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INVITATION TO COMMENT SPR14-01

Title	Action Requested
Appellate Procedure: Confidential Records	Review and submit comments by June 18, 2014
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Amend the advisory committee comments to Cal. Rules of Court, rules 8.45, 8.47, 8.320, 8.336, 8.380, 8.384, 8.385, and 8.610	January 1, 2015
Proposed by	Contact
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Executive Summary and Origin

Based on concerns raised about the application of the general rule regarding references to confidential records in appellate filings to information contained in probation reports, the Appellate Advisory Committee is proposing amendments to the advisory committee comments accompanying the rules regarding confidential records to (1) note that, under case law, much of the contents of probation reports is not confidential; (2) highlight that many laws establish specific requirements regarding the confidentiality of particular records, and those laws supersede the rules of court; and (3) remove probation reports as one of the examples of confidential records cited in these advisory committee comments.

Background

Last year, the Appellate Advisory Committee circulated for public comment and the Judicial Council ultimately adopted, effective January 1, 2014, a proposal to amend the appellate rules relating to sealed and confidential records. Among other things, this proposal established new procedures applicable when a party wants to keep the contents of confidential records from being revealed in the reviewing court's proceedings, including a procedure for filing an application or motion allowing the party to file under seal a brief, petition, or other filing that discusses such records. Among other things, this new procedure, set out in rule 8.47(c), provides:

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

- (1) Nothing filed publicly in the reviewing court—including any application, brief, petition, or memorandum—may disclose material contained in a confidential

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record, including a record that, by law, a party may choose be kept confidential in reviewing court proceedings and that the party has chosen to keep confidential.

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

The advisory committee comments accompanying this rule, as well as to rule 8.45 and several other rules, also included some examples of confidential records. Probation reports were included among these examples because Penal Code section 1203.05 specifically provides that, after 60 days following the date judgment is pronounced, a probation report may be inspected or copied only by specified persons and is not open to the general public, unless the court “upon its own motion orders that a report or reports shall be open or that the contents of the report or reports shall be disclosed.” However, under case law, much of the information in probation reports is not confidential and is routinely cited in both appellate briefs and appellate opinions (see *People v. Connor* (2004) 115 Cal.App.4th 669).

No concerns about the application of the proposed rules to information contained in probation reports were raised during the public comment period. However, after this proposal was adopted by the Judicial Council, concerns were raised about whether rule 8.47(c), together with the references to probation reports in the advisory committee comments, could be interpreted as restricting parties’ ability to refer to any information contained in probation reports without first seeking permission to file redacted and unredacted briefs or other filings. It would be an important change in practice if appointed counsel and the Office of the Attorney General were required to request permission to file redacted and unredacted briefs every time they wanted to refer to information contained in a probation report. Based on the concerns that the new rules would be interpreted to require seeking such permission, the Second, Third, Fourth, and Fifth Appellate Districts of the Court of Appeal, have adopted miscellaneous orders or other provisions intended to permit the citation to information from probation reports without seeking leave to use redacted and unredacted filings.¹

The Proposal

This proposal is intended to address the concerns about the application of the general rule regarding references to confidential records in appellate filings to information contained in probation reports by making several changes to the advisory committee comments accompanying the rules regarding confidential records:

¹ See, for example, www.courts.ca.gov/documents/2DCA-Misc-Order-13-1.pdf (Second District); www.courts.ca.gov/2974.htm (Third District); and www.courts.ca.gov/documents/4DCA-011314-Exception-to-Rule-8-47-c-1.pdf (Fourth District).

- ***Noting case law establishing that much of the information in probation reports is not confidential.*** The advisory committee comment to rule 8.47 would be amended to specifically note that, under existing case law, much of the information contained in probation reports is not confidential. In *People v. Connor, supra, 115 Cal.App.4th at p. 669*, the court held that the factual summary of an offense; the evaluations, analyses, calculations, and recommendations of the probation officer; and other nonpersonal information in a probation report are not confidential under Penal Code section 1203.05. Because the provisions of rule 8.47 apply only to confidential records, they would not apply to this nonconfidential material in a probation report. This proposed revision to the advisory committee comment is intended to clarify this point.
- ***Highlighting governance of specific laws.*** The advisory committee comments accompanying rules 8.45 and 8.47 would be amended to highlight that many laws establish specific requirements regarding the confidentiality of particular records and that those laws supersede the rules of court. Probation reports are one example of a record that is subject to particular law regarding what is confidential and to whom particular information may be disclosed, but there are many, many other such laws. As indicated in rule 8.45(a), such laws supersede the provisions of rules 8.45–8.47. This proposed revision to the advisory committee comment is intended to further emphasize the importance of identifying any such law applicable to a particular record.
- ***Removing probation reports as an example of a confidential record.*** The advisory committee comments accompanying rules 8.45, 8.320, 8.336, 8.380, 8.384, 8.385, and 8.610 would all be amended to delete probation reports as an example of a confidential record. As discussed above, although access to probation reports is restricted by statute, much of the information contained in these reports is not confidential, making probation reports an atypical example of a confidential record.

The committee also proposes two nonsubstantive changes to the advisory committee comment to rule 8.45(c) and (d): correcting a cross-reference and, to be consistent with the language used throughout Title 8, eliminating references to the “minor” in juvenile proceedings.”

Alternatives Considered

The committee considered not recommending this rule amendment on the basis that several Court of Appeal districts have already addressed concerns through the adoption of local orders.

However, the committee concluded that addressing these concerns in the statewide rules as well would be helpful.

Implementation Requirements, Costs, and Operational Impacts

This proposal should impose no implementation requirements or costs on the courts.

The advisory committee comments accompanying rules 8.45, 8.47, 8.320, 8.336, 8.380, 8.384, 8.385, and 8.610 of the California Rules of Court would be amended, effective January 1, 2015, to read:

Title 8. Appellate Rules

Rule 8.45. General provisions

(a) Application

The rules in this article establish general requirements regarding sealed and confidential records in appeals and original proceedings in the Supreme Court and Courts of Appeal. Where other laws establish specific requirements for particular types of sealed or confidential records that differ from the requirements in this article, those specific requirements supersede the requirements in this article.

(b) Definitions

As used in this article:

(1)–(4) * * *

(5) A “confidential” record is a record that, in court proceedings, is required by statute, rule of court, or other authority except a court order under rules 2.550–2.551 or rule 8.46 to be closed to inspection by the public or a party.

(6)–(7) * * *

(c) * * *

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

(1)–(3) * * *

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

Advisory Committee Comment

Subdivision (a). Many laws address sealed and confidential records. These laws differ from each other in a variety of respects, including what information is closed to inspection, from whom it is closed, under what circumstances it is closed, and what procedures apply to closing or opening it to inspection. It is very important to determine if any such law applies with respect to a particular record because where other laws establish specific requirements that differ from the requirements in this article, those specific requirements supersede the requirements in this article.

1 **Subdivision (b)(5).** Examples of confidential records are records in juvenile proceedings (Welf. & Inst.
2 Code, § 827 and California Rules of Court, rule 8.401), records of the family conciliation court (Fam.
3 Code, § 1818(b)), fee waiver applications (Gov. Code, § 68633(f)), ~~probation reports (Penal Code,~~
4 ~~§ 1203.05)~~, and court-ordered diagnostic reports (Penal Code, § 1203.03). This term also encompasses
5 records closed to inspection by a court order other than an order under rules 2.550–2.551 or 8.46, such as
6 situations in which case law, statute, or rule has established a category of records that must be closed to
7 inspection and a court has found that a particular record falls within that category and has ordered that it
8 be closed to inspection. Examples include discovery material subject to a protective order under Code of
9 Civil Procedure sections 2030.090, 2032.060, or 2033.080 and records closed to inspection by court order
10 under *People v. Marsden* (1970) 2 Cal.3d 118 or *Pitchess v. Superior Court* (1974) 11 Cal.3d 531. For
11 more examples of confidential records, please see appendix 1 of the *Trial Court Records Manual* at
12 www.courts.ca.gov/documents/trial-court-records-manual.pdf.

13
14 **Subdivisions (c) and (d).** The requirements in this rule for format and transmission of and access to
15 sealed and confidential records apply only unless otherwise provided by law. Special requirements that
16 govern transmission of and/or access to particular types of records may supersede the requirements in this
17 rule. For example, rules 8.619(g) and 8.622(e) require copies of reporters’ transcripts in capital cases to be
18 sent to the Habeas Corpus Resource Center and the California Appellate Project in San Francisco, and
19 under rules 8.336(d) and 8.409~~(d)~~(e), in non-capital felony appeals, if the defendant—or in juvenile
20 appeals, if the appellant, or the respondent, ~~or the minor~~—is not represented by appellate counsel when
21 the transcripts are certified as correct, the clerk must send that counsel’s copy of the transcripts to the
22 district appellate project.

23
24 **Subdivision (c)(1)(C).** For example, for juvenile records, this mark could state “Confidential—Welf. &
25 Inst. Code, § 827” or “Confidential—Juvenile Case File”; for a fee waiver application, this mark could
26 state “Confidential—Gov. Code, § 68633(f)” or “Confidential—Fee Waiver Application”; ~~for a probation~~
27 ~~report, this mark could say “Confidential—Pen. Code, § 1203.05” or “Confidential—Probation Report”;~~
28 and for a transcript of an in-camera hearing under *People v. Marsden* (1970) 2 Cal.3d 118, this mark
29 could say “Confidential—*Marsden* Hearing.”

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31 **Subdivision (c)(2).** * * *

32
33 **Subdivision (c)(3).** * * *

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

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38 **Subdivision (d)(4).** This rule limits to whom a copy of a probation report is transmitted based on the
39 provisions of Penal Code, § 1203.05, which limit who may inspect or copy probation reports.

40 41 42 **Rule 8.47. Confidential records**

43 44 **(a) Application**

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46 This rule applies to confidential records but does not apply to records sealed by court order
47 under rules 2.550–2.551 or rule 8.46 or to conditionally sealed records under rule 8.46.
48 Unless otherwise provided by this rule or other law, rule 8.45 governs the form and
49 transmission of and access to confidential records.

1
2 (b) * * *

3
4 (c) **Other confidential records**

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

7
8 (1) Nothing filed publicly in the reviewing court—including any application, brief,
9 petition, or memorandum—may disclose material contained in a confidential record,
10 including a record that, by law, a party may choose be kept confidential in reviewing
11 court proceedings and that the party has chosen to keep confidential.

12
13 (2) To maintain the confidentiality of material contained in a confidential record, if it is
14 necessary to disclose such material in a filing in the reviewing court, a party may
15 serve and file a motion or application in the reviewing court requesting permission
16 for the filing to be under seal.

17
18 (A)–(D) * * *

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20 **Advisory Committee Comment**

21
22 Subdivisions (a) and (c). Note that there are many laws that address the confidentiality of various
23 records. These laws differ from each other in a variety of respects, including what information is closed to
24 inspection, from whom it is closed, under what circumstances it is closed, and what procedures apply to
25 closing or opening it to inspection. It is very important to determine if any such law applies with respect
26 to a particular record because this rule applies only to confidential records as defined in rule 8.45, and the
27 procedures in this rule apply only “unless otherwise provided by law.” Thus, where other laws establish
28 specific requirements that differ from the requirements in this rule, those specific requirements may be
29 special requirements that govern particular types of confidential records that supersede the requirements
30 in this rule. For example, although Penal Code, § 1203.05 limits who may inspect or copy probation
31 reports, much of the material contained in such reports—such as the factual summary of the offense(s);
32 the evaluations, analyses, calculations, and recommendations of the probation officer; and other
33 nonpersonal information—is not considered confidential under that statute and is routinely discussed in
34 openly filed appellate briefs (see *People v. Connor* (2004) 115 Cal.App.4th 669, 695–696). In addition,
35 this rule does not alter any existing authority for a court to open a confidential record to inspection by the
36 public or another party to a proceeding.

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38 **Subdivision (c)(1).** * * *

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40 **Subdivision (c)(2).** * * *

1 **Rule 8.320. Normal record; exhibits**

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5 **Advisory Committee Comment**

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7 Rules 8.45–8.46 address the appropriate handling of sealed and confidential records that must be included
8 in the record on appeal. Examples of confidential records include ~~probation reports~~, Penal Code section
9 1203.03 diagnostic reports, records closed to inspection by court order under *People v. Marsden* (1970) 2
10 Cal.3d 118 or *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, in-camera proceedings on a confidential
11 informant, and defense expert funding requests (Pen. Code, § 987.9; *Keenan v. Superior Court* (1982) 31
12 Cal.3d 424, 430).

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14 **Subdivision (d)(1)(E).** * * *

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17 **Rule 8.336. Preparing, certifying, and sending the record**

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21 **Advisory Committee Comment**

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23 **Subdivision (a).** * * *

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25 **Subdivision (d).** * * *

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27 **Subdivision (f).** Examples of confidential records include ~~probation reports~~, Penal Code section 1203.03
28 diagnostic reports, records closed to inspection by court order under *People v. Marsden* (1970) 2 Cal.3d
29 118 or *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, in-camera proceedings on a confidential
30 informant, and defense expert funding requests (Pen. Code, § 987.9; *Keenan v. Superior Court* (1982) 31
31 Cal.3d 424, 430).

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34 **Rule 8.380. Petition for writ of habeas corpus filed by petitioner not represented by an**
35 **attorney**

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39 **Advisory Committee Comment**

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41 **Subdivision (b).** Examples of confidential records include ~~probation reports~~, Penal Code section 1203.03
42 diagnostic reports, records closed to inspection by court order under *People v. Marsden* (1970) 2 Cal.3d
43 118 or *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, in-camera proceedings on a confidential
44 informant, and defense expert funding requests (Pen. Code, § 987.9; *Keenan v. Superior Court* (1982) 31
45 Cal.3d 424, 430).

1 **Rule 8.384. Petition for writ of habeas corpus filed by an attorney for a party**

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5 **Advisory Committee Comment**

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7 **Subdivision (b)(4).** Examples of confidential records include ~~probation reports~~, Penal Code section
8 1203.03 diagnostic reports, records closed to inspection by court order under *People v. Marsden* (1970) 2
9 Cal.3d 118 or *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, in-camera proceedings on a confidential
10 informant, and defense expert funding requests (Pen. Code, § 987.9; *Keenan v. Superior Court* (1982) 31
11 Cal.3d 424, 430).

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14 **Rule 8.385. Proceedings after the petition is filed**

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18 **Advisory Committee Comment**

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20 **Subdivision (a).** Examples of confidential records include ~~probation reports~~, Penal Code section 1203.03
21 diagnostic reports, records closed to inspection by court order under *People v. Marsden* (1970) 2 Cal.3d
22 118 or *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, in-camera proceedings on a confidential
23 informant, and defense expert funding requests (Pen. Code, § 987.9; *Keenan v. Superior Court* (1982) 31
24 Cal.3d 424, 430).

25
26 **Subdivision (c).** * * *

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28 **Subdivision (d).** * * *

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31 **Rule 8.610. Contents and form of the record**

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36 **Advisory Committee Comment**

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38 **Subdivision (a).** * * *

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40 **Subdivision (b).** Examples of confidential records include ~~probation reports~~, Penal Code section 1203.03
41 diagnostic reports, records closed to inspection by court order under *People v. Marsden* (1970) 2 Cal.3d
42 118 or *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, in-camera proceedings on a confidential
43 informant, and defense expert funding requests (Pen. Code, § 987.9; *Keenan v. Superior Court* (1982) 31
44 Cal.3d 424, 430).