



JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

Item No.: 22-162

For business meeting on September 20, 2022

Title

Court Records: Retention of Reporters' Transcripts in Felony Appeals

Agenda Item Type

Action Required

Effective Date

January 1, 2023

Rules, Forms, Standards, or Statutes Affected

Amend Cal. Rules of Court, rule 10.1028

Date of Report

September 2, 2022

Recommended by

Appellate Advisory Committee
Hon. Louis R. Mauro, Chair

Contact

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Executive Summary

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 recommends amending the rule regarding retention of Court of Appeal records. The amendments would extend the time the Court of Appeal must keep the original or an electronic copy of the reporter's transcript from 20 years to 75 years in cases affirming a felony conviction. The amendments would also reflect the statutory presumption that an original reporter's transcript is in electronic form, not paper form.

Recommendation

The Appellate Advisory Committee recommends that the Judicial Council, effective January 1, 2023:

1. Amend rule 10.1028(d) of the California Rules of Court to add new paragraph (3) to require the Court of Appeal to retain the original or an electronic copy of the reporter's transcript in cases affirming a felony conviction for 75 years; and

2. Amend rule 10.1028(d)(2) and the Advisory Committee comment to reflect the statutory requirement that an original reporter's transcript must be in electronic form unless a specified exception allows for an original paper transcript.

The proposed amended rule is attached at pages 7–8.

Relevant Previous Council Action

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.

Analysis/Rationale

This 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.

Background

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.

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

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

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.

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

In spring 2020, the committee circulated for public comment a similar proposal that would have extended the retention period for felony appeals from 20 to 100 years. The feedback was overwhelmingly positive but a Court of Appeal suggested modifications based on 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. The committee withdrew the proposal to further consider these issues.

Time to keep reporters' transcripts

Having considered the court's concerns, the committee circulated a revised proposal and now recommends adding a provision to rule 10.1028(d) to extend the time for keeping the reporter's transcript from 20 years to 75 years in cases affirming a felony conviction. 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 form to reduce the amount of off-site storage space that is needed.

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.⁴ 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 [form] that satisfies the otherwise applicable standards for maintenance of court records, including electronic [forms], 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, the committee recommends amending rule 10.1028 to reflect the presumption that an original reporter's transcript is in electronic form and, if a

⁴ Former section 271 authorized courts and parties to receive, on request, copies of reporters' transcripts in "computer-readable form."

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.

The committee also recommends changing the word “format” in the advisory committee comment to “form” to be consistent with the language of section 271.

Policy implications

This proposal furthers the Judicial Council’s constitutional mandate to improve the administration of justice and, more specifically, its mission to increase access to justice, by ensuring that felony defendants can obtain a copy of the reporter’s transcript in their case for as long as it might reasonably be required. It also implements a legislative change that reflects the ongoing modernization of the courts.

Comments

This proposal was circulated for public comment from April 1 to May 13, 2022, as part of the regular spring comment cycle. Four organizations and courts submitted comments on this proposal. Two commenters agreed with the proposal; one agreed if the proposal was modified and one did not take a position but supported the proposal while cautioning that care be taken in storing electronic copies. A chart with the full text of the comments received and the committee’s responses is attached at pages 9–15.

The Committee on Appellate Courts of the California Lawyers Association’s Litigation Section (CAC) expressed support for extending the current 20-year retention period, but voiced concerns about courts’ ability to retain reporters’ transcripts for 75 years in an accessible electronic form. CAC described instances in which a trial court was unable to locate an electronic copy of a reporter’s transcript, but (fortunately) had retained the paper copy. It also expressed concern about electronic files becoming corrupt over time. CAC recommended that before paper copies of the reporter’s transcript are purged, the court should ensure that an electronic copy is being properly and accurately maintained in an accessible format.

The Orange County Bar Association, the Superior Court of Orange County, and the Superior Court of San Diego County responded to requests for specific comments on the proposed text of the rule. In response to whether the rule should use the term “certified” electronic copies rather than “original” and “copy,” both superior courts supported that change while the bar association felt there was no need to change the text because the proposed language makes clear that the retained transcript in either form is true and correct. To remain consistent with the language of section 271 and to avoid confusion about whether courts may convert paper originals to electronic copies, the committee declined to use the descriptor “certified” in the rule.

The invitation to comment also requested comments on the language in subdivisions (d)(2) and (d)(3): “in which the court affirms a judgment of conviction.” New subdivision (d)(3) 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 judgment of conviction but the defendant may need that reporter’s transcript in the future, the committee requested 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.

The bar association responded that no change is necessary; the current language is sufficient to trigger retention. The Superior Court of San Diego County approved of including “in whole or in part,” and suggested deleting the word “judgment” as unnecessary. The Superior Court of Orange County opined that the language, whether modified or not, should be the same in subdivisions (d)(2) and (d)(3).

The committee concluded that adding “in whole or in part” to subdivisions (d)(2) and (d)(3) would likely be helpful to clarify that various dispositional orders trigger retention. For consistency and clarity, the committee does not recommend changing the phrase “judgment of conviction” to simply “conviction” because the change would not be substantive, the phrase is used in the appellate rules of court, and changing the phrase could cause confusion.

Alternatives considered

The committee considered several 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 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 considered the courts' interest in digitizing paper records to reduce storage costs.

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 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.

The Superior Court of Orange County addressed implementation issues, observing that the workload would appear to fall primarily to certain groups of staff including Records Management. The court also noted that ensuring data storage space, indexing, and auditing of images would be of primary concern if transcripts are to be kept separate from the electronic case file.

Attachments and Links

1. Cal. Rules of Court, rule 10.1028, at pages 7–8
2. Chart of comments, at pages 9–15

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

Rule 10.1028. Preservation and destruction of Court of Appeal records

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

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

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

(b) Methods for signing, subscribing, or verifying documents

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

(c) Permanent records

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

(d) Time to keep other records

(1) Except as provided in (2) and (3), the clerk/executive officer may destroy all other records in a case 10 years after the decision becomes final, as ordered by the administrative presiding justice or, in a court with only one division, 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 in whole or in part, the clerk/executive officer must
3 keep the original reporter's transcript or, if the original is in paper, either the
4 original or a true and correct electronic copy of the transcript, for 20 years
5 after the decision becomes final.

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

12
13 **Advisory Committee Comment**
14

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

SPR22-03

Court Records: Retention of Reporters' Transcripts in Felony Appeals (Amend Cal. Rules of Court, rule 10.1028)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
1.	California Lawyers Association by Dean A. Bochner, Chair Committee on Appellate Courts	NI	I write on behalf of the Committee on Appellate Courts of the California Lawyers Association's Litigation Section ("CAC") to offer the following comments on the Appellate Advisory Committee's recent proposals (1) to update language referring to persons with disabilities in several court rules and in a form (SPR22-02) and (2) to extend the time the Court of Appeal must retain the reporter's transcript in cases affirming a felony conviction from 20 years to 75 years (SPR22-03). CAC consists of appellate practitioners and court staff, drawn from a wide range of practice areas, from across the state. As part of its mission, CAC frequently shares its views regarding proposals to change rules that govern appellate practice. [Comments on proposal SPR22-02] CAC also supports SPR22-03, which would extend the time the Court of Appeal must retain the reporter's transcript in cases affirming a felony conviction from 20 years to 75 years. We agree that the current 20-year retention period is insufficient in cases involving serious felony convictions and longer sentences, and we believe that this proposal will improve access to justice for those defendants who may need to obtain the reporter's transcript in their case more than 20 years after their conviction was affirmed.	The committee notes the commenter's support for the proposal and appreciates the information on CAC's perspective and role in the legal community. The committee appreciates these comments in support of the rule amendment.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

SPR22-03

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	Commenter	Position	Comment	Committee Response
			We have concerns, however, about the ability of courts to retain accessible electronic copies of the reporter's transcript for 75 years. Some of our members have seen instances in which a trial court was unable to locate an electronic copy of a reporter's transcript, but fortunately the court had retained the paper copy. We are also concerned that some electronic files could become corrupt over time. Retaining these transcripts in an accessible format is critical for preserving the appellate rights of criminal defendants. Before paper copies of the reporter's transcript are purged, the court should ensure that an electronic copy is being properly and accurately maintained in an accessible format. Thank you for giving us the opportunity to comment on these proposals.	The committee appreciates the commenter's concerns about ensuring that courts maintain an accessible version of a reporter's transcript, whether in paper or electronic form, and particularly that an electronic copy of a transcript is properly maintained and accessible before a paper transcript is purged. This feedback is noted in the report to the Judicial Council.
2.	Orange County Bar Association by Daniel S. Robinson President	A	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? The proposal does 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? No, the proposed 75 year retention period realistically should be sufficient even for LWOP	The committee notes the commenter's support for the proposal and appreciates the responses to its request for specific comments. No response required. The committee agrees with the commenter.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

SPR22-03

Court Records: Retention of Reporters' Transcripts in Felony Appeals (Amend Cal. Rules of Court, rule 10.1028)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
			cases. Permanent retention makes sense only for future historical review after the death of an individual. • Should the text of the rule reflect the current practice of court reporters to mark electronic reporters' transcripts "certified" rather than "original" and "copy"? No need to change the text as the current proffered language makes clear that the retained transcript in either form is true and accurate. • 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? No, the current language is sufficient to trigger retention.	For consistency with the statutory language and to avoid requiring that courts obtain a certified electronic copy if they choose not to retain an original paper transcript, the committee agrees with making no change. The committee received positive and negative responses to this question and decided to modify the language in an effort to ensure that transcripts that may be needed in the future are retained.
3.	Superior Court of Orange County by Iyana Doherty Courtroom Operations Supervisor	A	Transcripts should be retained permanently on all transcripts. California's laws are constantly revised, and new laws are created. A party should be able to request transcripts to assist them in their motion/petition at any time. The search for transcripts will no longer take countless hours.	The committee notes the commenter's support for the proposal, but disagrees with requiring permanent retention of all transcripts. The committee believes that a 75-year retention time balances defendants' need for a transcript and courts' cost concerns.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

SPR22-03

Court Records: Retention of Reporters' Transcripts in Felony Appeals (Amend Cal. Rules of Court, rule 10.1028)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
			A certified electronic transcript is an excellent adjective, since court reporters certify that their record is true and accurate copy. For consistency of the procedure and records retention, we suggest both subdivisions (d)(3) and (d)(2) read the same. The reporters' transcripts in electronic form are cost savings. The average cost of a box of paper is \$63.07, and the average price of a USB drive, ten pack, 32GB is \$52.78. A reporter's transcript includes copy paper that must not exceed 300 pages, cardstock paper for the front and back of the book, and fastener prongs to hold the volume together. The cost-saving measure will also include less printer ink and wear and tear. Leaving the transcripts in an electronic form instead of making volumes would save time for the reporter. The Court of Appeals would not have to buy or lease storage space to retain the paper record. Resources would not have to be spent storing the transcripts, retrieving the transcripts, and making extra copies of the transcripts. Implementing the workload would appear to fall primarily on CTS and Records Management staff. Unsure of the Appellate current imaging practices, but ensuring data storage space, indexing, and auditing of images would be of	The committee decided not to make this change in terminology to remain consistent with Code of Civil Procedure section 271 and to avoid suggesting that courts must obtain a certified electronic copy if they choose not to retain paper originals. The committee agrees and has made the same revision to subdivisions (d)(2) and (d)(3). The committee appreciates this feedback on the savings in cost and time that can be realized from retaining electronic transcripts rather than paper transcripts. The committee appreciates the commenter's feedback on implementation issues.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

SPR22-03

Court Records: Retention of Reporters' Transcripts in Felony Appeals (Amend Cal. Rules of Court, rule 10.1028)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
			primary concern if transcripts are to be kept separate from the electronic case file. 3 months would be sufficient. It is easier to eliminate processes than to implement new ones. This might be a bigger challenge for courts that retain paper records.	The committee appreciates this feedback.
4.	Superior Court of San Diego County by Mike Roddy Executive Officer	AM	• Does the proposal appropriately address the stated purpose? Yes. • 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? No. It is highly unlikely these would be needed beyond the 75 years. • Should the text of the rule reflect the current practice of court reporters to mark electronic reporters' transcripts "certified" rather than "original" and "copy"? Yes. • 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	The committee notes the commenter's support for the proposal if it is modified and appreciates the responses to the requests for specific comments. The committee agrees with the commenter. The committee decided not to make this change in terminology to maintain consistency with the language of Code of Civil Procedure section 271 and to avoid suggesting that courts must obtain a certified electronic copy if they choose not to retain paper originals.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

SPR22-03

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All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
			conviction, in whole or in part")? Should the same language in subdivision (d)(2) be modified? Yes. Including "in whole or in part" would be helpful. In addition, it may not be necessary to include the term "judgment." Since the terms "judgment" and "sentence" are generally considered "synonymous" "there is no 'judgment of conviction' without a sentence [Citation omitted]." (<i>People v. McKenzie</i> (2020) 9 Cal.5th 40, 46.) But, it would seem the rule is intended to apply anytime a conviction is affirmed (even if the sentence is vacated and the case remanded for re-sentencing). It seems unnecessary to include the term "judgment" in the rule. 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. No. • 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? Unknown.	The committee agrees that adding "in whole or in part" would be helpful and has made this change. The committee declines to change the term "judgment of conviction" because this term is also used in a number of appellate court rules and changing it could cause confusion. The committee notes the commenter's opinion that the rule change will not provide cost savings. No response required.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

SPR22-03

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	Commenter	Position	Comment	Committee Response
			• Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Unknown. • How well would this proposal work in courts of different sizes? Unknown.	No response required. No response required.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated