

JUDICIAL COUNCIL OF CALIFORNIA

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INVITATION TO COMMENT

SPR20-01

Title	Action Requested
Court Records: Retention of Reporters’ Transcripts in Criminal Appeals	Review and submit comments by June 9, 2020
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Amend Cal. Rules of Court, rule 10.1028	January 1, 2021
Proposed by	Contact
Appellate Advisory Committee Hon. Louis R. Mauro, Chair	Christy Simons, Attorney 415-865-7694 christy.simons@jud.ca.gov

Executive Summary and Origin

To conform to a recent statutory change and to better align the length of time reporters’ transcripts must be kept with the length of time they may be needed, the Appellate Advisory Committee proposes amending the rule regarding preservation and destruction of Court of Appeal records. Code of Civil Procedure section 271, subdivision (a), no longer requires that an original reporter’s transcript be in paper format. Thus, a provision in rule 10.1028 permitting the court to keep an electronic copy in lieu of an original paper reporter’s transcript should be revised. This proposal would also extend the time the court must keep the original or an electronic copy of the reporter’s transcript in felony appeals to 100 years. The rule’s current requirement to keep the reporter’s transcript for 20 years in any case affirming a criminal conviction does not account for longer sentences or changes in felony sentencing laws. This proposal originated with suggestions from a clerk/executive officer of a Court of Appeal and an attorney at the Supreme Court.

The Proposal

Statutory change

Rule 10.1028 governs the preservation and destruction of Court of Appeal records. Prior to 2018, the rule required the court to keep an original reporter’s transcript, which, under the version of

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 It is circulated for comment purposes only.

Code of Civil Procedure section 271¹ in effect at the time, had to be on paper.² Effective January 1, 2018, rule 10.1028, subdivision (d), was amended to allow the Court of Appeal to keep an electronic copy of the reporter's transcript in lieu of keeping the original. An advisory committee comment was added to explain that, "[a]lthough subdivision (a) allows the Court of Appeal to maintain its records in any format that satisfies the otherwise applicable standards for maintenance of court records, including electronic formats, the original of a reporter's transcript is required to be on paper under Code of Civil Procedure section 271(a). Subdivision (d) therefore specifies that an electronic copy may be kept, to clarify that the paper original need not be kept by the court."

Legislation repealing and replacing section 271 took effect January 1, 2018. Among other changes, new section 271 requires that the reporter's transcript be delivered in electronic form unless any of the specified exceptions apply, and provides that an electronic transcript is deemed to be an original for all purposes unless a paper transcript is delivered under any of the exceptions. In light of the new statutory language, rule 10.1028 should be revised to reflect that an original reporter's transcript must be in electronic format unless an exception applies. If an exception applies and the original transcript is on paper, the court may continue to keep either the paper original or a true and correct electronic copy.

Time to keep reporters' transcripts

Rule 10.1028(d) governs the time the Court of Appeal is required to keep records. Under subdivision (c), the court must permanently keep the court's minutes and a register of appeals and original proceedings. Under subdivision (d), all other records, with one exception, may be destroyed 10 years after the decision becomes final. The exception is for original reporters' transcripts in cases affirming a criminal conviction; these must be kept for 20 years after the decision becomes final. This retention time has not changed since the adoption of the initial version of the rule in 1975. (See former rule 55, adopted effective July 1, 1975; renumbered as rule 70 effective January 1, 2005; and renumbered as rule 10.1028 effective January 1, 2007.)

This 20-year retention period is insufficient. Sentences for the most serious felony convictions often exceed 20 years, as does the actual time served under these sentences. Certain writ proceedings may be filed at any time during service of a prison sentence. In addition, changes in felony sentencing laws, such as Proposition 47,³ which reduced penalties for certain offenses and allows for resentencing, warrant keeping reporters' transcripts in cases affirming felony convictions longer than 20 years so defendants can access opportunities for resentencing or other relief. This is not a theoretical problem. The committee has been advised that the California Department of Justice, which has a longer retention schedule, is frequently contacted by litigants

¹ All further statutory references are to the Code of Civil Procedure.

² Section 271 authorized courts and parties to receive, on request, copies of reporters' transcripts in "computer-readable form."

³ Voters passed Prop. 47, "The Safe Neighborhoods and Schools Act," on November 14, 2014; it went into effect the next day.

for copies of reporters' transcripts in cases in which a criminal conviction was affirmed more than 20 years ago.

Accordingly, the committee proposes adding a provision to rule 10.1028(d) to extend the time for keeping the reporter's transcript in felony cases. New paragraph (d)(3) would state: "In a felony case in which the court affirms a judgment of conviction, the clerk/executive officer must keep the original reporter's transcript or, if the original is in paper, either the original or a true and correct electronic copy, for 100 years after the decision becomes final."

This proposal is required both to conform the rule to statute and to address an identified concern. It would improve access to justice by ensuring that the original reporter's transcript is actually available when needed.

Alternatives Considered

The committee considered taking no action, but rejected this option because portions of the rule are based on a former version of the relevant statute and are inadequate in light of longer sentences and criminal justice reforms.

The committee also considered whether to extend the time for keeping the reporter's transcript only in cases involving a sentence of life or life without the possibility of parole. The committee rejected this option because it is too narrow and would not include many cases in which a reporter's transcript might be needed long after the conviction is affirmed.

The committee also considered extending the time to 50 years rather than 100. The committee declined this option because 50 years might not be long enough in all cases.

In addition, the committee considered a graduated retention schedule, such as the retention schedule adopted by the California Department of Justice, in which documents are retained for different time periods depending on the type of document or the circumstances. Moreover, the committee considered other possible amendments, including whether any reporters' transcripts should be retained permanently and whether the rule should provide that the reporter's transcript must be kept for a certain number of years (such as 10) following the death of the defendant. The committee rejected these options in favor of a rule that is simple and straightforward for the courts to implement, but welcomes comments on these and other options.

Fiscal and Operational Impacts

This proposal would require the Courts of Appeal to change their record retention policies and procedures with respect to reporters' transcripts in the identified cases. Education and training of staff would also be required. Despite the implementation requirements, the committee believes that the benefit of the proposal—making certain reporters' transcripts available to defendants for a more realistic amount of time within which they may be needed, and thereby improving access to justice—outweighs its potential cost to the courts.

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?
- Should reporters' transcripts in any type of case be retained permanently?
- Should any other provisions regarding retention of an original reporter's transcript be considered?

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?
- Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Cal. Rules of Court, rule 10.1028, at pages 5–6

1 **(d) Time to keep other records**

- 2
- 3 (1) Except as provided in (2) and (3), the clerk/executive officer may destroy all
- 4 other records in a case 10 years after the decision becomes final, as ordered
- 5 by the administrative presiding justice or, in a court with only one division,
- 6 by the presiding justice.
- 7
- 8 (2) Except as provided in (3), in a criminal case in which the court affirms a
- 9 judgment of conviction, the clerk/executive officer must keep the original
- 10 reporter's transcript or, if the original is in paper, either the original or a true
- 11 and correct electronic copy of the transcript, for 20 years after the decision
- 12 becomes final.
- 13
- 14 (3) In a felony case in which the court affirms a judgment of conviction, the
- 15 clerk/executive officer must keep the original reporter's transcript or, if the
- 16 original is in paper, either the original or a true and correct electronic copy,
- 17 for 100 years after the decision becomes final.
- 18

19 **Advisory Committee Comment**

20

21 **Subdivision (d).** Subdivision (d) permits the Court of Appeal to keep an electronic copy of the

22 reporter's transcript in lieu of keeping the original if the original transcript is in paper. Although

23 subdivision (a) allows the Court of Appeal to maintain its records in any format that satisfies the

24 otherwise applicable standards for maintenance of court records, including electronic formats, ~~the~~

25 ~~original of a reporter's transcript is required to be on paper under Code of Civil Procedure section~~

26 ~~271(a).~~ Code of Civil Procedure section 271 provides that an original reporter's transcript must be

27 in electronic form unless a specified exception allows for an original paper transcript. Subdivision

28 (d) therefore specifies that an electronic copy may be kept if the original transcript is in paper, to

29 clarify that the paper original need not be kept by the court.

30