



JUDICIAL COUNCIL OF CALIFORNIA

INFORMATION TECHNOLOGY
ADVISORY COMMITTEE

www.courts.ca.gov/itac.htm
itac@jud.ca.gov

ITAC RULES AND POLICY SUBCOMMITTEE

MINUTES OF OPEN MEETING

January 12, 2021

12:10 PM to 1:00 PM

Videoconference

Advisory Body Members Present: Hon. Peter Siggins, Chair; Hon. Julie Culver; Hon. Samantha Jessner; Hon. Louis R. Mauro; Hon. Kim Menninger; Mr. Darrel Parker; Mr. Don Willenburg

Advisory Body Members Absent:

Others Present: Judicial Council Staff

OPEN MEETING

Call to Order and Roll Call

The chair called the meeting to order at 12:13 PM and took roll call.

Approval of Minutes

The advisory body reviewed and approved the minutes of the November 4, 2020, Rules and Policy Subcommittee meeting.

DISCUSSION AND ACTION ITEMS (ITEMS 1 - 2)

Item 1

Trial Court Rules and Statutes Revisions: Proposed Amendments to the Government Code, Code of Civil Procedure, Penal Code, and the California Rules of Court (Action Required)

Consider whether to recommend circulating proposed amendments to the Government Code, Code of Civil Procedure, and Penal Code, and to permit courts to use vendors for storage of electronic exhibits and electronic evidence. Consider also whether to recommend circulating a proposed new rule to the California Rules of Court defining “lodged electronic exhibits.” These proposals are based on the recommendations of the Digital Evidence Workstream.

Presenters: Hon. Peter Siggins, Chair, Rules and Policy Subcommittee
Ms. Andrea Jaramillo, Attorney II, Legal Services

Action: Ms. Jaramillo presented the new language regarding electronic evidence. Digital evidence can be stored at the court, but not currently with vendors. Some subcommittee members worry about security of digital evidence stored at the court. In relation to the statute, it would be subject to the rules of the judicial branch as set forth by the Judicial

Council. By staying general with statutory proposal, then call out for comment on materials that should be excluded from the vendors storage.

B – As it is written. no objections.

C – Should be only judicial officers and court authorized persons by law or court order. No objections.

D – Is by the direction of the court and the clerk for disposal.

E – Destruction of exhibits or evidence as directed by court, who could give vendor a purge schedule.

F – Relates to disaster recovery and vendor backups.

New F – When the vendor’s contract ends.

New F – There are no fee charges for exhibits. This item will be removed at this time.

Final F – Add the “the Judicial Council may adopt rules to implement this provision”

Motion to approve as amended the proposed amendments to the Government Code, Code of Civil Procedure, Penal Code, and the California Rules of Court.

Approved.

Consider also whether to recommend circulating a proposed new rule to the California Rules of Court defining “lodged electronic exhibits.” These proposals are based on the recommendations of the Digital Evidence Workstream.

Ms. Jaramillo explained there needs to be a decision on the lodged electronic exhibits would be placed in the rules. The subcommittee agreed on here her selected placement as the appropriate section.

Discussion around lodged electronic exhibits that are not part of the court records cannot be made public unless it is marked and/or introduced into evidence. If lodged records are not filed or not in the possession of the court clerk, they would not be available to the public.

Item 2

Trial Court Rules and Statutes Revisions: Proposed Amendments to Amend the California Rules of Court (Action Required)

Consider whether to recommend circulating proposed amendments to the California Rules of Court to reference Penal Code section 690.5.

Presenters: Hon. Peter Siggins, Chair, Rules and Policy Subcommittee
Ms. Andrea Jaramillo, Attorney II, Legal Services

Action: This item was deferred until the next meeting.

ADJOURNMENT

There being no further business, the meeting was adjourned at 1:45 PM.

Approved by the advisory body on enter date.



JUDICIAL COUNCIL OF CALIFORNIA

INFORMATION TECHNOLOGY
ADVISORY COMMITTEE

www.courts.ca.gov/itac.htm
itac@jud.ca.gov

ITAC RULES AND POLICY SUBCOMMITTEE

MINUTES OF OPEN MEETING

January 21, 2021
12:00 PM to 1:30 PM
Videoconference

Advisory Body Members Present: Hon. Julie Culver, Chair; Hon. Samantha Jessner; Hon. Louis R. Mauro; Mr. Darrel Parker; Hon. Bruce Smith; Mr. Don Willenburg

Advisory Body Members Absent: Hon. Kim Menninger

Others Present: Judicial Council Staff

OPEN MEETING

Call to Order and Roll Call

The chair called the meeting to order at 12:04 PM and took roll call.

DISCUSSION AND ACTION ITEMS (ITEMS 1 - 1)

Item 1

Trial Court Rules and Statutes Revisions: Proposed Amendments to Amend the California Rules of Court (Action Required)

Consider whether to recommend circulating proposed amendments to the California Rules of Court to reference Penal Code section 690.5.

Presenters: Hon. Julie Culver, Chair, Rules and Policy Subcommittee
Ms. Andrea Jaramillo, Attorney II, Legal Services

Action: Judge Culver and Ms. Jaramillo reviewed the decisions from the January 12 meeting on lodged exhibits. The subcommittee agreed to add back in wording pertaining to confidentiality.

Retention of lodged exhibits may need to be at the court's discretion. The subcommittee will ask if there should be a certain time for these to be held by the court during public comment.

Ms. Jaramillo will wordsmith the redaction section to make it clearer that a reference sheet should be included of lodged exhibits that have been redacted.

Motion to proceed with changes Ms. Jaramillo will update and bring to the Information Technology Advisory Committee.

Approved.

A D J O U R N M E N T

There being no further business, the meeting was adjourned at 1:08 PM.

Approved by the advisory body on enter date.



JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue • San Francisco, California 94102-3688
Telephone 415-865-4200 • Fax 415-865-4205 • TDD 415-865-4272

MEMORANDUM

Date

June 25, 2021

Action Requested

Please review

To

Information Technology Advisory
Committee, Rules and Policy Subcommittee
Hon. Julie R. Culver, Chair

Deadline

July 6, 2021

From

Andrea L. Jaramillo, Attorney
Legal Services, Judicial Council

Contact

Andrea L. Jaramillo
916-263-0991 phone
andrea.jaramillo@jud.ca.gov

Subject

Rule Proposal: Review public comments and
make recommendation on amending rules
2.251, 2.252, 2.253, 2.255, 2.258, and 2.259
of the California Rules of Court

Background

This spring, the Information Technology Advisory Committee (ITAC) circulated a rule proposal for public comment to amend rules 2.251, 2.252, 2.253, 2.255, 2.258, and 2.259 of the California Rules of Court. The amendments would bring criminal cases within the scope of the electronic filing and electronic service rules of the California Rules of Court. The proposal is needed to comply with Penal Code section 690.5's requirement that the Judicial Council make rules for the electronic filing and electronic service of documents in criminal cases.

Discussion

Six commenters responded to the invitation to comment. The comments supported the proposed amendments, but most recommended modifications. All comments and draft committee

responses are included in the comment chart attached at pages 15 through 25. Staff will update the draft committee responses following the subcommittee's discussion.

The main issue for the subcommittee's consideration is whether service providers should be prohibited from charging service fees for electronic filing in criminal cases.

As circulated, the proposal includes a provision that would prohibit electronic filing service providers (EFSPs) and electronic filing managers (EFMs) from charging service fees when an electronic filer is a prosecutor, an indigent defendant, or counsel for an indigent defendant. Service fees could still be charged when the filer is a nonindigent defendant. These service fees are charged by the service provider and are not filing fees. The fees are not mandatory because there is no mandatory electronic filing in criminal cases. A filer could avoid any service fees by paper filing instead of electronic filing.

When the Criminal Law Advisory Committee reviewed the proposal before it circulated for public comment, the committee recommended service fees be prohibited. However, ITAC was concerned whether EFSPs and EFMs would be willing to provide services in criminal cases if no fees could be charged. ITAC also did not think a prohibition for all fees was necessary since electronic filing is not mandatory. Accordingly, ITAC did not prohibit service fees for nonindigent defendants in the proposal but did ask for specific comments on this issue in the invitation to comment. No EFMs or EFSPs commented on this issue.

A. Commenters opposed to service fees

Three of the commenters recommended service fees be prohibited in all criminal cases. One of these commenters stated it "would be unconscionable to charge working people accused of crimes these fees, but not taxpayer-funded entities with salaried staff." Another commenter stated the prohibition against charging service fees "should be extended to include non-indigent defendants which would include non-indigent pro pers and non-indigents represented by private counsel out of fairness." The commenter noted that there is no limit to such fees and that "[a]ccess to the court should not be more burdensome on a defendant simply because they are not an indigent within the definition of Penal Code section 987." The commenter is correct that there is no limit to such fees for permissive electronic filing.

1. Filing deadline for electronic filing as an additional consideration

Another consideration related to this issue other than those raised by the commenters above is the deadline for paper filing versus electronic filing. A paper-filed document that is filed in person in the courthouse would be limited to the court's business hours. Similarly, a paper filing left in a court's drop box would be considered filed on the same court day if filed before 4:00

p.m. unless the local court provides for a longer window of time for the drop box. (Cal. Rules of Court, rule 2.210(b).) Electronic filing has a standard deadline statewide: “Any document received electronically by the court between 12:00 a.m. and 11:59:59 p.m. on a court day shall be deemed filed on that court day.” (Code Civ. Proc., § 1010.6(b)(3); see Pen. Code, § 690.5(a) [applying Code Civ. Proc., § 1010.6(b) to criminal cases].) As such, if a court accepted electronic filings in criminal cases through an EFSP, the only way a nonindigent criminal defendant or their counsel could benefit from a 11:59:59 p.m. filing deadline is if the defendant paid whatever service fee the EFSP was charging.

In the absence of authority to charge services fees directly to filers, service providers could potentially not offer services, make up for the cost by charging more in civil filings, or come to an agreement with the court on funding electronic filing in criminal cases.¹

B. Alternatives to prohibiting service fees

One alternative to prohibiting any service fees would be to allow service fees with no exemptions. While this option would treat all parties equally, it would likely still be unfair to indigent defendants who could not afford the service fees.

Another alternative would be to further limit the scope of exemptions. If it would be unfair to indigent filers to allow service fees with no exemptions, an alternative would be to prohibit service fees for indigent defendants and their counsel only. If the subcommittee determines an exemption should apply to indigent defendants, one commenter recommended the language specify “court appointed counsel for an indigent defendant.”

Subcommittee’s Tasks

- Consider the comments received on the proposal and how the committee should respond.
- Decide whether to recommend ITAC revise the proposal.
- Decide whether to recommend the proposal for Judicial Council approval.

Attachments and Links

1. Text of proposed amendment to California Rules of Court, rules 2.251, 2.252, 2.253, 2.255, 2.258, and 2.259 at pages 5 through 8.
2. Chart of comments at pages 9 through 19.

¹ The funding of electronic filing services is also a topic ITAC’s soon-to-be launched electronic filing workstream will consider.

3. Penal Code section 690.5,
https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=690.5.&lawCode=PEN.
4. Code of Civil Procedure section 1010.6,
https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=CCP§ionNum=1010.6.
5. Rule 2.210 of the California Rules of Court,
https://www.courts.ca.gov/cms/rules/index.cfm?title=two&linkid=rule2_210.
6. Rule 2.251 of the California Rules of Court,
https://www.courts.ca.gov/cms/rules/index.cfm?title=two&linkid=rule2_251.
7. Rule 2.252 of the California Rules of Court,
https://www.courts.ca.gov/cms/rules/index.cfm?title=two&linkid=rule2_252.
8. Rule 2.253 of the California Rules of Court,
https://www.courts.ca.gov/cms/rules/index.cfm?title=two&linkid=rule2_253.
9. Rule 2.255 of the California Rules of Court,
https://www.courts.ca.gov/cms/rules/index.cfm?title=two&linkid=rule2_255.
10. Rule 2.258 of the California Rules of Court,
https://www.courts.ca.gov/cms/rules/index.cfm?title=two&linkid=rule2_258.
11. Rule 2.259 of the California Rules of Court,
https://www.courts.ca.gov/cms/rules/index.cfm?title=two&linkid=rule2_259.

Rules 2.251, 2.252, 2.253, 2.255, 2.258, and 2.259 of the California Rules of Court would be amended, effective January 1, 2022, to read:

1 **Rule 2.251. Electronic service**

2
3 **(a) Authorization for electronic service**

4
5 When a document may be served by mail, express mail, overnight delivery, or fax
6 transmission, the document may be served electronically under Code of Civil
7 Procedure section 1010.6, Penal Code section 690.5, and the rules in this chapter.
8 For purposes of electronic service made pursuant to Penal Code section 690.5,
9 express consent to electronic service is required.

10
11 **(b) * * ***

12
13 **(c) Electronic service required by local rule or court order**

14
15 (1) A court may require parties to serve documents electronically in specified
16 civil actions by local rule or court order, as provided in Code of Civil
17 Procedure section 1010.6 and the rules in this chapter.

18
19 (2) A court may require other persons to serve documents electronically in
20 specified civil actions by local rule, as provided in Code of Civil Procedure
21 section 1010.6 and the rules in this chapter.

22
23 (3)–(4) * * *

24
25 **(d)–(j) * * ***

26
27 **(k) Electronic service by or on court**

28
29 (1) The court may electronically serve documents as provided in Code of Civil
30 Procedure section 1010.6, Penal Code section 690.5, and the rules in this
31 chapter.

32
33 (2) A document may be electronically served on a court if the court consents to
34 electronic service or electronic service is otherwise provided for by law or
35 court order. A court indicates that it agrees to accept electronic service by:

36
37 (A) Serving a notice on all parties and other persons in the case that the
38 court accepts electronic service. The notice must include the electronic
39 service address at which the court agrees to accept service; or

40
41 (B) Adopting a local rule stating that the court accepts electronic service.
42 The rule must indicate where to obtain the electronic service address at
43 which the court agrees to accept service.

Rules 2.251, 2.252, 2.253, 2.255, 2.258, and 2.259 of the California Rules of Court would be amended, effective January 1, 2022, to read:

1
2
3 **Advisory Committee Comment**
4

5 **Subdivision (b)(1)(B).** The rule does not prescribe specific language for a provision of a term of
6 service when the filer consents to electronic service, but does require that any such provision be
7 clear. *Consent to Electronic Service and Notice of Electronic Service Address* (form EFS-005-
8 CV) provides an example of language for consenting to electronic service.
9

10 **Subdivision (c).** The subdivision is applicable only to civil actions as defined in rule 1.6. Penal
11 Code section 690.5 excludes mandatory electronic service in criminal cases.
12

13 **Subdivisions (c)–(d).** Court-ordered electronic service is not subject to the provisions in Code of
14 Civil Procedure section 1010.6 requiring that, where mandatory electronic filing and service are
15 established by local rule, the court and the parties must have access to more than one electronic
16 filing service provider.
17

18 **Rule 2.252. General rules on electronic filing of documents**
19

20 **(a) In general**
21

22 A court may provide for electronic filing of documents in actions and proceedings
23 as provided under Code of Civil Procedure section 1010.6, Penal Code section
24 690.5, and the rules in this chapter.
25

26 **(b)–(h) * * ***
27

28 **Rule 2.253. Permissive electronic filing, mandatory electronic filing, and electronic**
29 **filing by court order**
30

31 **(a) Permissive electronic filing by local rule**
32

33 A court may permit parties by local rule to file documents electronically in any
34 types of cases, subject to the conditions in Code of Civil Procedure section 1010.6,
35 Penal Code section 690.5, and the rules in this chapter.
36

37 **(b)–(c) * * ***
38

39 **Rule 2.255. Contracts with electronic filing service providers and electronic filing**
40 **managers**
41

42 **(a)–(g) * * ***
43

Rules 2.251, 2.252, 2.253, 2.255, 2.258, and 2.259 of the California Rules of Court would be amended, effective January 1, 2022, to read:

1 **(h) Fees for electronic filing services not chargeable in some criminal actions**

2
3 (1) Electronic filing service providers and electronic filing managers may not
4 charge a service fee when an electronic filer files a document in a criminal
5 action when the electronic filer is a prosecutor, an indigent defendant, or
6 counsel for an indigent defendant.

7
8 (2) For purposes of this subdivision, “indigent defendant” means a defendant who
9 the court has determined is not financially able to employ counsel pursuant to
10 Penal Code section 987. Pending the court’s determination, “indigent
11 defendant” also means a defendant the public defender is representing pursuant
12 to Government Code section 27707.

13
14 **Rule 2.258. Payment of filing fees in civil actions**

15
16 **(a) Use of credit cards and other methods**

17
18 A court may permit the use of credit cards, debit cards, electronic fund transfers, or
19 debit accounts for the payment of civil filing fees associated with electronic filing,
20 as provided in Government Code section 6159, rule 10.820, and other applicable
21 law. A court may also authorize other methods of payment.

22
23 **(b) * * ***

24
25 **Rule 2.259. Actions by court on receipt of electronic filing**

26
27 **~~(a)–(d)~~ * * ***

28
29 **(e) Issuance of electronic summons**

30
31 (1) Court authorized to issue electronic summons

32
33 **(A)** On the electronic filing of a complaint, a petition, or another document
34 that must be served with a summons in a civil action, the court may
35 transmit a summons electronically to the electronic filer in accordance
36 with this subdivision and Code of Civil Procedure section 1010.6.

37
38 **(B)** On the electronic filing of an accusatory pleading against a corporation,
39 the court may transmit a summons electronically to the prosecutor in
40 accordance with this subdivision and Penal Code sections 690.5, 1390
41 and 1391.

Rules 2.251, 2.252, 2.253, 2.255, 2.258, and 2.259 of the California Rules of Court would be amended, effective January 1, 2022, to read:

1
2
3
4
5
6
7
8
9
10
11
12

(C) When a summons is issued in lieu of an arrest warrant, the court may transmit the summons electronically to the prosecutor or person authorized to serve the summons in accordance with this subdivision and Penal Code sections 690.5, 813 and 816a.

(2) The electronically transmitted summons must contain an image of the court’s seal and the assigned case number.

(3) Personal service of the printed form of a summons transmitted electronically to the electronic filer has the same legal effect as personal service of a copy of an original summons.

DRAFT

SPR21-16

Rules: Electronic Filing and Service in Criminal Cases (Amend Cal. Rules of Court, rules 2.251, 2.252, 2.253, 2.255, 2.258, and 2.259)

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

| | Commenter | Position | Comment | DRAFT Committee Response |
|----|---|----------|--|---|
| 1. | Amitabho Chattopadhyay San Francisco, CA | AM | <p>It would be unconscionable to charge working people accused of crimes these fees, but not taxpayer-funded entities with salaried staff. Prosecutors would be the most obvious income source for any criminal e-filing service provider, and the most able to pay.</p> <p>The best possible alternative would be to simply require e-filing companies to provide e-filing services free of charge in criminal cases.</p> <p>The rules could also set a temporary cap on e-filing fee increases in certain types of cases to ensure that fee increases to offset this added cost do not affect particularly sensitive areas, such as unlawful detainers and family law.</p> | <p>The committee appreciates the concern raised and [agrees or disagrees] that service providers should be prohibited from charging fees for electronic filing in criminal cases.</p> <p>The recommendation on service fees charged for certain civil cases is outside the scope of the proposal, but something the committee may consider in the future.</p> |
| 2. | Orange County Bar Association by Larisa M. Dinsmoor President | AM | <p>Rule 2.255(h) is a new proposal which prohibits electronic filing service providers and electronic filing managers from charging a service fee when an electronic filer files a document in a criminal action when the electronic filer is a prosecutor, an indigent defendant, or counsel for an indigent defendant. It should be noted that the service fees of (h) are not filing fees charged by the court. This rule should be extended to include non-indigent defendants which would include non-indigent pro pers and non-indigents represented by private counsel out of fairness.</p> <p>The rule as proposed has no limits on the fees which an electronic filing service provider may charge the non-indigent defendant. It should be of concern that such providers will attempt to offset the expense of not charging prosecutors</p> | <p>The committee appreciates the concern raised and [agrees or disagrees] that service providers should be prohibited from charging fees for electronic filing in criminal cases.</p> |

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

SPR21-16

Rules: Electronic Filing and Service in Criminal Cases (Amend Cal. Rules of Court, rules 2.251, 2.252, 2.253, 2.255, 2.258, and 2.259)

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

| | Commenter | Position | Comment | DRAFT Committee Response |
|----|---------------------------------|----------|--|---|
| | | | <p>and indigents by higher fees for non-indigents. Access to the court should not be more burdensome on a defendant simply because they are not an indigent within the definition of Penal Code 987.</p> <p>Notwithstanding the suggested inclusion of non-indigent defendants in Rule 2.255(h), the proposal appropriately addresses the stated purpose.</p> | |
| 3. | Superior Court of Orange County | | <p>In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:</p> <ul style="list-style-type: none"> • Does the proposal appropriately address the stated purpose? <p>Yes, the proposal appropriately addresses the need to meet Penal Code section 690.5's requirement that the Judicial Council adopt rules for the electronic filing and service of documents in criminal cases in the trial courts.</p> <ul style="list-style-type: none"> • The proposed amendments would prohibit EFSPs and EFMs from charging for electronic filing services in criminal cases when an electronic filer is a prosecutor, indigent defendant, or counsel for an indigent defendant. <ul style="list-style-type: none"> o Is this exemption from service charges appropriate? <p>Yes, exemption from service charges is appropriate when the electronic filer is a prosecutor, indigent defendant, or counsel for an indigent defendant. No service charge for prosecutor also makes sense, as there should not be a price point for prosecutors to file as that could sway/impact filing quantities. Waiving</p> | The committee appreciates the court's comments. |

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

SPR21-16

Rules: Electronic Filing and Service in Criminal Cases (Amend Cal. Rules of Court, rules 2.251, 2.252, 2.253, 2.255, 2.258, and 2.259)

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

| | Commenter | Position | Comment | DRAFT Committee Response |
|--|-----------|----------|---|---|
| | | | <p>the service charge for indigent defendant or counsel for an indigent defendant also seems appropriate as those parties are in situations where applying a service charge can impact their right to access to the courts without regard to their economic means.</p> <p>o For EFSPs and EFMs: would you be willing to offer electronic filing in criminal cases with this limitation?</p> <p>This is a question for EFSPs and EFMs, I cannot answer. Also, our court currently does not use EFSPs or EFMs to support Criminal filings.</p> <p>o For prosecutors, defense attorneys representing indigent defendants, and those representing the interests of indigent, pro per defendants: would a service provider's fee prevent the use of electronic filing?</p> <p>From the court perspective, we could reasonably assume that a service provider's fee would prevent the use of electronic filing. But, if these types of electronic filers (prosecutors, indigent defendants, or counsel for an indigent defendants) are exempt from a service provider's fee, then we don't see any hindrance in the usage of EFSPs or EFMs.</p> <p>o For defense attorneys representing non-indigent defendants, would a service provider's fee prevent the use of electronic filing?</p> <p>Similar to the above, from the court perspective, it seems that it would likely prevent the use of electronic filing, since the service provider's fee would apply to these electronic filers (defense</p> | <p>The committee [agrees or disagrees] that a service fee could represent a hindrance to such filers though paper filing is still an option.</p> |

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

SPR21-16

Rules: Electronic Filing and Service in Criminal Cases (Amend Cal. Rules of Court, rules 2.251, 2.252, 2.253, 2.255, 2.258, and 2.259)

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

| | Commenter | Position | Comment | DRAFT Committee Response |
|--|-----------|----------|---|---|
| | | | <p>attorneys representing non-indigent defendants). There are currently no criminal electronic filings, and if a service provider's fee is instituted for criminal filings, then pursuing an electronic filing would be more expensive than filing on paper. It would be more cost effective to file in person/on paper.</p> <p>o Should there be no service charges for the electronic filing in criminal cases?</p> <p>Based on the responses above if there is a service charge for electronic filings for criminal cases, that may deter the use of EFSPs or EFMs to support criminal filings. If service charges will be placed for defense attorney representing non-indigent defendants, then expect to see little use in EFSPs or EFMs to support criminal filings.</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. <p>Our court currently does not participate in electronic filings for criminal cases and therefore would not see any cost savings. For courts who participate in electronic filings for criminal cases, any potential cost savings would be offset by the fact that service fees would only be applicable to certain electronic filers (prosecutors, indigent defendants, or counsel for an indigent defendants). If cost savings are present, it would likely be insignificant as there</p> | <p>The committee agrees with the concern that EFMs and EFSPs may not support criminal filings in the absence of the ability to charge fees. However, no EFMs or EFSPs commented either way.</p> <p>The committee appreciates the feedback concerning cost savings. The committee will include this information in the report to the Judicial Council.</p> |

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

SPR21-16

Rules: Electronic Filing and Service in Criminal Cases (Amend Cal. Rules of Court, rules 2.251, 2.252, 2.253, 2.255, 2.258, and 2.259)

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

| | Commenter | Position | Comment | DRAFT Committee Response |
|----|--|----------|--|---|
| | | | <p>will be a potential for less electronic filings to occur for criminal cases.</p> <ul style="list-style-type: none"> • 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>For courts like ours who do not participate in electronic filings the training would be extensive for there would have to be new processes and procedures surrounding these types of filings. The court would also need to work alongside the EFSPs and EFMs to determine how the application of a service fee or not would be communicated with the e-filer. This would include changes to the CMS and possibly new docket codes. For courts in which electronic filings are already in place, the level of effort to implement this proposal might be smaller and encompass training for staff and slight CMS changes surrounding the current EFSP/EFM communications/exchanges.</p> <ul style="list-style-type: none"> • How well would this proposal work in courts of different sizes? <p>This proposal would work well for courts who already use electronic filings for criminal cases and/or courts smaller in size. For larger courts, the potential is that there may be a larger amount of filings, which can impact workload.</p> | <p>The committee appreciates the comments on the significant implementation requirements that would be needed to accepted criminal electronic filings. The committee will include this information in the report to the Judicial Council.</p> |
| 4. | Superior Court of San Diego County by Mike Roddy Executive Officer | A | <ul style="list-style-type: none"> • Does the proposal appropriately address the stated purpose? <p>Yes.</p> | |

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

SPR21-16

Rules: Electronic Filing and Service in Criminal Cases (Amend Cal. Rules of Court, rules 2.251, 2.252, 2.253, 2.255, 2.258, and 2.259)

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

| | Commenter | Position | Comment | DRAFT Committee Response |
|--|-----------|----------|--|--|
| | | | <ul style="list-style-type: none"> • The proposed amendments would prohibit EFSPs and EFMs from charging for electronic filing services in criminal cases when an electronic filer is a prosecutor, indigent defendant, or counsel for an indigent defendant. Is this exemption from service charges appropriate? Should there be no service charges for the electronic filing in criminal cases? Yes and yes. • Would the proposal provide costs savings? If so, please quantify. Yes. If the court had a case management system that allowed for electronic filing, there would be long-term savings because it would require less processing time by court staff and overall savings in salaries. However, it should be noted that creating such a case management system would require initial time by staff to create, implement, and train, so the upstart costs would increase spending. • 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. It would require the court’s Information Technology team to develop a case management system. In addition, the legal team would need to be involved, along with court operational staff. It is difficult to quantify, but developing such a system would take several months to | <p>The committee [agrees or disagrees] that service providers should be prohibited from charging fees for electronic filing in criminal cases.</p> <p>The committee appreciates this feedback concerning cost savings and that there would be initial costs to update the case management system, but a reduction in costs for processing filings once such a thing was implemented. The committee will include this information in the report to the Judicial Council.</p> <p>The committee appreciates the comments concerning implementation requirements and will include the information in the report to the Judicial Council.</p> |

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

SPR21-16

Rules: Electronic Filing and Service in Criminal Cases (Amend Cal. Rules of Court, rules 2.251, 2.252, 2.253, 2.255, 2.258, and 2.259)

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

| | Commenter | Position | Comment | DRAFT Committee Response |
|----|--|----------|--|--|
| | | | <p>develop. Once developed, business office staff and courtroom clerks would need to be trained.</p> <ul style="list-style-type: none"> • How well would this proposal work in courts of different sizes? <p>Depending on the size of the courts, the capabilities to develop such a system may differ. In addition, the time needed to implement will vary by court size. Cost savings would also vary proportionally based on size. In addition, whether or not such a system would be used may also depend on the resources available to justice partners in particular counties and some may not have the resources to develop a process for electronic filing.</p> | |
| 5. | <p>Trial Court Presiding Judges Advisory Committee (TCPJAC) and the Court Executives Advisory Committee (CEAC) by the TCPJAC/CEAC Joint Rules Subcommittee (JRS)</p> | AM | <p>The JRS notes that the proposal is required to conform to a change of law.</p> <p>The JRS notes the following impact to court operations:</p> <ul style="list-style-type: none"> • Impact on existing automated systems o Fee structure and consent requirements may require modification to existing case management systems (and possibly EFSP contracts). • Requires development of local rules and/or forms. o Local rules/forms will likely need to be developed or amended to clarify county-specific efilng procedures. • Results in additional training, which requires the commitment of staff time and court resources. o Additional staff training will be needed to implement the financial-, notice- and consent-related changes. | <p>The committee appreciates this feedback on impacts to local courts and will include the information in the report to the Judicial Council.</p> <p>The committee agrees. Consistent with Penal Code section 690.5(a) and Code of Civil Procedure section 1010.6(b), courts would need to adopt local rules for permissive electronic filing of criminal documents.</p> <p>The committee appreciates this feedback on impacts to local courts and will include the information in the report to the Judicial Council.</p> |

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

SPR21-16

Rules: Electronic Filing and Service in Criminal Cases (Amend Cal. Rules of Court, rules 2.251, 2.252, 2.253, 2.255, 2.258, and 2.259)

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

| | Commenter | Position | Comment | DRAFT Committee Response |
|--|-----------|----------|--|--|
| | | | <ul style="list-style-type: none"> Impact on local or statewide justice partners. o Local justice partners may be impacted by any changes that differ from current local court filing operations. <p>Suggested modification(s):</p> <ul style="list-style-type: none"> Need clarification as to whether consent and notice requirements can be governed by local rule. <p>Specific Comments:</p> <p>Does the proposal address the stated purpose?</p> <ul style="list-style-type: none"> Yes. <p>Is the e-filing charge exemption appropriate?</p> <ul style="list-style-type: none"> Yes. Potentially consider amending language to refer to exemptions for “prosecutor, an indigent defendant, or <i>court appointed</i> counsel for an indigent defendant.” Suggested addition of “court appointed” would clarify that those attorneys who are retained would not be exempt and would need to pay the filing fees. <p>Should there be no service charge for e-filing in criminal cases?</p> <ul style="list-style-type: none"> This seems to be a policy question. One alternative would be to present an opportunity for retained counsel to request fee waivers. Also, query whether filing fees should be waived for all government entities (e.g., County Counsel in <i>Pitchess</i> motions). | <p>Consent and notice requirements apply to electronic service and are governed by Penal Code section 609.5, which relies on Code of Civil Procedure section 1010.6(a)(2)(A)(ii), and the California Rules of Court. The Code of Civil Procedure requires express consent and notice to be served on all parties. Rule 2.251(b) of the California Rules of Court provides additional detail including how a person can consent by electronic means. The committee will clarify this in the report to the Judicial Council.</p> <p>The committee considered this recommendation and [agrees or disagrees] that adding “court appointed” is clearer. [<i>Staff note, this comment may also change if the committee decides to prohibit service fees by EFMs and EFSPs.</i>]</p> <p>The fees in question are not “filing fees” charged by a court for filings, but rather service fees charged by private vendors to provide optional electronic filing services. Whether the scope of exemptions should be expanded is something the committee could consider in the future. The committee is in the process of starting a workstream to examine electronic filing in California, including funding. [<i>Staff note, this comment may also change if the committee</i></p> |

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

SPR21-16

Rules: Electronic Filing and Service in Criminal Cases (Amend Cal. Rules of Court, rules 2.251, 2.252, 2.253, 2.255, 2.258, and 2.259)

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

| | Commenter | Position | Comment | DRAFT Committee Response |
|----|----------------------------------|----------|---|--|
| | | | <p>Would the proposal provide cost savings for courts?</p> <ul style="list-style-type: none"> • Potential costs savings for courts depends on (1) the existing efilings opportunities, and (2) costs associated with implementing the new consent-related requirements. If almost all parties moved to efilings, the filing process would be streamlined and would likely save staffing resources. (The blend of in person and efilings is very staff intensive.) <p>What would be the implementation requirements for the courts?</p> <ul style="list-style-type: none"> • Developing a notice and consent procedure to efilings and service would be the most intensive implementation requirement for the courts that would require development of related business processes, technological modifications, and court, attorney, and party training. • The opportunity to develop local rules concerning notice and consent would facilitate implementation of the proposed rules. <p>How well would the proposal work for courts of different sizes?</p> <ul style="list-style-type: none"> • Developing a case-by-case consent system would be challenging for different sized courts, depending on their available resources. • Question: Would courts enacting local rules to streamline the process be able to develop a rule that presumed consent but provided an opt-out option? | <p><i>decides to prohibit service fees by EFMs and EFSPs].)</i></p> <p>The committee appreciates the comment on costs and will include the information in the report to the Judicial Council.</p> <p>The committee appreciates this feedback on implementation requirements and will include the information in the report to the Judicial Council. The need for training, updated processes, and updated technology is consistent with other commenters.</p> <p>Note, the legal requirements to permit electronic filing in criminal cases are not different than in civil cases. Both would be authorized by local rule if a court chose to permit electronic filing. “Notice and consent” are applicable to electronic service rather the electronic filing.</p> <p>Courts would not be able to develop a rule that presumed consent because that is not consistent with the consent provision of Civil Procedure section 1010.6, which requires express consent in a “specific action” rather than for all purposes.</p> |
| 6. | Kailin Wang San Francisco, CA | A | I absolutely agree with this proposal, but would add that this new feature should also be | The committee appreciates the comments and support of the proposal. The committee is in the |

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

SPR21-16

Rules: Electronic Filing and Service in Criminal Cases (Amend Cal. Rules of Court, rules 2.251, 2.252, 2.253, 2.255, 2.258, and 2.259)

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

| | Commenter | Position | Comment | DRAFT Committee Response |
|--|-----------|----------|--|--|
| | | | <p>available to Pro Per litigants and well as fee-waived for litigants that qualify. This is especially for voluminous and complex cases this could make a world of different and significantly speed up the court process for almost everyone. Other possible options are Tru-filing for all Superior Courts. I find that system is most reliable and affordable compared to let's say "File and Serve" (San Francisco Superior Ct.), which can be costly as it charges \$7 for filing, \$8 for service, and another \$10 to ensure the opposing party get it, which runs \$25 per filing on top of \$60 to file a request or order which can up very quickly, especially if the clerk reflects the filing for errors and you have to re-file several times and be charged each time to get it correct.</p> <p>These days personal proof of service is a luxury to file and serve can run up to \$500 each time, and the courts requirement of 3 to 4 copies is ridiculous and overwhelmingly a waste of our environment as well as takes up unnecessary space in our courts.</p> <p>Another benefit from offering this feature for all is in the COA they mandate bookmarks, page numbers but when you file a PDF to trial court the e-filing system could erase all those book marks, that does not happen with Trufiling. Inevitably I think either a vendor that has a drive of the parties documents, or a Dropbox feature where litigants can upload their trial exhibits, increase use of Screen Sharing can also greatly benefit the back log of cases due to COVID-19,</p> | <p>process of establishing a working group to examine statewide electronic filing including opportunities to expand electronic filing solutions.</p> |

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

SPR21-16

Rules: Electronic Filing and Service in Criminal Cases (Amend Cal. Rules of Court, rules 2.251, 2.252, 2.253, 2.255, 2.258, and 2.259)

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

| | Commenter | Position | Comment | DRAFT Committee Response |
|--|-----------|----------|---|---------------------------------|
| | | | <p>this move to Electronic everything will only increase efficiency of the Court.</p> <p>The comment is for SPR21-16. I am referring to the proposed , Penal Code section 690.5, as the "new feature. " While file and serve is used by the San Francisco Criminal Court for attorneys only, it should be available for indigent Pro Per's as well. There is a Fee-Waiver option avl. in E-serve websites for litigants in San Mateo and Santa Clara, but not in San Francisco on File and Serve which is the only E-service used for the Criminal Court as of right now. While some indigent litigants would prefer filing by paper, most if not all believe that electronic filing is far more cost effective, the printing costs for 3 or 4 copies needed in the Criminal Courts alone is cost prohibitive, vs. the \$7 for File and Serve to the Court only, but additional \$8 for service to all the parties. And public defenders should not be charged for this type of filing.</p> | |

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



JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue • San Francisco, California 94102-3688
Telephone 415-865-4200 • Fax 415-865-4205 • TDD 415-865-4272

MEMORANDUM

Date

June 25, 2021

Action Requested

Please review

To

Information Technology Advisory
Committee, Rules and Policy Subcommittee
Hon. Julie R. Culver, Chair

Deadline

July 6, 2021

From

Andrea L. Jaramillo, Attorney
Legal Services, Judicial Council

Contact

Andrea L. Jaramillo
916-263-0991 phone
andrea.jaramillo@jud.ca.gov

Subject

Legislative Proposal: Review public
comments and make recommendation on
enacting Government Code section 69846.1,
and amending Government Code section
69846, Code of Civil Procedure section 1952,
and Penal Code section 1417

Background

This spring, the Information Technology Advisory Committee (ITAC) circulated a legislative proposal for public comment to enact Government Code section 69846.1, and amend Government Code section 69846, Code of Civil Procedure section 1952, and Penal Code section 1417. The proposal would expressly authorize courts to use vendors for storage of exhibits and evidence in electronic format. The proposal originates with recommendations from the Information Technology Advisory Committee's Digital Evidence Workstream.

Discussion

Seven commenters responded to the invitation to comment. While the commenters were mainly supportive, one commenter questioned whether the legislation is necessary. This prompted staff to conduct an in-depth analysis of whether any law prohibits the use of a vendor to store exhibits. A copy of the analysis is attached at pages 4 through 8.

The analysis concludes that no law prohibits use of vendor storage of exhibits. Furthermore, it would not be inconsistent with the clerk of the court's obligations to use a vendor, provided the clerk, rather than the vendor, had control over the exhibits. This would apply whether exhibits are in a physical format or electronic format as the statutes governing the clerk's obligations are neutral with respect to format.

Accordingly, the main issue for the subcommittee to consider is whether the proposal should proceed. Staff recommend the proposal not move forward to the Judicial Council because the potential risks to proceeding outweigh the potential benefit.

The main benefit to proceeding with the the proposal is that it would provide express statutory authority to use a vendor to store exhibits and evidence in electronic format. With such authority, there could be no question whether courts are permitted to use vendor storage if it becomes an issue.

However, there are a couple of significant risks to proceeding with the proposal. First, it could have unintended consequences for exhibits in a physical format. One commenter raised a concern that the proposal "could be construed to mean that prior to implementation, no exhibits may be stored offsite with a third party vendor, and after implementation of this proposal, only digital exhibits can be stored with a third party vendor." Such a construction would pose a significant problem for courts that rely on vendor facility storage of exhibits in physical format. Second, there is the possibility that the Legislature could reject the proposal. Proceeding with vendor storage for exhibits in electronic format after such a rejection could be risky and lead the Legislature to enact legislation expressly prohibiting the use of vendor storage, which does not currently exist.

Because there is nothing prohibiting the use of vendor storage in the law and because there are significant risks associated with proceeding with the proposal, staff recommend the proposal not move forward to the Judicial Council.

After considering the matter, if the subcommittee decides the proposal should move forward, staff will prepare a second memorandum to the subcommittee to highlight issues raised by commenters that the subcommittee should address.

Subcommittee's Task

- Decide whether to recommend the proposal for Judicial Council approval.

Attachments and Links

1. Andrea L. Jaramillo, Attorney, Legal Services, Judicial Council, memorandum to Rules and Policy Subcommittee of the Information Technology Advisory Committee, June 25, 2021, at pages 4 through 8.
2. Text of proposed adoption of Government Code section 69846.1, and amendment to Government Code section 69846, Code of Civil Procedure section 1952, and Penal Code section 1417 at pages 9 through 10.
3. Chart of comments at pages 11 through 32.



JUDICIAL COUNCIL OF CALIFORNIA

2860 Gateway Oaks Drive, Suite 400 • Sacramento, California 95833-4336

Telephone 916-263-7885 • Fax 916-263-1966 • TDD 415-865-4272

MEMORANDUM

Date

June 24, 2021

Action Requested

Please review

To

Information Technology Advisory
Committee, Rules and Policy Subcommittee
Hon. Julie R. Culver, Chair

Deadline

July 6, 2021

From

Andrea L. Jaramillo, Attorney
Legal Services, Judicial Council

Contact

Andrea L. Jaramillo
916-263-0991 phone
andrea.jaramillo@jud.ca.gov

Subject

Court use of vendor storage for exhibits and
evidence

A commenter questioned whether legislation was necessary in public comments on the Information Technology Advisory Committee's legislative proposal to expressly authorize courts to use vendor storage for exhibits and evidence in electronic format. This prompted staff to conduct an in-depth review of whether any law *prohibits* vendor storage of exhibits.

In brief, there is no law prohibiting vendor storage. Furthermore, it is not inconsistent with the clerk of the court's obligations to use a vendor provided the clerk maintains control over the exhibits.

Discussion

A. Statutes Governing the Courts' Keeping of Exhibits

For the purpose of keeping exhibits, the relevant code sections are Government Code sections 69846 and 68150, Penal Code section 1417, and Code of Civil Procedure section 1952. Of these code sections, Government Code section 69846, is the broadest in scope, applying to all case types and to all records “filed or deposited in any action or proceeding before the court.” Accordingly, it applies to all exhibits that come into the court’s possession regardless of case type.

The remaining code sections are narrower. Penal Code section 1417 applies exclusively to exhibits “introduced or filed in any criminal action or proceeding[.]” Code of Civil Procedure section 1952 applies exclusively to “any exhibit, deposition, or administrative record introduced in the trial of a civil action or proceeding or filed in the action or proceeding[.]” (Gov. Code, § 1952(a).)

Government Code section 68150 governs “court records” generally and only applies to exhibits that meet the definition of “court record.” Court records consist of “filed papers, documents, administrative records, depositions, transcripts, and recordings of electronically recorded proceedings; depositions, transcripts, and recordings of electronically recorded proceedings that are lodged or “maintained in connection with the case”; and certain specified records generated by the court. (Gov. Code, § 69151(a).) As such, not all exhibits will necessarily be “court records.”

In sum, Government Code section 69846 applies to all exhibits in all case types; Penal Code section 1417 applies to all exhibits in criminal cases; Code of Civil Procedure applies to all exhibits in civil cases; and Government Code section 68150 applies to exhibits that meet the definition of “court record” regardless of case type.

B. Courts' Obligations for Managing Exhibits

Government Code section 69846, Penal Code section 1417, and Code of Civil Procedure section 1952 all require the clerk of the court to either “keep” or “retain” exhibits until they may be legally disposed of. Government Code section 68150 requires the Judicial Council to adopt rules “to establish standards or guidelines for the creation, maintenance, reproduction, or preservation of court records[.]” (Gov. Code, § 68150(c).)

1. “Keeping” or “retaining” exhibits under Government Code section 69846, Penal Code section 1417, and Code of Civil Procedure section 1952

Government Code section 69846 requires the clerk of the court to “safely *keep* or dispose of according to law all papers and records filed or deposited in any action or proceeding before the

court.” (Emphasis added.) The Government Code does not define what it means for the clerk to “keep” papers and records under section 69846, and there is no case law interpreting “keep” for purposes of this code section.¹ As such, the ordinary and usual meaning will apply, and a dictionary can be a source to provide such meaning. (*Green v. State of California* (2007) 42 Cal.4th 254, 260; *Humane Society of the United States v. Superior Court* (2013) 214 Cal.App.4th 1233, 1251.) Both the American Heritage Dictionary and Merriam-Webster have multiple entries for what it means “to keep” a thing. In relevant part, it could include:

- To retain possession of;
- To maintain for use or service;
- To manage, tend, or have charge of;
- To retain in one’s possession or power;
- To have in control.

(American Heritage Dict. [as of June 4, 2021]

<https://www.ahdictionary.com/word/search.html?id=K5029800>; Merriam-Webster Dict. [as of June 4, 2021] <https://www.merriam-webster.com/dictionary/keep>.) Based on the definitions, if a clerk had management of, power over, or control of an exhibit, the clerk would be “keeping” it for purposes of Government Code section 69846, whether or not the clerk maintained actual physical possession. (Cf. Cal Rules of Court, rule 10.815(b)(13) [recognizing the potential for third-party retrieval fees of court records that are maintained offsite].)

Penal Code section 1417 and Code of Civil Procedure section 1952 are similar. Both code sections require the clerk to “retain” exhibits filed or introduced in trials. “Retain” is synonymous with “keep.” (See Merriam-Webster Dict. [as of June 4, 2021] <https://www.merriam-webster.com/dictionary/retain> [noting “keep” and “retain” are synonyms].)

So long as a clerk maintains management and control over exhibits, the clerk would be “keeping” or “retaining” them. This would not necessarily preclude a vendor from storing the exhibits. For example, if the clerk kept evidence in a storage unit owned by a vendor, but the

¹ There is case law on what it means to “dispose of according to law” papers and records in possession of the clerk of the court. In *People v. Galland* (2008) 45 Cal.4th 354, 366, the court explained the law allows the clerk to “dispose” of records by authorizing the clerk to allow someone other than the clerk to retain them. In *Galland*, the court held the clerk could return a sealed search warrant affidavit to the police department when certain conditions were met, including that the clerk is unable to adequately safeguard the affidavit. (*Id.* at p. 368.) *Galland* is inapplicable here as the issue here is whether a clerk may “keep,” not “dispose of,” records through use of a storage vendor. As will be discussed, the key for “keeping” an exhibit would be to retain control over it, which is not necessarily inconsistent with the use of a vendor assuming the clerk of the court and *not* the vendor had control over the exhibit.

clerk, not the vendor, controlled access to the unit, that would be consistent with the clerk “keeping” or “retaining” the exhibits.²

2. The Trial Court Records Manual

As noted previously, only exhibits that meet the definition of “court record” fall within the scope of Government Code section 68150. Under this code section, the Judicial Council is required to adopt rules “to establish standards or guidelines for the creation, maintenance, reproduction, or preservation of court records[.]” (Gov. Code, § 68150(c).) The Judicial Council did this through rule 10.854 of the California Rules of Court, which established the Trial Court Records Manual (TCRM) to provide guidance to the courts. The TCRM includes guidelines for management of “court records” as that term is used in Government Code sections 68150 and 68151, and also includes the minimal statutory retention requirements for criminal and civil exhibits expressed in the Penal Code and Code of Civil Procedure, and sets retention standards for certain sensitive exhibits, such as ones posing a threat to safety or health. (See generally TCRM (Rev. Jan 1, 2020), § 7, pp. 67-71, <https://www.courts.ca.gov/documents/trial-court-records-manual.pdf>.)

As a practical matter, the TCRM is instructive for the handling of all records regardless of whether they meet the technical definition of “court record” as that term is used throughout Government Code section 68150 et seq. This is because the TCRM guidelines are concerned with the safe preservation of records and go into more detail than Government Code section 69846, Penal Code section 1417, and Code of Civil Procedure section 1952. The TCRM includes detailed guidelines for using “storage facilities” for paper records including:

Access to the facility should be restricted to authorized personnel. Adequate security procedures and systems should be provided to prevent loss, theft, or destruction of public records and to ensure the safety and integrity of the public records stored there.

(TCRM (Rev. Jan 1, 2020), p. 34, <https://www.courts.ca.gov/documents/trial-court-records-manual.pdf>.) The TCRM thus indicates that court records, including exhibits, can be maintained in vendors’ secure storage facilities as long as only authorized personnel may access the record.

² If the vendor, rather than the clerk, had control over the exhibits, this would be inconsistent with the clerk “keeping” them and could lead to a violation of Government Code section 6200, which makes it a crime for a public officer having the custody of a record to permit another person to do the following with the record:

- (a) Steal, remove, or secrete;
- (b) Destroy, mutilate, or deface;
- (c) Alter or falsify.

Assuming a clerk, using vendor storage, maintained control over the exhibits and had a appropriate security and safety protocols in place that did not permit the vendor to do the above, should not run a foul of Government Code section 6200.

In addition, the TCRM includes guidelines for maintaining the integrity and security of court records in electronic format. The TCRM recommends:

Protect the integrity of electronic court records, protect the systems on which the records are kept, and prevent unauthorized alteration or destruction of the records, by limiting access to them.

(TCRM (Rev. Jan 1, 2020), p. 48, <https://www.courts.ca.gov/documents/trial-court-records-manual.pdf>.) Again, this suggest that as long as access is limited to appropriate personnel and the storage is otherwise secure, electronic storage is not otherwise confined to the clerk’s own computer system.

Neither the paper nor electronic storage guidelines preclude the use of a vendor. Compliance with TCRM guidelines should ensure the safe preservation of “court records.” Compliance with TCRM guidelines, though not required, should also fit within the high-level requirements of Government Code section 69846 (“safely keep”) and Penal Code section 1417 and Code of Civil Procedure section 1952 (“retain”) with respect to exhibits.

Section 69846 of the Government Code, section 1952 of the Code of Civil Procedure, and section 1417 of the Penal Code would be amended, and section 69846.1 of the Government Code would be enacted, effective January 1, 2023, to read:

1 **§ 69846**

2
3 The clerk of the superior court shall safely keep or dispose of according to law all papers
4 and records filed or deposited in any action or proceeding before the court. The clerk may
5 use a vendor to store exhibits lodged or introduced and evidence received by the court in
6 electronic format subject to the requirements of Government Code section 69846.1.

7
8 **§ 69846.1**

- 9
10 (a) The clerk may use a vendor to store and maintain exhibits lodged or introduced and
11 evidence received by the court in electronic format. For purposes of this section,
12 “exhibits lodged or introduced and evidence received by the court in electronic
13 format” means exhibits and evidence that are transmitted electronically directly to
14 the court or the court’s electronic storage vendor.
- 15
16 (b) The vendor shall comply with any judicial branch security standards and policies
17 mandated by the Judicial Council and by any court with which the vendor
18 contracts.
- 19
20 (c) Exhibits and evidence in electronic format stored with a vendor shall be accessible
21 only by persons authorized by law or court order.
- 22
23 (d) If the court orders the clerk to destroy or otherwise dispose of an exhibit or
24 evidence in electronic format and that exhibit or evidence is stored with a vendor,
25 the clerk shall direct the vendor to destroy or dispose of the exhibit or evidence.
- 26
27 (e) The vendor shall only destroy or dispose of exhibits or evidence in electronic
28 format as directed by the court.
- 29
30 (f) The Judicial Council may adopt rules to facilitate implementation of this section.

31
32 **§ 1952**

- 33
34 (a) The clerk shall either retain in his or her custody, or in the custody of a vendor
35 consistent with the requirements of Government Code section 69846.1, any exhibit,
36 deposition, or administrative record introduced in the trial of a civil action or
37 proceeding or filed in the action or proceeding until the final determination thereof
38 or the dismissal of the action or proceeding, except that the court may order the
39 exhibit, deposition, or administrative record returned to the respective party or

1 parties at any time upon oral stipulation in open court or by written stipulation by
2 the parties or for good cause shown.

3
4 (b) No exhibit or deposition shall be ordered destroyed or otherwise disposed of
5 pursuant to this section where a party to the action or proceeding files a written
6 notice with the court requesting the preservation of any exhibit, deposition, or
7 administrative record for a stated time, but not to exceed one year.

8
9 (c) Upon the conclusion of the trial of a civil action or proceeding at which any exhibit
10 or deposition has been introduced, the court shall order that the exhibit or
11 deposition be destroyed or otherwise disposed of by the clerk. The operative
12 destruction or disposition date shall be 60 days following final determination of the
13 action or proceeding. Final determination includes final determination on appeal.
14 Written notice of the order shall be sent by electronic means or first-class mail to
15 the parties by the clerk.

16
17 (d) Upon the conclusion of any posttrial hearing at which any exhibit, deposition, or
18 administrative record has been introduced, the court shall order that the exhibit or
19 deposition be destroyed or otherwise disposed of by the clerk. The operative date of
20 destruction or disposition shall be 60 days following the conclusion of the hearing,
21 or if an appeal is taken, upon final determination of the appeal. Written notice of
22 the order shall be sent by electronic means or first-class mail to the parties by the
23 clerk.

24
25 **§ 1417**

26
27 All exhibits which have been introduced or filed in any criminal action or proceeding
28 shall be retained by the clerk of the court or in the custody of a vendor consistent with the
29 requirements of Government Code section 69846.1., who The clerk of the court shall
30 establish a procedure to account for the exhibits properly, subject to Sections 1417.2 and
31 1417.3 until final determination of the action or proceedings and the exhibits shall
32 thereafter be distributed or disposed of as provided in this chapter.

LEG21-02

Proposal for Judicial Council-Sponsored Legislation: Vendor Storage of Exhibits and Evidence in Electronic Format (Enact Gov. Code, § 69846.1; amend Gov. Code, § 69846; Code Civ. Proc., § 1952; and Pen. Code, § 1417)

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

| | Commenter | Position | Comment | Committee Response |
|----|--|-----------------|--|---------------------------|
| 1. | Robin Brandes-Gibbs Deputy General Counsel Superior Court of Orange County | A | <ul style="list-style-type: none"> • Does the proposal appropriately address the stated purpose? <p>Yes. The current law is unclear whether a third party vendor can store or maintain electronic exhibits. Current statutes require the clerk of court to “safely keep or dispose of” exhibits (Gov. Code, § 69846); to retain the exhibits and establish a procedure to account for them properly in criminal cases (Pen. Code, § 1917); and to “retain in his or her custody” the evidence in a civil proceeding (Code Civ. Proc., § 1952). The lack of explicit authorization to use third party vendors could pose significant risks to trial courts who delegate storage and maintenance responsibilities to third party vendors.</p> <p>Furthermore, as technology has advanced, evidence is increasingly offered in electronic format. Modern business transactions are conducted electronically, people communicate via email, text, and social media, and doorbell cameras and body-worn cameras record audio and video of everyday experiences. Trial courts lack the resources and expertise to maintain a secure and robust electronic evidence repository. Outside vendors offer robust electronic evidence repositories with features including:</p> <ol style="list-style-type: none"> 1. Access control based on digital rights management or security levels | |

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

LEG21-02

Proposal for Judicial Council-Sponsored Legislation: Vendor Storage of Exhibits and Evidence in Electronic Format (Enact Gov. Code, § 69846.1; amend Gov. Code, § 69846; Code Civ. Proc., § 1952; and Pen. Code, § 1417)

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

| | Commenter | Position | Comment | Committee Response |
|--|-----------|----------|---|--------------------|
| | | | <p>2. Electronic exhibit management including exhibit tags, chain of custody, and retention standards</p> <p>3. Security provisions, contingency planning, disaster recovery, and data integrity tests</p> <p>4. Make the data universally playable regardless of native format</p> <p>5. Maintain data in a secure manner that preserves confidentiality</p> <p>As authorized by the proposed legislation, the Judicial Council should enact rules to implement third party vendor storage and maintenance of evidence.</p> <p>As written, the proposal appears to assume no other exhibit types can or are being stored offsite with third party vendors. Many courts no longer have the storage capacity to store decades worth of exhibits on site, so they rent storage space from third party vendors. This common practice is necessitated by the sheer volume of exhibits courts have collected over the years. By giving permission to store digital exhibits with a third party vendor, this proposal could be construed to mean that prior to implementation, no exhibits may be stored offsite with a third party vendor, and after implementation of this proposal, only digital exhibits can be stored with a third party vendor. This could pose problems for trial courts which have stored exhibits off site for years. As a</p> | |

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

LEG21-02

Proposal for Judicial Council-Sponsored Legislation: Vendor Storage of Exhibits and Evidence in Electronic Format (Enact Gov. Code, § 69846.1; amend Gov. Code, § 69846; Code Civ. Proc., § 1952; and Pen. Code, § 1417)

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

| | Commenter | Position | Comment | Committee Response |
|--|-----------|----------|---|--------------------|
| | | | <p>result, this proposal creates uncertainty in our current and future practices.</p> <ul style="list-style-type: none"> Is there any type of material that should be excluded from vendor storage? If so, what type of material and why should it be excluded? <p>Exhibits in juvenile cases, harmful matter as defined by Penal Code section 1417.8, or other exhibits that are ordered sealed should potentially be excluded from vendor storage. These should be excluded unless security levels or other methods ensure that employees of the vendor or unauthorized persons cannot access or view sealed or confidential exhibits.</p> <ul style="list-style-type: none"> The proposal requires vendors to destroy or dispose of exhibits or evidence in electronic format only as directed by the court. Should the proposal also include a provision to require a vendor to confirm with the court that an exhibit or evidence was disposed of or destroyed? <p>Yes, the vendor should confirm with the court that the electronic evidence has been disposed of or destroyed.</p> <p>The advisory committee also seeks comments from courts on the following cost and implementation matters:</p> | |

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

LEG21-02

Proposal for Judicial Council-Sponsored Legislation: Vendor Storage of Exhibits and Evidence in Electronic Format (Enact Gov. Code, § 69846.1; amend Gov. Code, § 69846; Code Civ. Proc., § 1952; and Pen. Code, § 1417)

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

| | Commenter | Position | Comment | Committee Response |
|--|-----------|----------|--|--------------------|
| | | | <ul style="list-style-type: none"> • Would the proposal provide cost savings? If so, please quantify. <p>The proposal would not initially provide cost savings. If a court chose to have a vendor store and maintain exhibits it would be an expenditure. The cost may be offset over time if the amount of physical space required to store exhibits was reduced and repurposed for something that would otherwise require a cost. Reducing or eliminating the need to store exhibits on site could reduce the resources, storage, and personnel required to maintain, store, and arrange for disposition of exhibits.</p> <ul style="list-style-type: none"> • 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>Training for courtroom clerks and judicial officers would be required to learn how to use the vendor's product. The training should be just a few hours. Procedures for accepting electronic evidence would need to be developed so that staff have training material to reference.</p> <ul style="list-style-type: none"> • How well would this proposal work in courts of different sizes? | |

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

LEG21-02

Proposal for Judicial Council-Sponsored Legislation: Vendor Storage of Exhibits and Evidence in Electronic Format (Enact Gov. Code, § 69846.1; amend Gov. Code, § 69846; Code Civ. Proc., § 1952; and Pen. Code, § 1417)

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

| | Commenter | Position | Comment | Committee Response |
|----|---|-----------------|--|---------------------------|
| | | | <p>This may not work well for a smaller court that does not have the volume of electronic evidence that a larger court would have. The cost of contracting with a vendor could be greater than the need for the service. This should not be an issue since the proposal does not mandate storing exhibits with a vendor.</p> <p>Other comments and questions to consider:</p> <p>Should statutes address the possibility of lost or damaged evidence as a result of an action by the vendor? Should statutes address penalties for theft, improper use, granting access to unauthorized persons, alterations, falsification, improper destruction, or removal of electronic evidence stored with the vendor?</p> | |
| 2. | California Department of Child Support Services by Lara Racine Attorney III | NI | <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 (LCSA), and our case participants. Specific feedback related to the provisions of the proposed legislation with potential impacts to the department and its stakeholders follows.</p> <p>REQUEST FOR SPECIFIC COMMENTS:</p> <p>1) Does the proposal appropriately address the stated purpose?</p> <p>The stated purpose of the proposal is to facilitate the use of electronic exhibits and</p> | |

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

LEG21-02

Proposal for Judicial Council-Sponsored Legislation: Vendor Storage of Exhibits and Evidence in Electronic Format (Enact Gov. Code, § 69846.1; amend Gov. Code, § 69846; Code Civ. Proc., § 1952; and Pen. Code, § 1417)

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

| | Commenter | Position | Comment | Committee Response |
|--|-----------|----------|---|--------------------|
| | | | <p>electronic evidence in courts. If having a vendor store electronic exhibits and evidence for the court facilitates their use, then the proposal likely addresses the stated purpose.</p> <p>2) Is there any type of material that should be excluded from vendor storage? If so, what type of material and why should it be excluded?</p> <p>Probably not excluded, but perhaps marked confidential with restricted view. The vendor would need to follow current protocol for receipt of confidential documents today and abide by any state rules or local rules of court dictating proper protocol. Child support records are confidential per California Family Code section 17212 with some exceptions. Once documents are filed with the court, they lose their confidential nature unless they are marked as confidential by the court following standard practice. This should not make them exempt from storage, but there would need to be a way to store them as “confidential”.</p> <p>3) The proposal requires vendors to destroy or dispose of exhibits or evidence in electronic format only as directed by the court. Should the proposal also include a provision to require a vendor to confirm with the court that an exhibit or evidence was disposed of or destroyed?</p> <p>Yes. SPR21-15 Lodged Electronic Exhibits states that “The court must email or mail a</p> | |

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

LEG21-02

Proposal for Judicial Council-Sponsored Legislation: Vendor Storage of Exhibits and Evidence in Electronic Format (Enact Gov. Code, § 69846.1; amend Gov. Code, § 69846; Code Civ. Proc., § 1952; and Pen. Code, § 1417)

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

| | Commenter | Position | Comment | Committee Response |
|--|-----------|----------|---|--------------------|
| | | | <p>confirmation of deletion to the party who submitted the lodged electronic exhibit.” It stands to reason that the court would need to know when the stored exhibit/evidence was destroyed so they could then notify the parties. It would also allow full transparency into the process for all parties.</p> <p>GENERAL COMMENTS:</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 that sends documents for filing directly from our system of record to the court and back from the court to DCSS. However, LCSAs also file documents electronically using the 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 to establish e-filing connectivity. Anecdotally we have not heard that our LCSAs currently send electronic evidence or exhibits to court pre-trial, but of course that could change in the future. All of the documents sent to court in the electronic process result in a filing but with lodged exhibits and evidence the documents retain a “pending” status with the court.</p> | |

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

LEG21-02

Proposal for Judicial Council-Sponsored Legislation: Vendor Storage of Exhibits and Evidence in Electronic Format (Enact Gov. Code, § 69846.1; amend Gov. Code, § 69846; Code Civ. Proc., § 1952; and Pen. Code, § 1417)

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

| | Commenter | Position | Comment | Committee Response |
|----|--|----------|--|--------------------|
| | | | <p>DCSS currently works directly with e-filing vendors to establish that process with the courts they have contracted with. If new vendors are handling the storage of electronic evidence/exhibits, it would be helpful to know if that entire process would take place on the court’s side or if DCSS will need to work with those vendors independently to establish a new process. If the functionality would involve the LCSAs submitting these documents via separate vendors using a different process flow, that would complicate our current electronic filing mechanism.</p> <p>Thank you for the opportunity to provide input, express our ideas, experiences, and concerns with respect to the proposed legislation.</p> | |
| 3. | Child Support Directors Association, Judicial Council Forms Committee by Lisa Saporito Committee Chair | NI | <p>The Child Support Directors Association Judicial Council Forms Committee (Committee) has reviewed the proposal identified above for potential impacts to the child support program, the local child support agencies (LCSA), our judicial partner, and our case participants. Specific feedback related to the provisions of the proposed legislation with potential impacts to the LCSA and its stakeholders is set forth below.</p> <p>REQUEST FOR SPECIFIC COMMENTS:</p> <p>1) Does the proposal appropriately address the stated purpose? The stated purpose of the</p> | |

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

LEG21-02

Proposal for Judicial Council-Sponsored Legislation: Vendor Storage of Exhibits and Evidence in Electronic Format (Enact Gov. Code, § 69846.1; amend Gov. Code, § 69846; Code Civ. Proc., § 1952; and Pen. Code, § 1417)

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

| | Commenter | Position | Comment | Committee Response |
|--|-----------|----------|--|--------------------|
| | | | <p>proposal is to facilitate the use of electronic exhibits and electronic evidence in courts.</p> <p>The concept of authorizing the clerk of the court to use a vendor to store and maintain exhibits and evidence in electronic format would likely address the stated purpose.</p> <p>2) Is there any type of material that should be excluded from vendor storage? If so, what type of material and why should it be excluded?</p> <p>The focus should shift from what material should be excluded to ensuring the vendor adheres to state statutes, local court rules, and procedures surrounding receipt of documents containing confidential information. For example, Personal Identifiable Information (PII), LCSA records and documents subject to confidentiality rules pursuant to California Family Law section 17212 and those subject to IRS Publication 1075. The vendor must have the capability to mark and maintain a document as confidential with restrictive viewing or sealed by court order once filed.</p> <p>3) The proposal requires vendors to destroy or dispose of exhibits or evidence in electronic format only as directed by the court. Should the proposal also include a provision to require a vendor to confirm with the court that an exhibit or evidence was disposed of or destroyed?</p> | |

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

LEG21-02

Proposal for Judicial Council-Sponsored Legislation: Vendor Storage of Exhibits and Evidence in Electronic Format (Enact Gov. Code, § 69846.1; amend Gov. Code, § 69846; Code Civ. Proc., § 1952; and Pen. Code, § 1417)

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

| | Commenter | Position | Comment | Committee Response |
|--|-----------|----------|---|--------------------|
| | | | <p>Yes, the proposal should include a requirement upon the vendor to confirm with the court that the exhibit or evidence was disposed of or destroyed. This would be consistent with the rhetoric in SPR21-15 Rules: Lodged Electronic Exhibits, which states, “The court must email or mail a confirmation of deletion to the party who submitted the lodged electronic exhibit.” This would also be consistent with Code of Civil Procedure sections 1952(c) and (d). The court must know when the vendor destroys or disposes of exhibits or evidence in order to notify the parties either by electronic means or first-class mail.</p> <p>GENERAL COMMENTS:</p> <p>1) The Committee recommends the following amendment to the proposed language in Government Code section 69846 to maintain consistency with section 69846.1.</p> <p>The clerk of the superior court shall safely keep or dispose of according to law all papers and records filed or deposited in any action or proceeding before the court. The clerk may use a vendor to store <i>and maintain</i> exhibits lodged or introduced and evidence received by the court in electronic format subject to the requirements of Government Code section 69846.1.</p> | |

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

LEG21-02

Proposal for Judicial Council-Sponsored Legislation: Vendor Storage of Exhibits and Evidence in Electronic Format (Enact Gov. Code, § 69846.1; amend Gov. Code, § 69846; Code Civ. Proc., § 1952; and Pen. Code, § 1417)

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

| | Commenter | Position | Comment | Committee Response |
|--|-----------|----------|--|--------------------|
| | | | <p>2) The Committee recommends the following amendment to the proposed language in Government Code section 69846.1(b).</p> <p>The vendor shall comply with any judicial branch security and <i>privacy</i> standards in <u>addition to and security and privacy</u> policies mandated by the Judicial Council, state statutes and Rules of Court, and by any court with which the vendor contracts.</p> <p>3) The Committee recommends the following amendment to the Code of Civil Procedure section 1952(c) to reflect that the vendor, as well as the clerk, will destroy or dispose of the exhibit or evidence.</p> <p>Upon the conclusion of the trial of a civil action or proceeding at which any exhibit or deposition has been introduced, the court shall order that the exhibit or deposition be destroyed or otherwise disposed of by the clerk <u>or the court's electronic storage vendor</u>. The operative destruction or disposition date shall be 60 days following final determination of the action or proceedings. Final determination includes final determination on appeal. Written notice of the order shall be sent by <u>electronic means</u> or first-class mail to the parties by the clerk.</p> <p>4) The Committee recommends the following amendment to the Code of Civil Procedure</p> | |

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

LEG21-02

Proposal for Judicial Council-Sponsored Legislation: Vendor Storage of Exhibits and Evidence in Electronic Format (Enact Gov. Code, § 69846.1; amend Gov. Code, § 69846; Code Civ. Proc., § 1952; and Pen. Code, § 1417)

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

| | Commenter | Position | Comment | Committee Response |
|--|-----------|----------|--|--------------------|
| | | | <p>section 1952(d) to reflect that the vendor, as well as the clerk, will destroy or dispose of the exhibit or evidence.</p> <p>Upon the conclusion of any posttrial hearing at which any exhibit, deposition, or administrative record has been introduced, the court shall order that the exhibit or deposition be destroyed or otherwise disposed of by the clerk <i>or the court's electronic storage vendor</i>. The operative date of destruction or disposition shall be 60 days following the conclusion of the hearing, or if an appeal is taken, upon final determination of the appeal. Written notice of the order shall be sent by electronic means or first-class mail to the parties by the clerk.</p> <p>The Committee supports the concept of the clerk of the court's use of a vendor to store and maintain exhibits and evidence, which exist, in an electronic format with the following comment. LCSAs currently electronically file documents through DCSS. Some LCSAs also electronically file through their court's electronic filing service provider. If a court contracts with a different vendor, to store and maintain exhibits and evidence, than the vendor the court contracts with to electronically file documents, complications could arise due to different mechanisms, procedures, and processes. For example, the LCSA would then be required to upload and file a pleading for trial</p> | |

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

LEG21-02

Proposal for Judicial Council-Sponsored Legislation: Vendor Storage of Exhibits and Evidence in Electronic Format (Enact Gov. Code, § 69846.1; amend Gov. Code, § 69846; Code Civ. Proc., § 1952; and Pen. Code, § 1417)

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

| | Commenter | Position | Comment | Committee Response |
|----|---|----------|---|--------------------|
| | | | <p>through one vendor and then would need to upload and file trial exhibits through another. Thank you for the opportunity to provide input, express our ideas, experiences, and concerns with respect to the proposed legislation.</p> | |
| 4. | <p>Family Violence Appellate Project by Cory Hernandez Staff Attorney</p> | AM | <p>The following comments are submitted by Family Violence Appellate Project (FVAP) regarding the Judicial Council's (Council) Invitation to Comment number LEG21-02, concerning electronic storage of evidence and exhibits with external vendors.</p> <p>FVAP is the only nonprofit organization in California dedicated to representing survivors of domestic violence and other forms of intimate partner, family, and gender-based abuse, for free. FVAP represents low-income survivors who need to appeal dangerous trial court decisions that leave them or their children at risk of ongoing abuse. FVAP's goal is to empower abuse survivors through the court system and ensure that they and their children can live in safe and healthy environments, free from abuse. Because of FVAP's connection to the domestic violence community, it is uniquely positioned to assess the impact of the Judicial Council's proposed changes to the rules of court regarding education of judicial officers.</p> <p>We are writing to express support for SPR20-06, with amendments to address some ambiguous and vague areas of potential concern. We appreciate the spirit behind the</p> | |

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

LEG21-02

Proposal for Judicial Council-Sponsored Legislation: Vendor Storage of Exhibits and Evidence in Electronic Format (Enact Gov. Code, § 69846.1; amend Gov. Code, § 69846; Code Civ. Proc., § 1952; and Pen. Code, § 1417)

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

| | Commenter | Position | Comment | Committee Response |
|--|-----------|----------|---|--------------------|
| | | | <p>proposal of authorizing electronic storage of evidence and exhibits with external vendors—to modernize our courts system and more efficiently maintain court records. Still, we believe at least one amendment is needed to address potential economic concerns of the proposal as drafted.</p> <p>That is, the proposal is not clear on exactly who will cover the costs of any additional storage or other fees created by a court adopting the usage of an external vendor. On page 2, the proposal recognizes “vendor storage . . . would most likely involve paying fees to the vendors,” and simply notes it may be cheaper to do that than electronically storing documents internally. The proposed legislation, though, does not explicitly address this issue, and should. It is reasonable to think that some courts who use an external vendor may try to pass along any additional fees to litigants; after all, during the pandemic where remote appearances may be required by court order or health necessity, we have seen courts charge litigants for using their remote audio/video platform, even if the litigant has a fee waiver or is appearing in a matter without filing fees, such as a request for a domestic violence restraining order (Fam. Code, § 6222). At a minimum, the proposal should expressly prohibit courts from passing on any additional fees caused by an external vendor—whether the fee is labeled a storage fee or something else—to litigants with fee waivers. The proposal</p> | |

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

LEG21-02

Proposal for Judicial Council-Sponsored Legislation: Vendor Storage of Exhibits and Evidence in Electronic Format (Enact Gov. Code, § 69846.1; amend Gov. Code, § 69846; Code Civ. Proc., § 1952; and Pen. Code, § 1417)

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

| | Commenter | Position | Comment | Committee Response |
|----|--|----------|---|--------------------|
| | | | <p>should also prohibit the same for litigants in proceedings that, by law, have no filing fees, such as restraining order proceedings under the Domestic Violence Prevention Act (DVPA; Fam. Code, § 6200 et seq.).</p> <p>We appreciate that under this proposal, external vendors would be required to comply with standards and policies to be set by the Judicial Council. We urge the Council to make sure those standards and policies ensure the electronically stored documents' security, privacy, and confidentiality. Further, those policies must ensure that external vendors have sufficient protocols for addressing potential conflicts of interest, including between litigants and staff members of the external vendor, and that there are clear channels of communication and complaint resolution for when a litigant has an issue with how an external vendor has operated.</p> <p>In short, we support LEG21-02 with amendments. We urge the Council to take additional steps, outlined above, to realize the vision of more modern, efficient, and effective courtrooms.</p> | |
| 5. | Superior Court of Los Angeles County by Bryan Borys, Ph.D. Director of Research and Data Management | AM | Vendor storage of exhibits and evidence can be a cost-effective and solution. In many counties, Digital Evidence Management is a major County issue and County governments are crafting their own solutions. It may seem attractive for local Courts to simply use the | |

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

LEG21-02

Proposal for Judicial Council-Sponsored Legislation: Vendor Storage of Exhibits and Evidence in Electronic Format (Enact Gov. Code, § 69846.1; amend Gov. Code, § 69846; Code Civ. Proc., § 1952; and Pen. Code, § 1417)

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

| | Commenter | Position | Comment | Committee Response |
|--|-----------|----------|--|--------------------|
| | | | <p>County justice solution. While there is convenience and speed associated with this, such a solution does not adequately or appropriately reflect separation of powers concerns regarding chain of custody of evidence. Statutory language should mandate that Court storage must be distinct and separate from justice partners and that the contract must be exclusively controlled by the Court. The Court should receive and store electronic evidence on a system that is fully and exclusively under the control of the Court.</p> <p>The Court-selected vendor storage must be FEDRAMP compliant (federal guidance for cloud storage).</p> <p>In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:</p> <p>Does the proposal appropriately address the stated purpose? Not completely, as noted above: any statutory language must mandate that Court storage must be distinct and separate from justice partners and that the contract must be exclusively controlled by the Court.</p> <p>Is there any type of material that should be excluded from vendor storage? If so, what type of material and why should it be</p> | |

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

LEG21-02

Proposal for Judicial Council-Sponsored Legislation: Vendor Storage of Exhibits and Evidence in Electronic Format (Enact Gov. Code, § 69846.1; amend Gov. Code, § 69846; Code Civ. Proc., § 1952; and Pen. Code, § 1417)

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

| | Commenter | Position | Comment | Committee Response |
|--|-----------|----------|---|--------------------|
| | | | <p>excluded? No.</p> <p>The proposal requires vendors to destroy or dispose of exhibits or evidence in electronic format only as directed by the court. Should the proposal also include a provision to require a vendor to confirm with the court that an exhibit or evidence was disposed of or destroyed?</p> <p>Yes.</p> <p>Would the proposal provide cost savings? If so, please quantify. Potential cost savings depend upon a Court's current situation.</p> <p>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>In addition to the vendor costs, there would be a significant level of effort for participating courts to program existing case management systems and document handling systems; to procure a vendor; and to work with justice partners and attorney groups to secure their participation. There would also be ongoing support costs for non-Court users.</p> | |

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

LEG21-02

Proposal for Judicial Council-Sponsored Legislation: Vendor Storage of Exhibits and Evidence in Electronic Format (Enact Gov. Code, § 69846.1; amend Gov. Code, § 69846; Code Civ. Proc., § 1952; and Pen. Code, § 1417)

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

| | Commenter | Position | Comment | Committee Response |
|----|---|----------|---|--------------------|
| | | | How well would this proposal work in courts of different sizes? No comment. | |
| 6. | Randy Montejano Courtroom Operations Supervisor Superior Court of Orange County | NI | <ul style="list-style-type: none"> • Does the proposal appropriately address the stated purpose? Yes, it appears the proposal addresses the stated purpose. • Is there any type of material that should be excluded from vendor storage? If so, what type of material and why should it be excluded? The only concern would be sensitive materials, such as confidential reports, medical records or graphic photos. Would suggest including a sort of judicial discretion clause of some sort allowing a judicial officer to allow certain evidence not be submitted electronically, upon reasonable request or stipulation of the parties. <p>Also, guidance would be needed as to the legality of digitizing exhibits that do not work well in the digital world.</p> <ul style="list-style-type: none"> • The proposal requires vendors to destroy or dispose of exhibits or evidence in electronic format only as directed by the court. Should the proposal also include a provision to require a vendor to confirm with the court that an exhibit or evidence was disposed of or destroyed? Agreed. This would allow the court to make sure the minutes are accurate, and provide a clear resolution to the “chain of custody”. While the proposal does not address any sort of documentation be filed into each case when the exhibit or evidence is disposed of or destroyed, | |

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

LEG21-02

Proposal for Judicial Council-Sponsored Legislation: Vendor Storage of Exhibits and Evidence in Electronic Format (Enact Gov. Code, § 69846.1; amend Gov. Code, § 69846; Code Civ. Proc., § 1952; and Pen. Code, § 1417)

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

| | Commenter | Position | Comment | Committee Response |
|--|-----------|----------|---|--------------------|
| | | | <p>we recommend a provision be added to specify that the vendor must provide an affirmative response when exhibits are destroyed, or disposed of, which the court could then capture in the minutes.</p> <p>The advisory committee also seeks comments from <i>courts</i> on the following cost and implementation matters:</p> <ul style="list-style-type: none"> • Would the proposal provide cost savings? If so, please quantify. No. Software would need to be purchased from the vendor to support the electronic submission and storage of evidence as well as interfaces to the case management system to eliminate the need of entering data into 2 systems and to validate party information. Also, there would be a desire to store the evidence digitally in the CMS after exhibits are entered into evidence, so that interface would need to be built to transmit the exhibit electronically. • 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? Estimate is 3-6 months depending on whether a vendor is already in place or it will take longer if a vendor needs to be found through the bid process. There will be | |

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

LEG21-02

Proposal for Judicial Council-Sponsored Legislation: Vendor Storage of Exhibits and Evidence in Electronic Format (Enact Gov. Code, § 69846.1; amend Gov. Code, § 69846; Code Civ. Proc., § 1952; and Pen. Code, § 1417)

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

| | Commenter | Position | Comment | Committee Response |
|--|-----------|----------|--|--------------------|
| | | | <p>work related to the creating/modifying of docket codes, updating procedures, testing digital evidence technology and creating interfaces from the digital evidence system into the CMS. Training would also be a big effort in training the public (pro per) and justice partners on the use of the digital evidence system.</p> <ul style="list-style-type: none"> • How well would this proposal work in courts of different sizes? It really depends on the current technology infrastructure present in each court and the vendor selection process. For those courts with limited CMS capabilities, it would be less work. For those courts with capable CMS systems that can interface with the digital evidence system, more time would be needed to create interfaces. <p>Additional Comment Code of Civil Procedure 1952(c), per the proposal, will be updated to indicate that the notice of final destruction of the exhibit shall be sent by electronic means or first class-mail to the parties. The proposal does not mention gathering email contact information from the parties (though sending by electronic means is not required). We recommend modifying the proposal to include vendor capture and communication of email address for all parties and the agreement to electronic communication from the court.</p> | |

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

LEG21-02

Proposal for Judicial Council-Sponsored Legislation: Vendor Storage of Exhibits and Evidence in Electronic Format (Enact Gov. Code, § 69846.1; amend Gov. Code, § 69846; Code Civ. Proc., § 1952; and Pen. Code, § 1417)

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

| | Commenter | Position | Comment | Committee Response |
|----|--|-----------------|---|---------------------------|
| 7. | Superior Court County of San Bernardino County by Nancy CS Eberhardt Court Executive Officer | NI | <p>The Judicial Council has invited public comment on a proposal to sponsor legislation which would amend various statutory provisions governing the storage of electronic evidence. Broadly speaking, the proposed legislation would state that a third party vendor may be used to store evidence that exists in electronic form.</p> <p>Although not opposed to the proposal, the necessity is less clear. The legislative proposal does not cite any statutory or decisional law restricting a clerk’s use of a vendor to store evidence. Courts routinely lease private storage space for paper records. To be sure, there are distinctions between paper and electronic files, which every clerk should consider in maintaining the integrity of court records. However, those distinctions can likely be effectively addressed within the current statutory scheme, without the need for additional legislation.</p> <p>The law governing the scope of a clerk’s express or implied authority is complicated, and comment is not intended to be a definitive treatise on the contours of that authority. However, the California Supreme Court has noted that “certain court records may, even prior to the final determination of the action, be retained in the custody of someone other than the clerk of court.” (<i>People v. Galland</i> (2008) 45 Cal.4th 354, 366.) For example, in the context of an intercepted electronic</p> | |

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

LEG21-02

Proposal for Judicial Council-Sponsored Legislation: Vendor Storage of Exhibits and Evidence in Electronic Format (Enact Gov. Code, § 69846.1; amend Gov. Code, § 69846; Code Civ. Proc., § 1952; and Pen. Code, § 1417)

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

| | Commenter | Position | Comment | Committee Response |
|--|-----------|----------|---|--------------------|
| | | | communication, “Custody of the recordings shall be where the judge orders.” (Pen. Code, § 629.64.) There does not appear to be a policy reason that would require all electronic evidence be maintained on our own premises. Digital evidence is a new phenomenon, and the law is likely unsettled on many questions raised by the Digital Evidence Workstream. The Workstream’s efforts to move the judicial branch forward are applauded; thank you for your time and talent. | |

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



JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue • San Francisco, California 94102-3688
Telephone 415-865-4200 • Fax 415-865-4205 • TDD 415-865-4272

MEMORANDUM

Date

July 1, 2021

Action Requested

Please review

To

Information Technology Advisory
Committee, Rules and Policy Subcommittee
Hon. Julie R. Culver, Chair

Deadline

July 6, 2021

From

Andrea L. Jaramillo, Attorney
Legal Services, Judicial Council

Contact

Andrea L. Jaramillo
916-263-0991 phone
andrea.jaramillo@jud.ca.gov

Subject

Rule Proposal: Review public comments and
make recommendation on adopting rule 2.901
of the California Rules of Court

Background

This spring, the Information Technology Advisory Committee (ITAC) circulated a rule proposal for public comment to adopt rule 2.901 of the California Rules of Court. This new rule of court would define and govern “lodged electronic exhibits.” The purpose of the proposal is to provide clarity and facilitate the use of electronic exhibits in court proceedings. The proposal originates with recommendations from the Information Technology Advisory Committee’s Digital Evidence Workstream.

Discussion

Eight commenters responded to the invitation to comment. Six of the commenters agreed with the proposal if amended, and two commenters disagreed with the proposal (two separate commenters from one court). All comments and draft committee responses are included in the

comment chart attached at pages 19 to 41. Staff will update the draft committee responses following the subcommittee's discussion.

The rule has three provisions. The first defines "lodged electronic exhibit." The second governs access to lodged electronic exhibits. The third governs deletion of lodged electronic exhibits. Each of these provisions is addressed below with the applicable comments. Finally, a section below also includes additional considerations raised by the court that disagreed with the proposal.

A. The definition of lodged electronic exhibit

Proposed rule 2.901(a) would define a "lodged electronic exhibit" as:

an exhibit in electronic format that is not filed, but rather is electronically transmitted to or received by the court for temporary storage pending use at a trial or other evidentiary hearing.

This definition is based on the definition of "lodged" used elsewhere in the California Rules of Court as something "temporarily placed or deposited with the court but not filed." (Cal Rules of Court, rules 2.550(b)(3), 2.575(a)(3).)

One court staff commenter suggested using a term other than "lodged," stating, "Exhibits offered in this form are not 'lodged,' but rather temporarily transmitted or uploaded to a database before a proceeding so a party may offer, submit, or lodge them as evidence." The commenter offered "transmitted electronic exhibits," "uploaded electronic exhibits," or "pre-lodged electronic exhibits" as alternatives.

However, temporarily depositing an exhibit with the court, but not filing it is "lodging" it as that term is used elsewhere in the California Rules of Court. (See Cal. Rules of Court, rules 2.550(b)(3), 2.575.) [defining lodged.] "Lodged" appears to be the appropriate terminology.

A superior court judge also found "lodged" problematic. The judge commented, "Lodgments are an anachronism, left over from the days when voluminous paper submissions were burdensome to the court." The judge noted that the court was "in the process of amending our Local Rules to provide that lodgments will not be accepted, unless specifically required by statute, rule, or court order." Staff contacted the judge to discuss the issue and learned the court is focused on reducing paper lodgments. A lot of material that had been lodged in paper form in the past is now being *filed* electronically. The proposed rule should not impact the court's acceptance of electronic filings as the rule only applies to material in electronic format that is *not* filed. If an exhibit is filed, the proposed rule is inapplicable as the definition expressly excludes filings.

B. Access to lodged electronic exhibits

Subdivision (b) of the proposed rule limits access to lodged electronic exhibits. Specifically:

- (1) A lodged electronic exhibit may be accessible only by the parties and the court until it is admitted into evidence.
- (2) If a lodged electronic exhibit is confidential by law or sealed by court order, it does not lose its confidential or sealed status by operation of this rule.

The electronic nature of the exhibits makes them much more susceptible to easy viewing and dissemination by electronic means. Without an assurance of limited access in the rule until a lodged electronic exhibit is admitted into evidence, the committee was concerned litigants may be dissuaded from lodging electronic exhibits in advance of a trial or other evidentiary hearing and instead bring to court reams of paper or thumb drives, CDs, DVDs, or other storage media that the court would then need to store.

The committee requested specific comments on two topics with this rule. The first was whether who may access to a lodged electronic exhibit should be a broader scope than “the parties and the court. The request cited rule 2.515(b) as an example of such broader scope access. Rule 2.515(b) describes various individuals who may remotely access “court records” including not only individual parties, but also court-appointed persons, legal aid representatives assisting a party though not representing the party, attorneys, and staff working for the attorneys. The second was whether limiting access should end when “admitted into evidence” or whether the threshold should be something different such as “offered into evidence.”

1. Limiting access to a lodged electronic exhibit before it is admitted into evidence

Five commenters addressed the question of whether a broader scope of people should be able to access lodged electronic exhibits before they are admitted into evidence. Commenters stated:

- The list should also include the party's attorney and an authorized person working in a qualified legal services project providing brief legal services. Only the parties, their attorneys, and the court case should have access to uploaded exhibits. When physical exhibits are presented to court to be held until use at the hearing, only the submitting party has access to those physical exhibits. This should be consistent for exhibits uploaded electronically.

- No. The parties in the case and court staff should be the only ones who have access to the exhibits. It does not seem to be appropriate for parties named in Rule 2.515(b), to have access to view exhibits prior to their admission in open court.
- No, given that the documents being lodged are not evidence, have not been authenticated, and may never become evidence, access to those documents should be limited to the parties and the Court.
- No.
- [Subdivision] (b)(1)'s statement that lodged electronic exhibits may be accessible only by the parties and the court until admitted into evidence may suggest a potentially improper denial of access to the courts and court proceedings in that there are many hearings where proposed exhibits are discussed but not admitted into evidence that are and should be open to the public. To avoid this potentially dangerous ambiguity, we suggest adding the modifier ["A lodged electronic exhibit may be electronically accessible only by. . ."], limiting only electronic access to electronic exhibits marked for identification or lodged with the court, which would still enable them to be publicly used in court prior to admission into evidence.

It may be beneficial to keep the scope of those with access narrow at this time, but consider amending the rule in the future if it ultimately proves too limiting. Note also that a party's attorney is included within the scope of the access under the proposed rule because under the California Rules of Court, a "party" "includes the party's attorney of record." (Cal. Rules of Court, rule 1.6(15).)

The comment that subdivision (b)(1) may "suggest a potentially improper denial of access to the courts" should be resolved in the rule. Though the committee did not intend to deny access to public proceedings when a lodged electronic exhibit is used, the rule could be construed in that manner. For example, if a lodged electronic exhibit were a photograph in electronic format and projected during a proceeding prior to being admitted into evidence, access to that viewing under the rule as drafted would still be limited to the parties and the court.

To address the above problem, the commenter suggested revising the language to say a "lodged electronic exhibit may be electronically accessible..." While this would address situations where a member of the public seeks to access the exhibit directly through a court system, it may still be problematically prohibitive at the proceeding itself if the court has authorized media coverage including broadcasting, or providing livestreaming, as some courts have done during the

COVID-19 pandemic. It also would not address a person requesting and receiving a printed copy of a lodged electronic exhibit.

One possible alternative would be to make clear that “access” does not apply to the proceeding itself, such as: “A lodged electronic exhibit may be accessible only by the parties and the court until it is admitted into evidence. For purposes of this subdivision, “accessible” means accessing the exhibit outside a public court proceeding. This subdivision does not preclude in-person public viewing of a proceeding, a court’s public livestream of a proceeding, or court authorized media coverage of a proceeding.” In this manner, the public is still authorized to access proceedings and view whatever may be displayed during the proceeding.

2. “Admitted into evidence” as the threshold to removing the limitation on access

The second was whether limiting access should end when “admitted into evidence” or whether the threshold should be something different such as “offered into evidence.” Four commenters addressed the question. Specifically:

- I recommend that subdivision (b)(1) read: “An uploaded exhibit may be accessible only by the parties, their attorneys, and the court until it is offered into evidence.”

(The commenter noted that the public right of access to a lodged exhibit would apply when used as a basis for adjudication citing *Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, which, in relevant part, analyzed the meaning of “used as a basis for adjudication” and determined certain filed discovery materials were not subject to a public right of access when “not admitted at trial or used as a basis of the court's adjudication of a substantive matter.” (*Id.* at p. 105.))

- The language should be more specific and be “admitted into evidence” to ensure no ambiguity[.]
- No, the phrase “offered into evidence” introduces ambiguity. In particular, if a party fails to make a sufficient showing that the lodged item can be admitted into evidence, that party has still “offered” the lodged document into evidence. Changing “admitted” into “offered” will create confusion about which documents should be accessible to the public at large. If the judicial council wishes to expand the list of people to whom particular documents are accessible, it should do so expressly to avoid erroneous interpretations and inconsistent applications of the rule. As drafted, the rule is clear about who may access the lodged documents, and when they may be accessed by the public.

- If other language is being considered, we suggest “marked for identification” because many exhibits are marked for identification to preserve the record even when attorneys don’t intend to introduce them into evidence.

Lodged exhibits that the court has admitted into evidence are subject to a constitutional and common law right of public access as they have been used as the basis for adjudication in a substantive matter and reflect the official activities of the court. (See *Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60; see also *Copley Press, Inc. v. Superior Court* (1992) 6 Cal.App.4th 106.) Commenters that favored the “admitted into evidence” threshold preferred it as unambiguous.

Lodged exhibits that the court has considered but has not admitted to evidence occupy a less clear place with respect to public access though there is a strong policy argument that a common law right to access should apply. (See *Sander v. State Bar of Cal.* (2013) 58 Cal.4th 300 [discussing the common law right].) Under the common law, public access should apply when it “would contribute significantly to public understanding of government activities.” (*Id.* at p. 324.) If an exhibit is “offered into evidence” or “marked for identification” (the latter may be a clearer threshold than the former) during a court proceeding, even if not admitted into evidence, viewing the exhibit could nonetheless contribute significantly to the public’s understanding of court processes including what information judges consider during the course of a proceeding.

Finally, lodged exhibits that are simply being stored pending use in a proceeding likely are not subject to a right of access though no case law specifically addresses this. Staff have prepared a memorandum to provide a detailed briefing to the subcommittee on public access rights. The memorandum is attached at pages 12 to 17.

C. Deletion of lodged electronic exhibits

Subdivision (c) of the proposed rule governs deletion of lodged electronic exhibits. Specifically:

Unless otherwise ordered by the court, if a lodged electronic exhibit is not admitted into evidence, the clerk must delete it after the hearing, proceeding, or trial for which it was submitted, and email or mail confirmation of such deletion must be sent to the submitting party.

In addition to general comments on subdivision (c), the committee sought specific comments on whether a specific timeline for deletion should apply. Six commenters commented on subdivision (c) addressing it generally and addressing the timeline question. Two of the commenters noted significant issues about the burden subdivision (c) would place on courts. This raises a threshold question about whether subdivision (c) should remain in the proposal. Staff recommend the subcommittee consider this threshold issue first.

The two comments noting the burdensome nature of subdivision (c) are:

- [T]he most significant problem with [the proposal] is the requirement that the clerk will delete any lodged items that are not ultimately admitted into evidence. More than being unwieldy, this will be impossible. There is no way for a clerk to review scores of lodgments after trial and cross-reference which specific items may have been admitted into evidence and which have not, so that the non-exhibits can be deleted. Further, many cases never end in trial. To require a clerk to go back into every electronic case file and manually delete anything that was called a lodgment is unworkable, particularly given increasingly diminishing court resources.
- We recommend not setting a standard requirement for deletion of lodged electronic exhibits. Deletion should be based on judicial discretion or the local court's practice or local rule. Setting a standard requirement for deletion of lodged electronic exhibits would be problematic for the following reasons. The requirement that confirmation of deletion of materials be emailed/sent to the submitting party is unduly burdensome and unnecessary. First, many proposed exhibits are maintained to preserve the appellate record. Requiring court clerks to create a new writing to send to parties that divides out exhibits entered into evidence, not entered into evidence but maintained, and not entered into evidence but destroyed would create a substantial amount of unnecessary work, that, if inconsistent with the record, would create confusion. Second, these distinctions between the handling of the different exhibits would likely be already narrated on the record or in the minute order; there is no need to create a new, separate writing obligation.

The first comment is from a superior court judge and the second comment is from the Trial Court Presiding Judges Advisory Committee and the Court Executives Advisory Committee Joint Rules Subcommittee (the final bullet point, above). Given the significant burden presented by subdivision (c), especially in light of local rules, practices, or schedules for deletion that courts would already have in place, a statewide rule may be unnecessary at this time. This could be revisited if the need arose in the future.

The remaining comments for the subcommittee's consideration, if it determines subdivision (c) should remain, include:

- [P]ermitting immediate deletion of uploaded material that has not been offered, submitted, or lodged would facilitate court operations. The court has no duty to retain evidence that has not been offered, admitted, or lodged. In addition, to provide greater latitude for courts, subdivision (c) should be written in permissive terms regarding the timing of the deletion. Finally, it would be helpful to permit oral notice on the record or to permit notice to be given by text (when the evidence has been uploaded by cellular phone). A proposed revision to [subdivision] (c) might read:

“Unless otherwise ordered by the court, if an uploaded exhibit is not offered, submitted, or admitted into evidence, the clerk may delete it immediately after the hearing, proceeding, or trial for which it was submitted. The court must provide oral notice on the record, or provide email or mail confirmation of such deletion to the submitting party. For evidence that has been uploaded by cellular phone, notice may be given by text to the cellular phone number.”

- [T]here should be some sort of timeline [for deletion], so that there is no ambiguity and so there is consistency in handling these matters across all courts. The timeline should provide enough time to generate electronic notifications (or mail correspondence to the parties) of the deletion as well. It seems like a week would be enough time in this scenario.

We would also recommend that subdivision (c) be clear (or permissive) as to the format and information shared in this communication. Th[i]s would allow the court to make a broad statement in regards to the exhibits destroyed (e.g. "all exhibits previously lodged and not subsequently admitted into evidence, has been destroyed pursuant to Rule 2.901.") rather than itemize them.

- [The commenter] proposes adding the bolded language to subsection (c) to allow for a party to request a lodged electronic exhibit be retained

Unless otherwise ordered by the court, **or expressly requested by a party that attempted to offer a lodged exhibit as evidence**, if a lodged electronic exhibit is not admitted into evidence, the clerk must delete it after the hearing, proceeding, or trial for which it was submitted, and email or mail confirmation of such deletion must be sent to the submitting party.

(The commenter also stated that there should be no timeline applicable to the deletion of exhibits as “the rule should allow flexibility for the Courts and avoid the administrative burden of requiring court staff to delete lodged documents on a specified statutory timeframe.”

- It is recommended that [timing of deletion] be left to individual courts to establish via local rules.

Another consideration for the subcommittee in addition to the above comments is the question of whether “admitted into evidence” is the proper standard for determining what should be deleted or not deleted. This could run afoul of retention requirements in the Code of Civil Procedure and Penal Code. Specifically, Code of Civil Procedure section 1952 and Penal Code section 1417 require the clerk to retain any exhibits “introduced.”

One possible alternative would be to change the language to match the Code of Civil Procedure and Penal Code, and address retention rather than deletion. For example:

Unless otherwise ordered by the court, if a party does not introduce a lodged electronic exhibit, the clerk is not required to retain it after the hearing, proceeding, or trial for which it was lodged.

D. Additional considerations raised by the San Diego Superior Court

The San Diego Superior Court did not agree with the proposal and committee staff met with court staff to discuss the court’s concerns. The court raised the following concerns: lack of clarity on whether courts are required to accept lodged electronic exhibits, uncertainty about the return of exhibits, and lack of clarity on who is responsible for displaying exhibits in electronic format.

1. Acceptance of lodged electronic exhibits

The court is concerned that parties may demand to be able to use lodged electronic exhibits though the court does not have a system in place to accept them. A judge from the court also disagreed with the rule “unless the rule clearly provides that we are not going to be required to implement it.”

When developing the rule, the committee did not mean to mandate acceptance of lodged electronic exhibits, rather to address courts that do accept them. The most straightforward way to address this concern is to add a provision about it. Such as: “Acceptance of lodged electronic exhibits: Courts are not required to accept lodged electronic exhibits.”

2. Return of exhibits

The court regularly returns exhibits to the parties following trial and is uncertain whether it is required now to retain them. A provision concerning return of exhibits would be helpful.

To address this in rule, the committee could consider adding another rule addressing the return of exhibits in electronic format. Code of Civil Procedure section 1952 and Penal Code sections 1417.2 and 1417.3 authorize the return of exhibits. As such, there is authority to return exhibits, but it is not clear how to accomplish that with exhibits in electronic format.

Options include adding another rule with this one and re-circulating it for additional public comments during the winter rule cycle based on the comments the committee has received. Or developing a separate proposal and circulating it during the spring rule cycle. It may be more beneficial to circulate proposals at one time since they are highly related.

3. Responsibility for displaying exhibits in electronic format

The court was unclear if it was the court's or the parties' responsibility to display a lodged electronic exhibit during trial. For example, if a screen was needed to view it, would the court or the party need to provide it. As another example, would the court or the party be responsible for clicking on or otherwise selecting what exhibit will be displayed.

While these are important operational considerations, they are likely not appropriate to address in statewide rule. Rather, this seems an appropriate topic for local control as different courts may have different needs, resources, and capabilities.

Subcommittee's Tasks

- Consider the comments received on the proposal and how the committee should respond.
- Decide whether to recommend ITAC revise the proposal.
- Decide whether to recommend the proposal for Judicial Council approval.

Attachments and Links

1. Andrea L. Jaramillo, Attorney, Legal Services, Judicial Council, memorandum to Rules and Policy Subcommittee of the Information Technology Advisory Committee, July 1, 2021, at pages 12 through 17.

Information Technology Advisory Committee,
Rules and Policy Subcommittee
July 1, 2021
Page 11

2. Text of proposed California Rules of Court, rules 2.901 at page 18.
3. Chart of comments at pages 19 through 41.



JUDICIAL COUNCIL OF CALIFORNIA

2860 Gateway Oaks Drive, Suite 400 • Sacramento, California 95833-4336

Telephone 916-263-7885 • Fax 916-263-1966 • TDD 415-865-4272

MEMORANDUM

Date

July 1, 2021

Action Requested

Please review

To

Information Technology Advisory
Committee, Rules and Policy Subcommittee
Hon. Julie R. Culver, Chair

Deadline

July 6, 2021

From

Andrea L. Jaramillo, Attorney
Legal Services, Judicial Council

Contact

Andrea L. Jaramillo
916-263-0991 phone
andrea.jaramillo@jud.ca.gov

Subject

Lodged exhibits and public access

The purpose of this memorandum is to brief the Information Technology Advisory Committee's (ITAC's) Rules and Policy Subcommittee on the laws concerning public access to lodged exhibits as the subcommittee considers limitations on access to "lodged electronic exhibits." ITAC circulated a proposal for public comment on "lodged electronic exhibits" in spring 2021.

Whether the public has a clear right of access to lodged exhibits depends on whether the exhibits are used as a basis for adjudication in a substantive matter. Less clear is whether there is a right of access when a lodged exhibit is not used as the basis of adjudication in a substantive matter, but the court has still considered it. For example, when an exhibit is excluded from evidence in a matter. There is no case law directly addressing this issue, but there is a strong argument that a common law right of access applies and can only be denied if there is a countervailing public interest in denying access. Finally, for lodged exhibits that the court has not yet considered in any way, it is unlikely that the public has any right of access though, again, there is no case law addressing this specific scenario.

Discussion

Preliminarily, the public’s right to access exhibits potentially implicates constitutional and common rights. The governing legal frameworks of each will be addressed below, and then applied to lodged exhibits.

A. Constitutional and Common Law Rights to Access Records in General

1. Constitutional Right to Access Records

“[B]oth the First Amendment to the United States Constitution and its state counterpart, article I, section 2, subdivision (a) of the California Constitution, ‘provide broad access rights to judicial hearings and records.’” (*Sander v. State Bar of Cal.* (2013) Cal.4th 300, 319, fn. 7 [quoting *Copley Press, Inc. v. Superior Court* (1992) 6 Cal.App.4th 106, 111].) Under the federal and state constitutions, the public has a right of access to both criminal and civil litigation documents “filed in court as a basis for adjudication.” (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, fn. 25; see also *Savaglio v. Wal-Mart Stores, Inc.* (2007) 149 Cal.App.4th 588, 596.) Such records are presumptively open and can only be sealed when the court makes specific findings. (*NBC Subsidiary, supra*, 20 Cal.4th at pp. 1217–1218; *Savaglio, supra*, 149 Cal.App.4th at p. 597; see also Cal. Rules of Court, rules 2.550-2.551 [establishing procedures for filings under seal consistent with *NBC Subsidiary*].) The policies underpinning the right to public access include “(i) demonstrat[ing] that justice is meted out fairly, thereby promoting public confidence in such governmental proceedings; (ii) provid[ing] a means by which citizens scrutinize and check the use and possible abuse of judicial power; and (iii) enhance[ing] the truthfinding function of the proceeding.” (*Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 96, quoting *NBC Subsidiary, supra*, 20 Cal.4th at p. 1219.)

2. Common Law Right to Access Records

California has “long recognized a broader common law right of access that applies to all three branches of government and is not limited to adjudicatory records.” (*Sander, supra*, 58 Cal.4th at p. 308.) Under the common law, the public has a right to access “public records” and “other matters” held by a public officer. (*Id.* at pp. 314, 318 [discussing statutes applicable prior to the passage of the California Public Records Act (CPRA)] [noting that while the prior statutes were repealed, case law continued to recognize a right of access, and also noting that “the Legislature explicitly preserved existing law regarding ‘the status of judicial records as it existed immediately prior to the effective date’” of the CPRA].) Common law “public records” are the “written acts or records of the sovereign authority” and its official bodies. (*Id.* at p. 315.) “Other matters” refer to matters which are “‘public,’ and in which the whole public may have an interest.” (*Id.* at p. 314 [quoting *Whelan v. Superior Court* (1896) 114 Cal. 548, 550].) The threshold consideration for records that are “other matters” is “the public interest that would be served by disclosure. In making that determination, the particular motive of the party seeking the information is not the relevant interest.” (*Id.* at p. 324.) Rather, the relevant interest is that of the general public and “whether disclosure would contribute significantly to public understanding

of government activities.” (*Ibid.* [quoting *City of San Jose v. Superior Court* (1997) 56 Cal.App.4th 601, 616].)

3. General Categories of Records and Rights of Access

In *Copley Press*, the court identified three categories of records to help determine “which written material in the courthouse should be, and which should not be, deemed a record open to public inspection.” (*Copley Press, supra*, 6 Cal.App.4th at p. 113; see also *Sander, supra*, 58 Cal.4th at pp. 318–320, 323–324 [favorably discussing and applying the *Copley Press* analysis].) The first category of records are those which “accurately and officially reflects the work of the court, such as its orders and judgments, its scheduling and administration of cases, its assignment of judicial officers and administrators[,] . . . official court minutes, all its written orders and dispositions, the official reports of oral proceedings, the master calendar[,] . . . documents filed in or received by the court, such as the pleadings and motions filed by the parties and the evidence admitted in court proceedings.” (*Copley Press, supra*, 6 Cal.App.4th at p. 113, emphasis added.) Records in this first category are “presumptively accessible to the public.” (*Sander, supra*, 58 Cal.4th at p. 319.) These types of records fall within the scope of both the constitutional right of access and the common law right as common law “public records.”

The second category of records are those which “are created in the course of judicial work and for the purpose of carrying out judicial duties[,]” but which “do not speak for the court and do not constitute court action.” (*Copley Press, supra*, 6 Cal.App.4th at p. 114.) These records include “preliminary drafts, personal notes, and rough records” such as draft judgments, draft jury instructions, informal notes prepared by judges, and court reporters notes that have not been corrected. (*Ibid.*) Such “rough drafts, informal notes, memoranda, and other preliminary writings,” though they may be used in the course of judicial work, “are not subject to the right of public access. The reason is that public access to such documents is not generally in the public interest because ‘they are tentative, often wrong, sometimes misleading. . . they do not speak for the court and do not constitute court action.’” (*Sander, supra*, 58 Cal.4th at p. 319 [quoting *Copley Press, supra*, 6 Cal.App.4th at p. 114].) In addition, providing public access to the second category of records “would inhibit their creation” (*ibid.*) and “[m]uch more harm would be done to the judicial process by requiring this . . . material to be available to the public, than would ever be overborne by any benefit the public might derive thereby.” (*Copley Press, supra*, 6 Cal.App.4th at pp. 114–115.) These types of records are not covered by the constitutional right of access because they are not used at trial or a basis for adjudication; nor are they covered by the common law right as they are not “public records” because they are not official and they likely are not “other matters” because the material is “tentative, often wrong, sometimes misleading,” and as such, would not aid in the general public’s understanding of the court’s activities. (See *City Council v. Superior Court* (1962) 204 Cal.App.2d 68, 75 [“It is obvious that not every piece of correspondence or written statement lodged in the office of a public officer partakes of such a public interest as to be open to general inspection”].)

The third category of records are those which do not clearly fall into the first or second category and are “on the margin” of those categories. (*Sander, supra*, 58 Cal.4th at p. 319; *Copley Press, supra*, 6 Cal.App.4th at p. 115.) These records do not fall within the scope of the constitutional right of access, but may fall within the common law right as “other matters” that may be subject to public disclosure based on the public interest that would be served by the disclosure. (*Sander, supra*, 58 Cal.4th at p. 324.) Whether the public interest would be served depends on the usefulness of the records to contribute to the public understanding of government activities measured against any countervailing public interest in withholding the material. (*Id.* at pp. 320, 324; see also *Copley Press, supra*, 6 Cal.App.4th at p. 115 [holding that the court clerk’s “rough minutes” are in the third category of records and subject to public inspections because the book of rough minutes is “kept regularly by all clerks. It reflects ministerial action by the clerk. It is a useful document because it is the one repository of easy access which provides a continuous chronology of each court’s daily activities,” and unlike material in the second category of records that may contain inaccurate and erroneous information, “the clerk’s minute book presumptively contains only accurate, descriptive, and non-discretionary information”]; *Pantos v. City and County of San Francisco* (1984) 151 Cal.App.3d 258 [holding that a court’s master jury list of potential jurors was subject to disclosure to the public, but that juror questionnaires were not because disclosure would negatively impact prospective jurors’ “willingness to serve and thus interfere with official court administration. . . . Public interest in withholding such questionnaires outweighs to public’s interest in disclosure”].)

B. Rights of Access Applied to Lodged Exhibits

A lodged exhibit may become the basis for adjudication of a substantive matter once received in evidence in a court proceeding. A lodged exhibit might also not become the basis for adjudication in a substantive matter as the court may consider it and not admit it into evidence. Finally, a lodged exhibit might not yet have been considered by the court and is effectively just being stored pending a party offering it for the court’s consideration.

1. Lodged Exhibits that Are Admitted into Evidence and Serve as the Basis for Adjudication of a Substantive Matter in a Court

Under the *Copley Press* categorization of records, exhibits that have been received into evidence are in the first category of records that “accurately and officially reflect[] the work of the court,” which include “the evidence admitted in court proceedings.” (*Copley Press, supra*, 6 Cal.App.4th at p. 113.) They are unquestionably used as the basis for adjudication in a substantive matter. (See *Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60 [examining the term “used as a basis for adjudication” and determining it applies to substantive matters].) They are “presumptively accessible to the public” under the constitutional right of access. (*Sander, supra*, 58 Cal.4th at pp. 300, 319; *id.* at p. 319, fn. 7.)

The public also has a common law right to access the exhibits as they are part of the official record and therefore are common law “public records.” (See *Sander, supra*, 58 Cal.4th at p. 315 [discussing the nature of common law “public records” historically].) Under the common law, the public has a right to access these records, unless countervailing interests dictate otherwise. (*KNSD Channels 7/39 v. Superior Court* (1999) 63 Cal.App.4th 1200, 1203.) For example, if providing access would impair a defendant’s fair trial right, that could be a countervailing interest stronger than the public interest in access. (*Id.* at p. 1204.)

2. Lodged Exhibits that Are Considered by the Court, but Not Admitted into Evidence and Not Serving as the Basis for Adjudication of a Substantive Matter

Applying the categories in *Copley Press*, exhibits excluded from evidence appear to fall in the third category of public records. They do not fall within the first category as they are not official records of the court or used as a basis for the adjudication of substantive matters. They do not fall within the second category as they are not preliminary drafts, notes, or rough drafts created in the course of judicial work. Excluded exhibits appear to fall within the third category of records. No case law has analyzed the issue, but there is a strong argument that such exhibits are common law “other matters” that are subject to a test of whether they would significantly contribute to the general public’s interest in understanding of government activities and whether there is a countervailing public interest in withholding the material from the public. (*Sander, supra*, 58 Cal.4th at pp. 320, 324; see also *Copley Press, supra*, 6 Cal.App.4th at p. 115).

Although the exhibits are not used for the adjudication of a case, being able to review the same material that the judge reviewed and determined should be excluded from evidence would contribute to the public’s understanding of the court’s activities, even if it has no bearing on the outcome of a particular dispute. (See *Sander, supra*, 58 Cal.4th at pp. 320, 324.) The fact is that once a party offers the exhibit as evidence, a judge will make an official ruling excluding the exhibit, and the public arguably has a right to inspect the exhibit on which the judge based the ruling. Additionally, although the exhibit, by virtue of its exclusion, will not have borne on the outcome of the dispute in question, the ruling of exclusion could give rise to issues on appeal and, again, it could advance the public’s understanding of the court processes to afford access. Whether there is a countervailing public interest that would negate this interest would need to be determined on a case-by-case basis. (See, e.g., *KNSD Channels, supra*, 63 Cal.App.4th at p. 1204 [impairment of the right to a fair trial is a legitimate concern].)

3. Lodged Exhibits the Court Has Not Considered

Applying the categories in *Copley Press*, lodged exhibits that the court has not considered also appear to fall within the third category of public records. Like exhibits excluded from evidence, exhibits that have been lodged with the court, but that the court has not yet ruled upon do not fall within the first category as they are not official records of the court or used as a basis for the adjudication of disputes. (Cf. *Mercury Interactive Corp, supra*, 158 Cal.App.4th at pp. 96,

quoting *NBC Subsidiary, supra*, 20 Cal.4th at pp. 96-97, 104-105 [finding certain filed discovery documents not used as the basis for adjudication in a substantive matter are *not* presumed to be open to public inspection, and noting none of the policy purposes for public access would be served by making the documents public as they do nothing “to (1) establish the fairness of the proceedings, (2) increase public confidence in the judicial process, (3) provide useful scrutiny of the performance of judicial functions, or (4) improve the quality of the truthfinding process”].)

Lodged exhibits that the court has not considered also do not fall within the second category as records described in *Copley Press* because they are not preliminary drafts, notes, or rough drafts created in the course of judicial work. Finally, unlike exhibits excluded from evidence, there is no strong argument that lodged exhibits that the court has not yet considered are common law “other matters.” Such exhibits do not contribute to the general public’s understanding of the court’s activities, as the court has not reviewed the exhibits and may never do so. Accordingly, it is unlikely the public has a right to access exhibits that are merely lodged with the court.

Rule 2.901 of the California Rules of Court would be adopted, effective January 1, 2022, to read:

1 **Rule 2.901. Lodged electronic exhibits**

2
3 **(a) Definition**

4
5 A “lodged electronic exhibit” is an exhibit in electronic format that is not filed, but
6 rather is electronically transmitted to or received by the court for temporary storage
7 pending use at a trial or other evidentiary hearing.
8

9 **(b) Access to lodged electronic exhibits**

10
11 (1) A lodged electronic exhibit may be accessible only by the parties and the
12 court until it is admitted into evidence.

13
14 (2) If a lodged electronic exhibit is confidential by law or sealed by court order,
15 it does not lose its confidential or sealed status by operation of this rule.
16

17 **(c) Deletion of lodged electronic exhibit if not admitted into evidence**

18
19 Unless otherwise ordered by the court, if a lodged electronic exhibit is not admitted
20 into evidence, the clerk must delete it after the hearing, proceeding, or trial for
21 which it was submitted, and email or mail confirmation of such deletion must be
22 sent to the submitting party.

SPR21-15

Rules: Lodged Electronic Exhibits (Adopt Cal. Rules of Court, rule 2.901)

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

| | Commenter | Position | Comment | DRAFT Committee Response |
|----|--|----------|---|---|
| 1. | Robin Brandes-Gibbs Deputy General Counsel Superior Court of Orange County | AM | <ul style="list-style-type: none"> Does the proposal appropriately address the stated purpose? <p>Yes. It would be preferable to use something other than “lodged electronic exhibits.” Exhibits offered in this form are not “lodged,” but rather temporarily transmitted or uploaded to a database before a proceeding so a party may offer, submit, or lodge them as evidence. These exhibits only become part of the court’s record if they are admitted, refused, or lodged. Referring to the status of exhibits prior to being submitted, offered, or lodged as “transmitted electronic exhibits,” “uploaded electronic exhibits,” or “pre-lodged electronic exhibits” would distinguish these exhibits from lodged exhibits. While the public may have a right of public access to lodged exhibits which are used as a basis for adjudication, no such right applies to “lodged electronic exhibits” prior to being submitted, offered, or lodged. (See <i>Mercury Interactive Corp. v. Klein</i> (2007) 158 Cal.App.4th 60, 84, 91.) The remaining comments use the phrase “uploaded” to refer to “lodged electronic evidence.”</p> <ul style="list-style-type: none"> Subdivision (b) limits access to lodged electronic exhibits to parties and the court. Should the list be different—for example, a broader list like the list of those who may remotely access certain electronic records under rule 2.515(b) of the California Rules of Court? | <p>The committee [agrees/disagrees] that a term other than “lodged” should be used. [If disagree...] “Lodged” as used elsewhere in the rules is used similarly here to refer to material “temporarily placed or deposited with the court but not filed.” (Cal Rules of Court, rules 2.550(b)(3), 2.575(a)(3).) For this reason, the committee determined “lodged” is the appropriate term.</p> <p>The committee agrees that with respect to public access there is a distinction between exhibits lodged and used as a basis for adjudication versus and exhibits lodged and not used as a basis for adjudication. The citation to <i>Mercury Interactive Corp. v. Klein</i> (2007) 158 Cal.App.4th 60 is well taken. Though about filed discovery documents not used as a basis for adjudication rather than lodged documents, the case interprets the meaning of “used as a basis for adjudication.” There, the court rejected a broad interpretation where such documents become public when filed because they are “potentially something that would be used ‘as a basis for adjudication.’” (<i>Id.</i> at p. 90.) Rather, the court found there was no presumption of public access to material “was not admitted at trial or used as a basis of the court’s adjudication of a substantive matter.” (<i>Id.</i> at p. 105.) Here, a lodged electronic exhibit may never be admitted into evidence or used by the court in any substantive way. For example, a party changes</p> |

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

SPR21-15

Rules: Lodged Electronic Exhibits (Adopt Cal. Rules of Court, rule 2.901)

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

| | Commenter | Position | Comment | DRAFT Committee Response |
|--|-----------|----------|--|---|
| | | | <p>The list should also include the party's attorney and an authorized person working in a qualified legal services project providing brief legal services. Only the parties, their attorneys, and the court case should have access to uploaded exhibits. When physical exhibits are presented to court to be held until use at the hearing, only the submitting party has access to those physical exhibits. This should be consistent for exhibits uploaded electronically.</p> <ul style="list-style-type: none"> Under subdivision (b), once admitted into evidence, access to a lodged electronic exhibit is no longer limited to the parties and the court. Should the language of this subdivision be broader such as “offered into evidence” rather than “admitted into evidence”? <p>Yes, it should be broader. For reasons discussed in the other comments, I recommend that subdivision (b)(1) read: “An uploaded exhibit may be accessible only by the parties, their attorneys, and the court until it is offered into evidence.”</p> <ul style="list-style-type: none"> Under subdivision (c), if not admitted into evidence, a lodged electronic exhibit must be deleted unless otherwise ordered by the court. Should the language of this subdivision be broader such as “offered into evidence” rather than “admitted into evidence”? | <p>their mind on using an exhibit or the matter settles after the exhibit has been lodged. Subdivision (b) is designed to address this by limiting access to parties and the court until the lodged electronic exhibit is actually used in substantive manner.</p> <p>The committee has decided to keep the scope of who may access lodged electronic exhibits under subdivision (b)(1) limited, but may revisit it in the future if it proves too narrow. Note that a party’s attorney is included within the scope as a “party” under the California Rules of Court “includes the party's attorney of record.” (Cal. Rules of Court, rule 1.6(15).)</p> <p>The committee appreciates the comment addressing the “admitted into evidence” threshold. The committee has decided [TBD after RPS meeting].</p> <p>The committee [agrees/disagrees] that language other than “admitted into evidence” should be used. The committee has decided [TBD following subcommittee meeting on any change in verbiage].</p> |

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

SPR21-15

Rules: Lodged Electronic Exhibits (Adopt Cal. Rules of Court, rule 2.901)

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

| | Commenter | Position | Comment | DRAFT Committee Response |
|--|-----------|----------|--|---------------------------------|
| | | | <p>Yes, the language should read “offered into evidence.” At trial, once an exhibit is identified on the record and offered into evidence, the clerk is responsible for maintaining the exhibit. This includes exhibits offered but not admitted into evidence. The clerk does not return physical exhibits that were not admitted. Exhibits identified on the record in trial are held by the court unless there is a stipulation and order to release them or they are disposed of pursuant to statute. Lodged electronic exhibits neither identified on the record nor received into evidence can be deleted upon conclusion of the hearing.</p> <p>Evidence on appeal includes not only exhibits admitted in evidence, but also exhibits refused or lodged. (See Cal. Rules of Court, rules 4.119(c)(1)(B), 4.230(d)(1)(B), 4.571(b)(1), 8.122(b)(3)(B), 8.124(b)(4), 8.224(a)(1) & (b)(1), 8.320(e), 8.407(e), 8.610 (a)(3), 8.832(a)(3)(B) & (b)(3), 8.843(a)(1) & (d)(1), 8.845(b)(4), 8.870(a), 8.921(a).)</p> <p>Code of Civil Procedure section 1952 requires the clerk to retain in his or her custody any exhibit introduced in a civil trial or proceeding unless other provisions apply. Penal Code section 1417 similarly requires the clerk to retain all exhibits which have been introduced or filed in any criminal action or proceeding unless other provisions apply.</p> | |

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

SPR21-15

Rules: Lodged Electronic Exhibits (Adopt Cal. Rules of Court, rule 2.901)

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

| | Commenter | Position | Comment | DRAFT Committee Response |
|--|-----------|----------|---|--|
| | | | <p>Consequently, if a lodged electronic exhibit is offered into evidence but not admitted, it should not be deleted unless there is a stipulation and order from the court, or until destruction of the exhibit is authorized by law.</p> <ul style="list-style-type: none"> Should subdivision (c) have a specific timeline for a court’s deletion of lodged exhibits? <p>Yes, permitting immediate deletion of uploaded material that has not been offered, submitted, or lodged would facilitate court operations. The court has no duty to retain evidence that has not been offered, admitted, or lodged. In addition, to provide greater latitude for courts, subdivision (c) should be written in permissive terms regarding the timing of the deletion. Finally, it would be helpful to permit oral notice on the record or to permit notice to be given by text (when the evidence has been uploaded by cellular phone). A proposed revision to (c) might read:</p> <p>“Unless otherwise ordered by the court, if an uploaded exhibit is not offered, submitted, or admitted into evidence, the clerk may delete it immediately after the hearing, proceeding, or trial for which it was submitted. The court must provide oral notice on the record, or provide email or mail confirmation of such deletion to the submitting party. For evidence that has been uploaded by cellular phone, notice may be given by text to the cellular phone number.”</p> | <p>The committee appreciates these points and has decided [TBD following RPS meeting on what to do about subdivision (c)].</p> |

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

SPR21-15

Rules: Lodged Electronic Exhibits (Adopt Cal. Rules of Court, rule 2.901)

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

| | Commenter | Position | Comment | DRAFT Committee Response |
|--|-----------|----------|--|--|
| | | | <ul style="list-style-type: none"> Should any lodged electronic exhibits not be deleted under subdivision (c)? <p>No. Uploaded material that has not been offered, submitted, or lodged should be deleted unless ordered otherwise by the court.</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. <p>Allowing the deletion of uploaded exhibits that have not been offered into evidence alleviates any costs associated with electronic storage capacity for the uploaded material. If uploaded exhibits could not be deleted, the need for storage and memory could significantly increase.</p> <ul style="list-style-type: none"> 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>There would be no impact to the case management system since electronic exhibits would be handled in a separate application and</p> | <p>The feedback on cost savings and implementation are helpful and the committee will include the information in its report to the Judicial Council.</p> |

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

SPR21-15

Rules: Lodged Electronic Exhibits (Adopt Cal. Rules of Court, rule 2.901)

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

| | Commenter | Position | Comment | DRAFT Committee Response |
|----|---|----------|---|--|
| | | | <p>do not become part of the court file. Systems would need to differentiate uploaded evidence from evidence that has been admitted, offered, or lodged. Courtroom clerks would need to learn how to handle and maintain electronic exhibits and disposal of uploaded material that has not been admitted, offered, or lodged. This training should not take more than one hour. Implementation would also require written procedures about how to receive and maintain electronic exhibits, and the protocol for deletion of uploaded material.</p> <ul style="list-style-type: none"> • How well would this proposal work in courts of different sizes? <p>This proposal should work well for courts of any size because accepting electronic exhibits is not mandatory. If the court is large enough and has a high volume of cases, it would be more likely to utilize a vendor to handle electronic exhibits management. Smaller courts could elect to accept electronic exhibits through an internal process.</p> <p>Authorizing deletion of uploaded evidence that is not used, introduced, lodged, or admitted in court potentially could reduce storage and maintenance costs for courts of any size.</p> | |
| 2. | Clerks' Association of the California Courts of Appeal by Charles D. Johnson | NI | While amending 2.901, should the rules committee also consider providing a deletion option for the Courts of Appeal under rule 8.224? 8.224(d) does not expressly say what courts of appeal are supposed to do with exhibits lodged electronically. Since lodged | Amending rule 8.224 is beyond the scope of this proposal, but the committee understand the concern. The committee may consider this for future amendment and will also alert the Appellate Advisory Committee of the recommendation. |

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

SPR21-15

Rules: Lodged Electronic Exhibits (Adopt Cal. Rules of Court, rule 2.901)

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

| | Commenter | Position | Comment | DRAFT Committee Response |
|----|--|----------|--|---|
| | | | exhibits are not part of the record, should the Court of Appeal be guided regarding whether and when to delete any lodged exhibits?. Also, should there be a standard chain of custody form for transmission from trial courts to district Courts of Appeal wherein it is stated that the Court of Appeal will delete any electronically lodged exhibits once the remittitur issues? | |
| 3. | Hon. Janet Frangie Superior Court of San Bernardino County | AM | <p>1. The concern that I would have is if the electronic exhibit was not admitted into evidence because an objection to it was sustained by the Court. How would this exhibit be reviewed if an appeal was taken if the exhibit was destroyed following the "hearing, proceeding, or trial"?</p> <p>2. Once the exhibit is admitted into evidence, does the court continue to store it as an electronic exhibit?</p> | <p>The committee appreciates the comment and the issue raised. The committee has decided [TBD. This will depend on what RPS decides about subdivision (c).]</p> <p>The court would continue to store it or could return it consistent with statute. The committee understand the law does not specify how a return may be accomplished with an electronic exhibit and may consider this for further rule development.</p> |
| 4. | Hon. Julia Keley Superior Court of San Diego County | N | <p>Thank you for the opportunity to comment on your proposal with regard to electronic lodgments.</p> <p>The San Diego Superior Court (SDSC) is opposed to the proposal. However, if our court is not required to adhere to such a rule, then we have no position.</p> <p>By way of background, SDSC is moving away from the use of lodgments. In fact, we are in the process of amending our Local Rules to provide</p> | The committee appreciates the comments on the proposal. |

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

SPR21-15

Rules: Lodged Electronic Exhibits (Adopt Cal. Rules of Court, rule 2.901)

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

| | Commenter | Position | Comment | DRAFT Committee Response |
|--|-----------|----------|---|---|
| | | | <p>that lodgments will not be accepted, unless specifically required by statute, rule, or court order. Lodgments are an anachronism, left over from the days when voluminous paper submissions were burdensome to the court. Such submissions could be returned at the end of the case, eliminating the need for permanent storage of reams of paper. But that storage advantage came at a cost – the stacks of lodgments needed to move through the filing clerks, examiners, judges, and courtroom clerks, requiring special handling at every stage. Further, the return of lodgments meant that important information was removed from the file. (Anecdotally, over the past few years a San Diego probate case went up on appeal twice, because a trust document had been lodged and then returned, making it impossible to determine what document was before the court at the time.)</p> <p>Moving to e-filing was a game-changer for our court. Now the parties can attach as many exhibits as they wish to their petitions and oppositions, and it requires no additional burden on the court staff. We made the decision to end paper lodgments as much as possible (being mindful that certain statutes and rules of court may require their use). For exhibits that should not be seen by non-parties, we allow a confidential coversheet to be used.</p> <p>Turning to SPR21-15, as an initial matter, it is not clear what principled difference exists</p> | <p>The proposed rule should not act as an impediment to the court’s acceptance of exhibits included with filings. Filings are outside the scope of the rule as “lodged electronic exhibits” are not filed. The focus of the of the rule is on exhibits for trial and other evidentiary hearings, not exhibits included with a filing.</p> |

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

SPR21-15

Rules: Lodged Electronic Exhibits (Adopt Cal. Rules of Court, rule 2.901)

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

| | Commenter | Position | Comment | DRAFT Committee Response |
|--|-----------|----------|---|---|
| | | | <p>between a lodgment and an exhibit. Parties can and do attach multiple exhibits to their pleadings. They may or may not seek to use them at trial. Why have a separate rule for lodgments?</p> <p>But the most significant problem with SPR21-15 is the requirement that the clerk will delete any lodged items that are not ultimately admitted into evidence. More than being unwieldy, this will be impossible. There is no way for a clerk to review scores of lodgments after trial and cross-reference which specific items may have been admitted into evidence and which have not, so that the non-exhibits can be deleted. Further, many cases never end in trial. To require a clerk to go back into every electronic case file and manually delete anything that was called a lodgment is unworkable, particularly given increasingly diminishing court resources.</p> <p>Further, such an exercise will not advance any actual need. Assuming that sensitive material has been redacted or filed under a confidential coversheet, why would it be necessary to clear such matters from the electronic court file?</p> <p>The San Diego Superior Court opposes such a rule unless the rule clearly provides that we are not going to be required to implement it. Perhaps language could be added as follows: “This rule applies only if electronic lodging of documents is specifically permitted by the local</p> | <p>The committee appreciates this insight and has considered the workload impact of the deletion requirement. The committee has decided [TBD on RPS meeting on the deletion provision].</p> |

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

SPR21-15

Rules: Lodged Electronic Exhibits (Adopt Cal. Rules of Court, rule 2.901)

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

| | Commenter | Position | Comment | DRAFT Committee Response |
|----|---|----------|---|--|
| | | | <p>rules of court in which the matter is being heard.”</p> <p>We suggest that a more useful focus of effort for the Judicial Council would be to propose amendments to the probate code and the rules of court to eliminate all requirements for lodgments and to provide for a more modern means to submit documents that are offered as pre-trial support for or against pending probate petitions.</p> | |
| 5. | Randy Montejano Courtroom Operations Supervisor Superior Court of Orange County | NI | <p>In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:</p> <ul style="list-style-type: none"> Does the proposal appropriately address the stated purpose? Yes, it does seem to address the stated purpose. It provides valuable direction for courts that proceed with electronic evidence. The modification to the proposed rule to not require “immediate” deletion will help in processing, however there should be some kind of timeframe to ensure prompt processing. Though the proposal did not go into specifics regarding redactions (a prudent omission), it may be helpful to add mention that the parties are individually responsible for any redactions. Subdivision (b) limits access to lodged electronic exhibits to parties and the court. Should the list be different—for example, a broader list like the list of those who may | <p>The committee appreciates the feedback. The committee had decided [TBD on deletion requirement in subdivision (c)]. The committee had considered specific redactions, but opted against their inclusion when the proposal circulated. If needed, the committee may consider adding a more generalized statement concerning redaction responsibility in a future amendment.</p> <p>The committee [agrees/disagrees] with the comment. The committee had decided [TBD RPS meeting.]</p> |

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

SPR21-15

Rules: Lodged Electronic Exhibits (Adopt Cal. Rules of Court, rule 2.901)

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

| | Commenter | Position | Comment | DRAFT Committee Response |
|--|-----------|----------|---|--|
| | | | <p>remotely access certain electronic records under rule 2.515(b) of the California Rules of Court? No. The parties in the case and court staff should be the only ones who have access to the exhibits. It does not seem to be appropriate for parties named in Rule 2.515(b), to have access to view exhibits prior to their admission in open court.</p> <ul style="list-style-type: none"> • Under subdivision (b), once admitted into evidence, access to a lodged electronic exhibit is no longer limited to the parties and the court. Should the language of this subdivision be broader such as “offered into evidence” rather than “admitted into evidence”? The language should be more specific and be “admitted into evidence” to ensure no ambiguity as to the • Under subdivision (c), if not admitted into evidence, a lodged electronic exhibit must be deleted unless otherwise ordered by the court. Should the language of this subdivision be broader such as “offered into evidence” rather than “admitted into evidence”? As stated above, the vagueness should be removed and it should say “admitted into evidence”. This will help to provide courts with clear directives as to processing. • Should subdivision (c) have a specific | <p>The committee appreciates the comment and [agrees/disagrees] with the comment. [This will depend on whether the committee decides to keep it to “admitted” or change it to something else.]</p> <p>The committee appreciates the comment and has decided [TBD on what RPS does with subdivision (c)].</p> |

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

SPR21-15

Rules: Lodged Electronic Exhibits (Adopt Cal. Rules of Court, rule 2.901)

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

| | Commenter | Position | Comment | DRAFT Committee Response |
|--|-----------|----------|---|--|
| | | | <p>timeline for a court's deletion of lodged exhibits? Yes, there should be some sort of timeline, so that there is no ambiguity and so there is consistency in handling these matters across all courts. The timeline should provide enough time to generate electronic notifications (or mail correspondence to the parties)of the deletion as well. It seems like a week would be enough time in this scenario.</p> <p>We would also recommend that subdivision (c) be clear (or permissive) as to the format and information shared in this communication. This would allow the court to make a broad statement in regards to the exhibits destroyed (e.g. "all exhibits previously lodged and not subsequently admitted into evidence, has been destroyed pursuant to Rule 2.901.") rather than itemize them.</p> <ul style="list-style-type: none"> Should any lodged electronic exhibits not be deleted under subdivision (c)? We would not recommend to add any exceptions to the deletion under subdivision (c). If the exhibit is not admitted, it should be deleted. <p>The advisory committee also seeks comments from courts on the following cost and implementation matters:</p> | <p>The committee appreciates the comments on costs and implementation, and will include the information in its report to the Judicial Council.</p> |

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

SPR21-15

Rules: Lodged Electronic Exhibits (Adopt Cal. Rules of Court, rule 2.901)

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

| | Commenter | Position | Comment | DRAFT Committee Response |
|--|-----------|----------|--|---------------------------------|
| | | | <ul style="list-style-type: none"> <li data-bbox="814 302 1386 597"> <p>• Would the proposal provide cost savings? If so, please quantify. <i>While there would be significant upfront costs associated in onboarding an Digital Evidence vendor, this proposal would help in the standardization of the process, and would ultimately be a part of an overall cost-savings approach, as evidence admitted through this process will not take up physical space.</i></p> <li data-bbox="814 634 1386 1198"> <p>• 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? <i>The implementation of a digital evidence process (that would incorporate the proposal) would require several weeks of staff training and preparing procedure updates. It would also require modifying our case management system to properly account for digital evidence (e.g. docket codes, evidence lists). In order for this to be successful, training will need to be created and provided for stakeholders (e.g. public, District Attorney, Public Defender, etc)</i></p> <li data-bbox="814 1235 1386 1433"> <p>• How well would this proposal work in courts of different sizes? <i>The proposal itself is dependent on a court moving forward with digital evidence, which requires an upfront outlay of resources to get up and running. As it relates to the proposed rule, it</i></p> | |

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

SPR21-15

Rules: Lodged Electronic Exhibits (Adopt Cal. Rules of Court, rule 2.901)

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

| | Commenter | Position | Comment | DRAFT Committee Response |
|----|---|-----------------|--|--|
| | | | will work well for courts of different sizes, as it sets up | |
| 6. | Orange County Bar Association by Larisa M. Dinsmoor President | AM | <p>The OCBA proposes adding the bolded language to subsection (c) to allow for a party to request a lodged electronic exhibit be retained (see Request for Specific Comment No. 6, below):</p> <p>Unless otherwise ordered by the court, or expressly requested by a party that attempted to offer a lodged exhibit as evidence, if a lodged electronic exhibit is not admitted into evidence, the clerk must delete it after the hearing, proceeding, or trial for which it was submitted, and email or mail confirmation of such deletion must be sent to the submitting party.</p> <p>The OCBA provides the following responses to the Request for Specific Comments:</p> <ol style="list-style-type: none"> 1. The proposal addresses the stated purpose. 2. No, given that the documents being lodged are not evidence, have not been authenticated, and may never become evidence, access to those documents should be limited to the parties and the Court. 3. No, the phrase “offered into evidence” introduces ambiguity. In particular, if a party fails to make a sufficient showing that the lodged item can be admitted into evidence, that party has still “offered” the lodged document into evidence. Changing “admitted” into | <p>The committee appreciates the comment and [agrees/disagrees] with the proposed addition. [This will depend on whether the committee decides to do with subdivision (c).]</p> <p>The committee appreciates the OCBA’s feedback on these issues.</p> <p>The committee appreciates the comment and has decided. [TBD. This will depend on whether the committee decides to keep it to “admitted” or change it to something.]</p> |

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

SPR21-15

Rules: Lodged Electronic Exhibits (Adopt Cal. Rules of Court, rule 2.901)

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

| | Commenter | Position | Comment | DRAFT Committee Response |
|--|-----------|----------|---|--|
| | | | <p>“offered” will create confusion about which documents should be accessible to the public at large. If the judicial council wishes to expand the list of people to whom particular documents are accessible, it should do so expressly to avoid erroneous interpretations and inconsistent applications of the rule. As drafted, the rule is clear about who may access the lodged documents, and when they may be accessed by the public.</p> <p>4. No, for the same reasons as stated in No. 3, above.</p> <p>5. No, the rule should allow flexibility for the Courts and avoid the administrative burden of requiring court staff to delete lodged documents on a specified statutory timeframe.</p> <p>6. As provided in the suggested modified language above, the OCBA believes that a lodged electronic exhibit should be retained if a party at a hearing or trial where the lodged exhibit is offered intends to appeal the result of that hearing or trial and needs the lodged evidence to be preserved. For example, there are instances where a party could attempt to offer the lodged evidence, but the trial court refuses to admit the evidence; the offering party may wish to raise that evidentiary decision as part of an appeal. In such cases, the party should be permitted to request the Court retain the lodged exhibit. The proposed modified language is designed to capture these circumstances by requiring that the party requesting preservation attempted to offer the lodged exhibit. This requirement will avoid attempts by parties to</p> | <p>The committee agrees and [TBD on subdivision (c)].</p> <p>The committee understands and [TBD on subdivision (c)].</p> |

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

SPR21-15

Rules: Lodged Electronic Exhibits (Adopt Cal. Rules of Court, rule 2.901)

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

| | Commenter | Position | Comment | DRAFT Committee Response |
|----|--|----------|--|---|
| | | | make requests of the clerk/court that all lodged evidence be retained even when it has not been offered in to evidence. | |
| 7. | Superior Court of San Diego County by Mike Roddy Executive Officer | N | <ul style="list-style-type: none"> • Does the proposal appropriately address the stated purpose? Yes. • Subdivision (b) limits access to lodged electronic exhibits to parties and the court. Should the list be different—for example, a broader list like the list of those who may remotely access certain electronic records under rule 2.515(b) of the California Rules of Court? No. • Under subdivision (b), once admitted into evidence, access to a lodged electronic exhibit is no longer limited to the parties and the court. Should the language of this subdivision be broader such as “offered into evidence” rather than “admitted into evidence”? No. • Under subdivision (c), if not admitted into evidence, a lodged electronic exhibit must be deleted unless otherwise ordered by the court. Should the language of this subdivision be broader such as “offered into evidence” rather than “admitted into evidence”? No. • Should subdivision (c) have a specific timeline for a court’s deletion of lodged exhibits? | The committee appreciates the court’s feedback. |

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

SPR21-15

Rules: Lodged Electronic Exhibits (Adopt Cal. Rules of Court, rule 2.901)

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

| | Commenter | Position | Comment | DRAFT Committee Response |
|--|-----------|----------|--|---|
| | | | <p>No. It is recommended that this be left to individual courts to establish via local rules.</p> <ul style="list-style-type: none"> Should any lodged electronic exhibits not be deleted under subdivision (c)? <p>No.</p> <ul style="list-style-type: none"> Would the proposal provide costs savings? If so, please quantify. <p>No.</p> <ul style="list-style-type: none"> 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>If the court elected to implement electronic lodgments, it would require extensive changes to the court's online portal to limit access to parties, which would require several months of work by the Information Technology team and court operations.</p> <ul style="list-style-type: none"> How well would this proposal work in courts of different sizes? <p>This will require significant resources to implement and may not be feasible for smaller courts.</p> | <p>The committee will include comments on cost and implementation requirements in the report to the Judicial Council.</p> |

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

SPR21-15

Rules: Lodged Electronic Exhibits (Adopt Cal. Rules of Court, rule 2.901)

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

| | Commenter | Position | Comment | DRAFT Committee Response |
|----|--|----------|--|--|
| 8. | Trial Court Presiding Judges Advisory Committee (TCPJAC) and the Court Executives Advisory Committee (CEAC) by TCPJAC/CEAC Joint Rules Subcommittee (JRS) | AM | <p>The JRS notes the following impact to court operations:</p> <ul style="list-style-type: none"> • Impact on existing automated systems (e.g., case management system, accounting system, technology infrastructure or security equipment, Jury Plus/ACS, etc.)? <ul style="list-style-type: none"> o Depending on the case management or evidence presentation systems in use, the confidentiality requirement and deletion requirement may require modification of existing electronic systems. This could necessitate additional staff and financial resources. • Requires development of local rules and/or forms. <ul style="list-style-type: none"> o Courts will likely need to develop local rules or forms consistent with local practice and provide guidance when materials would be appropriately “lodged” and which require retention (with court order) or deletion. • Results in additional training, which requires the commitment of staff time and court resources. <ul style="list-style-type: none"> o Procedure would require additional staff training as well as judicial and Bar education. • Increases court staff workload. <ul style="list-style-type: none"> o As phrased, the required email confirmation of deletion would increase staff workload. | <p>The committee will include comments on cost and implementation requirements in the report to the Judicial Council.</p> <p>The committee agrees that local rules or forms may be needed to address local processes and requirements.</p> <p>The committee appreciates the comment on workload created by subdivision (c). After considering the comments, the committee had decided [TBD on subdivision (c)].</p> |

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

SPR21-15

Rules: Lodged Electronic Exhibits (Adopt Cal. Rules of Court, rule 2.901)

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

| | Commenter | Position | Comment | DRAFT Committee Response |
|--|-----------|----------|--|--|
| | | | <ul style="list-style-type: none"> • Impact on local or statewide justice partners. <ul style="list-style-type: none"> o Local and Statewide justice partners would need to be educated as to these operational changes and any other requirement imposed by related local rules. <p>JRS also notes that the proposal should be implemented because it addresses the increasingly common practice of transmitting evidence electronically.</p> <p>Suggested modification(s):</p> <p>Insert “electronically” in (b)(1) to read, “A lodged electronic exhibit may be electronically accessible only by ...”</p> <p>Delete requirement of mail/email confirmation of deletion of lodged exhibits. Request for Specific Comments: Does the proposal appropriately address the stated purpose?</p> <ul style="list-style-type: none"> • Subdivision (b) limits access to lodged electronic exhibits to parties and the court. Should the list be different—for example, a broader list like the list of those who may remotely access certain electronic records under rule 2.515(b) of the California Rules of Court? <ul style="list-style-type: none"> o (b)(1)’s statement that lodged electronic exhibits may be accessible only by the parties and the court until admitted into evidence may | <p>The committee appreciates the support.</p> <p>The committee appreciates the feedback and additional comments below concerning public access to proceedings. The proposal is not intended to prevent the public from viewing public proceedings where a lodged electronic exhibit may be displayed or discussed. To address this issue [TBD on the wording of subdivision (b)(1).]</p> |

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

SPR21-15

Rules: Lodged Electronic Exhibits (Adopt Cal. Rules of Court, rule 2.901)

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

| | Commenter | Position | Comment | DRAFT Committee Response |
|--|-----------|----------|--|---|
| | | | <p>suggest a potentially improper denial of access to the courts and court proceedings in that there are many hearings where proposed exhibits are discussed but not admitted into evidence that are and should be open to the public. To avoid this potentially dangerous ambiguity, we suggest adding the modifier listed above, limiting only electronic access to electronic exhibits marked for identification or lodged with the court, which would still enable them to be publicly used in court prior to admission into evidence.</p> <ul style="list-style-type: none"> • Under subdivision (b), once admitted into evidence, access to a lodged electronic exhibit is no longer limited to the parties and the court. Should the language of this subdivision be broader such as “offered into evidence” rather than “admitted into evidence”? o We suggest the language be modified as mentioned above to limiting only electronic access to electronic exhibits marked for identification or lodged with the court. o If other language is being considered, we suggest “marked for identification” because many exhibits are marked for identification to preserve the record even when attorneys don’t intend to introduce them into evidence. • Under subdivision (c), if not admitted into evidence, a lodged electronic exhibit must be deleted unless otherwise ordered by the court. Should the language of this subdivision | <p>The committee [agrees/disagrees]. The committee has decided to [modify or not modify the proposal language].</p> |

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

SPR21-15

Rules: Lodged Electronic Exhibits (Adopt Cal. Rules of Court, rule 2.901)

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

| | Commenter | Position | Comment | DRAFT Committee Response |
|--|-----------|----------|---|--|
| | | | <p>be broader such as “offered into evidence” rather than “admitted into evidence”?</p> <ul style="list-style-type: none"> o We recommend not setting a standard requirement for deletion of lodged electronic exhibits. Deletion should be based on judicial discretion or the local court’s practice or local rule. Setting a standard requirement for deletion of lodged electronic exhibits would be problematic for the following reasons. The requirement that confirmation of deletion of materials be emailed/sent to the submitting party is unduly burdensome and unnecessary. First, many proposed exhibits are maintained to preserve the appellate record. Requiring court clerks to create a new writing to send to parties that divides out exhibits entered into evidence, not entered into evidence but maintained, and not entered into evidence but destroyed would create a substantial amount of unnecessary work, that, if inconsistent with the record, would create confusion. Second, these distinctions between the handling of the different exhibits would likely be already narrated on the record or in the minute order; there is no need to create a new, separate writing obligation. • Should subdivision (c) have a specific timeline for a court’s deletion of lodged exhibits? o As stated above, we recommend not setting a standard requirement for deletion. | <p>The committee [agrees/disagrees] and after consideration of the issues raised had decided [TBD on what the committee decides on subdivision (c)].</p> |

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

SPR21-15

Rules: Lodged Electronic Exhibits (Adopt Cal. Rules of Court, rule 2.901)

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

| | Commenter | Position | Comment | DRAFT Committee Response |
|--|-----------|----------|--|--|
| | | | <ul style="list-style-type: none"> • Should any lodged electronic exhibits not be deleted under subdivision (c)? <ul style="list-style-type: none"> o As stated above, we recommend not setting a standard requirement for deletion. <p>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. <ul style="list-style-type: none"> o Cost savings are not evident at this time; in fact, the proposed deletion and notification process would likely increase costs. o Cost savings may be likely in the future in counties with advanced case management systems where almost all litigants move to an electronic evidence submission system. • 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? <ul style="list-style-type: none"> o Implementation requirements would depend on the court’s existing case management system, local rules and local practice. Implementation would be more effectively managed if courts could be allowed to | <p>The committee appreciates the feedback on cost and implementation issues and will incorporate them into the report to the Judicial Council.</p> |

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

SPR21-15

Rules: Lodged Electronic Exhibits (Adopt Cal. Rules of Court, rule 2.901)

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

| | Commenter | Position | Comment | DRAFT Committee Response |
|--|-----------|----------|--|---------------------------------|
| | | | implement the proposed rules consistent with local rules and local practice. <ul style="list-style-type: none">• How well would this proposal work in courts of different sizes?<ul style="list-style-type: none">o How well the proposal works can depend on the local courts' technology staffing and resources. Medium to small courts typically have small IT staff units and limited technology resources that may make implementing the proposal challenging. | |

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