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## PERSPECTIVE

## California's Code of Civil Procedure enters the 21st century with SB 1146

By Amy Lally and Joel Richert

On March 13, when California Chief Justice Tani Cantil-Sakauye issued a statement regarding pandemic-related emergency response measures in California courts, the confusion and concern, not least among those in the legal profession, was palpable. In the early days of the pandemic, few could have anticipated the extent of the upheaval COVID-19 would have on aspects of life that once felt routine. While the pandemic has resulted in many painful adjustments in our lives, it has also yielded a number of surprisingly positive changes. One such positive change spurred by the pandemic is the modernization of California's Code of Civil Procedure. California Senate Bill 1146 is leading the push to bring the Code of Civil Procedure into the 21st century by embracing modern technology and its conveniences. But while SB 1146's proposed changes to the Code of Civil Procedure are long-overdue and ultimately welcomed, SB 1146 also has unintended consequences, which may result in favoring some litigants over others.

California senate bill SB 1146 proposes three changes to the Code of Civil Procedure: first, mandatory acceptance of electronic service; second, allowance of remote depositions; and third, postponement or delay of trial dates. The first two of these proposed changes are efforts to modernize the Code of Civil Procedure, and are intended to be permanent amendments. The third, which may have unintended consequences for complex litigation matters and corporate litigants, is COVID-19 specific and designed to remain in effect only during the current pandemic-related state of emergency.

SB 1146's first proposed change is to amend Section 1010.6 of the Code. Existing law states, "[f]or cases filed on or after January 1, 2019, if

a document may be served by mail, express mail, overnight delivery, or facsimile transmission, electronic service of a document is not allowed unless a party ... has expressly consented to receive electronic service in that specific action." Code Civ. Proc. Section 1010.6(a)(2)(A)(ii) (emphasis added). In contrast, the proposed amendment "require[s] a party represented by counsel, who has appeared in an action or proceeding, to accept electronic service of a notice or document." On a practical level, this first proposed amendment relieves some of the impracticality, burden and tediousness that comes with paper service. It is also undoubtedly a welcome end by many to the sort of uncooperative gamesmanship that may plague particularly combative cases — another arrow confiscated from the quivers of counsel who would otherwise seek to frustrate the efficient resolution of litigation.

SB 1146's second proposed change is to amend Section 2025.310 of the Code. Section 20205.310, as currently written, allows "a nonparty deponent [to] appear by telephone if [the court] finds there is good cause and no prejudice to any party." A party deponent, however, must "appear in person and be in the presence of a deposition officer." Code Civ. Proc. Section 20205.310(b). The proposed amendment does away with these now seemingly unimportant differences and allows that, "[a]t 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." Even beyond COVID-19 and our current social distancing mores, the proliferation of digital video conferencing applications, such as Zoom, Google or WebEx, makes taking depositions "via remote means" an obvious and efficient solution to

modern global litigation, regardless of whether the deponent is located in Stockholm or Santa Monica, Mumbai or Marina del Rey.

SB 1146's final proposed change adds Section 599 to the Code. Section 599 now allows, "unless otherwise ordered by a court or agreed to by the parties, that a continuance or postponement of a trial date extends any deadlines that have not already passed as of March 19, 2020, applicable to discovery, including the exchange of expert witness information, mandatory settlement conferences, and summary judgment motions in the same matter," and is set to remain in effect "only during the state of emergency proclaimed by the Governor on March 4, 2020, related to the COVID-19 pandemic and 180 days after." The proposed addition has obvious benefits for individual litigants or less complex suits with few parties — that is, by extending applicable discovery deadlines for the same length of time as the continuance or postponement of the trial date, SB 1146 is providing counsel and litigants with necessary room to adapt to unforeseen obstacles related to the pandemic, without mate-

rially affecting litigation costs. However, this does not hold true in all cases. In particular, in complex litigation matters involving corporate clients as defendants, needlessly continuing discovery deadlines substantially increases litigation costs and will likely favor one side while placing an undue financial burden on the other.

We cannot be certain to what extent our lives will continue to be upended by the pandemic, or how long the COVID-19 state of emergency will be in effect. Despite the above, however, the long-term benefits of modernization to the Code of Civil Procedure for all practicing in California, far outweigh the temporary deleterious effect that SB 1146 may have on certain segments of the legal profession. ■

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