PERJURY! THE PROOF IS IN THE PROOF (OF SERVICE)

by Todd A. Green

Do you or someone working under your supervision commit perjury on a regular basis and then provide evidence of your offense to your opposing counsel? If you sign your proofs of service before—even *right* before—you serve the document that is the subject of the proof, then you do the former. And if you include that signed proof of service with the document that you serve, then you do the latter.

Well over half of the documents that are served on my office are accompanied by a signed proof of service. The signers of these proofs attest to something that simply cannot have been true at the time they swore to it. When they signed these proofs, the signers cannot yet have done the things they swear to have done. Specifically, they cannot yet have served whatever it is they are swearing that they have served. If they have already served the document when they signed the proof, how is it that the signed proof ended up in the same envelope (or email, or facsimile transmission) as the service copy of the document? I don't imagine that the majority of my opposing counsel or their staffs intentionally attest to something they know not to be true (and then provide me with evidence of its falsehood). More likely, they simply do not read and consider the substance of their own proofs of service before signing them. These proofs state (as they must) that the signer has *already* mailed or faxed or emailed the document that is the subject of the proof—not that the signer is *about to* do so.

What the Proof of Service Must Say

What a proof of service must say is dictated by statute and court rules. A proof of service by mail must state that that the envelope containing the document either "was sealed and deposited in the mail" (Cal. Civ. Proc. Code § 1013a(1), (2)), or "was sealed and placed for collection" (Cal. Civ. Proc. Code § 1013a(3)). These statements cannot be made truthfully until after the envelope has been sealed and deposited in the mail or placed for collection.

If service is made by fax, the proof of service must state that the document "was sent by fax transmission and that the transmission was reported as complete and without error." Cal. R. Ct. 2.306(h)(3). A copy of the transmission report must also be attached to the proof of service and "the proof of service must declare that the transmission report was properly issued by the sending fax machine." Cal. R. Ct. 2.306(h)(4). These statements cannot be made truthfully (and the transmission report cannot be attached) until after the fax transmission has been made.

If service is accomplished by email, instead of stating that an envelope was sealed and deposited in the mail, the proof of service must state that "the document was served electronically" (not that it soon will be). Cal. R. Ct. 2.251(g). This statement cannot be made truthfully until after the email containing the document has been sent.

Because a proof of service by any method cannot be signed truthfully until *after* the document has been served, a signed copy of the proof of service cannot accompany the document (unless serious alterations are made to the time-space continuum).

To Whom Service Must Be Proven

But if the signed proof of service is not included with the document, when and how do you prove service to opposing counsel? Simple: you don't. The purpose of a proof of service is not to prove to your opposition that you have served them. If they received the document, they know they have been served. And if they didn't receive it, they wouldn't receive any attached proof of service either. Rather, it is to prove to the *court* that you have served your opposition. There are a number of statutes and rules requiring a party to file a proof of service with the court. For example, proof of service of a summons must be filed with the court "within 60 days after the time the summons and complaint must be served upon a defendant." Cal. Civ. Proc. Code § 583.210(b) (West 2006). And for a noticed motion, "[p]roof of service of the moving papers must be filed no later than five court days before the time appointed for the hearing." Cal. R. Ct. 3.1300(c). There is no statute or rule, however, requiring service of a signed proof of service on the opposing party.

What You Must Tell Opposing Counsel About Service, and How

Of course, the opposing party does need to know when and how it was served in order to calculate whether service was timely. And for written discovery requests, the opposition needs to know when and how it was served in order to calculate its response date. The served party ought to be able to figure out *how* it was served on its own. If an envelope was delivered by the mailman, then service was by mail; if the document was sitting atop the fax machine, then service was by fax. But the served party may not be able to determine precisely *when* it was served. For this reason, in the case of service by mail, Express Mail, or fax, the Code of Civil Procedure directs that the document served bear a notation of the date and place of mailing, deposit, or transmission. Cal. Civ. Proc. Code § 1013(b), (d), (f) (West 2006). Or, in lieu of this notation, the Code of Civil Procedure provides that the document may be accompanied by a proof of service. Recognizing that the served document cannot be accompanied by a *signed* proof of service, the statute expressly states that this proof should be "unsigned." *Id.*

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