

Amendment to 09-03-03

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 1013 to read as follows:

1 §1013

2
3 [Subdivisions (a) through (d) remain unchanged.]

4
5 (e) Service by facsimile transmission shall be permitted only where the parties agree and a
6 written confirmation of that agreement is made. Such confirmation may be made by, including but
7 not limited to, U.S. Mail, overnight mail, facsimile, or electronic mail. The Judicial Council may
8 adopt rules implementing the service of documents by facsimile transmission and may provide a
9 form for the confirmation of the agreement required by this subdivision. In case of service by
10 facsimile transmission, the notice or other paper must be transmitted to a facsimile machine
11 maintained by the person on whom it is served at the facsimile machine telephone number as last
12 given by that person on any document which he or she has filed in the cause and served on the party
13 making the service unless the recipient expressly requests that a different facsimile number be used.
14 The service is complete at the time and day of transmission, so long as the entire transmission is
15 complete and without interruption or error prior to 5:00 p.m. of that same day, except that if service
16 commences after 5:00 p.m., service shall not be considered complete until the following business
17 day, but and any period of notice and any right or duty to do any act or make any response within
18 any period or on a date certain after the service of the document, which time period or date is
19 prescribed by statute or rule of court, shall be extended, after service by facsimile transmission, by
20 two court days, but the extension shall not apply to extend the time for filing notice of intention to
21 move for new trial, notice of intention to move to vacate judgment pursuant to Section 663a, or
22 notice of appeal. This extension applies in the absence of a specific exception provided for by this
23 section or other statute or rule of court.

24 (f) ~~The copy of the notice or other paper served by facsimile transmission pursuant to this~~
25 ~~chapter shall bear a notation of the date and place of transmission and the facsimile telephone~~
26 ~~number to which transmitted or be accompanied by an unsigned copy of the affidavit or certificate~~
27 ~~of transmission which shall contain the facsimile telephone number to which the notice or other~~
28 ~~paper was transmitted.~~ A proof of service by facsimile shall contain language substantially similar
29 to the following:

30 I am readily familiar with the practices of [Business Name] for sending documents via
31 facsimile. In the ordinary course of the [Business Name] practice, on the above stated date, the
32 transmission of the above listed document(s) was completed prior to 5:00 p.m. via facsimile and said
33 transmission was reported complete and without error on the above stated date. A copy of the
34 transmission report showing the date and time of transmission that was properly issued by the
35 transmitting facsimile machine is attached hereto, and incorporated herein by reference.

36 or

37 On the above stated date, I began the transmission of the above listed document(s) prior to
38 5:00 p.m. via facsimile and said transmission was reported complete and without error prior to 5:00
39 p.m. on the above stated date. A copy of the transmission report showing the date and time of
40 transmission that was properly issued by the transmitting facsimile machine is attached hereto, and
41 incorporated herein by reference.

42
43 (g) Subdivisions (b), (d), and (f) are directory.

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

RESOLUTION 9-03-03

DIGEST

Service: By Facsimile

Amends Code of Civil Procedure section 1013 to modify the timing and proof of service requirements for service by facsimile.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

Related to resolution 9-02-03.

Reasons:

This resolution amends Code of Civil Procedure section 1013 to modify the timing and proof of service requirements for service by facsimile. This resolution should be disapproved because it is unnecessary and could lead to “game-playing.”

This resolution, along with the companion resolution 9-02-03, modifies service procedures by eliminating the current requirement that facsimile service be completed by 5 p.m. on the date of transmission and by eliminating the requirement that a notation as to the exact time of the facsimile be on the facsimile at time of delivery. Thus, a fax commenced before 5 p.m. but completed before 11:59 p.m., would be deemed completed on the day of transmission for purposes of calculating notice.

The proponent seeks to modify the requirements of service by facsimile. The modification would likely shorten the time the receiving party would have to proceed with additional filings, such as a reply brief to an opposition. This would place an onerous burden on recipients, especially sole practitioners and pro per litigants, who are unlikely to have the staff or resources to respond to documents which are effectively served after the close of business or who would have to extend staff hours to receive and then respond to the after-hours opposition.

Game playing would be one result of the modifications being requested. There is nothing to prevent a party from waiting until 4:59 p.m. of the last day to fax the opposition to the other party. Even though this will reduce the responding party’s time to draft a reply by at least one day, he or she must still file the reply on time.

While it may be argued that it cannot be determined how long it will take for a facsimile transmission to be completed, such an argument would not be well founded. A party knows that a facsimile of many pages will take longer to transmit than a facsimile of two to three pages. Although facsimile machines may have different transmission speeds (three pages per minute versus ten pages per minute), the technical manual that comes with the machine will provide the transmission speed. The solution to the uncertainty is to send documents earlier in the day and not wait until the last minute. Whether service is to be done personally, by mail or facsimile, it is not difficult to plan accordingly with the statute as it presently exists.

This resolution also conflicts with California Rules of Court, rule 2008, whereby facsimile machines need only be available until 5:00 p.m.

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 legislation be sponsored to amend Code of Civil Procedure section 1013 to read as follows:

1 §1013
2
3 [Subdivisions (a) through (d) remain unchanged.]
4
5 (e) Service by facsimile transmission shall be permitted only where the parties agree and a
6 written confirmation of that agreement is made and such confirmation may be made by electronic
7 mail. The Judicial Council may adopt rules implementing the service of documents by facsimile
8 transmission and may provide a form for the confirmation of the agreement required by this
9 subdivision. In case of service by facsimile transmission, the notice or other paper must be
10 transmitted to a facsimile machine maintained by the person on whom it is served at the facsimile
11 machine telephone number as last given by that person on any document which he or she has filed in
12 the cause and served on the party making the service unless the recipient expressly requests that a
13 different facsimile number be used. The service is complete at the time and day of transmission, so
14 long as the entire transmission is complete and without interruption or error prior to 11:59 p.m. of
15 that same day, except that if service commences after 5:00 p.m., service shall not be considered
16 complete until the following business day, but and any period of notice and any right or duty to do
17 any act or make any response within any period or on a date certain after the service of the
18 document, which time period or date is prescribed by statute or rule of court, shall be extended, after
19 service by facsimile transmission, by two court days, but the extension shall not apply to extend the
20 time for filing notice of intention to move for new trial, notice of intention to move to vacate
21 judgment pursuant to Section 663a, or notice of appeal. This extension applies in the absence of a
22 specific exception provided for by this section or other statute or rule of court.
23 ~~(f) The copy of the notice or other paper served by facsimile transmission pursuant to this~~
24 ~~chapter shall bear a notation of the date and place of transmission and the facsimile telephone~~
25 ~~number to which transmitted or be accompanied by an unsigned copy of the affidavit or certificate of~~
26 ~~transmission which shall contain the facsimile telephone number to which the notice or other paper~~
27 ~~was transmitted. – A proof of service by facsimile shall contain language substantially similar to the~~
28 ~~following:~~
29 I am readily familiar with the practices of [Business Name] for sending documents via
30 facsimile. In the ordinary course of the [Business Name] practice, on the above stated date, the
31 transmission of the above listed document(s) began prior to 5:00 p.m. via facsimile and said
32 transmission was reported complete and without error on the above stated date. A copy of the
33 transmission report showing the date and time of transmission that was properly issued by the
34 transmitting facsimile machine is attached hereto, and incorporated herein by reference.
35 or
36 On the above stated date, I began the transmission of the above listed document(s) prior to
37 5:00 p.m. via facsimile and said transmission was reported complete and without error on the above
38 stated date. A copy of the transmission report showing the date and time of transmission that was
39 properly issued by the transmitting facsimile machine is attached hereto, and incorporated herein by

40 reference.

41

42 (g) Subdivisions (b), (d), and (f) are directory.

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

PROPONENT: The Lawyers' 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. (Code of Civil Procedure section 1013; Rules of Court, rule 2008.)

This Resolution: Provides that the 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 California Rules of Court, rule 2008, rendering portions of it unnecessary. A companion resolution is proposed. This resolution affects no other law, statute or rule.

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RESPONSIBLE FLOOR DELEGATE: Patrick M. Ryan

SAN DIEGO COUNTY BAR ASSOCIATION

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.

