



## Judicial Council of California · Administrative Office of the Courts

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# REPORT TO THE JUDICIAL COUNCIL

For business meeting on: December 13, 2011

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Title

Electronic Filing and Service: Extending  
E-filing Programs to the Supreme Court and  
the Courts of Appeal

Agenda Item Type

Action Required

Effective Date

January 1, 2012

Rules, Forms, Standards, or Statutes Affected

Amend Cal. Rules of Court, rules 8.70 and  
8.79

Date of Report

August 1, 2011

Recommended by

Court Technology Advisory Committee  
Hon. Ming W. Chin, Chair

Contact

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### **Executive Summary**

The Court Technology Advisory Committee recommends amending the rules authorizing an electronic filing pilot program in the Court of Appeal, Second Appellate District to extend the authority to conduct e-filing programs to the Supreme Court and any Court of Appeal that elects to do so.

### **Recommendation**

The Court Technology Advisory Committee recommends that the Judicial Council, effective January 1, 2012, amend rules 8.70 and 8.79 to extend the authority to conduct e-filing programs to the Supreme Court and any Court of Appeal that elects to do so.

The text of the proposed rules is attached at pages 4–5.

## **Previous Council Action**

The Judicial Council adopted rules 8.70–8.79, authorizing an electronic filing pilot program in the Court of Appeal, Second Appellate District, effective July 1, 2010. These rules were amended effective January 1, 2011 to authorize electronic service by providing electronic notice and a hyperlink to a document as well as by the electronic transmission of a document.

## **Rationale for Recommendation**

Last year, the Court Technology Advisory Committee proposed, and the Judicial Council adopted, rules for an electronic filing pilot program in the Court of Appeal, Second Appellate District. The Supreme Court and Court of Appeal Districts other than the Second Appellate District are interested in the possibility of using electronic filing and service. To permit this, this proposal would amend the rules adopted for the Second Appellate District pilot program to extend the authority to conduct e-filing programs to the Supreme Court and any Court of Appeal that elects to do so. The adoption of the amended rules would also ensure appropriate consistency among the electronic filing and service procedures in all the appellate courts in California.

## **Comments, Alternatives Considered, and Policy Implications**

### **Comments**

This proposal was circulated between April 21 and June 20, 2011, as part of the regular spring 2011 comment cycle. Eight individuals or organizations submitted comments on this proposal. Six commentators agreed with the proposal, and two did not indicate a position on the proposal. The full text of the comments received and the committee's responses are set out in the attached comment chart at pages 6–15.

No substantive comments on the current proposal were submitted; one commentator submitted suggestions for the committee's future consideration, and one commentator submitted general comments about concerns relating to the implementation of e-filing and public access to electronic court records. The committee is therefore recommending that this proposal be adopted as circulated for public comment.

### **Alternatives Considered**

The committee considered not recommending any changes to these rules. However, the committee concluded that it would be preferable for these changes to be adopted because the courts have indicated that they would like the authority to implement e-filing, the changes would not impose costs on any court, and, if implemented, e-filing may result in savings for the courts.

### **Implementation Requirements, Costs, and Operational Impacts**

Courts that choose to implement an e-filing program under these rules will assume some costs, including costs for developing local procedures and systems for accepting and filing documents that are received electronically. However, these proposed rules do not impose these costs on any

court; the rules simply establish the framework for e-filing and e-service that the courts may choose to implement.

### **Relevant Strategic Plan Goals and Operational Plan Objectives**

Because this proposal would facilitate increased availability of electronic filing, it supports the policies of promoting innovative and effective practices for processing cases and ensuring that statewide rules promote the fair, timely, effective, and efficient processing of cases underlying Goal III: Modernization of Management and Administration (Policies B.1 and B.2).

### **Attachments**

Cal. Rules of Court, rules 8.70 and 8.79, at pages 4–5  
Comment Chart, at pages 6–15

Rules 8.70 and 8.79 of the California Rules of Court are amended, effective January 1, 2012, to read:

**Title 8. Appellate Rules**

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

**Chapter 1. General Provisions**

**Article 4. E-filing ~~Pilot Project in Second Appellate District~~**

**Rule 8.70. Purpose, application, construction, and definitions**

**(a) Purpose**

The purpose of the rules in this article is to facilitate the implementation and testing of an e-filing projects in the Supreme Court and the Courts of Appeal, ~~Second Appellate District~~.

**(b) Application**

Notwithstanding any other rules to the contrary, the rules in this article govern filing and service by electronic means in the Supreme Court and the any Court of Appeal, ~~Second Appellate District~~ that elects to implement an e-filing project.

**(c) Construction**

The rules in this article must be construed to authorize and permit filing and service by electronic means to the extent feasible.

**(d) Definitions**

As used in this article, unless the context otherwise requires:

(1) “The court” ~~is~~ means the Supreme Court or any the Court of Appeal, ~~Second Appellate District~~ that elects to implement an e-filing project.

(2) – (9) \* \* \*

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**Rule 8.79. Actions by court on receipt of electronic filing**

**(a)—(d) \* \* \***

**(e) Endorsement**

- (1) The court’s endorsement of a document electronically filed must contain the following: “Electronically filed by ~~California Court of Appeal, Second Appellate District~~ [Name of Court], on \_\_\_\_\_ (date),” followed by the name of the court clerk.
- (2) The endorsement required under (1) has the same force and effect as a manually affixed endorsement stamp with the signature and initials of the court clerk.
- (3) A record on appeal, brief, or petition in an appeal or original proceeding that is filed and endorsed electronically may be printed and served on the appellant or respondent in the same manner as if it had been filed in paper form.

**SPR11-27****Court Technology: Electronic Filing and Service in the Supreme Court and the Courts of Appeal** (amend Cal. Rules of Court, rules 8.70 and 8.79)

All comments are verbatim unless indicated by an asterisk (\*).

	<b>Commentator</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
1.	Appellate Court Committee San Diego County Bar Association By Cecilia O. Miller, Chair	A	Our committee supports the revisions to rules 8.70 and 8.79 without comment.	No response required.
2.	Appellate Defenders, Inc., California Appellate Project - San Francisco, and the First District Appellate Project By Mat Zwerling, Executive Director	A	<p>We concur with the proposal amendments to rules 8.70 and 8.79 allowing the Supreme Court and all of the appellate districts to participate in an e-filing project.</p> <p>We suggest for a future amendment cycle a proposed modification of related rule 8.77 - Requirements for Signature on Documents. Rule 8.77(a) provides that when a document must be filed under penalty of perjury, “the document may be filed electronically provided that the original , signed verification page or pages are filed with the court within 5 calendar days.” This rule would require paper copies of signed originals for extension of time requests.<sup>1</sup> Requiring hard copies of those signature pages would to some degree defeat the goals of electronic filing and provide little benefit. Accordingly, we recommend that e-filed extension of time requests, and other routine applications that may include declarations under penalty of perjury (such as a motion to augment), be exempted from the hard copy requirement.</p> <p>A model for such an exemption is found in rule 8.71(f)(2) and (3), which provide that proofs of electronic service may be filed electronically.</p>	<p>No response required.</p> <p>The committee will consider this suggestion during the upcoming committee year</p>

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			<p>Relatedly, we note that the proof of electronic service rule requires that the party maintain the printed document with the original signature. This would mean a printed page would have to be saved for every pleading, to some degree defeating the purposes of moving to electronic filing and electronic files.</p> <p>For routine documents, such as proofs of service, extension of time requests, and motions to augment—even when made under penalty of perjury—consideration should be given to allowing electronic filing without requiring retention or submission of a paper copy with the original signature.</p>	
3.	Committee on Appellate Courts State Bar of California By Benjamin Shatz, Chair	A	The committee supports this proposal.	No response required.
4.	Courthouse News Service By Rachel Mattco-Boehm Holme Roberts & Owen LLP San Francisco	NI	<p>On behalf of Courthouse News Service ("Courthouse News"), we are pleased to make this submission in response to the invitation to comment on the proposed amendments to the California Rules of Court to permit electronic filing and service in all Districts of the Court of Appeal and in the Supreme Court.</p> <p>Although Courthouse News does not object to the proposed rule changes themselves, it writes to respectfully urge the Judicial Council, Court Technology Advisory Committee, and appellate courts to be mindful of the implications that e-</p>	The committee appreciates these comments and will consider them in connection with any related future actions concerning appellate e-filing.

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			<p>filing can have for public access to adjudicative court records and to ensure that any future implementation of electronic access to appellate filings will be consistent with principles of timely and equitable public access.</p> <p><b>I. About Courthouse News Service</b> Courthouse News Service is a legal news service for lawyers and the news media with a focus on civil lawsuits, from the date of filing through the appellate level. The majority of Courthouse News' nearly 3,000 subscribers nationwide are lawyers and law firms, including numerous prominent California firms. In addition, Courthouse News' media subscribers - which include the <i>Los Angeles Times</i>, the <i>Los Angeles Business Journal</i>, the <i>San Jose Mercury News</i>, and <i>Forbes</i> increasingly, look to Courthouse News to provide them with information about newsworthy new civil filings. A number of academic institutions and law libraries - including UCLA, Stanford Law School and the L.A. Law Library - also subscribe to Courthouse News' reports. Courthouse News' website (<a href="http://www.courthousenews.com">www.courthousenews.com</a>) also features news reports and commentary about civil cases and appeals, and receives an average of 850,000 unique visitors each month.</p> <p><b>II. Potential Issues Arising from Appellate E-Filing</b> Courthouse News recognizes that the proposed</p>	

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			<p>rule changes simply make the Second Appellate District e-filing rules applicable to any Court of Appeal and the Supreme Court. Nevertheless, the expansion of appellate e-filing warrants discussion of the unintended consequences that can follow electronic filing. Courthouse News would highlight two concerns, in particular: (1) preferential access to the public court record arising from a single-vendor e-filing system; and (2) access barriers in the form of delays and cost.</p> <p><b>A. Single-Vendor E-Filing and Preferential Court Record Access</b></p> <p>Though the Second Appellate District's pilot e-filing system appears to be administered internally, the Rules of Court on appellate and trial court e-filing currently allow for private vendor systems as well. Because of the serious legal implications that can arise from single-vendor e-filing systems, Courthouse News respectfully urges a change to the Rules to require either a truly equitable multi-vendor system or an in-house system.</p> <p>Media entities reporting news and information about the courts now include a variety of electronic publishers, who can instantly transmit a wealth of courthouse information to targeted audiences. Accordingly, news reporting about the courts now includes not only reports about high-profile cases, but also summaries or alerts of what was filed in a given court on a given</p>	

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			<p>day. For example, LexisNexis - which acts as an e-filing service provider in a number of courts - not only sells access to court records but also uses court filings to provide legal news, commentary, analysis, electronic case summaries, and case alerts to its subscribers. The financial value of reporting on court documents and the logistics of single-vendor e-filing programs combine to imperil public access to the court record.</p> <p>In a single-vendor e-filing program, the public record is necessarily filtered through, stored, or accessed on the vendor's computer servers or website, thus giving the vendor priority access to, and effective control over, the public court record. This control is valuable to vendors because it allows them to monopolize the market for dissemination of news about court filings. Where an e-filing program is built around a single vendor that also acts as an electronic publisher, as is the case with LexisNexis and others, the vendor enjoys a virtually insurmountable advantage over its competitors in the news media, both in terms of timing and cost. In short, putting e-filing in the hands of a single private vendor who also engages in news reporting is no different than telling the local newspaper that it will always have a head start in reporting newsworthy new civil cases, and will be able to conduct its news reporting at a cost that is lower than all other media outlets. But nothing in California's</p>	

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			<p>appellate e-filing rules precludes such an outcome.</p> <p>Because the government grant of preferential court record access to one media entity violates both the First Amendment to the United States Constitution and its equal protection clause, the single-vendor e-filing system has the potential to create a problem of constitutional dimension. <i>See, e.g., Telemundo of Los Angeles v. City of Los Angeles</i>, 283 F. Supp. 2d 1095, 1098, 1104 (C.D. Cal. 2003) (rejecting city's partnership with television station for coverage of official ceremony and ordering competitor station be given equal camera positioning, equal access credentials, and otherwise equal access); <i>Anderson v. Cryovac, Inc.</i>, 805 F.2d 1, 9 (1st Cir. 1986) (trial court "erred in granting access [to discovery materials) to one media entity and not the other"); <i>American Broadcasting Cos., Inc. v. Cuomo</i>, 570 F.2d 1080, 1083 (2d Cir. 1977) ("once there is ...participation by some of the media, the First Amendment requires equal access to all of the media or the rights of the First Amendment would no longer be tenable").</p> <p><b>B, Access Barriers in the Form of Delay and Cost</b></p> <p>The second major problem that has often resulted from e-filing initiatives is a delay in public access to court records. E-filing generally brings delay when courts choose to make e-filed documents available only after various</p>	

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			<p>administrative tasks have been completed (<i>e.g.</i>, manually checking the filing, processing it for electronic review, etc.). Where e-filing is combined with electronic access to court filings, an additional barrier arises if a court imposes significant charges for viewing court records electronically, thereby tying priority access to the ability to pay for it. This need not be the case, however, and California's appellate courts have an excellent opportunity here - with e-filing in its early stages - to avoid access delays at the appellate courts.</p> <p><b>1. Importance of Timely Access</b> The First Amendment right of access to court documents means a right of timely access. <i>See, e.g., Associated Press v. US. Dist. Court</i>, 705 F.2d 1143,1147 (9th Cir. 1983) (even short delays constitute "a total restraint on the public's first amendment right of access even though the restraint is limited in time, and are unconstitutional unless the strict test for denying access has been satisfied"). This timely access is critical because of the role the court record plays in providing a window into the processes of an open government. Because few members of the public can observe the court's activities directly, they learn what transpires in courts "chiefly through the print and electronic media," which function as "surrogates for the public" in the context of access to judicial records and information. <i>Richmond Newspapers, Inc. v. Virginia</i>, 448 U.S. 555,572-73 (1980). For the</p>	

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			<p>media to effectively fulfill this role, it must have access to what transpires in the court system while it is still transpiring. The "newsworthiness of a particular story is often fleeting," <i>Grove Fresh Distribs. v. Everfresh Juice Co.</i>, 24 F.3d 893 897 (7th Cir. 1994), and given the vast amount of information competing for its attention, it is only while court activity is still "current news that the public's attention can be commanded." <i>Chicago Council of Lawyers v. Bauer</i>, 522 F.2d 242, 250 (7th Cir. 1975). Thus, a court record that cannot be accessed on the day it is filed has a far lower chance of being reported on, which means a far lower chance of coming to the attention of interested members of the public.</p> <p>In addition, timely access is illusory if it is conditioned on paying substantial fees for viewing court records. This is especially true for the news media, who - unlike litigants themselves - are likely to have interest in frequently accessing a broad range of filings. This problem has arisen in some of California's Superior Courts, which have begun to charge hefty fees for viewing court records remotely over the Internet. In at least one instance, this has resulted in a situation where a superior court is providing timely access over the Internet for a significant fee without providing the press with an alternative means of obtaining the same timely access on a free or low-cost basis, resulting in the impairment of the constitutional</p>	

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			<p>right of access.</p> <p><b>2. Avoiding Cost and Access Delays Related to E-Filing</b></p> <p>Although California's appellate courts currently provide electronic access only to opinions, the implementation of e-filing may facilitate electronic access to other appellate filings (such as briefs, in which there is a clear news interest). Courthouse News respectfully urges the appellate courts to consider electronic access as they begin adopting e-filing.</p> <p>The first critical component of an electronic access system is that the court allow e-filed documents to be viewed as soon as they cross the electronic equivalent of the intake counter at the clerk's office, regardless of what administrative processing might remain to be done for the document. In other words, whatever mechanism transmits the filing to the courthouse should transmit it directly to the public access system, without manual interference, perhaps as a feature of the very effective California Appellate Courts Case Information System. This virtually instantaneous access upon e-filing is commonplace in the federal PACER system.</p> <p>The second critical component is public access at no charge, or - again, like the federal PACER system - at a level that is not prohibitive for media entities who review court</p>	

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			<p>filings for their news value and therefore access numerous documents on a regular basis.</p> <p>Courthouse News appreciates the opportunity to share its experience with the Judicial Council and Court Technology Advisory Committee in the hopes of fostering effective appellate e-filing systems that promote public access to the appellate court record.</p>	
5.	Judith McConnell, Presiding Justice Court of Appeal, Fourth District, Division One	A	I support the proposed amendments to rules 8.70 and 8.79 to authorize electronic filing and service in the Supreme Court and the Courts of Appeal, subject to the approval of those courts.	No response required.
6.	Superior Court of Monterey County By Rosalinda Chavez, ACEO	A	No specific comment.	No response required.
7.	Superior Court of California of Sacramento County	NI	No specific comment.	No response required.
8.	Superior Court of San Diego County By Michael M. Roddy Executive Officer	A	No specific comment.	No response required.