

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

455 Golden Gate Avenue
San Francisco, California 94102-3688

Report

TO: Members of the Judicial Council

FROM: Civil and Small Claims Advisory Committee
Hon. Lee Smalley Edmon, Chair
Uniform Rules Subcommittee
Hon. Brian R. Van Camp, Chair
Anne M. Ronan, Committee Counsel, 415-865-8933
anne.ronan@jud.ca.gov

DATE: August 8, 2008

SUBJECT: Civil Forms: *Proof of Service—Civil* (amend Cal. Rules of Court, rule 2.260 and revise forms POS-040 and POS-040(P)) (Action Required)

Issue Statement

Rule 2.260(f) of the California Rules of Court contains requirements for proof of electronic service. Rule 2.306(h) contains requirements for proof of service by fax. The current versions of *Proof of Service—Civil* (form POS-040) and *Attachment to Proof of Service-Civil (Persons Served)* (form POS-040(P)) do not comply with all of the rules' requirements. The forms would be revised to do so and to clarify what information is required for the various methods of service.

Further, the current language of rule 2.260(f)(1)(A), that an electronic address must be given *in place of* a residence or business address should be amended to require both the electronic and physical address of the server. The forms revised form would require this information.

Recommendation

The Civil and Small Claims Advisory Committee recommends that the Judicial Council, effective January 1, 2009, do the following:

1. Revise rule 2.260(f)(1)(A) to specify that the server's electronic service address in a proof of service is required in addition to a residence or business address;
2. Revise *Proof of Service—Civil* (form POS-040) to reflect the proposed change in rule 2.260(f)(1)(A) and clarify what addresses of the server are required; to

clarify what information is required for different methods of service, including the address where and time when service occurred; to add the appropriate hours for personal service on an attorney's office; and to make terms in the form consistent; and

3. Revise *Attachment to Proof of Service—Civil (Persons Served)* (form POS-040(P)) to clarify what information is required concerning the address where and time when service occurred.

The text of amended rule 2.260 is attached at page 7. The text of the revised forms is attached at pages 7-10.

Rationale for Recommendation

Revision of rule 2.260(f)(1)(A)

Rule 2.260(f)(1)(A) currently requires that, for electronic service, the electronic notification address of the person making the service be set forth in the proof of service in place of that person's residence or business address. The revised rule would require that the electronic notification address be shown *in addition to* the residence or business address. It is important for the person served to have sufficient information to be able to locate the person serving, if necessary. This would be consistent with rule 2.306(h)(1) on proof of service by fax, which requires that the sending fax machine number be given in the proof of service, but does not provide that it replace the residence or business address.

Revision of forms POS-040 and POS-040(P)

Use of "Fax"

The word "facsimile" is used only in two places, the caption and the Information Sheet. Elsewhere, the word "fax" is used. For consistency within the form and with the rule (see rule 2.306(h), Proof of service by fax) the word "fax" would be used throughout.

Use of "Electronic Service" and "Electronic Notification Address"

Rule 2.260 does not use the term "e-mail." Because in the future there may be forms of electronic service other than e-mail, the term "electronic service" allows for future technological developments. Further, the rule uses the term "electronic notification address," not "e-mail address" or "electronic address." The revisions, made in the text of the proof of service form itself, the information sheet that accompanies it, and the attachment form, would make the forms consistent with the rule.

Physical Address of Person Serving.

There is no requirement in any of the proof of service statutes or rules that the server specify whether the physical address provided is a business or a residence address. The revised form would eliminate the requirement for such specificity from item 2. The revised item, stating “My residence or business address is: _____,” would simplify the form and conform the item to the similar item on form POS-030, *Proof of Service by First-Class Mail*. This revision is a further modification made by the committee upon reviewing the form after the public comments were received.

Electronic Notification Address or Fax Number of Person Serving

Rule 2.260(f)(1)(A) currently requires that, for electronic service, the electronic notification address of the person making the service be set forth in the proof of service. Rule 2.306(h)(1) requires that for service by fax, the sending fax machine telephone number be included. Form POS-040 does not currently require this information. The revision would add a space for the electronic notification address or fax number of the person serving the documents as new item 3, immediately following the item requesting the server’s business or residential address. A new instruction regarding this item would also be added to the Information Sheet. The numbers of items following new item 3 would be adjusted in the text of both the form and the information sheet.

Electronic Notification Address or Fax Number of Person Being Served

Rule 2.260(f)(1)(C) requires that a proof of service for electronic service show the electronic notification address of the person being served, in place of the address that would be shown on an envelope required for proof of mailed service under Code of Civil Procedure section 1013a. Similarly, rule 2.306(h)(2) requires that a proof of service by fax show the fax machine telephone number of the person being served in place of the address of that person. Revised form POS-040 would reorganize item 4 on the current form (item 5 on the revised form), which requires information concerning the person being served. The revised form clarifies that (1) if personal delivery, mail service, overnight delivery, or messenger service is used, the street address where service was completed is required, and (2) if fax service or electronic service is used, a fax number or electronic notification address to which service was made is required but not the street address of the party being served.

A similar clarification would be made in the revised instructions for the “Address” column in form POS-040(P), the attachment used when form POS-040 is being used to show service to more than one person.

Reference to Time of Service

Rule 2.260(f)(1)(B) requires that the date and time of electronic service be included on the proof of service. Rule 2.306(h)(1) requires that the time of fax transmission be included on a proof of service by fax. Code of Civil Procedure section 1011 does not, however, require that the time of personal service be included on the proof of service. Current item 4d (item 5d in the revised form) would be revised to require only the time of service by electronic service or by fax. The reference to time at which personal service was completed would be deleted. The same revision would be made to the “Time of Service” column in attachment form POS-040(P).

The only requirements regarding the time of personal service are that (1) if service is on an attorney’s office, personal service must take place between the hours of nine in the morning and five in the afternoon (Code Civ. Proc., § 1011(a) and (2) if service is on a party’s residence, personal service must take place between the hours of eight in the morning and six in the evening (id., § 1011(b)). The time limitation on service on a party’s residence is already set forth in the two items on form POS-040 labeled “By personal service,” current item 5a (item 6a on the revised form) and the unnumbered item in the Declaration of Messenger, on page 2. Logic dictates that the time limitation on service to an attorney’s office be included in those same two items. This addition has been made to those items in the revised form.

Alternative Actions Considered

The committee considered deferring the changes until the next rules cycle in order to take them up at the same time that it considers a proposal for changes to another section of the form suggested by the State Bar Committee on Administration of Justice in its comments on this proposal. The committee concluded that the revisions are appropriate and will benefit litigants and so should not be delayed.

Comments From Interested Parties

The revised form and amended rule were circulated for public comment in the spring 2008 comments cycle. Comments were received from eight individuals and organizations, including several courts.¹ All commentators were in favor of the proposal; two proposed further modifications. As noted above, the proposals by the State Bar commentator are beyond the scope of the circulated form, and so will be considered by the committee in the future.

The committee agreed with other modifications in the organization of form POS-040, particularly to current item 4 (item 5 in the revised form), suggested in the

¹ A summary of the comments and the committee’s responses is attached at pages 11-15.

comments by a private attorney (see comment 1), and has modified the form to incorporate them.

Implementation Requirements and Costs

There will be some minor costs in making the new forms available to the public.

Attachments

Rule 2.260 of the California Rules of Court is amended, effective January 1, 2009, to read as follows:

1 **Rule 2.260. Electronic service**

2

3 **(a)–(e) * * ***

4

5 **(f) Proof of service**

6

7 (1) Proof of electronic service may be by any of the methods provided in Code of
8 Civil Procedure section 1013(a), except that the proof of service must state:

9

10 (A) The electronic notification address of the person making the service, in
11 ~~place of~~ addition to that person's residence or business address;

12

13 **(B)–(D) * * ***

14

15 **(2)–(4) * * ***

16

17 **(g) * * ***

ATTORNEY OR PARTY WITHOUT ATTORNEY <i>(Name, State Bar number, and address):</i> _____ TELEPHONE NO.: _____ FAX NO. <i>(Optional):</i> _____ E-MAIL ADDRESS <i>(Optional):</i> _____ ATTORNEY FOR <i>(Name):</i> _____	FOR COURT USE ONLY Draft 8 07/10/08 Not Approved by the Judicial Council
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	CASE NUMBER:
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT	
PROOF OF SERVICE—CIVIL Check method of service (only one): <input type="checkbox"/> By Personal Service <input type="checkbox"/> By Mail <input type="checkbox"/> By Overnight Delivery <input type="checkbox"/> By Messenger Service <input type="checkbox"/> By Fax <input type="checkbox"/> By Electronic Service	
(Do not use this proof of service to show service of a Summons and complaint.)	

1. At the time of service I was over 18 years of age and **not a party to this action.**
2. My residence or business address is: _____
3. The fax number or electronic notification address from which I served the documents is *(complete if service was by fax or electronic service):* _____
4. On *(date):* _____ I served the following **documents** *(specify):*

The documents are listed in the *Attachment to Proof of Service—Civil (Documents Served)* (form POS-040(D)).

5. I served the documents on the **person or persons** below, as follows:
 - a. Name of person served: _____
 - b. *(Complete if service was by personal service, mail, overnight delivery, or messenger service.)*
 Business or residential address where person was served: _____

- c. *(Complete if service was by fax or electronic service.)*
 - (1) Fax number or electronic notification address where person was served: _____

(2) Time of service: _____

The names, addresses, and other applicable information about persons served is on the *Attachment to Proof of Service—Civil (Persons Served)* (form POS-040(P)).

6. The documents were served by the following means *(specify):*
 - a. **By personal service.** I personally delivered the documents to the persons at the addresses listed in item 5. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents, in an envelope or package clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office, between the hours of nine in the morning and five in the evening. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not younger than 18 years of age between the hours of eight in the morning and six in the evening.

(Continued on back)

CASE NAME	CASE NUMBER:
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6. b. **By United States mail.** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses in item 5 and *(specify one)*:
- (1) deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.
 - (2) placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.
- I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at *(city and state)*:
- c. **By overnight delivery.** I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses in item 5. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.
 - d. **By messenger service.** I served the documents by placing them in an envelope or package addressed to the persons at the addresses listed in item 5 and providing them to a professional messenger service for service. *(A declaration by the messenger must accompany this Proof of Service or be contained in the Declaration of Messenger below.)*
 - e. **By fax transmission.** Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed in item 5. No error was reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.
 - f. **By electronic service.** Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses listed in item 5. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME OF DECLARANT)

▶ _____
(SIGNATURE OF DECLARANT)

(If item 6d above is checked, the declaration below must be completed or a separate declaration from a messenger must be attached.)

DECLARATION OF MESSENGER

By personal service. I personally delivered the envelope or package received from the declarant above to the persons at the addresses listed in item 5. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package, which was clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office, between the hours of nine in the morning and five in the evening. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not younger than 18 years of age between the hours of eight in the morning and six in the evening.

At the time of service, I was over 18 years of age. I am not a party to the above-referenced legal proceeding.

I served the envelope or package, as stated above, on *(date)*:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(NAME OF DECLARANT)

▶ _____
(SIGNATURE OF DECLARANT)

INFORMATION SHEET FOR PROOF OF SERVICE—CIVIL

(This information sheet is not part of the official proof of service form and does not need to be copied, served, or filed.)

USE OF THIS FORM

Note: This proof of service form should **not** be used to show proof of service of a summons and complaint. For that purpose, use *Proof of Service of Summons* (form POS-010).

This form is designed to be used to show proof of service of documents by (1) personal service, (2) mail, (3) overnight delivery, (4) messenger service, (5) fax, or (6) electronic transmission.

Certain documents must be personally served. For example, an order to show cause and temporary restraining order generally must be served by personal delivery. You must determine whether a document must be personally delivered or can be served by mail or another method.

GENERAL INSTRUCTIONS

A person must be over 18 years of age to serve the documents. The person who served the documents must complete the Proof of Service. **A party to the action cannot serve the documents.**

The Proof of Service should be typed or printed. If you have Internet access, a fillable version of this proof of service form is available at www.courtinfo.ca.gov/forms.

Complete the top section of the proof of service form as follows:

First box, left side: In this box print the name, address, and telephone number of the person *for* whom you served the documents.

Second box, left side: Print the name of the county in which the legal action is filed and the court's address in this box. The address for the court should be the same as the address on the documents that you served.

Third box, left side: Print the names of the plaintiff/petitioner and defendant/respondent in this box. Use the same names as are on the documents that you served.

Fourth box, left side: Check the method of service that was used. You should check only one method of service and should show proof of only one method on the form. If you served a party by several methods, use a separate form to show each method of service.

First box, top of form, right side: Leave this box blank for the court's use.

Second box, right side: Print the case number in this box. The case number should be the same as the case number on the documents that you served.

Third box, right side: State the judge and department assigned to the case, if known.

Complete items 1–6:

1. You are stating that you are over the age of 18 and that you are not a party to this action.
2. Print your home or business address.
3. If service was by fax service or electronic service, print the fax number or electronic notification address from which service was made.
4. List each document that you served. If you need more space, check the box in item 4, complete the *Attachment to Proof of Service—Civil (Documents Served)* (form POS-040(D)), and attach it to form POS-040.
5. Provide the names, addresses, and other applicable information about the persons served. If more than one person was served, check the box on item 5, complete the *Attachment to Proof of Service—Civil (Persons Served)* (form POS-040(P)), and attach it to form POS-040.
6. Check the box before the method of service that was used, and provide any additional information that is required. The law may require that documents be served in a particular manner (such as by personal delivery) for certain purposes. Service by fax or electronic transmission generally requires the prior agreement of the parties.

You must sign and date the proof of service form. By signing, you are stating under penalty of perjury that the information that you have provided on form POS-040 is true and correct.

SHORT TITLE:	CASE NUMBER:
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ATTACHMENT TO PROOF OF SERVICE—CIVIL (PERSONS SERVED)

(This attachment is for use with form POS-040.)

NAMES, ADDRESSES, AND OTHER APPLICABLE INFORMATION ABOUT PERSONS SERVED:

<u>Name of Person Served</u>	<u>Where Served</u> <i>(Provide business or residential address where service was made by personal service, mail, overnight delivery, or messenger service. For other means of service, provide fax number or electronic notification address, as applicable.)</i>	<u>Time of Service</u> <i>(Complete for service by fax transmission or electronic service.)</i>
		Time: _____

SPR08-21**Civil: Proof of Service** (amend Cal. Rules of Court, rule 2.260; revise forms POS-040 and POS-040(P))

Paraphrased comments are indicated by an asterisk; all other comments are verbatim.

	Commentator	Position	Comment	Committee Response
1.	Julie A. Goren, Esq. Lawdable Press Sherman Oaks	AM	<p>[re form POS-040]</p> <p>1. Item 5b.: Replace “address of person served” with “address, fax number, or electronic notification of person served.”</p> <p>2. Item 5b(1): The address of the recipient is required in all cases except fax or electronic service. Saying that the address is required when service is by “personal delivery or mail” could be construed to not include messenger and overnight delivery. Therefore, saying instead that the address must be inserted if service was “not by fax or electronic service” is more accurate.</p> <p>3. Item 5c: There is no requirement that the exact time of service be stated when service is by personal service. Therefore, 5c should say that time of service must be entered if service was by “fax or electronic service.”</p> <p>4. Item 6a: When service is by personal delivery to an attorney’s office, delivery must be made between the hours of 9:00 and 5:00. When is by personal delivery to a party’s residence, delivery must be made between the</p>	<p>1. The proposed revisions to this section of the form have been modified.</p> <p>2. The proposed revisions to the form have been modified to distinguish between service by fax or electronic service, on the one hand, and all other methods of service on the other hand.</p> <p>3. The committee acknowledges this comment, but notes that there is a certain time frame in which personal service must occur. The form has been revised to add the permissible hours of service on an attorneys’ office to item 6a to the messenger declaration, both of which items already include the permissible timeframe for service on a residence. This eliminates any need to include time of service for service by personal delivery in item 5.</p> <p>4. The committee agrees. See above response.</p>

Positions: A = Agree; AM = Agree if modified; N = Do not agree.

SPR08-21**Civil: Proof of Service** (amend Cal. Rules of Court, rule 2.260; revise forms POS-040 and POS-040(P))

Paraphrased comments are indicated by an asterisk; all other comments are verbatim.

	Commentator	Position	Comment	Committee Response
			<p>hours of 8:00 and 6:00. The language of 6a currently contains the 8:00–6:00 language for service at the party’s residence, but does contain the relevant time range for delivery at the attorney’s office. For consistency, and to obviate the need to state an exact time of service at 5c, 6a(1) should state that was made between the hours of 9:00 and 5:00.</p> <p>5. “Declaration of Messenger:” With respect to service “by messenger”—which is not different from “personal service” except that someone hands it to the messenger and there are 2 declarations—as currently drafted, the exact time is required if it’s personal service, but not if it’s service by messenger. Again, for consistency purposes, I suggest revising the “Declaration of Messenger” language so that (1) re service at attorney’s office says it was between 9:00 and 5:00.</p> <p>6. POS-040(P): Remove “personal” service from the heading of column for “Time of Service.”</p>	<p>5. The committee agrees. See response to point 3 above.</p> <p>6. Proposed form POS-040(P) has been revised in accordance with this comment.</p>
2.	Orange County Bar Association By Cathrine Castaldi, President Newport Beach	A	No specific comments.	Commentator’s agreement is noted.
3.	State Bar of California, Committee on Administrative Justice By Saul Bercovitch, Staff Attorney	AM	1. CAJ supports this proposal in general, but suggests some modifications to the form.	1. The support of the committee is noted.

Positions: A = Agree; AM = Agree if modified; N = Do not agree.

SPR08-21**Civil: Proof of Service** (amend Cal. Rules of Court, rule 2.260; revise forms POS-040 and POS-040(P))

Paraphrased comments are indicated by an asterisk; all other comments are verbatim.

	Commentator	Position	Comment	Committee Response
	San Francisco		<p>2. CAJ believes that item 6f on page 2 of the form should follow more closely the requirements of rule 2.260 of the California Rules of Court. Rule 2.260(a) is headed “Consent to electronic service.” Rule 2.260(a)(2) allows electronic service on a party if, “A party indicates that the party agrees to accept electronic service by” filing and serving a notice so stating or electronically filing any document with the court. A party is deemed to agree to accept electronic service by taking either of those two actions. This is not what is commonly understood by “an agreement of the parties” (the language used in item 6f). Such an “agreement” usually refers to a bilateral or multilateral oral or written agreement, as opposed to the unilateral actions described in rule 2.260(a)(2). Moreover, an oral or written agreement to accept electronic service would not satisfy the requirements of rule 2.260(a)(2) unless the agreement were accompanied by the filing and service of a notice or the electronic filing of a document with the court.</p> <p>Item 6e of the form uses similar language (“Based on an agreement of the parties to accept service by fax transmission . . .”), but that language corresponds with the authorizing rule of court. Rule 2.306(a)(1) states, “Service by fax transmission is permitted only if the parties agree and a written confirmation of that agreement is made.” That rule contemplates a</p>	<p>2. This comment and proposal concerning item 6f and the instructions concerning it address a section of the form that is not within the scope of the proposal circulated for comment. The committee will consider the suggestion in the future as time and resources allow.</p>

Positions: A = Agree; AM = Agree if modified; N = Do not agree.

SPR08-21**Civil: Proof of Service** (amend Cal. Rules of Court, rule 2.260; revise forms POS-040 and POS-040(P))

Paraphrased comments are indicated by an asterisk; all other comments are verbatim.

	Commentator	Position	Comment	Committee Response
			<p>bilateral or multilateral oral or written agreement with a written confirmation, and does not require filing or service of any notice to that effect. Rule 2.260(a)(2), however, is different.</p> <p>CAJ suggests modifying the first sentence in item 6f to state, “Based on a court order or the consent of each party served, I caused the documents to be sent to the persons at the electronic notification addresses listed in item 5.” Similar changes should be made on the Information Sheet for Proof of Service on page 3 of the form, item 6, which states, “Service by fax or electronic transmission generally requires the prior agreement of the parties.” Again, this statement is true of service by fax but appears to be inaccurate as to service by electronic transmission.</p> <p>It appears that the second sentence in item 6f does not conform to rule 2.260(f)(1)(D), which states that the proof of service must state, “That the document was served electronically and the transmission was reported as complete and without error” CAJ members were uncertain as to whether this language in the rule was intended to mean that the sender received no error message, as suggested in the proposed form, or that the sender received some electronic or other notification that the transmission was complete and without error. CAJ believes that the language in the form (“I</p>	

Positions: A = Agree; AM = Agree if modified; N = Do not agree.

SPR08-21**Civil: Proof of Service** (amend Cal. Rules of Court, rule 2.260; revise forms POS-040 and POS-040(P))

Paraphrased comments are indicated by an asterisk; all other comments are verbatim.

	Commentator	Position	Comment	Committee Response
			<p>did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.”) more accurately reflects the practical reality of electronic transmission, and suggests that consideration be given to amending rule 2.260(f)(1)(D) to conform to this language.</p> <p>3. In addition to these proposed changes, CAJ noted two typographical errors. Item 5c on the first page includes a comma between “personal” and “delivery,” which should be deleted. And the parenthetical line following the signature line on the second page of the form refers to “item 5d above,” but should refer to “item 6d above.”</p> <p>4. Finally, CAJ suggests that the Judicial Council consider citing either Code of Civil Procedure section 1010.6 or rule 2.260 of the California Rules of Court, relating to rules governing electronic service, together with the statutes cited in the bottom right corner of the first page of the form.</p>	<p>3. These errors have been corrected in the revised forms.</p> <p>4. Reference to Code Civ. Proc., § 1010.6 has been added to the proposed form.</p>
4.	Superior Court of Los Angeles County	A	No specific comments.	Commentator’s agreement is noted.
5.	Superior Court of San Bernardino County By Debra Meyers	A	No specific comments.	Commentator’s agreement is noted.

Positions: A = Agree; AM = Agree if modified; N = Do not agree.

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	Commentator	Position	Comment	Committee Response
	Director of Staff Counsel Services and Self-Help Division			
6.	Superior Court of San Diego County By Michael M. Roddy, Executive Officer	A	No specific comments.	Commentator's agreement is noted.
7.	Superior Court of Ventura County Self-Help Legal Access Center By Tina Rasnow Senior Attorney / Coordinator	A	No specific comments.	Commentator's agreement is noted.
8.	Derek Tabone, Attorney Van Nuys	A	No specific comments.	Commentator's agreement is noted.

Positions: A = Agree; AM = Agree if modified; N = Do not agree.