

JUDICIAL COUNCIL OF CALIFORNIA

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INVITATION TO COMMENT

SPR20-03

Title	Action Requested
Appellate Procedure: Consent to Electronic Service	Review and submit comments by June 9, 2020
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Amend Cal. Rules of Court, rule 8.25, 8.72, and 8.78; revise form APP-009-INFO	January 1, 2021
Proposed by	Contact
Appellate Advisory Committee Hon. Louis R. Mauro, Chair	Eric Long, Attorney, 415-865-7691 eric.long@jud.ca.gov

Executive Summary and Origin

The Appellate Advisory Committee proposes amending rules and revising a form to clarify the appellate procedures for electronic service. The proposal would amend rules 8.25, 8.72, and 8.78 of the California Rules of Court and revise form APP-009-INFO. The purpose of the proposed amendments and revisions is to clarify the procedures for electronic service in the Supreme Court and the Courts of Appeal. The proposal originated from the committee's awareness of a change in the law regarding consent to electronic service.

Background

Effective January 1, 2018, the Legislature amended Code of Civil Procedure section 1010.6 to require all persons to provide express consent to electronic service in each specific action in the trial courts. The trial court and appellate court rules had allowed the act of electronically filing alone to evidence consent to receive electronic service, but the 2018 amendments to section 1010.6 eliminated this option for trial courts. As amended, subdivision (a)(2)(A)(ii) states:

For cases filed on or after January 1, 2019, if a document may be served by mail, express mail, overnight delivery, or facsimile transmission, electronic service of the document is not authorized unless a party or other person has expressly consented to receive electronic service in that specific action or the court has ordered electronic service on a represented party or other represented person under subdivision (c) or (d). Express consent to electronic service may be accomplished either by (I) serving a notice on all the parties and filing the notice

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It is circulated for comment purposes only.*

with the court, or (II) 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. The act of electronic filing shall not be construed as express consent.

(Code Civ. Proc., § 1010.6(a)(2)(A)(ii).) Subdivision (e) directs the Judicial Council to “adopt uniform rules for electronic filing and service of documents *in the trial courts of the state*, which shall include statewide policies on vendor contracts, privacy, and access to public records, and rules relating to the integrity of electronic service.” (§ 1010.6(e) (emphasis added).) There are no provisions in section 1010.6 that expressly speak to appellate court proceedings or to the adoption of rules for electronic service in the appellate courts.

Electronic filing and electronic service in the appellate courts and the trial courts are in different stages of implementation. The Judicial Council first adopted rules for e-filing and e-service in the appellate courts in 2010 as a pilot project in the Court of Appeal, Second Appellate District, and then in 2012 for all appellate courts. Last year, the Appellate Advisory Committee proposed instituting mandatory e-filing with statewide formatting requirements (subject to certain exceptions), effective January 1, 2020, which the council approved. Consistent with mandatory e-filing in the appellate courts, the appellate rules treat electronic filing as agreement to receive e-service unless a party opts out of e-service. (Cal. Rules of Court, rule 8.78(a)(2)(B).) E-filing in the trial courts, on the other hand, was authorized in 2012, when the Legislature enacted Assembly Bill 2073 (Stats. 2012, ch. 320). A pilot project on mandatory e-filing in the Superior Court of Orange County from 2013 was a success,¹ and as of 2019, 29 of the 58 trial courts provide e-filing and e-service to the public.² Although the trial courts are making commendable progress in implementing e-filing, it nevertheless remains true that while the appellate courts uniformly rely on e-filing and service, only half of the trial courts have standardized the practice.

The Proposal

It appears that the 2018 amendment to Code of Civil Procedure section 1010.6 only applies to the trial courts, and not to the appellate courts. Because section 1010.6 and its legislative history are silent about e-service in the appellate courts, the procedures in the Supreme Court and the Courts of Appeal do not need to change. The committee therefore proposes amending rules 8.25, 8.72, and 8.78 and revising form APP-009-INFO to reflect that express consent to electronic service is not required from every party in each specific appellate proceeding.

¹ See Judicial Council of Cal., *Report on the Superior Court of Orange County’s Mandatory E-Filing Pilot Project* (Sept. 30, 2014), www.courts.ca.gov/documents/lr-SC-of-Orange-e-file-pilot-proj.pdf.

² See Judicial Council of Cal., *Report to the Legislature: State Trial Court Electronic Filing and Document Service Accessibility Compliance* (Dec. 23, 2019), <https://jcc.legistar.com/View.ashx?M=F&ID=7977274&GUID=AE037AC0-DC91-496B-83D9-CDCDE8D0674A>.

This proposal would clarify that the appellate rules authorize electronic service if a party registers with the court's electronic filing service provider and provides an electronic service address, unless the party opts out.

Proposed rule 8.25 would not change, except to remove references to methods of service permitted by the Code of Civil Procedure. APP-009-INFO form would be revised in the same way. The deletions are intended to eliminate ambiguity about whether section 1010.6 applies more broadly in the appellate courts, and to acknowledge that e-service is a permissible method of service in the appellate courts. New language would be added to the form to note that section 1010.6(a)(2)(A)(ii) addresses electronic service in the trial courts, and rule 8.78 addresses electronic service in the Courts of Appeal.

Proposed rule 8.78(a)(2)(B) would be clarified to reflect existing appellate practice. Although the rule has long provided that the act of electronically filing any document with the court is deemed to show a party's agreement to electronic service, the appellate practice has been to rely on a party's *registration* with the court's electronic filing service provider (EFSP) and concurrent provision of an email address—prerequisites to electronically filing any document with the court—as a basis for showing agreement to electronic service. This proposed change maintains the status quo with respect to electronic filing and electronic service in the Supreme Court and the Courts of Appeal and more accurately reflects how parties authorize electronic service in these courts.

Proposed rule 8.78(g) would exempt courts from the electronic service rules applicable to parties, reflecting that courts send notifications and transmit documents rather than serving documents on parties. No changes are proposed with respect to electronic service on courts.

New advisory committee comments to rules 8.25 and 8.78 acknowledge the difference in procedures for electronic service in the trial courts and the appellate courts by noting that the type of consent required in the trial courts by section 1010.6 is not required of parties in the Supreme Court and the Courts of Appeal.

Proposed rule 8.72, which presently requires electronic filers to furnish an email address at which they agree to accept service, would be amended to acknowledge that furnishing an email address does not necessarily mean a party has authorized e-service because a party may opt out of e-service under rule 8.78(a)(2)(B).

Alternatives Considered

The committee considered proposing rules that would implement section 1010.6's express consent requirements in the appellate courts. The committee concluded that such a significant change in procedure was not supported for at least three reasons. First, there could be significant costs associated with directing the court's EFSPs to develop an opt-in option at case initiation. Second, case filings might be delayed due to unexpected service requirements where the parties have been relying on e-service in the appellate courts for several years. Third, the Legislature did not address the appellate courts when it amended section 1010.6. The committee was not

independently aware of any compelling reasons to adopt the trial court’s practices at this time, so the committee proposes clarifying and maintaining existing appellate procedures for electronic service.

The committee also considered leaving the appellate rules and form unchanged at this time. Considering the trial court’s e-service procedures, however, the committee was concerned that preexisting references to the Code of Civil Procedure in the appellate rules and form could cause confusion for practitioners and litigants. The committee also recognized that the appellate rules did not fully reflect current practice and wanted the rules to be clearer about when electronic service is permissible in the Supreme Court and the Courts of Appeal.

Fiscal and Operational Impacts

Implementation of this proposal should not have significant fiscal or operational impacts. This proposal is intended to create efficiencies and to assist parties and courts in understanding the existing appellate procedures. Unlike the alternative considered, which could burden the courts and litigants with additional service and filing requirements, no costs of implementation are anticipated other than informing courts and litigants of the new rule amendments and form revisions.

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?

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.
- 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?
- Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Cal. Rules of Court, rules 8.25, 8.77, and 8.78, at pages 6–8
2. Form APP-009-INFO, at pages 9–11

3. Link A: Code Civ. Proc., § 1010.6,

https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=1010.6.&lawCode=CCP

Rules 8.25, 8.72, and 8.78 of the California Rules of Court would be amended, effective January 1, 2021, to read:

1 **Rule 8.25. Service, filing, and filing fees**

2
3 **(a) Service**

4
5 (1) Before filing any document, a party must serve, ~~by any method permitted by~~
6 ~~the Code of Civil Procedure,~~ one copy of the document on the attorney for
7 each party separately represented, on each unrepresented party, and on any
8 other person or entity when required by statute or rule.

9
10 (2) The party must attach to the document presented for filing a proof of service
11 showing service on each person or entity required to be served under (1). The
12 proof must name each party represented by each attorney served.

13
14 **(b)–(c) * * ***

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16 **Advisory Committee Comment**

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18 **Subdivision (a).** ~~Subdivision (a)(1) requires service “by any method permitted by the Code of~~
19 ~~Civil Procedure.” The reference is to the several permissible methods of service provided in Code~~
20 ~~of Civil Procedure sections 1010.6– 1020 1013a describe generally permissible methods of~~
21 service. Information Sheet for Proof of Service (Court of Appeal) (form APP-009-INFO) provides
22 additional information about how to serve documents and how to provide proof of service. Note
23 that in the Supreme Court and the Courts of Appeal, registration with the court’s electronic filing
24 servicer provider is deemed to show agreement to accept service electronically at the email
25 address provided, unless a party affirmatively opts out of electronic service under rule
26 8.78(a)(2)(B). This procedure differs from the procedure for electronic service in the trial courts
27 (including the appellate division of the superior court). See rules 2.250–2.261.

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29 * * *

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31 **Rule 8.72. Responsibilities of court and electronic filer**

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33 **(a) * * ***

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35 **(b) Responsibilities of electronic filer**

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37 Each electronic filer must:

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39 (1) Take all reasonable steps to ensure that the filing does not contain computer
40 code, including viruses, that might be harmful to the court’s electronic filing
41 system and to other users of that system;

- 1 (2) Furnish one or more electronic service addresses, in the manner specified by
2 the court, at which the electronic filer agrees to accept ~~service~~ receipt and
3 filing confirmations under rule 8.77 and, if applicable, at which the electronic
4 filer agrees to receive electronic service; and
5
6 (3) Immediately provide the court and all parties with any change to the
7 electronic filer’s electronic service address.
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9 **Rule 8.78. Electronic service**

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11 **(a) Authorization for electronic service; exceptions**

- 12
13 (1) A document may be electronically served under these rules:
14
15 (A) If electronic service is provided for by law or court order; or
16
17 (B) If the recipient agrees to accept electronic services as provided by these
18 rules and the document is otherwise authorized to be served by mail,
19 express mail, overnight delivery, or fax transmission.
20
21 (2) A party indicates that the party agrees to accept electronic service by:
22
23 (A) Serving a notice on all parties that the party accepts electronic service
24 and filing the notice with the court. The notice must include the
25 electronic service address at which the party agrees to accept service; or
26
27 (B) ~~Electronically filing any document with the court~~ Registering with the
28 court’s electronic filing service provider and providing the party’s
29 electronic service address. The act of electronic filing shall be
30 Registration with the court’s electronic filing service provider is
31 deemed to show that the party agrees to accept service at the electronic
32 service address that the party has ~~furnished to the court under rule~~
33 ~~8.72(b)(2)~~ provided, unless the party serves a notice on all parties and
34 files the notice with the court that the party does not accept electronic
35 service and chooses instead to be served paper copies at an address
36 specified in the notice.
37
38 (3) A document may be electronically served on a nonparty if the nonparty
39 consents to electronic service or electronic service is otherwise provided for
40 by law or court order. All provisions of this rule that apply or relate to a party
41 also apply to any nonparty who has agreed to or is otherwise required by law
42 or court order to accept electronic service or to electronically serve
43 documents.

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(b)–(f) * * *

(g) Electronic service delivery by court and electronic service on court

(1) The court may ~~electronically serve~~ deliver any notice, order, opinion, or other document issued by the court ~~in the same manner that parties may serve documents~~ by electronic service means.

(2) * * *

Advisory Committee Comment

In the Supreme Court and the Courts of Appeal, registration with the court’s electronic filing service provider is deemed to show agreement to accept service electronically at the email address provided, unless a party affirmatively opts out of electronic service under rule 8.78(a)(2)(B). This procedure differs from the procedure for electronic service in the trial courts (including the appellate division of the superior court). See rules 2.250–2.261.

INFORMATION SHEET FOR PROOF OF SERVICE (COURT OF APPEAL)

GENERAL INFORMATION ABOUT SERVICE AND PROOF OF SERVICE

This information sheet provides instructions for completing *Proof of Service (Court of Appeal)* (form APP-009) or *Proof of Electronic Service (Court of Appeal)* (form APP-009E). This information sheet is not part of the proof of service and does not need to be copied, served, or filed.

Rule 8.25 of the California Rules of Court provides that before filing any document in court in a case in the Court of Appeal, a party must serve, one copy of the document on the attorney for each party separately represented, on each unrepresented party, and on any other person or entity when required by statute or rule. Other rules specifically require that certain documents be served, including the notice of appeal and notice designating the record on appeal in civil appeals and briefs in both civil and criminal appeals.

To “serve” a document on a person means to have that document delivered to the person. The general requirements concerning service are set out in Code of Civil Procedure sections 1010.6–1013a. Section 1010.6(a)(2)(ii) addresses electronic service in the trial courts. Rule 8.78 of the California Rules of Court addresses electronic service in the Courts of Appeal. There are three main ways to serve documents: (1) by mail, (2) by personal delivery, or (3) by electronic service. Regardless of what method of service is used, the Code of Civil Procedure provides that a document in a court case can only be served by a person who is over 18 years of age. Service by mail or personal delivery must be by someone who is not a party in the case; electronic service may be performed directly by a party. Electronic service may be by (1) electronic transmission, transmitting a document to the electronic service address of a person; or by (2) electronic notification, sending a message to the electronic service address specifying the exact name of the document served and providing a hyperlink at which the served document may be viewed and downloaded.

If you are a party to the case and wish to serve documents by mail or personal delivery, you must therefore have someone else who is over 18 and who is not a party to the case serve any documents in your case. You will need to give the person doing the serving (the server) the names and addresses of all those who must be served. You will also need to give the server one copy of each document that needs to be served for each person or entity that is being served.

If you are serving documents electronically, you can do this yourself or have another person over 18 do it for you. The person doing the serving (the server) will need the names and electronic service addresses of all those who must be served, and the document to be served in a form that allows it to be electronically transmitted or made available by hyperlink.

Rule 8.25 also requires the party filing a document in the court to attach to the document presented for filing a proof of service showing the required service. *Proof of Service (Court of Appeal)* (form APP-009) or *Proof of Electronic Service (Court of Appeal)* (form APP-009E) may be used to provide this required proof of service in any proceeding in the Court of Appeal. The server should follow the instructions below for completing the *Proof of Service (Court of Appeal)* (form APP-009) or *Proof of Electronic Service (Court of Appeal)* (form APP-009E). If another person is serving the documents for you—as is required if the document will be served by mail or personal delivery—tell the server to give you the original form when it is completed. You will need to attach this original proof of service to the document you are filing.

INSTRUCTIONS FOR THE SERVER (THE PERSON WHO IS SERVING THE DOCUMENTS) IF SERVING BY MAIL OR PERSONAL DELIVERY

If you are serving a document for a party in a court case, it is your responsibility to prepare the proof of service. You can use *Proof of Service (Court of Appeal)* (form APP-009) to prepare this proof of service in any case in the Court of Appeal. The proof of service should be printed or typed. If you have internet access, a fillable version of form APP-009 is available at www.courts.ca.gov/forms. You can fill out most of the form before you serve the document, but you should sign and date the form only after you have finished serving the document.

Complete the top section of *Proof of Service (Court of Appeal)* (form APP-009) as follows:

1. *First box, left side*: Check whether the document is being served by mail or by personal delivery.
2. *Third box, left side*: Print the name of the case in which the document is being filed, the Court of Appeal case number, and the superior court case number. Use the same case name and numbers as are on the top of the document that you are serving.
3. *Box, top of form, right side*: Leave this box blank for the court's use.

Complete items 1–3 as follows:

1. You are stating that you are over the age of 18 and that you are not a party to this action.
2. Check one of the boxes and provide your home or business address.

3. Fill in the name of the document that you are serving.
- a. If you are serving the document by mail, check the box in item 3a and BEFORE YOU SEAL AND MAIL THE ENVELOPE, fill in the following information:
- (1) Check the box in item 3a(1)(a) if you will personally deposit the document with the U.S. Postal Service such as at a U.S. Postal Service Office or U.S. Postal Service mailbox. Check the box in item 3a(1)(b) if you will put the document in the mail at your place of business.
 - (2) Provide the date the documents are being mailed.
 - (3) Provide the name and address of each person to whom you are mailing the document. If you need more space to list additional names and addresses, check the box after item (3)(c) and attach a page listing them. At the top of the page, write "APP-009, Item 3a."
 - (4) You are stating that you live or work in the county in which the document is being mailed. Provide the city and state from which the document is being mailed.

Once you have finished filling out these parts of the form, make one copy of *Proof of Service (Court of Appeal)* (form APP-009) with this information filled in for each person you are serving by mail and put this copy in the envelope with the document you are serving. Seal the envelope and mail the document as you have indicated on the proof of service.

- b. If you personally delivered the document, check the box in item 3b. For a party represented by an attorney, delivery needs to be made by giving the document directly to the party's attorney or by leaving the document in an envelope or package clearly labeled to identify the attorney being served with a receptionist at the attorney's office or an individual in charge of the office. For a party who is not represented by an attorney, delivery needs to be made by giving the document directly to the party or by leaving the document at the party's residence with some person not less than 18 years of age between the hours of eight in the morning and six in the evening. Under item 3b, for each person to whom you delivered the document, you need to provide:
- (1) The name of the person;
 - (2) The address at which you delivered the document;
 - (3) The date on which you delivered the document; and
 - (4) The time at which you delivered the document.

If you need more space to list additional names, addresses, and delivery dates and times, check the box under item 3b and attach a page listing this information. At the top of the page, write "APP-009, Item 3b."

At the bottom of the form, print your name, sign the form, and fill in the date on which you signed the form. **By signing, you are stating under penalty of perjury that all the information you have provided on *Proof of Service (Court of Appeal)* is true and correct.**

Give the original completed *Proof of Service* to the party for whom you served the document.

INSTRUCTIONS FOR THE SERVER (THE PERSON WHO IS SERVING THE DOCUMENTS) IF SERVING ELECTRONICALLY

If you are serving a document for a party in a court case, it is your responsibility to prepare the proof of service. If you are serving a document electronically, you can use *Proof of Electronic Service (Court of Appeal)* (form APP-009E) to prepare this proof of service in any case in the Court of Appeal. The proof of service should be printed or typed. A fillable version of form APP-009E is available at www.courts.ca.gov/forms. You can fill out most of the form before you serve the document, but you should sign and date the form only after you have finished serving the document.

Complete the top section of *Proof of Electronic Service (Court of Appeal)* (form APP-009E) as follows:

1. *Third box, left side:* Print the name of the case in which the document is being filed, the Court of Appeal case number, and the superior court case number. Use the same case name and numbers as are on the top of the document that you are serving.
2. *Box, top of form, right side:* Leave this box blank for the court's use.

Complete items 1–4 as follows:

1. You are stating that you are over the age of 18.
2. a. Check one of the boxes and provide your home or business address.
- b. Provide your electronic service address. This is the address at which you have agreed to accept electronic service.

Continued on the reverse

3. Fill in the names of the documents that you are serving.
4. Fill in the information for the person to whom you are sending the document. If you are serving more than one person, check the box after item 4c and attach a page listing the persons served, with the electronic service address and date and time of service for each person served. At the top of the page, write "APP-009E, Item 4."
 - a. Provide the name of the person being served. If the person being served is an attorney, also fill in the name or names of the parties represented.
 - b. Provide the electronic service address of the person to whom you are sending the document.
 - c. Provide the date on which you transmitted the document.

After you have filled in the information in items 1–4, create an electronic copy of the *Proof of Electronic Service (Court of Appeal)* (form APP-009E). Transmit the filled-in form with the document you are serving to each person served.

At the bottom of the form, print your name, sign the form, and fill in the date on which you signed the form. **By signing, you are stating under penalty of perjury that all the information you have provided on *Proof of Electronic Service (Court of Appeal)* is true and correct.**

If you are not the party for whom the documents are served, give the original completed Proof of Service to the party for whom you served the document.