



Judicial Council of California

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INVITATION TO COMMENT

SPR24-03

Title

Appellate Procedure: Expanded Clerk's
Transcript in Felony Appeals

Action Requested

Review and submit comments by May 3, 2024

Proposed Rules, Forms, Standards, or Statutes

Amend Cal. Rules of Court, rule 8.320

Proposed Effective Date

January 1, 2025

Proposed by

Appellate Advisory Committee
Hon. Louis Mauro, Chair

Contact

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Executive Summary and Origin

The Appellate Advisory Committee proposes amending California Rules of Court, rule 8.320 to authorize the Courts of Appeal to require, by local rule, that the clerk's transcript in felony appeals include either (1) all contents of the superior court file or (2) additional items from the superior court file beyond those currently required in rule 8.320(b). This proposal is designed to help minimize delays in felony appeals occasioned by the need to cure omissions from, or make augmentations to, the clerk's transcript. This proposal originated from a recommendation of the former Chief Justice's Appellate Caseflow Workgroup.

Proposal

Under California Rules of Court, rule 8.320, the normal record on appeal in an appeal from a judgment of conviction (or an appeal from an order granting a new trial) in a felony cases must contain both a reporter's transcript and a clerk's transcript.¹ Rule 8.320(b) governs the contents of the clerk's transcript, and it identifies a number of filings, orders, and other items from the superior court proceedings that must be included in the clerk's transcript.

The need to parse through the superior court records to find all the items that rule 8.320(b) requires to be included in the clerk's transcript can be time consuming. Additionally, required

¹ All further references to rules are to the California Rules of Court.

items can be erroneously omitted. In its December 2022 report, the Appellate Caseflow Workgroup recognized that the “need to cure omissions from and to make augmentations to the standard criminal record are two of the most significant causes for record preparation delay.”²

To address this, the committee proposes amending rule 8.320(b) by adding a new paragraph that authorizes the Courts of Appeal to adopt local rules requiring the clerk’s transcript to include either “all contents of the superior court file” or “[a]dditional filings, orders, or other documents contained in the superior court file, in addition to the items listed in (b)(1).” The committee also proposes to amend the advisory committee comment to state that, for purposes of this rule, items which are excluded from the definition of “court record” under rule 2.502(3) are not considered part of the “superior court file.” This would exclude items such as a judge’s personal notes or memoranda of judges or other judicial branch personnel as well as reporter’s transcripts for which the reporter is entitled to receive a fee. A judge’s notes and memoranda are traditionally not included in the case file or treated as a court record³ and reporter’s transcripts are covered by the rules governing the creation of the reporter’s transcript on appeal. The committee seeks specific comment on whether this limitation should be included in the rule text as opposed to the advisory committee comment.

In addition, the proposed new paragraph would, notwithstanding rule 8.320(e),⁴ authorize a Court of Appeal’s local rule to require the clerk’s transcript to include copies of exhibits admitted into evidence, refused, or lodged. The committee seeks specific comment on whether the proposal should include this provision to provide the Courts of Appeal with greater flexibility on how to handle exhibits.

Requiring the clerk’s transcript to include all the records from the trial court proceeding could alleviate the appellate record-preparation delays identified by the Appellate Caseflow Workgroup. First, the appellate record preparation process would be simplified because clerks would no longer have to determine whether a given record from the trial court proceeding is required to be included in the clerk’s transcript under rule 8.320(b). Second, there would be no need for the clerk to cure omissions from the transcript or time-consuming motions to augment to the clerk’s transcript with items not listed in rule 8.320(b) because the clerk’s transcript would include all records from the trial court proceeding.

² Appellate Caseflow Workgroup, *Report to the Chief Justice* (Dec. 6, 2022), p. 20, https://newsroom.courts.ca.gov/sites/default/files/newsroom/2022-12/Appellate%20Caseflow%20Workgroup%20Report_Final.pdf. The Workgroup was appointed by former Chief Justice Tani G. Cantil-Sakauye in June 2022. The Chief Justice directed the Workgroup to “review policies, procedures, and management and administrative practices of the Courts of Appeal, and to recommend measures to promote transparency, accountability, and efficiency in issuing timely judgments.” (*Id.* at p. 1.)

³ Rule 2.502(3); *People v. Lewis & Oliver* (2006) 39 Cal.4th 970 (a judge’s bench notes “are not public or court records in the sense that they represent or record the official work or actions of the judge or his clerk”).

⁴ Under rule 8.320(e), “[e]xhibits admitted into evidence, refused, or lodged are deemed part of the record but may be transmitted to the reviewing court only as provided in rule 8.224.”

At the same time, however, including the all the records from the trial court proceeding in the clerk's transcript would result in larger records on appeal that could include a number of items irrelevant to the issues on appeal. Such an approach could also create practical burdens that could vary based on the superior court from which the case originates. Although many superior courts maintain their records electronically, not all do. In addition, the courts that do maintain their records electronically use a variety of case management systems that may differ in their capabilities. One court may have the ability to easily download all the records from a case for inclusion in the clerk's transcript, while in another court this exercise would require a time-consuming effort. Additionally, although a superior court that maintains paper files may be able to copy the entire file into the clerk's transcript, doing so may impose burdens on the superior court to copy all of this material and on the Court of Appeal to handle the paper record.

The proposed rule, therefore, would permit each Court of Appeal to consider the capabilities of the superior courts in its district, weigh the potential time-saving benefits against the potential costs inherent in preparing or reviewing a larger record on appeal, and tailor its local rule accordingly.

Alternatives Considered

Appellate Caseflow Workgroup recommendation

In addressing the record preparation delays discussed above, the Appellate Caseflow Workgroup encouraged the Judicial Council to consider "adopting a rule of court that would allow litigants in criminal cases to stipulate to the use of the superior court file in lieu of a clerk's transcript."⁵ The committee declined to propose this specific suggestion for the following reasons.

First, the committee believes adoption of a separate rule specifically addressing use of the superior court file as an alternative to the clerk's transcript would add complexity to the rules and record designation process. Such a rule, likely mirrored on rule 8.128, which applies in unlimited civil appeals, would have to provide new deadlines and impose new obligations on superior court clerks describing how to prepare the court file. Authorizing the Courts of Appeal to expand the contents of the clerk's transcript, by contrast, would accomplish the Workgroup's goal of streamlining the record preparation process while using the existing clerk's transcript procedures.

Second, the committee determined that an additional requirement that the parties stipulate to the use of an expanded clerk's transcript may be unnecessary. Rules 8.833, 8.863, and 8.914 which permit the use of the original trial court record in lieu of the clerk's transcript in limited civil, misdemeanor, and infraction appeals, respectively, do not contain a requirement that the parties stipulate to the use of the original trial court file. The committee seeks specific comment on whether the proposal should include a requirement that the parties stipulate to the use of an expanded clerk's transcript.

⁵ Appellate Caseflow Workgroup, *supra*, at p. 2.

Other alternatives considered

As currently drafted, the proposal addresses only rule 8.320(b), which applies where the “defendant appeals from a judgment of conviction” or the “People appeal from an order granting a new trial.”⁶ Rule 8.320(d), by contrast, provides for a “[l]imited normal record” in all other felony appeals, including postconviction proceedings. The committee considered whether the proposal should amend rule 8.320(d) to add a similar provision authorizing the Courts of Appeal to expand the items that will be contained in the clerk’s transcript for these proceedings. The committee seeks specific comment on whether the proposal should be amended in this way.

Finally, the committee considered the alternative of taking no action but rejected this option on the ground that the proposal has the potential to make the record preparation process more efficient.

Fiscal and Operational Impacts

The committee does not anticipate any fiscal or operational impacts on the courts as a result of the proposed amendments. Implementation requirements for courts would involve making the Courts of Appeal aware of the changes and the discretion the amended rule would provide.

⁶ Rule 8.320(a).

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?
- Should the rule text define “superior court file” as excluding items not considered “court records” as defined by rule 2.502(3), or is it enough to have this limitation addressed in the advisory committee comment?
- Should the proposal include a provision allowing for a Court of Appeal’s local rule to require inclusion of exhibits in the clerk’s transcript?
- In addition to authorizing Courts of Appeal to adopt a local rule expanding the contents of the clerk’s transcript, should the proposal include a requirement that the parties stipulate before an expanded clerk’s transcript is used?
- Should rule 8.320(d) be similarly amended to allow the Courts of Appeal to adopt a local rule expanding the contents of the clerk’s transcript in appeals governed by that 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.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Cal. Rules of Court, rule 8.320, at pages 6–8

Rule 8.320 of the California Rules of Court would be amended, effective January 1, 2025, to read:

1 **Rule 8.320. Normal record; exhibits**

2
3 (a) * * *

4
5 (b) **Clerk's transcript**

6
7 (1) The clerk's transcript must contain:

8
9 (1) ~~(A)~~ (A) The accusatory pleading and any amendment;

10
11 ~~(2)~~ (B) Any demurrer or other plea;

12
13 ~~(3)~~ (C) All court minutes;

14
15 ~~(4)~~ (D) All jury instructions that any party submitted in writing and the
16 cover page required by rule 2.1055(b)(2) indicating the party requesting
17 each instruction, and any written jury instructions given by the court;

18
19 ~~(5)~~ (E) Any written communication between the court and the jury or
20 any individual juror;

21
22 ~~(6)~~ (F) Any verdict;

23
24 ~~(7)~~ (G) Any written opinion of the court;

25
26 ~~(8)~~ (H) The judgment or order appealed from and any abstract of
27 judgment or commitment;

28
29 ~~(9)~~ (I) Any motion for new trial, with supporting and opposing
30 memoranda and attachments;

31
32 ~~(10)~~ (J) The notice of appeal and any certificate of probable cause filed
33 under rule 8.304(b);

34
35 ~~(11)~~ (K) Any transcript of a sound or sound-and-video recording furnished to
36 the jury or tendered to the court under rule 2.1040;

37
38 ~~(12)~~ (L) Any application for additional record and any order on the
39 application;

40
41 ~~(13)~~ (M) And, if the appellant is the defendant:
42

1 ~~(A)~~ (i) Any written defense motion denied in whole or in part,
2 with supporting and opposing memoranda and attachments;

3
4 ~~(B)~~ (ii) If related to a motion under ~~(A)~~ (i), any search warrant and
5 return and the reporter’s transcript of any preliminary
6 examination or grand jury hearing;

7
8 ~~(C)~~ (iii) Any document admitted in evidence to prove a prior
9 juvenile adjudication, criminal conviction, or prison term;

10
11 ~~(D)~~ (iv) The probation officer’s report; and

12
13 ~~(E)~~ (v) Any court-ordered diagnostic or psychological report
14 required under Penal Code section 1203.03(b) or 1369.

15
16 (2) The reviewing court may, by local rule, require the clerk’s transcript to
17 include:

18
19 (A) All contents of the superior court file; or

20
21 (B) Additional filings, orders, or other documents contained in the superior
22 court file, in addition to the items listed in (b)(1).

23
24 Notwithstanding (e), the reviewing court’s local rule under (A) or (B) may
25 require the clerk’s transcript to include copies of exhibits admitted into
26 evidence, refused, or lodged.

27
28 (c)–(d) * * *

29
30 (e) **Exhibits**

31
32 Exhibits admitted in evidence, refused, or lodged are deemed part of the record, but
33 may be transmitted to the reviewing court only as provided in rule 8.224.

34
35 (f) * * *

36
37 **Advisory Committee Comment**

38
39 Rules 8.45–8.46 address the appropriate handling of sealed and confidential records that must be
40 included in the record on appeal. Examples of confidential records include Penal Code section
41 1203.03 diagnostic reports, records closed to inspection by court order under *People v. Marsden*
42 (1970) 2 Cal.3d 118 or *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, in-camera proceedings

1 on a confidential informant, and defense expert funding requests (Pen. Code, § 987.9; *Keenan v.*
2 *Superior Court* (1982) 31 Cal.3d 424, 430).

3
4 **Subdivision (d)(1)(E).** This rule identifies the minutes that must be included in the record. The
5 trial court clerk may include additional minutes beyond those identified in this rule if that would
6 be more cost-effective.

7
8 **Subdivision (b)(2).** This rule authorizes the Courts of Appeal to adopt local rules which require
9 additional materials to be included in the clerk’s transcript, up to the entire contents of the
10 superior court file. For purposes of this rule, items excluded from the definition of “court records”
11 under rule 2.502(3) are not considered part of the superior court file.

12
13 Rule 8.483 governs the normal record and exhibits in civil commitment appeals.
14
15