

RESOLUTION 09-05-2008

DIGEST

Service of Documents: Sufficiency of Electronic Service

Amends Code of Civil Procedure section 1010.6 to permit all documents except a summons or subpoena to be served electronically, without prior agreement.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

No similar resolutions found.

Reasons:

This resolution amends Code of Civil Procedure section 1010.6 to permit all documents except a summons or subpoena to be served electronically, without prior agreement. This resolution should be disapproved because it contains no safeguards to ensure that the electronically served documents are actually received by the intended recipient.

The “computer age” brings about an opportunity to have service of documents completed electronically, rather than with paper copies. This innovation promises to save paper, trees and much cost to parties. Concerns exist, however, for the problems which arise in the use of electronic service, and these concerns are not addressed in the resolution. With facsimile service, a confirmation of delivery report can be generated. With mail delivery service, return receipts can be provided (although the reliability of the United States Postal Service, which also assures delivery through rain, sleet, and snow, is well-established after more than a century of service). However, similar receipt confirmation is not always available for electronically served documents. Furthermore, electronically sent documents are misdelivered more commonly than those sent by mail, and there is no established, reliable method to provide notice to the sender that the documents were misdelivered (unlike an improperly addressed mailed item, which is usually returned as undeliverable). Without the requirement of any methods of confirmation (let alone adequate methods) that the electronically served documents were actually received by the intended recipient, this resolution would result in too many missed deadlines by parties who had no actual or constructive knowledge that motions or discovery had been served on them.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that the Legislature amend section 1010.6 of the Code of Civil Procedure as follows:

- 1 §1010.6
- 2 (a) A trial court may adopt local rules permitting electronic filing and service of
- 3 documents, subject to rules adopted pursuant to subdivision (b) and the following
- 4 conditions:
- 5 (1) A document that is filed electronically shall have the same legal effect as an
- 6 original paper document.

7 (2) (A) When a document to be filed requires the signature, not under penalty of
8 perjury, of an attorney or a person filing in propria persona, the document shall be deemed
9 to have been signed by that attorney or person if filed electronically.

10 (B) When a document to be filed requires the signature, under penalty of perjury, of
11 any person, the document shall be deemed to have been signed by that person if filed
12 electronically and if a printed form of the document has been signed by that person prior
13 to, or on the same day as, the date of filing. The attorney or person filing the document
14 represents, by the act of filing, that the declarant has complied with this section. The
15 attorney or person filing the document shall maintain the printed form of the document
16 bearing the original signature and make it available for review and copying upon the
17 request of the court or any party to the action or proceeding in which it is filed.

18 (3) Any document that is electronically filed with the court after the close of
19 business on any day shall be deemed to have been filed on the next court day. "Close of
20 business," as used in this paragraph, shall mean 5 p.m. or the time at which the court would
21 not accept filing at the court's filing counter, whichever is earlier.

22 (4) The court receiving a document filed electronically shall issue a confirmation
23 that the document has been received and filed. The confirmation shall serve as proof that
24 the document has been filed.

25 (5) Upon electronic filing of a complaint, petition, or other document that must be
26 served with a summons, a trial court, upon request of the party filing the action, shall issue
27 a summons with the court seal and the case number. The court shall keep the summons in
28 its records and may electronically transmit a copy of the summons to the requesting party.
29 Personal service of a printed form of the electronic summons shall have the same legal
30 effect as personal service of an original summons. If a trial court plans to electronically
31 transmit a summons to the party filing a complaint, the court shall immediately upon
32 receipt of the complaint notify the attorney or party that a summons will be electronically
33 transmitted to the electronic address given by the person filing the complaint.

34 (6) Where by any statute or rule of court any notice may be served by mail, express
35 mail, overnight delivery, or facsimile transmission, electronic service of the notice and any
36 accompanying documents may be used by the party serving such notice ~~authorized when a~~
37 ~~party has agreed to accept service electronically in that action.~~ Electronic service is
38 complete at the time of transmission, but any period of notice or any right or duty to do any
39 act or make any response within any period or on a date certain after the service of the
40 document, which time period or date is prescribed by statute or rule of court, shall be
41 extended after service by electronic transmission by two court days, but the extension shall
42 not apply to extend the time for filing notice of intention to move for new trial, notice of
43 intention to move to vacate judgment pursuant to Section 663a, or notice of appeal. This
44 extension applies in the absence of a specific exception provided for by any other statute or
45 rule of court. This subsection does not apply to service of a summons or a subpoena
46 except when the recipient has agreed to accept service of a summons or a subpoena
47 electronically.

48 (7) The court shall permit a party or attorney to file an application for waiver of
49 court fees and costs, in lieu of requiring the payment of the filing fee, as part of the process
50 involving the electronic filing of a document. The court shall consider and determine the
51 application in accordance with Section 68511.3 of the Government Code and shall not
52 require the party or attorney to submit any documentation other than that set forth in

53 Section 68511.3 of the Government Code. Nothing in this section shall require the court to
54 waive a filing fee that is not otherwise waivable.

55 (8) If a trial court adopts rules conforming to paragraphs (1) to (7), inclusive, it may
56 provide by order that all parties to an action file and/or serve documents electronically in a
57 class action, a consolidated action, or a group of actions, a coordinated action, or an action
58 that is deemed complex under Judicial Council rules, provided that the trial court's order
59 does not cause undue hardship or significant prejudice to any party in the action.

60 (b) By January 1, ~~2003~~2009, the Judicial Council shall adopt uniform rules for the
61 electronic filing and service of documents in the trial courts of the state, which shall
62 include statewide policies on vendor contracts, privacy, and access to public records.

63 These rules shall conform to the conditions set forth in this section, as amended from time
64 to time.

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

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS:

Existing Law: Allows parties to serve documents electronically only when the recipient has agreed to accept service in that manner.

This Resolution: Would allow papers to be served electronically in all cases, with the exception of a summons or subpoena.

The Problem: For centuries, attorneys and courts have relied on paper documents. Not surprisingly, our profession has probably generated – and consumed – more paper than any other. The preparation, copying, service, and retention of paper documents routinely consume inordinate amounts of time and expense for every practitioner and official. Until now, we've had no alternative but to put up with it, because paper was the only practicable medium we could use.

The electronic age has been upon us for decades, but it has been only relatively recently that electronic document management has come within everyone's grasp. Instead of spending \$30 or more to send a packet of documents overnight to a colleague across the country, a lawyer can send those same documents to their destination *immediately* for *nothing*. And instead of worrying about whether the documents will get lost in transit (or even in her own mailroom), the recipient can simply download them into her document management system. Also, many courts, including most federal district courts, now accept electronic filing as their sole means of document submissions. The entire process takes nothing more than an e-mail account, some software, and a few clicks. And when the time and cost of effecting paper service upon multiple recipients are considered, the benefits of electronic service become even more compelling.

The resolution contains an exception for the service of summonses and subpoenas. The rationale for excepting those documents is that the recipients thereof are usually not yet parties to litigation, and thus service upon them should be accomplished in a more direct and personal manner to ensure and verify receipt.

IMPACT STATEMENT

This resolution would not affect any other rule, statute, or law.

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COUNTERARGUMENT

BAR ASSOCIATION OF NORTHERN SAN DIEGO COUNTY

Although the internet has become a useful tool in many areas, and email communication is generally quick and effective, a party or attorney should not be **forced** to rely on the internet for serious litigation matters, absent freely available advances in technology that assure absolute reliability.

SANTA CLARA COUNTY BAR ASSOCIATION

This resolution would allow a party serving documents, other than a summons or subpoena, to independently choose to serve the other parties electronically, even though current law requires that the parties have a prior agreement in place. Certainly, in this day and age, this would appear to be a wonderful idea. Unfortunately, it is not. The simple fact is, not everyone uses or is comfortable with email. This resolution basically dismisses those people without a second thought. The resolution ignores the fact that emails can be rejected as spam, blocked due to size, go the wrong in-box, or end up in a mailbox of someone on vacation, thereby preventing access to the email. Moreover, this resolution does not address the issue of the format a document is to be sent in, e.g., Word, WordPerfect, etc, and how to resolve conflicts when a document is delivered to a party in an unreadable manner. Granted, parties should be encouraged to enter into email stipulations. Permitting one side to simply make that choice independently, however, is not the solution. The Santa Clara County delegation recommends disapproval of this resolution.