAL COUNCIL OF CALIFORNIA

INFORMATION TECHNOLOGY  
ADVISORY COMMITTEE

[www.courts.ca.gov/itac.htm](http://www.courts.ca.gov/itac.htm)  
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## ITAC RULES AND POLICY SUBCOMMITTEE

### MINUTES OF OPEN MEETING

February 3, 2022

12:00 PM to 1:30 PM

Videoconference

**Advisory Body Members Present:** Hon. Julie Culver, Chair; Hon. Samantha Jessner; Hon. Louis R. Mauro; Hon. Samantha Jessner; Hon. Kim Menninger; Mr. Darrel Parker; and Mr. Don Willenburg

**Advisory Body Members Absent:** Hon. Bruce Smith

**Others Present:** Ms. Sharon Reilly; and Judicial Council Staff

#### OPEN MEETING

##### Call to Order and Roll Call

The chair called the meeting to order at 12:00 PM and took roll call.

The October 25, 2021, Rules and Policy Subcommittee minutes were approved.

The subcommittee received one public comment from an appellate programs' attorney. This was shared with members prior to the meeting.

#### DISCUSSION AND ACTION ITEMS (ITEMS 1-4)

##### Item 1

##### **Trial Court Rules Revisions: Proposed Amendment to rule 2.253 of the California Rules of Court (Action Required)**

Consider whether to recommend circulating a proposed amendment to rule 2.253 of the California Rules of Court to remove a requirement that a trial court with mandatory electronic filing submit reports about its electronic filing program to the Judicial Council.

**Presenter:** Hon. Julie Culver, Chair, Rules and Policy Subcommittee  
Ms. Andrea Jaramillo, Attorney II, Legal Services

**Action:** These reports are no longer received in this manner as the information is reported elsewhere, making this rule obsolete. The subcommittee approved amending rule for circulation to remove the mandatory requirement of electronic filing reports.

**Item 2**

**Trial Court Rules Revisions: Proposed Adoption of New Rule 2.523, Amendments to Rules 2.524 (re-numbered) and 2.540, and Re-numbering of Rules 2.523, 2.524, 2.525, 2.526, 2.527, and 2.528 (Action Required)**

Consider whether to recommend circulating a proposed new rule and amendments to the California Rules of Court to on remote access to electronic records to authorize remote access by appellate courts, appellate appointed counsel administrators, and the Habeas Corpus Resource Center.

Presenter: Hon. Julie Culver, Chair, Rules and Policy Subcommittee  
Ms. Andrea Jaramillo, Attorney II, Legal Services

**Action:** The new rule would allow remote access that would alleviate delays being experienced due to pandemic. The subcommittee suggested revising Rule 2.521 Remote Access by Court-appointed person instead of making a new rule. Ms. Jaramillo will gather additional information around the current process at courts to ensure the drafted changes reflect needs of requestor.

**Item 3**

**Trial Court Rules Revisions: Proposed Amendments to Rule 2.540 of the California Rules of Court (Action Required)**

Consider whether to recommend circulating a proposal by the California Attorneys for Criminal Justice to amend rule 2.540.

Presenter: Hon. Julie Culver, Chair, Rules and Policy Subcommittee  
Ms. Andrea Jaramillo, Attorney II, Legal Services

**Action:** The subcommittee agreed to add this rule change and to amend their annual agenda. The change would broaden remote access to case files matching current in-person access. There are issues that need to be considered around access management and, types of materials accessed, making access equal and still maintaining necessary limits. Ms. Jaramillo will take suggestions from this meeting to draft the rule change and the public invitation to comment and bring back to the subcommittee for consideration.

**Item 4**

**Legislative Update (No Action Required)**

Update on legislation impacting technology and the courts.

Presenter: Mr. Mark Neuburger, Legislative Advocate, Office of Governmental Affairs

**Discussion:** The Office of Governmental Affairs has asked this item to be deferred until a future meeting.

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**A D J O U R N M E N T**

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There being no further business, the meeting was adjourned at 1:00pm.

Approved by the advisory body on enter date.

# JUDICIAL COUNCIL OF CALIFORNIA

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## DRAFT INVITATION TO COMMENT [ITC prefix as assigned]-\_\_

<b>Title</b> Rules: Remote Access to Criminal Electronic Records	<b>Action Requested</b> Review and submit comments by May 13, 2022
<b>Proposed Rules, Forms, Standards, or Statutes</b> Amend rule 2.519 of the California Rules of Court	<b>Proposed Effective Date</b> January 1, 2023
<b>Proposed by</b> Information Technology Advisory Committee Hon. Sheila F. Hanson, Chair	<b>Contact</b> Andrea L. Jaramillo, 916-263-0991, <a href="mailto:andrea.jaramillo@jud.ca.gov">andrea.jaramillo@jud.ca.gov</a>

### Executive Summary and Origin

The Information Technology Advisory Committee (ITAC) proposes the Judicial Council amend rule 2.519 of the California Rules of Court<sup>1</sup> to authorize trial courts to provide private criminal defense attorneys remote access to criminal electronic records. The proposal originates with the California Attorneys for Criminal Justice, an advocacy organization comprised of criminal defense lawyers and associated professionals.

### The Proposal

The proposal would amend rule 2.519 to authorize the court to allow an attorney representing a party in a criminal action to remotely access any criminal electronic records the attorney would be legally entitled to view at the courthouse.

The purpose of the proposal is to ensure the rules on remote access treat private criminal defense counsel on par with public defenders and prosecutors. According to the California Attorneys for Criminal Justice (CACJ), this change is needed because the current rules are unfair because they do not provide parity between private defense counsel and public defender. For example, the current rules do not allow a private attorney to remotely access criminal electronic records other

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

*This proposal has not been approved by the Judicial Council and is not intended to represent the views of the council, its Rules Committee, or its Legislation Committee. It is circulated for comment purposes only.*

than those of their client's; thus, they could not remotely access electronic records in cases of witnesses or co-defendants.

CACJ's originally proposed amending rule 2.540 to include private counsel within its scope. However, rule 2.540 specifically addresses remote access by persons working for government entities only and is located in an article of the rules exclusive to government entities. As such, ITAC determined the proposed changes would be more suitable in amendments to rule 2.519, which includes private attorneys within its scope. Accordingly, ITAC developed a revised proposal to amend rule 2.519 instead of rule 2.540.

The proposed amendments authorize courts to allow attorneys representing a party in a criminal case to remotely access any criminal electronic records that the attorney would have been entitled to view at the courthouse. The terms for remote access will apply in this instance. Specifically, the attorney:

- May remotely access the electronic records only for the purpose of assisting the party with the party's court matter,
- May not distribute for sale any electronic records obtained remotely under the rules in this article. Such sale is strictly prohibited.
- Must comply with any other terms of remote access required by the court.<sup>2</sup>

Failure to comply with these terms can result in sanctions, including termination of remote access.<sup>3</sup> These terms should help guard against the use of remote access for purposes such as selling access to electronic criminal records.

In addition to the terms for remote access, the rules include other provisions designed to protect against unauthorized remote access or improper use of remote access. For example, rule 2.523 requires user identity verification, rule 2.524 requires remote access to sealed or confidential to be "provided through a secure platform and any electronic transmission of the information must be encrypted," rule 5.525 limits searches to searches by case number or case caption, and rule 5.526 encourages courts to utilize audit trails so when an electronic record is accessed remotely, there is a record of that remote access.

### Alternatives Considered

As discussed above, ITAC considered CACJ's proposal to amend rule 2.540, but determined revising the proposal to amend rule 2.519 instead was more appropriate. Additional alternatives considered were the status quo, limiting remote access by public defenders rather than broadening remote access by private attorneys, and providing attorneys remote access to any electronic record they could access at the courthouse.

<sup>2</sup> Rule 2.519(d)(1)-(3).

<sup>3</sup> Rule 2.519(d)(4).

**Commented [JA1]:** This section reflects discussion points raised at the ITAC Rules and Policy Subcommittee (RPS) meeting on Feb. 3, 2022. It will be revised following the next RPS and ITAC meetings if needed.

### The Status Quo

ITAC considered the status quo. The problem with the status quo raised by CACJ is that a private attorney would still need to visit a courthouse to access certain criminal court records, e.g. criminal court records of a co-defendant, whereas a public defender or prosecutor would not. This is a concern if it may impact the quality of representation of a criminal defendant if needed records are burdensome to obtain. ITAC seeks specific comment on that issue.

The benefit of the status quo is that it limits the dissemination of criminal electronic records. The rules prohibit the general public from viewing criminal electronic records remotely.<sup>4</sup> While such records are open to the public, unless sealed or confidential, they can contain highly sensitive information. Accordingly, “practical obscurity” was built into the rules by prohibiting remote access to certain types of electronic records, including criminal electronic records, and limiting the viewing of such records to the courthouse.<sup>5</sup> This was intentional to help prevent widespread public dissemination of such records.<sup>6</sup>

However, the Judicial Council recognized that there are persons and entities that are not the public at large, such as parties and their counsel, that the rules did not address and that courts were addressing in a piecemeal, ad hoc fashion.<sup>7</sup> Accordingly, nine Judicial Council advisory committees formed a subcommittee that developed rules for remote access to electronic records that is different than public access.<sup>8</sup> Under the remote access rules, criminal electronic records are available to specified users including private criminal defense attorneys, but private attorneys are currently limited to remotely accessing their client’s records.<sup>9</sup>

Broadening remote access to criminal electronic records by private counsel would lessen the “practical obscurity” of such records. However, given that the proposed amendment is limited in scope as it applies only to attorneys representing parties in criminal cases, attorneys are bound by professional obligations to be honest with the court,<sup>10</sup> and attorneys are bound by the terms of remote access described in rule 2.519(d), ITAC determined the proposed amendments should strike an appropriate balance between privacy and access to provide private criminal defense counsel with access on par with public defenders. ITAC seeks specific comment on this issue, however.

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<sup>4</sup> Rule 2.503(c)(5).

<sup>5</sup> Administrative Office of the Courts Manager Charlene Hammitt and Special Consultant Victor Rowley, mem. to Chief Justice Ronald M. George and Members of the Judicial Council, Dec. 10, 2001, pp. 1-6 (discussing the reasons for precluding remote access to specific electronic records in proposed rule 2073(c), the predecessor to current rule 2.503(c)). A copy of the memorandum is attached to at pages 8-23.

<sup>6</sup> *Ibid.*

<sup>7</sup> Judicial Council of Cal., Advisory Com. Rep., Rules and Forms: Remote Access to Electronic Records (Aug. 31, 2018), available online at <https://jcc.legistar.com/View.ashx?M=F&ID=6613671&GUID=DA39F21F-B0F6-464E-8E33-1A771C41B679> (as of Feb. 15, 2022).

<sup>8</sup> *Ibid.*

<sup>9</sup> Rule 2.519(a)-(b).

<sup>10</sup> Cal. State Bar, Rules Prof. Conduct, rule 3.3 (candor toward tribunal), available online at [https://www.calbar.ca.gov/Portals/0/documents/rules/Rule\\_3.3-Exec\\_Summary-Redline.pdf](https://www.calbar.ca.gov/Portals/0/documents/rules/Rule_3.3-Exec_Summary-Redline.pdf) (as of Feb. 15, 2022).

### **Limiting Remote Access by Public Defenders**

Instead of expanding the scope of electronic records that private counsel can access remotely, one alternative to provide parity of remote access with public defenders would be limiting the scope of public defenders' remote access to only those clients represented by the public defender's office.

ITAC considered this approach undesirable for a few reasons. First, it may be impractical and controversial, especially for courts that have already established a remote access for public defenders. Second, it would also create a new parity issue: all criminal defense attorneys would have remote access that is less than what prosecutors could have under the rules. Finally, it is inconsistent with the intent expressed in the Advisory Committee Comment on rule 2.540 that the rule does "not restrict courts to providing remote access only to local government entities in the same county in which the court is situated." Accordingly, this was the least desirable alternative to the proposed amendments and the status quo.

### **Providing Attorneys Remote Access to Any Electronic Record They Could Access at the Courthouse**

ITAC considered whether there was a broader issue of providing attorneys remote access to *any* electronic records that they could access at the courthouse. This also raised concerns about remote access versus practical obscurity. Ultimately, ITAC determined while this issue may be explored more in the future, that will require the participation of other Judicial Council advisory committees and is well beyond the scope of CACJ's original proposal. Accordingly, ITAC kept the scope of the current proposal to the scope CACJ originally proposed.

### **Fiscal and Operational Impacts**

While the proposed rule amendment would authorize courts to allow remote access to electronic criminal records by private criminal defense counsel, courts would need to implement appropriate technological updates in their systems to accomplish it and provide training to staff about the update. While the aim of the remote access rules is for courts to provide remote access to certain users, including private counsel, the rules recognize that courts have varying financial means, security resources, or technical capabilities to allow them to implement remote access systems.<sup>11</sup> Thus, implementation is only required to the extent it is feasible for a court to do so.<sup>12</sup>

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<sup>11</sup> Rule 2.516.

<sup>12</sup> Rule 2.516.

### 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?
- If rule is *not* amended, in what ways would that impact the quality of a defendant's representation for a defendant represented by private counsel?
- Does the proposal adequately strike a balance between privacy and remote access to criminal electronic records by criminal defense attorneys? If not, why not?
- Should remote access be broader than what the proposal provides?
- Should remote access be narrower than what the proposal provides?

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

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

### Attachments and Links

1. Cal. Rules of Court, rule 2.519, at pages 6–7.
2. Administrative Office of the Courts Manager Charlene Hammitt and Special Consultant Victor Rowley, memorandum to Chief Justice Ronald M. George and Members of the Judicial Council, Dec. 10, 2001, regarding proposed rules on electronic access to court records, at pages 8–23.
3. Link A: Cal. Rules of Court, rule 2.516,  
[https://www.courts.ca.gov/cms/rules/index.cfm?title=two&linkid=rule2\\_516](https://www.courts.ca.gov/cms/rules/index.cfm?title=two&linkid=rule2_516)
4. Link B: Cal. Rules of Court, rule 2.523,
5. [https://www.courts.ca.gov/cms/rules/index.cfm?title=two&linkid=rule2\\_523](https://www.courts.ca.gov/cms/rules/index.cfm?title=two&linkid=rule2_523)
6. Link C: Cal. Rules of Court, rule 2.524,
7. [https://www.courts.ca.gov/cms/rules/index.cfm?title=two&linkid=rule2\\_524](https://www.courts.ca.gov/cms/rules/index.cfm?title=two&linkid=rule2_524)
8. Link D: Cal. Rules of Court, rule 2.525,
9. [https://www.courts.ca.gov/cms/rules/index.cfm?title=two&linkid=rule2\\_525](https://www.courts.ca.gov/cms/rules/index.cfm?title=two&linkid=rule2_525)
10. Link E: Cal. Rules of Court, rule 2.526,
11. [https://www.courts.ca.gov/cms/rules/index.cfm?title=two&linkid=rule2\\_526](https://www.courts.ca.gov/cms/rules/index.cfm?title=two&linkid=rule2_526)
12. Link F: Cal. Rules of Court, rule 2.540,  
[https://www.courts.ca.gov/cms/rules/index.cfm?title=two&linkid=rule2\\_540](https://www.courts.ca.gov/cms/rules/index.cfm?title=two&linkid=rule2_540)

1 **Rule 2.519. Remote access by a party's attorney**

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3 **(a) Remote access generally permitted**

- 4  
5 (1) A party's attorney may have remote access to electronic records ~~in the party's~~  
6 ~~actions or proceedings~~ under this rule or under rule 2.518. If a party's  
7 attorney gains remote access under rule 2.518, the requirements of rule 2.519  
8 do not apply.  
9

10 *Staff comments: The above change is to account for the broader access afforded under*  
11 *new subdivision (b)(2), below.*

- 12  
13 (2) If a court notifies an attorney of the court's intention to appoint the attorney  
14 to represent a party in a criminal, juvenile justice, child welfare, family law,  
15 or probate proceeding, the court may grant remote access to that attorney  
16 before an order of appointment is issued by the court.  
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18 **(b) Level of remote access**

- 19  
20 (1) A party's attorney may be provided remote access to the same electronic  
21 records in the party's actions or proceedings that the party's attorney would  
22 be legally entitled to view at the courthouse.  
23  
24 (2) An attorney representing a party in a criminal action may be provided remote  
25 access to any electronic criminal records that the attorney would be legally  
26 entitled to view at the courthouse.  
27

28 *Staff comments: With the above change, attorneys representing parties in criminal cases*  
29 *will not be limited to their own party's electronic criminal records. This is consistent with*  
30 *what the California Attorneys for Criminal Justice sought in their original proposal.*

31  
32 **(c) Terms of remote access applicable to an attorney who is not the attorney of**  
33 **record**

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35 Except as provided in subdivision (b)(2), an~~Att~~ attorney who represents a party, but  
36 who is not the party's attorney of record in the party's actions or proceedings, may  
37 remotely access the party's electronic records, provided that the attorney:  
38

39 *Staff comments: The addition of subdivision (b)(2) would allow attorneys representing*  
40 *criminal defendants to access any remote electronic criminal records they could view at*  
41 *the courthouse. As such, the provisions of subdivision (c) will not apply to such access.*  
42 *Subdivision (c) is focused on access to a party's electronic records with the party's*  
43 *consent.*



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- (1) Obtains the party’s consent to remotely access the party’s electronic records;  
and
- (2) Represents to the court in the remote access system that he or she has  
obtained the party’s consent to remotely access the party’s electronic records.

**(d) Terms of remote access applicable to all attorneys**

- (1) A party’s attorney may remotely access the electronic records only for the  
purpose of assisting the party with the party’s court matter.
- (2) A party’s attorney may not distribute for sale any electronic records obtained  
remotely under the rules in this article. Such sale is strictly prohibited.
- (3) A party’s attorney must comply with any other terms of remote access  
required by the court.
- (4) Failure to comply with these rules may result in the imposition of sanctions,  
including termination of access.

**Advisory Committee Comment**

**Subdivision (c).** An attorney of record will be known to the court for purposes of remote access. However, a person may engage an attorney other than the attorney of record for assistance in an action or proceeding in which the person is a party. For example, a party may engage an attorney to (1) prepare legal documents but not appear in the party’s action (e.g., provide limited-scope representation); (2) assist the party with dismissal or sealing of a criminal record when the attorney did not represent the party in the criminal proceeding; or (3) represent the party in an appellate matter when the attorney did not represent the party in the trial court. Subdivision (c) provides a mechanism for an attorney not of record to be known to the court for purposes of remote access.

Because the level of remote access is limited to the same court records that an attorney would be entitled to access if he or she were to appear at the courthouse, an attorney providing undisclosed representation would only be able to remotely access electronic records that the public could access at the courthouse. The rule essentially removes the step of the attorney having to go to the courthouse.



**Judicial Council of California**  
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RONALD M. GEORGE  
Chief Justice of California  
Chair of the Judicial Council

WILLIAM C. VICKREY  
Administrative Director of the Courts

RONALD G. OVERHOLT  
Chief Deputy Director

PATRICIA YERIAN  
Director  
Information Services Division

**TO:** Chief Justice Ronald M. George  
Members of the Judicial Council

**FROM:** Charlene Hammitt, Manager  
Victor Rowley, Special Consultant

**DATE:** December 10, 2001

**SUBJECT/ PURPOSE OF MEMO:** Proposed Rules on Electronic Access to Court Records

**CONTACT FOR FURTHER INFORMATION:**

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**QUESTION PRESENTED**

Why should the rule prohibit remote electronic access (other than to the register and calendar) in case types other than civil?

**REASONS FOR PRECLUDING REMOTE ACCESS TO SPECIFIC CATEGORIES OF CASE FILES**

Proposed rules 2070-2076 require courts to provide electronic access to general information about court cases and prohibit them from providing access to case files in certain types of cases.

Rule 2073(b) would require courts to provide remote access to registers of actions (as defined in Government Code section 69845) and calendars when they can feasibly do so.

Rule 2073(c), however, would require courts to restrict access to electronic versions of the documents and other records that are found in case files. Under this rule, only case files in civil cases would be available remotely. Files in other types of cases, which are listed in 2073(c), would not be accessible remotely at this time.

The proposed rules represent an initial approach to providing remote access to electronic case files that are likely to contain sensitive and personal information. Electronic records in all case types could be available through terminals at the courthouse. This approach provides them the same de facto privacy protection traditionally afforded paper records. The United States Supreme Court has characterized this protection as a “practical obscurity” that is attributable to the relative difficulty of gathering paper files. See *United States Dep’t of Justice v. Reporters Committee for Freedom of the Press* 489 U.S. 749 [109 S.Ct. 1468, 103 L.Ed.2d 774].

Delivery of court records on the Internet constitutes publication and typically facilitates republication. With the exception of docket information, trial courts generally have not been publishers of case records. Electronically published data can be easily copied disseminated, and its dissemination is irretrievably beyond the court’s control. Publication of court records on the Internet creates a much greater threat to privacy interests than does access to paper records, or access to electronic records through terminals at the courthouse.

The case-types set out in rule 2073 (c) would be precluded from remote access for the following reasons:

- *Sensitive personal information unrelated to adjudication.* Courts sometimes collect sensitive personal information that has no bearing on the merits of a case but that assists the court in contacting parties or in record keeping. Such information could include unlisted home telephone numbers, home addresses, driver’s license numbers, and Social Security numbers. Before such information is published on the Internet, the Judicial Council should survey trial courts to identify the sensitive or personal information they collect, determine whether or not this information is essential to workload management, and then consider how to protect such information when it is legitimately needed.
- *Privacy of involuntary participants.* Individuals who are sued, subpoenaed, or summoned for jury duty are involuntary participants in legal proceedings and may be

compelled to provide the court with sensitive personal information. As records custodians, courts should proceed with caution in publishing such information, as it has relatively little relevance to the public's ability to monitor the institutional operation of the courts but relatively great impact on the privacy of citizens who come in contact with the court as defendants, litigants, witnesses, or jurors. Publication of sensitive financial, medical, or family information provided by involuntary court participants could, for instance, harm individuals by holding them up to ridicule, damaging their personal relationships, and foreclosing business opportunities.

- *Investigations in criminal cases.* The Federal Judicial Conference<sup>1</sup> in September 2001 adopted a policy that makes criminal cases unavailable remotely for a two-year period. The Judicial Conference identified two reasons for this exclusion of criminal cases. First, electronic publication of criminal case records could jeopardize investigations that are under way and create safety risks for victims, witnesses, and their families. Second, access to preindictment information, such as unexecuted arrest and search warrants, could severely hamper law enforcement efforts and put law enforcement personnel at risk. These reasons would apply to the proposed California policy as well.
- *Criminal histories.* Allowing remote electronic access to criminal cases would greatly facilitate the compilation of individual criminal histories, in contravention of public policy as established in statute. (See *Westbrook v. City of Los Angeles* (1994) 27 Cal.App.4<sup>th</sup> 157 [court note required to provide to public database containing criminal case information].) For this reason, the Attorney General supports excluding criminal cases from remote electronic access:

Our principal concern is with criminal records and the threat that the electronic release of these records poses to individual privacy and to the legislative and judicial safeguards that have been created to insure that only accurate information is disclosed to authorized recipients. (See, e.g., Penal Code sec. 11105.) The

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<sup>1</sup> "The federal court system governs itself on the national level through the Judicial Conference of the United States. The Judicial Conference is a body of 27 federal judges. It is composed of the Chief Justice of the United States, who serves as the presiding officer, the chief judges of the 13 courts of appeal, the chief judge of the Court of International Trade, and 12 district judges from the regional circuits who are chosen by the judges of their circuit to serve terms of three years. The Judicial Conference meets twice yearly to consider policy issues affecting the federal courts, to make recommendations to Congress on legislation affecting the judicial system, to propose amendments to the federal rules of practice and procedure, and to consider the administrative problems of the courts." See [http://www.uscourts.gov/understanding\\_courts/89914.htm](http://www.uscourts.gov/understanding_courts/89914.htm)

electronic dissemination of criminal records is a tremendous danger to individual privacy because it will enable the creation of virtual rap sheets or private databases of criminal proceedings which will not be subject to the administrative, legislative or judicial safeguards that currently regulate disclosure of criminal record information. (Letter from Attorney General Daniel E. Lungren commenting on draft rules (March 6, 1997); See letter from Attorney General Bill Lockyer (Dec. 15, 2000), reaffirming position taken in March 6, 1997 letter.)

- *Risk of physical harm to victims and witnesses.* The safety of victims and witnesses could be compromised if courts were to publish their addresses, telephone numbers, and other information that would allow them to be located. Such risk is perhaps most common in criminal and family cases.
- *Fraud and identity theft.* Although sensitive personal information, such as Social Security and financial account numbers, may already be available in paper files at the courthouse, its “practical obscurity” has provided it with de facto privacy protection. Publishing such information on the Internet exposes it to a substantial risk of criminal misuse. Participation in court proceedings, whether voluntary or involuntary, should not expose participants to such victimization.
- *Determination of reliability.* Ex parte allegations, particularly in family cases, present a problem in that they may be skewed by self-interest and subsequently determined to be unreliable. Although such allegations could be read in case files at the courthouse, the physical demands of accessing such files would afford them “practical obscurity.” Courts should not broadcast ex parte allegations on the Internet until there are policies and procedures to address the problems of unvetted ex parte allegations.
- *Statutory rehabilitation policies.* Various sections of the Penal Code allow for sealing of a defendant’s criminal record provided that certain conditions are met. Such sealing does not occur by operation of law; see for instance the entries on arrest or conviction for marijuana possession and the record of a “factually innocent” defendant in Table 1. If such information is published before conditions for sealing are met, the publication would make the subsequent sealing ineffectual and thus thwart the rehabilitative intent of the authorizing legislation. Admittedly, information could be published from files accessed at the courthouse, but the “practical obscurity” of such files has lessened the likelihood of publication and reduced the risk of thwarting rehabilitation policies. Publication on the Internet would make it difficult to implement such policies.

- *Tools to apply confidentiality policies.* By statute, courts are obligated to protect confidential information in many types of case records, including some of the types of case records specified in rule 2073(c) (see Table 1). This obligation may be absolute or defined by statutorily set or judicially determined time limits. Courts have traditionally met these obligations on an ad hoc basis, as individual case records have been requested at the courthouse. To respond in a responsible manner to remote electronic requests, courts would need to meet these obligations by applying appropriately protective criteria to all records, not only those that are requested but those that might be. Courts simply do not have staff who can review and monitor all records to make them available for remote electronic access. They will need to use automated tools to address the review and monitoring problem. Effective tools should be based on standards. Standards should then be applied by case management systems. Until these standards can be developed and applied by case management systems, the proposed rules would make specified case types unavailable by remote electronic access.
- *Inadvertent exposure of sensitive or personal information.* Parties to the excepted case types (particularly family law) who are unaware that sensitive or personal information included in court filings is publicly accessible will also be unaware they can take steps to protect such information, by requesting a sealing or protective order. For example, in family law proceedings, it is not unusual for litigants to attach copies of their tax returns to their filings, even though tax returns are made confidential by statute. Similarly, in family law proceedings, allegations of abuse are not uncommon; however, litigants may not be aware that there are procedures for limiting public access to this highly sensitive and personal information to protect not only their own privacy, but that of their minor children. The exceptions to remote access in rule 2073 (c) afford time for the Judicial Council to consider how the privacy interests of litigants, particularly the self-represented, might be protected before courts electronically publish case files that include sensitive or personal information that litigants have inadvertently disclosed.

*Policy development.* While the proposed rules encourage courts to use technology to facilitate access to court records (in accordance with long-term goals of the judicial branch), they do so cautiously, providing breathing room while privacy issues and records policies are more thoroughly reexamined at state and federal levels. The rules allow remote access to civil case files. Civil cases do present some of the same privacy

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concerns discussed above, but generally to a lesser degree than in the types of case records that are unavailable under 2073(c). The courts' experiences with remote access to civil cases will guide the council's policy-making in the future. This incremental approach allows further debate and experimentation. Such an approach is in line with the approach adopted by the Judicial Conference of the United States and other states.

Proposed Rule 2073(c)  
RECORDS NOT AVAILABLE BY REMOTE ELECTRONIC ACCESS

Under proposed Rule 2073(c), the public would be provided with electronic access to court records in specified case types only at the courthouse and not remotely, pending the development and implementation of software standards that enable the courts to meet their legal obligations to protect confidentiality and privacy. This table illustrates the confidentiality and privacy issues that the courts must resolve before providing such remote electronic access to the public.

Case type	Record type	Restricted data	Legal authority	Comment
CIVIL				
Civil or criminal	Subpoenaed business records	Entire record	Evid Code § 1560(d) (confidential until introduced into evidence or entered into record)	As with court records generally, these records are not accessible by public unless and until relied on by court as part of adjudicative process. See <i>Copley Press Inc v Superior Court</i> (1992) 6 CA4th 106, 113-15 (public right of access to court records does not apply to all of court's records and files, but only to records that officially reflect work of court)
All cases involving fee waiver application	Fee waiver application	Entire record	Cal Rules of Court, rule 985(h) (records of application to proceed without paying court fees and costs are confidential)	Purpose is to prevent disclosure of applicant's financial information
All cases involving attachment	Records in attachment action	Entire record	Code Civ Proc § 482.050(a) (attachment action records are confidential for 30 days from filing complaint or return of service, on plaintiff's request).	
All cases involving garnishment	Judicial Council forms 982.5 (11S) and 982.5 (14S)	Entire form	Judicial Council forms 982.5 (11S) and 982.5 (14S)	Purpose is to prevent disclosure of debtor's Social Security Number (SSN)
Unlawful detainer	Register of Actions	Case title, date of commencement, memorandum of	Code Civ Proc § 1162(a) (in certain unlawful detainer actions, Register of Actions unavailable for 60 days from	

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		every subsequent proceeding and date (see Gov Code § 69845)	filing of complaint)	
CIVIL HARASSMENT				
Harassment generally		Address and telephone number of applicant for restraining order.	CCP § 527 6 (requires showing of unlawful violence, credible threat of violence, or course of conduct resulting in "substantial emotional distress," including stalking)	No explicit statutory authority, but publication of the restricted information might facilitate further harassment Analogous to authority given to court under Fam Code to prohibit disclosure of identifying information in proceeding under Domestic Violence Prevention Act (see below)
Domestic Violence		Address and telephone number of applicant for restraining order and or his or her minor children.	Fam Code § 6322 5 (court may issue ex parte order prohibiting disclosure of address or other identifying information of a party, child, parent, guardian, or other caretaker of child in proceeding under Domestic Violence Prevention Act)	Publication of the restricted information might facilitate further harassment
CRIMINAL				
	Grand jury proceedings		Pen Code § 938 1(b) (transcript not subject to disclosure until 10 days after delivery to defendant or attorney, subject to specified conditions)	Records not public unless indictment returned
	Search warrants and affidavits	Entire record until return of service or 10 days after issuance, whichever is first	Pen Code § 1534(a) (these records are confidential for time period specified)	
	Police reports	Address or telephone number of victims, witnesses	Pen Code § 1054 2 (no attorney may disclose unless permitted to do so by the court after a hearing and a showing of good cause)	Conforms to policy of Pen Code § 841 5 (no law enforcement officer or employee of law enforcement agency shall disclose to any arrested person, or to any person who may be a defendant in a criminal action, address or telephone number of victim or witness in alleged offense)
	Pre-sentence	Entire record	Pen Code § 1203 05 (pre-sentence	Publication on Internet would effectively be

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probation report		probation report is confidential after 60 days from sentencing or granting of probation and under certain other conditions)	permanent and thus thwart policy behind making record unavailable after 60 days
Pre-sentence diagnostic report	Entire record	Pen Code § 1203 03 (report is confidential)	Unavailable as public record in any form absent change in legislative policy
Defendant's statement of assets	Entire record	Pen Code § 1202 4 (mandatory Judicial Council form (CR-115) is confidential)	Purpose is to prevent disclosure of defendant's financial information
Criminal history information	Summaries of criminal history information "	Summaries of criminal history information are confidential ( <i>Westbrook v Los Angeles</i> (1994) 27 CA4th 157, 164, Pen Code §§ 11105, 13300-13326) Public officials have duty to preserve confidentiality of defendant's criminal history ( <i>Craig v Municipal Court</i> (1979) 100 CA3d 69, 76)	Court in <i>Westbrook</i> noted adverse impact of disseminating this information with its potential for frustrating policies permitting subsequent sealing or destruction of records, or limiting dissemination of similar records by other criminal justice agencies (pp 166-67) Pen Code § 11105 limits access to state summary criminal history information to public agencies and others given express right of access by statute Pen Code § 13300 contains similar limitations on public access with respect to local summary criminal history information
Arrest or conviction for marijuana possession	All records except for transcripts or appellate opinions, see Health & Saf Code § 11361 5(d) Any information	Health & Saf Code §§ 11361 5-11361 7 (generally, records of arrest or conviction for marijuana possession to be destroyed two years from date of arrest or conviction)  42 CFR 2.12 (restricts disclosure of patient identity in federally assisted alcohol or drug abuse rehabilitation program)	Publication on Internet would effectively be permanent and thus thwart policy behind sealing after sentencing  Publication is antithetical to goal of rehabilitation
Record of "factually innocent" defendant	Entire record	Pen Code §§ 851 8, 851 85 (on acquittal, or if no accusatory pleading is filed or, after filing, there is a judicial determination that defendant was	Publication on Internet would effectively be permanent and thus thwart policy behind sealing

			“factually innocent” of the charges, court records, including arrest records may be sealed)	
	Indigent defendant requests	Indigent defendant’s in forma pauperis records and request for experts in capital case	Cal Rules of Ct 985(h) (indigent defendant’s in forma pauperis records are confidential) and Pen Code § 987 9 (request for experts in capital case are confidential)	Purpose of Rule 985(h) is to prevent disclosure of defendant’s financial information Purpose of sec 987 9 is to preserve confidentiality of defense
	Plea based on insanity or defense based on defendant’s mental or emotional condition	Entire record	Evid Code § 1017 (psychotherapist appointed by order of court on request of lawyer for defendant in criminal proceeding, to provide lawyer with information to advise defendant whether to enter or withdraw plea based on insanity or to present defense based on mental or emotional condition)	Purpose is to preserve confidentiality of defense
	Reports concerning mentally disordered prisoners	Entire record	Pen Code § 4011 6 (reports to evaluate whether prisoners are mentally disordered are confidential)	
	Victim/witness information	Specified victim personal identifying information and victim impact statements	Gov Code § 6254(f)(2) and Pen Code § 293 (in specified abuse and sexual assault cases, victim’s name and address, and the offense, confidential on victim’s request). Pen. Code § 293 5(a) (at request of victim of certain sexual offenses, court may order that victim’s identity in all records be either Jane Doe or John Doe, on finding that order is reasonably necessary to protect victim’s privacy and will not unduly prejudice prosecution or defense) Pen. Code § 1191.15 (victim impact	Purpose is to protect victim’s privacy

Misdemeanor proceedings	Dismissal of accusatory pleading and setting aside of guilty verdict		statements are confidential before judgment and sentencing and may not be copied After judgment and sentencing, statement must be made available as public record of court)  Pen Code § 1203 4a (misdemeanor proceedings resulting in conviction may be modified on petition and proof that one year has elapsed from date of judgment, sentence has been fully complied with, and no other crimes have been committed)	Publication is antithetical to goal of rehabilitation
Fines, fees, forfeitures	Any record containing Social Security Number (SSN)	Social Security Number	Gov Code § 68107 (court may order criminal defendant on whom fine, forfeiture, or penalty is imposed to disclose social security number to assist court in collection, but number is not a public record and is not to be disclosed except for collection purposes), see also 42 U S C § 405(c)(2)(C)(viii) (I)	Purpose is to prevent disclosure of defendant's Social Security Number (SSN)
FAMILY				
Child or spousal support	Tax return	Entire record	Fam Code § 3552 (parties' tax returns filed in support proceedings must be sealed)	Unavailable as public record in any form absent change in legislative policy
Child custody	Custody evaluation report  All, when noncustodial parent is registered sex offender, or convicted of child	Entire record  Custodial parent's place of residence and employment, and child's school	Fam Code § 3111 (report is available only to court, parties, and their attorneys)  Fam Code § 3030(e) (this information may not be disclosed unless court finds that disclosure would be in child's best interest)	In general, these records are made confidential to protect privacy of parties and their minor children

Other	abuse, child molestation, or rape that resulted in child's conception		
	Records in conciliation proceedings	Entire record	Fam Code § 1818(b) (files of family conciliation court shall be closed)
	Records in action under Uniform Parentage Act (UPA)	All records, except for final judgment	Fam Code § 7643(a) (records are subject to public inspection only in exceptional cases, on court order for good cause shown).
	Petition and probation or social services report in proceeding to terminate parental rights	Entire record	Fam Code § 7805 (records are to be disclosed only to court personnel, the parties, and persons designated by the judge)
	Adoption records	Entire record	Fam Code § 9200(a) (judge may not authorize public inspection except in exceptional circumstances and for good cause "approaching the necessitous")
	Support enforcement, child abduction	Entire record	Fam Code § 17212 (records generally confidential with specified exceptions)  Fam Code § 4926 (on finding that health, safety, or liberty of party or child would be unreasonably put at risk by disclosure of identifying information, court shall order that address of child or party or other identifying information not be disclosed in any pleading or other document filed
Support enforcement under Uniform Interstate Family Support	Address of child or party or other identifying information		

	Act Confidential Counseling Statement (Marriage)	Judicial Council Form 1284	in proceeding under Act) Judicial Council Form 1284	
GUARDIANSHIP, CONSERVATORSHIP				
	Confidential Guardian Screening Form (Probate Guardianship)	Entire Judicial Council Form GC- 212	Prob Code § 1516, Cal Rules of Court, rule 7 1001	Unavailable as public record in any form absent change in legislative policy
	Confidential Conservator Screening Forms (Probate Conservatorship)	Entire Judicial Council Forms GC-314 and GC- 312	Prob Code § 1821(a), Cal Rules of Court, rule 7 1050	
	Report and recommendation re proposed guardianship	Entire record	Prob Code § 1513(d) (report of investigation and recommendation concerning proposed guardianship is confidential)	
	Report and recommendation re proposed conservatorship	Entire record	Prob Code § 1826(n) (report of investigation and recommendation concerning proposed conservatorship is confidential, except that court has discretion to release report if it would serve conservatee's interests)	
	Report arising from periodic review of conservatorship	Entire record	Prob Code § 1851(e) (report is confidential, except that court has discretion to release report if it would serve conservatee's interests)	
	Periodic accounting of assets in estate or	Accounting containing ward's or conservatee's	Prob Code § 2620(d) [AB 1286, 1517] (accounting containing this information should be filed under seal)	

	ward or conservatee	Social Security number or any other personal information not otherwise required to be submitted to court		
JUROR RECORDS				
	Juror questionnaires and personal identifying information	Jurors' names, addresses, and telephone numbers	Code Civ Proc § 237 (juror personal identifying information after verdict in criminal case, to be confidential) <i>Bellas v Superior Court</i> (2000) 85 CA4th 636, 646 (jurors' responses to questionnaires used in voir dire are accessible by public unless judge orders them to be sealed) <i>Townsel v Superior Court</i> (1999) 20 C4th 1084, 1091 (trial courts have inherent power to protect juror safety and juror privacy) <i>Copley Press, Inc v Superior Court</i> (1991) 228 CA3d 77, 88 (public should not be given access to personal information furnished to determine juror qualification or necessary for management of the jury system, but not properly part of voir dire, e g, the prospective juror's telephone number, SSN, or driver's license number) See also Cal Rules of Court, rule 33.6 (sealing juror-identifying information in record on appeal).	Do courts have an obligation to protect the privacy of these nonparties to the proceeding?
JUVENILE				
All	All	Entire record	Welf & Inst Code § 827 and Cal Rules of Court 1423 (access to case files in juvenile court proceedings is generally restricted), Pen Code § 676 (certain violent offenses excepted)	General purpose behind confidentiality of these records is to promote rehabilitation of juvenile offenders

	<p>Adult court criminal records</p> <p>Record of "factually innocent" defendant Judgments</p> <p>All records, papers, and exhibits in the person's case in the custody of the juvenile court (see Welf. &amp; Inst Code §781)</p>	<p>Entire record, including arrest record</p> <p>Entire juvenile court record, minute book entries, and entries on dockets, and any other records relating to the case</p>	<p>Pen Code § 851 7 and Welf &amp; Inst Code § 707 4 (adult court criminal records involving minors that do not result in conviction to be sent to juvenile court, to obliterate minor's name in adult court index or record book)</p> <p>Pen Code § 1203 45 (minor would qualify for judgment modification as a probationer or misdemeanant)</p> <p>Pen. Code § 851 85 (any criminal proceedings, after acquittal plus judicial finding of factual innocence)</p> <p>Pen. Code § 1203 4 (criminal judgments may be modified for convicted probationers after successful completion of probationary period) or Pen Code § 1203 4a (criminal judgments may be modified for convicted misdemeanants after one year and successful completion of sentence)</p> <p>Welf &amp; Inst. Code §781 (juveniles declared wards of the court may on petition have their juvenile court records (including those made public by Welf &amp; Inst Code § 676) sealed five years after the jurisdiction of the court ceases or the juvenile reaches 18, if there are no subsequent convictions involving felonies or moral turpitude, and there is a finding of rehabilitation)</p>	
MENTAL HEALTH				



Civil and criminal	Mental health service records	Entire record	Welf & Inst Code §§ 5328-5330 (specified records confidential and can be disclosed only to authorized recipients, including records related to the Dept. of Mental Health; Developmental Services; Community Mental Health Services, services for developmentally disabled, voluntary admission to mental hospitals and mental institutions)	Publication on Internet would effectively be permanent and thus thwart policy behind sealing after sentencing
	Developmentally Disabled Assessment Reports	Entire record	Welf & Inst Code § 4514 (Developmentally Disabled Assessment Reports, to be sealed after sentencing)	Publication on Internet would effectively be permanent and thus thwart policy behind sealing after sentencing

SOCIAL SECURITY NUMBERS By statute SSNs are required in the following court proceedings

- (1) The judgment debtor's SSN (if known to the judgment creditor) must be set forth on the abstract of judgment CCP § 674(a)(6)
- (2) The application for an earnings withholding order must include the judgment debtor's SSN (if known to the judgment creditor CCP § 706 121(a) The earnings withholding order and the employer's return must also include this SSN if known CCP §§ 706 125(a) (order), 706 126(a)(3) (return)
- (3) As noted above with regard to criminal cases, courts are authorized to collect SSNs from criminal defendants with fines, forfeitures, or penalties imposed, but these numbers are not to become public records and are not to be disclosed except for collection purposes Govt Code § 68107

In civil and bankruptcy cases in the federal courts, only the last four digits of a party's SSN should be set forth in any document filed with the court See [http //www.uscourts.gov/Press\\_Releases/att81501.pdf](http://www.uscourts.gov/Press_Releases/att81501.pdf)

# JUDICIAL COUNCIL OF CALIFORNIA

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## DRAFT INVITATION TO COMMENT

[ITC prefix as assigned]-\_\_

<p><b>Title</b> Rules: Remote Access to Electronic Records by Appellate Appointed Counsel Administrators, Courts of Appeal, and the Habeas Corpus Resource Center</p> <p><b>Proposed Rules, Forms, Standards, or Statutes</b> Amend rules 2.515, 2.521, 2.523, and 2.540 of the California Rules of Court</p> <p><b>Proposed by</b> Information Technology Advisory Committee Hon. Sheila F. Hanson, Chair</p>	<p><b>Action Requested</b> Review and submit comments by May 13, 2022</p> <p><b>Proposed Effective Date</b> January 1, 2023</p> <p><b>Contact</b> Andrea L. Jaramillo, 916-263-0991, <a href="mailto:andrea.jaramillo@jud.ca.gov">andrea.jaramillo@jud.ca.gov</a></p>
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### Executive Summary and Origin

The Information Technology Advisory Committee (ITAC) proposes the Judicial Council amend rules 2.515, 2.521, 2.523, and 2.540 of the California Rules of Court<sup>1</sup> to authorize trial courts to provide remote access to electronic records by administrators contracted to run appellate appointed counsel programs, the Courts of Appeal, and the Habeas Corpus Resource Center. The proposal originated with a recommendation from Sixth District Appellate Program staff.

### The Proposal

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

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

*This proposal has not been approved by the Judicial Council and is not intended to represent the views of the council, its Rules Committee, or its Legislation Committee. It is circulated for comment purposes only.*

records at the courthouse; timely obtaining the records has been a challenge during the COVID-19 pandemic.

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

#### **Remote access by appellate appointed counsel administrators**

##### ***Appellate Appointed Counsel Administrators Operate in All Six Appellate Districts***

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

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

One appellate contractor does not fall within the scope of rule 8.300: the California Appellate Project-San Francisco (CAP-SF). CAP-SF provides similar services as other appellate appointed counsel administrators, but only for indigent defendants sentenced to death. CAP-SF is funded through a contract with the Judicial Council and "assists in capital postconviction proceedings, supporting appointed counsel in challenging their clients' convictions and sentences on direct appeal and through habeas corpus proceedings."<sup>7</sup> Under the California Rules of Court, CAP-SF, in addition to the State Public Defender, is qualified to serve on death penalty appeals.<sup>8</sup>

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<sup>2</sup> Rule 8.300(a)(1).

<sup>3</sup> Rule 8.300(b)-(c).

<sup>4</sup> Rule 8.300(e)(1).

<sup>5</sup> A list of appellate projects is available online at <https://www.courts.ca.gov/13714.htm> (as of Feb. 14, 2022).

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

<sup>7</sup> California Appellate Project-San Francisco, About CAP-SF, <https://www.capsf.org/public/about.aspx> (as of Jan. 19, 2022).

<sup>8</sup> Rule 8.604(g).

Furthermore, "[w]hen a judgment of death is rendered, the superior court clerk must immediately send certified copies of the commitment" to CAP-SF and specified government entities.<sup>9</sup>

***The Current Rules on Remote Access to Electronic Court Records and Not Adequate to Address Remote Access by Appellate Appointed Counsel Administrators***

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

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

- A potential client may contact an appellate appointed counsel administrator for help and the administrator would need access to records to determine if the client is entitled to appointed counsel.
- If a criminal defendant files an appeal following a guilty plea, which requires a certificate of probable cause to appeal,<sup>10</sup> but there is no certificate, the administrator may need to work with the defendant and view the defendant's court records to resolve the certificate of probable cause issue before counsel can be appointed. According to SDAP staff, this happens often.
- Administrators need to view court records as part of their evaluation of the performance of appellate appointed counsel, which they are obligated to do.<sup>11</sup>
- Finally, appointed counsel may become unavailable during the appeal and, if that occurs, the administrator may need to access court records to act on behalf of the client before new counsel can be appointed or facilitate transferring information to new counsel.

***Proposed Amendments to Authorize Remote Access by Appellate Appointed Counsel Administrators***

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

Rule 2.515 provides an overview of which users may access electronic records under article 3 of chapter 2 of title 2 of the California Rules of Court, which governs remote access by specified

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<sup>9</sup> Rule 8.603(b).

<sup>10</sup> Pen. Code, § 1237.5.

<sup>11</sup> See rule 8.300(d) (obligation to "review and evaluate the performance of each appointed counsel to determine whether counsel's name should remain on the list at the same level, be placed on a different level, or be deleted from the list").

users. The proposed amendment adds appellate appointed counsel administrators to the list of specified users.

Rule 2.523 requires verification of persons authorized to access electronic records remotely under rules 2.515 through 5.521. Subdivision (d) of rule 2.523 describes the responsibilities of certain organizations to verify the identity of users from the organizations. The proposed amendment adds appellate appointed counsel administrators to the organizations included in subdivision (d).

Rule 2.521 authorizes remote access by court-appointed persons. The proposed amendments bring appellate appointed counsel administrators within the rule's scope. ITAC considered a separate, standalone rule for appellate appointed counsel administrators. However, to preserve the logical organization of the rules, this would have necessitated renumbering several rules. Rules 2.517 through 2.522 current address remote access by specified users while rules 2.523 through rule 2.528 address requirements related to remote access systems, such as security and conditions of access. ITAC considered proposing a new rule 2.523, and renumbering existing rules 2.523 through 5.528. However, ITAC decided it would be preferable and less confusing to amend an existing rule rather than adding a new rule and renumbering several rules. ITAC determined rule 2.251, which relates to remote access by court-appointed persons, was topically similar to the proposed amendments for appellate appointed counsel administrators. Accordingly, ITAC proposes amending rule 2.251 to bring appellate appointed counsel administrators within its scope.

The proposed amendments to rule 2.521 split subdivision (a) into two paragraphs. Paragraph (1) and its subparagraphs contain existing language about remote access by court-appointed persons. Paragraph (2) its subparagraphs address remote access by a person working for an appellate appointed counsel administrator. Subparagraph (B) lists the six appellate appointed counsel administrators by name. A new advisory committee comment related to subparagraph (B) is also included to note that more details about the appellate appointed counsel administrators, including physical and web addresses and contact information, are available on a Judicial Council's website. ITAC had considered describing the appellate appointed counsel administrators more generally but determined that specificity made the rule clearer.

The proposed amendments add appellate appointed counsel administrators to subdivisions (c) and (d) of rule 2.251, but make no other substantive changes to those subdivisions. Under the amendments, persons working for appellate appointed counsel administrators may remotely access any electronic records they would have been entitled to view at the courthouse. They are authorized to remotely access records only for purposes of fulfilling the administrator's responsibilities, are prohibited from selling electronic records, and must comply with any of the court's terms for remote access.

#### **Remote access by Courts of Appeal**

Courts of Appeal are responsible for operating programs for appellate appointed counsel under rule 8.300. However, as noted previously, that rule authorizes them to contract the work to

administrators, which all the Courts of Appeal have done. A Court of Appeal that uses a contract administrator is responsible for providing "the administrator with the information needed to fulfill the administrator's duties."<sup>12</sup> Extending remote access to Courts of Appeal should help facilitate information sharing to administrators if the administrators lack needed information. In addition, should a Court of Appeal choose to operate its own appointed counsel program rather than contracting with an administrator, the rule would facilitate the Court of Appeal meeting its rule 8.300 obligations. The draft proposal includes remote access to electronic records pertinent in case types in which a party is entitled to appointed counsel on appeal.

#### **Remote access by the Habeas Corpus Resource Center**

Like the California Appellate Project-San Francisco, the Habeas Corpus Resource Center (HCRC) only represents indigent defendants sentenced to death. In addition, it "recruits and trains attorneys to expand the pool of private counsel qualified to accept appointments in death penalty habeas corpus proceedings and serves as a resource to appointed counsel[.]"<sup>13</sup> Unlike the appellate appointed counsel administrators described in the amendments to rule 2.521, HCRC is a government entity. Accordingly, the proposed amendments bring HCRC within the scope of rule 2.540, which addresses remote access by government entities. HCRC staff explained to ITAC that trial courts differ on how they categorize records in habeas corpus matters, with some using a distinct case type for habeas corpus and some including habeas corpus with the criminal case type. HCRC explained that remote access to "criminal electronic records" and "habeas corpus electronic records" would help it fulfill its obligations. Accordingly, the proposed amendments authorize courts to provide HCRC with remote access to those case types.

#### **Alternatives Considered**

As discussed previously, ITAC considered a standalone rule for remote access by appellate appointed counsel administrators but determined it would be preferable to amend rule 2.251 instead. As also previously discussed, ITAC considered more general language to define the appellate appointed counsel administrators but determined it was clearer to list them by name. ITAC did not consider the alternative of the status quo to be preferable given the challenges in accessing needed records during the COVID-19 pandemic that SDAP described.

#### **Fiscal and Operational Impacts**

Courts may need to make system updates or execute new agreements to allow remote access by the new users described in the proposed amendments. Courts may need to train staff about what electronic records the new users described in the proposed amendments may remotely access. Rule 2.516 would require courts to authorize remote access by appellate appointed counsel administrators, but only to the extent it is feasible to do so. Financial and technological limitations may affect the feasibility of providing remote access. Costs and specific

**Commented [JA1]:** This reflects discussion of ITAC's subcommittee on Feb. 3, 2022. This section will be updated, if needed, following the subcommittee meeting on Feb. 23 and full committee meeting on Feb. 25.

<sup>12</sup> Rule 8.300(e)(2).

<sup>13</sup> Habeas Corpus Resource Center, <https://www.hcrc.ca.gov/> (as of Feb. 14, 2022).

implementation requirements would vary across the courts depending on each court's current capabilities and approach to providing services.

### **Request for Specific Comments**

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

- Does the proposal appropriately address the stated purpose?
- Are there additional case types that should be included with the proposed amendments to rule 2.540?

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

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

### **Attachments and Links**

1. Cal. Rules of Court, rules 8.42 and 8.44, at pages 7–12
2. Link A: California Rules of Court, Title 2,  
<https://www.courts.ca.gov/cms/rules/index.cfm?title=two>

Rules 2.515, 2.521, 2.523, and 2.540 of the California Rules of Court are amended, effective January 1, 2023, to read:

1 **Rule 2.515. Application and scope**

2  
3 (a) \* \* \*

4  
5 (b) **Who may access**

6  
7 The rules in this article apply to remote access to electronic records by:

- 8  
9 (1) A person who is a party;
- 10  
11 (2) A designee of a person who is a party;
- 12  
13 (3) A party's attorney;
- 14  
15 (4) An authorized person working in the same legal organization as a party's
- 16 attorney;
- 17  
18 (5) An authorized person working in a qualified legal services project providing
- 19 brief legal services; and
- 20  
21 (6) A court-appointed person; and
- 22  
23 (7) An authorized person working for an appellate appointed counsel
- 24 administrator

25  
26 **Advisory Committee Comment**

27  
28 Article 2 allows remote access in most civil cases, and the rules in article 3 are not intended to

29 limit that access. Rather, the article 3 rules allow broader remote access—by parties, parties'

30 designees, parties' attorneys, authorized persons working in legal organizations, authorized

31 persons working in a qualified legal services project providing brief services, ~~and~~ court-appointed

32 persons, and authorized persons working for an appellate appointed counsel administrator—to

33 those electronic records where remote access by the public is not allowed.

34

35 Under the rules in article 3, a party, a party's attorney, an authorized person working in the same

36 legal organization as a party's attorney, ~~or~~ a person appointed by the court in the proceeding, or

37 an authorized person working for an appellate appointed counsel administrator basically has the

38 same level of access to electronic records remotely that he or she would have if he or she were to

39 seek to inspect the records in person at the courthouse. Thus, if he or she is legally entitled to

40 inspect certain records at the courthouse, that person could view the same records remotely; on

41 the other hand, if he or she is restricted from inspecting certain court records at the courthouse

42 (e.g., because the records are confidential or sealed), that person would not be permitted to view



Rules 2.515, 2.521, 2.523, and 2.540 of the California Rules of Court are amended, effective January 1, 2023, to read:

1 the records remotely. In some types of cases, such as unlimited civil cases, the access available to  
2 parties and their attorneys is generally similar to the public's but in other types of cases, such as  
3 juvenile cases, it is much more extensive (see Cal. Rules of Court, rule 5.552).

4  
5 For authorized persons working in a qualified legal services program, the rule contemplates  
6 services offered in high-volume environments on an ad hoc basis. There are some limitations on  
7 access under the rule for qualified legal services projects. When an attorney at a qualified legal  
8 services project becomes a party's attorney and offers services beyond the scope contemplated  
9 under this rule, the access rules for a party's attorney would apply.

10  
11 **Rule 2.521. Remote access by a court-appointed person or person working for an**  
12 **appellate appointed counsel administrator**

13  
14 **(a) Remote access generally permitted**

15  
16 (1) Remote access by a court-appointed person

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18 (A) A court may grant a court-appointed person remote access to electronic  
19 records in any action or proceeding in which the person has been  
20 appointed by the court.

21  
22 (B) Court-appointed persons include an attorney appointed to represent a  
23 minor child under Family Code section 3150; a Court Appointed Special  
24 Advocate volunteer in a juvenile proceeding; an attorney appointed under  
25 Probate Code section 1470, 1471, or 1474; an investigator appointed under  
26 Probate Code section 1454; a probate referee designated under Probate Code  
27 section 8920; a fiduciary, as defined in Probate Code section 39; an attorney  
28 appointed under Welfare and Institutions Code section 5365; or a guardian ad  
29 litem appointed under Code of Civil Procedure section 372 or Probate Code  
30 section 1003.

31  
32 (2) Remote access by a person working for an appellate appointed counsel  
33 administrator

34  
35 (A) A court may grant a person working for an appellate appointed counsel  
36 administrator remote access to electronic records.

37  
38 (B) Appellate appointed counsel administrators are contracted with the Courts  
39 of Appeal or Judicial Council to administer programs for appointed  
40 counsel on appeal. The appellate appointed counsel administrators are:

41  
42 (i) Appellate Defenders, Inc.

Rules 2.515, 2.521, 2.523, and 2.540 of the California Rules of Court are amended, effective January 1, 2023, to read:

- (ii) California Appellate Project – Los Angeles,
- (iii) California Appellate Project – San Francisco,
- (iv) Central California Appellate Program
- (v) First District Appellate Project, and
- (vi) Sixth District Appellate Program.

*Staff Comments: The first draft of the proposal described most of these generally as “organizations contracted to perform the duties prescribed in rule 8.300 of the California Rules of Court.” However, the language may create practical problems if trial court staff are unfamiliar with such organizations. The proposed language now lists all of the appellate appointed counsel administrators by name. In addition, the advisory comment, below, includes to a link to a Judicial Council website that provides a significant level of detail about the organizations such as their addresses, phone numbers, web addresses, and names of executive directors. The goal is to be specific with the trial courts about who these organizations are.*

(C) "Working for an appellate appointed counsel administrator" under this rule includes attorneys, employees, contractors, and volunteers.

*Staff comments: This is like organizational access authorized under rules 2.520 and 2.522.*

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

*Staff comments: This is like organizational access under rules 2.520 and 2.522.*

**(b) Level of remote access**

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

**(c) Terms of remote access**

Rules 2.515, 2.521, 2.523, and 2.540 of the California Rules of Court are amended, effective January 1, 2023, to read:

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(1) *Remote access only for purpose of fulfilling responsibilities*

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

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

(2) Any distribution for sale of electronic records obtained remotely under the rules in this article is strictly prohibited.

(3) All laws governing confidentiality and disclosure of court records apply to the records obtained under this article.

(4) A court-appointed person or person working for an appellate appointed counsel administrator must comply with any other terms of remote access required by the court.

(5) Failure to comply with these rules may result in the imposition of sanctions, including termination of access.

**Advisory Committee Comment**

**Subdivision (a)(2)(B).** A detailed list of appellate appointed counsel administrators, including physical and web addresses and contact information, is available on the Judicial Council’s web site at <https://www.courts.ca.gov/13714.htm>.

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

(a)- (c) \* \* \*

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

(1) If a person is accessing electronic records on behalf of a legal organization, ~~or~~ qualified legal services project, or appellate appointed counsel administrator, the organization or project must approve granting access to that person, verify the person’s identity, and provide the court with all the information it directs in order to authorize that person to have access to electronic records.

Rules 2.515, 2.521, 2.523, and 2.540 of the California Rules of Court are amended, effective January 1, 2023, to read:

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- (2) If a person accessing electronic records on behalf of a legal organization, ~~or~~ qualified legal services project, or appellate appointed counsel administrator leaves his or her position or for any other reason is no longer entitled to access, the organization or project must immediately notify the court so that it can terminate the person’s access.

*Staff comments:* This brings the same responsibilities to appellate appointed counsel administrators that other organizations have under the rules.

(e) \* \* \*

**Rule 2.540. Application and scope**

(a) \* \* \*

**(b) Level of remote access**

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

(A)-(P) \* \* \*

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

*Staff comments:* This reflects the types of cases for which parties are entitled to appointed counsel on appeal. Courts of Appeal could provide this information to their contracted appellate appointed counsel administrators. If a Court of Appeal chose to operate its own appointed counsel program instead of contracting it to an administrator, this would also ensure remote access to the appropriate records for the court’s program.

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

*Staff comments:* According to Habeas Corpus Resource Center staff, some courts keep habeas records with the criminal records, but others keep them as separate habeas corpus records. Accordingly, HCRC requested “habeas corpus electronic records” specifically be included.

Rules 2.515, 2.521, 2.523, and 2.540 of the California Rules of Court are amended, effective January 1, 2023, to read:

1           ~~(Q)~~(S)       For good cause, a court may grant remote access to electronic  
2                   records in particular case types to government entities beyond those  
3                   listed in (b)(1)(A)–(P). For purposes of this rule, “good cause” means  
4                   that the government entity requires access to the electronic records in  
5                   order to adequately perform its legal duties or fulfill its responsibilities  
6                   in litigation.

7  
8           ~~(R)~~(T)       All other remote access for government entities is governed by  
9                   articles 2 and 3.

10  
11       (2)   Subject to (b)(1), the court may provide a government entity with the same  
12           level of remote access to electronic records as the government entity would  
13           be legally entitled to if a person working for the government entity were to  
14           appear at the courthouse to inspect court records in that case type. If a court  
15           record is confidential by law or sealed by court order and a person working  
16           for the government entity would not be legally entitled to inspect the court  
17           record at the courthouse, the court may not provide the government entity  
18           with remote access to the confidential or sealed electronic record.

19  
20       (3)   This rule applies only to electronic records. A government entity is not  
21           entitled under these rules to remote access to any documents, information,  
22           data, or other types of materials created or maintained by the courts that are  
23           not electronic records.

24  
25       (c)   \* \* \*