

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

SB 1040 (Ochoa Bogh)
Version: April 8, 2024
Hearing Date: April 16, 2024
Fiscal: Yes
Urgency: No
ID

SUBJECT

Civil actions: service of process

DIGEST

This bill permits substitute service of process upon an inmate in a state prison or county jail through specified processes, if an attempt at personal service as described was not successful.

EXECUTIVE SUMMARY

Under the Due Process clause of the United States Constitution, individuals whose rights may be effected by a judicial proceeding are entitled to be heard and notified of the proceeding. Typically, notice of the proceeding must be delivered to the person to be served in person in order to satisfy the Constitutional requirements of procedural due process. However, in certain circumstances, it may be difficult to personally serve the individual. When personal service is impossible and the party completing service has exercised reasonable diligence to personally serve the other party, substitute service through other means may be permissible. This bill allows for substitute service of an individual who is incarcerated in a state prison or jail, when at least one attempt of personal service is not successful. It specifies that, if substitute service is attempted by leaving a copy of the papers to be served with a warden, sheriff, or jailer, and the person to be served has been transferred or released, the warden, sheriff, or jailer must notify the person completing service within 24 hours of that fact, and service shall be considered ineffective. This bill also specifies a process for personal service and substitute in state prisons and jails to be completed, and makes the warden, sheriff, or jailer liable for failing to serve a paper provided to them. SB 1040 is sponsored by the California Association of Legal Support Professionals, and the San Bernardino County Sheriff. The Committee has received no timely opposition.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Holds that parties whose rights are to be effected have a procedural due process right to be heard, and in order that they be heard, they must have notice of the legal proceeding against them. (*Fuentes v. Shevin* (1972), 407 U.S. 67, 80.)
- 2) Requires that notice to a party whose interests are to be effected in a legal proceeding be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” (*Mullane v. Central Hanover Bank & Trust, Co.* (1950), 339 U.S. 306, 314.)
- 3) Provides that a summons may be served by personal delivery of a copy of the summons and the complaint on the person to be served, and that personal service is deemed complete at the time of such delivery. Requires that the date of the personal service must be affixed to the face of the copy at the time of delivery. (Code of Civ. Proc. § 415.10.)
- 4) Provides that, in lieu of personal delivery of a copy of the summons and complaint to a corporate or public entity, as defined, the summons may be served by leaving a copy during usual office hours at their office, or if no physical address is known, at their usual mailing address, other than a United States Postal Service post office box, with the person apparently in charge of the office, and subsequently mailing a copy of the summons and complaint by first-class mail with prepaid postage to the place where the summons and complaint were left. If the summons is left at the mailing address, it must be left with a person who is at least 18 years old, and they must be informed of the contents of the summons. Substitute service through these methods is deemed complete on the tenth day after the copy is mailed. (Code of Civ. Proc. § 415.20(a).)
- 5) Provides that, if a copy of a summons and complaint cannot with reasonable diligence be personally delivered to an individual to be served, a summons may be served by leaving a copy of the summons and complaint at the person’s dwelling, usual place of abode, usual place of business, or usual mailing address other than a United States Postal Service post office box, in the presence of a competent member of the household or person apparently in charge of the office, place of business, or usual mailing address, who is at least 18 years old. The competent member of the household or person apparently in charge must be informed of the contents, and a copy of the summons and complaint must thereafter be mailed by first-class mail, with prepaid postage, to the person to be served at the address where the summons were left. Service in this manner is deemed complete on the tenth day after mailing. (Code of Civ. Proc. § 415.20(b).)

- 6) Provides that, if the only address reasonably known for the person to be served is a private mailbox obtained through a commercial mail receiving agency, service of process may be effected on the first delivery by leaving a copy of the summons and complaint with the commercial mail receiving agency, as prescribed. (Code of Civ. Proc. § 415.20(c).)
- 7) Provides that, if a summons is to be served by mail, a copy of the summons and complaint must be mailed by first-class mail or airmail, with prepaid postage, with two copies of a specified notice, and with a prepaid return envelope for acknowledgement of receipt of summons. Specifies that service by this manner is deemed complete on the date of the written acknowledgement of receipt, if the acknowledgement is returned to the person sending service. (Code of Civ. Proc. § 415.30.)
- 8) Requires that a warden of a state prison, sheriff, or jailer who receives papers in a judicial proceeding directed to an inmate in the custody of the warden, sheriff, or jailer, forthwith deliver the paper to the incarcerated person with a note on the papers indicating the time of service. Provides that the warden, sheriff, or jailer is liable to the incarcerated person for all damages occasioned by the warden, sheriff, or jailer's failure to deliver the papers as proscribed. Provides that service to an incarcerated person may be completed by any person who may lawfully complete service. (Penal Code § 4013.)
- 9) Regulates and requires the registration of specified persons who qualify as process servers. (Bus. & Prof. Code § 22350 *et seq.*)

This bill:

- 1) Provides that, if the only address reasonably known for a person to be served is a state prison or county jail, personal service of process must first be attempted as specified, and that substitute service may be made by leaving a copy of the summons and complaint with the warden, sheriff, or jailer as prescribed, if personal service cannot be made.
- 2) Provides that, if the warden, sheriff, or jailer who receives a copy of the summons and complaint to be served on a person who has been transferred or released from the warden, sheriff, or jailer's custody, the warden, sheriff, or jailer must notify the server of the summons and complaint within 24 hours of that fact, and that service shall not be considered effective.
- 3) Provides that, if a sheriff or a jailer receives paper in a judicial proceeding directed to an incarcerated person in their custody, the sheriff or jailer must forthwith deliver the paper to the incarcerated person with a notice on the paper indicating the time of

service. Provides that the sheriff or jailer is liable to the incarcerated person for all damages occasioned by failing to deliver the paper as specified.

- 4) Provides that, if a warden of a state prison receives a paper in a judicial proceeding directed to an incarcerated person in their custody, the warden must not preclude proper service of the paper, and specifies service must be completed in one of the following manners:
 - a) By having the paper delivered to the inmate as incoming confidential mail, in which it is placed in an envelope provided by the person requesting service, opened by designated institution staff in the presence of the inmate to be served at a designated time and place, and removed from the envelope upside down and shaken to prevent inadvertent reading of the contents and to ensure the absence of prohibited materials, and have the incarcerated person sign for the mail at the time of delivery;
 - b) By allowing a peace officer be escorted into the security area to complete service; and
 - c) By allowing personal service under the following circumstances:
 - i. Personal service is requested to the institution;
 - ii. The incarcerated person can reasonably be brought to the visiting area; and
 - iii. Permitting personal service does not compromise the institution's security.
- 5) Specifies that the warden of a state prison is liable to an incarcerated person for all damages occasioned from the warden failing to allow proper service.
- 6) Specifies that service directed to an incarcerated person within any institution in the state may be served by any person who may lawfully serve process.

COMMENTS

1. Author's statement

According to the author:

SB 1040 facilitates service of process to incarcerated individuals at a state prison or county jail if the prison or jail is the recipient party's only reasonably known address. The bill addresses some courts' interpretation that process servers must attempt to personally serve an incarcerated person with court documents multiple times before leaving them with the facility's litigation coordinator, regardless of whether the jail or prison staff indicate they will not present the documents to the named person. SB 1040 protects the due process rights of incarcerated individuals, while holding jail and prison administrators responsible for delivery of court documents to the named person.

2. The constitutional right to adequate service of process

The Fourteenth Amendment of the United States Constitution ensures all persons in the United States protection against deprivation of life, liberty, or property without “due process of law.”¹ It is one of the fundamental tenants of the nation’s Constitution and the rights of persons in the United States that it protects. The right to due process includes two separate types of due process: substantive due process and procedural due process. While substantive due process concerns fundamental rights, procedural due process relates to the adjudicative procedures a person is due in order to be able to ensure that they are heard and protected against a mistaken or unjustified deprivation of life, liberty, or property. Thus, procedural due process relates to an individual’s right to a process that is fair and ensures they are afforded the ability to defend themselves or make their case.

An important component of procedural due process is the right of an individual being sued or brought into court to be heard. However, in order for an individual to be able to be heard, they must be notified of the court proceeding and the claims against them. As the United States Supreme Court has stated: “for more than a century the central meaning of procedural due process has been clear: parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.”² Notice to a defendant of a lawsuit against them must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”³ In California, this notice must be accomplished by personal service – the handing of the complaint and summons relating to the case to the person whose rights are affected in person. (Cal. Code of Civ. Proc. § 415.10.)

3. Substituted service is sometimes available when personal service is not possible

However, sometimes it may be difficult to personally serve someone. For example, a party may try to serve a defendant at their residence, only to find that they are not at home, or if the residence is in a gated community, that they cannot enter the community to visit the defendant’s residence. Prior to 1969, California and its courts required strict compliance with personal service; however, in 1969, the state enacted laws that allowed for substituted service through other means in limited circumstances. In order to be able to serve a defendant through substituted service, the person completing service must first exercise “reasonable diligence” to personally serve the defendant. (Cal. Code of Civ. Proc. § 415.20.) Thus, even with substituted service, a person attempting service must still attempt to serve the defendant personally first. The courts have generally found that “ordinarily, two or three attempts at personal service at a proper place

¹ U.S. Const. Art. XIV, Sec. 1.

² *Fuentes v. Shevin* (1972), 407 U.S. 67, 80; *Wilkinson v. Austin* (2005), 545 U.S. 209, 226.

³ *Mullane v. Central Hanover Bank & Trust, Co.* (1950), 339 U.S. 306, 314.

should fully satisfy the requirement of reasonable diligence and allow substituted service to be made.”⁴

Substituted service is allowed to be accomplished in a variety of ways. For example, when service is to be made on an individual and is attempted at the individual’s home, and they are not available for personal service, the documents to be served can be left with a competent member of the household who is at least 18 years old. (Cal. Code of Civ. Proc. § 415.20(b).) A copy of the documents must then also be mailed by first-class mail to the individual’s home where the documents were left. Substitute service can be accomplished in a similar way by leaving the documents at the individual’s usual place of business with a person apparently in charge of the office. When service is to be completed on an individual at their residence in a gated community or a multifamily dwelling, the law requires that the community or dwelling’s security guard grant access to the community or dwelling for the purposes of completing personal service. (Code of Civ. Proc. § 415.21.)

On the other hand, substituted service in lieu of personal service in the first instance is only allowed in limited circumstances and to certain defendants. Substituted service is allowed in place of personal service when the entity to be served is a corporate or public entity. (Code of Civ. Proc. § 415.20(a).) It is also allowed to be accomplished by mail in the first instance, if the only address reasonably known for the person to be served is a private mailbox obtained through a commercial mail receiving agency. (Code of Civ. Proc. § 415.20(c).)

4. Service of individuals currently incarcerated in California

Affecting personal service when a defendant is currently incarcerated in a local jail or state prison may present challenges due to the individual’s incarceration. Carceral institutions usually maintain significant security measures for entry and for visiting with inmates. The author asserts that often, in order to meet the requirements of reasonable diligence, process servers must make multiple attempts to personally deliver the documents to an incarcerated individual even when the jail or prison staff have indicated that they are unable to present the individual to receive the documents.

California law and guidance from the California Department of Corrections and Rehabilitation (CDCR) address service to inmates in the custody of a jail or state prison. Section 4013 of the Penal Code requires a warden, sheriff, or jailer to “forthwith” deliver papers directed to an incarcerated individual relating to a judicial proceeding. (Pen. Code § 4013.) The warden, sheriff, or jailer must include a note on the papers indicating the time the papers were served, and is liable to the incarcerated individual for any damages that result from the warden, sheriff, or jailer’s failure to deliver the papers to the incarcerated individual.

⁴ *Espindola v. Nunez* (1988) 199 Cal. App. 3d 1389, 1392.

Moreover, CDCR's Operations Manual specifies procedures for service on an inmate in a prison. These regulations specify that service may be completed by: accepting the papers from the process server and completing service on the inmate; escorting a sworn peace officer into a security area to complete service; or by permitting a non-sworn process server to complete personal service under certain circumstances.⁵ For non-sworn process servers to be allowed to personally serve an inmate, they must desire to make personal service and have made prior arrangements, inmates must be able to be reasonably brought to the visiting area, and allowing personal service must not compromise the institution's security. The Operations Manual also specifies that, if a request for service is received by mail, the institution must serve the papers and complete the verification of service. Thus, the CDCR's guidance allows for personal service, under certain circumstances, as well as other forms of service if requested.

5. This bill allows substituted service in the first instance

SB 1040 proposes to allow for substituted service under certain circumstances when a defendant is incarcerated in a California prison or jail. It does so by specifying in the California Code of Civil Procedure that, if the only address reasonably known for the person to be served is a state prison or county jail, service may be effected by leaving a copy of the summons and complaint with the warden, sheriff, or jailer in a process prescribed in Sections 4013 and 4013.5 of the Penal Code, if personal service is first attempted and is not successful. Under its amendments to Section 4013, a sheriff or jailer of a county jail must deliver the documents "forthwith" to the inmate to be served with a note indicating the time of service. A sheriff or jailer would be liable for all damages to the inmate intended to be served arising from the sheriff or jailer's failure to deliver the documents forthwith.

If the inmate to be served is in the custody of a state prison, SB 4013 requires that the institution not preclude proper service of the summons, and codifies the methods for service outlined in the CDCR Operations Manual for effectuating that service. Thus, it specifies that personal service of an inmate may be allowed, if the person serving the papers desires to make personal service and makes prior arrangements, the inmate can be reasonably brought to the visiting area, and personal service does not compromise the institution's security. SB 1040 also allows for service to be completed by the institution accepting the papers from the process server and completing service on the inmate as proscribed or by the institution escorting a sworn peace officer into a security area to complete service. SB 1040 makes the warden liable to the incarcerated individual for all damages resulting from the institution's failure to allow proper service as specified. If the institution accepts the summons for delivery on the incarcerated person by the institution, SB 1040 requires the institution to treat the summons as incoming confidential mail and treat it with the procedures applied to incoming confidential mail.

⁵ Cal. Dept. of Corrections & Rehabilitation, Department Operations Manual (DOM) Ch. 1, Art. 18, § 14010.7.4 (2024), available at <https://www.cdcr.ca.gov/regulations/cdcr-regulations/dom-toc/>.

These procedures under the bill require that institution staff place the paper in an envelope provided by the person requesting service, open the envelope in the presence of the incarcerated person at a designated time and place, and remove the contents of the envelope upside down to prevent inadvertent reading of the contents and shake them to ensure there are no prohibited material. The bill requires that the incarcerated person sign for all confidential mail at the time of delivery. Lastly, it allows that, in the context of a state prison, service directed to a person incarcerated in any institution in the state may be served by any person who may lawfully serve process.

SB 1040 also includes a provision to address the scenario in which the inmate is no longer at the jail or prison that is their last reasonably known address. If an inmate to be served has been transferred to another facility or has been released, the warden, sheriff, or jailer who receives the documents must notify the process server within 24 hours of that fact. In that case, SB 1040 states that service cannot be considered effective.

6. An inmate's remedy under this bill is to sue for damages

Because SB 1040 includes provisions that specify that, if the warden, sheriff, or jailer fails to deliver the summons, or delivers them to the inmate too late in the specified process, and the inmate loses the right to defend themselves or their interests in the judicial proceeding for which service was required, the inmate could seek an award of damages in court. If, for example, an inmate was sued for collections of a debt or breach of contract, and a default judgement was entered against them in the case, they could sue the warden, sheriff, or jailer to recover the damages they suffered from not being able to defend their interests in the collections or breach of contract suit. This provision could thus allow defendant inmates some recourse if they never receive notice as required, and may encourage wardens, sheriffs, and jailers to comply with SB 1040's requirements in order to avoid liability.

However, this provision does not provide for or allow the underlying judicial proceeding to be reversed if the inmate never received notice. Therefore, the inmate could lose their property, or a significant interest or right in the underlying proceeding, for which damages or any post-judgement remedy would be unable to fully remedy. For example, if the inmate did not receive the notice and a default judgement was entered against them in a judicial foreclosure suit, they could later sue the prison or jail for the damages they suffered in losing their home and not being able to present their case in the judicial foreclosure proceeding, but they would not be able to reverse the sale of their home in the foreclosure sale. In another example, an inmate who was not served the papers from the prison or jail and therefore had a default judgement entered against them in a family court case over custody of their child, would not be able to reverse the custody determination based on Penal Code section 4013 or this bill.

The only way for an inmate defendant to undo a default judgement would be through filing a motion to set aside the default judgement. Code of Civil Procedure Section 473.5

allows for a defendant who did not receive actual notice of the judicial proceeding in which a default judgement was entered against them to file a motion to set aside the default judgment with the court. (Code of Civ. Procedure § 473.5.) In order to be able to file such a motion, the motion must be served and filed within a reasonable time, but in no case more than either two years after the entry of the default judgement, or 180 days after the defendant received notice of the default judgement. A defendant must also file with such a motion their answer, motion, or other pleading in response to the original complaint. If the court finds that a defendant made a motion within the required timeframe, and that the defendant's lack of actual notice was not caused by their avoidance of service or inexcusable neglect, the court may set aside the default judgement and allow the defendant to defend themselves in a re-hearing of the underlying case.

Practically speaking, filing motions to set aside a default judgement are not easy or simple motions. The defendant inmate would need to have become aware of the default judgement within the timeframe required for such a motion to be filed, and must have access to an attorney or legal assistance to file such a motion. If, for example, the defendant inmate is serving a multi-year sentence, the two year timeframe for filing a motion to set aside a default judgement after entry of the default may well run before the inmate is even released from jail. Moreover, in certain types of judicial proceedings, the harm caused the defendant inmate from a default judgement may be irreversible: they may lose title to their home, or lose custody rights and the ability to see their child. Their property could be seized and sold to satisfy a judgement of monetary awards to the plaintiff. In these situations, even if a court were to set aside the judgement and permit the defendant to present their defense, the defendant's rights and property may already have been irreversibly affected or disposed of.

Such realities are part of why notice is such an important component of an individual's Constitutional procedural due process rights and right to be heard, and why personal service is highly favored in the law. Allowing more substitute service may present a greater risk that inmates are not afforded actual notice of civil proceedings against them. SB 1040 requires personal service be attempted at least once, and includes a variety of procedures to help ensure that wardens, sheriffs, and jailers comply with its requirements to actually serve legal documents provided by a process server. However, two remaining ambiguities in this bill include the process for when an inmate refuses to sign for the service documents, as required, and how soon after the prison warden receives the service documents from the process server must the prison deliver the documents to the inmate. The author has agreed to continue working with stakeholders on these issues.

SUPPORT

California Association of Legal Support Professionals (sponsor)
San Bernardino County Sheriff

OPPOSITION

None received

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

AB 561 (Chen, 2023) would have allowed service of process and subpoenas on incarcerated individuals in the first instance if the prison or jail is the individual's only reasonably known address by leaving a copy of the summons and complaint with the warden, sheriff, or jailer, and would have required the warden, sheriff, or jailer to notify the process server within 24 hours of attempted service if the individual to receive service has been transferred or released from the facility. AB 561 died in the Assembly Appropriations Committee.

AB 1974 (Chen, Ch. 255, Stats. 2022) applied to wardens at state prisons existing law requiring a sheriff or jailer of a county jail who received paperwork in a judicial proceeding to deliver the document to the incarcerated individual.

AB 3131 (Diep, 2020) would have required persons designated to effect service upon inmates of a state prison to forthwith deliver the paper to the inmate, and would have made this individual liable for all damages occasioned by neglecting to deliver the paper. AB 3131 died in the Assembly Public Safety Committee.

AB 622 (Chen, Ch. 12, Stats. 2019) expanded the types of structures into which a qualified individual must be granted limited access for the purpose of service of process or service of a subpoena to include covered multifamily dwellings.

AB 1093 (Chen, Ch. 129, Stats. 2017) clarified the manner in which service of process on the first delivery attempt may be effected on a person whose only address reasonably known is a private mailbox obtained through a commercial mail receiving agency.
