

# JUDICIAL COUNCIL OF CALIFORNIA

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## INVITATION TO COMMENT

### SPR21-15

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<b>Title</b>	<b>Action Requested</b>
Rules: Lodged Electronic Exhibits	Review and submit comments by May 27, 2021
<b>Proposed Rules, Forms, Standards, or Statutes</b>	<b>Proposed Effective Date</b>
Adopt Cal. Rules of Court, rule 2.901	January 1, 2022
<b>Proposed by</b>	<b>Contact</b>
Information Technology Advisory Committee Hon. Sheila F. Hanson, Chair	Andrea L. Jaramillo, 916-263-0991 <a href="mailto:andrea.jaramillo@jud.ca.gov">andrea.jaramillo@jud.ca.gov</a>

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### Executive Summary and Origin

The Information Technology Advisory Committee recommends that the Judicial Council adopt a new rule of court to define and govern “lodged electronic exhibits.” The purpose of the proposal is to provide clarity and facilitate the use of electronic exhibits in court proceedings. The proposal originates with recommendations from the Information Technology Advisory Committee’s Digital Evidence Workstream.

### Background

In 2017, the Information Technology Advisory Committee (ITAC) established the Digital Evidence Workstream to investigate, assess, and report on statutes, rules, business practices, and technical standards related to digital evidence, also known as electronic evidence. During the first phase of the workstream’s activity, the workstream completed a survey of the courts about digital evidence. During the next phase, the workstream established a subgroup (1) to work on identifying statutes and rules that need to change to allow courts to implement and receive electronic evidence, and (2) to identify and recommend new statutes and rules where appropriate. In November 2020, the workstream presented its recommendations to ITAC, including rules defining and governing “lodged electronic exhibits.”

### The Proposal

The proposal would add rule 2.901 to the California Rules of Court to define “lodged electronic exhibits” and establish requirements for access and deletion. The purpose of the proposal is to provide clarity to the courts, litigants, and the public on the handling of exhibits in electronic format and to facilitate the use of electronic exhibits in court proceedings.

*This proposal has not been approved by the Judicial Council and is not intended to represent the views of the council, its Rules Committee, or its Legislation Committee. It is circulated for comment purposes only.*

Rule 2.901 would be located in chapter 1 of division 7 of title 2 of the California Rules of Court. This chapter governs general provisions for proceedings in the trial courts. As such, the rule would apply to all proceedings in the trial courts.

The proposal would define a “lodged electronic exhibit” as “an exhibit in electronic format that is not filed, but rather is electronically transmitted to or received by the court for temporary storage pending use at a trial or other evidentiary hearing.” The rule only concerns exhibits that are in electronic format rather than a physical format. While a lodged electronic exhibit may be something that originally exists in an electronic format, e.g., an email, the rule does not require a lodged electronic exhibit to have originally existed in electronic format. For example, a lodged electronic exhibit could be a copy of a paper map that was scanned to be in electronic format. In addition, because lodged electronic exhibits are electronically transmitted or received by the court, the court would be storing only the electronic exhibit, not physical items such as thumb drives or CDs.

Because a lodged electronic exhibit is only temporarily stored pending use in a trial or other evidentiary hearing, it may ultimately never be used. Unlike a filing, a lodged electronic exhibit may never become part of the court record. For example, a party might lodge an electronic exhibit by transmitting it through a court’s online portal designed for that purpose, and then during the proceeding decide not to present it. Hence, the rule limits access to lodged electronic exhibits to parties and the court pending their use in a proceeding. However, once a lodged electronic exhibit is admitted into evidence and becomes part of the record of the proceeding, access would not be limited to that exhibit unless the exhibit was otherwise confidential by law or sealed by court order.

Also, because lodged electronic exhibits are only temporarily stored pending use in a proceeding, the rule requires deletion of lodged electronic exhibits following the proceeding unless otherwise ordered by the court. The court must email or mail a confirmation of deletion to the party who submitted the lodged electronic exhibit.

### **Alternatives Considered**

One alternative to the proposal would be to maintain the status quo. However, because courts are increasingly becoming the recipients of exhibits in electronic format, the committee determined that a change is now needed to create clarity and facilitate the use of such exhibits.

The committee also considered alternative provisions. It discussed the timing for the court’s deletion of the lodged exhibits under rule 2.901(c) and whether it should be “immediately,” but decided that offering no specific timeline gives courts flexibility to delete the lodged electronic exhibits consistent with their own needs and schedules. The committee also discussed the scope of who may access lodged electronic exhibits and limited it to parties and the court until the lodged electronic exhibit is admitted into evidence. The committee seeks specific comments on the timing of deletion, the scope of who may access lodged electronic exhibits, and admission into evidence as the trigger for both broader scope access and retention of the exhibits.

The committee considered including a provision related to protection of privacy similar to rule 1.201 of the California Rules of Court, which governs protection of privacy in filed documents.<sup>1</sup> However, the committee determined it was not practical for inclusion in the proposed rule.

### **Fiscal and Operational Impacts**

The proposal does not require courts to accept lodged electronic exhibits, but if a court does accept lodged electronic exhibits, the rule governs how they must be handled. The rule does not prescribe the use of any particular system or technology for electronically receiving or handling lodged electronic exhibits. Costs to establish a system will likely vary depending on a court's current technical capabilities. Staff would need to be trained on any system and in local procedures for deletion and electronically categorizing exhibits that are admitted into evidence. Electronic storage of lodged electronic exhibits could become a challenge for courts in terms of storage capacity and technical capability.

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<sup>1</sup> Specifically, the committee considered, but ultimately decided not to include the following subdivision:

**(d) Exclusion or redaction of identifiers**

*(1) Identifiers*

To protect personal privacy and other legitimate interests, parties and their attorneys must not include, or must redact where inclusion is necessary, the following identifiers from all lodged electronic exhibits, unless otherwise provided by law or ordered by the court:

- (A) Social security numbers. If an individual's social security number is required, the last four digits of that number may remain unredacted.
- (B) Account numbers. If account numbers are required, the last four digits of these numbers may remain unredacted.
- (C) Complete dates of birth. If a date of birth is required, a partial date may remain unredacted.
- (D) Criminal Identification and Information numbers and National Crime Information Center numbers.
- (E) Addresses and phone numbers of victims, parties, witnesses, and court personnel.
- (F) Names of victims.

(2) The requirements of subdivision (d)(1) do not apply to lodged electronic exhibits that are sealed or otherwise confidential by law independent of this rule.

*(3) Responsibility of the party lodging the electronic exhibit*

The responsibility for excluding or redacting identifiers identified in (d)(1) from all electronic exhibits lodged with the court rests solely with the parties and their attorneys. The court clerk will not review each electronic exhibit for compliance with this provision.

*(4) Confidential reference list*

A party may replace a redacted identifier with a reference. If a party does so, the party must lodge electronically, along with the lodged electronic exhibit, a reference list. The reference list is confidential. The party lodging the reference list must include the word "CONFIDENTIAL" at the top of each page. The reference list must identify each item of redacted information and specify the reference that uniquely corresponds to each item of redacted information listed. The reference list must also specify the lodged electronic exhibits where the reference appears in place of the identifier. A single list may be used for the entire set of lodged electronic exhibits.

## 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?
- Subdivision (b) limits access to lodged electronic exhibits to parties and the court. Should the list be different—for example, a broader list like the list of those who may remotely access certain electronic records under rule 2.515(b) of the California Rules of Court?
- Under subdivision (b), once admitted into evidence, access to a lodged electronic exhibit is no longer limited to the parties and the court. Should the language of this subdivision be broader such as “offered into evidence” rather than “admitted into evidence”?
- Under subdivision (c), if not admitted into evidence, a lodged electronic exhibit must be deleted unless otherwise ordered by the court. Should the language of this subdivision be broader such as “offered into evidence” rather than “admitted into evidence”?
- Should subdivision (c) have a specific timeline for a court’s deletion of lodged exhibits?
- Should any lodged electronic exhibits *not* be deleted under subdivision (c)?

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?
- How well would this proposal work in courts of different sizes?

## Attachments and Links

1. Cal. Rules of Court, rule 2.901, at pages 5.

Rule 2.901 of the California Rules of Court would be adopted, effective January 1, 2022, to read:

1 **Rule 2.901. Lodged electronic exhibits**

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3 **(a) Definition**

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5 A “lodged electronic exhibit” is an exhibit in electronic format that is not filed, but  
6 rather is electronically transmitted to or received by the court for temporary storage  
7 pending use at a trial or other evidentiary hearing.

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9 **(b) Access to lodged electronic exhibits**

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11 (1) A lodged electronic exhibit may be accessible only by the parties and the  
12 court until it is admitted into evidence.

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14 (2) If a lodged electronic exhibit is confidential by law or sealed by court order,  
15 it does not lose its confidential or sealed status by operation of this rule.

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17 **(c) Deletion of lodged electronic exhibit if not admitted into evidence**

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19 Unless otherwise ordered by the court, if a lodged electronic exhibit is not admitted  
20 into evidence, the clerk must delete it after the hearing, proceeding, or trial for  
21 which it was submitted, and email or mail confirmation of such deletion must be  
22 sent to the submitting party.