

Judicial Council of California

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INVITATION TO COMMENT SPR18-36

Title	Action Requested
Technology: Rules Modernization Project	Review and submit comments by June 8, 2018
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Amend Cal. Rules of Court, rules 2.250, 2.251, 2.255, and 2.257	January 1, 2019
Proposed by	Contact
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Executive Summary and Origin

As part of the Rules Modernization Project, the Information Technology Advisory Committee recommends amending several rules related to electronic service and electronic filing. The purpose of the proposal is to conform the rules to the Code of Civil Procedure, clarify and remove redundancies in rule definitions, and ensure indigent filers are not required to have a payment mechanism to create an account with electronic filing service providers (EFSPs). The proposal includes amendments required by statute and suggested by the public.

Background

New provisions of Code of Civil Procedure section 1010.6 (section 1010.6) require express consent for electronic service, which will require rule amendments and adoption of a form for withdrawal of consent. In addition, new provisions of section 1010.6 require the Judicial Council to adopt rules of court related to disability access and electronic signatures for documents signed under penalty of perjury. Finally, the proposal includes amendments based on comments received from the public. These include amendments to the definitions and contract requirements between EFSPs and courts.

The Proposal

The proposal would make the following amendments:

- **“Document.”** Amend the definition of “document” in rule 2.250(b). The current wording can be read to mean that a document must be a filing. The proposed amendment removes this

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ambiguity by striking “filing” and replacing it with “writing” to clarify that a “document” is not necessarily a filing. The amendment was suggested by members of the public.

- **“Electronic service,” “electronic transmission,” and “electronic notification.”** Amend the definitions of “electronic service,” “electronic transmission,” and “electronic notification” in rule 2.250(b) to refer to the definitions in section 1010.6 rather than duplicate them. This is to avoid risk of the rules and Code of Civil Procedure differing in their definitions should the Legislature amend section 1010.6.
- **“Electronic filing manager.”** Add a definition for “electronic filing manager.” The proposal includes amendments to rule 2.255 to include electronic filing managers. Accordingly, a definition was also added and is based on descriptions of electronic filing managers the Judicial Council used in a request for proposals in 2017.
- **“Self-represented.”** Add a definition for “self-represented” to rule 2.250(b) and exclude attorneys from the definition. Rules applicable to self-represented persons were intended to add protections for those without an attorney. For example, self-represented persons are exempt from mandatory electronic filing. Attorneys acting for themselves are not acting without an attorney. Accordingly, attorneys are excluded from the definition of “self-represented” under the electronic filing and service rules. Because section 1010.6 uses the term “unrepresented” and the rules of court use the term “self-represented,” the definition in the rules refers to self-represented parties or other persons as being those unrepresented by an attorney. This proposal was a suggestion from a member of the public.
- **Express consent.** Amend rule 2.251(b) to require express consent for permissive electronic service and add a provision for how a party or other person may manifest consent as required by statute. The current rules allow the act of electronic filing to serve as consent to electronic service. Effective January 1, 2019, section 1010.6 will no longer allow the act of electronic filing alone to serve as consent. (§ 1010.6(a)(2)(A)(ii).) Under section 1010.6, parties may still consent through electronic means by “manifesting affirmative consent through electronic means with the court or the court’s electronic filing service provider, and concurrently providing the party’s electronic service address with that consent for the purpose of receiving electronic service.” The proposal amends the rules to remove the provision allowing the act of filing to serve as consent to electronic service and replaces it with the language for manifesting affirmative consent by electronic means from section 1010.6. The proposal also adds a provision for how a party or other person may “manifest affirmative consent.”
- **Electronic filing managers.** Amend rule 2.255 to add electronic filing managers within the scope of the rule. Section 1010.6(g)(2) requires that “[a]ny system for the electronic filing and service of documents, including any information technology applications, Internet Web sites, and Web-based applications, used by an electronic service provider or any other vendor or contractor that provides an electronic filing and service system to a trial court” be accessible by persons with disabilities and comply with certain access standards. Vendors

and contractors must comply as soon as practicable, but no later than June 30, 2019. (§ 1010.6(g)(3).) Likewise, the statute requires the Judicial Council to adopt rules to implement the requirements as soon as practicable, but no later than June 30, 2019. (§ 1010.6(g)(1).) Section 1010.6 includes specific requirements that courts and contractors must meet. Rule 2.255 already requires courts contracting with EFSPs to comply with section 1010.6. However, because the rules of court do not account for contracts with electronic filing managers, the proposal amends rule 2.255 to include them.

- ***Payment information.*** Amend rule 2.255 to add subdivision (f) requiring require EFSPs to allow filers to create an account without having to provide a credit card, debit card, or bank account information. The amendment is based on a suggestion from the State Bar’s Standing Committee on the Delivery of Legal Services. According to the standing committee, some EFSPs require such payment information even if the filer is never charged. According to the standing committee, this “creates an insurmountable barrier to those without access to credit or banking services.” Subdivision (f) provides that it only applies to the creation of an account, but not to the provision of services unless the filer has a fee waiver.
- ***Electronic signatures.*** Amend rule 2.257 to create a procedure for electronically filed documents signed under penalty of perjury. Section 1010.6(b)(2)(B)(ii) provides that when a document to be filed requires a signature made under penalty of perjury, the document is considered signed by the person if, in relevant part, “[t]he person has signed the document using a computer or other technology pursuant to the procedure set forth in a rule of court adopted by the Judicial Council by January 1, 2019.” Accordingly, the proposal creates a procedure where the document is deemed signed when the “declarant has signed the document using an electronic signature, and declares under penalty of perjury under the laws of the state of California that the information submitted is true and correct.” The language is modeled after the requirements in the Uniform Electronic Transactions Act (UETA) for electronic signatures made under penalty of perjury. (Civ. Code, § 1633.11(b).) In addition, a definition of “electronic signature” is added to the rule, modeled after the definitions used in UETA and the Code of Civil Procedure.

Alternatives Considered

The committee considered retaining the definitions of “electronic service,” “electronic transmission,” and “electronic notification” in rule 2.250(b) rather than referencing section 1010.6 for the definitions. Referencing the Code of Civil Procedure will create an extra step in looking up the definitions. However, the committee opted for the proposed language to remove the risk of having differing definitions should the Legislature amend section 1010.6.

The committee considered making a technical amendment to the consent requirements in rule 2.251(b) to ensure the rules comply with section 1010.6’s express consent requirements without interpreting the statute. However, the committee received public comments from the EFSP community raising concerns over uncertainty in the meaning of “manifesting affirmative

consent” in section 1010.6’s express consent requirements. The public comment included a proposed interpretation, which was integrated into the proposal.

Implementation Requirements, Costs, and Operational Impacts

It is expected that the new express consent requirements will result in one-time costs to EFSPs and courts to create a mechanism to capture affirmative consent by electronic means to electronic service. It is unknown whether or how these costs will impact the fees EFSPs charge filers for their services.

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?
- The amendments to rule 2.251(b) bring the rule into compliance with section 1010.6’s express consent requirements. In addition, the rule adds a provision for how a party or other person may “manifest affirmative consent.”
 - Is the provision for manifesting affirmative consent clear and does it adequately capture how a party or other person may manifest affirmative consent?
 - Rule 2.251(b) does not detail (1) how notice is to be given to the court that a party or other person has provided express consent, or (2) how notice of the same is to be given to other parties or persons in the case. The committee seeks specific comments on how such notification should be addressed in the rules.

Attachments and Links

1. Cal. Rules of Court, rules 2.250, 2.251, 2.255, and 2.257, pages 5–10
2. Code of Civil Procedure section 1010.6,
http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=1010.6&lawCode=CCP

Rules 2.250, 2.251, 2.255, and 2.257 of the California Rules of Court would be amended, effective January 1, 2019, to read:

1 **Rule 2.250. Construction and definitions**

2
3 (a) * * *

4
5 (b) **Definitions**

6
7 As used in this chapter, unless the context otherwise requires:

8
9 (1) A “document” is a pleading, ~~a paper~~, a declaration, an exhibit, or another
10 writing submitted by a party or other person, or by an agent of a party or
11 other person on the party’s or other person’s behalf. A document is also a
12 notice, order, judgment, or other issuance by the court. A document may be
13 in paper or electronic form.

14
15 (2) “Electronic service” has the same meaning as defined in Code of Civil
16 Procedure section 1010.6 is service of a document on a party or other person
17 by either electronic transmission or electronic notification. Electronic service
18 may be performed directly by a party or other person, by an agent of a party
19 or other person, including the party’s or other person’s attorney, through an
20 electronic filing service provider, or by a court.

21
22 (3) “Electronic transmission” has the same meaning as defined in Code of Civil
23 Procedure section 1010.6 means the transmission of a document by electronic
24 means to the electronic service address at or through which a party or other
25 person has authorized electronic service.

26
27 (4) “Electronic notification” has the same meaning as defined in Code of Civil
28 Procedure section 1010.6 means the notification of a party or other person
29 that a document is served by sending an electronic message to the electronic
30 service address at or through which the party or other person has authorized
31 electronic service, specifying the exact name of the document served and
32 providing a hyperlink at which the served document can be viewed and
33 downloaded.

34
35 (5)–(8) * * *

36
37 (9) An “electronic filing manager” is a service that acts as an intermediary
38 between a court and various electronic filing service provider solutions
39 certified for filing into California courts.

40
41 (10) “Self-represented” means a party or other person who is unrepresented in an
42 action by an attorney and does not include an attorney appearing in an action
43 who represents himself or herself.

1 **Rule 2.251. Electronic service**

2
3 (a) * * *

4
5 (b) **Electronic service by express consent of the parties**

6
7 (1) ~~Electronic service may be established by consent.~~ A party or other person
8 indicates that the party or other person agrees to accept electronic service by:

9
10 (A) Serving a notice on all parties and other persons that the party or other
11 person accepts electronic service and filing the notice with the court.
12 The notice must include the electronic service address at which the
13 party or other person agrees to accept service; or

14
15 (B) ~~Electronically filing any document with the court. The act of electronic~~
16 ~~filing is evidence that the party or other person agrees to accept service~~
17 ~~at the electronic service address the party or other person has furnished~~
18 ~~to the court under rule 2.256(a)(4). This subparagraph (B) does not~~
19 ~~apply to self-represented parties or other self-represented persons; they~~
20 ~~must affirmatively consent to electronic service under subparagraph~~
21 ~~(A). Manifesting affirmative consent through electronic means with the~~
22 ~~court or the court's electronic filing service provider, and concurrently~~
23 ~~providing the party's electronic service address with that consent for~~
24 ~~the purpose of receiving electronic service.~~

25
26 (C) A party or other person may manifest affirmative consent under (B) by:

27
28 (i) Agreeing to the terms of service agreement with an electronic
29 filing service provider, which clearly states that agreement
30 constitutes consent to receive electronic service electronically;
31 or

32
33 (ii) Filing *Consent to Electronic Service and Notice of Electronic*
34 *Service Address* (form EFS-005-CV).

35
36 (2) A party or other person that has consented to electronic service under (1) and
37 has used an electronic filing service provider to serve and file documents in a
38 case consents to service on that electronic filing service provider as the
39 designated agent for service for the party or other person in the case, until
40 such time as the party or other person designates a different agent for service.

41
42 (c)-(k) * * *

1 **Rule 2.255. Contracts with electronic filing service providers and electronic filing**
2 **managers**

3
4 **(a) Right to contract**

- 5
6 (1) A court may contract with one or more electronic filing service providers to
7 furnish and maintain an electronic filing system for the court.
8
9 (2) If the court contracts with an electronic filing service provider, it may require
10 electronic filers to transmit the documents to the provider.
11
12 (3) A court may contract with one or more electronic filing managers to act as an
13 intermediary between the court and electronic filing service providers.
14
15 ~~(3)~~(4) If the court contracts with an electronic service provider or the court has an
16 in-house system, the provider or system must accept filing from other
17 electronic filing service providers to the extent the provider or system is
18 compatible with them.
19

20 **(b) Provisions of contract**

- 21
22 (1) The court's contract with an electronic filing service provider may:
23
24 (A) Allow the provider to charge electronic filers a reasonable fee in
25 addition to the court's filing fee;
26
27 (B) Allow the provider to make other reasonable requirements for use of
28 the electronic filing system.
29
30 (2) The court's contract with an electronic filing service provider must comply
31 with the requirements of Code of Civil Procedure section 1010.6.
32
33 (3) The court's contract with an electronic filing manager must comply with the
34 requirements of Code of Civil Procedure section 1010.6.
35

36 **(c) Transmission of filing to court**

- 37
38 (1) An electronic filing service provider must promptly transmit any electronic
39 filing and any applicable filing fee to the court: directly or through the court's
40 electronic filing manager.
41
42 (2) An electronic filing manager must promptly transmit an electronic filing and
43 any applicable filing fee to the court.

1
2 **(d) Confirmation of receipt and filing of document**

- 3
4 (1) An electronic filing service provider must promptly send to an electronic filer
5 its confirmation of the receipt of any document that the filer has transmitted
6 to the provider for filing with the court.
7
8 (2) The electronic filing service provider must send its confirmation to the filer's
9 electronic service address and must indicate the date and time of receipt, in
10 accordance with rule 2.259(a).
11
12 (3) After reviewing the documents, the court must promptly transmit to the
13 electronic filing service provider and the electronic filer the court's
14 confirmation of filing or notice of rejection of filing, in accordance with rule
15 2.259.

16
17 **(e) Ownership of information**

18
19 All contracts between the court and electronic filing service providers or the court
20 and electronic filing managers must acknowledge that the court is the owner of the
21 contents of the filing system and has the exclusive right to control the system's use.
22

23 **(f) Establishing a filer account with an electronic filing service provider**

- 24
25 (1) An electronic filing service provider may not require a filer to provide a credit
26 card, debit card, or bank account information to create an account with the
27 electronic filing service provider.
28
29 (2) This provision applies only to the creation of an account and not to the use of
30 an electronic filing service provider's services. An electronic filing services
31 provider may require a filer to provide a credit card, debit card, or bank account
32 information before rendering services unless the services are within the scope
33 of a fee waiver granted by the court to the filer.
34

35 **Rule 2.257. Requirements for signatures on documents**

36
37 **(a) Electronic signature**

38
39 An electronic signature is an electronic sound, symbol, or process attached to or
40 logically associated with an electronic record and executed or adopted by a person
41 with the intent to sign a document or record created, generated, sent,
42 communicated, received, or stored by electronic means.
43

1 **(a)(b) Documents signed under penalty of perjury**

2
3 When a document to be filed electronically provides for a signature under penalty
4 of perjury of any person, the document is deemed to have been signed by that
5 person if filed electronically provided that either of the following conditions is
6 satisfied:

- 7
- 8 (1) The declarant has signed the document using an electronic signature a
9 computer or other technology, in accordance with procedures, standards, and
10 guidelines established by the Judicial Council and declares under penalty of
11 perjury under the laws of the state of California that the information
12 submitted is true and correct; or
- 13
- 14 (2) The declarant, before filing, has physically signed a printed form of the
15 document. By electronically filing the document, the electronic filer certifies
16 that the original, signed document is available for inspection and copying at
17 the request of the court or any other party. In the event this second method of
18 submitting documents electronically under penalty of perjury is used, the
19 following conditions apply:
- 20
- 21 (A) At any time after the electronic version of the document is filed, any
22 party may serve a demand for production of the original signed
23 document. The demand must be served on all other parties but need not
24 be filed with the court.
- 25
- 26 (B) Within five days of service of the demand under (A), the party or other
27 person on whom the demand is made must make the original signed
28 document available for inspection and copying by all other parties.
- 29
- 30 (C) At any time after the electronic version of the document is filed, the
31 court may order the filing party or other person to produce the original
32 signed document in court for inspection and copying by the court. The
33 order must specify the date, time, and place for the production and must
34 be served on all parties.
- 35
- 36 (D) Notwithstanding (A)–(C), local child support agencies may maintain
37 original, signed pleadings by way of an electronic copy in the statewide
38 automated child support system and must maintain them only for the
39 period of time stated in Government Code section 68152(a). If the local
40 child support agency maintains an electronic copy of the original,
41 signed pleading in the statewide automated child support system, it may
42 destroy the paper original.
- 43

1 ~~(b)(c)~~ * * *

2

3 ~~(e)(d)~~ * * *

4

5 ~~(d)(e)~~ * * *

6

7 ~~(e)(f)~~ * * *

8

9

Advisory Committee Comment

10

11 ~~Subdivision (a)(1). The standards and guidelines for electronic signatures that satisfy the~~
12 ~~requirements for an electronic signature under penalty of perjury are contained in the Trial Court~~
13 ~~Records Manual.~~