



JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on September 21, 2018

Title	Agenda Item Type
Rules Modernization: Electronic Sealed and Confidential Records and Lodged Records in the Court of Appeal	Action Required
	Effective Date
	January 1, 2019
Rules, Forms, Standards, or Statutes Affected	Date of Report
Amend Cal. Rules of Court, rules 8.45, 8.46, and 8.47	August 31, 2018
Recommended by	Contact
Appellate Advisory Committee	Ingrid Leverett, (415) 865-8031
Hon. Louis R. Mauro, Chair	Ingrid.Leverett@jud.ca.gov
Information Technology Advisory Committee	
Hon. Sheila F. Hanson, Chair	

Executive Summary

The Appellate Advisory Committee and the Information Technology Advisory Committee recommend amending the rules that establish procedures for handling sealed and confidential materials to address records submitted electronically in the Court of Appeal. The proposed amendments encompass the court's return of lodged electronic records submitted in connection with a motion to seal that is denied. The proposal would (1) harmonize the appellate rules with parallel trial court rules governing sealed records, (2) make these appellate rules internally consistent, and (3) address the transmission and handling of records in a proceeding challenging a trial court's order denying a motion to seal.

Recommendation

The Appellate Advisory Committee and the Information Technology Advisory Committee recommend that the Judicial Council, effective January 1, 2019:

1. Amend rules 8.45 and 8.46 to add language requiring that sealed, conditionally sealed, and confidential records be transmitted to the reviewing court in a secure manner that preserves the confidentiality of the record;
2. Add new subdivision (e) to rule 8.46 to clarify procedures for transmitting, conditionally sealing, and returning or deleting a record that is the subject of a challenge to a trial court order denying a motion or application to seal;
3. Amend rule 8.46 to require that the notice sent by a court proposing to unseal a record on its own motion include the court's reason for unsealing the record;
4. Amend rules 8.46 and 8.47 to:
 - Provide that when the court denies a motion or application to seal, if the moving party does not timely direct the clerk to file the lodged record unsealed, the clerk must delete the lodged record if it is in electronic form, consistent with rule 2.551;
 - Clarify the procedure for lodging an unredacted version of a record in connection with an appellate filing by requiring that the confidential material within the record be identified as such in the filing, consistent with trial court rules; and
 - Make other minor changes in language and punctuation intended to clarify the rules.

Relevant Previous Council Action

The Judicial Council adopted the predecessor to rule 8.46 effective January 1, 2001, along with similar rules for the trial courts, to establish uniform procedures regarding records sealed by court order. Effective January 1, 2004, the Judicial Council amended these rules to clarify the factual findings a court must make before sealing a record and the standard for their unsealing. Subsequent amendments clarified the applicability of the rule to various proceedings.

Effective January 1, 2014, the Judicial Council adopted new article 3 in chapter 1 of division 1 of title 8 of the California Rules of Court to serve as the location for the rules concerning sealed and confidential records in the Supreme Court and Courts of Appeal. As part of new article 3, the Judicial Council adopted new rule 8.45 to establish definitions and set forth general provisions governing sealed and confidential records in the reviewing courts. At the same time, the Judicial Council adopted new rule 8.47 to establish requirements relating to confidential records in Supreme Court and Court of Appeal proceedings, and amended rule 8.46 to make conforming changes and to add provisions regarding redacted and unredacted submissions.

Effective January 1, 2016, the Judicial Council amended rules 8.46 and 8.47 to add language requiring that all sealed or confidential documents that are transmitted electronically be transmitted in a secure manner.

Analysis/Rationale

The goal of the current proposal is to harmonize rules 8.45, 8.46, and 8.47 with one another and with parallel trial court rules (rules 2.550 and 2.551), including adding provisions to address records that are lodged electronically.

Rules 2.550 and 2.551 govern the handling of sealed records in the trial court. Effective January 1, 2017, the Judicial Council revised rule 2.551 to provide that, unless otherwise ordered, the moving party has 10 days following an order denying a motion or application to seal to direct the court to file the lodged material unsealed. If the clerk receives no notification within 10 days of the order, the clerk must return the lodged records if in paper form or permanently delete them if lodged in electronic form.

Unlike rule 2.551, the appellate rules do not specifically address the handling of a lodged electronic record. The proposed amendments to rules 8.46 and 8.47 provide that when the court denies a motion or application to seal, if the moving party does not timely direct the clerk to file the lodged record unsealed, the clerk must delete the lodged record if it is in electronic form, consistent with rule 2.551.

For internal consistency among the three appellate rules at issue (rules 8.45, 8.46, and 8.47), the amendments add to rule 8.45 and several subdivisions of rule 8.46 a requirement that sealed and confidential records be transmitted in a secure manner that preserves their confidentiality (a provision that is already in rule 8.47 and in one subdivision of rule 8.46). The amendments also add to rule 8.47 language which directs that when an unredacted record is lodged with a reviewing court, the particular sealed or confidential material within the record be identified as such (language that is already in rule 8.46).

A new proposed subdivision (e) is added to rule 8.46 to address the handling of records that are the subject of review in an appeal or original proceeding challenging a lower court's denial of a motion or application to seal. Under subdivision (e), the record at issue would remain conditionally under seal while the review proceeding was pending. After the reviewing court's decision becomes final, the clerk is required to return the record to the lodging party if it is in paper form, or permanently delete it if it is in electronic form.

Finally, for consistency with trial court rule 2.551, rule 8.46 is amended to require that the notice sent by a reviewing court proposing to order a record unsealed on its own motion state the reason for unsealing the record.

Policy implications

This proposal furthers the goals of (1) consistency between the trial court rules and the appellate rules, including the handling of records lodged in electronic format, and (2) internal consistency within the appellate rules.

Comments

Five organizations submitted comments on this proposal. Two bar associations and one superior court agreed with the proposed rule amendments. Two child support organizations agreed with the proposal if modified. Both raised the same substantive issue and suggest that the same additional language be added. A chart with the full text of the comments received and the committees' responses is attached at pages 13-15.

The two commenters who agreed with the proposal if modified suggest that proposed new subdivision (e) to rule 8.46 could potentially be construed as expanding the right to appeal evidentiary rulings and providing for a stay of the proceedings during the pendency of such an appeal. The commenters suggest adding the following language clarifying that new subdivision (e) is not intended to expand availability of appellate review: "This paragraph is not intended to expand the scope of relief available but only to prescribe the manner [in] which confidential records are maintained."

Although a rule of court cannot expand appellate jurisdiction, the committees were sensitive to the request for clarification and considered adding language to the rule—either the language suggested by the commenters or other language. The committees also considered whether to address the issue in an Advisory Committee Comment. Because this is a point of clarification, the committees recommend revising the proposal to add an Advisory Committee Comment as follows:

Subdivision (e). This subdivision is not intended to expand the availability of existing appellate review for any person aggrieved by a court's denial of a motion or application to seal a record.

Alternatives considered

In addition to the alternatives considered in response to the public comments, the committees considered not proposing these amendments. The committees concluded that the proposed changes were necessary to (1) give guidance and direction to litigants, (2) harmonize the appellate court rules with existing trial court rules governing the same subject matter, (3) make the appellate court rules internally consistent regarding the handling of sealed and confidential records, and (4) clarify the proper procedure for handling sealed and confidential records that are the subject of a proceeding in a reviewing court.

Fiscal and Operational Impacts

The committees anticipate that appellate courts will likely incur some cost to train staff on the new procedures for disposing of lodged electronic records when the court denies a motion or application to seal and for handling records lodged with the court that are the subject of a challenge to a trial court order denying a motion or application to seal. However, the committees expect that the amended rules will ease the burden on the courts by providing additional guidance and procedures for handling sealed and confidential records, and particularly lodged electronic records. No other costs or implementation challenges are expected.

Attachments and Links

1. Cal. Rules of Court, rules 8.45–8.47, at pages 6-12
2. Chart of comments, at pages 13-15

Rules 8.45–8.47 of the California Rules of Court are amended, effective January 1, 2019, to read:

1 **Rule 8.45. General provisions**

2
3 **(a)–(c) * * ***

4
5 **(d) Transmission of and access to sealed and confidential records**

6
7 (1) A sealed or confidential record must be transmitted in a secure manner that
8 preserves the confidentiality of the record.

9
10 ~~(1)(2)~~ Unless otherwise provided by ~~(2)–(4)(3)–(5)~~ or other law or court order, a
11 sealed or confidential record that is part of the record on appeal or the
12 supporting documents or other records accompanying a motion, petition for a
13 writ of habeas corpus, other writ petition, or other filing in the reviewing
14 court must be transmitted only to the reviewing court and the party or parties
15 who had access to the record in the trial court or other proceedings under
16 review and may be examined only by the reviewing court and that party or
17 parties. If a party’s attorney but not the party had access to the record in the
18 trial court or other proceedings under review, only the party’s attorney may
19 examine the record.

20
21 ~~(2)(3)~~ Except as provided in ~~(3)(4)~~, if the record is a reporter’s transcript or any
22 document related to any in-camera hearing from which a party was excluded
23 in the trial court, the record must be transmitted to and examined by only the
24 reviewing court and the party or parties who participated in the in-camera
25 hearing.

26
27 ~~(3)(4)~~ * * *

28
29 ~~(4)(5)~~ * * *

30
31 **Advisory Committee Comment**

32
33 **Subdivision (a).** * * *

34
35 **Subdivision (b)(5).** * * *

36
37 **Subdivisions (c) and (d).** * * *

38
39 **Subdivision (c)(1)(C).** * * *

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

1 **Subdivision (c)(3).** * * *

2
3 **Subdivision (d).** * * *

4
5 **Subdivision (d)(1)(2) and (2)(3).** * * *

6
7 **Subdivision (d)(4)(5).** * * *

8
9 **Rule 8.46. Sealed records**

10
11 **(a)–(c)** * * *

12
13 **(d) Record not filed in the trial court; motion or application to file under seal**

14
15 (1)–(6) * * *

16
17 (7) ~~If the court denies the motion or application to seal the record, the clerk must~~
18 ~~not place the lodged record in the case file but must return it to the submitting~~
19 ~~party unless that party notifies the clerk in writing that the record is to be~~
20 ~~filed. Unless otherwise ordered by the court, the submitting party must notify~~
21 ~~the clerk within 10 days after the order denying the motion or application the~~
22 ~~lodging party may notify the court that the lodged record is to be filed~~
23 ~~unsealed. This notification must be received within 10 days of the order~~
24 ~~denying the motion or application to seal, unless otherwise ordered by the~~
25 ~~court. On receipt of this notification, the clerk must unseal and file the record.~~
26 ~~If the lodging party does not notify the court within 10 days of the order, the~~
27 ~~clerk must (1) return the lodged record to the lodging party if it is in paper~~
28 ~~form, or (2) permanently delete the lodged record if it is in electronic form.~~

29
30 (8)–(9) * * *

31
32 **(e) Challenge to an order denying a motion or application to seal a record**

33
34 Notwithstanding the provisions in (d)(1)–(2), when an appeal or original
35 proceeding challenges an order denying a motion or application to seal a record, the
36 appellant or petitioner must lodge the subject record labeled as conditionally under
37 seal in the reviewing court as provided in (d)(3)–(5), and the reviewing court must
38 maintain the record conditionally under seal during the pendency of the appeal or
39 original proceeding. Once the reviewing court’s decision on the appeal or original
40 proceeding becomes final, the clerk must (1) return the lodged record to the lodging
41 party if it is in paper form, or (2) permanently delete the lodged record if it is in
42 electronic form.

1 **(e)(f) Unsealing a record in the reviewing court**

2
3 (1)–(2) * * *

4
5 (3) If the reviewing court proposes to order a record unsealed on its own motion,
6 the court must send notice to the parties stating the reason for unsealing the
7 record. Unless otherwise ordered by the court, any party may serve and file
8 an opposition within 10 days after the notice is sent, and any other party may
9 serve and file a response within 5 days after an opposition is filed.

10
11 (4)–(7) * * *

12
13 **(f)(g) Disclosure of nonpublic material in public filings prohibited**

14
15 (1) * * *

16
17 (2) If it is necessary to disclose material contained in a sealed record in a filing in
18 the reviewing court, two versions must be filed:

19
20 (A) * * *

21
22 (B) An unredacted version. If this version is in paper format, it must be
23 placed in a sealed envelope or other appropriate sealed container. The
24 cover of this version, and if applicable the envelope or other container,
25 must identify it as “May Not Be Examined Without Court Order—
26 Contains material from sealed record.” Sealed material disclosed in this
27 version must be identified as such in the filing and accompanied by a
28 citation to the court order sealing that material.

29
30 (C) * * *

31
32 (3) If it is necessary to disclose material contained in a conditionally sealed
33 record in a filing in the reviewing court:

34
35 (A) * * *

36
37 (B) An unredacted version must be lodged. The filing must be transmitted
38 in a secure manner that preserves the confidentiality of the filing being
39 lodged. If this version is in paper format, it must be placed in a sealed
40 envelope or other appropriate sealed container. The cover of this
41 version, and if applicable the envelope or other container, must identify
42 it as “May Not Be Examined Without Court Order—Contains material

1 from conditionally sealed record.” Conditionally sealed material
2 disclosed in this version must be identified as such in the filing.

3
4 (C) * * *

5
6 (D) If the court denies the motion or application to seal the record, ~~the clerk~~
7 ~~must not place the unredacted version lodged under (B) in the case file~~
8 ~~but must return it to the party who filed the application or motion to~~
9 ~~seal unless that party notifies the clerk that the record is to be publicly~~
10 ~~filed, as provided in (d)(7) the party who filed the motion or application~~
11 may notify the court that the unredacted version lodged under (B) is to
12 be filed unsealed. This notification must be received within 10 days of
13 the order denying the motion or application to seal, unless otherwise
14 ordered by the court. On receipt of this notification, the clerk must
15 unseal and file the lodged unredacted version. If the party who filed the
16 motion or application does not notify the court within 10 days of the
17 order, the clerk must (1) return the lodged unredacted version to the
18 lodging party if it is in paper form, or (2) permanently delete the lodged
19 unredacted version if it is in electronic form.
20

21 Advisory Committee Comment

22
23 * * *

24
25 Subdivision (e). This subdivision is not intended to expand the availability of existing appellate
26 review for any person aggrieved by a court’s denial of a motion or application to seal a record.
27

28 Rule 8.47. Confidential records

29
30 (a) * * *

31 (b) Records of *Marsden* hearings and other in-camera proceedings

32
33 (1) * * *

34
35 (2) Except as provided in (3), if the defendant raises a *Marsden* issue or an issue
36 related to another in-camera hearing covered by this rule in a brief, petition,
37 or other filing in the reviewing court, the following procedures apply:
38

39
40 (A) The brief, including any portion that discloses matters contained in the
41 transcript of the in-camera hearing, and other documents filed or lodged
42 in connection with the hearing, must be filed publicly. The requirement

1 to publicly file this brief does not apply in juvenile cases; rule 8.401
2 governs the format of and access to such briefs in juvenile cases.

3
4 (B) The People may serve and file an application requesting a copy of the
5 reporter’s transcript of, and documents filed or lodged by a defendant
6 in connection with, the in-camera hearing.

7
8 (C) * * *

9
10 (D) If the defendant does not timely serve and file opposition to the
11 application, the reviewing court clerk must send to the People a copy of
12 the reporter’s transcript of, and documents filed or lodged by a
13 defendant in connection with, the in-camera hearing.

14
15 (3) A defendant may serve and file a motion or application in the reviewing court
16 requesting permission to file under seal a brief, petition, or other filing that
17 raises a *Marsden* issue or an issue related to another in-camera hearing
18 covered by this subdivision, and requesting an order maintaining the
19 confidentiality of the relevant material from the reporter’s transcript of, or
20 documents filed or lodged in connection with, the in-camera hearing.

21
22 (A) * * *

23
24 (B) The declaration accompanying the motion or application must contain
25 facts sufficient to justify an order maintaining the confidentiality of the
26 relevant material from the reporter’s transcript of, or documents filed or
27 lodged in connection with, the in-camera hearing and sealing of the
28 brief, petition, or other filing.

29
30 (C) At the time the motion or application is filed, the defendant must:

31
32 (i) * * *

33
34 (ii) Lodge an unredacted version of the brief, petition, or other filing
35 that he or she is requesting be filed under seal. The filing must be
36 transmitted in a secure manner that preserves the confidentiality
37 of the filing being lodged. If this version is in paper format, it
38 must be placed in a sealed envelope or other appropriate sealed
39 container. The cover of the unredacted version of the document,
40 and if applicable the envelope or other container, must identify it
41 as “May Not Be Examined Without Court Order—Contains
42 material from conditionally sealed record.” Conditionally sealed

1 material disclosed in this version must be identified as such in the
2 filing.

3
4 (D) If the court denies the motion or application to file the brief, petition, or
5 other filing under seal, ~~the clerk must not place the unredacted brief,~~
6 ~~petition, or other filing lodged under (C)(ii) in the case file but must~~
7 ~~return it to the defendant unless the defendant notifies the clerk in~~
8 ~~writing that it is to be filed. Unless otherwise ordered by the court, the~~
9 ~~defendant must notify the clerk within 10 days after the order denying~~
10 ~~the motion or application~~ the defendant may notify the court that the
11 unredacted brief, petition, or other filing lodged under (C)(ii) is to be
12 filed unsealed. This notification must be received within 10 days of the
13 order denying the motion or application to file the brief, petition, or
14 other filing under seal, unless otherwise ordered by the court. On
15 receipt of this notification, the clerk must unseal and file the lodged
16 unredacted brief, petition, or other filing. If the defendant does not
17 notify the court within 10 days of the order, the clerk must (1) return
18 the lodged unredacted brief, petition, or other filing to the defendant if
19 it is in paper form, or (2) permanently delete the lodged unredacted
20 brief, petition, or other filing if it is in electronic form.

21
22 (c) **Other confidential records**

23
24 Except as otherwise provided by law or order of the reviewing court:

25
26 (1) * * *

27
28 (2) To maintain the confidentiality of material contained in a confidential record,
29 if it is necessary to disclose such material in a filing in the reviewing court, a
30 party may serve and file a motion or application in the reviewing court
31 requesting permission for the filing to be under seal.

32
33 (A)–(C) * * *

34
35 (D) If the court denies the motion or application to file the brief, petition, or
36 other filing under seal, ~~the clerk must not place the unredacted brief,~~
37 ~~petition, or other filing lodged under (C)(ii) in the case file but must~~
38 ~~return it to the lodging party unless the party notifies the clerk in~~
39 ~~writing that it is to be filed. Unless otherwise ordered by the court, the~~
40 ~~party must notify the clerk within 10 days after the order denying the~~
41 ~~motion or application~~ the party who filed the motion or application may
42 notify the court that the unredacted brief, petition, or other filing lodged
43 under (C)(ii) is to be filed unsealed. This notification must be received

1 within 10 days of the order denying the motion or application to file the
2 brief, petition, or other filing under seal, unless otherwise ordered by
3 the court. On receipt of this notification, the clerk must unseal and file
4 the lodged unredacted brief, petition, or other filing. If the party who
5 filed the motion or application does not notify the court within 10 days
6 of the order, the clerk must (1) return the lodged unredacted brief,
7 petition, or other filing to the lodging party if it is in paper form, or
8 (2) permanently delete the lodged unredacted brief, petition, or other
9 filing if it is in electronic form.

10
11 **Advisory Committee Comment**

12
13 **Subdivisions (a) and (c). * * ***

14
15 **Subdivision (c)(1). * * ***

16
17 **Subdivision (c)(2).** Note that when a record has been sealed by court order, rule 8.46~~(f)~~(g)(2)
18 requires a party to file redacted (public) and unredacted (sealed) versions of any filing that
19 discloses material from the sealed record; it does not require the party to make a motion or
20 application for permission to do so. By contrast, this rule requires court permission before
21 redacted (public) and unredacted (sealed) filings may be made to prevent disclosure of material
22 from confidential records.

SPR18-06

Appellate Procedure: Electronic Sealed and Confidential Records and Lodged Records in the Court of Appeal (Amend Cal. Rules of Court, rules 8.45, 8.46, and 8.47)

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

	Commenter	Position	Comment	Committee Response
1.	California Department of Child Support Services by Kristen Donadee Assistant Chief Counsel Rancho Cordova, CA	AM	<p>The California Department of Child Support Services (Department) has reviewed the proposal identified above for potential impacts to the child support program, the local child support agencies, and our case participants. Specific feedback related to the provisions of the rules with potential impacts to the Department and its stakeholders is set forth below.</p> <p>Rule 8.46 - Sealed records</p> <p>The Department recommends clarification regarding Rule 8.46, subdivision (e), which is related to challenges to an order denying a motion or application to seal a record. Evidentiary rulings are not always subject to immediate appeals. It is unclear if this rule intends to stay the proceedings while an evidentiary ruling is appealed. Clarifying this point would be beneficial to the parties when considering whether to appeal evidentiary rulings regarding motions and applications to seal records.</p> <p>If this is not the JCC's intent, the Department respectfully suggests adding language to subsection e, which provides as follows:</p> <p>This paragraph is not intended to expand the scope of relief available but</p>	<p>The committees note the commenter’s agreement with the proposal if modified.</p> <p>The committees appreciate this feedback.</p> <p>Although a rule of court cannot expand appellate jurisdiction, the committees note the concern and have revised the proposal to add an Advisory Committee Comment, as follows:</p> <p style="text-align: center;"><u>Advisory Committee Comment</u></p> <p><u>Subdivision (e)</u>. This subdivision is not intended to expand the availability of existing appellate review for any person aggrieved by a court’s denial of a motion or application to seal a record.</p>

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

SPR18-06

Appellate Procedure: Electronic Sealed and Confidential Records and Lodged Records in the Court of Appeal (Amend Cal. Rules of Court, rules 8.45, 8.46, and 8.47)

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

	Commenter	Position	Comment	Committee Response
			<p>only to prescribe the manner of which confidential records are maintained.</p> <p>Thank you for the opportunity to provide input, express our ideas, experiences and concerns with respect to the proposed rules and form changes.</p>	
2.	California Lawyers Association, Committee on Appellate Courts of the Litigation Section San Francisco, CA	A	<p>The Committee on Appellate Courts supports this proposal and responds as follows to the Invitation to Comment’s request for specific comments.</p> <p>Does the proposal appropriately address the stated purpose? Yes, the new and revised forms achieve the stated purpose because (1) when motion to seal is denied, it requires the clerk to either return paper copies submitted, or delete electronic copies; (2) it requires sealed documents to be transmitted to the reviewing court in a secure and confidential manner; (3) it clarifies procedures for transmitting and conditionally sealing materials where the ruling denying sealing is challenged on appeal; and (4) it clarifies procedures for lodging unredacted materials in the appellate court.</p> <p>Is new subdivision (e) of rule 8.46—addressing a record that is the subject of an appeal or original proceeding challenging a trial court’s ruling denying a motion or</p>	<p>The committees note the commenter’s support for the proposal.</p> <p>The committees appreciate this feedback.</p>

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

SPR18-06**Appellate Procedure: Electronic Sealed and Confidential Records and Lodged Records in the Court of Appeal** (Amend Cal. Rules of Court, rules 8.45, 8.46, and 8.47)

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

	Commenter	Position	Comment	Committee Response
			<p>application to seal that record—helpful, and does it provide sufficient guidance? Yes, new subdivision (e) is helpful and provides sufficient guidance.</p>	The committees appreciate this feedback.
3.	Child Support Directors Association, Judicial Council Forms Committee by Ronald Ladage, Chair	AM	<p>The Committee is concerned that Rule 8.46 subdivision (e), may be interpreted to expand the scope of relief that may be available. Assuming this is not the intent of the Rule, we suggest adding the following language to subsection (e):</p> <p style="padding-left: 40px;">This paragraph is not intended to expand the scope of relief available, but only to prescribe the manner of which confidential records are maintained.</p> <p>Thank you for the opportunity to provide input, express our ideas, experiences and concerns with respect to the proposed rules and form changes.</p>	See response to comment No. 1, above.
4.	Orange County Bar Association by Nikki P. Miliband, President	A	No specific comment.	The committees note the commenter’s agreement with the proposal. No further response required.
5.	Superior Court of San Diego County by Mike Roddy, CEO	A	No specific comment.	The committees note the commenter’s agreement with the proposal. No further response required.

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