

## Invitation to Comment

Title	Electronic Service of Documents: Proposed Legislation (amend Code of Civil Procedure section 1010.6)
Summary	This proposal would amend section 1010.6 of the Code of Civil Procedure to authorize electronic service not only by means of the electronic transmission of documents, but also by the electronic notification that a document is being served and provision of a hyperlink at which the document may be viewed and downloaded. Several other amendments to the statute would clarify the law regarding the electronic service of documents.
Source	Court Technology Advisory Committee Hon. Ming W. Chin, Chair
Staff	Patrick O'Donnell, Supervising Attorney, 415-865-7665, patrick.o'donnell@jud.ca.gov
Discussion	<p><b>The Issue</b></p> <p>Electronic service of documents in civil cases is becoming increasingly common. In the years ahead, it is likely to become the most prevalent method of service. At least two different methods of electronic service are currently being used. These may be referred to as the “electronic transmission” method and the “electronic notification” method.</p> <p>The electronic transmission method operates by analogy to traditional service in which a document is served by sending it through the mail to a recipient; in a similar manner, electronic service is carried out by electronically transmitting (sending) a document to the person served. By contrast, under the electronic notification method, the recipient is not sent a document; instead, the recipient is notified electronically that a document is available and is informed where to access it through a hyperlink.</p> <p>The electronic transmission method is codified in the Code of Civil Procedure and the rules of court on electronic service (rules 2.250-2.261). Though not codified in state law, the electronic notification method is also currently being used.</p> <p>A recent appellate decision has directly raised the issue whether the law needs to be changed to expressly authorize electronic service by the electronic notification method. In <i>Insyst, Ltd. v. Applied Materials, Inc.</i> (2009) 170 Cal.App.4th 1129, the court</p>

held that only the electronic transmission method constitutes legally valid service under current California law. The court ruled that the superior court's particular method of service, which involved sending a link at which the stamped judgment could be accessed, did not legally constitute "electronic service" under Code of Civil Procedure section 1010.6 or the rules of court on electronic service (rules 2.250-2.261). "We see no provision in the new statute, section 1010.6, or its implementing rules that authorizes serving a document by giving a party notice of where he or she may find it . . . . We do not regard an e-mail explanation of where to electronically locate a judgment as the equivalent of the electronic transmission of the document." (*Id.*, at page 1140.)

Thus, the appellate court in *Insys, Ltd.* concluded that service of the judgment by the superior court by providing a hyperlink to the document failed to constitute legally effective service triggering the 60-day appeal period under rule 8.104 of the California Rules of Court, which provides that a notice of appeal must be filed within 60 days after the superior court clerk mails the party a judgment or notice of entry of judgment.

#### **This Proposal**

This proposal recommends that the law be changed to expressly authorize service by electronic notification. Specifically, it proposes amending Code of Civil Procedure section 1010.6 to define "electronic service" as including *both* electronic transmission and electronic notification. "Electronic transmission" means the electronic transmission of a document to the electronic address at or through which a party or other person has authorized electronic service. "Electronic notification" means the notification of the party or other person that a document is served by sending an electronic message to the electronic address at or through which the party or other person has authorized electronic service, specifying the exact name of the document served and providing a hyperlink at which the served document can be viewed and downloaded. (See amended Code Civ. Proc, § 1010.6(a)(6).)

This proposal also recommends that section 1010.6 be amended to clarify that the documents that may be served electronically are any documents in a case, not just notices and accompanying documents. (See amended Code Civ. Proc, § 1010.6(a)(7).)

A new section would state that, in actions where the parties have agreed to accept electronic service or the court has ordered electronic service under the statute, the court may electronically

serve any order, notice, judgment, or other document issued by the court that is not required to be personally served. This amendment, which is based on current rule 2.260(g), would place the provision in the statute for clarity. (See amended Code Civ. Proc, § 1010.6(a)(8).)

Finally, to reflect the new authorization of service by notification, the statutory provision on the time when service of a document is “complete” would be also amended to provide that service 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” (new text underlined). (See amended Code Civ. Proc, § 1010.6(a)(9).)

The text of the proposed legislation is attached at the end of this Invitation to Comment.<sup>1</sup>

### **Rationale for the Proposal**

Code of Civil Procedure section 1010.6 should be amended to define electronic service as including both electronic transmission and electronic notification. This will provide more flexibility for litigants and the courts. Although electronic transmission is an effective means of service, it is not the only one. Electronic notification can also be quite effective. Indeed, the federal courts have recognized this and have expressly approved electronic notification as a legally valid method of service.

The federal courts have adopted an Electronic Case File System (ECF). Unlike the California system, the federal e-filing system is mandatory for attorneys in most types of cases. Electronic filing consists of logging onto the court Web site and completing a transaction that includes uploading the documents comprising the filing to the court’s system. Sending a document by e-mail does not constitute an electronic filing.

As far as service is concerned, the parties in the federal system do not transmit copies of electronically filed documents to each other. “Upon the filing of a document by a party, an e-mail message will be automatically generated by the electronic filing system and sent to all parties in the case. Receipt of this message

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<sup>1</sup> A set of proposed rule amendments has also been developed and will be circulated later. The rule amendments will modify the California Rules of Court on electronic service in a manner similar to these legislative amendments—for example, to authorize service by electronic notification as well as electronic transmission. Both the statutory and rule changes would go into effect by January 1, 2011.

shall constitute service on the receiving party. . . .The automatic e-mail message generated by the ECF system and sent to all parties whose e-mail addresses have been registered in the case...shall constitute service on the attorney or other persons in a case subject to ECF.” (See U.S.D.C., N.D.Cal., General Order 45-Electronic Case Filing (General Order 45).) The federal courts do not mail or electronically send parties copies of orders. “Orders filed by the court in cases designated for electronic filing will be served only via the e-mail Notice of Electronic Filing. No paper service will be made by the court.” (General Order 45.) Thus, with respect to documents filed with the courts, the federal ECF relies on electronic notification that a document has been filed rather than the transmission of the document. Receipt of a message that a document has been filed constitutes “service.”

This proposal does not recommend the general adoption of the federal e-filing and e-service system in California. It simply recognizes that such a system may provide an effective alternative means of serving documents electronically. A variant of the federal notification system is used by electronic filing service providers that create Web sites where parties can post documents and notify other parties that the documents are available to be downloaded. This is, in effect, a method of “service” by electronic notification instead of transmitting documents to the parties. The amended statute would legally authorize service by this method.

Electronic notification has benefits. The electronic notification method operates particularly well for more complicated or complex cases involving multiple parties and the service of a large number of documents or of documents of a substantial size, thereby avoiding the need to transmit them. Because this method of service does not involve the direct transmission of documents, it saves considerable bandwidth. Also, for the parties in federal cases, this method of service reduces filing and service to one basic step: electronic filing. Upon the filing of a document, the court automatically provides a notice of the filing to all other parties—the receipt of which is treated as “service.” All parties receive notice of the filing promptly and at the same time as the filer.

The electronic notification method, however, is not ideal for everyone. This method of service seems best suited for use by more sophisticated users such as law firms and government entities. To be fully effective, service by electronic notification may require developed, well-organized, and indexed document

management systems to which notified parties may be sent to open up a hyperlink and download documents. These systems also are generally set up so that participants register and have passwords and accounts. For the sole practitioner or the self-represented litigant who simply wants to serve documents by e-mail, requiring the use of hyperlinks for service would effectively prevent them from using electronic service at all.

So there is a persuasive argument that both methods of electronic service—by transmission of documents and by notice with a hyperlink—should be legally recognized. Both provide quick, effective means for parties to serve legal documents on each other—and for courts to serve the parties. Both methods are superior to, and less expensive than, using conventional mail. Yet each method has its advantages and disadvantages. So at this stage in the development of e-filing and e-service, rather than mandate only one or another of the two methods of electronic service, both methods should be legally permissible.

Accordingly, the Court Technology Advisory Committee recommends amending Code of Civil Procedure 1010.60 to permit service by both by electronic transmission and electronic notification.

The committee also recommends several other amendments to clarify the law regarding electronic service of documents. In particular, section 1010.6 should be amended to clarify that parties may serve all types of documents electronically, not just notices and accompanying documents. Language limiting the types of documents that may be served appears to have been included in section 1010.6 inadvertently. It is different from the language in all the other statutes on service. They permit service of “the notice or other papers,” not just “accompanying” papers. (See Code Civ. Proc., § 1011 (personal), § 1013(a) (mail), § 1013(c) (express mail), and § 1013(e) (fax).) To be consistent with these other service statutes, section 1010.6 should be amended to explicitly allow electronic service of all types of documents and thereby encourage the use of electronic service to the extent feasible.

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Attachment

Code of Civil Procedure section 1010.6 would be amended to read:

1 1010.6. (a) A trial court may adopt local rules permitting electronic filing and service of  
2 documents, subject to rules adopted pursuant to subdivision (b) and the following  
3 conditions:

4 (1) A document that is filed electronically shall have the same legal effect as an original  
5 paper document.

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

10 (B) When a document to be filed requires the signature, under penalty of perjury, of any  
11 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 business  
19 on any day shall be deemed to have been filed on the next court day. "Close of business,"  
20 as used in this paragraph, shall mean 5 p.m. or the time at which the court would not  
21 accept filing at the court's filing counter, whichever is earlier.

22 (4) The court receiving a document filed electronically shall issue a confirmation that  
23 the document has been received and filed. The confirmation shall serve as proof that the  
24 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  
27 issue a summons with the court seal and the case number. The court shall keep the  
28 summons in its records and may electronically transmit a copy of the summons to the  
29 requesting party. Personal service of a printed form of the electronic summons shall have  
30 the same legal effect as personal service of an original summons. If a trial court plans to  
31 electronically transmit a summons to the party filing a complaint, the court shall  
32 immediately upon receipt of the complaint notify the attorney or party that a summons  
33 will be electronically transmitted to the electronic address given by the person filing the  
34 complaint.

35 (6) A document may be served electronically in an action filed with the court as provided  
36 in this section. "Electronic service" is service of a document, on a party or other person,  
37 by either electronic transmission or electronic notification. "Electronic transmission"  
38 means the electronic transmission of a document to the electronic address at or through  
39 which a party or other person has authorized electronic service. "Electronic notification"  
40 means the notification of the party or other person that a document is served by sending  
41 an electronic message to the electronic address at or through which the party or other  
42 person has authorized electronic service, specifying the exact name of the document  
43 served and providing a hyperlink at which the served document can be viewed and

1 downloaded. Electronic service may be performed directly by a party, by an agent of a  
2 party including the party's attorney, or through an electronic filing service provider.

3 ~~(6)~~ (7) Where a notice or other document may be served by mail, express mail,  
4 overnight delivery, or facsimile transmission, electronic service of the notice and any  
5 accompanying or other documents may be authorized when a party has agreed to accept  
6 service electronically in that action.

7 (8) In any action in which a party has agreed to accept electronic service under (7) or in  
8 which the court has ordered electronic service under (11), the court may electronically  
9 serve any notice, order, judgment, or other document issued by the court that is not  
10 required to be personally served, in the same manner that parties electronically serve  
11 documents. The electronic service of documents by the court shall have the same legal  
12 effect as service by mail, except as provided in (9).

13 (9) Electronic service of a document is complete at the time of the electronic  
14 transmission of the document or at the time that the electronic notification of service of  
15 the document is sent, but, however, any period of notice or any right or duty to do any act  
16 or make any response within any period or on a date certain after the service of the  
17 document, which time period or date is prescribed by statute or rule of court, shall be  
18 extended after service by electronic transmission by two court days, but the extension  
19 shall not apply to extend the time for filing:

20 (A) a notice of intention to move for new trial,

21 (B) a notice of intention to move to vacate judgment pursuant to Section 663a, or

22 (C) a notice of appeal.

23 This extension applies in the absence of a specific exception provided for by any other  
24 statute or rule of court.

25 ~~(7)~~ (10) The court shall permit a party or attorney to file an application for waiver of  
26 court fees and costs, in lieu of requiring the payment of the filing fee, as part of the  
27 process involving the electronic filing of a document. The court shall consider and  
28 determine the application in accordance with Sections ~~68511.3~~ 68630-68641 of the  
29 Government Code and shall not require the party or attorney to submit any  
30 documentation other than that set forth in Sections ~~68511.3~~ 68630-68641 of the  
31 Government Code. Nothing in this section shall require the court to waive a filing fee that  
32 is not otherwise waivable.

33 ~~(8)~~ (11) If a trial court adopts rules conforming to paragraphs (1) to ~~(7)~~ (10), inclusive,  
34 it may provide by order that all parties to an action file documents electronically in a  
35 class action, a consolidated action, or a group of actions, a coordinated action, or an  
36 action that is deemed complex under Judicial Council rules, provided that the trial court's  
37 order does not cause undue hardship or significant prejudice to any party in the action.

38 ~~(b) By January 1, 2003,~~ The Judicial Council shall adopt uniform rules for the  
39 electronic filing and service of documents in the trial courts of the state, which shall  
40 include statewide policies on vendor contracts, privacy, and access to public records.  
41 These rules shall conform to the conditions set forth in this section, as amended from  
42 time to time.

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## Item LEG09-01 Response Form

**Title:** Proposed Legislation on Electronic Service of Documents: Amend Code of Civil Procedure section 1010.6

- Agree with proposed changes
- Agree with proposed changes **if modified**
- Do not agree with proposed changes

Comments: \_\_\_\_\_

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**Name:** \_\_\_\_\_ **Title:** \_\_\_\_\_

**Organization:** \_\_\_\_\_

- Commenting on behalf of an organization

**Address:** \_\_\_\_\_

**City, State, Zip:** \_\_\_\_\_

### **To Submit Comments**

Comments may be submitted online, written on this form, or prepared in a letter format. If you are *not* commenting directly on this form, please include the information requested above and the proposal number for identification purposes. Please submit your comments online or email, mail, or fax comments. You are welcome to email your comments as an attachment.

**Internet:** <http://www.courtinfo.ca.gov/invitationstocomment/>

**Email:** [invitations@jud.ca.gov](mailto:invitations@jud.ca.gov)

**Mail:** Ms. Camilla Kieliger  
Judicial Council, 455 Golden Gate Avenue  
San Francisco, CA 94102

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<b>DEADLINE FOR COMMENT:</b> 5:00 p.m., Friday, September 4, 2009
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