

## **RESOLUTION 09-02-03**

### **DIGEST**

#### Service: By Facsimile

Amends Rules of Court, rule 2008, to remove most procedures regarding service by facsimile.

### **RESOLUTIONS COMMITTEE RECOMMENDATION**

#### **DISAPPROVE**

#### History:

Related to resolution 09-03-03.

#### Reasons:

This resolution amends Rules of Court, rule 2008, to remove most procedures regarding service by facsimile. This resolution should be disapproved because it is unnecessary.

This resolution, along with the companion resolution 9-03-03, modifies facsimile procedures by eliminating the current requirements that facsimile service extend the service by two days and that a notation as to the exact time of the facsimile be on the facsimile at the time of its delivery. This resolution also modifies the timing of the service by facsimile, eliminating the requirement that the service be completed by 5 p.m. and eliminating the statement that service is not deemed complete until the entire document is received.

Under this resolution, a fax commenced before 5 p.m. but completed before 11:59 p.m. will be deemed completed on the day of transmission for purposes of calculating notice. The proponent provides no support for the contention that the current procedures, including the requirement that facsimile be completed by 5 p.m., are cumbersome. Moreover, this resolution creates potential for significant game playing by litigants. For example, there would be nothing to prevent a party from waiting until 4:59 p.m. of the last day to fax an opposition to the moving party.

This section and other similar sections provide for the delivery of documents at prescribed periods. If service is done personally, then service is completed when served; if service of a document is done by mailing, then five days needs to be added. These prescribed procedures allow an attorney to calendar and schedule when documents are to be filed or acts have to be performed. They also provide the receiving party reasonable expectations of when the documents are to be received. These procedures are well established and relied upon by the legal community.

The proponent seeks to modify the requirements of service by facsimile. The modification would effectively shorten the time the receiving party would have to respond to moving and opposing papers. This would place an onerous burden on recipients, especially sole practitioners and pro per litigants.

### **SECTION/COMMITTEE REPORT**

#### **FAMILY LAW SECTION**

Recommendation: DISAPPROVE

#### Reason:

These resolutions are incomplete and are unnecessary. It would unduly complicate issues of proper service and lead to confusion.

### TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that the Judicial Council amend California Rules of Court, rule 2008, to read as follows:

1 Rule 2008

2 (a) A court may serve any notice by fax in the same manner that litigants may serve papers  
3 by fax.

4 ~~(b) Service by facsimile transfer shall be permitted only if the parties agree and a written~~  
5 ~~confirmation of that agreement is made. The notice or other paper must be transmitted to a facsimile~~  
6 ~~machine maintained by the person on whom it is served at the facsimile machine telephone number~~  
7 ~~as last given by that person on any document which he or she has filed in the cause and served on the~~  
8 ~~party making service. The service is complete at the time of transmission, but any prescribed period~~  
9 ~~of notice and any right or duty to do any act or make any response within any prescribed period or~~  
10 ~~on a date certain after the service of such document served by facsimile transmission shall be~~  
11 ~~extended by two court days, but such extension shall not apply to extend the time for filing notice of~~  
12 ~~intention to move for new trial.~~

13 ~~(b)(e)~~ A party or attorney agreeing to accept service by fax shall make his or her fax machine  
14 generally available for receipt of documents between the hours of 9 a.m. and 5 p.m. on days that are  
15 not court holidays under Code of Civil Procedure section 136. This provision does not prevent the  
16 attorney from sending documents by means of the fax machine or providing for normal repair and  
17 maintenance of the fax machine during these hours.

18 ~~(d) Except as provided in subdivision (e), service by fax is complete upon receipt of the~~  
19 ~~entire document by the receiving party's facsimile machine. Service that occurs after 5 p.m. shall be~~  
20 ~~deemed to have occurred on the next court day. Time shall be extended as provided by this rule.~~

21 ~~(e) Proof of service by fax may be made by any of the methods provided in Code of Civil~~  
22 ~~Procedure section 1013a, except that:~~

23 ~~(1) The time, date, and sending facsimile machine telephone number shall be used in lieu of~~  
24 ~~the date and place of deposit in the mail;~~

25 ~~(2) The name and facsimile machine telephone number of the person served shall be used in~~  
26 ~~lieu of the name and address of the person served as shown on the envelope;~~

27 ~~(3) A statement that the document was transmitted by facsimile transmission and that the~~  
28 ~~transmission was reported as complete and without error shall be used in lieu of the statement that~~  
29 ~~the envelope was sealed and deposited in the mail with the postage thereon fully prepaid;~~

30 ~~(4) A copy of the transmission report shall be attached to the proof of service and the proof~~  
31 ~~of service shall declare that the transmission report was properly issued by the transmitting facsimile~~  
32 ~~machine; and~~

33 ~~(5) Service of papers by fax is ineffective if the transmission does not fully conform to these~~  
34 ~~provisions.~~

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: The Lawyer's Club of San Francisco

STATEMENT OF REASONS

Existing Law: Requires that the time appear on the facsimile proof of service and that the entire document be received prior to 5:00 p.m. in order to be deemed served on that business day.

This Resolution: Conforms California Rules of Court, rule 2008, with the companion resolution, amending Code of Civil Procedure section 1013, subdivisions (e) and (f), such that the facsimile transmission must begin prior to 5:00 p.m. This resolution incorporates the transmission report by reference so that the sender is not required to type the time of the transmission on the proof itself.

The Problem: The current procedure is cumbersome because it creates additional steps. First the proof is prepared generally, then the facsimile is sent, then the proof has to be updated with the exact time of the transmission, and then the transmission report is attached. Now, the time of transmission will not appear on the proof itself, it will merely require transmission that the report be incorporated by reference.

#### IMPACT STATEMENT

This resolution affects Code of Civil Procedure section 1013, subdivisions (e) and (f). See companion resolution. This resolution does not affect any other law, statute or rule.

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**RESPONSIBLE FLOOR DELEGATE:** Patrick M. Ryan

#### COUNTERARGUMENT

##### **SAN DIEGO COUNTY BAR ASSOCIATION**

This resolution is a companion to 9-03-03 and embodies the same flaws.

Current law requires fax service to be complete by 5:00 p.m. on the day of deadline. This resolution requires fax service to commence by 5:00 p.m. that day. Aside from reducing the time the served party has to respond, often in practical terms by a business day, this requirement imposes an unreasonable burden on the receiving party. First, it is inconsistent with the requirement to maintain the receiving fax machine in operable condition only until 5:00 p.m. Second, because of fax machine reliability issues, it requires sole practitioners and small firms to extend staff hours either consistently or at random when an opposing party chooses to serve an end-of-day fax.

For the technologically advanced office, electronic service is rapidly replacing fax service, which is among the most expensive and least reliable ways to serve papers. It is a waste to fine-tune fax service rules when we should be encouraging the use of electronic service and overnight commercial courier. In a polite nod to electronic media, the proponent provides that consent to fax service may be made by electronic mail! Why not just consent to service of documents as e-mail attachments? That consent could be given by fax.