

JUDICIAL COUNCIL OF CALIFORNIA

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INVITATION TO COMMENT

SPR19-40

Title	Action Requested
Rules and Forms: Electronic Filing and Service	Review and submit comments by June 10, 2019
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Amend Cal. Rules of Court, rules 2.251, 2.255, and 2.257	January 1, 2020
Proposed by	Contact
Information Technology Advisory Committee Hon. Sheila F. Hanson, Chair	Andrea L. Jaramillo, 916-263-0991 andrea.jaramillo@jud.ca.gov

Executive Summary and Origin

The Information Technology Advisory Committee recommends the Judicial Council amend rules 2.251, 2.255, and 2.257 of the California Rules of Court. The purpose of the proposed amendments to rules 2.251 and 2.255 is to (1) specify how notice of consent to electronic service is to be given, (2) provide example language for consent, and (3) require electronic filing service providers and electronic filing managers to transmit a person’s consent to the court. The proposed amendments to rules 2.251 and 2.255 originated with comments received from the Superior Court of San Diego County. The purpose of the proposed amendments to rule 2.257 is to reduce the reliance on paper for signatures on electronically filed documents and include other persons in addition to parties within the scope of the rule. The proposed amendments to rule 2.257 originated with comments received from the Department of Child Support Services and Judicial Council staff.

Background

Rule 2.251—Consent to electronic service

In 2017, the Legislature amended Code of Civil Procedure section 1010.6 (section 1010.6) to require all persons to provide express consent to electronic service. Rule 2.251(b) had allowed the act of electronic filing alone to act as evidence of consent to receive electronic service for represented persons, but the 2017 amendments to section 1010.6 eliminated this option. Section 1010.6 does, however, allow a person to provide express consent electronically by “manifesting

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 It is circulated for comment purposes only.

affirmative consent through electronic means with the court or the court’s electronic filing service provider, and concurrently providing the party’s electronic address with that consent for the purpose of receiving electronic service.” (Code Civ. Proc., § 1010.6(a)(2)(A)(ii).)

The Legislature did not provide for what it means to “manifest affirmative consent through electronic means.” To fill this gap, the Judicial Council amended rule 2.251(b), effective January 1, 2019, to provide a process for manifesting affirmative consent through electronic means. One of the objectives was to replicate the prior process of consenting by the act of electronic filing while also ensuring, consistent with Legislative direction, that parties and other persons expressly consented. Neither section 1010.6 nor the electronic filing and service rules of court detail how notice is to be given to the court, as well as to other parties or persons in the case, that a party or other person has provided express consent. ITAC sought specific comments on these issues when the amendments to rule 2.251(b) circulated for comment in 2018. The Superior Court of San Diego County commented:

Our court proposes that the [Information Technology Advisory Committee] create standard language for parties to consent to service by the method outlined in 2.251(b)(1)(C)(i). The court or court’s electronic filing service providers could then include that language in their filing portal, which would allow parties to consent by accepting the terms. A copy of the acceptance would then be transmitted to the court by the service provider. If express consent is provided by filing a Consent to Electronic Service and Notice of Electronic Service Address (JC Form # EFS-005-CV) as indicated in 2.251(b)(1)(C)(ii), the court is provided notice through the filing. Our court proposes that the rule include that if a party manifests affirmative consent by either of the methods listed in 2.251(b)(1)(C), he/she is required to serve notice on all other parties.

Rule 2.255—Requirements electronic filing service providers and electronic filing managers

Requirements of electronic filing service providers and electronic filing managers

Rule 2.255 authorizes courts to contract with electronic filing service providers (EFSPs) and electronic filing managers (EFMs), and places requirements on EFSPs and EFMs. For example, EFSPs and EFMs must promptly transmit filings and fees to the courts and confirmation of receipt of documents to the electronic filers. Rule 2.255 does not require EFSPs and EFMs to transmit an electronic filer’s consent to electronic service to the court.

Rule 2.257—Opposing parties and other persons

Signatures of opposing parties on electronically filed documents

Rule 2.257(d) governs signatures of opposing parties and requires electronic filers to use and retain printed versions of documents with ink signatures. This is a challenge for local child support agencies and the California Department of Child Support Services (DCSS) as DCSS moves toward expanding its system’s electronic filing process as more courts start requiring

electronic filing. Currently, local child support agencies generate thousands of stipulations in child support cases that either are physically signed at an in-person appointment or, more often, mailed out for the signing party to review, sign, and mail back to the caseworker. This can be a protracted process, particularly when the signing party resides out-of-state or multiple signatures are needed. DCSS recommended that the rule be amended as the ability to electronically file stipulations containing electronic signatures would drastically reduce the time it takes to obtain a filed stipulation and update the child support case based on the parties' agreement.

Effective January 1, 2019, consistent with statutory requirement, the Judicial Council adopted an amendment to rule 2.257 to create a procedure for electronic signatures on electronically filed documents signed under penalty of perjury. Under that procedure—"When a document to be filed electronically provides for a signature under penalty of perjury of any person, the document is deemed to have been signed by that person if filed electronically provided that either of the following conditions is satisfied . . ."—the person signs with 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. (Cal. Rules of Court, rule 2.257(b)(1).) However, when an opposing party signature is required, rule 2.257(d) still requires the use and retention of a printed document.

Parties and other persons

The scope of section 1010.6 includes "other persons" in addition to parties. Some provisions of rule 2.257 refer to only parties, when it would be appropriate to include other persons.

The Proposal

Rules 2.251 and 2.255

The proposed amendments to rule 2.251 would require parties or other persons who have "manifested affirmative consent through electronic means" to serve notice of this consent on all parties and other persons. The proposal would also add an advisory committee comment citing an example of language for consenting to electronic service. The proposed amendments to rule 2.255 would require EFSPs and EFMS to promptly transmit—to the court—a party or other person's acceptance of consent to receive electronic service. The amendments would further clarify what it means to "manifest affirmative consent through electronic means" and ensure that parties, other persons, and the court receive notice that someone has done so.

Rules 2.257

The proposed amendments to rule 2.257(b) would add requirements for electronic signatures on electronically filed documents signed under penalty of perjury when the declarant is not the filer. Because electronic signatures are simple to create, there is more of a concern about the validity of electronic signatures if the filer and the signer are different people. Under the proposed requirements, the electronic signature must be (1) unique to the declarant, (2) capable of verification, (3) under the sole control of the declarant, and (4) linked to data in such a manner that if the data are changed, the electronic signature may be declared invalid by the court. These requirements are designed to ensure that the application of the signatures is the act of the person signing, can be proven as such, and may be invalidated if the document signed appears to have

been altered after being electronically signed. The requirements in the proposed rule are similar to the requirements for digital signatures under Government Code section 16.5(a). A digital signature is a type of secure electronic signature that may be used in communications with public entities. (Gov. Code, § 16.5.) The first three requirements in the proposed rule are the same as for a digital signature, but the fourth is different. Under Government Code 16.5(a)(4), a digital signature must be “linked to data in such a manner that if the data are changed, the digital signature *is* invalidated.” (Emphasis added.) Under the proposed rule, instead of the electronic signature being invalidated automatically, the court has discretion to decide whether the signature should be declared invalid. Also unlike a digital signature, the proposed rule does not require electronic signatures to conform to the Secretary of State’s regulations, which prescribe the use of specific technologies. (Gov. Code, § 16.5(a)(5); see Cal. Code Regs., tit. 2, §§ 22000–22005.)

The proposed amendments also strike the subdivision (d) heading, “Documents requiring signatures of opposing parties,” and instead incorporate the requirements from subdivision (d) into subdivision (c), which governs documents not signed under penalty of perjury. Subdivision (d) is no longer necessary for signatures of opposing parties under penalty of perjury as those requirements are captured in subdivision (b). Therefore, the only remaining requirements would be for signatures not under penalty of perjury. The existing rule on opposing parties currently requires the filer to obtain ink signatures and retain them for inspection by other parties or the court. The proposal adds an option for electronic signatures when the electronic signature is unique to the person using it, capable of verification, under the sole control of the person using it, and linked to data in such a manner that if the data are changed, the electronic signature may be declared invalid by the court. This option would allow for an entirely paperless process.

Finally, the proposed amendments include “other persons” within the scope of the rules. Section 1010.6 includes “other persons” in addition to parties within its scope. Accordingly, “other persons” have been added to rule 2.257 where appropriate.

Alternatives Considered

The committee considered the alternative of continuing to require the retention of ink signatures on printed forms for rule 2.257(d), but found that creating an option for an entirely paperless process would be preferable. In considering the requirements for electronic signatures by persons other than the filer, the committee considered including a requirement that the electronic signature be “linked to data in such a manner that if the data are changed, the electronic signature is invalidated.” For example, if the document were changed after being electronically signed, the signature would be invalidated. However, the committee was concerned that this would remove discretion that would appropriately belong to the court and decided on changing “the electronic signature *is* invalidated” to “the electronic signature *may be* declared invalid *by the court.*” (Emphases added.)

Fiscal and Operational Impacts

The proposed amendments to rules 2.251 and 2.257 should help improve the mechanics of “manifesting affirmative consent through electronic means,” and should ensure the courts and litigants are aware that someone has consented to electronic service.

For rule 2.257, the idea for the proposed amendments originated with DCSS, which expects that the option to electronically file stipulations containing electronic signatures will drastically reduce the time it takes for local child support agencies to obtain a filed stipulation and update the child support case based on the parties’ agreement. DCSS also expects that this will lead to increased participation by parents in their child support case, greater ability to offer technological advancements to case participants involved with the government and court, and timelier establishment or modification of parentage, child support, medical insurance, and other supplemental support for the children of California. While DCSS originated the idea, the implications are broader for all litigants. Because electronic signatures do not require the physical presence of the signer or an exchange of mailed paper documents, the option to use them should offer litigants a potentially faster and more convenient option for obtaining needed signatures.

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 advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- The committee considered including a requirement that the electronic signature be “linked to data in such a manner that if the data are changed, the electronic signature is invalidated.” However, the committee was concerned that this would remove authority that would appropriately belong to the court and decided on changing “the electronic signature *is* invalidated” to “the electronic signature *may be* declared invalid *by the court.*” Is the proposed language preferable? Is the particular requirement necessary?
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training) or revising processes and procedures (please describe)?

Attachments and Links

1. Cal. Rules of Court, rules 2.251, 2.255, and 2.257, at pages 6–9
2. Link A: Code Civ. Proc., § 1010.6,
https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=1010.6.&lawCode=CCP

Rules 2.251, 2.255, and 2.257 of the California Rules of Court would be amended, effective January 1, 2020, to read:

1 **Rule 2.251. Electronic service**

2
3 (a) * * *

4
5 (b) **Electronic service by express consent**

6
7 (1) A party or other person indicates that the party or other person agrees to
8 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) Manifesting affirmative consent through electronic means with the
16 court or the court's electronic filing service provider, and concurrently
17 providing the party's electronic service address with that consent for
18 the purpose of receiving electronic service. A party or other person may
19 manifest affirmative consent by serving notice of consent to all parties
20 and other persons and either:

21
22 ~~(C) A party or other person may manifest affirmative consent under (B) by:~~

23
24 (i) Agreeing to the terms of service ~~agreement~~ with an electronic
25 filing service provider, which clearly states that agreement
26 constitutes consent to receive electronic service ~~electronically~~; or

27
28 (ii) Filing Consent to Electronic Service and Notice of Electronic
29 Service Address (form EFS-005-CV).

30
31 (2) * * *

32
33 (c)–(k) * * *

34
35 **Advisory Committee Comment**

36 Subdivisions (b)(1)(B). The rule does not prescribe specific language for a provision of a term of
37 service where the filer consents to electronic service, but does require that any such provision be
38 clear. *Consent to Electronic Service and Notice of Electronic Service Address (form EFS-005-*
39 *CV)* provides an example of language for consenting to electronic service.

40 **Subdivisions (c)–(d).** * * *

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

3
4 **(a)–(b) * * ***

5
6 **(c) Transmission of filing to court**

7
8 (1) An electronic filing service provider must promptly transmit any electronic
9 filing, ~~and~~ any applicable filing fee, and any applicable acceptance of consent
10 to receive electronic service to the court directly or through the court's
11 electronic filing manager.

12
13 (2) An electronic filing manager must promptly transmit an electronic filing, ~~and~~
14 any applicable filing fee, and any applicable acceptance of consent to receive
15 electronic service to the court.

16
17 **(d)–(f) * * ***

18
19 **Rule 2.257. Requirements for signatures on documents**

20
21 **(a) Electronic signature**

22
23 An electronic signature is an electronic sound, symbol, or process attached to or
24 logically associated with an electronic record and executed or adopted by a person
25 with the intent to sign a document or record created, generated, sent,
26 communicated, received, or stored by electronic means.

27
28 **(b) Documents signed under penalty of perjury**

29
30 When a document to be filed electronically provides for a signature under penalty
31 of perjury of any person, the document is deemed to have been signed by that
32 person if filed electronically provided that either of the following conditions is
33 satisfied:

34
35 (1) The declarant has signed the document using an electronic signature and
36 declares under penalty of perjury under the laws of the state of California that
37 the information submitted is true and correct. If the declarant is not the
38 electronic filer, the electronic signature must be unique to the declarant,
39 capable of verification, under the sole control of the declarant, and linked to
40 data in such a manner that if the data are changed, the electronic signature
41 may be declared invalid by the court; or
42

1 (2) The declarant, before filing, has physically signed a printed form of the
2 document. By electronically filing the document, the electronic filer certifies
3 that the original, signed document is available for inspection and copying at
4 the request of the court or any other party. In the event this second method of
5 submitting documents electronically under penalty of perjury is used, the
6 following conditions apply:

7
8 (A) At any time after the electronic version of the document is filed, any
9 party may serve a demand for production of the original signed
10 document. The demand must be served on all other parties but need not
11 be filed with the court.

12
13 (B) Within five days of service of the demand under (A), the party or other
14 person on whom the demand is made must make the original signed
15 document available for inspection and copying by all other parties.

16
17 (C) At any time after the electronic version of the document is filed, the
18 court may order the filing party or other person to produce the original
19 signed document in court for inspection and copying by the court. The
20 order must specify the date, time, and place for the production and must
21 be served on all parties.

22
23 (D) Notwithstanding (A)–(C), local child support agencies may maintain
24 original, signed pleadings by way of an electronic copy in the statewide
25 automated child support system and must maintain them only for the
26 period of time stated in Government Code section 68152(a). If the local
27 child support agency maintains an electronic copy of the original,
28 signed pleading in the statewide automated child support system, it may
29 destroy the paper original.

30
31 **(c) Documents not signed under penalty of perjury**

32
33 (1) If a document does not require a signature under penalty of perjury, the
34 document is deemed signed by the ~~party if the document is~~ person who filed
35 electronically.

36
37 ~~**(d) Documents requiring signatures of opposing parties**~~

38
39 (2) When a document to be filed electronically, such as a stipulation, requires the
40 signatures of opposing parties or other persons not under penalty of perjury, the
41 following procedures ~~applies~~ apply:
42

1 ~~(1)(A)~~ The party filing the document must obtain the signatures of all parties
2 on a printed form of the document. The opposing party or other person
3 has signed a printed form of the document before, or on the same day
4 as, the date of filing.

5 ~~(2)~~—The ~~party filing the document~~ electronic filer must maintain the
6 original, signed document and must make it available for inspection
7 and copying as provided in ~~(a)(b)(2)~~ of this rule and Code of Civil
8 Procedure section 1010.6. The court and any other party may demand
9 production of the original signed document in the manner provided in
10 ~~(a)(b)(2)(A–C)~~.

11 ~~(3)~~—By electronically filing the document, the electronic filer indicates that
12 all parties have signed the document and that the filer has the signed
13 original in his or her possession; or

14
15 (B) The opposing party or other person has signed the document using an
16 electronic signature and that electronic signature is unique to the person
17 using it, capable of verification, under the sole control of the person
18 using it, and linked to data in such a manner that if the data are
19 changed, the electronic signature may be declared invalid by the court.
20

21 ~~(e)(d)~~ **Digital signature**

22
23 A party or other person is not required to use a digital signature on an electronically
24 filed document.

25
26 ~~(f)(e)~~ **Judicial signatures**

27
28 If a document requires a signature by a court or a judicial officer, the document
29 may be electronically signed in any manner permitted by law.