



JUDICIAL COUNCIL OF CALIFORNIA

INFORMATION TECHNOLOGY
ADVISORY COMMITTEE

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

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INFORMATION TECHNOLOGY ADVISORY COMMITTEE

NOTICE AND AGENDA OF OPEN MEETING

Open to the Public (Cal. Rules of Court, rule 10.75(c)(1) and (e)(1))

THIS MEETING IS BEING CONDUCTED BY ELECTRONIC MEANS

THIS MEETING IS BEING RECORDED

Date: July 28, 2021
Time: 12:00 – 1:00 PM
Connection Info: <https://jcc.granicus.com/player/event/1125?&redirect=true>

Meeting materials will be posted on the advisory body web page on the California Courts website at least three business days before the meeting.

Members of the public seeking to make an audio recording of the meeting must submit a written request at least two business days before the meeting. Requests can be e-mailed to itac@jud.ca.gov.

Agenda items are numbered for identification purposes only and will not necessarily be considered in the indicated order.

I. OPEN MEETING (CAL. RULES OF COURT, RULE 10.75(C)(1))

Call to Order and Roll Call 12:00 a.m. – 12:05 p.m.

Approval of Minutes (Action Required)

Approve minutes of the following Information Technology Advisory Committee meetings:

- June 23, 2021

II. PUBLIC COMMENT (CAL. RULES OF COURT, RULE 10.75(K)(1))

This meeting will be conducted by electronic means with a listen only conference line available for the public. As such, the public may submit comments for this meeting only in writing. In accordance with California Rules of Court, rule 10.75(k)(1), written comments pertaining to any agenda item of a regularly noticed open meeting can be submitted up to one complete business day before the meeting. For this specific meeting, comments should be e-mailed to itac@jud.ca.gov. Only written comments received by **12 p.m. on July 27** will be provided to advisory body members prior to the start of the meeting.

III. REPORTS AND POSSIBLE ACTION ITEMS (ITEMS 1–7)

Item 1 12:05 p.m. – 12:10 p.m.

Chair’s Report

Presenter: Hon. Sheila F. Hanson, Chair

Item 2 12:10 p.m. – 12:15 p.m.

Judicial Council Technology Committee Update

Update on activities and news coming from this internal oversight committee.

Presenter: Hon. Kyle S. Brodie, Chair, Technology Committee

Item 3 12:15 p.m. – 12:20 p.m.

E-Filing Workstream: Update Annual Agenda

The workstream is requesting minor edits to its objectives in the 2021 ITAC Annual Agenda.

Presenter: Snorri Ogata, Workstream Sponsor

Item 4 12:20 p.m. – 12:30 p.m.

Trial Court Rule Revisions: Proposed Amendments to Add Criminal Cases to the Electronic Filing and Electronic Service Rules of the California Rules of Court

Review public comments and decide whether to recommend the Judicial Council amend the California Rules of Court to add criminal cases to the electronic filing and electronic service rules.

Presenters: Hon. Julie R. Culver, Chair, Rules & Policies Subcommittee
Andrea Jaramillo, Attorney

Item 5 12:30 p.m. – 12:40 p.m.

Trial Court Rule Revisions: Rule Proposal to Add a Rule about Lodged Electronic Exhibits to the California Rules of Court

Review public comments and decide whether to recommend the Judicial Council adopt rule 2.901 of the California Rules of Court to govern lodged electronic exhibits.

Presenters: Hon. Julie R. Culver, Chair, Rules & Policies Subcommittee
Andrea Jaramillo, Attorney

Item 6 12:40 p.m. – 12:50 p.m.

Trial Court Statutes Revisions: Legislative Proposal Concerning Vendor Storage of Exhibits and Evidence in Electronic Format

Review subcommittee recommendation that the proposal not proceed to the Judicial Council, but instead be potentially revised and circulated as a rule proposal.

Presenters: Hon. Julie R. Culver, Chair, Rules & Policies Subcommittee
 Andrea Jaramillo, Attorney

Item 7 12:50 p.m. – 1:00 p.m.

Judicial Council Information Technology Update

Receive an update of current and ongoing activities.

Presenters: Heather Pettit, CIO

IV. A D J O U R N M E N T

Adjourn



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INFORMATION TECHNOLOGY ADVISORY COMMITTEE

MINUTES OF OPEN MEETING WITH CLOSED SESSION

June 23, 2021
12:00 PM to 1:00 PM
Videoconference

Advisory Body Members Present:	Hon. Sheila F. Hanson, Chair; Hon. Louis R. Mauro, Vice Chair; Mr. Adam Creiglow; Mr. Jake Chatters; Mr. Brian Cotta; Hon. Julie R. Culver; Hon. Tara Desautels; Hon. Michael S. Groch; Mr. Paras Gupta; Senator Robert Hertzberg (Alex Barnett); Hon. Samantha P. Jessner; Hon. Kimberly Menninger; Mr. Snorri Ogata; Mr. Darrel Parker; Hon. Donald Segerstrom; Hon. Bruce Smith; Ms. Jeannette Vannoy; Mr. Don Willenburg; Mr. David H. Yamasaki; Hon. Theodore Zayner
Advisory Body Members Absent:	Assembly member Marc Berman; Ms. Alexandra Grimwade; Hon. James Mize; Hon. Joseph Wiseman
Others Present:	Judge Kyle Brodie; Mr. Zlatko Theodorovic; Ms. Heather Pettit; Mr. Kevin Lane; Mr. Mark Dusman; Ms. Jamel Jones; Ms. Jessica Craven; Ms. Andrea Jaramillo; Ms. Jackie Woods and other JCC staff present

OPEN MEETING

Call to Order and Roll Call

The chair called the meeting to order at 12:02 PM and took roll call.

Approval of Minutes

The advisory body reviewed and approved the minutes of the April 28, 2021, Information Technology Advisory Committee meeting. One abstention from Judge Zayner as he did not attend the meeting.

No public comments were received for this meeting.

DISCUSSION AND ACTION ITEMS (ITEMS 1 - 4)

Item 1

Chair's Report

Presenter: Hon. Sheila F. Hanson, Chair

Update: Judge Hanson welcomed members to the meeting and provided the following updates.

The new E-filing Workstream has confirmed its membership and will hold its first meeting in early July. Mr. Snorri Ogata is the project sponsor and Mr. Edmund Herbert is the project manager.

Judge Culver will present the final report of the Online Dispute Resolution Workstream to the Technology Committee at their meeting on June 24.

Lastly, the Rules & Policy Subcommittee will meet in early July to address the public comments received on their rule and legislative proposals and will report back at a future ITAC meeting.

Item 2

Judicial Council Technology Committee Update

Update on activities and news coming from this internal oversight committee.

Presenter: Hon. Kyle S. Brodie, Chair, Technology Committee

Update: Judge Brodie shared his appreciation for the partnership between the two committees.

The Technology Committee held two open meetings in May that focused primarily on the Court Technology Modernization Funding. They approved additional projects for courts wanting to expand their use of direct allocations in the current fiscal year. Also approved were program categories and the process for next year's funding (FY2021-22).

The committee's next meeting will be July 12.

Item 3

Governor's Budget Update

Receive an update on the Governor's budget for 2021.

Presenter: Mr. Zlatko Theodorovic, Deputy Director, Budget Services

Update: Mr. Theodorovic provided a budget update as of this meeting, noting the budget is due to be signed by June 28. The legislature passed the budget on June 14.

A technology trailer bill with language that allows for remote civil proceedings is in process and may make it into the Governor's signed budget. If the Ability to Pay (ATP) application is approved in the budget, rollout will continue in the trial courts for online traffic issues.

Technology budget concepts are underway for FY2022-23 and will be presented to the Judicial Council at its July meeting. The concepts include requests for ongoing funding for court technology modernization for Supreme Court, Court of Appeals and trial courts.

Item 4

Court Technology Modernization Funding Update and Status

Receive an update on activities related to the allocation of court technology modernization funding.

Presenter: Hon. Kyle S. Brodie, Chair, Technology Committee
Ms. Heather Pettit, Chief Information Officer

Update: Judge Brodie and Ms. Pettit presented an update on the process for FY2021-22 \$25M Court Technology Modernization Funding allocations. A workstream was formed to refine program categories, define success criteria, and review requests, and provide recommendations. The Technology Committee will finalize allocation recommendations in preparation for the Judicial Council September meeting.

The framework for court technology funding allocations aligns with the Chief Justice's Access 3D initiative and includes core systems along with a digital ecosystem that supports self-service public and partner portals.

Courts will shortly submit their funding request applications, which the workstream will evaluate and recommend to the Technology Committee for review and finalization for Judicial Council consideration.

Members asked for a process to be put in place for phased multi-year projects that have been funded through the end of the current fiscal year that may need funding in order to continue before allocations are made in October. This will be taken back to the workstream for discussion.

The new process is intended to maximize flexibility and innovation for the trial courts.

A D J O U R N M E N T

There being no further open meeting business, the meeting was adjourned at 12:48 PM.

CLOSED SESSION (CAL. RULES OF COURT, RULE 10.75(D)(5))

Item 1

Security Roadmap Workstream Update

Update and report on judicial branch security priorities, security awareness program, risk management, incident response, and education strategy, for the branch and individual courts.

Presenter: Hon. Donald Segerstrom, Security Workstream Co-Sponsor
 Mr. Brian Cotta, Security Workstream Co-Sponsor
 Ms. Heather Pettit, Chief Information Officer

Adjourned closed session at 1:30 PM.

Approved by the advisory body on enter date.

New Workstream (Ending 2021)	
9. Statewide e-Filing Program Review/Evaluation	<i>Priority 2</i>
Workstream membership approved: _____	<i>Scope category(ies): Possibilities; Policies</i>
<p>Project Summary: Review and evaluate the existing statewide e-filing program. Expand the number of e-filing manager (EFM) solutions in the program and standardize electronic filing fees across the state.</p> <p>Key Objectives:</p> <ul style="list-style-type: none"> (a) Identify core team (sponsor and leads); form group membership; hold kickoff meeting(s). (b) Provide recommendations on expanding Explore the strengths and weaknesses of current e-filing programs and practices across the state solutions to a branchwide approach. (c) Evaluate Explore benefits of statewide EFM solutions and identify inclusive of development opportunities and potential funding sources. (d) Evaluate standardizing e-filing transaction fees across the state. (e) Review e-filing rules and statutes to clarify language and improve consistency across the branch. (f) At the completion of these objectives, present findings and recommendations to, and seek approval from, ITAC, the Technology Committee and, if appropriate, the Judicial Council. Formally sunset the workstream. <p>Origin of Project: Tactical Plan for Technology 2021-2022; branch-identified business need.</p> <p>Status/Timeline: December 2021</p> <p>Fiscal Impact:</p> <p><input type="checkbox"/> This project may result in an allocation or distribution of funds to the courts. We will coordinate with Budget Services to ensure their review of relevant materials.</p> <p>Resources:</p> <ul style="list-style-type: none"> • <i>ITAC:</i> Workstream: Sponsor: Snorri Ogata • <i>Judicial Council Staffing:</i> Information Technology, Legal Services • <i>Collaborations:</i> ITAC Rules and Policy Subcommittee 	



JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue • San Francisco, California 94102-3688

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REPORT TO THE JUDICIAL COUNCIL

Item No.:

For business meeting on: September 30–October 1, 2021

Title	Agenda Item Type
Judicial Branch Technology: Electronic Filing and Electronic Service in Criminal Cases	Action Required
	Effective Date
	January 1, 2022
Rules, Forms, Standards, or Statutes Affected	Date of Report
Amend Cal. Rules of Court, rules 2.251, 2.252, 2.253, 2.255, 2.258, and 2.259	July 16, 2021
Recommended by	Contact
Information Technology Advisory Committee Hon. Sheila F. Hanson, Chair	Andrea L. Jaramillo, 916-263-0991 andrea.jaramillo@jud.ca.gov

Executive Summary

The Information Technology Advisory Committee recommends the Judicial Council amend rules 2.251, 2.252, 2.253, 2.255, 2.258, and 2.259 of the California Rules of Court. The purpose of the proposal is 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.

Recommendation

The Information Technology Advisory Committee (ITAC) recommends the Judicial Council amend rules 2.251, 2.252, 2.253, 2.255, 2.258, and 2.259 of the California Rules of Court effective January 1, 2022. The proposal would add references to Penal Code section 690.5 to the electronic filing and electronic service rules of the California Rules of Court to bring criminal cases within the scope of those rules. The text of the amended rules is attached at pages 7–10.

Relevant Previous Council Action

In 2017, the Judicial Council sponsored legislation to add section 690.5 to the Penal Code to provide express authority for “the permissive filing and service of documents” in criminal proceedings. Penal Code section 690.5 became law effective January 1, 2018.

Analysis/Rationale

The proposal would add references to Penal Code section 690.5 to the electronic filing and electronic service rules of the California Rules of Court to bring criminal cases within the scope of those rules. 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. In addition, Penal Code section 690.5 states:

Subdivisions (a) and (b) of Section 1010.6 of the Code of Civil Procedure, pertaining to the permissive filing and service of documents, are applicable to criminal actions, except as otherwise provided in Section 959.1 or any other provision of this code.

This language was intended to ensure electronic filing and electronic service would not be *required* in criminal matters. As the Judicial Council report recommending the council sponsor Penal Code section 690.5 explains:

Because some county justice partners may not have sufficient resources to undertake electronic filing and service in criminal cases, new Penal Code section 690.5 will incorporate only the permissive provisions of section 1010.6 into the Penal Code. Under this proposal, courts will not be authorized to require mandatory electronic filing and service in criminal actions. Rather, for those courts with the resources to implement electronic filing and service in criminal matters, this proposal will provide them with express authority to do so, provided the parties *consent* to electronic filing and service.

(Judicial Council of Cal., Advisory Com. Rep., *Judicial Council–Sponsored Legislation: Applying the Electronic Filing and Service Provisions of Code of Civ. Proc., § 1010.6(a) and (b) to Criminal Actions* (Oct. 28, 2016), p. 3, <https://jcc.legistar.com/View.ashx?M=F&ID=4815159&GUID=80D76D4B-5A18-4048-8B97-346AEBCF1DA5>, italics added.)

The following amendments are included in the proposal:

- **Rule 2.251(a):** This provision generally authorizes electronic service and states that service may be made electronically under Code of Civil Procedure section 1010.6 and the California Rules of Court. The amendment adds a reference to Penal Code section 690.5 and specifies that electronic service in criminal cases requires consent.

- **Rule 2.251(c)(1)–(2):** These provisions govern electronic service required by local rule or court order. The amendments specify that courts may only require electronic service in civil actions because mandatory electronic filing and electronic service are not applicable in criminal actions under Penal Code section 690.5.
- **Rule 2.251(k):** This provision authorizes a court to serve documents electronically under Code of Civil Procedure section 1010.6 and the California Rules of Court. The amendment adds a reference to Penal Code section 690.5.
- **Rule 2.252(a):** This provision generally authorizes electronic filing as provided under Code of Civil Procedure section 1010.6 and the California Rules of Court. The amendment adds a reference to Penal Code section 690.5.
- **Rule 2.253(a):** This provision specifically authorizes courts to permit electronic filing by local rule subject to the conditions in Code of Civil Procedure section 1010.6 and the California Rules of Court. The amendment adds a reference to Penal Code section 690.5.
- **Rule 2.255(h):** This is a new provision that prohibits 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. These service fees are charged by the service provider and are not filing fees. The rule uses “prosecutor” rather than listing specific agencies to encompass any agency serving in that role. The rule also defines “indigent defendant.”
- **Rule 2.258:** This rule governs the payment of filing fees. The amendment specifies the rule applies to civil actions as criminal cases do not have filing fees.
- **Rule 2.259(e):** This rule provides for issuance of an electronic summons. The amendment adds new provisions authorizing the court to issue an electronic summons pursuant to Penal Code sections 813, 816a, 1390, and 1391. Service of the summons would need to be made as prescribed elsewhere by law.

Policy implications

Whether service fees should be authorized to electronic filing in criminal cases is a policy issue. EFSPs and EFMs (collectively “service providers”) typically charge service fees for providing their services. These are not filing fees and, when electronic filing is permissive, are avoidable on the part of the filer. Under Penal Code section 690.5, electronic filing is permissive rather than mandatory. This means courts are authorized to make local rules permitting—but not requiring—electronic filing in criminal cases. As such, a filer in a criminal case should not need to electronically file and could avoid any service fees charged by service providers for electronic filing.

Nonetheless, electronic filing provides significant convenience for filers who need not visit the courthouse to submit a filing. Electronic filing also has an 11:59:59 p.m. deadline statewide

whereas paper filing will vary depending on the hours the clerk's office or drop box is available to accept filings. (Code Civ. Proc., § 1010.6(b)(3); Pen. Code, § 690.5(a) [applying Code Civ. Proc., § 1010.6(b) to criminal cases].) In addition to benefits to filers, electronic filing reduces the amount of physical paper that courts must handle and process.

The proposal prohibits service providers from charging service fees to prosecutors, indigent defendants, and counsel for an indigent defendant. This approach is consistent with the Judicial Council's approach when it secured master agreements with service providers. The master agreements provide for "no fee" filing for indigent filers and government entities. (See Judicial Council of Cal., "E-Filing Services for the Superior Courts of California, RFP #BAP-2017-01-PC," <https://www.courts.ca.gov/35604.htm>, [document titled "RFP Revision 2" contains the key provisions] [as of July 8, 2021].) Currently, one court is live with electronic filing using a Judicial Council master agreement, and three more are in the process of implementation. Rather than use one of the master agreements, courts also have independent agreements with service providers. Based on survey data from spring 2021, 33 courts accept electronic filings. What types of cases courts accept for electronic filing is a local decision made by the courts. (Code Civ. Proc., § 1010.6(b)-(d).)

The committee is continuing to review policies impacting electronic filing in California. The committee formed an ad hoc working group, the E-filing Workstream, to review and make recommendations on both technical and policy aspects of electronic filing. The E-filing Workstream is projected to have recommendations finalized by December 2021. As such, the committee is cognizant that policies may need to be reconsidered following that review and as electronic filing becomes more widely available across case types.

Comments

Before the proposal circulated for comment, ITAC also sought feedback from the Criminal Law Advisory Committee (CLAC). That committee raised concerns that service fees would likely bar most public defender and district attorney offices from opting into electronic filing and would be a hardship for indigent defendants. CLAC recommended no service charges be permitted for filings in criminal actions for prosecutors and all defendants and their counsel. While ITAC agreed with the concerns CLAC raised about prosecutors, public defenders, and indigent defendants, it did not agree that service providers should be unable to charge nonindigent defendants for optional services. ITAC also had concerns that service providers may not provide the services in criminal cases if service fees were prohibited across the board. ITAC circulated the proposal prohibiting service fees for prosecutors, indigent defendants, and counsel for indigent defendants and sought specific comments on the service fee issue.

Six commenters responded to the invitation to comment. The comments supported the proposed amendments though four recommended modifications. Three commenters recommended no service fees be permitted though only two provided substantive comments on the topic. Both were concerned with fairness, with one noting that there are "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 and indigents by higher fees for non-indigents.”

(ITAC discussed this issue and decided to keep the proposal as circulated) with service fees prohibited for prosecutors, indigent defendants, and counsel for indigent defendants only. This is consistent with the approach the Judicial Council took with the statewide electronic filing program master agreements, which prohibit fees for governmental and indigent filers. It is also consistent with policies on setting fines and fees consistent with a defendant’s ability to pay. (See, e.g., Judicial Council of Cal., “Online Traffic: Ability to Pay,” <https://www.courts.ca.gov/abilitytopay.htm> [as of July 9, 2021].)

Commented [JA1]: This section will be updated if needed to include any further discussion by the full ITAC. The section here currently reflects discussion amongst the subcommittee members.

While an indigent defendant would not have the ability to pay, a nonindigent defendant would not have this barrier. In addition, because Penal Code section 690.5 limits electronic filing to permissive electronic filing, nonindigent defendants should still have the option to file in paper. While there are no limits to the service fees a service provider can charge for permissive electronic filing, if a service provider sets service fees beyond what is acceptable to filers, the filers will either not electronically file or select another service provider.

Alternatives considered

Because Penal Code section 690.5 requires the Judicial Council to make rules, no alternative to rulemaking was considered. As discussed above, ITAC considered the service fee issue and recommends service fees be prohibited.

Fiscal and Operational Impacts

Commenters from two courts and the Joint Rules Subcommittee (JRS) of the Court Executives Advisory Committee and Trial Court Presiding Judges Advisory Committee commented on fiscal and operational impacts. One commenter from a court noted that courts not currently participating in electronic filing would need to develop new processes and procedures for these filings, including making changes to the case management system. Courts that already accept electronic filing might need to make smaller changes to the case management system and provide staff training.

Another court commented that electronic filing could provide a cost savings since electronic filings would require less processing time, but that startup costs to implement electronic filing would be necessary. Costs would include staff time to develop a system and provide staff training on the system. JRS noted that updates to processes, technology, and training would be needed. Also, if almost all parties moved to electronic filing, the filing process would be more streamlined and save staff resources, but otherwise a blend of paper and electronic filing is staff intensive. Finally, courts that do not have electronic filing for criminal cases would need to develop local rules for local procedures.

Attachments and Links

1. Cal. Rules of Court, rules 2.251, 2.252, 2.253, 2.255, 2.258, and 2.259, at pages 7–10
2. Chart of comments, at pages 11–22
3. Link A: Pen. Code, § 690.5,
https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=690.5&lawCode=PEN
4. Link B: Code Civ. Proc., § 1010.6,
https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=CCP§ionNum=1010.6

DRAFT

Rules 2.251, 2.252, 2.253, 2.255, 2.258, and 2.259 of the California Rules of Court are 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.

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**
9 **who the court has determined is not financially able to employ counsel**
10 **pursuant to Penal Code section 987. Pending the court’s determination,**
11 **“indigent defendant” also means a defendant the public defender is**
12 **representing pursuant 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.**

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(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. 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 has considered the matter. The committee decided to keep the proposal as-is and not prohibit service providers from charging service fees for electronic filing to non-indigent defendants. The committee does not agree that prosecutors are an obvious income source as resources available will vary in different localities. Because Penal Code section 690.5 applies only the permissive, not mandatory, electronic filing provisions of Code of Civil Procedure section 1010.6, non-indigent defendants should not be required to use electronic filing. The committee expects the market will constrain service fees to an appropriate level or non-indigent filers will not use the service. The approach that the committee has taken is consistent with the Judicial Council's approach in statewide electronic filing master agreements, which exempt governmental and indigent filers from paying service fees. That said, the committee has an ad hoc group working on examining the state of electronic filing in California with the goal of making recommendations to improve it. This group will be examining electronic filing policies. As such, this rule may be revisited for amendment following the group's recommendations.</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. This is a topic the ad hoc working group mentioned above may consider.</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
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 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>	<p>The committee appreciates the concern raised and has considered the matter. The committee decided to keep the proposal as-is and not prohibit service providers from charging service fees for electronic filing to non-indigent defendants. Because Penal Code section 690.5 applies only the permissive, not mandatory, electronic filing provisions of Code of Civil Procedure section 1010.6, non-indigent defendants should not be required to use electronic filing. The committee expects the market will constrain service fees to an appropriate level or non-indigent filers will not use the service. The approach that the committee has taken is consistent with the Judicial Council's approach in statewide electronic filing master agreements, which exempt governmental and indigent filers from paying service fees. That said, the committee has an ad hoc group working on examining the state of electronic filing in California with the goal of making recommendations to improve it. This group will be examining electronic filing policies. As such, this rule may be revisited for amendment following the group's recommendations.</p>
3.	Randy Montejano Courtroom Operations Supervisor 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>The committee appreciates the comments.</p>

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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>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 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> <ul style="list-style-type: none"> o For EFSPs and EFMs: would you be willing to offer electronic filing in criminal cases with this limitation? <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> <ul style="list-style-type: none"> o For prosecutors, defense attorneys representing indigent defendants, and those 	<p>The committee agrees with these points.</p>

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			<p>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 EFM.</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 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 EFM to support criminal filings. If service charges will be placed for defense attorney representing non-indigent defendants, then expect to see little</p>	<p>The committee understands these points. Authorization for electronic filing in criminal is relatively new it may take some time to see how it develops in practice.</p>

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	Commenter	Position	Comment	DRAFT Committee Response
			<p>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 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.</p>	<p>The committee appreciates the comments on costs and implementation requirements that would be needed to accepted criminal electronic filings. The committee will include some of this information in its report to the Judicial Council.</p>

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	Commenter	Position	Comment	DRAFT Committee Response
			<p>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>	
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? Yes. • 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. 	<p>The committee appreciates the court’s comments. The committee decided to keep the proposal as-is and not prohibit service providers from charging service fees for electronic filing to non-indigent defendants. Because Penal Code section 690.5 applies only the permissive, not mandatory, electronic filing provisions of Code of Civil Procedure section 1010.6, non-indigent defendants should not be required to use electronic filing. The committee expects the market will constrain service fees to an appropriate level or non-indigent filers will not use the service. The approach that the committee has taken is consistent with the Judicial Council’s approach in statewide electronic filing master agreements, which exempt governmental and indigent filers from paying service fees. That said,</p>

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	Commenter	Position	Comment	DRAFT Committee Response
			<ul style="list-style-type: none"> • 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 has an ad hoc group working on examining the state of electronic filing in California with the goal of making recommendations to improve it. This group will be examining electronic filing policies. As such, this rule may be revisited for amendment following the group's recommendations.</p> <p>The committee appreciates the 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 will include the information on implementation requirements and will include it in the report to the Judicial Council.</p>

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	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. The JRS notes the following impact to court operations:</p> <ul style="list-style-type: none"> • Impact on existing automated systems <ul style="list-style-type: none"> 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. <ul style="list-style-type: none"> 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. <ul style="list-style-type: none"> 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>

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	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 690.5, 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.</p> <p>The committee considered this recommendation and [agrees or disagrees] that adding “court appointed” is clearer.</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. The committee considered the broader government filer issue. The statewide electronic filing master agreements exempt government filers (used or being implemented in 4 courts) so a broader scope beyond the prosecutor would be consistent with that. However, the committee could not think of non-prosecutorial entities that need to file in criminal cases. This is something the committee would consider in the future if there is a need to expand the scope in the rule.</p>

Commented [JA1]: This is TBD following the ITAC meeting. I will update it after ITAC meets and update the proposal if needed.

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	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>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 has

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	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 bookmarks, 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</p>	<p>established a working group to examine statewide electronic filing including opportunities to expand electronic filing.</p>

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	Commenter	Position	Comment	DRAFT Committee Response
			<p>benefit the back log of cases due to COVID-19, 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>	

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JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

Item No.:

For business meeting on: September 30–October 1, 2021

Title	Agenda Item Type
Judicial Branch Technology: Lodged Electronic Exhibits	Action Required
Rules, Forms, Standards, or Statutes Affected	Effective Date
Adopt Cal. Rules of Court, rule 2.901	January 1, 2022
Recommended by	Date of Report
Information Technology Advisory Committee	July 20, 2021
Hon. Sheila F. Hanson, Chair	Contact
	Andrea L. Jaramillo, 916-263-0991 andrea.jaramillo@jud.ca.gov

Executive Summary

The Information Technology Advisory Committee recommends the Judicial Council adopt a new rule of court to define and govern “lodged electronic exhibits.” The purpose of the proposal is to provide clarity to facilitate the use of electronic exhibits in court proceedings.

Recommendation

The Information Technology Advisory Committee (ITAC) recommends the Judicial Council adopt rule 2.901 of the California Rules of Court, effective January 1, 2022. The rule would define “lodged electronic exhibits” and establish requirements for access and provide guidance on deletion. The text of the new rule is attached at page 7.

Analysis/Rationale

Rule 2.901 of the California Rules of Court would do three things. First, it would define “lodged electronic exhibit.” Second, it would provide for the scope of access to lodged electronic exhibits. Third, it would authorize deletion of lodged electronic exhibits. The purpose of the proposal is to provide clarity to the courts, litigants, and the public on the handling of exhibits in electronic format to facilitate the use of electronic exhibits in court proceedings. This would be

beneficial in remote evidentiary proceedings as transmitting exhibits during a proceeding with parties and the court in different locations may present a challenge. This would also be beneficial to courts that wish to reduce the amount exhibits in physical format they must handle.

Rule 2.901 would be in chapter 1 of division 7 of title 2 of the California Rules of Court. This chapter governs general provisions for proceedings in the trial courts. As such, the rule would apply to all proceedings in the trial courts.

Definition of Lodged Electronic Exhibit

The proposal 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.” The rule only concerns exhibits that are in electronic format rather than a physical format. While a lodged electronic exhibit may be something that originally exists in an electronic format such as an email, the rule does not require a lodged electronic exhibit to have originally existed in electronic format. For example, a lodged electronic exhibit could be a copy of a paper map that was scanned to be in electronic format. In addition, because lodged electronic exhibits are in *electronic* format, the court would be storing only the electronic exhibit, not physical items such thumb drives, DVDs, and CDs. The committee added an advisory committee comment that the rule applies only when the court accepts an exhibit lodged in electronic format rather than physical format and noted an example of the distinction between the two.

While a lodged electronic exhibit can be transmitted electronically to the court, and this would likely be the most convenient method for parties and the court, electronic transmission is not a requirement. While a thumb drive would not meet the criteria to be a lodged electronic exhibit, the rule would allow a party to bring a thumb drive to court and transfer electronic exhibits on the thumb drive to deliver them into the court’s system. The court would not store the thumb drive, however, only the electronic exhibits transferred to the court’s system.

Access to Lodged Electronic Exhibits

The proposal limits access to lodged electronic exhibits to parties and the court until the exhibit is admitted into evidence. “Parties” includes attorneys of record. (Cal. Rules of Court, rule 1.6(15).) Because a lodged electronic exhibit is only temporarily stored pending use in a trial or other evidentiary hearing, it may ultimately never be used and, as such, may never become part of the judicial record. For example, a party might lodge a photograph in electronic format by transmitting it through a court’s online portal designed for that purpose, and then during the proceeding decide not to present it. In that event, the court will never use the photograph as a basis for adjudication.

The electronic nature of the exhibits also 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 physical media that the court would then need to store.

The rule is not meant to preclude the public from accessing public court proceedings. To avoid any issues with that, the rule makes clear that “accessible” means accessing the exhibit outside a public court proceeding rather than viewing it during the course of the proceeding, for example, seeing the exhibit if it is displayed on a screen where public spectators could see it.

Deletion of Lodged Electronic Exhibits

The proposal authorizes the clerk to delete a lodged electronic exhibit unless otherwise ordered by the court after the hearing, proceeding, or trial. As noted previously, a lodged electronic exhibit ultimately may never be presented by a party. In that event, the clerk would generally have no need to retain it though the court could order retention if there was a need.

Policy implications

The committee discussed policy concerning access to lodged electronic exhibits. While exhibits the court has admitted into evidence are subject to constitutional and common law rights of public access (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), lodged electronic exhibits are merely stored *pending use* in a trial or other evidentiary hearing. Until they are used, they have no bearing on any substantive matter before the court nor do they reflect any official activity taken during a court proceeding. As such, there is no general public interest in them. Furthermore, parties may be dissuaded from lodging electronic exhibits if they believe they will be potentially viewed and disseminated before the party has had an opportunity to present them to the court. Accordingly, the committee limited access to lodged electronic exhibits to the parties and the court until they are admitted into evidence.

The Joint Rules Subcommittee (JRS) of the Trial Court Presiding Judges Advisory Committee and Court Executives Advisory Committee commented on the topic of access, stating, the proposed rule, “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.” Though ITAC did not intend to deny access to public proceedings where a lodged electronic exhibit may be displayed, the rule could be construed in that manner. For example, if a lodged electronic exhibit was a photograph displayed on a screen during a public evidentiary hearing prior to admission into evidence, the rule could be read to mean the public should be excluded from the hearing. To avoid this unintended consequence, the committee added clarifying language specifying, “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.”

Commented [A1]: The discussions here and other sections below reflect discussion among the subcommittee members. This will be updated if there is further discussion at the meeting of the full committee.

Comments

Eight commenters responded to the invitation to comment. Six of the commenters agreed with the proposal if amended, and two commenters from the same court did not agree with the proposal. Committee staff reached out to the court that disagreed for additional details.

Definition of Lodged Electronic Exhibit

One 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. The committee considered this but determined “lodged” was the appropriate term. 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].)

One of the commenters from a court that disagreed noted that “Lodgments are an anachronism, left over from the days when voluminous paper submissions were burdensome to the court.” Staff contacted the commenter to discuss the issue and learned the court is focused on reducing paper lodgments. A significant amount 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.

Access to Lodged Electronic Exhibits

Commenters generally agreed access to lodged electronic exhibits should be limited to parties and the court. However, commenters were split on whether “admitted into evidence” was the proper threshold for limiting access. The committee had sought specific comments on this issue. One commenter preferred “offered into evidence,” and another suggested as a potential alternative, “marked for identification.” Two commenters preferred “admitted into evidence” as a clear standard and believed “offered” was too ambiguous a term. The committee discussed this issue, considered alternative language, including “marked for identification,” “offered into evidence,” and “introduced.” The committee considered “marked for identification” too broad in scope because exhibits may need to be pre-marked before any court proceeding. The committee found “offered” and “introduced” too ambiguous to be able to practically implement and determined “admitted into evidence” offered a clear and practical bright line for courts.

Deletion of Lodged Electronic Exhibits

As circulated, the proposal would have required the clerk to delete lodged electronic exhibits not admitted into evidence unless otherwise ordered by the court and provide notice to the parties of the deletion. Two commenters including one who disagreed with the proposal noted that this provision was overly burdensome on the courts, creating a significant amount of work for the clerk. One also noted that the clerk may be otherwise required to keep exhibits for the appellate record even if not admitted into evidence. Another commenter recommended the provision be written in permissive rather than mandatory terms. In light of these considerations, the

committee revised the proposal to make it permissive, remove confirmation of deletion, and remove the language on admission into evidence. This should prove less burdensome on the courts.

Additional Considerations

Staff communicated with commenters from a court that disagreed with the proposal, which raised a few additional concerns over the phone. First, the court was concerned it would be required to accept lodged electronic exhibits. The committee did not draft the rule to require courts to accept lodged electronic exhibits. It may not be feasible in many courts to do so at this time. The committee added an advisory committee comment noting that the rule only applies if a court accepts exhibits lodged in an electronic rather than physical format. The comment also notes the distinction between the two.

Second, the court noted that it regularly returns exhibits to the parties following trial and was uncertain if it could do that if an exhibit was in electronic format. The committee may consider proposing another rule in the future 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 there is no statewide rule or guidance on how to return an exhibit in electronic format. This is a topic the committee may consider for future rulemaking.

Third, 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, the committee did not believe they need to be addressed in statewide rule. Rather, this seems an appropriate topic for local control as different courts may have different needs, resources, and capabilities.

Alternatives considered

One alternative to the proposal would be to maintain the status quo. However, because courts are increasingly becoming the recipients of exhibits in electronic format, the committee determined that a change is now needed to create clarity and facilitate the use of such exhibits.

The committee considered including a provision related to protection of privacy like rule 1.201 of the California Rules of Court, which governs protection of privacy in filed documents. However, the committee determined it was not practical for inclusion in the proposed rule.

The committee also considered different alternatives for the provisions on access and deletion, which are discussed in detail in the preceding sections.

Fiscal and Operational Impacts

There would be upfront costs to implement systems that can manage exhibits in electronic format. Two commenters noted that there could be future cost savings if most litigants move to

use an electronic evidence submission system. One stated that a cost savings could be achieved because there would be no need for physical storage space for exhibits in electronic format. There would be a need though for electronic storage space though this could be mitigated when courts delete or return exhibits.

Implementation would likely require updated local procedures including local rules on exhibits in electronic format. Training of judicial officers and court staff on updated procedures would also be needed. In addition, education would need to be offered to members of the bar for a new system and procedures to be successful.

How well the proposal would work in different courts would depend on available technology resources including staff. Implementation may be more challenging for smaller courts. Because acceptance of electronic exhibits is not mandatory though, courts will be able to implement such acceptance on their own timelines based on their local needs and resources.

Attachments and Links

1. Cal. Rules of Court, rule 2.901, at page 7.
2. Chart of comments, at pages 8–29.

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. For purposes of this subdivision,
13 “accessible” means accessing the exhibit outside a public court proceeding.
14 This subdivision does not preclude in-person public viewing of a proceeding,
15 a court’s public livestream of a proceeding, or court authorized media
16 coverage of a proceeding.”
17

18 (2) If a lodged electronic exhibit is confidential by law or sealed by court order,
19 it does not lose its confidential or sealed status by operation of this rule.
20

21 **(c) Deletion of lodged electronic exhibit**

22
23 Unless otherwise ordered by the court, the clerk may delete a lodged electronic
24 exhibit after the hearing, proceeding, or trial.
25

26 **Advisory Committee Comment**

27
28 The rule applies only if a court accepts exhibits lodged in electronic rather than physical format.
29 For example, if a party lodged a compact disc, the exhibit would be in physical format and the
30 rule would not apply. If the party instead lodged an .mp3 audio file, the exhibit would be in
31 electronic format, and the rule would apply.

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

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	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 does not agree that a term other than “lodged” should be used. “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 their mind on using an exhibit or the matter settles</p>

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	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>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 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 ITAC meeting].</p>

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	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>	<p>The committee appreciates the points made. After discussion, the committee determined “offered into evidence” was not a clear standard but agreed “admitted into evidence” would be too limiting. The committee decided to strike the language on “admitted into evidence” and leave the rule more open.</p>

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	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 agrees that there is no duty to retain exhibits that have only been stored and not subsequently used in any way. The committee agrees that subdivision (c) should be in permissive terms and has made that modification. Other commenters noted that the notice requirements imposed a significant workload burden on the courts and thus, the committee decided to eliminate that provision.</p>

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	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 committee appreciates the information on the costs, implementation requirements, and impact on courts of different sizes. The committee will include this information in the report to the Judicial Council.</p>

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			<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	Amending rule 8.224 is beyond the scope of this proposal, but the committee understand the concern. The committee may consider this for

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	Commenter	Position	Comment	DRAFT Committee Response
			courts of appeal are supposed to do with exhibits lodged electronically. Since lodged 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?	future amendment or refer it to another committee.
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 revised subdivision (c) to remove the mandatory language requiring deletion. The committee has also removed the "admitted into evidence" language.</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 if needed.</p>
4.	Hon. Julia Kelety 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>	The committee appreciates the comments on the proposal.

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	Commenter	Position	Comment	DRAFT Committee Response
			<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 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>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>

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			<p>Turning to SPR21-15, as an initial matter, it is not clear what principled difference exists 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? 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:</p>	<p>The committee appreciates this insight and has considered the workload impact of the deletion requirement. The committee has revised the language to make it permissive rather than mandatory and remote the notice requirement.</p> <p>The rule only applies if the court accepts exhibits lodged in electronic format. It is not intended to require courts to accept such exhibits.</p>

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	Commenter	Position	Comment	DRAFT Committee Response
			<p>“This rule applies only if electronic lodging of documents is specifically permitted by the local 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>	<p>This is beyond the scope of the current proposal, but the committee will refer the suggestion to the Probate and Mental Health Advisory Committee.</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 	<p>The committee appreciates the feedback.</p> <p>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>

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			<p>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> <p>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”? <p>The language should be more specific and be “admitted into evidence” to ensure no ambiguity as to the</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>As stated above, the vagueness should be removed and it should say “admitted into evidence”. This will help to provide courts</p>	<p>The committee agrees with the comment and has not expanded the scope of who may access a lodged electronic exhibit.</p> <p>The committee appreciates the comment and agrees that “admitted into evidence” is a clear threshold. [But TBD if ITAC does anything further.]</p> <p>The committee appreciates the comment and has decided to revise subdivision (c) to remove the “admitted into evidence” language. The committee agrees that this language is clearer than the broader language, but other commenters noted that it could be problematic considering other retention requirements. Accordingly, the committee has removed the “admitted into evidence language.”</p>

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			<p>with clear directives as to processing.</p> <ul style="list-style-type: none"> Should subdivision (c) have a specific timeline for a court's deletion of lodged exhibits? <p>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)? <p>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>	<p>The committee appreciates the comment but determined subdivision (c) needed to be less onerous on courts and a specific timeline could be more onerous. The committee determined the notification requirement was too burdensome and removed it.</p>

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			<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. 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. • 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? 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) • How well would this proposal work in courts of different sizes? 	<p>The committee appreciates the information on the costs, implementation requirements, and impact on courts of different sizes. The committee will include this information in the report to the Judicial Council.</p>

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	Commenter	Position	Comment	DRAFT Committee Response
			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 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 	<p>The committee appreciates the comment and agrees subdivision (c) needs to be revised. Ultimately, based on other comments received, the committee determined subdivision (c) was written in too onerous a manner. The committee did not implement these specific suggestions in the revision but did remove the requirement that a clerk delete exhibits not admitted into evidence. The mandatory deletion would have created a burdensome workload and linking deletion to whether a lodged electronic exhibit had been admitted into evidence was problematic considering other exhibit retention requirements. Accordingly, the revised version allows, but does not require deletion. The rule does not preclude the parties from asking for a court order to prevent deletion.</p> <p>The committee agrees.</p>

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

	Commenter	Position	Comment	DRAFT Committee Response
			<p>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.</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</p>	<p>The committee agrees that the change would create ambiguity and that “offered” is not sufficiently clear.</p> <p>The committee agrees.</p> <p>The committee has removed the requirement that a clerk delete lodged electronic exhibits not admitted into evidence. Rather, the rule is now permissive and allows, but does not require, the clerk to delete lodged electronic exhibits following the trial or other proceeding unless the court orders otherwise. The rule does not preclude the party from requesting the court make such an order.</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
			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 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. 	<p>The committee appreciates the court’s feedback.</p> <p>The committee has not expanded the scope of access in the proposal.</p> <p>The committee agrees and determined “offered into evidence” was too ambiguous.</p> <p>The committee revised the language as mandatory deletion would have created additional workload and possibly conflicted with other retention requirements.</p>

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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 subdivision (c) have a specific timeline for a court’s deletion of lodged exhibits? No. It is recommended that this be left to individual courts to establish via local rules. • Should any lodged electronic exhibits not be deleted under subdivision (c)? No. • Would the proposal provide costs savings? If so, please quantify. No. • 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. 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. • How well would this proposal work in courts of different sizes? 	<p>The committee agrees.</p> <p>The committee appreciates the information on the costs, implementation requirements, and impact on courts of different sizes. The committee will include this information in the report to the Judicial Council.</p>

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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
			This will require significant resources to implement and may not be feasible for smaller courts.	
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. 	<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>

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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"> o As phrased, the required email confirmation of deletion would increase staff workload. • Impact on local or statewide justice partners. 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? 	<p>The committee appreciates the comment on workload created by subdivision (c). After considering the comments, the committee decided the workload increase was problematic without significant benefit. As such, the committee removed requirements for deletion and notice.</p> <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, the committee added language clarifying that the rule does not preclude the public from viewing public proceedings. The committee did not use “electronically accessible” as that could still be read to prevent viewing of a proceeding if there is a court livestream or authorized media broadcast.</p>

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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"> o (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 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. • 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. 	<p>The committee considered "marked for identification," but it could prove problematic when parties must pre-mark exhibits for identification. The committee considered other language as well including "offered" and "introduced on the record," but committee</p>

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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"> • 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”? 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. 	<p>members found these terms too ambiguous and determined “admitted into evidence” was the clearest standard.</p> <p>The committee agrees and has removed the requirement for deletion.</p>

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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 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. • Should any lodged electronic exhibits not be deleted under subdivision (c)? 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. 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? 	<p>The committee appreciates the information on the costs, implementation requirements, and impact on courts of different sizes. 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

SPR21-15

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"> 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 implement the proposed rules consistent with local rules and local practice. • How well would this proposal work in courts of different sizes? 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



JUDICIAL COUNCIL OF CALIFORNIA

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MEMORANDUM

Date

July 15, 2021

Action Requested

Please review

To

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

Deadline

July 28, 2021

From

Andrea L. Jaramillo, Attorney
Legal Services, Judicial Council

Contact

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

Subject

Recommendation to Consider Revising
Vendor Storage Proposal and Circulate as a
Rule Proposal

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 the Rules and Policy Subcommittee considered at its July 6, 2021 meeting is whether the proposal should proceed. Staff recommended the proposal not move forward to the Judicial Council because of risks of proceeding with the proposal.

One risk is 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 risks associated with proceeding with the proposal, staff recommended the proposal not move forward to the Judicial Council.

The Rules and Policy Subcommittee discussed this matter and ultimately decided to recommend to ITAC that the legislative proposal not proceed to the Judicial Council as express statutory authority to use vendor storage is not needed. However, the subcommittee also determined certain provisions of the proposal could potentially recirculate as a rule proposal rather than a legislative proposal. Specifically, provisions on vendor compliance with security standards and policies, limiting access to persons authorized by law and court order, and destruction of exhibits only as directed by the court. These topics could possibly benefit from statewide rule to ensure there is consistency in policy for securing electronic exhibits stored with a vendor.

ITAC staff consulted with the Judicial Council's Rules Committee staff to determine what the appropriate timeline would be should ITAC revise the proposal for circulation as a rule proposal. Because the Rules Committee has never seen the proposal, it would need to go on the regular rule cycle in 2022 for a January 1, 2023 effective date.

At this time, the Rules and Policy Subcommittee does not yet know what else it may be working on in 2022. The subcommittee typically meets for annual agenda planning in late October or

early November each year, and presents its recommendations for the next year's annual agenda in December. As such, a project to convert certain provisions of the legislative proposal to a rule proposal will need to be considered and prioritized in light of other items that the subcommittee has not yet considered, but will consider when developing annual agenda recommendations. The subcommittee will have a final recommendation for ITAC at ITAC's December meeting when it votes on the 2022 annual agenda.

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

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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.
33

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 	

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			<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>	

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			<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>	

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			<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? 	

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			<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>	

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			<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>	

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			<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>	

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			<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>	

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			<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>	

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			<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>	

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			<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</u> and <u>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>	

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			<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>	

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			<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>	

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			<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>	

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			<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	

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			<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>	

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			<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>	

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			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. Also, guidance would be needed as to the legality of digitizing exhibits that do not work well in the digital world. • 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, 	

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			<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 	

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			<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>	

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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