

SENATE JUDICIARY COMMITTEE
Senator Hannah-Beth Jackson, Chair
2019-2020 Regular Session

SB 1146 (Umberg)
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AWM

SUBJECT

Civil procedure: electronic filing and remote depositions.

DIGEST

This bill, as proposed to be amended, makes permanent two of the emergency measures adopted by the Judicial Council to ensure civil litigation can move forward during the COVID-19 pandemic: allowing parties to electronically serve documents on represented parties and to opt to have represented parties serve them electronically; and allowing depositions to be taken with the deposition officer at a different location than the deponent.

EXECUTIVE SUMMARY

While the legal profession has increased its use of technology over the years, the Code of Civil Procedure still imposes strict limits on when technology may be used to facilitate two key aspects of litigation: service and depositions. The COVID-19 pandemic, however, required a reassessment of those limits in light of the risks posed by in-person contact. The Judicial Council adopted a number of emergency rules in recognition of the fact that, for civil litigation to move forward, steps had to be taken to protect parties, attorneys, court staff, and other participants from unnecessary exposure to COVID-19.

This bill, as proposed to be amended, would codify two of the emergency rules that would otherwise expire 90 days after the COVID-19-related state of emergency is lifted. First, the bill would allow electronic service of documents on represented parties, and for other parties to elect electronic service by represented parties. Second, the bill would allow any participant in a deposition to elect that the deposition be taken with the deposition officer (court reporter) at a different location than the deponent, and for the deponent to be sworn in remotely; other counsel of record would retain their right to attend the deposition in person. This bill is co-sponsored by the Consumer Attorneys of

California and California Defense Counsel, and is supported by the California Deposition Reporters Association. There are no known opponents.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Provides that electronic service of documents is permitted only under specified circumstances:
 - a) When a party or other person has expressly consented to receive electronic service in the specific action (Code Civ. Proc., § 1010.6(a)(2)(A)(ii)); or
 - b) The court has ordered electronic service on a represented party or other represented person in a jurisdiction that has adopted local rules permitting electronic filing of documents and related procedures. (Code Civ. Proc., § 1010.6(a)(2)(A)(ii), (c), (d).)
- 2) Suspends, for the duration of the COVID-19-related state of emergency and 90 days after, the limitations on electronic service listed above and provides for alternative electronic service procedures and requirements in cases where parties are not already required to provide or accept electronic service (Judicial Council, Emergency Rules Related to COVID-19, Emergency Rule 12):
 - a) Parties represented by counsel must accept electronic service of notice and documents that may be served by mail, express mail, overnight delivery, or facsimile transmission. Before first serving a represented party electronically, the serving party must confirm by telephone or email the appropriate electronic service address for the counsel being served. (Judicial Council, Emergency Rules Related to COVID-19, Emergency Rule 12(b)(1).)
 - b) Parties represented by counsel must, upon the request of any party who has appeared in the action or proceeding, and who provides an electronic service address and copy of the Emergency Rule, electronically serve the requesting party with any notice or document that may be served by mail, express mail, overnight delivery, or facsimile transmission. (Judicial Council, Emergency Rules Related to COVID-19, Emergency Rule 12(b)(2).)
 - c) Self-represented parties may be electronically served if they provide with written consent. (Judicial Council, Emergency Rules Related to COVID-19, Emergency Rule 12(c).)
- 3) Provides that a person may take, and any person other than the deponent may attend, a deposition by telephone or other remote electronic means. (Code Civ. Proc., § 2025.310(a).)
- 4) Provides that the court may expressly permit a nonparty deponent to appear at a deposition by telephone if it finds there is good cause and no prejudice to any party. (Code Civ. Proc., § 2025.310(b).)

- 5) Provides that a party deponent must appear at a deposition in person and in the presence of the deposition officer. (Code Civ. Proc., § 2025.310(b).)
- 6) Suspends, for the duration of the COVID-19-related state of emergency and 90 days after, the limitations on remote depositions listed at items 3-5, and permits a party or nonparty deponent, and/or the deposing party, to elect not to be present with the deposition officer at the time of the deposition. (Judicial Council, Emergency Rules Related to COVID-19, Emergency Rule 11.)

This bill:

- 1) Codifies certain portions of Emergency Rule 12's expansion of the circumstances in which represented parties may serve, or be served with, documents via electronic service, by:
 - a) Requiring a party represented by counsel, who has appeared in an action or proceeding, to accept electronic service of a notice or document that may be served by mail, express mail, overnight delivery, or facsimile transmission, where the serving party has confirmed by telephone or email the appropriate electronic service address for the counsel being served.
 - b) Requiring a party represented by counsel, upon the request of any party who has appeared in an action or proceeding and who provides an electronic service address and a copy of the statute, to electronically serve the requesting party with any notice or document that may be served by mail, express mail, overnight delivery, or facsimile transmission.
- 2) Codifies certain portions of Emergency Rule 11's expansion of the circumstances in which remote depositions may be conducted, by:
 - a) Providing that the party noticing the deposition, or the deponent, may elect to have the deposition officer attend the deposition remotely; and
 - b) Providing that the deponent is not required to be present with the deposition officer when being sworn in at the time of the deposition.
- 3) Provides that any party or attorney of record may be physically present at the deposition at the location of the deponent.

COMMENTS

1. Author's comment

Due to the COVID-19 pandemic, California courts have either stalled all service to civil cases or are operating at a minimum level. In the face of this backlog, court leaders are announcing their intent to delay many civil cases. California courts are struggling to find a way to operate during this pandemic and must better utilize technology. In order to facilitate this adaptation by the courts I have introduced language into SB 1146 that will allow for remote depositions and electronic service.

Unfortunately, during this pandemic, some parties to civil cases have refused to agree to electronic service and instead insist on service by mail or fax. These traditional methods are problematic as they conflict with stay-at-home orders. Without electronic service, attorneys are forced to choose between jeopardizing their own safety and that of staff or risk hindering their client's legal rights by abiding to stay-at-home orders. To prevent this problem, SB 1146 requires that any represented party accept electronic service of documents without needing to consent to electronic service. The bill also requires represented parties to serve others electronically if the other party provides notice of this rule and asks for electronic service.

Finally, SB 1146 will require parties to utilize existing remote and technological resources to conduct depositions. Without this requirement attorneys can face repercussions like sanctions when refusing to conduct an in-person deposition by instead offering to proceed remotely. This change is particularly important because current statute requires that the deposition officer be in the presence of the deponent. Without emergency orders or a change in the statute, no depositions could be able to safely take place during this pandemic.

2. Expanding electronic service will reduce COVID-19 exposure risk and save paper.

In jurisdictions where courts have not adopted mandatory electronic service procedures, electronic service on represented parties is permitted only if the party being served consents to electronic service.¹ There is no provision allowing a represented party to elect to be served electronically by other represented parties.²

¹ Code Civ. Proc., § 1010.6 (a)(2)(A).

² See generally Code Civ. Proc., § 1010.6.

The Judicial Council's Emergency Rule 12 alters the statutory limitations on electronic service. For the duration of the COVID-19-related state of emergency and 90 days after it is lifted, represented parties *must* accept electronically served documents, and *must* serve other parties electronically when those other parties request it.³ Parties serving documents electronically are still subject to the timeframes for electronic service set forth in Code of Civil Procedure section 1010.6(a)(4) and (5).⁴ Emergency Rule 12 also provides for electronic service on self-represented parties who consent in writing.⁵

This bill would make permanent Emergency Rule 12's provisions for electronic service from and on represented parties. In the immediate wake of the COVID-19 pandemic – when the virus has been contained sufficiently to lift the state of emergency, but before the virus has abated entirely – allowing parties to elect electronic service from other represented parties, and to elect to serve represented parties electronically, will help attorneys, their staff, and delivery personnel to avoid exposure. And taking a longer view, allowing electronic service is a logical step in the legal profession's move toward "paperlessness." Many law firms, upon being served with paper copies, immediately scan the documents and put the paper copies away for good; giving attorneys the option to cut down on unnecessary paper copies will save time and effort, and benefit the environment.

The bill's required electronic service provisions have important limitations protecting self-represented parties. Under this bill, self-represented parties would be able to serve represented parties electronically, and could opt into electronic service on request. The bill does not, however, require that self-represented parties accept electronic service of documents or serve documents electronically. These protections for self-represented parties will preserve access to justice for litigants without, e.g., reliable internet service or access to a computer.

3. Allowing deposition officers to appear remotely at depositions on a permanent basis will avoid needless COVID-19 exposure after the state of emergency is lifted and increase opportunities for, and access to, court reporters.

By statute, the availability of remote depositions – depositions in which the deponent is at a different location than the deposition officer – is extremely limited. The court's express permission is required to conduct a remote nonparty deposition; party depositions cannot be conducted with a remote deposition officer under any circumstances.⁶

³ Judicial Council, Emergency Rules Related to COVID-19, Emergency Rule 12. The party requesting electronic service must provide a copy of the rule and the appropriate email address for service; the party opting to serve documents electronically must first confirm the appropriate email address with the party to be served. (*Ibid.*)

⁴ *Id.*, Emergency Rule 12(d).

⁵ *Id.*, Emergency Rule 12(c).

⁶ Civ. Code, § 2025.310(b).

These restrictions have been relaxed for the duration of the COVID-19 pandemic under the Judicial Council’s Emergency Rule 11. Emergency Rule 11 allows any deposition – party or nonparty – to be taken with the deposition officer at a remote location at the election of either the deponent or the deposing party.⁷ Emergency Rule 11 is silent as to whether the other participants in the deposition, such as the deposing and defending counsel, can or may be present with the deponent at the time of the deposition.⁸

This bill is intended to codify Emergency Rule 11 by allowing, on a permanent basis, the party noticing a deposition or the deponent to elect to have the deposition officer attend the deposition remotely. It also adds a provision specifying that any party or counsel of record may also elect to be in the same location as the deponent. As currently drafted, however, the bill could be read to go beyond Emergency Rule 11 and allow any party – even the deponent – to opt to attend remotely. If interpreted this way, any other attendant of the deposition who wished to appear in person would be forced to attend at whatever location the deponent chose. To eliminate this ambiguity and potential for abuse, the author may wish to consider the possible amendments discussed below.

With respect to the author’s intent – to allow deposing parties and/or deponents to elect to have deposition officers attend depositions remotely – there are many factors weighing in favor of this change. One of the “unknown unknowns” of the COVID-19 pandemic is how long it will last as an imminent, emergency health risk, and after that, as a new reality of life to which we all must adjust. Emergency Rule 11 allows remote depositions until 90 days after the Governor lifts the COVID-19-related state of emergency, or until the Judicial Council amends or repeals the rule.⁹ But given that it may take years to develop a COVID-19 vaccine,¹⁰ it is likely that the risks of contagion will counsel against unnecessary gatherings of people long after the state of emergency is lifted. The risk of transmission of COVID-19 is particularly high in indoor, enclosed spaces,¹¹ which is precisely where depositions take place. Permitting remote depositions even after the state of emergency is lifted will allow civil litigation to move forward without needlessly increasing the risk of exposure (or by) deposition officers.

Remote depositions also confer benefits unrelated to the pandemic. If deposition officers need not be at the same location as the deponent, they can perform their role from anywhere in the state, making it easier for attorneys to find available court reporters and for court reporters to schedule jobs. The California Deposition Reporters

⁷ Judicial Council, Emergency Rules Related to COVID-19, Emergency Rule 11.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ E.g., Spinney, *When will a coronavirus vaccine be ready?*, The Guardian (Apr. 6, 2020), <https://www.theguardian.com/world/2020/apr/06/when-will-coronavirus-vaccine-be-ready>.

¹¹ Centers for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19)*, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (last visited May 14, 2020).

Association, which supports the bill, anticipates that allowing court reporters to transcribe and report depositions remotely will help assuage the shortage of licensed freelance court reporters in the state while benefitting attorneys and clients alike.

The trade-off of remote depositions is that, without a deposition officer in the room with the deponent, there will be no neutral party to serve as a check on the deponent's conduct. Emergency Rule 11's silence on whether other parties and/or attorneys in an action may attend a deposition in the same location as the deponent could be interpreted to allow the *deponent* to elect who else may be in the room with them, which carries obvious potential for abuse. At worst, deponents could, unknown to deposing and/or defending counsel, refer to materials or other persons off-screen during a deposition. And even if deponents do not consciously taint the integrity of their depositions, unsophisticated deponents could inadvertently take steps or refer to resources that would diminish the deposition's value as both a discovery device and as potential future trial testimony.

Accordingly, to protect the integrity of depositions where the court reporter is attending remotely, this bill allows parties and attorneys of record to elect to attend deposition in person. While this will, unfortunately, result in some increased risk of transmission of COVID-19, those risks can be mitigated by enforcing social distancing at deposition locations, requiring attendants to wear face masks when they are not speaking or on camera, and ensuring that depositions do not go forward if any attendants report experiencing COVID-19 symptoms. The California Deposition Reporters Association agrees that allowing other participants in the deposition to be present with the deponent will serve as an adequate safeguard against concerns of witness tampering. And as discussed further below, the author may wish to amend the bill to clarify that the right to attend remains subject to the limitations of Code of Civil Procedure section 2025.420, and that the deponent may not elect to appear remotely for a deposition noticed to take place in person.

With the suggested amendments outlined below, this bill will allow litigants to move forward with depositions without needlessly exposing deposition officers and others to COVID-19, even after the Governor has lifted the COVID-19-related state of emergency, and to streamline deposition procedure going forward.

4. Potential Amendments

a. Amendment regarding who may opt to appear via remote means

As currently drafted, this bill could be interpreted to go beyond Emergency Rule 11's provision that a deposition may move forward with a deposition officer in another location. The bill provides that any participant – deponent or otherwise – may elect to appear at the deposition via remote or telephonic means. Taken literally, this provision could allow the deponent, after receiving a deposition notice to appear at a certain

location to opt instead to appear remotely; any attorneys (including the examining attorney) would then have no choice but to go to whatever location from which the deponent opted to appear. Under this approach, deponents could game the system and cause opposing parties to incur significant costs by having to travel to, and set up video recording equipment at, remote and/or costly locations.

To avoid this result, the author may wish to consider the following amendment:

Amendment 1¹²

Amend Section 2025.310 of the Code of Civil Procedure, subdivision (a), to read “(a) ~~A person may take or attend a deposition by telephone or other remote electronic means.~~ *At the election of the deponent or the deposing party, the deposition officer may attend the deposition at a different location than the deponent via remote means.* A deponent is not required to be physically present with the deposition officer when being sworn in at the time of the deposition.

b. Amendment regarding the limits of who may attend the deposition in person

The bill currently allows any party or counsel of record to elect to attend a deposition at the deponent’s location. As drafted, the absolute nature of the language may raise a question as to whether the right to appear in person with the deponent is subject to Code of Civil Procedure section 2025.420’s provision that the court may issue protective orders relating to deposition attendance. The court’s protective order power is essential for the administration of justice in cases where a party’s (or other person’s) presence at a deposition might be traumatic for the deponent or otherwise harm the integrity of the testimony.¹³

In view of these concerns, the author may wish to consider the following amendment:

Amendment 2

Amend Section 2025.310 of the Code of Civil Procedure, subdivision (b), to read, “~~Any~~ *Subject to Code of Civil Procedure section 2025.420, any party or attorney of record may, but is not required to, be physically present at the deposition at the location of the deponent.*”

¹² The amendments suggested in this analysis may also include technical, nonsubstantive changes recommended by the Office of Legislative Counsel.

¹³ *E.g.*, cases involving domestic violence or child abuse.

c. Amendment clarifying that this bill does not alter any other time, place, and manner requirements for depositions

In order to ensure that the provisions allowing a deposition officer to appear remotely are not interpreted to modify any of the Civil Discovery Act's other requirements regarding the time, place, and manner of depositions, the author may wish to consider the following amendment:

Amendment 3

Amend Section 2025.310 of the Code of Civil Procedure to add subdivision (d): "*(d) An exercise of the authority granted by subdivision (a) or (b) does not waive any other requirement of this Title regarding the time, place, or manner in which a deposition shall be conducted.*"

SUPPORT

Consumer Attorneys of California (co-sponsor)
California Defense Counsel (co-sponsor)
Deposition Reporters Association of California

OPPOSITION

None known.

RELATED LEGISLATION

Pending:

AB 2165 (Rivas, 2020) modifies electronic filing procedures and requirements and limits what courts may charge for electronic filing. AB 2165 is pending in the Assembly Committee on Appropriations.

Prior:

SB 1511 (Senate Judiciary Committee, 2018) would have extended the exemption for mandatory electronic service requirements by local child support agencies from January 1, 2019, to January 1, 2021. The bill's contents were included in the Judiciary Omnibus bill, AB 3248 (Assembly Judiciary Committee, Ch. 504, Stats. 2018).

AB 976 (Berman, Ch. 319, Stats. 2017) amended Code of Civil Procedure section 1010.6's electronic service provisions to create a timeline for the implementation of electronic service: for cases filed on or before December 31, 2018, documents could be served electronically only if the party agreed to accept electronic service or electronic service

was ordered by the court pursuant to local rules; for cases filed on or after January 1, 2019, the same restrictions applied, but parties could manifest consent to electronic service either by serving a notice on all the parties and filing the notice with the court, or manifesting affirmative consent through electronic means with the court or the court's electronic filing service provider, and concurrently providing the party's electronic address with their consent for the purpose of receiving electronic service.