

**JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS**

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Report

TO: Members of the Judicial Council

FROM: Appellate Advisory Committee
Hon. Kathryn Doi Todd, Chair
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DATE: September 8, 2009

SUBJECT: Appellate Procedure: Time for Filing Notice of Appeal in a Civil Case
(amend Cal. Rules of Court, rule 8.104) (Action Required)

Issue Statement

Rule 8.104 of the California Rules of Court establishes the time within which a notice of appeal must be filed in a civil case, other than a limited civil case. Under this rule, the time for filing the notice of appeal begins to run either when the superior court mails or a party serves a file-stamped copy of the judgment or a document entitled “Notice of Entry” of judgment. A recent court decision held that a court’s electronic service of the judgment did not constitute mailing the judgment within the meaning of rule 8.104 and thus did not trigger the start of the time for filing a notice of appeal.

Recommendation

To establish that electronic service by the court of the judgment or a notice of entry of the judgment will trigger the start of the time for filing the notice of appeal, the Appellate Advisory Committee recommends that the Judicial Council amend rule 8.104, effective January 1, 2010, to provide that the time for filing a notice of appeal runs from when the superior court clerk “serves,” rather than “mails,” the judgment or notice of entry of the judgment.

The text of the proposed amended rule is attached at page 4.

Rationale for Recommendation

Under Code of Civil Procedure section 1010.6 and California Rules of Court, rules 2.250–2.261, a court may order or a party may consent to electronic service of documents under certain circumstances. Rule 2.260(g) specifically provides that a court may electronically serve any order or judgment issued by the court in the same manner that parties may serve documents by electronic service. However, a recent court decision,

Citizens for Civic Accountability v. Town of Danville (2008) 167 Cal.App.4th 1158, held that electronic service of a judgment by the court did not constitute mailing of the judgment within the meaning of rule 8.104 and thus did not start the time period for filing a notice of appeal.

This proposal would amend rule 8.104 to provide that the time for filing a notice of appeal runs from when the superior court clerk “serves,” rather than “mails,” the judgment or notice of entry of the judgment. The proposal would also amend rule 8.104 to clarify that service under this rule can be made in any manner permitted by the Code of Civil Procedure, including electronic service when permitted under Code of Civil Procedure section 1010.6 and rules 2.250–2.261.

Alternative Actions Considered

The committee considered recommending that rule 8.104 be amended to provide that if a court has ordered electronic service of documents or a party has agreed to electronic service of documents under rules 2.250–2.261, the electronic service of the judgment or notice of entry of the judgment by either the court or a party will trigger the start of the notice of appeal period. The committee concluded that it would be better to simply amend the rule to provide for service, rather than mailing, of the judgment or notice of entry of judgment by the court.

Comments From Interested Parties

These proposed amendments were circulated as part of the spring 2009 comment cycle. Twelve individuals or organizations submitted comments on this proposal. Nine commentators agreed with the proposal, one agreed with the proposal if modified, and two did not indicate their position on the proposal but provided comments. The full text of the comments received and the committee’s responses is attached beginning on page 5.

In the proposal that was circulated for comment, the language concerning the permissible methods of service was incorporated into the advisory committee comment to rule 8.104, rather than the rule text. The committee specifically requested input on whether this language should be in the rule text, rather than in an advisory committee comment. Seven commentators provided input on this issue. Five of these commentators supported incorporating the language in the rule text. Among other things, these commentators suggested that incorporating this language in the text would provide clearer guidance to practitioners and also noted that not all sources of the rules include the comments. Based on this input, the committee is recommending that the language concerning the permissible methods of service be incorporated into the text of rule 8.104.

The Appellate Courts Committee of the State Bar of California suggested that the sentence in the *Civil Case Information Statement* (form APP-004) that refers to the mailing of the judgment or notice of entry of judgment by the court clerk should be revised to refer to service of these documents to reflect the proposed amendment of rule 8.104. The committee agreed with this suggestion and has incorporated this change into

its proposal to revise form APP-004, which is the subject of a separate report to the council.

Implementation Requirements and Costs

This amendment will facilitate electronic service of judgments or notice of entry of judgments by the courts, which should reduce court costs.

Attachments

Rule 8.104 of the California Rules of Court is amended, effective January 1, 2010, to read:

1 Rule 8.104. Time to appeal

2

3 (a) Normal time

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5 Unless a statute or rule 8.108 provides otherwise, a notice of appeal must be
6 filed on or before the earliest of:

7

8 (1) 60 days after the superior court clerk ~~mails~~ serves the party filing the
9 notice of appeal with a document entitled “Notice of Entry” of
10 judgment or a file-stamped copy of the judgment, showing the date
11 either was ~~mailed~~ served;

12

13 (2) 60 days after the party filing the notice of appeal serves or is served by
14 a party with a document entitled “Notice of Entry” of judgment or a
15 file-stamped copy of the judgment, accompanied by proof of service;
16 or

17

18 (3) * * *

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20 (4) Service under (1) and (2) may be by any method permitted by the Code
21 of Civil Procedure, including electronic service when permitted under
22 Code of Civil Procedure section 1010.6 and rules 2.250–2.261.

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24 (b)–(f) * * *

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Advisory Committee Comment

Subdivision (a). Under subdivision (a)(1), a notice of entry of judgment (or a copy of the judgment) must show the date on which the clerk ~~mailed~~ served the document. ~~This provision is intended to establish~~ The proof of service establishes the date that the 60-day period under subdivision (a)(1) begins to run.

Subdivision (a)(2) requires that a notice of entry of judgment (or a copy of the judgment) served by or on a party be accompanied by proof of service. The proof of service establishes the date that the 60-day period under subdivision (a)(2) begins to run. Although the general rule on service (rule 8.25(a)) requires proof of service for all documents served by parties, the requirement is reiterated here because of the serious consequence of a failure to file a timely notice of appeal (see subd. (e)).

Subdivision (b). * * *

SPR09-03

Appellate Procedure: Time for Filing Notice of Appeal in a Civil Case (amend Cal. Rules of Court, rule 8.104)

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
1.	Appellate Court Committee San Diego County Bar Association by Matthew C. Mulford Chair	NI	<p>Revised rule 8.104 seeks to clarify the time within which a notice of appeal must be filed in an unlimited civil case when electronic service of a judgment is utilized based on the recent holding in <i>Citizens for Civil Accountability v. Town of Danville</i> (2008) 167 Cal.App.4th 1158. We commend the Committee's efforts to address the potential uncertainty created by the decision and seek confirmation that this proposal sufficiently addresses the further issues raised in this 2009 decision. The <i>Insys</i> court held that electronic service of a document by a court clerk may trigger the appeal time, but further held that electronic notice providing a link to a website with a document description and a hyperlink to the document image is not sufficient. Rather, the court suggested that an image of the document itself should be electronically transmitted. <i>Id.</i> at 1140.</p> <p>The current proposed rule amendment does not directly address the issue of whether an image of the document served via electronic service must be attached or if a link to a website where the document may be found is sufficient. Clarification of this point is important due to the growing use of complex litigation tools and electronic service providers. In many complex litigation matters, courts order participation in electronic filing procedures. Thus, the</p>	<p>This proposal seeks only to address the issues raised by the decision in <i>Citizens for Civil Accountability v. Town of Danville</i>. The additional issues raised by the decision in <i>Insys, Ltd v. Applied Materials, Inc.</i> are being considered by the Judicial Council's Court Technology Advisory Committee.</p>

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			<p>procedural impact of how notifications are provided through electronic service providers is increasingly important.</p> <p>The invitation to comment also solicited input on the placement of certain explanatory text. Setting forth in the text of rule 8.104 that service may be made by any method permitted by the Code of Civil Procedure, including electronic service when permitted under Code of Civil Procedure section 1010.6 and rules 2.250–2.261, would increase clarity and be more user-friendly. Not all sources of the rules make comments available, and practitioners may not regularly consult the comment. Therefore, we recommend that the language addressing the manner of service should be in the rule text, rather than in the advisory committee comment.</p>	<p>Based on the weight of the comments, the committee has revised the proposal to include the explanation regarding the permissible methods of service in the rule text.</p>
2.	Committee on Appellate Courts The State Bar of California by Saul Bercovitch Legislative Counsel	A	<p>The Committee supports the proposal to replace the word “mails” with “serves” in rule 8.104(a)(1) as a means of modernizing the rule. The Committee sees no reason to clutter the rule with an express explanation about what constitutes valid “service.” The Advisory Committee’s inclination to express that point in the Comment to the rule rather than the rule itself is an efficient and effective approach.</p>	<p>No response required</p> <p>Based on the weight of the comments, the committee has revised the proposal to include the explanation regarding the permissible methods of service in the rule text.</p>

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			The Committee also notes that making this change will require a similar change in the <i>Civil Case Information Statement</i> (Mandatory Judicial Council form APP-004), in line B.2, as follows: “Date that notice of entry of judgment or a copy of the judgment was mailed <u>served</u> by the clerk or <u>served</u> by a party under California Rules of Court, rule 8.140.”	The committee agrees with this suggestion and is proposing this revision to form APP-004.
3.	Katherine Lynn Managing Attorney Court of Appeal, Second Appellate District	A	I agree with the proposed changes in the following: SPR09-03.	No response required.
4.	Hon. Judith D. McConnell Presiding Justice Court of Appeal, Fourth Appellate District, Division One	A	I agree with the proposed revision to rule 8.104 to expand the types of service that will commence the running of the time within which a notice of appeal must be filed in an unlimited civil case, To provide clearer guidance to practitioners, I believe, however, that the explanation that such service may be by any method permitted by the Code of Civil Procedure and the California Rules of Court should be made within the text of proposed rule 8.104 rather than in the Advisory Committee Comment.	No response required. Based on the weight of the comments, the committee has revised the proposal to include the explanation regarding the permissible methods of service in the rule text.
5.	One Legal LLC. by Robert DeFilippis President and COO	NI	The committee specifically asks whether language addressing the manner of service should be in the rule text, rather than in an	Based on the weight of the comments, the committee has revised the proposal to include the explanation regarding the permissible methods of

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	Commentator	Position	Comment	Committee Response
			advisory committee comment. Normally, we'd be hesitant to recommend this approach but given the significance of triggering documents being able to be served electronically, it is probably not a bad idea to include the manner of service language in the rule text.	service in the rule text.
6.	Orange County Bar Association by Michael G. Yoder, President	A	Recommend the proposed language addressing the manner of service should remain in an advisory committee comment, rather than being moved into the rule text.	Based on the weight of the comments, the committee has revised the proposal to include the explanation regarding the permissible methods of service in the rule text.
7.	M. Catherine Reid Newport Harbor Bar Association Irvine	AM	I would suggest including language clarifying what constitutes service in the actual rule as opposed to the committee comments. This will ensure that rule itself incorporates all methods of service under the Code of Civil Procedure.	Based on the weight of the comments, the committee has revised the proposal to include the explanation regarding the permissible methods of service in the rule text.
8.	Mark Schaeffer Attorney Sherman Oaks	A	No additional comments.	No response required.
9.	Superior Court of Los Angeles County	A	No additional comments.	No response required.
10.	Superior Court of San Diego County by Michael M. Roddy Executive Officer	A	No additional comments.	No response required.
11.	Superior Court of Ventura County by Julie Camacho	A	It is recommended that the manner of service should be in the rule text for clarification	Based on the weight of the comments, the committee has revised the proposal to include the

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	Commentator	Position	Comment	Committee Response
	Court Program Manager		purposes, rather than in an advisory committee comment.	explanation regarding the permissible methods of service in the rule text.
12.	Trial Court Presiding Judges Advisory Committee/Court Executives Advisory Committee Joint Rules Working Group by Patrick Danna Court Services Analyst	A	No additional comments.	No response required.