



JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on November 14, 2019

Title

Judicial Council–Sponsored Legislation:
Electronic Delivery of Documents Following
Conviction

Rules, Forms, Standards, or Statutes Affected
Amend Pen. Code, § 1203.01

Recommended by

Policy Coordination and Liaison Committee
Hon. Marla O. Anderson, Chair
Information Technology Advisory
Committee
Hon. Sheila F. Hanson, Chair

Agenda Item Type

Action Required

Effective Date

November 14, 2019

Date of Report

October 22, 2019

Contact

Andrea L. Jaramillo, 916-263-0991
andrea.jaramillo@jud.ca.gov
Sharon Reilly, 916-323-3121
sharon.reilly@jud.ca.gov

Executive Summary

The Policy Coordination and Liaison Committee and Information Technology Advisory Committee recommend sponsoring legislation to allow for electronic delivery of documents currently required to be mailed following conviction. The proposal is intended to reduce reliance on paper and improve efficiency by providing an electronic option when paper is currently required. The proposal originated with a recommendation of the Judicial Council's Data Exchange Working Group, which comprises court participants and justice partners working to develop standardized data exchanges.

Recommendation

The Policy Coordination and Liaison Committee and the Information Technology Advisory Committee (ITAC) recommend that the Judicial Council sponsor legislation to amend Penal Code section 1203.01 to allow courts to electronically deliver certain material that courts are currently required to mail after a person has been convicted. If the Legislature approves the amendments, the expected effective date would be January 1, 2021.

The text of the proposed legislation is attached at pages 6–7.

Relevant Previous Council Action

In November 2018, the Judicial Council adopted the *Strategic Plan for Technology 2019–2022* (see Link A) to provide comprehensive technology strategy at the branch level. The plan included a goal of promoting rule and legislative changes that facilitate the use of technology in the courts. (*Strategic Plan for Technology 2019–2022*, pp. 14–15.)

Analysis/Rationale

Under Penal Code section 1203.01, once judgment is pronounced in a criminal case, “the judge and the district attorney, respectively, may cause to be filed with the clerk of the court a brief statement of their views respecting the person convicted or sentenced and the crime committed, together with any reports the probation officer may have filed relative to the prisoner.” (Pen. Code, § 1203.01(a).) Counsel for the defendant and the law enforcement agency that investigated the case may also file statements with the clerk. (*Ibid.*) The clerk is then required to mail copies of the statements and reports to the defendant, in care of the California Department of Corrections and Rehabilitation (CDCR), and to the attorney for the defendant. (*Ibid.*) The attorney for the defendant may also file a statement, and in that event, the clerk is required to mail a copy of that statement to the district attorney. (*Ibid.*) The clerk is also required to mail certified copies of all statements and reports addressed to the CDCR at the prison or other institution to which the person convicted is delivered. (*Ibid.*)

In addition, the clerk is required to mail to the prison or other institution to which the person convicted is delivered, copies of the charging documents and waiver and plea forms, if any. (Pen. Code, § 1203.01(b)(1), (2).) Finally, when the sentence is death or of an indeterminate term—or on request of CDCR, the inmate, or the inmate’s counsel—the clerk is required to mail the transcript of the proceedings at the time of sentencing and, if applicable, the transcript of the proceedings at the time of the defendant’s guilty or nolo contendere plea. (*Ibid.*)

No option is available for the clerk to deliver the documents or data contained in the documents described in Penal Code section 1203.01 by electronic means rather than by mail.

This proposal would add a new subdivision to Penal Code section 1203.01 to create an option for electronic delivery of the material currently required to be mailed. Under the proposal, if a recipient consents to electronic delivery, the court may deliver the documents electronically rather than by mail. Accordingly, providing electronic delivery would be an option, though not a requirement, for the court, and likewise, receiving documents electronically would be an option for the recipient.¹

¹ Penal Code section 1203.01(a) would still require material sent to the CDCR to be certified. Courts are permitted to certify their records “by electronic or other technological means.” (Gov. Code, § 68150(f).)

A main concern with electronic delivery is that an incarcerated recipient may have unreliable access to electronic resources even if he or she had initially consented to electronic delivery rather than mail. To address this concern, the proposal includes a provision that would still require the court to mail the materials to an incarcerated recipient on the request of that recipient or his or her counsel, even if the incarcerated recipient had consented to electronic delivery.

The proposal is intended to reduce reliance on paper and improve efficiency by providing an electronic option where paper is currently required.

Policy implications

The proposal advances the judicial branch goal of promoting rule and legislative changes that facilitate the use of technology in the courts. (*Strategic Plan for Technology 2019–2022*, pp. 14–15.) In particular, it advances the objective of ensuring that “current rules and legislation do not inhibit the use of technology solutions.” (*Id.* at p. 14.)

Further policy development may be necessary to address potential issues that may arise from problems with electronic delivery—for example, how to address failures of, capture consent to, or maintain security of electronic delivery. Ultimately, ITAC determined that these issues did not need to be addressed in statute and anticipates that policies to address these practical issues can be addressed at the local level. However, ITAC will consider state-level rule making as an option if the need arises.

Comments

Four commenters responded to the invitation to comment: the Superior Courts of Orange and San Diego Counties, which agreed with the proposal if modified, and the Orange County Bar Association (OCBA) and Child Support Directors Association of California, which agreed with the proposal.

All commenters agreed that the proposal appropriately addressed its stated purpose. The San Diego County court noted as a practical concern that courts may have technological limitations impacting their ability to implement the electronic delivery option, but that courts could decide what to choose in light of those limitations. The OCBA observed that the proposal “advances the judicial branch goal of promoting rule and legislative changes that facilitate the use of technology in the courts.”

The bulk of comments received were in response to ITAC’s request for specific comments. ITAC had considered three options when developing the proposal. (See Alternatives considered, below.) ITAC’s main concern in crafting the options was that an inmate, even if he or she opted into electronic delivery, may find access to the electronic materials difficult. ITAC ultimately chose the option under which an inmate may opt in to electronic delivery but may also request mailed documents. The Orange County court and the OCBA both preferred the proposed option. However, ITAC sought specific comments on the two alternatives to the option it selected. One of the alternatives was to make incarcerated persons ineligible for electronic delivery and require the court to continue to mail documents to those persons. The San Diego County court submitted

detailed comments on this alternative. The court's concern was of workload. In particular, courts would have to send the same materials twice if an inmate opted in to electronic delivery and then requested that the documents be mailed. The committee agreed that mailing twice would be an added workload. However, it should be ameliorated by the discretionary nature of the electronic delivery option. The proposed amendment allows, but does not require, courts to deliver the materials by electronic means. Courts could choose a mail-only option for materials sent to inmates.

The San Diego County court also proposed adding in a good cause requirement as another alternative, which would require an inmate to have good cause to obtain a mailed copy of the documents after opting in to electronic delivery. The court noted that inmates can also access documents through their attorney and through the prison. The committee determined that although requiring a good cause standard could potentially reduce the number of requests for paper copies from inmates, it would also create more work for a court than mailing documents. First, inmate efforts to demonstrate good cause would likely result in lengthy individual filings. Second, the court would have to make a good cause determination in every instance in addition to mailing documents where good cause is found.

The proposal does not prescribe any particular method for how the consent of the recipient would be documented. ITAC sought comments on whether documentation of consent should be addressed by a statute, by a rule, or some other way. The San Diego County court recommended that consent to electronic service be required in writing in the statute. The Orange County court recommended the creation of a form. Though not specifically in response to the issue of documentation of consent, the OCBA also recommended the creation of a form to ensure that accurate contact information is captured. ITAC determined that written consent would be an effective way to document consent, but in addition, oral consent on the record would also be effective. The committee revised the proposed language consistent with these determinations. The committee will consider developing a relevant form in the future.

Alternatives considered

Terminology

ITAC considered alternative terminology for use in the new subdivision to refer to the paper documents that Penal Code section 1203.01 currently requires to be mailed. Because data exchanges may not require the transmission of an electronic version of a paper document (e.g., a PDF), the term "document" alone seemed insufficient. The Data Exchange Working Group suggested "information" instead because the information contained in the documents is what is important. Because "information" has a particular meaning in an accusatory pleading in criminal law, to avoid confusion, the committee decided to use "documents, or the data contained in the documents" instead to convey that the document itself is not necessarily required.

The Data Exchange Working Group had suggested "the clerk of the court may deliver the information described in subdivisions (a) and (b) by electronic means in a mutually agreeable format," but the committee did not include the "mutually agreeable format" language because the

proposed new subdivision is already predicated on consent. If the recipient does not agree with the format the court has available, the recipient would simply not consent to electronic delivery.

Delivery options

To address the concern about incarcerated recipients having unreliable access to electronic resources to receive an electronic delivery from the court, ITAC considered three options: (1) incarcerated recipients would continue to receive mail-only documents, but other recipients could opt in for electronic delivery; (2) incarcerated recipients could opt in for electronic delivery but would receive mailed documents as well; or (3) incarcerated recipients could opt in for electronic delivery but could still receive mailed documents on request.

ITAC chose the third option for the proposal because it removes all reliance on paper when recipients opt in but still ensures that convicted persons can obtain mailed paper copies if they request them. Continuing to require the use of mail would be inconsistent with the strategic goal of facilitating technology use by the courts. ITAC concluded that the third option had the best balance of advancing the use of technology while mitigating against unreliable access to electronic resources that persons convicted may experience even if they had initially opted in for electronic delivery. However, ITAC requested and received specific comments on whether one of the other options was preferable, and those comments are discussed in the comments section, above.

Fiscal and Operational Impacts

The San Diego County court commented that any cost savings would be minimal because the labor involved in scanning paper-filed documents can be more intensive than the labor for copying and mailing them. The Orange County court commented that cost savings on postage for transcripts would be significant.

Because electronic delivery is optional on the part of the courts, each court can decide not to use electronic delivery when its use would create financial or operational inefficiencies.

Attachments and Links

1. Pen. Code, § 1203.01, at pages 6–7
2. Chart of comments, at pages 8–15
3. Link A: Judicial Council of California, *Strategic Plan for Technology 2019–2022*, www.courts.ca.gov/documents/jctc-Court-Technology-Strategic-Plan.pdf

Section 1203.01 of the Penal Code would be amended, effective January 1, 2021, to read:

§ 1203.01

(a) Immediately after judgment has been pronounced, the judge and the district attorney, respectively, may cause to be filed with the clerk of the court a brief statement of their views respecting the person convicted or sentenced and the crime committed, together with any reports the probation officer may have filed relative to the prisoner. The judge and district attorney shall cause those statements to be filed if no probation officer's report has been filed. The attorney for the defendant and the law enforcement agency that investigated the case may likewise file with the clerk of the court statements of their views respecting the defendant and the crime of which he or she was convicted.

Immediately after the filing of those statements and reports, the clerk of the court shall mail a copy thereof, certified by that clerk, with postage prepaid, addressed to the Department of Corrections and Rehabilitation at the prison or other institution to which the person convicted is delivered. The clerk shall also mail a copy of any statement submitted by the court, district attorney, or law enforcement agency, pursuant to this section, with postage prepaid, addressed to the attorney for the defendant, if any, and to the defendant, in care of the Department of Corrections and Rehabilitation, and a copy of any statement submitted by the attorney for the defendant, with postage prepaid, shall be mailed to the district attorney.

(b)(1) In all cases in which the judgment imposed includes a sentence of death or an indeterminate term with or without the possibility of parole, the clerk shall, within 60 days after judgment has been pronounced, mail with postage prepaid, to the prison or other institution to which the person convicted is delivered, a copy of the charging documents, a copy of waiver and plea forms, if any, the transcript of the proceedings at the time of the defendant's guilty or nolo contendere plea, if the defendant pleaded guilty or nolo contendere, and the transcript of the proceedings at the time of sentencing.

(2) In all other cases not described in paragraph (1), the clerk shall mail with postage prepaid, to the prison or other institution to which the person convicted is delivered, a copy of the charging documents, a copy of the waiver and plea forms, if any, and upon written request by the Department of Corrections and Rehabilitation or by an inmate, or by his or her counsel, for, among other purposes on a particular case, appeals, review of custody credits and release dates, and restitution orders, the transcript of the proceedings at the time of the defendant's guilty or nolo contendere plea, if the defendant pleaded guilty or nolo contendere, and the transcript of the proceedings at the time of sentencing.

(c)(1) With the consent of the recipient expressed in writing or orally on the record, the clerk of the court may deliver the documents, or the data contained in the documents, described in subdivisions (a) and (b) by electronic means rather than by mail.

1 (2) Notwithstanding paragraph (1), upon written request by a person convicted or by his
2 or her counsel, the clerk shall also mail with postage prepaid, to the prison or other
3 institution to which the person convicted is delivered, copies of the documents described
4 in subdivisions (a) and (b).

LEG19-02

Judicial Council–Sponsored Legislation: Electronic Delivery of Documents Currently Required to Be Mailed Following Conviction (Amend Pen. Code, § 1203.01)

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

	Commenter	Position	Comment	Committee Responses
1.	Child Support Directors Association By Terrie Porter Sacramento, CA	A	<p>General Comments:</p> <p>Education or outreach materials may be necessary to ensure the person incarcerated understands receiving these documents via an electronic delivery is specific to these documents alone and does not remain the method of delivery for all other correspondence. In addition, electronic delivery, as noted, can be challenging to an incarcerated recipient so including physical mail as an option, upon request is preferred.</p> <p>Implementation of this process could result in savings for the clerk of the court in both staffing time and costs associated to postage, and materials necessary to generate all of the copies (paper, toner, etc).</p> <p>Request for Specific Comments:</p> <p>Does the proposal appropriately address the stated purpose? Yes while including options for potential limitations for incarcerated individuals.</p> <p>The committee considered the following alternatives to the language proposed. Are either of these alternatives preferable to the proposed language, or is the proposed language preferable? Why? The proposed language is preferred. It is clearer with the incarcerated individuals being able to opt-in for electronic delivery while also still having the option to receive mailed documents upon request.</p>	The committee appreciates the support and the comments.
2.	Orange County Bar Association By Deirdre Kelly President P.O. Box 6130	A	<p>Agree with the proposal as stated.</p> <p>1) Does the proposal appropriately address the stated purpose?</p>	The committee appreciates the support and the comments. The committee will consider creating a form to capture alternate electronic mail or mailing address.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

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	Commenter	Position	Comment	Committee Responses
	Newport Beach, CA 92658		<p>Yes. The proposal’s objective is to reduce reliance on paper and improve efficiency by providing an electronic option where paper distribution is currently required. It advances the judicial branch goal of promoting rule and legislative changes that facilitate the use of technology in the courts.</p> <p>2) Comment on the alternatives to current proposal. The listed alternatives are inferior to the one proposed. Alternative 1 is missing an if/then statement to clarify the second part and is confusing. It makes it obligatory to mail the documents should the defendant be ineligible to receive them electronically. The current proposal allows a defendant to opt in for both electronic and paper documentation, so seems to address ineligibility for electronic transmission by giving the defendant the option of regular mail.</p> <p>Alternative 2 requires the court to provide paper copies no matter what, which seems at odds with the stated purpose of the proposal to move toward electronic distribution.</p> <p>3) How might we address electronic mail being returned? One way to address returned emails is for the forms/rule of court (not yet proposed) to include alternative email/mailling addresses in case the primary email or mailing address is not valid.</p>	
3.	Superior Court of California, County of Orange	AM	As far as we are aware, the only time the court is sending information via email is in response to a	The committee appreciates the support and the comments. The court raised a concern that “The

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	Commenter	Position	Comment	Committee Responses
	By Randy Montejano Courtroom Operations Supervisor Westminster, CA		<p>record or copy request, not as part of the business of the court as a case progresses from initiation to adjudication to appeal. The proposed legislation could impact sensitive documentation, such as transcripts or confidential information. If the court chooses to opt-in to electronic delivery, steps should be implemented to ensure the email address provided by an agency and/or party is current and correct.</p> <p>Request for Specific Comments</p> <ul style="list-style-type: none">• Does the proposal appropriately address the stated purpose? Yes, purpose is stated clearly.• The committee considered the following alternatives to the language proposed. Are either of these alternatives preferable to the proposed language, or is the proposed language preferable? Why? Proposed language seems sufficient. Defense can request in writing that documents be sent via mail to prison.<ul style="list-style-type: none">o Alternative 1: (c)(1) With the consent of the recipient, the clerk of the court may deliver the documents, or the data contained in the documents, described in subdivisions (a) and (b) by electronic means rather than by mail.(2) Notwithstanding paragraph (1), the person convicted is not eligible to receive electronic delivery of the documents, or the data contained in the documents, described in subdivisions (a) and (b), and the clerk of the court must mail with postage prepaid, to the prison or other institution to which the person convicted is delivered, copies of the documents described in subdivisions (a) and (b).	<p>proposed language in the statute does not make clear that electronic delivery is not a requirement for the court.” The statute is written using permissive, not mandatory language. Specifically, “With the consent of the recipient, the clerk of the court <i>may</i> deliver the documents, or the data contained in the documents . . . by electronic means rather than by mail.” The use of “may” rather than “must” indicates that the amended language is not imposing a requirement on courts to offer electronic delivery.</p> <p>The court commented that a form may be helpful for documenting consent and the committee will consider creating an appropriate form.</p> <p>The court commented that direction would be helpful on what the court should do in the event an electronic transmission turns out to be undeliverable. The committee considered this issue and determined this is something that could be handled through local policy. The statute does not address what to do if a mailed delivery fails so it seems unnecessary to do so for electronic delivery. However, if it turns out that this does need to be addressed at a state rather than local level in the future, it could be addressed by statewide rule.</p>

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Commenter	Position	Comment	Committee Responses
		<p>o Alternative 2: (c)(1) With the consent of the recipient, the clerk of the court may deliver the documents, or the data contained in the documents, described in subdivisions (a) and (b) by electronic means rather than by mail.</p> <p>(2) Notwithstanding paragraph (1), the clerk of the court must also mail with postage prepaid, to the prison or other institution to which the person convicted is delivered, copies of the documents described in subdivisions (a) and (b).</p> <p>The advisory committee also seeks comments from courts on the following cost and implementation matters:</p> <ul style="list-style-type: none">• Would the proposal provide cost savings? If so, please quantify. Postage costs for transcripts in particular would be significant.• Does the proposal raise any concerns on means of transferring data? If so, should those concerns be addressed in statute or in some other way? The proposed language in the statute does not make clear that electronic delivery is not a requirement for the court. Perhaps you may consider adding language to the statute that explains that this applies to courts that have the current capability for electronic delivery.• Does the proposal raise any concerns on data being sent back to the court by the recipient (e.g., if the court delivers an electronic copy of a document by e-mail to a convicted person and the convicted person replies to that e-mail in an attempt to communicate with the court)? If so, should those concerns be addressed in statute or in some other way? Yes, it should be made clear that	

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			<p>the option of electronic delivery is for the clerk of the court and not the recipient.</p> <ul style="list-style-type: none">• The proposed amendment does not prescribe any particular method for how consent from the recipient would be documented. Is this something that should be addressed in statute, a rule of court, or in some other way? A form could be helpful, especially for defendants represented by private counsel or defendants in pro per. Could also be helpful if agencies are required to submit something with each case to ensure the court has the correct email address when staff or departments shift.• The proposed amendment does not address what the court should do if someone consents to electronic delivery, but when the court electronically transmits the document, it is undeliverable (e.g., the court emails the documents to an address the recipient provided, but then gets a message back that the email was undeliverable). Is this something that should be addressed in statute, a rule of court, or in some other way? Direction would be helpful. Is it the court's responsibility to then send via mail? Or is the recipient responsible for following up if documentation is not received, as the email information provided is likely incorrect?	
4.	Superior Court of California, County of San Diego By Mike Roddy, Executive Officer Central Courthouse 1100 Union Street San Diego, California 92101	AM	<p>1. Does the proposal appropriately address the stated purpose?</p> <p>In theory, the idea of being able to serve such documents electronically does serve the stated purpose. However, practically speaking, unless a</p>	The committee appreciates the court's support and comments. The court expressed workload concerns where the court would have to mail documents it had already electronically delivered to an inmate. The court recommended the inmate be required to provide good cause why they need

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			<p>particular court has adopted a local rule allowing electronic filing in criminal cases (and, even then, it would not be mandatory, per Cal. Rules of Court, rule 2.253, subd. (a)), these documents are still going to be filed by the parties in paper format. As such, the clerk will have to take the filed documents and scan them before emailing them. The process of scanning, saving, and emailing is often the same or more time consuming than the process of copying and mailing the documents. However, this court understands the desire to move to a paperless court and that the new rules are permissive and not mandatory. As such, each court can decide whether it makes sense based on their technological limitations.</p> <p>In addition, this issue could be resolved by courts implementing a local rule requiring parties to serve courtesy electronic copies of the filed documents with the courtroom clerk.</p> <p>2. Consideration of alternative language.</p> <p>The court has some concerns about allowing an inmate to opt in for email, but then also be able to send a written request for these documents without having to make any showing on why a duplicate hard copy is necessary and/or what efforts he or she has made to secure the emailed version. Even if an inmate receives an electronic copy, he or she is likely to request a hard copy from the court be mailed. After all, if the court mails a copy, an inmate does not have to pay the cost of printing the</p>	<p>a mailed copy. The committee understands the workload concern. However, this should be ameliorated by the discretionary nature of the electronic delivery option. The amendment allows, but does not require, a court to provide the materials by electronic means. Mail-only is an option a court could choose for materials sent to inmates. The committee considered the court's recommendation for a good cause provision and determined that such a provision would increase workload. First, inmate efforts to demonstrate good cause would likely result in individual filings that would be lengthy in nature. Second, the court would have to make a good cause determination in every instance, even where good cause is not found, in addition to mailing documents where good cause is found. Accordingly, the committee decided against adding a good cause provision.</p> <p>The court also recommended the proposed amendment require consent to be in writing. The committee considered this and determined written consent would be an effective means of documenting consent. In addition, the committee discussed oral consent on the record as an alternative. The committee will recommend a revision where consent must be written or made on the record.</p>

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LEG19-02**Judicial Council–Sponsored Legislation: Electronic Delivery of Documents Currently Required to Be Mailed Following Conviction (Amend Pen. Code, § 1203.01)**

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			<p>emailed version. Thus, courts will likely only be doubling their work by having to send electronic copies and mail copies.</p> <p>This court suggests either using Alternative 1, which provides for maintaining only mail service for inmates. The other option would be to keep the language as proposed; however, add language requiring that an inmate who previously opted in for electronic service provide good cause for also needing a hard copy be mailed.</p> <p>It should be noted that these documents are also being sent to CDCR for their records. These documents will be placed in an inmates Central File (C-File), which an inmate has a right to review. (Cal. Code of Reg., §3370, subd. (c).) As such, even if an inmate were to opt into email service, but then have trouble accessing it, the documents would be available to them through their own C-File in prison. In addition, copies are also being provided to an inmate’s trial attorney. Upon request, the attorney must supply an inmate with a copy of his/her file. (Rules of Professional Conduct, rule 3-700, subd. (d).) In sum, if an inmate opts in for email service, then the court should not be required to also send a duplicate copy via mail. An inmate has other means by which to obtain such a records, if he or she has an issue accessing email. If this is a concern, then it is recommended that the policy be that inmates only get mailed copies.</p>	

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			<p>3. Would the proposal provide cost savings? If so, please quantify.</p> <p>The cost saving would be minimal because, as mentioned above, clerks would still need to scan the filed documents before emailing them out and inmates are likely to request written copies in addition to email copies.</p> <p>4. Does the proposal raise any concerns on means of transferring data? If so, should those concerns be addressed in statute or some other way?</p> <p>Any time that data is transferred via email, there is a security concern. However, such a concern could be alleviated by including language that the court may also use an approved electronic filing service provider.</p> <p>5. The proposed amendment does not prescribe any particular method for how consent from the recipient would be documented. Is this something that should be addressed in statute, a rule of court, or in some other way?</p> <p>Yes. It is recommended that the rule itself use language to the effect of: “With the written consent of the recipient.”</p>	

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