

RESOLUTION 09-04-2008

DIGEST

Civil Procedure: Service of Opposition and Reply Papers in Law and Motion

Amends Code of Civil Procedure section 1005 to exclude regular mail as a means of serving opposition and reply papers, and allows facsimile service without prior agreement of the parties.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

Similar to Resolution 10-11-02, which was withdrawn.

Reasons:

This resolution amends Code of Civil Procedure section 1005 to exclude regular mail as a means of serving opposition and reply papers, and allows facsimile service without prior agreement of the parties. This resolution should be disapproved because it would eliminate safeguards necessary to assure proper service.

As currently written, Code of Civil Procedure section 1005 requires that service of papers opposing motions and all reply papers be made by a method reasonably calculated to ensure delivery no later than the close of the next business day after these documents are filed. The practical result is that the documents must be hand-delivered, faxed, or sent via a one-day delivery service to comply with the statute.

This resolution would provide for fax service without any of the safeguards provided in Code of Civil Procedure section 1013 and Rules of Court, Rule 2.306. The prior agreement of and designation of proper fax number by the recipient, and knowledge on the part of the recipient that service will be made by fax, are absolutely necessary in order to assure actual receipt of all pages of the documents thus served; and permits the parties to limit, by agreement, the total number of pages, including exhibits, which they are willing or reasonably able to accept by that method of service.

Electronic filing of pleadings is being implemented in court after court throughout the state, and electronic service will soon become the preferred, if not required, method of service of all motion papers. Fax service is on the way out. In the meantime, such service requires the safeguards provided by existing law.

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 1005 to read as follows:

- 1 §1005
- 2 (a) Written notice shall be given, as prescribed in subdivisions (b) and (c), for the
- 3 following motions:

- 4 (1) Notice of Application and Hearing for Writ of Attachment under Section
5 484.040.
- 6 (2) Notice of Application and Hearing for Claim and Delivery under Section
7 512.030.
- 8 (3) Notice of Hearing for Claim of Exemption under Section 706.105.
- 9 (4) Motion to Quash Summons pursuant to subdivision (b) of Section 418.10.
- 10 (5) Motion for Determination of Good Faith Settlement pursuant to Section 877.6.
- 11 (6) Hearing for Discovery of Peace Officer Personnel Records pursuant to Section
12 1043 of the Evidence Code.
- 13 (7) Notice of Hearing of Third-Party Claim pursuant to Section 720.320.
- 14 (8) Motion for an Order to Attend Deposition more than 150 miles from deponent's
15 residence pursuant to Section 2025.260.
- 16 (9) Notice of Hearing of Application for Relief pursuant to Section 946.6 of the
17 Government Code.
- 18 (10) Motion to Set Aside Default or Default Judgment and for Leave to Defend
19 Actions pursuant to Section 473.5.
- 20 (11) Motion to Expunge Notice of Pendency of Action pursuant to Section 405.30.
- 21 (12) Motion to Set Aside Default and for Leave to Amend pursuant to Section
22 585.5.
- 23 (13) Any other proceeding under this code in which notice is required and no other
24 time or method is prescribed by law or by court or judge.
- 25 (b) Unless otherwise ordered or specifically provided by law, all moving and
26 supporting papers shall be served and filed at least 16 court days before the hearing. The
27 moving and supporting papers served shall be a copy of the papers filed or to be filed with
28 the court. However, if the notice is served by mail, the required 16-day period of notice
29 before the hearing shall be increased by five calendar days if the place of mailing and the
30 place of address are within the State of California, 10 calendar days if either the place of
31 mailing or the place of address is outside the State of California but within the United
32 States, and 20 calendar days if either the place of mailing or the place of address is outside
33 the United States, and if the notice is served by facsimile transmission, express mail, or
34 another method of delivery providing for overnight delivery, the required 16-day period of
35 notice before the hearing shall be increased by two calendar days. Section 1013, which
36 extends the time within which a right may be exercised or an act may be done, does not
37 apply to a notice of motion, papers opposing a motion, or reply papers governed by this
38 section. All papers opposing a motion so noticed shall be filed with the court and a copy
39 served on each party at least nine court days, and all reply papers at least five court days
40 before the hearing. The court, or a judge thereof, may prescribe a shorter time. (c)
- 41 (c) Notwithstanding any other provision of this section, all papers opposing a
42 motion and all reply papers shall be served by personal delivery, facsimile transmission,
43 express mail, or other means consistent with Sections 1010, 1011, 1012, and 1013, and
44 reasonably calculated to ensure delivery to the other party not later than the close of the
45 next business day after the time the opposing papers or reply papers, as applicable, are
46 filed. This subdivision applies to the service of opposition and reply papers regarding
47 motions for summary judgment or summary adjudication, in addition to the motions listed
48 in subdivision (a). The court, or a judge thereof, may prescribe a shorter time. Service by
49 regular mail is not a permissible method of serving opposing papers or reply papers.

50 Notwithstanding Code of Civil Procedure section 1013 (d), California Rule of Court 2.306,
51 or any other rule of court or provision of this Code, facsimile transmission of opposing
52 papers and reply papers is expressly permitted by this section even in the absence of an
53 agreement by the parties.

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

PROPONENT: CONTRA COSTA COUNTY BAR ASSOCIATION

STATEMENT OF REASONS

Existing law: States that opposing papers and reply papers on a motion must be served by a method “reasonably calculated to ensure delivery to the other . . . parties not later than the close of the next business day . . .”

This Resolution: Would make it clear that, as a matter of law, service by regular mail is never considered “reasonably calculated to ensure delivery to the other . . . parties not later than the close of the next business day . . .” It would also make it clear that facsimile transmission of opposing and reply papers is permitted notwithstanding any other provision of the Code of Civil Procedure.

The Problem: Under current law most practitioners take the view that opposing and reply papers must be served in a manner such as facsimile transmission or overnight delivery that ensures delivery by the close of the next business day. Recently, however, a leading commentator has suggested that the language “or other means . . . reasonably calculated to ensure delivery to the other . . . parties not later than the close of the next business day . . .” may permit the possibility of service by regular mail if the mail is addressed locally. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2007) ¶ 9:105.2, p. 9 et seq.) Accordingly, some practitioners have begun serving opposing and reply papers by regular mail. Whenever such service does not result in delivery by the close of the next business day, the opposing party is unfairly disadvantaged by having his or her time for briefing unduly shortened.

Further, Code of Civil Procedure section 1013, subdivision (d) and California Rule of Court, rule 2.306 state that service by facsimile is permitted only where the parties enter into an express agreement so stating. The proposed amendment would make it clear that, as to opposing and reply papers on a motion at least, service by facsimile transmission is expressly permitted even in the absence of such an agreement.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule except to the extent stated above.

AUTHOR AND/OR PERMANENT CONTACT: Jay Chafetz, 2033 N. Main St., Suite 750, Walnut Creek, CA, 94596, Phone: (925) 933-5890, Fax: (925) 933-5620; Jchaf@aol.com

COUNTERARGUMENTS

BAR ASSOCIATION OF NORTHERN SAN DIEGO COUNTY

We support any indication that regular mail is not a proper medium for the service of opposition and reply paperwork if it does not comply with the time extensions found in Code of Civil Procedure section 1013. However, any effort to force a party to receive service by facsimile (or, for that matter, email) should be discouraged, in the absence of a stipulation.

SAN DIEGO COUNTY BAR ASSOCIATION

The proponent has identified a genuine problem, but forcing lawyers and pro pers to accept fax service is unacceptable as a solution. Some lawyers do not have fax machines; there is no rule of court or professional conduct requiring a lawyer to be accessible for service by fax. Many pro pers do not have fax machines. An opposition to a major motion may have hundreds of pages of exhibits that would tie up a lawyer's fax machines for hours. This could disable a small law office, since fax machines often double as printers.

The correct solution is to exclude U.S. first class and priority mail from permissible methods of service and allow the responding or replying party to use any other method reasonably calculated to assure timely arrival of the papers. Permissible methods include messenger, overnight delivery providers (e.g., Federal Express), U.S. Express Mail, and a variety of electronic technologies if agreed by the parties to a case.