



## JUDICIAL COUNCIL OF CALIFORNIA

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### MEMORANDUM

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Date	Action Requested
October 3, 2014	Please review for October 14 meeting
To	Deadline
Members of the Joint Appellate Technology Subcommittee	October 14, 2014
From	Contact
Heather Anderson Senior Attorney, Legal Services	Heather Anderson Legal Services 415-865-7691 phone 415-865-7664 fax heather.anderson@jud.ca.gov
Subject	
Consideration of development of rule amendment to authorize electronic service on consenting courts	

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#### Introduction

As you may recall, one of the items on the list of projects for the Joint Appellate Technology Subcommittee is modernizing the appellate court rules for e-filing and e-business, including identifying, evaluating, and prioritizing potential rule changes. At its last meeting, the Appellate Advisory Committee (AAC) considered a suggestion from one of its members, Ms. Sheran Morton, Court Executive Officer of the Fresno County Superior Court, relating to electronic service. Given the subject matter of the suggestion, AAC concluded that this suggestion was best considered by the Joint Appellate Technology Subcommittee and so has referred the suggestion to the subcommittee.

## The Suggestion

There are several California Rules of Court that require that certain documents be served on the superior court. For example, rule 8.212(c)(1) requires that one copy of each brief in a civil appeal must be served on the superior court clerk for delivery to the trial judge. Similar language also appears in rule 8.360 relating to briefs in felony appeals, rule 8.412 relating to briefs in juvenile appeals, and rule 8.630 relating to briefs in capital appeals. Rules 8.500 and 8.508 relating to petitions for review filed in the Supreme Court similarly require that copies of such petitions be served on both the superior court and the Court of Appeal.

AAC committee member Sheran Morton said it would enhance efficiency if parties served the superior court's copy of briefs on the court electronically if the court consented to such service. She indicated that this would allow the court to forward the copy of the electronic brief to the trial judge by e-mail. She also noted that electronic service would, in many cases, be more efficient for those filing briefs.

Under the current rules, however, there is some uncertainty about whether electronic service on a court is authorized. Rule 8.25(a), which generally addresses service of documents in appellate proceedings, requires parties to serve documents "by any method permitted by the Code of Civil Procedure." Code of Civil Procedure section 1010.6 (the statute relating to electronic service and filing in the trial courts), rules 2.250 and 2.251 (part of the trial court rules relating to electronic filing and service); and rule 8.70 (part of the rules on electronic filing and service in the appellate courts) all define "electronic service" as service of a document, *on a party or other person* (emphasis added); they do not specifically provide for service on a court.

It could be argued that courts are encompassed within "other person" under these provisions. Under the definition in rule 1.6 (15), "[p]erson" includes a corporation *or other legal entity* as well as a natural person" (emphasis added). However, there is also a countervailing argument. Code of Civil Procedure section 1010.6 and rules 2.251 and 8.71 specifically address electronic service *by* a court. Under the general rules of statutory/rule interpretation, the lack of a provision regarding service *on* a court when service *by* a court is specifically addressed could potentially be interpreted as indicating intent not to authorize electronic service on a court.

Given the uncertainty about this whether the statute and rules on electronic service currently authorize electronic service on the court, the AAC concluded that the preferable approach was to consider developing a proposal to amend the rules to clarify that, with the court's consent, service can be made on a court electronically.

### The Draft Rule Amendment

Attached for the subcommittee's review and consideration is a draft of possible amendments to rule 8.71 to specifically permit electronic service on a court with that court's consent.

The amendment would add new subdivision (2) to 8.71(g), which currently addresses electronic service by a court. The initial paragraph of this new subdivision is modeled on the language of current 8.71(c)(2), which provides that a document may not be served on a nonparty unless that nonparty consents or electronic service is otherwise provided for by law or court order. The draft of new 8.71(g)(2) would similarly prohibit electronic service on a court without the court's consent unless such service is provided for by law or court order.

Subparts (A) and (B) of 8.71(g)(2) would specify how a court indicates its agreement to accept electronic service. Subpart (A) is modeled on 8.71(2)(A), which provides that a party may indicate it agrees to accept electronic service by serving a notice on all parties. The draft of new 8.71(g)(2)(A) would similarly provide that a court may indicate it agrees to accept electronic service by serving a notice on all parties. Subpart (B) would provide that the court may also indicate its agreement to accept electronic service by adopting a local rule stating this.

The attached draft also contains possible amendments to 8.71(a) and (c). These are intended to be nonsubstantive amendments to make this rule more consistent with the language of rule 2.251, relating to electronic service in the trial courts, and to consolidate provisions relating to the authorization for electronic service. The amendment would clarify that a document may be electronically served on a party or other person if electronic service is provided for by law or court order or if the party or person consents to this service. The amendment would also move the provision regarding service on a nonparty from subdivision (c) to subdivision (a).

### Subcommittee Task

The subcommittee's task is to analyze this proposal and:

- Ask staff or subcommittee members for further information/analysis;
- Advise AAC and CTAC on whether to:
  - recommend to RUPRO that all or part the proposal be approved for circulation as drafted or as amended by the subcommittee; or
  - reject the proposal.

**Rule 8.71. Electronic service**

**(a) ~~Consent to~~ Authorization for electronic service**

- (1) A document may be electronically served [on a party or other person] under these rules if:
  - (A) Electronic service is provided for by law or court order; or
  - (B) When a document may be served by mail, express mail, overnight delivery, or fax transmission, and the [recipient] [party or other person] agrees to accept electronic service of the document is permitted when authorized as provided by these rules.
- (2) A party indicates that the party agrees to accept electronic service by:
  - (A) Serving a notice on all parties that the party accepts electronic service and filing the notice with the court. The notice must include the electronic service address at which the party agrees to accept service; or
  - (B) Electronically filing any document with the court. The act of electronic filing is evidence that the party agrees to accept service at the electronic service address that the party has furnished to the court under rule 8.76(a)(4).
- (3) A party that has consented to electronic service under (2) and has used an electronic filing service provider to serve and file documents in a case consents to service on that electronic filing service provider as the designated agent for service for the party in the case, until such time as the party designates a different agent for service.
- (4) A document may not be electronically served on a nonparty unless the nonparty consents to electronic service or electronic service is otherwise provided for by law or court order.

**(b) Maintenance of electronic service lists**

When the court orders or permits electronic filing in a case, it must maintain and make available electronically to the parties an electronic service list that contains the parties' current electronic service addresses, as provided by the parties that have filed electronically in the case.

**(c) Service by the parties**

- (1) Notwithstanding (b), parties are responsible for electronic service on all other parties in the case. A party may serve documents electronically directly, by an agent, or through a designated electronic filing service provider.
- (2) ~~A document may not be electronically served on a nonparty unless the nonparty consents to electronic service or electronic service is otherwise provided for by law or court order.~~

**(d) – (g) \* \* \***

**(g) Electronic service by or on court**

- (1) The court may electronically serve any notice, order, opinion, or other document issued by the court in the same manner that parties may serve documents by electronic service.
- (2) A document may not be electronically served on a court unless the court consents to electronic service or electronic service is otherwise provided for by law or court order. A court indicates that it agrees to accept electronic service by:
  - (A) Serving a notice on all parties that the court accepts electronic service. The notice must include the electronic service address at which the court agrees to accept service; or
  - (B) Adopting a local rule stating that the court accepts electronic service. The rule must indicate where to obtain the electronic service address at which the court agrees to accept service.