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# Chapter 156: A Surgical Procedure to Revive California's Crippled Electronic Service of Process

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# Chapter 156: A Surgical Procedure to Revive California's Crippled Electronic Service of Process

Allan Woodworth

## Code Sections Affected

Code of Civil Procedure §§ 1010.6, 1013 (amended).  
SB 1274 (Corbett), 2010 STAT. Ch. 156.

## I. INTRODUCTION

Over the past two decades, the percentage of Americans using the Internet has increased dramatically.<sup>1</sup> In 1990, less than 1% of the population used the Internet, but by 2008, this number had jumped to almost 80%.<sup>2</sup> In the wake of this popularity, email has become an increasingly prevalent form of communication.<sup>3</sup> For example, a recent survey of email users showed 59% of users check their email from the bathroom, 50% do so while driving, and 15% even admitted to checking their email while in church.<sup>4</sup>

The explosion of Internet use has not gone unnoticed by law offices and courts, where electronic service and filing of documents is becoming a more common, effective, and affordable alternative to paper.<sup>5</sup> In 1997, the National Center for State Courts (NCSC) published a study finding that enormous savings could be realized by switching to an electronic filing, which would save 9.63 work hours, or \$218.86, for every 100 documents filed.<sup>6</sup> According to this study, Los Angeles County alone would save three million dollars annually, simply by filing documents electronically.<sup>7</sup>

In 1999, the California Legislature passed a bill allowing trial courts to adopt “rules permitting electronic filing and service of documents . . . .”<sup>8</sup> Until recently, courts executed electronic service with either electronic transmission or electronic notification.<sup>9</sup> “Electronic transmission occurs when a document is electronically sent to the party to be served[,]” attached to an email.<sup>10</sup> Sometimes,

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1. See *Internet Users (Per 100 People)*, WORLD BANK.ORG, <http://data.worldbank.org/indicator/IT.NET.USER.P2> (last visited Mar. 16, 2011) (on file with the *McGeorge Law Review*) (showing a table indicating the percentage of Internet users across the globe).

2. *Id.*

3. AOL; *It's 3 A.M.—Are You Checking Your Email Again?*, LAB BUS. WK., Aug. 24, 2008, at 265 (“More than 50% [of respondents] said they check their email while on vacation.”).

4. *Id.*

5. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1274, at 1 (Apr. 13, 2010).

6. See SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 367, at 5 (Sept. 5, 1999) (stating that the study found “that electronic filing would save 9.63 work hours, or \$218.86, for every 100 documents filed”).

7. *Id.* (“The 370 million documents filed in [the] state and federal courts in the United States cost about \$1 billion to file and archive.”).

8. CAL. CODE CIV. PROC. § 1010.6(a) (West 2009).

9. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1274, at 1 (Apr. 13, 2010).

10. *Id.*

however, an attachment may be too large for an email or parties may not have the necessary software to open the attachment.<sup>11</sup> Thus, it often makes more sense to notify a party that a document is available electronically and can be retrieved via a provided hyperlink; a method called electronic notification.<sup>12</sup> Unfortunately, “recent case law has interpreted the authorization of electronic service to include only electronic transmission.”<sup>13</sup> Thus, a gap emerged between the court’s interpretation of the statute and the actual practice of electronic service in California.<sup>14</sup> Chapter 156 fills this gap by redefining electronic service to include both electronic transmission and electronic notification.<sup>15</sup>

## II. LEGAL BACKGROUND

California initially authorized electronic service of process more than a decade ago.<sup>16</sup> As a result, two methods of electronic service emerged: electronic transmission and electronic notification.<sup>17</sup> Courts and attorneys practiced both methods with increasing regularity until recent case law invalidated electronic notification as a legal method of service.<sup>18</sup>

### A. Existing California Law

In 1999, the California Legislature amended the Code of Civil Procedure to permit electronic service and electronic filing of court documents.<sup>19</sup> One condition permits electronic service of notice where the party receiving service consents to electronic service and can receive service by mail.<sup>20</sup> Additionally, parties can only consent to electronic service if the local trial court had authorized such service.<sup>21</sup>

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11. Wayne G. Nitti, *Practice Tips: The Advantages of Using Electronic Service Providers*, L.A. LAWYER, June 2007, at 13, 14.

12. *Id.*

13. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1274, at 2 (Apr. 13, 2010); *see also* *InSyst, Ltd. v. Applied Materials, Inc.*, 170 Cal. App. 4th 1129, 1140, 88 Cal. Rptr. 3d 808, 816 (6th Dist. 2009) (holding that the court does “not regard an e-mail explanation of where to electronically locate a judgment as the equivalent of the electronic transmission of the document”).

14. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1274, at 2 (Apr. 13, 2010).

15. *Id.* at 2-3.

16. CAL. CODE CIV. PROC. § 1010.6(a) (West 2009).

17. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1274, at 4 (Apr. 13, 2010).

18. *Id.* at 2.

19. CAL. CODE CIV. PROC. § 1010.6(a); SENATE FLOOR, COMMITTEE ANALYSIS OF SB 367, at 2 (Sept. 5, 1999).

20. CAL. CODE CIV. PROC. § 1010.6(a)(6).

21. *See id.* § 1010.6(a) (“A trial court *may* adopt local rules permitting electronic filing and service of documents . . . .”) (emphasis added).

*B. Methods of Electronic Service*

Electronic transmission typically occurs when a party sends a document electronically via email with an attachment.<sup>22</sup> While this method of service is commonly used, it has many shortcomings.<sup>23</sup> In addition to files being too large to send as attachments and parties not having the correct software to view attachments, sending emails may result in parties disputing whether the emails were actually received, mistyping the email addresses of served parties, and even transferring computer viruses.<sup>24</sup>

One way to remedy the potential problems with electronic transmission is to use electronic notification, in which a party is notified that a document is available electronically and can be retrieved via a hyperlink.<sup>25</sup> This is usually accomplished by using an Electronic Service Provider (ESP), a commercial entity which hosts documents to be served and notifies parties of the availability and method for retrieval of such documents.<sup>26</sup>

*C. The Crippling of Electronic Notification*

In 2006, Santa Clara County Superior Court authorized electronic service of documents via electronic notification by an ESP.<sup>27</sup> In a routine process two years later, the court entered a judgment for a defendant, which was electronically filed on April 11, 2008.<sup>28</sup> Shortly thereafter, the court sent an email notice identifying the document to the plaintiff's attorneys.<sup>29</sup> This email provided instructions describing how to access the document via a provided hyperlink.<sup>30</sup> On April 15, 2008, the court clerk mailed a paper copy of the entry of judgment to the attorneys.<sup>31</sup> "On June 11, 2008, [sixty-one] days after the email notice" and fifty-seven days after the paper notice, "plaintiff filed a notice of appeal from the April 11, 2008 judgment."<sup>32</sup>

This posed a problem for the plaintiff because the statutory time frame to file a notice of appeal was sixty days after valid service of the judgment.<sup>33</sup> Thus, if

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22. See SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1274, at 3 (Apr. 13, 2010) (noting that electronic transmission "occurs when a document is sent through electronic means to an electronic address that has been provided by the receiving party").

23. Nitti, *supra* note 11, at 14.

24. *Id.*

25. *Id.*

26. *Id.* at 13.

27. *InSyst, Ltd. v. Applied Materials, Inc.*, 170 Cal. App. 4th 1129, 1133, 88 Cal. Rptr. 3d 808, 810 (6th Dist. 2009).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 1134, 88 Cal. Rptr. 3d at 810.

32. *Id.*

33. *Id.* at 1135, 88 Cal. Rptr. 3d at 812.

the electronic notification on April 11 constituted valid service, the plaintiff would not be able to appeal.<sup>34</sup>

The court noted that “‘electronic service’ is the electronic transmission of a document to a party’s electronic notification address . . . .”<sup>35</sup> The court reasoned that section 1010.6 did not authorize service by simply “giving a party notice of where he or she may find it.”<sup>36</sup> Under this rationale, the court concluded an email explanation of a document’s location did not constitute electronic transmission under the statute.<sup>37</sup> Therefore, the court ruled that the “notice of appeal was timely filed” within sixty days of “the clerk’s physical mailing of a self-identified notice of entry of judgment.”<sup>38</sup> This holding rendered electronic notification invalid under California law.<sup>39</sup> Since electronic notification was a common and effective method of electronic service prior to this decision, a strong need for modification to the statute emerged.<sup>40</sup> Senator Ellen Corbett introduced Chapter 156 to meet this need by broadening the definition of electronic service to include electronic notification.<sup>41</sup>

### III. CHAPTER 156

Chapter 156 redefines electronic service in California Code of Civil Procedure section 1010.6 to include electronic notification.<sup>42</sup> A party must consent to electronic service, which is not available if personal service of a document is required.<sup>43</sup> Chapter 156 also provides that once a party has consented to electronic service, “the court may electronically serve any [future] document issued by the court that is not required to be personally served . . . .”<sup>44</sup> Under Chapter 156, “[e]lectronic service of a document is complete at the time of the electronic transmission of the document or at the time that the electronic notification of service of the document is sent.”<sup>45</sup>

Furthermore, Chapter 156 mandates that the Judicial Council “adopt uniform rules for the electronic filing and service of documents in the trial courts of the

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34. *See id.* at 1137, 88 Cal. Rptr. 3d at 813 (noting that defendant argued the sixty day timeline for filing a notice to appeal began with the electronic notification).

35. *Id.* at 1137 n.6.

36. *Id.* at 1140, 88 Cal. Rptr. 3d at 816.

37. *Id.*

38. *Id.*

39. *See* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1274, at 4-5 (Apr. 13, 2010) (“[T]he only method which is now considered an acceptable form of electronic service is the electronic transmission method.”).

40. *Id.* at 5.

41. *Id.* at 1-2.

42. CAL. CODE CIV. PROC. § 1010.6(a)(1)(3) (amended by Chapter 156).

43. *Id.* § 1010.6(a)(2) (amended by Chapter 156).

44. *Id.* § 1010.6(a)(3) (amended by Chapter 156).

45. *Id.* § 1010.6(a)(4) (amended by Chapter 156).

state . . . [,]”<sup>46</sup> thereby eliminating the requirement for a local rule authorizing electronic service.<sup>47</sup> In other words, Chapter 156 provides parties the option to voluntarily receive electronic service so long as both parties consent and personal service is not required.<sup>48</sup>

#### IV. ANALYSIS

By explicitly allowing electronic notification as a valid method of electronic service, Chapter 156 fixes a system crippled by the decision in *InSyst v. Applied Materials*.<sup>49</sup> By mandating all local courts allow electronic service, and putting the choice to opt for electronic service in the hands of the parties, Chapter 156 creates uniformity throughout California courts.<sup>50</sup>

##### A. *The Need for Electronic Notification*

Electronic transmission has many shortcomings.<sup>51</sup> Proponents argue that if a party needs to serve a particularly large document, delivery may not be possible via email.<sup>52</sup> Sending parties a document link, as opposed to an actual document file, diminishes the possibility of “delay or non-delivery of email” due to large file size.<sup>53</sup> Without electronic notification, parties would resort to service by mail or facsimile transmission, increasing costs and delays.<sup>54</sup> Beyond overcoming the limitations of electronic transmission, electronic notification offers many additional benefits.<sup>55</sup> One advantage of electronic notification is the universal availability of documents wherever an Internet connection is available.<sup>56</sup> While this is also true of attachments via email, ESPs are much better equipped to organize documents for easy access.<sup>57</sup> Courts can also use ESPs to “provide third-party verification” to prove whether or not a party was served.<sup>58</sup>

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46. *Id.* § 1010.6(d) (amended by Chapter 156).

47. See SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1274, at 5 (Apr. 13, 2010) (stating that “a local rule authorizing electronic service would no longer be required”).

48. *Id.*

49. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1274, at 2 (Apr. 13, 2010).

50. *Id.*

51. See Nitti, *supra* note 11, at 14 (describing several issues relating to electronic transmission).

52. *Id.*

53. *Id.*

54. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1274, at 5 (Apr. 13, 2010).

55. See Nitti, *supra* note 11, at 14 (“The benefits of using an ESP are measured in terms of cost savings, convenience, and coordination.”).

56. *Id.*

57. *Id.*

58. *Id.*

There are, however, reasons to forgo the use of electronic notification.<sup>59</sup> Websites that host documents could experience unforeseen down time.<sup>60</sup> In an atmosphere where time is often of the essence, lack of access to documents could be devastating.<sup>61</sup> To prevent this problem, Chapter 156 requires the Judicial Council to adopt rules to ensure the reliability of electronic notification.<sup>62</sup> Possible solutions include requiring that ESPs use redundant servers and data backup systems.<sup>63</sup>

Another potential problem is that unintended parties may be able to access documents that are hosted online.<sup>64</sup> Fortunately, ESPs use multiple safeguards, including passwords, encryption, and firewalls, to shield documents from unauthorized parties.<sup>65</sup> And while no safeguard is completely secure, electronic transmission through email is open to the same vulnerabilities.<sup>66</sup> Despite these potential concerns, Chapter 156 (sponsored by the powerful Judicial Council), has no known opponents and was unanimously approved on the assembly floor.<sup>67</sup>

### B. Availability of Electronic Service

Prior to Chapter 156, electronic service was only available to parties whose local courts had adopted it.<sup>68</sup> Chapter 156 eliminates the requirement for a local rule to authorize electronic service.<sup>69</sup> This creates uniformity throughout California, giving consenting parties the option to receive electronic service.<sup>70</sup> Of course, since both parties must consent to electronic service, parties who do not wish to receive electronic notification may refuse to consent to electronic service.<sup>71</sup> Finally, when the law requires personal service, electronic service is prohibited.<sup>72</sup>

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59. See *id.* at 14-15 (detailing some shortcomings of ESPs).

60. *Id.*

61. *Id.*; see also, e.g., Yehuda Cagen, *Where to Start With Your IT Outsourcing Decision?* RINF NEWS (Oct. 26, 2010), <http://rinf.com/alt-news/business-news/where-to-start-with-your-it-outsourcing-decision/8943/> ("For example, at an average hourly billing rate of \$292 to \$309 per hour for non-equity partners, a law firm of 25 attorneys stands to lose thousands in lost revenue for just one hour of downtime costs.").

62. CAL. CODE CIV. PROC. § 1010.6(d) (amended by Chapter 156).

63. Nitti, *supra* note 11, at 15.

64. *Id.* at 14.

65. *Id.*

66. *Id.*

67. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 1274, at 3-4 (Apr. 27, 2010); Complete Bill History of SB 1274, [http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb\\_1251-1300/sb\\_1274\\_bill\\_2010\\_0818\\_history.html](http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_1251-1300/sb_1274_bill_2010_0818_history.html) (last visited Mar. 4, 2009) (on file with the *McGeorge Law Review*).

68. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 1274, at 1 (Apr. 27, 2010).

69. *Id.* at 2.

70. *Id.*

71. *Id.* at 1.

72. *Id.* at 2.

## V. CONCLUSION

While redefining electronic service might seem of little significance, Chapter 156 will repair a method of service that is currently crippled.<sup>73</sup> Since 1999, when California courts began electronic service,<sup>74</sup> the use of electronic notification as a method of service has become increasingly prevalent, with some local courts even mandating electronic service in certain types of cases.<sup>75</sup>

Chapter 156 allows the courts and parties to advance this successful method of service, while also encouraging others to follow suit.<sup>76</sup> At a time of massive budget deficits<sup>77</sup> and a growing need to conserve resources, allowing parties to use electronic notification is not a difficult decision to make because it has already proven to be both cost effective and efficient.<sup>78</sup>

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73. *Id.*

74. CAL. CODE CIV. PROC. § 1010.6 (West 2009).

75. *See* Nitti, *supra* note 11, at 13.

76. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1274, at 2 (Apr. 13, 2010).

77. Op-Ed, *The Clock is Ticking*, S.F. CHRON., May 18, 2010, at A9.

78. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1274, at 1 (Apr. 13, 2010).