

Judicial Council of California • Administrative Office of the Courts

455 Golden Gate Avenue · San Francisco, California 94102-3688
www.courtinfo.ca.gov/invitationstocomment/

INVITATION TO COMMENT

W11-02

Title	Action Requested
Trial and Appellate Procedure: Electronic Recordings Offered Into Evidence	Review and submit comments by Monday, January 24, 2011
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Amend Cal. Rules of Court, rules 2.1040 and 8.122	July 1, 2011
Proposed by	Contact
Appellate Advisory Committee Hon. Kathryn Doi Todd, Chair	Heather Anderson, 415-865-7691, heather.anderson@jud.ca.gov

Summary

This is a revised version of a proposal that was circulated for comment in spring 2010. This proposal would amend the rule relating to electronic recordings offered into evidence in trial court proceedings to better ensure that a record of these recordings is available in the event of an appeal. The proposed amendments include adding a requirement that, before any sound or sound-and-video recording of deposition or other testimony is offered into evidence or presented, a transcript of the testimony must be lodged with the court and that the party presenting or offering the recording must identify on the record the page and line numbers of the testimony. Unlike the proposal circulated this spring, this revised proposal would retain trial judges' discretion to waive the requirement that parties provide transcripts of recordings other than recordings of deposition or other testimony.

Discussion

Rule 2.1040 of the California Rules of Court currently provides that, unless otherwise ordered by the trial judge, a party offering into evidence an electronic sound or sound-and-video recording must tender to the court a typewritten transcript of the electronic recording, and a copy of the transcript must be filed by the clerk and must be made part of the clerk's transcript in the event of an appeal. The rules on felony, misdemeanor, and infraction appeals also specifically require that any transcript provided by a party under rule 2.1040 be included in the clerk's transcript on appeal (see rules 8.320, 8.861, and 8.912). Sometimes, however, a party offering such a recording into evidence does not tender a transcript of the recording and the court reporter is not asked to take down the content of the electronic recording. As a result, no written record of the

The proposals have not been approved by the Judicial Council and are not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. These proposals are circulated for comment purposes only.

recording is available in the event of an appeal. This creates delays and increases costs in the appellate proceeding.

To address this problem, this proposal would make several changes to rule 2.1040. These changes are designed to better ensure that, in the event of an appeal, there is an appropriate record of any recording offered into evidence or presented in the trial court proceedings while at the same time balancing the interests of litigants and trial courts in not delaying or increasing costs in the trial court proceedings.

Recordings of deposition or other prior testimony

This proposal would add a new provision specifically addressing sound and sound-and-video recordings of deposition or other prior testimony (amended rule 2.1040(a)). Under this provision, before presenting or offering into evidence such an electronic recording, a party would be required to lodge a transcript of the testimony with the court. It is the committee's understanding that when a deposition or other testimony is electronically recorded, a written transcript of the testimony is also typically prepared. Thus, any party that wishes to present an electronic recording of such testimony in a trial court proceeding will typically already have a transcript of that testimony and it should not increase litigation costs or delay the trial court proceedings to require that a copy of that transcript be provided to the court.

To ensure that there is a record of the portion of the recording that is actually presented or offered into evidence in the trial court, this proposal would also require the party presenting or offering the electronic recording to identify on the record the page and line numbers in the transcript where the testimony being presented or offered appears (amended rule 2.1040(a)(1)). In addition, it would require that, unless the court reporter takes down all portions of the electronic recording that are played, the party presenting or offering the electronic recording must serve and file — within 5 days after the recording is presented or offered or by the close of evidence, whichever is later — a copy of the cover of the transcript showing the witness name and a copy of the pages of the transcript where the testimony played appears (amended rule 2.1040(a)(2)). The committee would particularly appreciate comments about whether the party presenting or offering the recording should be required to mark the transcript pages to reflect what testimony on each page was presented or offered.

Other electronic recordings

For all other electronic recordings, such as 911 tapes and day-in-the-life videos, this proposal would maintain the current requirement that the party offering the electronic recording into evidence must generally provide a transcript of the recording unless the trial court judge orders otherwise. However, the proposed amendments would also establish that a transcript need not be provided either in uncontested proceedings (unless ordered by the trial judge) or if the parties stipulate that the sound portion of the recording does not contain any words relevant to the issues in the case (amended rule 2.1040(b)(3)). Because uncontested proceedings are rarely the subject of an appeal, the committee concluded that it would be an unnecessary burden and expense to require a transcript of electronic recordings offered into evidence in these proceedings. Similarly,

preparing a transcript would be an unnecessary burden and expense if the parties agree that there are no words on the electronic recording that are relevant to the case.

When a transcript is required, this proposal would authorize the trial judge to permit the party to provide the transcript five days after the electronic recording is offered or presented or at the close of evidence, whichever is later (amended rule 2.1040(b)(2)). This provision would give the party the opportunity to prepare a transcript if one is not available at the time the recording is presented or offered into evidence and should ensure that the trial court proceedings are not delayed by the lack of a transcript. This proposal would also add a requirement that the party presenting or offering the recording into evidence provide other parties with a copy of the electronic recording. This would allow the other parties to check the recording if any question arises concerning the accuracy of the transcript.

Advisory committee comment

To guide courts and litigants, a new advisory committee comment would be added to rule 2.1040. The comment would explain that the purpose of rule 2.1040 is to ensure that an appropriate record of any electronic recording presented or offered into evidence is available in the event of an appeal. It would also note that while in most circumstances the electronic recording itself, not a transcript, is considered the evidence offered or presented, under Code of Civil Procedure section 2025.510(g) if the testimony at a deposition is recorded both stenographically and by audio or video technology, the stenographic transcript is the official record of that testimony for the purpose of the trial and any subsequent hearing or appeal. In addition, the comment would clarify that if only a portion of a longer electronic recording is presented or offered into evidence, the transcript and duplicate recording provided by the party should contain only that portion of the electronic recording. Finally, the comment would provide guidance about the circumstances in which it would be beneficial to have a court reporter take down the content of an electronic recording.

Impact on Local Rules

Some superior courts have local rules regarding electronic recordings offered into evidence. To the extent that these local rules conflict with proposed rule 2.1040, they would be preempted.

Rule 8.122

This proposal also includes a clarifying amendment to rule 8.122, relating to clerk's transcripts in civil appeals in the Court of Appeal. Rule 8.122 currently provides that the clerk must not copy or transmit to the reviewing court the original of a deposition. When the earlier proposal to amend rule 2.1040 was circulated for public comment, a commentator expressed concerns that this provision in rule 8.122 might be read as inconsistent with the intent that portions of a deposition transcript might be included in the clerk's transcript under rule 2.1040. To address this concern, this proposal would add an exception to this provision in rule 8.122 for transcripts of portions of a deposition presented or offered into evidence under rule 2.1040.

Rules 2.1040 and 8.122 of the California Rules of Court would be amended, effective July 1, 2011, to read:

Title 2. Trial Court Rules

Division 8. Trials

Chapter 3. Testimony and Evidence

Rule 2.1040. Electronic recordings presented or offered into evidence

(a) Electronic recordings of deposition or other prior testimony

(1) Before a party may present or offer into evidence an electronic sound or sound-and-video recording of deposition or other prior testimony, the party must lodge a transcript of the deposition or prior testimony with the court. At the time the recording is played, the party must identify on the record the page and line numbers where the testimony presented or offered appears in the transcript.

(2) Except as provided in (3), at the time the presentation of evidence closes or within five days after the recording in (1) is presented or offered into evidence, whichever is later, the party presenting or offering the recording into evidence must serve and file a copy of the transcript cover showing the witness name and a copy of the pages of the transcript where the testimony presented or offered appears.

(3) If the court reporter takes down the content of all portions of an electronic recording that were presented or offered into evidence, the party offering or presenting the recording is not required to provide a transcript of that recording under (2).

~~(a)(b) Transcript of Other electronic recordings~~

~~(1) Unless otherwise ordered by the trial judge~~ Except as provided in (2) and (3), before a party may present or offering into evidence any electronic sound or sound-and-video recording not covered under (a), the party must tender provide to the court and to opposing parties a typewritten transcript of the electronic recording. The transcript must be marked for identification. A and provide opposing parties with a duplicate of the transcript electronic recording, as defined in Evidence Code section 260.5, must be filed by the clerk and must be part of the clerk's transcript in the event of an appeal. The

1 transcript may be prepared by the party presenting or offering the recording
2 into evidence; a certified transcript is not required.

3
4 (2) For good cause, the trial judge may permit the party to provide the transcript
5 or the duplicate recording at the time the presentation of evidence closes or
6 within five days after the recording is presented or offered into evidence,
7 whichever is later.

8
9 (3) No transcript is required to be provided under (1):

10
11 (A) In proceedings that are uncontested or in which the responding party
12 does not appear, unless otherwise ordered by the trial judge;

13
14 (B) If the parties stipulate in writing or on the record that the sound portion
15 of a sound-and-video recording does not contain any words that are
16 relevant to the issues in the case; or

17
18 (C) If the trial judge orders that a transcript is not required.

19
20 **(c) Clerk's duties**

21
22 ~~Any other~~ An electronic recording transcript provided to the jury court under this
23 rule must also be marked for identification, and a duplicate A transcript provided
24 under (a)(2) or (b)(1) must be filed by the clerk and made part of the clerk's
25 transcript in the event of an appeal.

26
27 **(b)(d) Transcription by court reporter not required**

28
29 Unless otherwise ordered by the trial judge, the court reporter need not take down
30 ~~or transcribe~~ the content of an electronic recording that is offered or presented
31 ~~admitted~~ into evidence.

32
33 **Advisory Committee Comment**

34
35 This rule is designed to ensure that, in the event of an appeal, there is an appropriate record of any
36 electronic sound or sound-and-video recording that was presented or offered into evidence in the
37 trial court. The rules on felony, misdemeanor, and infraction appeals require that any transcript
38 provided by a party under this rule be included in the clerk's transcript on appeal (see rules 8.320,
39 8.861, and 8.912). In civil appeals, the parties may designate such a transcript for inclusion in the
40 clerk's transcript (see rules 8.122(b) and 8.832(a)).

41
42 **Subdivision (a).** Note that, under Code of Civil Procedure section 2025.510(g), if the testimony
43 at a deposition is recorded both stenographically and by audio or video technology, the

1 stenographic transcript is the official record of that testimony for the purpose of the trial and any
2 subsequent hearing or appeal.

3
4 **Subdivision (a)(2).** The party offering or presenting the electronic recording may serve and file a
5 copy of the cover and of the relevant pages of the deposition or other transcript; a new transcript
6 need not be prepared.

7
8 **Subdivision (b).** Note that, with the exception of recordings covered by Code of Civil Procedure
9 section 2025.510(g), the recording itself, not the transcript, is the evidence that was offered or
10 presented (see *People v. Sims* (1993) 5 Cal.4th 405, 448). Sometimes, a party may present or
11 offer into evidence only a portion of a longer electronic recording. In such circumstances, the
12 transcript provided to the court and opposing parties should contain only a transcription of those
13 portions of the electronic recording that are actually presented or offered into evidence. If a party
14 believes that a transcript provided under this subdivision is inaccurate, the party can raise an
15 objection in the trial court.

16
17 **Subdivision (c).** The requirement to file a transcript provided to the court under (a)(2) or (b)(1) is
18 intended to ensure that the transcript is available for inclusion in a clerk’s transcript in the event
19 of an appeal.

20
21 **Subdivision (d).** In some circumstances it may be helpful to have the court reporter take down
22 the content of an electronic recording. For example, when short portions of a sound or sound-and-
23 video recording of deposition or other testimony are played to impeach statements made by a
24 witness on the stand, the best way to create a useful record of the proceedings may be for the
25 court reporter to take down the portions of recorded testimony that are interspersed with the live
26 testimony.

27
28
29 **Title 8. Appellate Rules**

30
31 **Division 1. Rules Relating to the Supreme Court and Courts of Appeal**

32
33 **Chapter 2. Civil Appeals**

34
35 **Article 1. Record on Appeal**

36
37
38 **Rule 8.122. Clerk’s transcript**

39
40 **(a) * * ***

41
42 **(b) Contents of transcript**

1
2
3
4
5
6
7
8
9
10
11
12

(1)–(3) * * *

(4) Unless the reviewing court orders or the parties stipulate otherwise:

(A) The clerk must not copy or transmit to the reviewing court the original of a deposition except those portions of a deposition presented or offered into evidence under rule 2.1040.

(B) * * *

(c)–(d) * * *

Item W11-02 Response Form

Title: Trial and Appellate Procedure: Electronic Recordings Offered Into Evidence
(amend Cal. Rules of Court, rules 2.1040 and 8.122)

- Agree** with proposed changes
- Agree** with proposed changes **if modified**
- Do not agree** with proposed changes

Comments: _____

Name: _____ Title: _____

Organization: _____

- Commenting on behalf of an organization**

Address: _____

City, State, Zip: _____

To Submit Comments

Comments may be submitted online, written on this form, or prepared in a letter format. If you are *not* commenting directly on this form, please include the information requested above and the proposal number for identification purposes. Please submit your comments online or email, mail, or fax comments. You are welcome to email your comments as an attachment.

Internet: <http://www.courtinfo.ca.gov/invitationstocomment/>

Email: invitations@jud.ca.gov

Mail: Ms. Camilla Kieliger
Judicial Council, 455 Golden Gate Avenue
San Francisco, CA 94102

Fax: (415) 865-7664, Attn: Camilla Kieliger

DEADLINE FOR COMMENT: 5:00 p.m., Monday, January 24, 2011
--

The proposals have not been approved by the Judicial Council and are not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. These proposals are circulated for comment purposes only.