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CALIFORNIA LEGISLATIVE CHANGES IN SERVICE OF PROCESS

Senate Bill 503, amended in the California State Senate on May 1, 1969, becomes operative on July 1, 1970.¹ The Bill revises California law relating to jurisdiction and service of process. The intent of the new Bill is to provide California with a modern procedural code, that is, to add and amend certain sections of the California Code of Civil Procedure in light of modern advancements in communication and technology.

This comment focuses on that portion of the Senate Bill which allows for additional means of serving a summons and complaint and on how it corrects several shortcomings in the present law.² This comment will also review the effect of the change and will attempt to depict its scope compared to similar code sections in the Federal Rules and statutes of other states.

PRESENT CALIFORNIA LAW

Sections 411³ and 412⁴ of the California Code of Civil Procedure were enacted in 1872 and since that date neither statute has undergone a major substantive revision.⁵ Service of a summons and complaint is governed by section 411 which effectuates the traditional common law requirement of personal delivery of process.⁶

¹ Cal. Stats. 1969, ch. 1610, at 3140-43 (1969), *adding*, CAL. CODE CIV. PROC. §§ 415.10-416.90 (West Cal. Leg. Serv. 1969) [Hereinafter cited CAL. CODE CIV. PROC. §§ 415.10-416.90 (West Cal. Leg. Serv. 1969)].

² Major legislative changes in the manner of service of process necessitates a separate comment on this subject; therefore, the field of jurisdiction is eliminated from this article in order to emphasize the importance of the new, alternative methods of serving process.

The major jurisdictional change states: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." Cal. Stats. 1969, ch. 1610, at 3138 (1969), *adding* CAL. CODE CIV. PROC. § 410.10 (West Cal. Leg. Serv. 1969).

³ CAL. CODE CIV. PROC. § 411 (West 1954).

⁴ CAL. CODE CIV. PROC. § 412 (West 1954).

⁵ See *Journal of the State Bar of California, Annual Report*, 23 J. ST. B. CAL. 191 (1948); Comment, *Service of Process in Civil Actions in California*, 37 CALIF. L. REV. 80, 81 (1949); Dambach, *Personal Jurisdiction: Some Current Problems and Modern Trends*, 5 U.C.L.A. L. REV. 198, 229 (1958); JUDICIAL COUNCIL OF CALIFORNIA, ANNUAL REPORT (Jan. 6, 1969).

⁶ CAL. CODE CIV. PROC. § 411 (West 1954). For comment on the traditional common law requirement of serving process see *Hunstock v. Estate Dev. Corp.*, 22 Cal. 2d 205, 138 P.2d 1 (1943).

Section 412,⁷ providing for the only "non-personal" manner of service now available in California,⁸ authorizes service by publication.

While personal delivery of a summons and complaint has long been recognized as the most dependable means of giving a party notice of a pending action,⁹ methods of communication have been developed that are almost equally reliable.¹⁰ However, these methods have exposed at least two practical problems of personal service.

In *Hunstock v. Estate Development Corporation*,¹¹ the California Supreme Court reviewed the meaning of the word "delivery" as used in section 411 and also in section 373¹² of the Civil Code. The plaintiff attempted substituted service on a corporation by mailing a copy of the summons and complaint to the Secretary of State. The court ruled that even though the Secretary of State sent a letter to the plaintiff notifying him that process had been transmitted by registered letter to the corporate defendant, the statutory requirement of personal delivery upon the Secretary of State had not been met. Plaintiff argued that since the Secretary of State received a copy of the process, the means of delivery should not be important. The court rejected this argument, concluding that "delivery" meant "manual delivery"¹³ and that "any argument based upon the allegedly needless expense of requiring manual delivery rather than mailing is one to be addressed to the legislature and not to the courts."¹⁴

The *Hunstock* court alluded to one of the two major practical disadvantages of section 411, that is, the expense of personal service

⁷ CAL. CODE CIV. PROC. § 412 (West 1954).

⁸ See CAL. CODE CIV. PROC. §§ 411-12 (West 1954); CAL. CORP. CODE §§ 3300-06 (West 1958); CAL. INS. CODE §§ 1600-07 (West 1955). CAL. VEH. CODE § 22 (West 1960), provides a method of giving notice either by personal delivery or by mailing a notice to the party at his address as shown on the records of the department. This section incorporates a "non-personal" mode of giving notice, however, it does not govern the service of a summons and complaint.

CAL. CODE CIV. PROC. § 117c (West 1954), provides for delivery of an affidavit either personally or by registered mail, to the party defendant, however, this section governs only those actions brought in small claims court.

⁹ The Supreme Court has indirectly commented on the effectiveness of personal delivery in *McDonald v. Mabee*, 243 U.S. 90, 92 (1917). "To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done."

¹⁰ This is a personal observation on the part of the author suggesting that major improvements have been made in delivery of mail, transportation and mass communication.

¹¹ 22 Cal. 2d 205, 138 P.2d 1 (1943).

¹² Cal. Stats. 1931, ch. 862, at 1820, § 2 (1931), *repealed* 1947; delivery to the Secretary of State as specified in CAL. CODE CIV. PROC. § 411(1) (West 1954) now requires the serving party to follow CAL. CORP. CODE §§ 3301-04 (West 1958).

¹³ *Hunstock v. Estate Dev. Corp.*, 22 Cal. 2d 205, 211, 138 P.2d 1, 4 (1943).

¹⁴ *Id.* at 213, 138 P.2d at 5.

of process.¹⁵ The usual practice of hiring a process server is costlier than service by mail.¹⁶ The second practical disadvantage is the amount of time required for manual service, which varies in relation to distance and the availability of the defendant.

Publication under section 412 is permitted when the defendant cannot with "due diligence" be served personally.¹⁷ Courts have interpreted "due diligence" to be a "relative term which must be determined by the circumstances of each case."¹⁸ Service in this manner is effected by publishing the summons in a newspaper most likely to give notice to the person to be served.¹⁹

PUBLICATION AND PROCEDURAL DUE PROCESS

Modern methods of communication reveal a major shortcoming of publication. United States Supreme Court decisions have questioned the effectiveness of service by publication as a means of giving actual notice.²⁰ In *Mullane v. Central Hanover Bank and Trust Co.*,²¹ the Court reviewed the constitutionality of a New York banking law. The assets of numerous small trusts were invested in a common fund established under the statute and managed exclusively by a New York trust company. Both known and unknown, residents and nonresidents of New York were the beneficiaries of these trusts. All were given the required statutory notice by publication in a local newspaper of a petition for a judicial settlement of accounts. The Court determined that notice in this case did not meet the require-

¹⁵ The court requires delivery of the summons and complaint by a person over the age of eighteen and not a party to the action. CAL. CODE CIV. PROC. § 410 (West 1954). The plaintiff's attorney is not a party to the action and is competent to serve process. See *Sheehan v. All Persons*, 80 Cal. App. 393, 252 P. 337 (1927). However, practically speaking, an attorney does not have the time to serve process.

¹⁶ Telephone interview with Bill Cave of Attorney's Messenger Service in San Francisco, Oct. 31, 1969; and telephonic interview with John L. Feeney of Feeney-Capriola attorneys at law in Willows, California, Nov. 6, 1969. While the professional service fees range from a flat rate of four to six dollars, such fees presently cost as much as twenty dollars or more depending upon the distance. That is, in many situations, the cost of serving process will include a mileage charge.

¹⁷ CAL. CODE CIV. PROC. § 412 (West 1954).

¹⁸ *Vorburg v. Vorburg*, 18 Cal. 2d 794, 797, 117 P.2d 875, 876 (1941). For further discussion on the interpretation of "reasonable diligence," see, *Stern v. Judson*, 163 Cal. 726, 127 P. 38 (1912).

¹⁹ CAL. CODE CIV. PROC. § 413 (West 1954).

²⁰ See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *accord*, *New York v. New York, N.H. & H.R.R.*, 344 U.S. 293 (1953); *Milliken v. Meyer*, 311 U.S. 457 (1940).

²¹ 339 U.S. 306 (1950).

ments of due process, which required that at least the known beneficiaries be reached by mail:

The statutory notice to known beneficiaries is inadequate, not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand.²²

Mullane established that the primary purpose of serving process is to give an interested party both actual notice of the proceedings and an opportunity to be heard.

The Supreme Court again expressed dissatisfaction with publication as a mode of service in the case of *New York v. New York, New Haven and Hartford Railroad Co.*²³ The City of New York had made certain improvements on parcels of land owned by the defendant railroad. The City placed liens on these parcels in order to insure payment for the improvements, whereupon the Court ordered the railroad's creditors to file claims against the railroad by a certain date. Notice was mailed to mortgage trustees and to those creditors who had already appeared in court; however, a New York Bankruptcy law required the plaintiff creditors to rely upon two once-a-week publications of the order in five daily newspapers, one being the Wall Street Journal. Nevertheless, the plaintiff City failed to file its lien claims. The Supreme Court found this notice to be unreasonable and suggested that delivery by mail would have complied with the constitutional mandate of procedural due process. Furthermore, the Court pronounced notice by publication to be a poor and sometimes hopeless substitute for actual service of notice.²⁴

Generally, publication as a mode of service does not violate due process. However, where an alternative method may be better adapted to give actual notice in a particular situation, failure to use it is tantamount to a deprivation of due process.

SECTIONS 415.10-416.90 OF THE CODE OF CIVIL PROCEDURE

Pressures for Revision

While criticism of publication has undoubtedly been a factor leading to revision of California's present law, the most powerful stimulant has been a recognition of California's need for a modern law of jurisdiction and service of process.²⁵ Having worked on this

²² *Id.* at 319.

²³ 344 U.S. 293 (1953).

²⁴ *Id.* at 297.

²⁵ See *Journal of the State Bar of California, Annual Report*, 37 J. ST. B. CAL. 590 (1962); Comment, *Service of Process in Civil Actions in California*, 37 CALIF. L. REV. 80 (1949); JUDICIAL COUNCIL OF CALIFORNIA, ANNUAL REPORT (Jan. 6, 1969).

revision for approximately five years, in 1966 the State Bar Association developed and submitted a proposal to the Judicial Council for joint study.²⁶ The Council also recognized a need for legislative changes in this area of the law.²⁷ Moreover, many states have influenced California through their revised and modernized methods of serving process.²⁸

California courts also contributed to the efforts prompting the legislature to revise the Code of Civil Procedure sections on service of process. In *Sternbeck v. Buck*,²⁹ a California appellate court found ineffective service where the wife accepted process for her husband. The court commented that it did not have the power to consider a liberalization of the techniques of serving process.³⁰

Modern developments in communication and transportation served as an additional impetus for legislative action. For instance, mail service has progressed from the pony express to the zip code. Fortunately or unfortunately, society is approaching a computerized age of speed and accuracy. Thus, parties to litigation are no longer dependent on personal delivery as the only means of giving an interested party fair notice and an opportunity to be heard.³¹ Service by mail offers a quick, dependable and inexpensive way of supplying an adverse party with notice.³² Accordingly, California needed a modernization of its process serving techniques.

The Revision

Sections 415.10-.50³³ are the new California Code of Civil Procedure statutes providing for several methods of serving process.

²⁶ Interview with John Smock, Administrative Office of the Courts, at State Building in San Francisco, Oct. 16, 1969. Mr. Smock stated that this revision has been under intensive study for approximately two years.

²⁷ JUDICIAL COUNCIL OF CALIFORNIA, ANNUAL REPORT (Jan. 6, 1969).

²⁸ For examples, see: WIS. STATS. ANN. §§ 262.08-.09 (West 1957); N.Y. CIV. PROC. LAW & RULES § 308 (McKinney 1963); COLO. REV. STAT. 4 (West 1963); 52 CONN. STAT. ANN. § 57 (West 1960); 10 DEL. CODE ANN. § 3103 (West 1953); 12 OKLA. STAT. ANN. § 159 (West 1960); 78 UTAH CODE ANN. 4(e)(1) (1953).

²⁹ 148 Cal. App. 2d 829, 307 P.2d 970 (1957).

³⁰ "It is for the legislature, not the courts, to liberalize the techniques of serving process if it be deemed to be in the best interests of the administration of justice." *Id.* at 834, 307 P.2d at 973.

³¹ See *Milliken v. Meyer*, 311 U.S. 457 (1940); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

³² For instance, it would cost approximately twelve cents to mail an envelope containing a summons and an enclosed, self-addressed, stamped acknowledgment form. See 31 CALIF. L. REV., 449, 450 where it was stated "[T]hose who comply with the letter of the codes suffer needless delay and expense engaging a process server . . ."

³³ CAL. CODE CIV. PROC. §§ 415.10-.50 (West Cal. Leg. Serv. 1969).

§ 415.10. "A summons may be served by personal delivery of a copy of the summons and of the complaint to the person to be served. Service of a summons in this manner is deemed complete at the time of such delivery."

§ 415.20. "(a) In lieu of personal delivery of a copy of the summons and of the complaint to the person to be served as specified in section 416.10, 416.20, 416.30, 416.40, or 416.50, a summons may be served by leaving a copy of the summons and of the complaint during usual office hours in his office with the person who is apparently in charge thereof, and by thereafter mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served at the place where a copy of the summons and of the complaint were left. Service of a summons in this manner is deemed complete on the 10th day after such mailing.

"(b) If a copy of the summons and of the complaint cannot with reasonable diligence be personally delivered to the person to be served as specified in Section 416.60, 416.70, 416.80, or 416.90, a summons may be served by leaving a copy of the summons and of the complaint at such person's dwelling house, usual place of abode, or usual place of business in the presence of a competent member of the household or a person apparently in charge of his office or place of business, at least 18 years of age, who shall be informed of the contents thereof, and by thereafter mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served at the place where a copy of the summons and of the complaint were left. Service of a summons in this manner is deemed complete on the 10th day after such mailing."

§ 415.30. "(a) A summons may be served by mail as provided in this section. A copy of the summons and of the complaint shall be mailed (by first-class mail or airmail, postage prepaid) to the person to be served, together with two copies of the notice and acknowledgment provided for in subdivision (b) and a return envelope, postage prepaid, addressed to the sender.

"(b) The notice specified in subdivision (a) shall be in substantially the following form:

(Title of court and cause, with action number, to be inserted by the sender prior to mailing)

NOTICE

To: (Here state the name of the person to be served.) This summons is served pursuant to Section 415.30 of the California Code of Civil Procedure. Failure to complete this form and return it to the sender within 20 days may subject you (or the party on whose behalf you are being served) to liability for the payment of any expenses incurred in serving a summons upon you in any other manner permitted by law. If you are being served on behalf of a corporation, unincorporated association (including a partnership), or other entity, this form must be signed in the name of such entity by you or by a person authorized to receive service of process on behalf of such entity. In all other cases, this form must be signed by you personally or by a person authorized by you to acknowledge receipt of summons. Section 415.30 provides that this summons is deemed served on the date of execution of an acknowledgment of receipt of summons.

Signature of sender

ACKNOWLEDGMENT OF RECEIPT OF SUMMONS

This acknowledges receipt on (insert date) of a copy of the summons and of the complaint at (insert address).

Date: _____

(Date this acknowledgment is executed)

Signature of person acknowledging receipt, with title if acknowledgment is made on behalf of another person

"(c) Service of a summons pursuant to this section is deemed complete on the date a written acknowledgment of receipt of summons is executed, if such acknowledgment thereafter is returned to the sender.

"(d) If the person to whom a copy of the summons and of the complaint are mailed pursuant to this section fails to complete and return the acknowledgment form set forth in subdivision (b) within 20 days from the date of such mailing, the party to whom the summons was mailed shall be liable for reasonable expenses thereafter incurred in serving or attempting to serve the party by another method permitted by this chapter, and, except for good cause shown, the court in which the action is pending, upon motion, with or without notice, shall award the party

Section 415.10 reflects the traditional common law requirement of personal delivery,³⁴ a primary mode of service. Section 415.20(b),³⁵ a substitute method of service commonly referred to as "abode service," becomes a primary method when personal service cannot be effected with reasonable diligence as specified in sections 416.60-90.³⁶ "Abode service" requires that a copy of the summons and complaint be left at the party's dwelling house, usual place of abode or usual place of business.³⁷

Although section 415.20 appears to be a radical innovation in California law, sister states have long before devised similar statutes.³⁸ As early as 1876, in *Earle v. McVeigh*,³⁹ the Supreme Court commented on "abode service." Notice had been posted on the door of defendant's house seven months after the house had been vacated. The Court ruled that leaving a summons in such manner did not

such expenses whether or not he is otherwise entitled to recover his costs in the action.

"(e) A notice or acknowledgment of receipt in form approved by the Judicial Council is deemed to comply with this section."

§ 415.40. "A summons may be served on a person outside this state in any manner provided by this article or by sending a copy of the summons and of the complaint to the person to be served by any form of airmail requiring a return receipt. Service of a summons by this form of mail is deemed complete on the 10th day after such mailing."

§ 415.50. "(a) A summons may be served by publication if upon affidavit it appears to the satisfaction of the court in which the action is pending that the party to be served cannot with reasonable diligence be served in another manner specified in this article and that:

(1) A cause of action exists against the party upon whom service is to be made or he is a necessary or proper party to the action; or

(2) The party to be served has or claims an interest in real or personal property in this state that is subject to the jurisdiction of the court or the relief demanded in the action consists wholly or in part in excluding such party from any interest in such property.

"(b) The court shall order the summons to be published in a named newspaper, published in this state, that is most likely to give actual notice to the party to be served and direct that a copy of the summons and of the complaint be forthwith mailed to such party if his address is ascertained before expiration of the time prescribed for publication of summons. Except as otherwise provided by statute, the publication shall be made as provided by section 6064 of the Government Code unless the court in its discretion orders publication for a longer period.

"(c) Service of a summons in this manner is deemed complete on the last day of publication.

"(d) Notwithstanding an order for publication of the summons, a summons may be served in another manner authorized by this chapter, in which event such service shall supersede any published summons."

³⁴ *Id.* § 415.10.

³⁵ *Id.* § 415.20(b).

³⁶ CAL. CODE CIV. PROC. §§ 416.60-90 (West Cal. Ed. Serv. 1969); See note

61 *infra*.

³⁷ CAL. CODE CIV. PROC. § 415.20(b) (West Cal. Leg. Serv. 1969).

³⁸ See note 28 *supra*.

³⁹ 91 U.S. 503 (1876).

comply with a state statute requiring delivery at the "usual place of abode."⁴⁰ Florida courts have also interpreted this phrase in a similar manner to the apparent intent of the new California statute. In *State ex rel. Merritt v. Hefferman*,⁴¹ defendant had an office, paid his taxes and voted in the state of Minnesota. However, he maintained an apartment in Miami where his wife and children lived. Further evidence showed that defendant had completed a visit to Miami and was traveling by train back to Minnesota. A copy of a summons and complaint was left, pursuant to Florida law, at his Miami apartment with his wife. The Florida Supreme Court logically interpreted the usual place of abode "as the place where the defendant is actually living at the time of the service."⁴² Therefore, service at defendant's Miami apartment was effective.

Section 415.20(b) also specifies that service be left with a competent person at least eighteen years of age.⁴³ Codes of other states as well as the Federal Rules supply abundant precedent for this provision.⁴⁴ For example, the Federal Rules require that process be left with a person of "suitable age and discretion,"⁴⁵ whereas Wisconsin law stipulates that service be made on a competent member of the family at least fourteen years of age.⁴⁶

Section 415.30 is a major innovation in California law on service of process.⁴⁷ The section allows mail delivery of a copy of the summons and complaint as a primary and not a substitute mode of service. Delivery is not deemed complete unless a written acknowledgment of receipt of summons is executed and returned within twenty days of the date of mailing.⁴⁸ If notice is not effected in this manner, an alternative method must be used. In most cases, failure to complete service by mail compels personal delivery of the summons as specified in section 415.10.⁴⁹ The most vital characteristic of section 415.30 is the clause which subjects the party to be served to reasonable expenses incurred in using an alternative method of service if that party fails to acknowledge mail delivery.⁵⁰ The individual can avoid these expenses upon a showing of good cause for

⁴⁰ "By the expression, 'the usual place of abode'; the law does not mean the last place of abode; for a party may change his place of abode every month in the year." *Id.* at 508.

⁴¹ 142 Fla. 496, 195 So. 145 (1940).

⁴² *Id.* at 499, 195 So. at 147.

⁴³ CAL. CODE CIV. PROC. § 415.20(b) (West Cal. Leg. Serv. 1969).

⁴⁴ See note 28 *supra*; FED. R. CIV. PROC. 4(d) (1) (1963).

⁴⁵ FED. R. CIV. PROC. 4(d) (1) (1963).

⁴⁶ WIS. STATS. ANN. § 262.08(3) (West 1957).

⁴⁷ CAL. CODE CIV. PROC. § 415.30 (West Cal. Leg. Serv. 1969).

⁴⁸ *Id.*

⁴⁹ CAL. CODE CIV. PROC. § 415.30 (West Cal. Leg. Serv. 1969).

⁵⁰ *Id.*

failure to acknowledge.⁵¹ The insertion of this clause is an attempt to discourage avoidance of service of process by mail.⁵²

Section 415.40 provides for delivery of a copy of the summons and complaint to a person outside the state by one of the methods delineated in section 415 or by any form of airmail requiring a return receipt.⁵³ Section 415.50 is a general provision authorizing service by publication which may be used only if the supporting affidavit satisfies the court that "the party to be served cannot with reasonable diligence be served in another manner specified in this article."⁵⁴ The clause admits that service by publication is an inadequate mode of giving actual notice; thus it is consistent with the Supreme Court holding in *Mullane v. Central Hanover Bank and Trust Co.*⁵⁵

Choosing the proper mode of service specified in sections 415.10-.50 depends upon the classification of the party to be served. A corporation, a joint stock company or association, a corporation which has forfeited its charter, an unincorporated association (including a partnership) or a public entity, under section 416.10-.50,⁵⁶ may be served in any of three different ways. The first means is the customary personal service requiring manual delivery to the party defendant.⁵⁷ The second of the methods which may be used is that of leaving the summons at the person's office during usual office hours.⁵⁸ The third mode authorizes mail delivery.⁵⁹ The serving party must attempt delivery by these varied methods with "reasonable diligence" before he can serve by publication.⁶⁰

There are two primary methods of service for the parties specified in code sections 416.60-.90,⁶¹ first, manual delivery to the

⁵¹ *Id.*

⁵² See note 26 *supra*.

⁵³ CAL. CODE CIV. PROC. § 415.40 (West Cal. Leg. Serv. 1969).

⁵⁴ CAL. CODE CIV. PROC. § 415.50 (West Cal. Leg. Serv. 1969).

⁵⁵ 339 U.S. 306 (1950): "Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed." *Id.* at 315. While California now provides for publication, it also recognizes that this mode is inadequate and requires the attempted use of every other manner of service prior to publication.

⁵⁶ CAL. CODE CIV. PROC. §§ 416.10-.50 (West Cal. Leg. Serv. 1969).

⁵⁷ *Id.* § 415.10.

⁵⁸ *Id.* § 415.20(a).

⁵⁹ *Id.* § 415.30; see also *Id.* § 415.40 (describing the manner of serving process on persons outside the state).

⁶⁰ *Id.* § 415.50.

⁶¹ *Id.* §§ 416.60-.90.

§ 416.60. "A summons may be served on a minor under 18 years of age by delivering a copy of the summons and of the complaint to his parent, guardian, conservator,

person stipulated⁶² and second, mail delivery.⁶³ In addition, an alternative mode of service is available if the party cannot with "reasonable diligence" be personally served.⁶⁴ This mode is effected by leaving a copy of the summons and complaint at the party's usual place of abode.⁶⁵ Again, the litigant must attempt service by alternative means before he may serve summons by publication.⁶⁶

PRACTICAL EFFECTS ON PARTIES TO BE SERVED,
ATTORNEYS, AND PROCESS SERVERS

The new provisions do not appear to violate the due process rights of the person to be served. In fact, section 415⁶⁷ acts as a safeguard by providing better methods of informing one of a pending action and by limiting the use of service by publication. In *Milliken v. Meyer*,⁶⁸ the Supreme Court implied that mail and abode service are adequate means of giving notice:

Its adequacy so far as due process is concerned is dependent on whether or not the form of substituted service provided for such cases and employed is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard. If it is, the traditional notions of fair play and substantial justice implicit in due process are satisfied.⁶⁹

The advantages of section 415⁷⁰ are directed primarily toward the members of the practicing bar, providing them with convenient, inexpensive and reliable modes of service. Because delivery by mail is a primary means of service, attorneys no longer need rely on per-

or similar fiduciary, or, if no such person can be found with reasonable diligence, to any person having the care or control of such minor or with whom he resides or by whom he is employed, and to the minor if he is at least 12 years of age."

§ 416.70. "A summons may be served on a person (other than a minor under 18 years of age) for whom a guardian, conservator, or similar fiduciary has been appointed by delivering a copy of the summons and of the complaint to his guardian, conservator, or similar fiduciary and to such person, but, for good cause shown, the court in which the action is pending may dispense with delivery to such person."

§ 416.80. "When authorized by Section 54 of the Elections Code, a summons may be served as provided by that section."

§ 416.90. "A summons may be served on a person not otherwise specified in this article by delivering a copy of the summons and of the complaint to such person or to a person authorized by him to receive service of process."

⁶² *Id.* § 415.10.

⁶³ *Id.* § 415.30; see also *Id.* § 415.40 (describing the manner of serving process on persons outside the state).

⁶⁴ *Id.* § 415.20(b).

⁶⁵ *Id.*

⁶⁶ *Id.* § 415.50.

⁶⁷ *Id.* § 415.10-.50.

⁶⁸ 311 U.S. 457 (1940).

⁶⁹ *Id.* at 463.

⁷⁰ CAL. CODE CIV. PROC. §§ 415.10-.50 (West Cal. Leg. Serv. 1969).

sonal service, which consumes valuable time and effort. Mail delivery also eliminates the costs incurred in procuring the assistance of professional process servers.⁷¹ Finally, attorneys should be able to consistently depend upon this method since section 415.30 requires the party served to reimburse the serving party for any additional expenses generated as a result of his failure to complete and return the attached acknowledgment form evidencing receipt of the summons and complaint.⁷²

Section 415.30 may detrimentally affect those agencies in the state engaged in the present primary method of personally delivering process. Present California law,⁷³ in effect, forces the general practitioner to hire a process serving agency to personally deliver a copy of the summons and complaint. However, the rates and role of the process server will change considerably, for service by mail substantially reduces demand for his work. One process agency estimates that this manner of service may reduce the total volume of business by as much as fifty percent, causing a corresponding increase in service fees to compensate for the loss of business.⁷⁴ Nonetheless, an accurate prediction of the economic effect which section 415.30 will have on the process server will be impossible until the section becomes effective on July 1, 1970.⁷⁵

Service by mail will not always be attempted or completed. Attorneys may observe that some situations require immediate personal service and that delivery by mail would not be adequate. Furthermore, personal service will be required where the party served either fails to complete and return the acknowledgment form or is intent on avoiding process.⁷⁶

CONCLUSION

Senate Bill 503 is the first major revision in almost a century.⁷⁷ While the revision appears substantial, it does not reflect a radical change.

⁷¹ See note 16 *supra*.

⁷² CAL. CODE CIV. PROC. § 415.30 (West Cal. Leg. Serv. 1969).

⁷³ CAL. CODE CIV. PROC. § 411 (West 1954).

⁷⁴ Telephone interview with Bill Cave of Attorney's Messenger Service, in San Francisco, California, Oct. 31, 1969. Mr. Cave predicted losing personal service on the sophisticated litigant. However, he stated that personal service would still be used on those parties avoiding process; the price per service would probably reach ten or twelve dollars.

⁷⁵ CAL. CODE CIV. PROC. §§ 415.10-416.90 (West Cal. Leg. Serv. 1969).

⁷⁶ *Id.* § 415.30.

⁷⁷ CAL. CODE CIV. PROC. §§ 411-12 (West 1954), enacted in 1872. For a legislative history see sources cited in note 5, *supra*.

California's revisions to service of process are quite conservative compared to similar changes in other states. Wisconsin's applicable statute for the mode of service upon a corporation is not as restricted as California's. The equivalent of personal service upon a corporation in Wisconsin is obtained by leaving a copy of the summons and complaint in the office of the party to be served with the person apparently in charge of that office.⁷⁸ The California provision, however, requires that the summons and complaint be left during usual office hours and that a copy of the summons and complaint be mailed to the party to be served at the place where a copy of the summons and complaint was left.⁷⁹

California's new mode of "abode service" is more restricted than the comparable section in New York law. New York's method provides that service may be made by mailing a copy of the summons and the complaint to the person at his last known place of residence and either affixing a copy of the summons to his door or delivering process to a person of suitable age and discretion at his place of business, dwelling house or usual place of abode.⁸⁰ California limits "abode service" to leaving a copy of process with a competent person eighteen years or over and informing him of its contents; a subsequent mailing of process is also required.⁸¹

In addition, section 308 of the New York Civil Practice Law and Rules allows the court "upon motion without notice," to prescribe a manner of service, if service is otherwise "impracticable."⁸² This provision is quite liberal in that it allows the court discretion to direct special methods of service. A constitutional objection would arise only if the method chosen was not reasonably calculated to give the party served actual notice of the pending action and an opportunity to be heard.⁸³

The California revision does not reflect the progress made in some sister states.⁸⁴ In a technological society, the possibilities of creating unique and effective means of serving process are unlimited;

⁷⁸ WIS. STATS. ANN. § 262.09 (West 1957).

⁷⁹ CAL. CODE CIV. PROC. § 415.20(a) (West Cal. Leg. Serv. 1969).

⁸⁰ N.Y. CIV. PRAC. LAW & RULES § 308 (McKinney 1963).

⁸¹ CAL. CODE CIV. PROC. § 415.20(b) (West Cal. Leg. Serv. 1969).

⁸² N.Y. CIV. PRAC. LAW & RULES § 308 (McKinney 1963): "In such manner as the court, upon motion without notice, directs, if service is impracticable under paragraph one, two or three of this section." FED. R. CIV. PROC. 4(d)(1) (1963), takes a liberal position regarding personal service. A copy of the summons may be delivered personally or copies may be left at the party's dwelling house or usual place of abode "with some person of suitable age and discretion then residing therein."

⁸³ See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Milliken v. Meyer*, 311 U.S. 457 (1940).

⁸⁴ See note 28 *supra*.

therefore, future changes in the techniques of service may soon be developed. Notice might be given by attaching a copy of the summons and complaint to a monthly bill of a consumer credit card of the party to be served. A system might even be devised whereby a copy of the summons would be included in a monthly bank statement. Another creation would be something to the effect of a "dial-a-process."⁸⁵ This system would effect service over the telephone, perhaps by dialing the social security number of the party to be served.⁸⁶

These methods are not so unusual when considered in an age of major electronic achievement. Nothing should hinder the development of unique manners of service as long as these methods can be made to conform with procedural due process.

William H. Baber, III

⁸⁵ Telephone interview with John Smock, Administrative Office of the Courts, at State Building, in San Francisco, Oct. 31, 1969.

⁸⁶ *Id.* There are many different techniques of serving process; the methods suggested in the text of this comment are merely to make the reader aware of future possibilities.