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# E-Notice Something?

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By Benjamin G. Shatz

It's the year 2009. The 21st century has begun in earnest, and the technological advances promised by futurists and science fiction writers have arrived, haven't they? Children have cell phones and cars have voice-activated navigation systems. No one can escape the march of progress, even time-honored professions inherently resistant to change, like the practice of law. Today's lawyers simply cannot function without computers, Internet access, e-mail and electronic documents. The federal judiciary boasts that electronic filing of documents is now mandatory in 99 percent of all federal courts. But has the future arrived in California's courts? Two recent court of appeal opinions make clear that California's rules of practice have not kept pace with the technology actually used by courts and the lawyers.

In *Citizens for Civic Accountability v. Town of Danville*, 167 Cal.App.4th 1158 (Oct. 27, 2008), Division 5 of the 1st District Court of Appeal examined whether an e-mail from the superior court clerk triggered the time to appeal. Citizens involved a legal challenge to a residential development project approved by the town of Danville. The superior court designated the matter a complex litigation, and issued an order precluding the filing of paper documents and mandating electronic filing and service, in accord with the court's Electronic Case Filing Standing Order. That standing order explained that rather than issue paper orders, all court orders would be served either by e-mail from the court or through the Electronic Filing Service Provider, in this case LexisNexis File & Serve.

On April 1, 2008, LexisNexis File & Serve sent the parties an e-mail stating, "You are being served documents that have been electronically submitted," and identified the document as the judgment. To actually see the document, however, e-mail recipients had to visit the LexisNexis File & Serve Web site, log in and then open the document file. Following those steps revealed the judgment with an "electronically filed" stamp showing entry of judgment on April 1. Needless to say, the aspiring appellant did not file a notice of appeal within 60 days from April 1, raising the question of whether the appeal - filed 69 days after April 1 - was untimely.

To answer this question, the court looked to California Rule of Court 8.104(a), which sets forth the possible triggers for a notice of appeal. One of those triggers is when "the superior court clerk *mails* ... a document entitled 'Notice of Entry' of judgment or a file-stamped copy of the judgment, showing the date either was *mailed*." Rule 8.104(a)(1) (emphasis added). Thus, the issue was whether the court had "mailed" a copy of the judgment. The parties seeking to dismiss the appeal urged the court to construe "mail" broadly to include "e-mail." The court declined to take that leap, noting that the rules should be construed in favor of allowing appeals, and that triggering documents must strictly comply with the precise language of the rules.

The court concluded that statutes and rules using the term "mail" limit that word to mean physical delivery by the postal service. Indeed, the rule of court governing electronic service separately distinguishes between "mail," "express mail," "overnight delivery," "fax transmission" and "electronic service." California Rule of Court 2.260(a)(1). Applying the principle that any ambiguity governing the time to appeal should be resolved to preserve the right to appeal, the court narrowly interpreted "mail" to mean postal delivery only.

The *Citizens* opinion turned on the fact that rule 8.104(a)(1) used the word "mail" as the triggering event, as opposed to mere "service." Had the rule allowed "service" as the trigger, the court hinted that its analysis might have been different. The court also was concerned that allowing an e-mail from the court to

trigger the appeal period could "create a trap for the unwary," leading to a forfeiture of the important right to appeal based on a "lack of clarity" about what sort of notice or document qualifies as the trigger to appeal. In federal practice, there is no such concern, because the time to appeal is triggered by the entry of judgment (not by "mailing" or "service" of any notice) - and the courts' electronic filing system alerts those involved in the case when that happens.

Just last month, in *Insyst Ltd. v. Applied Materials Inc.*, 2009 DJDAR 1603, the 6th District Court of Appeal addressed essentially the same question, and reached the same result, but under a different analysis. Again, the question was "whether an e-mail notice of the entry of judgment in [a] complex litigation was sufficient to start the time running to file a notice of appeal."

The factual background mirrors *Citizens*: The superior court deemed an action to be a complex litigation and adopted a standing order authorizing electronic service. All parties were ordered to file and serve documents through the court's electronic filing system. After a jury verdict for the defendants, judgment was electronically filed-stamped on April 11, 2008, at 1:38 p.m. Five minutes later, an e-mail issued to all counsel - including six attorneys representing the plaintiff - notifying them that the judge had signed the "Final Judgment." That e-mail included a hyperlink reading "Click here to view document information." Clicking that link led to a description of the document, which in turn contained another hyperlink leading to a file-stamped copy of the judgment. Naturally the notice of appeal was filed 61 days after the e-mail notice.

The court agreed with *Citizens* that the word "mail" in rule 8.104(a)(1) standing alone does not include "e-mail." Unlike *Citizens*, however, the *Insyst* court reasoned that in cases where electronic service is authorized, Code of Civil Procedure Section 1010.6, subdivision (a)(6), equates "mail" and "electronic service." In particular, the second sentence of section 1010.6, subdivision (a)(6), specifically mentions that electronic service does not extend the time to appeal, thus indicating that the Legislature intended to authorize electronically served in lieu of mailed documents as triggering the time to appeal. Thus, *Insyst* held that a "superior court clerk may electronically serve a triggering document in a case in which electronic service has already been authorized."

Examining the particular e-mail at issue, however, the court found that it did not trigger the time to appeal. The e-mail was not "entitled 'Notice of Entry'" as required by Rule 8.104(a)(1), so that option did not apply. The question then became whether the e-mail qualified as "a file-stamped copy of the judgment." Here, the court reasoned that it did not because technically no file-stamped copy of the judgment was electronically transmitted; rather, the e-mail merely provided notice that a judgment had been filed, and provided instructions for accessing the judgment through two hyperlinks. The court made clear that "giving a party notice of where he or she may find" a document on the internet is not the same as actually sending that document. In other words, "an e-mail explanation of where to electronically locate a judgment" is not "the equivalent of the electronic transmission of the document." Consequently, the results in *Citizens* and *Insyst* were the same, in that neither appeal was dismissed as untimely.

The underlying dispute in *Insyst* involved technology for semiconductor fabrication equipment. And the irony that the 6th District geographically covers the heart of the digital revolution did not escape the court's attention. Indeed, the opinion opens by noting, "In this day and age and location, what is popularly called Silicon Valley, electronic mail (e-mail) has virtually supplanted regular mail (sometimes pejoratively dubbed 'snail' mail) for many types of communication."

As interesting as the *Citizens* and *Insyst* opinions may be, one obvious lesson is that disputes about the timeliness of an appeal should be avoided by conservatively calendaring the 60-day time to appeal from anything arguably resembling a trigger, be it mail, e-mail, fax, pony express or gorilla-gram. It is hard enough being an appellant without having to leap jurisdictional hurdles to ensure the appeal will be heard. Although the appellants in both cases were no doubt relieved that their appeals could proceed, they probably were not thrilled about the risk and expense involved in obtaining that procedural victory. Prudent practitioners should file early to avoid procedural problems.

Both *Citizens* and *Insyst* reach the right result premised on the precise language of California's existing rules. But given today's reality of e-mail communication and e-filing, a strong case exists that those rules are overdue for an overhaul.

For now, however, it seems that the future has not quite arrived. Lawyers do not yet use jet-packs to fly to court, robots do not yet wash our flying cars - indeed, such vehicles are not yet available - and e-mails from superior court clerks - at least in the form currently sent - do not yet trigger the time to appeal.

Will "mail" eventually become synonymous with e-mail in common speech? Will court clerks change the format of their e-mails to counsel? Will California's rules be updated to more clearly allow electronic triggering of the time to appeal? Stay tuned, and be sure to buy a new rule book every year. Or better yet, access the rules online (www.courtinfo.ca.gov/rules/) - this is, after all, the year 2009.

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