

SELECTED CHANGES TO CALIFORNIA RULES OF COURT

– EFFECTIVE JANUARY 1, 2014 –

Court of Appeal rules: miscellaneous, writs, sealed and confidential records¹
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MISCELLANEOUS PROVISIONS

Recycled paper no longer required or officially encouraged

Rules 1.6(22), 1.22, and 8.204(b)(1) and (10): Amendments delete provisions requiring or encouraging use of recycled paper.

Document (such as a stipulation) requiring signatures of multiple parties

New rule 8.42: If a document requires the signature of multiple parties, the original signature of at least one party must appear on the document filed in the Court of Appeal. Other signatures may be on copies of the signature page.

Signatures on electronically filed documents

Document under penalty of perjury, revised rule 8.77(a): If a document filed electronically must be signed under penalty of perjury, the declarant must sign and retain a printed form of the document. The act of electronically filing certifies the original signed document will be made available to the court or another party on request, under procedures specified by subdivision (a)(3)-(5) of the rule.

Document (such as a stipulation) requiring signatures of multiple parties, revised rule 8.77(c): If an electronically filed document requires the signatures of multiple parties, the filer must obtain the signatures of all required parties – either an original or a copy of the signed signature page. The act of filing certifies the party has obtained the signatures and will make them available as provided in rule 8.77(a)(3)-(5).

Electronic form of reporter's transcript in criminal or juvenile case

Rules 8.336(d)(2) and 8.409(c)(2): The Court of Appeal or any party in a felony or juvenile appeal may request a reporter's transcript in computer-readable form. These provisions implement Code of Civil Procedure section 271 and mirror the long-standing provisions of rule 8.130(f)(4).

¹**Not covered in this summary** are rules affecting only trial courts, regular civil appeals, and the appellate division; minor changes in wording are also not included.

WRITS

A. HABEAS CORPUS (rule 8.380 et seq.)

Habeas corpus filings concerning sealed or confidential records

Rules 8.380(b) [petition filed in pro per], 8.384(b)(4) [petition filed by attorney], and 8.385(a) [proceedings after petition]: New provisions require that sealed or confidential supporting documents, filings referring to them, and any sealed or confidential records ordered produced must comply with rules 8.45-8.47.

Service of informal response and return

Rules 8.385(b)(2) and 8.386(b)(3): Besides service of an informal response and a return on an unrepresented petitioner or counsel for a represented petitioner, the rules now require service on the applicable appellate project if petitioner is represented by appointed counsel other than the State Public Defender or Habeas Corpus Resource Center.

Length limit of memorandum accompanying a return or traverse

Rule 8.386(c)(1) and (d)(2): Any memorandum accompanying a return or traverse now must comply with the length limits of rule 8.204(c) – 14,000 words or 50 typewritten pages. Like rule 8.384(a)(2) on petitions, this limit applies to the memorandum of points and authorities, not to the return or traverse itself or supporting documents, such as exhibits and declarations. The limits do not apply to death penalty cases.

Remittitur in habeas corpus proceeding

Rule 8.387(f)(2): A new provision requires the Court of Appeal to issue a remittitur in a habeas corpus proceeding if the Supreme Court has issued a remittitur to the Court of Appeal. (See rule 8.540(a)(1) [remittitur after review of Court of Appeal decision] and (2) [remittitur after transfer from Court of Appeal under rule 8.552].) This serves as notice to the superior court that the habeas corpus proceeding has concluded.

B. MANDATE, PROHIBITION, CERTIORARI (rule 8.485 et seq.)

Writs under Welf. & Inst. Code, §§ 366.26 & 366.28 not subject to these rules

Rule 8.485(b): The amendment clarifies that juvenile dependency writ proceedings required by Welfare and Institutions Code sections 366.26 and 366.28 are governed by rules 8.450-8.456, not the general rules on writs, 8.485 et seq.²

Writ filings involving sealed or confidential records

Rules 8.486(d) and 8.487(c): Writ filings involving matters in sealed or confidential records are governed by rules 8.45-8.47. These include petitions, oppositions, supporting documents, memoranda, etc.

Finality of decision

Summary dismissal is final immediately: Rule 8.490(b)(1)(A) is amended to clarify that an order dismissing (as well as denying) a petition without issuance of an alternative writ, order to show cause, or writ of review is final immediately.*

Denial or dismissal for mootness is final immediately: Rule 8.490(b)(1)(B) specifies a denial or dismissal for mootness after issuance of an alternative writ, order to show cause, or writ of review is final immediately.*

* An Advisory Committee comment offers examples of such dismissals.

²The general writ rules, 8.485 et seq., do govern mandate and other traditional writs sought in juvenile dependency proceedings for purposes other than fulfilling these statutory requirements.

SEALED AND CONFIDENTIAL RECORDS

PREPARER'S INTRODUCTION

Overview of changes

The rules concerning sealed and confidential records in the Supreme Court and Court of Appeal have been rewritten to create more comprehensive and internally consistent provisions. For example, it is sometimes unclear (1) how records closed to inspection by the public or another party should be formatted or transmitted to the reviewing court, (2) who should receive copies of such records, and (3) whether or how a party can discuss these records in a brief, petition, or other filing in a particular appellate court proceeding. The new rules attempt to close the gaps and resolve ambiguous or inconsistent provisions.

Application to writ proceedings

The sealed or confidential record rules now specifically cover writ proceedings. Sealed or confidential records – e.g., supporting documents, records ordered by the court or provided by a party – must comply with these rules, as must any filings referring to them. The rules cover review of proceedings from a tribunal other than a trial court.

New rule 8.45 – general provisions

This rule covers contains general provisions on sealed and confidential records, including definitions, format, and procedures for transmission of and access to these records. Many of these provisions are new.

Revised rule 8.46 – sealed records

Although rule 8.46 still governs records sealed by order of court under rules 2.550–2.551,³ it now specifies in detail the use of redacted and unredacted versions of filings and related procedures.

³These rules reflect the decision in *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178.

New rule 8.47 – records made confidential by law

This rule consolidates, streamlines, and clarifies provisions on records made confidential by law, including *Marsden* transcripts. It also specifies a procedure for filing briefs and other documents making reference to confidential records. It covers confidential records in civil, as well as criminal, cases.

Other rules

Rule 8.328 on confidential criminal records is repealed, and a number of rules affected by the new provisions on sealed and confidential records are amended to refer to these provisions.

A. GENERAL PROVISIONS (new rule 8.45)

Definitions

Rule 8.45(b): These provisions expand the list of terms defined, to correct previous inconsistencies and clarify ambiguities. The Advisory Committee comment to subdivision (b)(5) on confidential records provides examples.⁴

Format of sealed or confidential records

Rule 8.45(c)(1) – separation from rest of record: Sealed or confidential records must be kept separate from other parts of the records, such as transcripts or appendices. In addition:

Rule 8.45(c)(1)(A) – container: The sealed or confidential record, if in paper form, must be in a sealed envelope or other appropriate container.

⁴To avoid the costs of largely duplicative filings in complex cases, such as capital appeals, “unredacted version” is defined to permit a single argument to be covered in the document, even if multiple arguments are raised in the public version.

Rule 8.45(c)(1)(B) and (C) – labeling: The record must be labeled as sealed or confidential. New: The label must state the source of confidentiality. For example:⁵

“Sealed by order of court on (date).”

“Confidential (Pen. Code, § 1203.05 [probation report] / 1203.03 [diagnostic report] / *People v. Marsden* (1970) 2 Cal.3d 118 / etc.) – May Not Be Examined Without Court Order.”⁶

Indexes

Rule 8.45(c)(1)(D) – sealed or confidential index: The superior court clerk or party providing the record must prepare and transmit with it a sealed or confidential index to the records, including parties and counsel present at an in camera hearing. An exception is in subdivision (c)(3), below, for proceedings whose very occurrence may not be disclosed.

Rule 8.45(c)(2) – general indexes: Except as provided in (3), the alphabetical and chronological indexes to the record must list sealed or confidential records by title, not revealing substance, label them “Sealed” or “Confidential,” and include “– May Not Be Examined Without Court Order.”

Rule 8.45(c)(3) – exception for proceedings whose occurrence is confidential: As before, the indexes must not mention a record pertaining to a Penal Code section 987.9 [funds for expert in capital case] or other proceeding whose very occurrence may not be disclosed. The 987.9 record must not be bound with other sealed or confidential records.

Transmission of and access to sealed or confidential records

Rule 8.45(d)(1) – general rule: Except as provided in subdivisions (2)-(4), a sealed or confidential record in an appeal, writ proceeding, motion, etc., must be transmitted to, and examined by, only the reviewing court and those parties or counsel who had access in the lower court or other proceeding being reviewed.

⁵The Advisory Committee comment to subdivision (c)(1)(C) offers additional examples.

⁶This provision applies to the record delivered to the reviewing court. If the client or trial attorney had access to the record, the appellate attorney has the right to examine the record without a court order.

Rule 8.45(d)(2) – in camera proceeding: Except for confidential informant proceedings (subd. (3)), records of an in camera proceeding from which one party was excluded must be transmitted to and examined by only the reviewing court and parties participating in the in camera proceeding.

Rule 8.45(d)(3) – confidential informant proceeding: Records of an in camera proceeding involving a confidential informant (Evid. Code, §§ 1041-1042) must be transmitted to and examined by only the reviewing court.

Rule 8.45(d)(4) – probation report: A probation report must be transmitted only to the court, the People, and the defendant who is the subject of the report.

Clarifications: The Advisory Committee comment to subdivision (d) clarifies that these provisions do not supersede other provisions of law, such as those specifying when records are sent to the appellate projects.

B. SEALED RECORDS (revised rule 8.46)

The following discussion covers changes to rule 8.46. A number of provisions are not changed by the January 1, 2014, amendments, and those are not covered.

Requirements when filing includes record sealed by trial court

Rule 8.46(b): If the record on appeal or a record accompanying a motion, writ, or other filing includes a record sealed by the trial court, then:

Subdivision (b)(1): The record must remain sealed unless the reviewing court orders otherwise. Rule 8.45 on format, transmission, and access applies.

Subdivision (b)(2) – required part of record or supporting documents: The record or supporting documents must include the trial court motion to seal, documents related to it, and the trial court sealing order.

Proceedings to seal record not sealed in trial court

Rule 8.46(d)(1): Only the reviewing court can seal a record not sealed by the trial court. A record may not be sealed by stipulation of the parties.

Rule 8.46(d)(3) – lodging record sought to be sealed: The record sought to be sealed must be separate from the rest of the records filed, placed in an appropriate container if in paper form, and include a cover sheet that has the information required by rule 8.40(c) and states “CONDITIONALLY UNDER SEAL.”

Rule 8.46(d)(4) – documents related to record sought to be sealed: If necessary to protect confidentiality, the motion to seal and related documents referring to the record must be filed in both public redacted and conditionally sealed unredacted forms.

Cover of the redacted version: Must state, “Public – Redacts material from conditionally sealed record.” Juvenile case: “Redacted version – Redacts material from conditionally sealed record.”⁷

Cover of unredacted version: Must state, “May Not Be Examined Without Court Order—Contains material from conditionally sealed record.”

Service: Unless the court orders otherwise, a party or attorney who had access to the record in the trial court must be served with both versions.

Rule 8.46(d)(7) – if court refuses to seal record: Clerk must return the record to the party unless the party notifies the clerk to file it. The notification must be within 10 days of the order denying sealing, unless the court specifies otherwise.

Rule 8.46(d)(9) – if court orders record sealed: No public filings may disclose the contents of the sealed record.

Unsealing record in reviewing court

Rule 8.46(e)(4) – motion to unseal, opposition, supporting documents: If necessary to maintain the confidentiality of material in a sealed record, a motion to unseal a record, opposition, and supporting or other related documents must be filed in both public redacted and unredacted forms.

Cover of the redacted version: Must state, “Public – Redacts material from sealed record.” Juvenile case: “Redacted version – Redacts material from sealed record.”

⁷Although juvenile records already are confidential by law (Welf. & Inst. Code, § 827), circumstances sometimes require sealing information from a person or entity otherwise permitted to access the record.

Cover of unredacted version: Must state, “May Not Be Examined Without Court Order—Contains material from sealed record.”

Service: Unless the court orders otherwise, a party or attorney who had access to the sealed record in the trial court or other lower tribunal must be served with both versions.

Public filings may not disclose contents of sealed or conditionally sealed record

Rule 8.46(f)(1) – general rule: Documents filed publicly may not disclose confidential material sealed by court order or lodged conditionally under seal.

Rule 8.46(f) – redacted and unredacted filings if record is sealed (subd. (f)(2)) or is lodged conditionally under seal (subd. (f)(3): If it is necessary for a filing to disclose material from a sealed or conditionally sealed record, both public redacted and unredacted forms must be filed.

Cover of the redacted version: Must state, “Public – Redacts material from sealed record.” Juvenile case: “Redacted version – Redacts material from sealed record.” The term “conditionally sealed” should be used when applicable.

Cover of unredacted version: Must state, “May Not Be Examined Without Court Order—Contains material from sealed record.” The filing must cite the court order sealing the record. The term “conditionally sealed” should be used when applicable.

Service: Unless the court orders otherwise, a party or attorney who had access to the sealed record in the trial court or other lower tribunal must be served with both versions. Other parties or attorneys must be served with only the redacted version.

Rule 8.46(f)(3)(D) – if court refuses to seal record lodged conditionally under seal: The clerk must not put the unredacted version of the document referring to the record in the case file, but must return the document to the party unless the party notifies the clerk to file it publicly, as provided in subdivision (d)(7).

C. CONFIDENTIAL RECORDS (new rule 8.47)

Application

Rule 8.47(a): Rule applies to records made confidential by law, not to those sealed by court order.

Marsden and other defense-only in camera proceedings

Rule 8.47(b)(1) – application of subdivision: This subdivision applies to records of proceedings under *People v. Marsden* (1970) 2 Cal.3d 118 and other in camera proceedings from which the People were excluded in order to prevent disclosure of defense strategy or other information the defense was entitled to keep from the prosecution.

Preparer’s note: Rule 8.47(b) replaces former rule 8.328(b), now repealed. The provisions are similar. Differences include: Rule 8.47(b) is not confined to *Marsden* cases, eliminates the appellant’s notice accompanying the opening brief, and provides for filing briefs and other documents under seal.

Rule 8.47(b)(2)(A) – opening brief: An appellant’s opening brief raising an issue from a *Marsden* or other defense-only proceeding must be filed publicly, unless it is a juvenile case (see rule 8.401).

Rule 8.47(b)(2)(B)-(D) – People’s access to confidential transcript:

Subdivision (b)(2)(B) – People’s application: The People may apply for a copy of the confidential record.

Subdivision (b)(2)(C) – defendant’s opposition: Within 10 days of (B), the defendant may file an opposition stating there are confidential parts of the record not relevant to the issue raised and citing those parts.

Subdivision (b)(2)(D) – lack of defense opposition: If the defendant does not file an opposition under (C), the clerk must send the record to the People.

Rule 8.47(b)(3) – sealing brief, petition, etc., referring to Marsden or confidential record: Defendant may file a request to file a brief or other document under seal if

necessary to protect confidential matters in the record.⁸ The request must be sufficient to justify the sealing and confidentiality. Rule 8.46(d) governs the procedure. The defendant must submit both a redacted and an unredacted version of the document.

Subdivision (b)(3)(C)(i) – cover of the redacted version: Must state: “Public – Redacts material from conditionally sealed record.” Juvenile case: “Redacted version – Redacts material from conditionally sealed record.”

Subdivision (b)(3)(C)(ii) – cover of unredacted version: The filing, if in paper form, must be in a sealed container. The cover must state: “May Not Be Examined Without Court Order—Contains material from conditionally sealed record.”

Subdivision (b)(3)(D) – if court refuses to seal brief or other document lodged conditionally under seal: The clerk must not put the unredacted version of the document in the case file, but must return the document to the party unless within 10 days of the order the party notifies the clerk to file it publicly.

Other confidential records

Preparer’s note: Rules 8.45 and 8.47(c) replace former rule 8.328(c), now repealed. The changes are significant.

Rule 8.47(c)(1) – general rule: Nothing filed publicly may disclose material from a confidential record. This principle includes a record a party has chosen to keep confidential under the law.

Rule 8.47(c)(2) – filings referring to confidential records: A party may file a request to file a brief or other document under seal in order to avoid disclosing confidential information. The request must be sufficient to justify the sealing and confidentiality. Rule 8.46(d) governs the procedure. The party must submit both a redacted and an unredacted version of the document.

⁸Typically, the need to preserve confidentiality exists at the trial stage of a case, before the defense is presented. This rule might apply most often, therefore, in a pre-judgment writ proceeding.

Subdivision (c)(2)(C)(i) – cover of redacted version: Must state, “Public – Redacts material from conditionally sealed record.” Juvenile case: “Redacted version – Redacts material from conditionally sealed record.”

Subdivision (c)(2)(C)(ii) – cover of unredacted version: The filing, if in paper form, must be in a sealed container. The cover must state: “May Not Be Examined Without Court Order—Contains material from conditionally sealed record.” Material from a confidential record disclosed in the unredacted filing must be identified and accompanied by a citation to the statute, rule, case, or other authority requiring confidentiality.

Subdivision (c)(2)(D) – if court refuses to seal brief or other document lodged conditionally under seal: The clerk must not put the unredacted version of the document in the case file, but must return the document to the party unless within 10 days of the order the party notifies the clerk to file it publicly.