



JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: October 28, 2014

Title	Agenda Item Type
Appellate Procedure: Confidential Records	Action Required
Rules, Forms, Standards, or Statutes Affected	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
Recommended by	Date of Report
Appellate Advisory Committee Justice Raymond J. Ikola, Chair	September 18, 2014
	Contact
	Heather Anderson, Senior Attorney, 415-865-7691, heather.anderson@jud.ca.gov

Executive Summary

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

Recommendation

The Appellate Advisory Committee recommends that the Judicial Council, effective January 1, 2015:

1. Amend the advisory committee comment to rule 8.45 to:

- Highlight that many laws establish specific requirements regarding the confidentiality of particular records, and those laws supersede the rules of court; and
 - Note that this rule limits to whom a copy of a probation report is transmitted based on the provisions of Penal Code section 1203.05;
2. Similarly amend the advisory committee comment to rule 8.47 to:
- Highlight that many laws establish specific requirements regarding the confidentiality of particular records, and those laws supersede the rules of court; and
 - Note that that, under case law, much of the contents of probation reports is not confidential; and;
3. Further amend the advisory committee comment to rule 8.45 and amend the advisory committee comments to rules 8.320, 8.336, 8.380, 8.384, 8.385, and 8.610 to remove probation reports as one of the examples of confidential records cited in these advisory committee comments

The text of the amended advisory committee comments is attached at pages 5–10.

Previous Council Action

Effective January 1, 2014, on the recommendation of the Appellate Advisory Committee, the Judicial Council adopted new appellate rules and rule amendments relating to sealed and confidential records. New rule 8.47, among other things, established procedures applicable when a party wants to keep the contents of confidential records from being revealed in the reviewing court’s proceedings.

Rationale for Recommendation

Rule 8.47 requires that, unless otherwise provided by law, a party seeking to prevent disclosure of a confidential record must file an application or motion allowing the party to file the brief, petition, or other filing that discusses the confidential record under seal. The advisory committee comments accompanying rule 8.45 and several other rules include 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).

After the Judicial Council adopted the new appellate rules and rule amendments relating to sealed and confidential records, concerns were raised about whether rule 8.47, together with the references to probation reports in the advisory committee comments, could be interpreted as generally restricting appointed counsel's and the Office of the Attorney General's ability to refer to information contained in probation reports without first seeking permission to file redacted and unredacted briefs or other filings. Based on these concerns, the Second, Third, Fourth, and Fifth Appellate Districts of the Court of Appeal, 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

To address these same concerns at a statewide level, the committee recommends making the following changes to the advisory committee comments accompanying the rules regarding confidential records:

- ***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. The recommended revision to the advisory committee comments to rules 8.45 and 8.47 is intended to further emphasize the importance of identifying any such law applicable to a particular record.
- ***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. The recommended revision to the advisory committee comment accompanying rule 8.47 is intended to clarify this point.
- ***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

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).

information contained in these reports is not confidential, making probation reports an atypical example of a confidential record.

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

Comments, Alternatives Considered, and Policy Implications

Comments

This proposal was circulated from April 18 to June 18, 2014, in the regular spring 2014 comment cycle. Seven individuals or organizations submitted comments on this proposal. Six commentators agreed with the proposal, and one did not indicate a position. A chart with the full text of the comments received and the committee’s responses is attached at pages 11–12. Based on these comments, the committee recommends adopting this proposal as circulated.

Alternatives

The committee considered not recommending these amendments to the advisory committee comments on the basis that several Court of Appeal districts have already addressed the concerns that have been raised regarding probation reports 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.

Attachments and Links

1. 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, at pages 5–10
2. Chart of comments, at pages 11–12

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 are amended, effective January 1, 2015, to read:

Title 8. Appellate Rules

Division 1. Rules Relating to the Supreme Court and Courts of Appeal

Chapter 1. General Provisions

Article 3. Sealed and Confidential Records

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.

1
2
3 **Advisory Committee Comment**

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

10 **Subdivision (b)(5).** Examples of confidential records are records in juvenile proceedings (Welf. & Inst.
11 Code, § 827 and California Rules of Court, rule 8.401), records of the family conciliation court (Fam.
12 Code, § 1818(b)), fee waiver applications (Gov. Code, § 68633(f)), ~~probation reports (Penal Code,~~
13 ~~§ 1203.05),~~ and court-ordered diagnostic reports (Penal Code, § 1203.03). This term also encompasses
14 records closed to inspection by a court order other than an order under rules 2.550–2.551 or 8.46, such as
15 situations in which case law, statute, or rule has established a category of records that must be closed to
16 inspection and a court has found that a particular record falls within that category and has ordered that it
17 be closed to inspection. Examples include discovery material subject to a protective order under Code of
18 Civil Procedure sections ~~section~~ 2030.090, 2032.060, or 2033.080 and records closed to inspection by
19 court order under *People v. Marsden* (1970) 2 Cal.3d 118 or *Pitchess v. Superior Court* (1974) 11 Cal.3d
20 531. For more examples of confidential records, please see appendix 1 of the *Trial Court Records Manual*
21 at www.courts.ca.gov/documents/trial-court-records-manual.pdf.

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

32
33 **Subdivision (c)(1)(C).** For example, for juvenile records, this mark could state “Confidential—Welf. &
34 Inst. Code, § 827” or “Confidential—Juvenile Case File”; for a fee waiver application, this mark could
35 state “Confidential—Gov. Code, § 68633(f)” or “Confidential—Fee Waiver Application”; ~~for a probation~~
36 ~~report, this mark could say “Confidential—Pen. Code, § 1203.05” or “Confidential—Probation Report”;~~
37 and for a transcript of an in-camera hearing under *People v. Marsden* (1970) 2 Cal.3d 118, this mark
38 could say “Confidential—*Marsden* Hearing.”

39
40 **Subdivision (c)(2).** * * *

41
42 **Subdivision (c)(3).** * * *

43
44 **Subdivision (d).** See rule 8.47(b) for special requirements concerning access to certain confidential
45 records.

46
47 **Subdivision (d)(4).** This rule limits to whom a copy of a probation report is transmitted based on the
48 provisions of Penal Code section 1203.05, which limit who may inspect or copy probation reports.

1 **Rule 8.47. Confidential records**

2
3 **(a) Application**

4
5 This rule applies to confidential records but does not apply to records sealed by court order
6 under rules 2.550–2.551 or rule 8.46 or to conditionally sealed records under rule 8.46.
7 Unless otherwise provided by this rule or other law, rule 8.45 governs the form and
8 transmission of and access to confidential records.
9

10 **(b) * * ***

11
12 **(c) Other confidential records**

13
14 Except as otherwise provided by law or order of the reviewing court:

15
16 (1) Nothing filed publicly in the reviewing court—including any application, brief,
17 petition, or memorandum—may disclose material contained in a confidential record,
18 including a record that, by law, a party may choose be kept confidential in reviewing
19 court proceedings and that the party has chosen to keep confidential.
20

21 (2) To maintain the confidentiality of material contained in a confidential record, if it is
22 necessary to disclose such material in a filing in the reviewing court, a party may
23 serve and file a motion or application in the reviewing court requesting permission
24 for the filing to be under seal.
25

26 (A)–(D) * * *

27
28 **Advisory Committee Comment**

29
30 **Subdivisions (a) and (c).** Note that there are many laws that address the confidentiality of various
31 records. These laws differ from each other in a variety of respects, including what information is closed to
32 inspection, from whom it is closed, under what circumstances it is closed, and what procedures apply to
33 closing or opening it to inspection. It is very important to determine if any such law applies with respect
34 to a particular record because this rule applies only to confidential records as defined in rule 8.45, and the
35 procedures in this rule apply only “unless otherwise provided by law.” Thus, where other laws establish
36 specific requirements that differ from the requirements in this rule, those specific requirements may be
37 special requirements that govern particular types of confidential records that supersede the requirements
38 in this rule. For example, although Penal Code section 1203.05 limits who may inspect or copy probation
39 reports, much of the material contained in such reports—such as the factual summary of the offense(s);
40 the evaluations, analyses, calculations, and recommendations of the probation officer; and other
41 nonpersonal information—is not considered confidential under that statute and is routinely discussed in
42 openly filed appellate briefs (see *People v. Connor* (2004) 115 Cal.App.4th 669, 695–696). In addition,
43 this rule does not alter any existing authority for a court to open a confidential record to inspection by the
44 public or another party to a proceeding.
45

46 **Subdivision (c)(1).** * * *

47
48 **Subdivision (c)(2).** * * *

1 **Chapter 3. Criminal Appeals**

2 **Article 2. Record on Appeal**

3
4
5 **Rule 8.320. Normal record; exhibits**

6
7 (a)–(f) * * *

8
9 **Advisory Committee Comment**

10
11 Rules 8.45–8.46 address the appropriate handling of sealed and confidential records that must be included
12 in the record on appeal. Examples of confidential records include ~~probation reports~~, Penal Code section
13 1203.03 diagnostic reports, records closed to inspection by court order under *People v. Marsden* (1970) 2
14 Cal.3d 118 or *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, in-camera proceedings on a confidential
15 informant, and defense expert funding requests (Pen. Code, § 987.9; *Keenan v. Superior Court* (1982) 31
16 Cal.3d 424, 430).

17
18 **Subdivision (d)(1)(E).** * * *

19
20
21 **Rule 8.336. Preparing, certifying, and sending the record**

22
23 (a)–(h) * * *

24
25 **Advisory Committee Comment**

26
27 **Subdivision (a).** * * *

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

30
31 **Subdivision (f).** Examples of confidential records include ~~probation reports~~, Penal Code section 1203.03
32 diagnostic reports, records closed to inspection by court order under *People v. Marsden* (1970) 2 Cal.3d
33 118 or *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, in-camera proceedings on a confidential
34 informant, and defense expert funding requests (Pen. Code, § 987.9; *Keenan v. Superior Court* (1982) 31
35 Cal.3d 424, 430).

36
37
38 **Chapter 4. Habeas Corpus Appeals and Writs**

39
40 **Rule 8.380. Petition for writ of habeas corpus filed by petitioner not represented by an**
41 **attorney**

42
43 (a)–(c) * * *

44
45 **Advisory Committee Comment**

46
47 **Subdivision (b).** Examples of confidential records include ~~probation reports~~, Penal Code section 1203.03
48 diagnostic reports, records closed to inspection by court order under *People v. Marsden* (1970) 2 Cal.3d

1 118 or *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, in-camera proceedings on a confidential
2 informant, and defense expert funding requests (Pen. Code, § 987.9; *Keenan v. Superior Court* (1982) 31
3 Cal.3d 424, 430).

4
5
6 **Rule 8.384. Petition for writ of habeas corpus filed by an attorney for a party**

7
8 (a)–(d) * * *

9
10 **Advisory Committee Comment**

11
12 **Subdivision (b)(4).** Examples of confidential records include ~~probation reports~~, Penal Code section
13 1203.03 diagnostic reports, records closed to inspection by court order under *People v. Marsden* (1970) 2
14 Cal.3d 118 or *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, in-camera proceedings on a confidential
15 informant, and defense expert funding requests (Pen. Code, § 987.9; *Keenan v. Superior Court* (1982) 31
16 Cal.3d 424, 430).

17
18
19 **Rule 8.385. Proceedings after the petition is filed**

20
21 (a)–(f) * * *

22
23 **Advisory Committee Comment**

24
25 **Subdivision (a).** Examples of confidential records include ~~probation reports~~, Penal Code section 1203.03
26 diagnostic reports, records closed to inspection by court order under *People v. Marsden* (1970) 2 Cal.3d
27 118 or *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, in-camera proceedings on a confidential
28 informant, and defense expert funding requests (Pen. Code, § 987.9; *Keenan v. Superior Court* (1982) 31
29 Cal.3d 424, 430).

30
31 **Subdivision (c).** * * *

32
33 **Subdivision (d).** * * *

34
35
36 **Chapter 10. Appeals From Judgments of Death**

37
38 **Article 2. Record on Appeal**

39
40 **Rule 8.610. Contents and form of the record**

41
42 (a)–(d) * * *

43
44 **Advisory Committee Comment**

45
46 **Subdivision (a).** * * *

1 **Subdivision (b).** Examples of confidential records include ~~probation reports~~, Penal Code section 1203.03
2 diagnostic reports, records closed to inspection by court order under *People v. Marsden* (1970) 2 Cal.3d
3 118 or *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, in-camera proceedings on a confidential
4 informant, and defense expert funding requests (Pen. Code, § 987.9; *Keenan v. Superior Court* (1982) 31
5 Cal.3d 424, 430).
6

SPR14-01

Appellate Procedure: Confidential Records: 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
 All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
1.	Committee on Appellate Courts State Bar of California Saul Bercovitch	A	The Committee on Appellate Courts supports this proposal.	The committee notes the commentator's support for the proposal; no response required.
2.	Court of Appeal, Second Appellate District Thomas Kallay Managing Attorney	A	1. We agree with this proposal. As noted in the proposal, not all the information in probation reports is confidential. As also noted, Pen, Code, § 1203.05 governs access to and the copying of probation reports. 2. We agree that this proposal entails no implementation costs or requirements for the courts.	The committee notes the commentator's support for the proposal; no response required.
3.	Orange County Bar Association	A		The committee notes the commentator's support for the proposal; no response required.
4.	Superior Court of Los Angeles County	A	We would agree with the proposed changes to remove the language concerning probation reports as an example of a confidential record and the addition of the language added to 8.47 (a) & (c) from the advisory committee comments. The latter should specifically alleviate the problem. Although several Court of Appeal districts have already adopted a local Order to address this issue, the addition of this language clarifies and supports the application of the rule uniformly. While the proposed changes may be helpful to attorneys preparing appellate briefs, they do not impact the manner in which our appeal units prepare appeal records, i.e., probation reports will still be placed in confidential	The committee notes the commentator's support for the proposal; no response required.

SPR14-01

Appellate Procedure: Confidential Records: 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
 All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			envelopes within the appeal records delivered to the parties and the reviewing court because of the requirement under PC 1203.05. Also, petitions to unseal portions of any appeal record for briefing purposes (or any purpose) have no effect on appeal units if granted. The reviewing court and the parties treat the sealed portions of the record already delivered to them as unsealed. We are not required to re-issue a new record.	
5.	Superior Court of Riverside County	NI	No comment	No response required.
6.	Superior Court of San Diego County Michael M. Roddy Executive Officer	A	It appears that the proposal mirrors the 4 th DCA's blanket Order and may be beneficial for them: www.courts.ca.gov/documents/4DCA-011314-Exception-to-Rule-8-47-c-1.pdf .	The committee notes the commentator's support for the proposal; no response required.
7.	TCPJAC/CEAC Joint Rules Subcommittee	A	The proposal is intended to provide significant cost savings and efficiencies. The proposed changes incorporate ideas that would improve the cost effectiveness of the appellate process without being overly burdensome on the Courts and parties that are part of the appeals process. The proposal would streamline the appeals procedures, resulting in anticipated savings in staff time for processing and operational costs.	The committee notes the commentator's support for the proposal; no response required.