

## Memorandum in Opposition

### COMMITTEE ON CIVIL PRACTICE LAW AND RULES

CPLR #1

May 16, 2011

S. 4578

By: Senator Bonacic

A. 6835

By: M. of A. Simotas

Senate Committee: Judiciary

Assembly Committee: Judiciary

Effective Date: First of January next succeeding the date on which it shall have become a law.

**AN ACT** to amend the civil practice law and rules, in relation to the service of papers.

**LAW AND SECTION REFERRED TO:** CPLR §2103

### **THE COMMITTEE ON CIVIL PRACTICE LAW AND RULES** **OPPOSES THIS LEGISLATION**

This is a bill that would amend CPLR 2103 (relating to service of papers after lawsuit is commenced) to (a) permit papers to be mailed outside of the State, (b) add six as opposed to five days to resulting deadlines when papers are mailed outside the State, and (c) require a formal stipulation demonstrating consent to receive service by facsimile rather than having such consent indicated on the signature block of litigation papers as CPLR 2103(b)(5) now requires. The bill is disapproved as none of these changes are needed and they will simply add problems and create delay, confusion and unnecessary waste.

CPLR 2103 governs the method by which attorneys, once an action is commenced, serve papers on each other. These are the myriad of papers that are served within an action such as discovery requests and responses, motion papers and the day-to-day documents that attorneys send to each other under the CPLR in the context of an ongoing case. At the time of the adoption of CPLR in 1962, the general method of such service was by regular postal mail. E-mail and facsimile had not yet been invented and overnight delivery was not yet common. Apart from mail, the only other practical means of service was hand-delivery to the attorney (CPLR 2103[b][1]) or to the attorney's office (CPLR 2103[b][3]). As originally enacted, CPLR 2103 provided that mail service was complete upon mailing and that where mail service is used, three days were added to the time for other party to act where the time frame is measured from service (CPLR 2103[b][2]). Service by mail was required to be posted within the State of New York, which helped insure that the delivery was not delayed by mailing from a remote location.<sup>1</sup>

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<sup>1</sup>See Advisory Committee Notes to original CPLR 2103: "The requirement that mailing be from the city, village, or town of the server has been eliminated; mailing under the proposed rule may be from anywhere within the state. With the speed of our modern mail service, mailing anywhere within the state gives sufficient assurance of prompt delivery."

Over the years, other means of communicating have become more prevalent and accepted in the business world, including email, facsimile and overnight service. Today, other than in the context of litigation, few would use ordinary mail for the transmission of important papers that are time sensitive. Although CPLR 2103 has been amended over the years to permit additional forms of delivery, including facsimile (CPLR 2103[b][5]), overnight delivery (CPLR2103[b][6]), and electronic means (CPLR 2103[b][7]). Facsimile and e-mail service each require consent of the receiving party. Increasingly, e-mail is the means of transmission of documents between parties, and in electronic filing system, e-mail is the requirement.

The continued use of mail service, however, has proved problematic and troubling. In 1982, CPLR 2103 was amended to change the three days to five days. The five day period has been said to be “ubiquitous in New York procedure, applying to extend several time periods.”<sup>2</sup>Other systems generally provide three days. See FRCP 6[d]; NJ Rule 1:3-3. No other system works in such a long delay for mailing.

In 1989, CPLR 2103 was amended to permit service by overnight service and, on consent, by facsimile. At that time, it was noted that there was no reason to require that overnight service be deposited within the state as the service must provide actual receipt the next day. The 1989 amendment also added one day (as opposed to five) to overnight service. E-mail and facsimile service required no additional time.

The committee believes that amendments to CPLR 2103 should discourage use of ordinary mail and instead encourage more modern and efficient means of communication. The proposed amendment does exactly the opposite, and encourages mail and builds in additional delays.

The requirement that papers, where mailed, be mailed within the state, remains as valid today as when the CPLR was enacted. Mail service has not appreciably been improved over the years, and mailing outside of New York simply delays and slows down litigation. If a party insists on serving papers outside of New York – and there is no indication that there is a large demand for this – the overnight option provided under CPLR 2103(b)(6) provides an adequate opportunity for those situations where the adverse party does not consent to e-mail or facsimile service. These options did not exist when the CPLR was originally enacted.

The supporting memorandum stated are reason for permitting mail outside of New York is *M. Entertainment, Inc. v. Laurence Leydeir*, 62 A.D.3d 627 (1<sup>st</sup> Dep’t 2009). In that case a party sought to mail a notice of appeal from New Jersey, which was held to be ineffective because it was not mailed from within the State. The decision, however, was reversed by the Court of Appeals, which held that the error was a mere irregularity that could be overlooked where the notice of appeal was otherwise filed timely. 13 NY3d 827 [2009]). In view of the reversal, the decision does not appear to present a compelling reason for legislative action.<sup>3</sup>

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<sup>2</sup>4 Weinstein-Korn-Miller, New York Practice (2d ed) ¶ 2103.00 at 21-24.

<sup>3</sup>One observer has noted that the consequence of mailing outside of New York is that “Paper served by mail from outside New York will be deemed served when received, not when mailed.”HAMMHamm, Practice Insight, CPLR 2103 (Lexis-Nexis).

The proposed amendment would also alter the five day rule to six where a paper is mailed outside of New York. The five day rule itself creates complications, confusion and delays;<sup>4</sup> the proposed amendment would simply make the situation worse. The recent amendment to CPLR 2215 adds three days where a cross motion is served by mail. If this bill were enacted, there would be three separate timeframes applied where a paper is served by mail, which is absurdly complicated. A party receiving service cannot even be certain as to which time frame applies since the postmark is not controlling.<sup>5</sup> The party receiving the service has no way of safely knowing when and where it was served by mail, adding even more confusion.

The extra mail time also adds delay the proceedings. For example, a motion otherwise being served 16 days in advance of the return date can be served 21 days (with the five extra days) and now, under the amendment 22 days. This runs counter to the notion of avoiding delays in litigation.

The proposed amendment would also require an explicit stipulation between parties before facsimile can be used for service. This provision is unnecessary and would simply discourage use of that method of service. Contrary to the assertion in the legislative memorandum, a facsimile number on an attorney's letterhead is not consent to service by facsimile.<sup>6</sup> Such consent requires that the facsimile number be included "in the address block subscribed on a paper served or filed in the course of an action or proceeding." (CPLR 2103[b][5]). Inclusion of a fax number on letterhead or on a blueback has been held not to constitute consent to facsimile service.<sup>7</sup> There is no evidence that indicating consent on the signature block of a litigation papers, as CPLR 2103(b)(5) now requires, has proven unworkable or has led to abuses. If anything, there should be a concern about facsimile service of long documents, but the proposed amendment does not deal with that problem.

There is no real reason for this measure, and it runs entirely counter to the modern trend of avoiding transmitting papers by mail, and the attendant waste, delay and confusion that normally is inherent in that mode of communication.

For the foregoing reasons, this Committee on Civil Practice Law and Rules **OPPOSES** this legislation.

Person Who Prepared the Report: Paul H. Aloe, Esq.  
Chair of the Committee: Hon. Stephen G. Crane

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<sup>4</sup>See HAMMHamm, *supra*; Aloe, Civil Practice, 58 Syracuse L. Rev. 713, 721-725 (2008)

<sup>5</sup>See HAMMHamm, *supra*; see also *Jenny Oil Corp. v. Petro Products Distributors, Inc.*, 121 A.D.2d 687, 688, 503 N.Y.S.2d 886, 887 (2<sup>d</sup> Dep't 1986) ("The affidavit of service of the answer indicates that the answer was mailed on June 21, 1984. Thus, it was of no consequence that the envelope was postmarked June 22, 1984, as it is well settled that service is complete as of the date of actual mailing").

<sup>6</sup>Legislative Memorandum. "merely designating the fax number on an attorney's letterhead is sufficient under the CPLR to signify the attorney's consent to receive service by fax."

<sup>7</sup>*Levin v. Levin*, 160 Misc.2d 388, 609 N.Y.S.2d 547 (Sup. Ct. Nassau Co. 1994)