

# JUDICIAL COUNCIL OF CALIFORNIA

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## INVITATION TO COMMENT

### SPR20-28

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<b>Title</b>	<b>Action Requested</b>
Judicial Branch Technology: Electronic Filer Need Not Consent to Electronic Service	Review and submit comments by June 9, 2020
<b>Proposed Rules, Forms, Standards, or Statutes</b>	<b>Proposed Effective Date</b>
Amend Cal. Rules of Court, rule 2.255	January 1, 2021
<b>Proposed by</b>	<b>Contact</b>
Information Technology Advisory Committee Hon. Sheila F. Hanson, Chair	Andrea L. Jaramillo, 916-263-0991 andrea.jaramillo@jud.ca.gov

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### Executive Summary and Origin

The Information Technology Advisory Committee recommends the Judicial Council amend rule 2.255 of the California Rules of Court. The purpose of the proposed amendment is to require an electronic filing service provider to allow an electronic filer to proceed with an electronic filing even if the electronic filer does not consent to receive electronic service. The proposal originated with comments received from the Superior Court of Orange County and the Joint Rules Subcommittee of the Trial Court Presiding Judges Advisory Committee and Court Executives Advisory Committee.

### Background

Code of Civil Procedure section 1010.6 (§ 1010.6) provides statutory authority for electronic filing and service. Courts may (1) permit electronic service by local rule, or (2) require electronic service by local rule or court order. (§ 1010.6(b)–(d).)

In 2017, the Legislature amended section 1010.6 to state that for cases filed on or after January 1, 2019, electronic service was “not authorized unless a party or other person has expressly consented to receive electronic service in that specific action” unless electronic service was required by local rule or court order. Rule 2.251(b) of the California Rules of Court<sup>1</sup> had previously allowed the act of electronic filing alone to be evidence of consent to receive electronic service for represented persons, but the amendments to section 1010.6 eliminated this option. Section 1010.6 does, however, allow a person to provide express consent electronically

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<sup>1</sup> All further references to rules are to the California Rules of Court.

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

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

The Legislature did not provide a definition or meaning for “manifest affirmative consent through electronic means.” To fill this gap, the Judicial Council amended rule 2.251(b) to allow an electronic filer to consent by either filing a form or agreeing to a term with an electronic filing service provider (EFSP) that “clearly states that agreement constitutes consent” to receive electronic service. (Cal. Rules of Court, rule 2.251(b)(1)(B)(i).) The rules allow, but do not require, an EFSP to include such a term.

### **The Proposal**

The proposed rule would require an EFSP that includes a term for the electronic filer’s consent to electronic service to allow an electronic filer to proceed with an electronic filing even if the electronic filer does not agree to that term. For example, if an EFSP had a check box that an electronic filer could click to agree to electronic service, the proposed rule would require the EFSP to allow the electronic filer to proceed with the electronic filing even if the electronic filer did not click on the check box. The proposal may improve access to electronic filing by ensuring that filers are able to file electronically even if they choose not to receive electronic service.

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

### **Alternatives Considered**

The committee considered the alternative of making no change, but found the proposal preferable as it may reduce barriers to electronic filing by ensuring electronic filers are able to opt out of electronic service when electronic service is not otherwise required by the court. In considering the options, the committee agreed with comments from the Superior Court of Orange County and the Joint Rules Subcommittee of the Trial Court Presiding Judges Advisory Committee and Court Executives Advisory Committee that clarification was needed on the ability of electronic filers to opt out.

### **Fiscal and Operational Impacts**

It is not expected that the proposal will have significant impact on the courts different from any impacts that may exist as a result of the statutory requirement for persons to provide express consent to electronic service. It is expected that the proposal will ensure litigants always have the option to electronically file at courts where electronic filing is permitted. EFSPs may be impacted, but they are not required to include a term allowing electronic filers to consent to electronic service through the EFSP.

### **Request for Specific Comments**

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?
- Should electronic filers be able to opt out of electronic service? Why or why not?
- For EFSPs, is the proposal feasible?

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

- Would the proposal provide cost savings? If so, please quantify.
- Would there be implementation requirements for courts? If so, what would they be— for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), or modifying case management systems?

### **Attachments and Links**

1. Cal. Rules of Court, rule 2.255, at page 4
2. Link A: Cal. Rules of Court, rule 2.251,  
[https://www.courts.ca.gov/cms/rules/index.cfm?title=two&linkid=rule2\\_251](https://www.courts.ca.gov/cms/rules/index.cfm?title=two&linkid=rule2_251)
3. Link B: Cal. Rules of Court, rule 2.255,  
[https://www.courts.ca.gov/cms/rules/index.cfm?title=two&linkid=rule2\\_255](https://www.courts.ca.gov/cms/rules/index.cfm?title=two&linkid=rule2_255)

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

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

3  
4 **(a)–(f) \* \* \***

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

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

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