



## JUDICIAL COUNCIL OF CALIFORNIA

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# REPORT TO THE JUDICIAL COUNCIL

For business meeting on: October 27–28, 2016

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Title	Agenda Item Type
Appellate Procedure: Transcripts of <i>Marsden</i> Hearings	Action Required
Rules, Forms, Standards, or Statutes Affected	Effective Date
Amend advisory committee comment to Cal. Rules of Court, rule 8.45	January 1, 2017
Recommended by	Date of Report
Appellate Advisory Committee	August 17, 2016
Hon. Raymond J. Ikola, Chair	Contact
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### Executive Summary and Origin

The Appellate Advisory Committee recommends amending the advisory committee comment accompanying the rule that addresses the transmission of confidential records to clarify that a copy of the confidential reporter's transcript of any in-camera hearings conducted by the superior court under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden* transcripts) must be transmitted to the appellate counsel for the party that participated in the hearing or, if such counsel has not yet been appointed, to the district appellate project. This change, which is based on a suggestion received from the assistant clerk/administrator of a Court of Appeal, is intended to eliminate confusion about whether copies of *Marsden* transcripts should be provided to appellate counsel and should result in decreased costs associated with motions by counsel to receive a copy of any such transcripts.

### Recommendation

The Appellate Advisory Committee recommends that the Judicial Council, effective January 1, 2017, amend the advisory committee comment to California Rules of Court, rule 8.45 to:

1. Clarify that a copy of any confidential *Marsden* transcript must be transmitted to the appellate counsel for the party that participated in the hearing or, if such counsel has not yet been appointed, to the district appellate project;
2. Correct a cross-referencing error; and
3. Make other minor, nonsubstantive changes.

The text of the proposed advisory committee comment is attached at page 5.

### **Previous Council Action**

The former rule relating to confidential records in felony and juvenile appeals,<sup>1</sup> originally rule 33.5, was adopted by the Judicial Council effective July 1, 1990, to ensure that confidential records are properly included in the record on appeal in these cases and to specify the procedures for ensuring that confidential information is not disclosed. As adopted, this rule specifically provided that appellate counsel for a defendant (or an appellant or respondent entitled to appointed counsel in juvenile appeals) was entitled to receive a copy of any confidential *Marsden* transcript.<sup>2</sup> Effective January 1, 2004, to reflect existing practice, the Judicial Council amended this rule to specifically provide that, if appellate counsel has not yet been retained or appointed, the defendant's copy of any confidential *Marsden* transcript must be sent to the appellate project for the district. This rule was renumbered as rule 8.328 effective January 1, 2007 as part of the general reorganization of the California Rules of Court. Effective January 1, 2014, the Judicial Council amended the appellate rules relating to sealed and confidential records. Rule 8.328 and several other rules were repealed and replaced with rules 8.45 through 8.47, which address sealed and confidential records in general.

### **Rationale for Recommendation**

The January 1, 2014 amendments to the appellate rules relating to sealed and confidential records were not intended to change the practice of sending a copy of any *Marsden* transcripts to the appellate counsel for a party who participated in a *Marsden* hearing or, if the party is not yet represented by appellate counsel, to the appellate project for the district. Transmission of confidential transcripts is now addressed in rule 8.45, which generally addresses access to and transmission of sealed and confidential records. Rule 8.45(d)(2) provides that a reporter's transcript or any document related to any in-camera hearing from which a party was excluded in the trial court, such as a *Marsden* hearing, must be transmitted to the reviewing court and to the party or parties who participated in the in-camera hearing. The term "party" includes any attorney of record for that party and, thus, when a party who participated in an in-camera

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<sup>1</sup> Prior to January 1, 2004, rule 39(a) provided that the rules in criminal appeals governed appeals and writs in juvenile cases, except where otherwise provided. Thus, under rule 39(a), rule 33.5 and its successor rules relating to confidential records in felony appeals applied to juvenile appeals as well.

<sup>2</sup> These in-camera hearings are held to hear motions to substitute new counsel by criminal defendants and parties in juvenile cases who have appointed counsel.

hearing, such as a criminal defendant or child in a juvenile proceeding who participated in a *Marsden* hearing, is represented by appellate counsel, the confidential transcript of that hearing must be transmitted to that party's appellate counsel. Rule 8.336(g), which was not substantively modified in 2014, also provides that one copy of the reporter's transcript in a felony appeal must be sent to appellate counsel for each defendant represented by separate counsel and that if the defendant is not represented by appellate counsel when the transcripts are certified as correct, the clerk must send that defendant's counsel's copy of the transcripts to the district appellate project. Similarly, rule 8.409(e)(2) provides that in juvenile appeals, if appellate counsel has not yet been retained or appointed for the appellant or the respondent when the transcripts are certified as correct, the clerk must send that counsel's copy of the transcripts to the district appellate project.

The committee understands that, despite there being no intent to change the existing practice, the repeal of former rule 8.328 has resulted in some confusion about whether a copy of any *Marsden* transcripts must be sent to appellate counsel. In some cases, this confusion has resulted in appellate counsel having to file a motion to obtain the necessary copy of a *Marsden* transcript. To eliminate any confusion about this, the committee is proposing an amendment to the advisory committee comment accompanying rule 8.45 addressing subdivision (d) clarifying the continuing requirement to send a copy of any *Marsden* transcripts to appellate counsel for the party who participated in a *Marsden* hearing or, if the party is not yet represented by appellate counsel, to the appellate project for the district.

The committee is also proposing a few nonsubstantive changes to the comment regarding rule 8.45(c) and (d) that would correct a cross-referencing error, provide a more specific citation to another rule provision, and clarify that a reference to "transcripts" encompasses both clerk's and reporter's transcripts.

## **Comments, Alternatives Considered, and Policy Implications**

### **External comments**

The proposed amendments to the advisory committee comment to rule 8.45 were circulated for public comment between April 15 and June 14, 2016 as part of the regular spring comment cycle. Six individuals or organizations submitted comments on this proposal. Four commentators agreed with the proposal, one agreed with the proposal if amended, and one did not state a position on the proposal but provided comments. A chart with the full text of the comments received and the committee's responses is attached at pages 7–8. Based on these comments, the committee recommends adopting this proposal, with two changes.

The commentator who agreed with the proposal if amended pointed out a typographical error. The committee has modified its proposal to correct this error.

The committee specifically sought comment on whether, rather than amending the advisory committee comment, it would be preferable to amend rule 8.47 to add language specifically

requiring the superior court clerk to send one copy of a *Marsden* transcript to appellate counsel for the party that participated in the hearing or, if such counsel has not yet been appointed, to the district appellate project. Three commentators provided input on this question: one indicated that amending the advisory committee comment is sufficient; one indicated that perhaps the rule could be amended in the future, but that the comment is helpful at this point; and one recommended amending rule 8.47. The committee discussed these comments and concluded that the best approach at this time is to amend the advisory committee comment, rather than the rule. As noted above, rule 8.45 already requires copies of confidential records, including *Marsden* transcripts, to be sent to the party or parties who had access to these records in the trial court. The committee was concerned that adding another provision separately addressing *Marsden* transcripts could result in rule 8.45 being interpreted as not encompassing certain confidential records, which would be inconsistent with the original intent of rule 8.45.

The commentator who recommended amending rule 8.47 to address the transmission of *Marsden* transcripts also suggested that either rule 8.47 or rule 8.401 be amended to clarify the handling of *Marsden* transcripts in juvenile proceedings. Because the provisions relating to transcripts of confidential hearings in rule 8.45 and rule 8.47's provisions relating to *Marsden* transcripts already cover appellate proceedings in juvenile cases, the committee declined to recommend the rule amendments suggested by the commentator. However, the committee did modify the recommended amendments to the advisory committee comment to rule 8.45 so that the example provided more clearly encompasses *Marsden* transcripts in juvenile proceedings as well as criminal proceedings.

### **Alternatives**

In addition to the alternative discussed above, the committee considered not proposing any amendments to address the concerns about the provision of *Marsden* transcripts. However, the committee concluded that eliminating confusion about whether copies of *Marsden* transcripts should be provided to appellate counsel would likely result in decreased costs and delay associated with motions by counsel to receive a copy of any such transcripts, and therefore that it would benefit the courts and litigants to propose these amendments.

### **Implementation Requirements, Costs, and Operational Impacts**

This proposal should not impose significant implementation requirements on the courts and should result in decreased costs associated with motions by counsel to receive a copy of any *Marsden* transcripts.

### **Attachments and Links**

1. Advisory Committee Comment to California Rules of Court, rule 8.45, at pages 5–6
2. Chart of comments, at pages 7–8

The advisory committee comment to rule 8.45 of the California Rules of Court is amended, effective January 1, 2017, to read:

**Rule 8.45. General provisions**

**(a) Application \* \* \***

**(b) Definitions \* \* \***

**(c) Format of sealed and confidential records \* \* \***

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

- (1) Unless otherwise provided by (2)–(4) or other law or court order, a sealed or confidential record that is part of the record on appeal or the supporting documents or other records accompanying a motion, petition for a writ of habeas corpus, other writ petition, or other filing in the reviewing court must be transmitted only to the reviewing court and the party or parties who had access to the record in the trial court or other proceedings under review and may be examined only by the reviewing court and that party or parties. If a party’s attorney but not the party had access to the record in the trial court or other proceedings under review, only the party’s attorney may examine the record.
- (2) Except as provided in (3), if the record is a reporter’s transcript or any document related to any in-camera hearing from which a party was excluded in the trial court, the record must be transmitted to and examined by only the reviewing court and the party or parties who participated in the in-camera hearing.
- (3) A reporter’s transcript or any document related to an in-camera hearing concerning a confidential informant under Evidence Code sections 1041–1042 must be transmitted only to the reviewing court.
- (4) A probation report must be transmitted only to the reviewing court and to appellate counsel for the People and the defendant who was the subject of the report.

**Advisory Committee Comment**

**Subdivision (a). \* \* \***

**Subdivision (b)(5). \* \* \***

**Subdivisions (c) and (d).** The requirements in this rule for format and transmission of and access to sealed and confidential records apply only unless otherwise provided by law. Special requirements that govern transmission of and/or access to particular types of records may supersede the requirements in this

1 rule. For example, rules 8.619(g) and 8.622(e) require copies of reporters' transcripts in capital cases to be  
2 sent to the Habeas Corpus Resource Center and the California Appellate Project in San Francisco, and  
3 under rules 8.336 ~~(d)~~(g)(2) and 8.409(e)(2), in non-capital felony appeals, if the defendant—or in juvenile  
4 appeals, if the appellant or the respondent—is not represented by appellate counsel when the clerk's and  
5 reporter's transcripts are certified as correct, the clerk must send that counsel's copy of the transcripts to  
6 the district appellate project.

7  
8 **Subdivision (c)(1)(C).** \* \* \*

9  
10 **Subdivision (c)(2).** \* \* \*

11  
12 **Subdivision (c)(3).** \* \* \*

13  
14 **Subdivision (d).** See rule 8.47(b) for special requirements concerning access to certain confidential  
15 records.

16  
17 **Subdivision (d)(1) and (2).**

18 Because the term "party" includes any attorney of record for that party, under rule 8.10(3), when a party  
19 who had access to a record in the trial court or other proceedings under review or who participated in an  
20 in-camera hearing—such as a *Marsden* hearing in a criminal or juvenile proceeding—is represented by  
21 appellate counsel, the confidential record or transcript must be transmitted to that party's appellate  
22 counsel. Under rules 8.336(g)(2) and 8.409(e)(2), in non-capital felony appeals, if the defendant—or in  
23 juvenile appeals, if the appellant or the respondent—is not represented by appellate counsel when the  
24 clerk's and reporter's transcripts are certified as correct, the clerk must send the copy of the transcripts  
25 that would go to appellate counsel, including confidential records such as transcripts of *Marsden* hearings,  
26 to the district appellate project.

27  
28 **Subdivision (d)(4).** \* \* \*

**SPR16-04****Appellate Procedure: Transcripts of Marsden Hearings** (amend advisory committee comment to rule 8.45)

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

	Commentator	Position	Comment	Committee Response
1.	Family Law and Juvenile Court Managers Superior Court of Orange County	AM	<p>Whether it would be preferable to amend rule 8.47 to add language specifically requiring the superior court clerk to send one copy of a <i>Marsden</i> transcript to the defendant's appellate counsel or, if not yet represented by appellate counsel, the district appellate project.</p> <p>We recommend amending rule 8.47 to add language specifically requiring the court clerk to send one copy of a Marsden transcript to the defendant's appellate counsel. It appears appropriate within this sections since it discusses Marsden hearings and procedures specific to Marsden hearings.</p> <p>Furthermore, 8.47(b)(2)(A) references 8.401 as governing the format and access to such Marsden briefs in juvenile cases; however, rule 8.401 makes no mention of Marsden transcripts in juvenile. Therefore, we recommend amending 8.401 to include Marsden reference as it pertains in juvenile; or alternatively, including the pertinent information in 8.47 for juvenile cases to add clarity regarding the handling of Juvenile cases.</p>	<p>The committee appreciates the commentator's response to this question. Based on the weight of the comments on this issue, however, the committee decided to recommend that the Judicial Council amend the advisory committee comment to rule 8.45, rather than the text of rule 8.47. Rule 8.45 addresses the transmission of sealed and confidential records generally. This reflects a policy decision to consolidate provisions relating to confidential records to the extent possible, rather than having multiple, separate but similar provisions addressing access to and transmission of different types of confidential documents. The committee's view is that it would be contrary to this policy approach, and could cause interpretive issues, to also have a separate requirement regarding transmission of <i>Marsden</i> transcripts in rule 8.47 when transmission of such transcripts is already covered by rule 8.45.</p> <p>For the same reasons articulated above, the committee decided against adding references regarding <i>Marsden</i> transcripts in rule 8.401. This topic is covered in rules 8.45-8.47 and rule 8.401(b)(3) includes a cross reference to these rules. Similarly, the committee decided against adding an additional mention of juvenile proceedings in rule 8.47(b). Rule 8.45(a) provides that rules 8.45-8.47 apply in all proceedings in the Court of Appeal. Thus, rule 8.47's provisions relating to <i>Marsden</i> transcripts generally cover appellate proceedings in</p>

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				juvenile cases. The specific mention of rule 8.401 in rule 8.47 is there to clarify an exception in juvenile cases to one provision of rule 8.47– the requirement of publically filing any brief raising a <i>Marsden</i> issue – since no briefs in juvenile cases are publically filed. However, the committee did modify the recommended amendments to the advisory committee comment to rule 8.45 so that the example provided more clearly encompasses Marsden transcripts in juvenile proceedings as well as criminal proceedings.
2.	Jonathan Berger Attorney Sebastopol	A	Good plan. Most courts do routinely include Marsden hearing transcripts with the record, but when they don't, it's at least mildly inconvenient to hunt them down. Every appellate defense attorney needs them, every time with no exception, so it would be in the interests of efficiency to just make it automatic.	The committee notes the commentator's support for the proposal; no response required.
3.	Orange County Bar Association Todd G. Friedland, President	A	No specific comment.	The committee notes the commentator's support for the proposal; no response required.
4.	State Bar of California Paul Killion, Chair, 2015-2016 Committee on Appellate Courts	A	The Committee on Appellate Courts supports the proposal to amend the advisory committee comment to rule 8.45, to clarify that superior court clerks are required in criminal cases to send a copy of the confidential transcript from any in-camera <i>Marsden</i> hearing to defendant's appellate counsel or, if not yet appointed, the district appellate project. This seems to be the easiest solution for clarifying the rule. The effectiveness	The committee notes the commentator's support for the proposal.



**SPR16-04****Appellate Procedure: Transcripts of Marsden Hearings** (amend advisory committee comment to rule 8.45)

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			<p>of this change will likely depend on whether superior court clerks receive notification of it and adopt procedures for ensuring compliance.</p> <p>The invitation to comment asks whether it would be preferable to formally amend rule 8.47, which discusses the use of a <i>Marsden</i> transcript in the Court of Appeal. As above, the Committee believes that adding an advisory committee comment to Rule 8.45 would be sufficient. However, if a more formal approach is taken, the Committee suggests amending rule 8.45, rather than rule 8.47. Rule 8.45 already addresses the superior court's role in transmitting certain confidential documents once an appeal is filed. Rule 8.45(d)(3) and (4) address two types of criminal documents specifically: a transcript from a confidential informant hearing, and a probation report. Along these lines, a new subdivision (d)(5) could be added to address <i>Marsden</i> transcripts.</p>	<p>The committee appreciates the commentator's response to this question. As noted above, based on the weight of the comments on this issue, the committee decided to recommend that the Judicial Council amend the advisory committee comment to rule 8.45, rather than the text of either rule 8.45 or rule 8.47.</p>
5.	Superior Court of Los Angeles County	A	No specific comment.	The committee notes the commentator's support for the proposal; no response required.
6.	Superior Court of San Diego County Mike Roddy, Executive Officer,	AM	<p>Q: Does the proposal appropriately address the stated purpose? Yes – clarification. However, it should be noted that there is an incorrect spelling on the fourth line of the proposed amendment to the Advisory Committee Comment to rule 8.45 – “musty” should read “must.”</p> <p>Q: Whether it would be preferable to amend rule 8.47 to add language specifically requiring the</p>	<p>The committee appreciates the commentator catching this typographical error; the committee has revised the proposal to correct this error.</p> <p>The committee appreciates the commentator's response to this question. Based on the weight</p>

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	Commentator	Position	Comment	Committee Response
			<p>superior court clerk to send one copy of a Marsden transcript to the defendant's appellate counsel or, if the defendant is not yet represented by counsel, [to the district appellate project]? Perhaps in the future, but the comment itself is helpful at this point and mirrors current practice.</p> <p>Q: Would the proposal provide cost savings? No.</p> <p>Q: What are implementations requirements for courts? None – mirrors current practice.</p> <p>Q: Would two months from JC approval of this proposal until its effective date provide sufficient time for implementation? Yes.</p> <p>Additional comments: None.</p>	<p>of the comments on this issue, the committee decided to recommend that the Judicial Council amend the advisory committee comment to rule 8.45, rather than the text of rule 8.47.</p> <p>The committee appreciates the commentator's responses to these questions.</p>