

Invitation to Comment

Title	Trial and Appellate Procedure: Electronic Recordings Offered Into Evidence (amend Cal. Rules of Court, rule 2.1040).
Summary	This proposal would amend the rule relating to electronic recordings offered into evidence in trial court proceedings to ensure that there is a record of these recordings in the event of an appeal. The proposed amendments include requiring that, before any sound and video recording of deposition or other testimony is presented, a transcript of the testimony be lodged with the court and that the party presenting the recording identify on the record the page and line numbers of the testimony being presented.
Source	Appellate Advisory Committee Hon. Kathryn Doi Todd, Chair
Staff	Heather Anderson, Committee Counsel, 415-865-7691, heather.anderson@jud.ca.gov

Rule 2.1040 of the California Rules of Court currently provides that, unless otherwise ordered by the trial judge, a party offering into evidence an electronic sound or sound-and-video recording must tender to the court a typewritten transcript of the electronic recording, and a copy of the transcript must be filed by the clerk and must be made part of the clerk’s transcript in the event of an appeal. The rules on felony, misdemeanor, and infraction appeals also specifically require that any transcript provided by a party under rule 2.1040 be included in the clerk’s transcript on appeal (see rules 8.320, 8.861, and 8.912). Sometimes, however, a party offering such a recording into evidence will not tender a written transcript of the recording and the court reporter will not be asked to take down the content of the electronic recording. As a result, no written record of the recording is available in the event of an appeal. This creates delays and increases cost in the appellate proceeding.

To address this problem, this proposal would make several changes to rule 2.1040 designed to ensure that there is an appropriate record of any recording offered into evidence or presented in the trial court proceedings. First, it would add a new provision specifically addressing sound and video recordings of deposition or other prior testimony. Under this provision, before presenting such an electronic recording, a party would be required to lodge a written transcript of the testimony with the court. It is the committee’s understanding that when a deposition or other testimony is videotaped, a written transcript of the testimony is also typically prepared. Thus, any party who wishes to present a videotape of such testimony in a trial court proceeding will typically already have a transcript of that testimony and it should not increase litigation costs or delay the trial

court proceedings to require that a copy of that transcript be provided to the court. To ensure that there is a record of the portion of the recording that is actually presented in the trial court, this proposal would also require that the party presenting the electronic recording identify the page and line numbers in the transcript where the testimony being presented appears.

For all other electronic recordings, such as 911 tapes and day-in-the-life videos, this proposal would maintain the current requirement that the party offering the electronic recording into evidence generally provide a transcript of the recording that is filed by the clerk. However, instead of giving the trial judge general discretion to waive this requirement, these proposed amendments would provide that a transcript need not be provided of a sound-and-video recording if the parties stipulate that the sound portion of the recording does not contain any words relevant to the issues in the case. In these circumstances, preparing a transcript would be an unnecessary burden and expense. In addition, when the recording does contain words relevant to the issues in the case, this proposal would give the trial judge authority to permit the party to provide the transcript five days (or longer in extraordinary circumstances) after the electronic recording is offered into evidence. This new provision would give the party the opportunity to prepare a transcript if one is not available at the time the recording is offered into evidence and should ensure that the trial court proceedings are not delayed by the lack of a transcript. The committee would particularly appreciate comments on whether there are other circumstances (such as when the recording is offered by a self-represented litigant) or case types (such as misdemeanor, infraction, or limited civil cases in which the rate of appeals is relatively low) in which a party offering an electronic recording into evidence should not be required to provide a transcript of the recording, either at all or until an appeal is actually filed.

Finally, this proposal would add a requirement that the party offering the recording into evidence provide other parties with a copy of the electronic recording itself. This would allow the other parties to check the original recording if any question arises concerning the accuracy of the transcript. The committee would particularly appreciate comments on whether such copies of the recording should be provided in all cases or only upon the request of the other party.

To guide rule users, a new advisory committee comment would be added explaining that the purpose of rule 2.1040 is to ensure that an appropriate record of any electronic recording presented or offered into evidence is available in the event of an appeal. It would also clarify that if only a portion of a longer electronic recording is offered into evidence, the transcript and duplicate recordings provided by the party should contain only those portions of the electronic recording that were actually offered into evidence. In addition, the comment would provide guidance about the circumstances in which it would be beneficial to have a court reporter take down the content of an electronic recording.

Rule 2.1040 of the California Rules of Court would be amended, effective January 1, 2011, to read:

1 **Rule 2.1040. Electronic recordings presented or offered in evidence**

2
3 **(a) Electronic recordings of depositions or other prior testimony**

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5 Before a party may present an electronic sound-and-video recording of deposition or
6 other prior testimony, the party must lodge a written transcript of the deposition or
7 prior testimony with the court. At the time the recording is played, the party must
8 identify on the record the page and line numbers where the testimony presented
9 appears in the transcript.

10
11 **(a)(b) Transcript of Other electronic recordings**

12
13 (1) Unless otherwise ordered by the trial judge ~~Except as provided in (2), before a~~
14 party may offering into evidence any electronic sound or sound-and-video
15 recording not covered under (a), the party must ~~tender~~ provide to the court and
16 to opposing parties a typewritten transcript of the electronic recording and
17 provide opposing parties with a. The transcript must be marked for
18 identification. A duplicate of the ~~transcript~~ electronic recording, as defined in
19 Evidence Code section 260, must be filed by the clerk and must be part of the
20 clerk's transcript in the event of an appeal. Any other recording transcript
21 provided to the jury must also For good cause, the trial judge may permit the
22 party to provide the duplicate recording or the transcript within 5 days after the
23 recording is offered into evidence or, in extraordinary circumstance, a later
24 date. The electronic recording provided to the court must be marked for
25 identification; and a duplicate the transcript must be filed by the clerk and so
26 that it can be made part of the clerk's transcript in the event of an appeal.

27
28 (2) If the parties stipulate in writing or on the record that the sound portion of a
29 sound-and-video recording does not contain any words that are relevant to the
30 issues in the case, no transcript of that recording is required to be provided
31 under (1).

32
33 **(b)(c) Transcription by court reporter not required**

34
35 Unless otherwise ordered by the trial judge, the court reporter need not take down or
36 transcribe the content of an electronic recording that is offered ~~admitted~~ into
37 evidence.

Advisory Committee Comment

This rule is designed to ensure that, in the event of an appeal, there is an appropriate record of any electronic sound or sound-and-video recording that was presented or offered into evidence in the trial court. The rules on felony, misdemeanor, and infraction appeals require that any transcript provided by a party under this rule be included in the clerk’s transcript on appeal (see rules 8.320, 8.861, and 8.912). In civil appeals the parties may designate such a transcript for inclusion in the clerk’s transcript (see rules 8.122(b) and 8.832(a)).

Subdivision (b). Sometimes, a party may offer into evidence only a portion of a longer electronic recording. In such circumstances, the copies of the recording and transcript provided to the court and opposing parties should contain only those portions of the electronic recording that were actually offered into evidence.

Subdivision (c). In some circumstances it may be helpful to have the court reporter take down the content of an electronic recording. For example, when short portions of a sound-and-video recording of deposition or other testimony are played to impeach statements made by a witness on the stand, the best way to create a useful record of the proceedings may be for the court reporter to take down the portions of recorded testimony that are interspersed with the live testimony.

Item SPR10-04 Response Form

Title: Trial and Appellate Procedure: Electronic Recordings Offered Into Evidence (amend Cal. Rules of Court, rule 2.1040)

- Agree with proposed changes
- Agree with proposed changes **if modified**
- Do not agree** with proposed changes

Comments: _____

Name: _____ **Title:** _____

Organization: _____

- Commenting on behalf of an organization**

Address: _____

City, State, Zip: _____

To Submit Comments

Comments may be submitted online, written on this form, or prepared in a letter format. If you are *not* commenting directly on this form, please include the information requested above and the proposal number for identification purposes. Please submit your comments online or email, mail, or fax comments. You are welcome to email your comments as an attachment.

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DEADLINE FOR COMMENT: 5:00 p.m., Friday, June 18, 2010

Circulation for comment does not imply endorsement by the Judicial Council or the Rules and Projects Committee. All comments will become part of the public record of the council's action.