

JUDICIAL COUNCIL OF CALIFORNIA

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INVITATION TO COMMENT SPR22-03

Title	Action Requested
Court Records: Retention of Reporters’ Transcripts in Felony Appeals	Review and submit comments by May 13, 2022
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Amend Cal. Rules of Court, rule 10.1028	January 1, 2023
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 better align the length of time reporters’ transcripts must be kept with the length of time they may be needed and to conform to a recent statutory change, the Appellate Advisory Committee proposes amending the rule regarding retention of Court of Appeal records. This proposal would extend the time the Court of Appeal must keep the original or an electronic copy of the reporter’s transcript in cases affirming a felony conviction from 20 years to 75 years. It would also amend the rule to reflect the statutory presumption that an original reporter’s transcript is in electronic form, not paper form. This proposal originated with suggestions from a clerk/executive officer of a Court of Appeal and an attorney at the Supreme Court.

Background

Rule 10.1028 was originally adopted as rule 55 in 1975. It was renumbered as rule 70 effective January 1, 2005, and renumbered again as rule 10.1028 in 2007. Its provisions have been amended over the years, but none of those changes has bearing on this proposal. The 20-year retention time for reporters’ transcripts in criminal cases has not changed since adoption.

Prior Circulation

The committee circulated for public comment a similar proposal in spring 2020 that would have extended the retention period for felony appeals from 20 to 100 years. The committee received eight comments on the proposal. Four commenters agreed with the proposal; three other commenters agreed with the proposal if modified. One commenter submitted positive feedback but did not state a position.

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 It is circulated for comment purposes only.

In support of the proposed 100-year retention schedule, a bar association commented, “Given the need to review the underlying basis of previously affirmed felony convictions brought on by changes in the law or other circumstances years later, the current 20-year period is clearly insufficient. The increased proposed mandated retention period of 100 years should accommodate any foreseeable need for review of such transcripts.” An appellate criminal defense organization stated, “One hundred years ensures new laws can be fairly applied to anyone affected.” Regarding cost, a superior court noted that keeping electronic versions of reporters’ transcripts rather than hard copies would save the cost of physical storage space.

In suggesting that the proposal be modified, a Court of Appeal expressed concerns about the practicality and cost of extending the retention time to 100 years for all felonies. The court noted that it is a minority of cases in which the reporter’s transcript may be needed beyond 20 years and recommended that the committee reconsider the alternative of a tiered retention schedule in which the length of retention would be based on the length of the sentence. The court’s cost concerns were based on the additional costs of storing paper transcripts for 80 more years.

A court reporters association suggested modifying the text of the rule to reflect court reporters’ current practice of marking electronic reporters’ transcripts “certified” rather than “original” and “copy.” This invitation to comment includes a question regarding this suggestion. Two other commenters expressed concern that, if paper versions of reporters’ transcripts are converted to electronic format before storage, there be safeguards in place to ensure that the electronic versions are correct, complete, and accessible before hard copies are destroyed.

In light of concerns about the cost and duration of the proposed retention, the committee withdrew the proposal to further consider these issues.

The Proposal

This revised proposal is intended to achieve two main goals: improving access to justice for defendants who may need to obtain the reporter’s transcript in their case more than 20 years after the conviction was upheld, and conforming the rule to Code of Civil Procedure section 271(a),¹ which no longer requires that the original transcript be in paper form.

Time to keep reporters’ transcripts

Rule 10.1028 governs the preservation and destruction of Court of Appeal 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.

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

This rule's current 20-year retention period is insufficient because it does not account for longer sentences or changes in felony sentencing laws. 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, and reporter's transcripts may be important to the issues raised. In addition, changes in felony sentencing laws, such as Senate Bill 1437,² which changed the law of felony murder and allows for resentencing, and 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 understands from the California Department of Justice, which has a longer retention schedule for reporter's transcripts, that litigants frequently request copies of reporters' transcripts in cases in which a criminal conviction was affirmed more than 20 years ago.

Having considered the issues raised in previous comments, the committee proposes adding a provision to rule 10.1028(d) to extend the time for keeping the reporter's transcript in cases affirming a felony conviction from 20 years to 75 years. 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 75 years after the decision becomes final."⁴

This single retention time of 75 years would make transcripts available for the lifetime of most felony defendants and reduce the costs of the original 100-year proposal. The cost of storage, particularly of paper records, is still an area of concern, but the committee understands from the courts that electronic records have become much more common in the last couple of years and that this trend is expected to continue. In addition, courts have expressed interest in converting paper records to electronic format to reduce the amount of off-site storage space that is needed.

Finally, the committee would like feedback regarding the proposed language in subdivision (d)(3), "in which the court affirms a judgment of conviction." This new subdivision is modeled on subdivision (d)(2), which has included the language, "[i]n a criminal case in which the court affirms a judgment of conviction," since the rule was adopted. The new language in (d)(3) narrows "criminal case" to "felony case."

² Stats. 2018, ch. 1015.

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

⁴ This invitation to comment also includes a question regarding the language, "in which a court affirms a judgment of conviction." Subdivision (d)(2) has included the language, "[i]n a criminal case in which the court affirms a judgment of conviction," since the rule was adopted. New subdivision (d)(3) narrows "criminal case" to "felony case." In light of the variation in dispositional orders and language, the question seeks comments on whether this language should be modified.

Statutory change

Prior to 2018, rule 10.1028 required the court to keep an original reporter's transcript, which, under the version of section 271 in effect at the time, had to be in paper form.⁵ Effective January 1, 2018, rule 10.1028(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 also 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 statutory change, rule 10.1028 should be revised to reflect the presumption that an original reporter's transcript is in electronic form and, if a statutory exception applies and the original transcript is on paper, to provide that the court may continue to keep either the paper original or a true and correct electronic copy.

Alternatives Considered

The committee considered a number of alternatives. As in 2020, it rejected the option of taking no action because portions of the rule are based on a former version of section 271, and it is undisputed that a 20-year retention period is insufficient.

Originally, the committee considered proposing a retention time of 50 years rather than 100. The committee declined this option because 50 years might not be long enough in all cases. Upon reconsideration, the committee again concluded that 50 years was not enough time to ensure that all defendants who might need the reporter's transcript in their case would be able to access it.

The committee considered whether to propose extending the time for keeping the reporter's transcript only in cases involving certain sentences, such as 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 more than 20 years after a felony conviction is affirmed.

Also in 2020, 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. In addition, the committee considered other possible amendments, including whether any reporters' transcripts

⁵ Former section 271 authorized courts and parties to receive, on request, copies of reporters' transcripts in "computer-readable form."

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 would be simple and straightforward for the courts to implement but welcomed comments on these and other options.

Upon reconsideration of a graduated or tiered retention schedule for this proposal, including obtaining input from the courts, the committee again concluded that a single retention period for reporter's transcripts in all cases affirming a felony conviction would be preferable. A defendant's future need for a reporter's transcript does not necessarily align with the crime committed or the sentence imposed. Administering the retention and destruction of records, particularly paper transcripts, based on such a retention schedule would be complex and might not yield significant savings. The committee also took into account the courts' interest in digitizing paper records to reduce storage costs.

Finally, the committee would like feedback regarding the proposed language in subdivision (d)(3), "in which the court affirms a judgment of conviction." This new subdivision is modeled on subdivision (d)(2), which has included the language, "[i]n a criminal case in which the court affirms a judgment of conviction," since the rule was adopted. The new language in (d)(3) narrows "criminal case" to "felony case." To account for various possible dispositional orders and situations in which the appellate court does not "affirm" a conviction but the defendant may need that reporter's transcript in the future, the committee is requesting comments on whether this language should be deleted, modified in some way (e.g., to state "in which the court affirms a judgment of conviction, in whole or in part"), or retained as-is.

Fiscal and Operational Impacts

This proposal would require the Courts of Appeal to change their record retention policies and procedures for reporters' transcripts in the identified cases. Education and training of staff would also be required. As of January 1, 2023, all reporter's transcripts are required by Code of Civil Procedure section 271 to be in electronic form unless a party requests paper, and courts report that electronic filing has become much more prevalent in recent years. The cost of storage of electronic records is a fraction of the cost of storing paper, and courts are looking into converting existing paper records to electronic form to reduce storage costs going forward. Despite the fiscal impacts, the committee believes that the benefits of the proposal—safeguarding defendants' rights to avail themselves of changes in the law or other remedies, and thereby improving access to justice—outweigh 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 particular types of cases (e.g., conviction of first-degree murder or sentence of life without the possibility of parole) be retained permanently?
- Should the text of the rule reflect the current practice of court reporters to mark electronic reporters' transcripts "certified" rather than "original" and "copy"?
- Should the subdivision (d)(3) language, "in which the court affirms a judgment of conviction," be deleted or modified (e.g., to state "in which the court affirms a judgment of conviction, in whole or in part")? Should the same language in subdivision (d)(2) be modified?

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 7–8

Rule 10.1028 of the California Rules of Court would be amended, effective January 1, 2023, to read:

1 **Rule 10.1028. Preservation and destruction of Court of Appeal records**

2
3 **(a) Form or forms in which records may be preserved**

4
5 (1) Court of Appeal records may be created, maintained, and preserved in any
6 form or forms of communication or representation, including paper or
7 optical, electronic, magnetic, micrographic, or photographic media or other
8 technology, if the form or forms of representation or communication satisfy
9 the standards or guidelines for the creation, maintenance, reproduction, and
10 preservation of court records established under rule 10.854.

11
12 (2) If records are preserved in a medium other than paper, the following
13 provisions of Government Code section 68150 apply: subdivisions (c)–(l),
14 excluding subdivision (i)(1).

15
16 **(b) Methods for signing, subscribing, or verifying documents**

17
18 Any notice, order, ruling, decision, opinion, memorandum, certificate of service, or
19 similar document issued by an appellate court or by a judicial officer of an
20 appellate court may be signed, subscribed, or verified using a computer or other
21 technology in accordance with procedures, standards, and guidelines established by
22 the Judicial Council. Notwithstanding any other provision of law, all notices,
23 orders, rulings, decisions, opinions, memoranda, certificates of service, or similar
24 documents that are signed, subscribed, or verified by computer or other
25 technological means under this subdivision shall have the same validity, and the
26 same legal force and effect, as paper documents signed, subscribed, or verified by
27 an appellate court or a judicial officer of the court.

28
29 **(c) Permanent records**

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31 The clerk/executive officer of the Court of Appeal must permanently keep the
32 court’s minutes and a register of appeals and original proceedings.

33
34 **(d) Time to keep other records**

35
36 (1) Except as provided in (2) and (3), the clerk/executive officer may destroy all
37 other records in a case 10 years after the decision becomes final, as ordered
38 by the administrative presiding justice or, in a court with only one division,
39 by the presiding justice.

1 (2) Except as provided in (3), in a criminal case in which the court affirms a
2 judgment of conviction, the clerk/executive officer must keep the original
3 reporter's transcript or, if the original is in paper, either the original or a true
4 and correct electronic copy of the transcript, for 20 years after the decision
5 becomes final.

6
7 (3) In a felony case in which the court affirms a judgment of conviction, the
8 clerk/executive officer must keep the original reporter's transcript or, if the
9 original is in paper, either the original or a true and correct electronic copy of
10 the transcript, for 75 years after the decision becomes final.

11
12 **Advisory Committee Comment**

13
14 **Subdivision (d).** Subdivision (d) permits the Court of Appeal to keep an electronic copy of the
15 reporter's transcript in lieu of keeping the original if the original transcript is in paper. Although
16 subdivision (a) allows the Court of Appeal to maintain its records in any ~~format form~~ that satisfies
17 the otherwise applicable standards for maintenance of court records, including electronic ~~formats~~
18 forms, ~~the original of a reporter's transcript is required to be on paper under Code of Civil~~
19 ~~Procedure section 271(a).~~ Code of Civil Procedure section 271 provides that an original reporter's
20 transcript must be in electronic form unless a specified exception allows for an original paper
21 transcript. Subdivision (d) therefore specifies that an electronic copy may be kept if the original
22 transcript is in paper, to clarify that the paper original need not be kept by the court.