



JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

Item No.: 20-077

For business meeting on: September 25, 2020

Title

Judicial Branch Technology: Electronic Filer
Need Not Consent to Electronic Service

Agenda Item Type

Action Required

Effective Date

January 1, 2021

Rules, Forms, Standards, or Statutes Affected

Amend Cal. Rules of Court, rule 2.255

Date of Report

August 31, 2020

Recommended by

Information Technology Advisory
Committee
Hon. Sheila F. Hanson, Chair

Contact

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Executive Summary

The Information Technology Advisory Committee recommends the Judicial Council amend rule 2.255 of the California Rules of Court. The proposed amendment would require an electronic filing service provider to allow an electronic filer to proceed with an electronic filing even if the electronic filer does not consent to receive electronic service. The proposal further clarifies procedures for consent to electronic service as permitted by Code of Civil Procedure section 1010.6.

Recommendation

The Information Technology Advisory Committee (ITAC) recommends the Judicial Council amend rule 2.255 of the California Rules of Court effective January 1, 2021. The proposed amendment would add a new subdivision (g) to rule 2.255 to require an electronic filing service provider to allow an electronic filer to proceed with an electronic filing even if the electronic filer does not consent to electronic service. The proposed amendment applies only to permissive electronic service, which requires consent, and not to electronic service required by court order or local rule, which does not require consent. The text of the amended rule is attached at page 5.

Relevant Previous Council Action

In response to a legislative amendment to Code of Civil Procedure section 1010.6 (section 1010.6) requiring parties to expressly consent to electronic service, the Judicial Council amended rules 2.251 and 2.255¹ effective January 1, 2019, and January 1, 2020, to provide procedures for express consent that comply with statute.

Analysis/Rationale

In 2017, the Legislature amended section 1010.6 to state that for cases filed on or after January 1, 2019, electronic service was “not authorized unless a party or other person has expressly consented to receive electronic service in that specific action” or if electronic service was required by local rule or court order. Rule 2.251(b) had previously allowed the act of electronic filing alone to be evidence of consent to receive electronic service for represented persons, but the amendment to section 1010.6 eliminated this option. Section 1010.6 does, however, allow a person to provide express consent electronically 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 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 a definition or meaning for “manifesting affirmative consent through electronic means.” To fill this gap, the Judicial Council amended rule 2.251(b) to allow an electronic filer to consent by agreeing to a term with an electronic filing service provider (EFSP) that “clearly states that agreement constitutes consent” to receive electronic service. (Cal. Rules of Court, rule 2.251(b)(1)(B)(i).) The rules allow, but do not require, an EFSP to include such a term.

The proposed amendment to rule 2.255 would require an EFSP that includes a term for the electronic filer’s consent to electronic service to allow an electronic filer to proceed with an electronic filing even if the electronic filer does not agree to electronic service. For example, if an EFSP had a check box that an electronic filer could click to agree to electronic service, the proposed rule would require the EFSP to allow the electronic filer to proceed with the electronic filing even if the electronic filer did not click on the check box.

The proposed amendment would apply only to electronic service by express consent. Accordingly, it would not apply to electronic service required by local rule or court order.

Policy implications

The proposal advances the judicial branch goal of promoting rule changes that facilitate the use of technology. (*Strategic Plan for Technology 2019–2022*, pp. 14–15.) It advances objectives of ensuring that rules promote equal access to justice and do not inhibit use of technology. (*Id.* at p. 15.)

¹ This and all further references to rules are to the California Rules of Court.

Comments

Nine commenters responded to the invitation to comment including:

1. California Department of Child Support Services
2. California Lawyers Association, Executive Committee of the Family Law Section
3. Child Support Directors Association, Judicial Council Forms Committee
4. Orange County Bar Association
5. Public Law Center
6. Superior Court of Orange County, Family Law Division
7. Superior Court of Orange County, Juvenile Court Division
8. Superior Court of Orange County, Training and Analyst Group
9. Superior Court of San Diego County

Most of the comments supported the proposed amendment, but one court raised concerns about workload and its case management system. ITAC sought specific comments on whether electronic filers should be able to “opt out” of electronic service, and this topic generated the most comments. Most commenters agreed that they should, but one court commenter stated they should not. Comments in support included the following reasons for their support:

- Opt-out reduces barriers to using electronic filing.
- Opt-out improves access to courts.
- Electronic filers should be able to use any means legislatively permitted, and it should not be up to a service provider that is not a party to the action.
- Electronic filers should be able to select whatever services benefit them.
- Some people may be able to submit an electronic filing, but not have regular access to technology in order to receive electronic service.

The committee members agreed with these points and were particularly concerned about ensuring access to justice for litigants who have limited access to technology or limited knowledge of using technology for court matters.

One court commenter opposed opt-out and stated “courts need to have the ability to electronically serve the parties with orders, notices, etc. . . . in [electronically filed] cases. If the parties were allowed to [electronically file] and choose not to be electronically served, it would result in courts having to devise systems to serve in two forms, which is costly and difficult for staff.” The committee acknowledged the court’s concerns, but ultimately determined that it should recommend the proposed amendment for adoption by the Judicial Council because facilitating electronic filing improves access to justice. In addition, one of the committee members investigated at his court how often litigants who electronically file then choose not to receive electronic service. The committee member noted that it was a small minority comprised mostly of self-represented litigants. While there may be some variation in the courts, overall, the

committee member expects those electronic filers who opt out of electronic service will be a minority.

Alternatives considered

The committee considered the alternative of making no change but found the proposal preferable as it may reduce barriers to electronic filing by ensuring electronic filers are able to opt out of electronic service when electronic service is not otherwise required by the court.

Fiscal and Operational Impacts

Two courts commented that the proposal would require staff training and updates to case management systems, which would result in increased costs for the training and updates. One of the courts commented there might be minimal savings associated with not having to process paper such as “the costs of stamping conformed copies and the postage required to return them by mail if the postage was not provided by the filing party.”

Attachments and Links

1. Cal. Rules of Court, rule 2.255, at page 5
2. Chart of comments, at pages 6–18
3. Link A: Code Civ. Proc., § 1010.6,
https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=CCP§ionNum=1010.6
4. Link B: *Strategic Plan for Technology 2019–2022*,
<https://www.courts.ca.gov/documents/jctc-Court-Technology-Strategic-Plan.pdf>

Rule 2.255 of the California Rules of Court is amended, effective January 1, 2021, to read:

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

3
4 **(a)–(f) * * ***

5
6 **(g) Electronic filer not required to consent to electronic service**

7
8 **(1) An electronic filing service provider must allow an electronic filer to proceed**
9 **with an electronic filing even if the electronic filer does not consent to**
10 **receive electronic service.**

11
12 **(2) This provision applies only to electronic service by express consent under**
13 **rule 2.251(b).**

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Judicial Branch Technology: Electronic Filer Need Not Consent to Electronic Service (Amend Cal. Rules of Court, rule 2.255)

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

	Commenter	Position	Comment	Committee Response
1.	California Department of Child Support Services by Lara Racine, Attorney III Rancho Cordova, CA	A	<p>The California Department of Child Support Services (DCSS) has reviewed the proposal identified above for potential impacts to the child support program, the local child support agencies (LCSAs), and our case participants. DCSS is in support of the proposal made in this invitation.</p> <p>REQUEST FOR SPECIFIC COMMENTS:</p> <p>1. Does the proposal appropriately address the stated purpose?</p> <p>Yes, the proposal is clear as to intent and purpose. The background section was well stated, especially as to the many iterations of Code of Civil Procedure (CCP) Section 1010.6, the applicable California Rules of Court (CRC), and the proposed amendment to CRC 2.255 as it pertains to electronic filing and electronic service requirements.</p> <p>2. Should electronic filers be able to opt out of electronic service? Why or why not?</p> <p>Yes. Where not required or otherwise ordered, an electronic filer should have the option to decline electronic service. An individual that is filing a document via the electronic process may not know what rules apply to their particular circumstance. If</p>	The committee appreciates the comment and perspective DCSS offers as a regular electronic filer.

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			<p>they fall in the permissive category of e-filing and simply want to submit a document to the court on their case, they should be allowed to do that without also having to serve or accept documents electronically. Allowing a party to opt out of electronic service improves access to the court if that person is not interested in the electronic service process.</p> <p>GENERAL COMMENTS:</p> <p>DCSS agrees that this proposal may reduce barriers to electronic filing by ensuring electronic filers are able to opt out of electronic service when electronic service is not otherwise required by the court. The proposal will ensure litigants always have the option to electronically file at courts where electronic filing is permitted and thus increase access to the court. The proposal also provides clarification as to when the rule applies and to whom.</p> <p>DCSS is a current e-filer with several Superior Courts statewide. When our LCSAs e-file legal documents today, they do so via an established e-filing process vetted and approved by the Judicial Council. However, DCSS also files documents electronically using the</p>	<p>The committee appreciates this point and agrees reducing barriers to electronic filing is an important consideration.</p>

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			<p>electronic filing service providers on the court's public facing e-filing portals. DCSS works with many e-filing vendors including but not limited to, Tyler, JTI, and in-house information technology staff. While some of our counties are able to accept and process electronic service requests, others do not have a fully established process. Emergency Rule 12 will likely expand the ability of the local counties to accept and serve legal filings electronically, but eventually that rule may expire and the opt in mechanism for electronic service will once again apply.</p> <p>This proposal is more important from an access perspective for those filers that are not represented by an attorney and who are permitted to e-file, although are not required to participate in the process. Allowing this population of users to avail themselves to e-filing but not e-service, and making the rule clear as to intent, encourages the use of technology while not requiring participation in all aspects, which may otherwise deter some users. Further definition regarding the procedures required in CCP 1010.6 is always welcome, and explicit rules of court help facilitate the understanding of the entire electronic process.</p>	<p>The committee appreciates DCSS making this point and agrees that improving access to the courts through electronic filing is an important consideration.</p>

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2.	California Lawyers Association, Executive Committee of the Family Law Section (FLEXCOM) by Justin M. O'Connell, FLEXCOM Legislation Chair Sacramento, CA	A	FLEXCOM agrees with this proposal.	No response required.
3.	Child Support Directors Association, Judicial Council Forms Committee Ronald Ladage, Chair Sacramento, CA	A	<p>The Committee agrees with the proposed revisions to Rule of Court 2.255. The proposed revision to California Rule of Court 2.255 accomplishes the stated purpose in that it allows electronic filers to utilize only the services of the EFSP that they wish to utilize, except when either a local rule of court directs that electronic service is mandatory when filing electronically or is specifically ordered by the court.</p> <p>The Committee believes that the proposal is feasible for the electronic filing service provider to offer a menu of services. Within the menu, the electronic filer should be able to select which services are of benefits to the electronic filed document and should not be mandated to receive services that are of no or limited benefit to the electronic filer.</p>	The committee appreciates the comment.
4.	Orange County Bar Association by Scott B. Garner, President	A	Does the proposal appropriately address the stated purpose?	The committee appreciates the comment.

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			<p>Yes, the proposal will require electronic filing services to update their forms to comply with the statutory changes to Code of Civil Procedure Section 1010.6.</p> <p>Should electronic filers be able to opt out of electronic service? Why, or why not?</p> <p>Yes. Conceivably some persons who are required to utilize electronic filing services may not have regular access to a reliable electronic means to receive service. Also, cyberspace does not always deliver documents properly, and mistakes can be made in attempts to effect electronic service. A party should have the option to avoid these types of problems by withholding consent.</p> <p>For Electronic Filing Service Providers, is the proposal feasible?</p> <p>Yes. It appears all that would be required is for EFSPs to add an additional check box to their forms as to whether or not a party consents to electronic service in those proceedings wherein that option is available.</p>	<p>The committee appreciates these point and agrees ensuring access to electronic filing and allowing a choice are important considerations.</p>
5.	Public Law Center by Leigh E. Ferrin, Director of Litigation and Pro Bono	A	On a regular basis, but particularly over the last three months, PLC has worked with many self-represented litigants who may be	The committee appreciates PLC’s perspective on the impact for self-represented litigants, particularly those without regular access to

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	Santa Ana, CA		<p>able to file electronically, either through a legal services organization like PLC, or, once the stay-at-home orders are lifted, at a community center or local library.</p> <p>However, these same litigants often do not have regular access to an email address. Some litigants have no email address at all, others may only be able to check their email once a week or less frequently. This is particularly true now, during the stay-at-home orders, as people are more isolated now than ever and legal services is providing more services remotely as well. For instance, PLC currently assists individuals with drafting declarations to support their domestic violence restraining orders. PLC also assists these litigants with filing, in pro per, when the litigant is unable to file on their own. In these instances, it would be particularly valuable for those litigants to still receive service by mail, rather than being required to consent to electronic service.</p> <p>PLC has one additional suggestion, which is to find a way for the filing services to verify the address, maybe through USPS as many online retailers do, to ensure that the address entered in the electronic filing system is a correct address.</p>	technology required in order to receive electronic service.

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6.	Superior Court of Orange County, Family Law Division by Vivian Tran, Administrative Analyst	NI	<p>Does the proposal appropriately address the stated purpose?</p> <p>Yes</p> <p>Should electronic filers be able to opt out of electronic service? Why or why not?</p> <p>Yes, electronic filers should be able to opt out of electric service. They are entitled to effectuate service by any means as described by the legislature. If there is no requirement per code or by rules of court that mandate electronic service of a document, then the EFSP should not be able to impose this restriction. Some courts have requirements regarding electronic filing. A filer would not be able to comply with the requirements if they were denied the opportunity to file electronically due to their choice not to accept electronic service of documents. The way a party receives service should not be determined by a service provider who is not a party to the action.</p> <p>For EFSPs, is the proposal feasible?</p> <p>Yes, the providers who are impacted by this change can remove the check box that identifies consent to electronic service, or</p>	<p>The committee appreciates these points and agrees with them.</p>

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			<p>they can change the functionality of the box so that it does not preclude the processing of documents if the box remains unchecked.</p> <p>Would the proposal provide cost savings? If so, please quantify.</p> <p>No, any potential cost savings is likely minimal. It is a possibility that the proposed change would increase the number of electronic filings received by the court and reduce the number of paper filings received by mail. This could save on the costs of stamping conformed copies and the postage required to return them by mail if the postage was not provided by the filing party.</p> <p>Would there be implementation requirements for courts? If so, what would they be— for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), or modifying case management systems?</p> <p>Case management system may need updates to capture or record who is opting out of e-service. Additionally, as a result of any system updates staff training will be needed.</p>	<p>The committee appreciates the comments on costs and implementation requirements and will report the information to the Judicial Council.</p>

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7.	Superior Court of Orange County, Juvenile Court Division by Linda Contreras, Administrative Analyst I	NI	<p>Does the proposal appropriately address the stated purpose?</p> <p>Yes.</p> <p>Should electronic filers be able to opt out of electronic service? Why or why not?</p> <p>Yes, electronic filers should be able to opt out of electric service. It may reduce the barriers to electronic filing.</p> <p>For EFSPs, is the proposal feasible?</p> <p>Yes, the providers who are impacted by this change can remove the check box that identifies consent to electronic service, or they can change the functionality of the box so that it does not preclude the processing of documents if the box remains unchecked.</p> <p>Would the proposal provide cost savings? If so, please quantify.</p> <p>None identified at this time.</p> <p>Would there be implementation requirements for courts? If so, what would they be— for example, training staff (please identify position and expected hours of training), revising processes and procedures</p>	<p>The committee agrees with the comment that reducing barriers to electronic filing is an important consideration.</p> <p>The committee appreciates the comments implementation requirements and will report the information to the Judicial Council.</p>

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			<p>(please describe), or modifying case management systems?</p> <p>Case management system may need updates to capture or record who is opting out of e-service. Additionally, as a result of any system updates staff training will be needed.</p>	
8.	Superior Court of Orange County, Training and Analyst Group	NI	<p>General Comments</p> <p>This ITC proposal was requested in part by OCSC.</p> <p>Request for Specific Comments</p> <p>1. Does the proposal appropriately address the stated purpose?</p> <p>Yes</p> <p>2. Should the electronic filers be able to opt out of electronic service? Why or why not?</p> <p>We defer to the Information and Technology Advisory Committee</p> <p>3. For EFSPs, is the proposal feasible?</p> <p>Yes, it is feasible as it would only require minimal system updates.</p>	

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			<p>4. Would the proposal result in costs or savings to the court? If so, please quantify.</p> <p>The court would have to implement a mechanism for monitoring parties who opt out of e-service. This would result in additional costs to update the case management system and to train staff accordingly.</p> <p>5. What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?</p> <p>This would require staff training and system updates to ensure notice is provided according to preference.</p>	<p>The committee appreciates the comments on costs and implementation requirements and will report the information to the Judicial Council.</p>
9.	<p>Superior Court of San Diego County by Mike Roddy, Executive Officer</p>	<p>NI</p>	<p>Does the proposal appropriately address the stated purpose?</p> <p>Yes.</p> <p>Should electronic filers be able to opt out of electronic service? Why or why not?</p>	

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			<p>No. The courts need to have the ability to electronically serve the parties with orders, notices, etc..., in efile cases. If the parties were allowed to efile and choose not to be electronically served, it would result in courts having to devise systems to serve in two forms, which is costly and difficult for staff.</p> <p>For EFSPs, is the proposal feasible?</p> <p>Defer to EFSPs.</p> <p>Would the proposal provide cost savings? If so, please quantify.</p> <p>No, as set forth above, if parties were able to choose manner of service, it would increase costs to the court and defeat the savings from efilng.</p> <p>Would there be implementation requirements for courts? If so, what would they be—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), or modifying case management systems?</p> <p>Would the consent to service only apply to the parties or the court communication as</p>	<p>The committee acknowledges the concerns raised by the court about impact to its workload and case management system updates. The committee discussed the matter, but decided to recommend the proposal for adoption by the Judicial Council because facilitating electronic filing improves access to justice. The committee expects that parties choosing to electronically file, but opting not to receive electronic service will be a minority.</p> <p>The committee appreciates the comments on costs and implementation requirements and will report the information to the Judicial Council.</p> <p>The provision would apply to service, but not other forms of communication. This is a statutory requirement. Under Code of Civil</p>

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			well? If it applies to service between the parties, minimal impact. However, if it applies to court communication, we would need to have development added to CCMS V-3 that would allow the recording of expressed consent somewhere on the participants' tab, which would result in a significant impact. It would also increase costs in cases because staff would have to serve in potentially two forms, which will take training, time, and significantly add to the costs incurred by the court to provide notice.	Procedure section 1010.6(a)(3), if the court is required to serve a party with a document and electronic service is not mandated by court order or local rule, then the party must have consented to receive electronic service in the case before the court can electronically serve them. To ensure courts would have a way of knowing an electronic filer had consented to electronic service through electronic filing service provider rather than through filing a form, the Judicial Council amended rule 2.255 last year to require the electronic filing service providers to transmit that information to the court.

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