
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair

2023 - 2024 Regular

Bill No: SB 1040 **Hearing Date:** April 23, 2024
Author: Ochoa Bogh
Version: April 8, 2024
Urgency: No **Fiscal:** Yes
Consultant: SJ

Subject: *Civil actions: service of process*

HISTORY

Source: California Association of Legal Support Professionals

Prior Legislation: AB 561 (Chen), not heard in Assembly Public Safety in 2023
AB 1974 (Chen), Ch. 255, Stats. 2022
AB 1093 (Chen), Ch. 129, Stats. 2017
AB 496 (Aghazarian), Ch. 300, Stats. 2005

Support: Child Support Directors Association of California; San Bernardino County Sheriff's Department

Opposition: None known

PURPOSE

The purpose of this bill is to allow for substitute service when a person's only reasonably known address is a state prison or county jail and personal service cannot be effectuated, by allowing a person to leave a copy of the summons and complaint with the warden, sheriff, or jailer of that state prison or county jail, as specified.

Existing federal law provides that no state shall deprive any person of life, liberty, or property without due process of law. (U.S. Const., 14th Amend.)

Existing law provides that a person may not be deprived of life, liberty, or property without due process of law or be denied equal protection of the laws. (Cal. Const., art. I, § 7.)

Existing law provides that an incarcerated person may, during the period of confinement, be deprived of such rights, and only such rights, as is reasonably related to legitimate penological interests. (Pen. Code, § 2600.)

Existing law provides that a court in which an action is pending has jurisdiction over a party from the time a summons is served on the party. (Code Civ. Proc., § 410.50.)

Existing law defines "process" as a writ or summons issued in the course of judicial proceedings. (Code Civ. Proc., § 17, subd. (b)(7).)

Existing law provides that if no provision of law covers the manner in which a service of summons may be made, the court in which the action is pending may prescribe the manner of service in a way reasonably calculated to give actual notice. (Code Civ. Proc., § 413.30.)

Existing law provides that personal service may be deemed completed by personally delivering a copy of the summons and complaint to the person to be served. (Code Civ. Proc., § 415.10.)

Existing law provides that, in lieu of personal service, substitute service may be completed as follows:

- For corporations, dissolved corporations, joint stock companies, unincorporated associations, or public entities by leaving the document during usual office hours at their office, or, if their office address is not known, their mailing address, aside from a post office box, with the person apparently in charge thereof, and by afterward mailing a copy of the summons and complaint to the person to be served at the place where a copy of the summons and complaint was left. Provides that service is deemed complete 10 days after the mailing;
- For minors, individuals under conservatorship or other guardianship, or persons otherwise not specified, if the document cannot with reasonable diligence be personally served, by leaving the document at the individual's home, usual place of abode, business, or mailing address aside from a post office box, in the presence of a competent adult in the household, person apparently in charge of the business or mailing address, and by afterwards mailing a copy of the document to the person to be served at the place where the document was left. Provides that service is deemed complete 10 days after the mailing; or,
- For persons whose only reasonably known address is a private mailbox managed by a commercial mail receiving agency, service of process may be effected on the first delivery attempt by leaving a copy of the summons and complaint with the commercial mail receiving agency.
(Code Civ. Proc., § 415.20.)

Existing law provides that service by mail may be completed by sending a copy of the summons and the complaint through first-class mail to the individual with an acknowledgement of receipt of the summons. Provides that service is deemed complete on the date when a written acknowledgment of receipt of the document is executed, if such acknowledgement is thereafter returned to the sender. (Code Civ. Proc., § 415.30.)

Existing law outlines various other methods in which service may be completed, such as service by publication. (Code Civ. Proc., §§ 415.40 et seq.)

Existing law provides that a registered process server or licensed private investigator must be granted access to a gated community or a covered multifamily dwelling for a reasonable period to perform lawful service of process. (Code Civ. Proc., § 415.21.)

Existing law provides that a warden, sheriff, or jailer upon whom a paper in a judicial proceeding, directed to an incarcerated person in the custody of the warden, sheriff, or jailer, is served, must deliver the paper to the incarcerated person, with a note thereon of the time of its service. Provides that a failure to do so will result in liability to the incarcerated person for all damages occasioned. (Pen. Code, § 4013, subd. (a).)

Existing law provides that any person who may lawfully serve process may serve process to an incarcerated person. (Pen. Code, § 4013, subd. (b).)

This bill 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.

This bill requires a warden, sheriff, or jailer who receives a copy of a summons and complaint on behalf of a person who has been transferred or released, to notify the server that the person has been transferred or released within 24 hours of the attempted service. Provides that under these circumstances, service is not to be considered effective.

This bill provides that, if a warden of a state prison receives a paper in a judicial proceeding directed to an incarcerated person in the custody of the warden, the warden must not preclude proper service of the paper.

This bill requires service directed to a person who is incarcerated within the institution to be completed as follows:

- 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;
- By allowing a peace officer be escorted into the security area to complete service; and,
- By allowing personal service under the following circumstances:
 - Personal service is requested to the institution;
 - The incarcerated person can reasonably be brought to the visiting area; and
 - Permitting personal service does not compromise the institution's security.

This bill provides 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.

This bill provides 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. Need For This Bill

According to the author:

SB 1040 would facilitate service of process to incarcerated individuals on the first try at a state prison or county jail if the prison or jail is the recipient party's only reasonably known address, and codifies CDCR's Department Operations Manual

provisions that facilitate delivery of documents to an incarcerated individual through a prison's confidential mail process.

This bill will help prevent 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. SB 1040 will ensure that the due process rights of incarcerated individuals are protected, while holding jail and prison administrators responsible for delivery of court documents to the incarcerated population.

2. Service of Process and Due Process

The word "jurisdiction" is often used in a number of ways, however, it generally means the right to adjudicate an action or proceeding. (*Harrington v. Superior Court of County of Placer* (1924) 194 Cal.185, 188.) One crucial part of obtaining proper jurisdiction over a proceeding, and those involved in the proceeding, is ensuring that the parties have been given proper notice of the proceeding. (*Mullane v. Cent. Hanover Bank & Trust Co.* (hereafter *Mullane*) (1950) 339 U.S. 306, 314.) The method of ensuring parties are given notice is often referred to as "service of process." The term "process" signifies a writ or summons issued in the course of a proceeding and "service of process" is the means by which a court asserts its jurisdiction over a party and gives the parties notice. (*Rockefeller Technology Investments VII v. Changzhou Sino Type Technology Co.*, (2020) 9 Cal.5th 125 139.) In proceedings where a party is considered to be given proper notice or service of process, the party is at risk of losing by default if they do not appear at the proceeding. (See e.g., Code Civ. Proc., § 473.)

Not only must a party be given notice, the party must be given proper notice. The Fourteenth Amendment's Due Process clause requires notice that is reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of an action and afford them an opportunity to present their objections. (*Mullane*, supra, 339 U.S. at 314.) As the results of a proceeding can result in the deprivation of life, liberty, or property, the U.S. Supreme Court has stated notice and a fair opportunity to be heard are, "among the most important procedural mechanisms for purposes of avoiding erroneous deprivations." (*Wilkinson v. Austin* (2005) 545 U.S. 209, 226.)

Assessing the adequacy of a particular form of notice requires a balancing of the interest in having a judicial proceeding be settled, against the individual interest protected by the Fourteenth Amendment. (*Jones v. Flowers* (hereafter *Jones*) (2006) 574 U.S. 220, 229.) As mentioned above, the adequacy of notice depends on whether, under all the circumstances, it was reasonably calculated to apprise parties of the proceeding. This means that service of process should take into account the totality of the circumstances to avoid going through the motions of effecting notice without meaning it. "When notice is a person's due, process which is a mere gesture is not due process." (*Mullane*, supra, 339 U.S. at 315.) When setting up a statutory scheme for service of process, "[t]he government must consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case." (*Jones*, supra, 574 U.S. at 230.)

3. Service of Process in California

There are four usual methods for completing service within California. (*Crane v. Dolihite* (2021) 70 Cal.App.5th 772, 786.) The methods for completing service are personal delivery to an individual (i.e. personal service), delivery to someone else where the individual's usual residence or place of business is (i.e. substitute service), delivery by mail with acknowledgement of receipt (i.e. service by mail), and service by publication.

This bill deals with substitute service, which can be used in lieu of personal service based on certain situations. (Code Civ. Proc., § 415.20.) Substitute service allows for a copy of the summons and complaint to be left with someone other than the person who is a party to an action. For example, in the case of a corporation, a document could be left at the corporation's office or mailing address with a person who is apparently in charge of the place and afterwards mailing a copy of the document to that location. (Code Civ. Proc., § 415.20, subd. (a).) For a natural person, substitute service allows for a document to be left at their dwelling, usual place of abode, or place of business, with an adult member of the household or person seemingly in charge of the office and afterwards mailing a copy of the document to that location. (Code Civ. Proc., § 415.20, subd. (b).) In both situations, service of process is considered complete 10 days after mailing a copy of the document.

Substitute service may be used on corporations and other business entities without ever needing to attempt to personally serve those entities. (Code Civ. Proc., § 415.20, subd. (a).) However, substitute service can only be used for "natural persons" if the person cannot, with reasonable diligence, be personally served. (Code Civ. Proc., § 415.20, subd. (b).) For natural persons, existing law allows for substitute service without attempting personal service if the person has a private mailbox through a commercial mail agency and cannot otherwise be located. (Code Civ. Proc., § 415.20, subd. (c).) However, that person must have first signed an agreement allowing the mailing agency to accept service of process for them. (Bus. & Prof. Code, § 17538.5, subd. (d).) The courts have generally found that "ordinarily, two or three attempts at personal service at a proper place should fully satisfy the requirement of reasonable diligence and allow substituted service to be made." (*Espindola v. Nunez* (1988) 199 Cal. App. 3d 1389, 1392.)

4. Applicability of Current Law to Persons Incarcerated in State Prisons

Penal Code section 4013 requires a warden, sheriff, or jailer upon whom a paper in a judicial proceeding, directed to an incarcerated person in the warden, sheriff, or jailer's custody, is served, to deliver it to the incarcerated person, with a note thereon of the time of its service. A warden, sheriff, or jailer is liable to the incarcerated person for all damages for failing to do so.

Section 14010.7.4 of the California Department of Corrections and Rehabilitation (CDCR) Department Operations Manual lays out the legal process for serving incarcerated individuals:

No charge shall be made for the serving of legal papers on inmates by departmental staff. This shall preclude process servers from direct access to security areas of the institutions. This shall not preclude the proper service of papers by a sworn peace officer escorted into a security area. Service may be completed as follows:

- Staff may accept the papers from the process server and then complete the service on the inmate.

- A sworn peace officer may be escorted into the security area to complete the service of papers.
- A non-sworn process server may be permitted to complete personal service if:
 - The server desires to make personal service and has made prior arrangements.
 - The inmate can reasonably be brought to the visiting area.
 - Permitting the personal service does not compromise the institution security.
- If a request for service is received by mail, institution staff shall serve the papers and complete the verification of service.

5. Effect of This Bill

This bill allows for substitute service under certain circumstances when a defendant is incarcerated in a state prison or county jail. Specifically, this bill provides 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 if personal service is first attempted and is not successful. Penal Code section 4013 currently requires a sheriff or jailer of a county jail upon whom a paper in a judicial proceeding, directed to an incarcerated person in the sheriff or jailer's custody, is served, to deliver it to the incarcerated person, with a note thereon of the time of its service. Under current law, a sheriff or jailer is liable for all damages to the incarcerated person intended to be served arising from the sheriff or jailer's failure to deliver the documents.

If the incarcerated individual to be served is in the custody of a state prison, this bill prohibits the institution from precluding proper service of the summons, and codifies the methods for service outlined in the department's DOM for effectuating that service. Specifically, the bill provides that personal service of an incarcerated individual may be allowed, if the person serving the papers desires to make personal service and makes prior arrangements, the incarcerated individual can be reasonably brought to the visiting area, and personal service does not compromise the institution's security. The bill also allows for service to be completed by the institution accepting the papers from the process server and completing service on the incarcerated individual or by the institution escorting a sworn peace officer into a security area to complete service. This bill 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, this bill requires the institution to treat the summons as incoming confidential mail and subject to the procedures applied to all incoming confidential mail. More specifically, this bill requires 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.

This bill additionally includes provides that if an incarcerated individual 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, this bill provides that service cannot be considered effective.

6. Argument in Support

The California Association of Legal Support Professionals, the bill's co-sponsor, writes:

California law and constitutional guarantees of due process require that in order for a party to be brought within the jurisdiction of the court, the party receive formal notice that the legal process has begun. California requires a sheriff, who is served with a paper in a judicial proceeding and is directed to an inmate in their custody, to deliver the paper to the inmate in their custody, to deliver the paper to the inmate and to note when the paper was served. Until the enactment of AB 1974..., there was no corresponding statute applying this requirement to state prisons. SB 1040 seeks to address the remaining issue which was not resolved by AB 1974 about whether diligence is required under service left with a sheriff and warden.

Existing law is unclear whether serving the court documents to a sheriff or warden constitutes personal service. If this service is not considered personal service, courts generally require the exercise of due diligence to effect service. Frequently to show due diligence, the process server will have to make multiple attempts to personally deliver the documents to the incarcerated person even when the jail or prison staff indicate that they will not produce the individual for service. SB 1040 clarifies that if the only reasonably known address for an incarcerated person is the prison or jail then service may be effected on the first delivery attempt by leaving the summons and complaint with the warden or sheriff. This is similar to existing law for service of an individual who's only reasonably known address is a private mailbox at a commercial mail receiving agency.

...[SB 1040] codif[ies] the legal process at penal facilities and clarifies that leaving legal documents with prison staff constitutes "confidential mail" and the incarcerated person signs for the delivery.

-- END --