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The Advantages of Using Electronic Service Providers

MAIL OR COURIER? When court-filed documents and discovery require service on opposing counsel, law firms rarely consider other options. Reliance on traditional paper-based service, however, is changing. Widespread access to the Internet at law firms and the adoption of rules authorizing—or even mandating—electronic transmission of documents in various courts have led to a powerful alternative for attorneys: electronic service.

To facilitate this process, commercial online e-service providers (ESPs) have emerged. ESPs enable attorneys to serve documents electronically and manage their litigation over the Internet. Working with ESPs, law firms can reduce the costs of service, access case documents remotely, and coordinate teams of attorneys and staff. The resulting benefits can be dramatic.

Many jurisdictions throughout the country expressly authorize e-service upon consent of the parties. Some courts have gone a step further by requiring e-service for particular types of cases. To the extent e-service is required, it typically is implemented as part of a mandatory e-filing program.

California follows this general pattern. Although not required by any statewide rule, e-service has been approved for use in all state court proceedings. Pursuant to the mandate of Code of Civil Procedure Section 1010.6(b), the Judicial Council of California has adopted Rules of Court expressly authorizing e-service in cases in which the parties have consented or upon order of the court.¹

A party may consent to e-service in any California state court matter either by express agreement or by electronically filing any document with the court.² Also, “[t]he court may, on the motion of any party or on its own motion, order all parties to serve and file all documents electronically in any class action, a consolidated action, a group of actions, a coordinated action, or an action that is deemed complex under rule 3.403, after finding that such an order would not cause undue hardship or significant prejudice to any party.”³

At the local level, some courts have used this rule to mandate e-service in particular types of cases through a general order or a standing order. In San Francisco Superior Court, for example, asbestos matters are subject to mandatory e-service and e-filing.⁴ The same is true of construction defect litigation in San Diego Superior Court,⁵ most complex litigation in Contra Costa County,⁶ and select types of litigation in other counties.

Once e-service is permitted in a California case, other rules relating to e-service come into play. Pursuant to these rules, service is deemed complete at the time of transmission,⁷ and two court days are added to the response period for electronically served documents.⁸

At the federal level, service of case documents by electronic means is authorized by Rule 5(b)(2)(D) of the Federal Rules of Civil

Procedure.⁹ Each time a document is electronically submitted to the court, the Case Management/Electronic Case Files (CM/ECF) system utilized by most district courts throughout the country generates a Notice of Electronic Filing (NEF)—an e-mail message containing a hyperlink to the filed document. District court local rules or general orders typically provide that participation in the ECF system constitutes consent to electronic service and that transmission of an NEF constitutes service.¹⁰

ESPs are part of a broader class of application service providers—third-party entities that manage and distribute software-based ser-

After a document is served through an ESP, it is automatically added to an electronic repository that can be accessed remotely by any member of a litigation team. Moreover, built-in databases can be used to search, sort, group, and isolate case records.

vices and solutions to customers across a wide area network from a central data center. When used during litigation, ESPs become either the required means or an authorized means of serving case documents among parties.

Core Functions of an ESP

ESPs differ materially in design, document management, advanced features, and access control. However, three core functions define ESPs: a service interface, a notification mechanism, and an online case file.

The service interface is accessed through the ESP’s Web site and is the tool by which attorneys upload case documents in electronic form. Some ESPs require that documents be transmitted in PDF files while others convert records to this universal format following transmission.

The notification mechanism is the vehicle for informing users that a document has been electronically served in a proceeding. ESPs typically accomplish this objective via e-mail.

The online case file is a repository of litigation documents indexed and organized within the ESP’s system. As documents are uploaded through the service interface, the ESP stores the records and compiles an electronic pleading and discovery file cabinet that can be accessed

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anywhere via an Internet connection.

Some ESPs combine these core components with other advanced functions that include message boards, deposition libraries, and case calendars. When these premium features are present, ESPs can function effectively as a case management center that offers not only a method for serving documents but also a means for counsel to access and search case records efficiently, communicate with other case participants, track important litigation dates, and store and retrieve deposition transcripts.

Using an ESP only requires an Internet connection, an e-mail address, and the ability to open a PDF document. A document scanner to convert paper records to electronic files is also recommended, although it is not required because ESPs or third-party vendors can provide scanning services.

Why should the use of an ESP be considered when electronic service can be accomplished by e-mail attachment? The answer is simple. The use of ESPs allows attorneys to avoid problems typically associated with e-mail service. Moreover, ESPs do much more than electronically serve documents.

The problems that arise in connection with serving documents by e-mail include:

- Delay or nondelivery of e-mail when large attachments are appended. ESPs typically include document links—not attachments—in e-mail notifications.
- Transmission of computer viruses. ESPs usually have built-in virus protection.
- Disputes over whether service took place. ESPs can provide third-party verification.
- Inadvertently omitting or incorrectly typing e-mail addresses. ESPs generally do not require manual entry of e-mail addresses in their service interface.
- File attachments that cannot be opened. ESPs store documents in universal PDF format.

Although service by e-mail attachment will transmit a document, little else is accomplished. Once received, an e-mail attachment must be printed out and organized with other case documents, distributed among firm attorneys and professional staff working on the matter, and maintained as part of an active paper litigation file. In comparison, after a document is served through an ESP, it is automatically added to an electronic repository that can be accessed remotely by any member of a litigation team. Moreover, built-in databases can be used to search, sort, group, and isolate case records. These features, along with other attributes of more robust ESPs, further distinguish ESPs from basic e-mail.

Range of Benefits

The benefits of using an ESP are measured in terms of cost savings, convenience, and coordination. These benefits potentially can be

realized in any size or type of litigation.

Service of pleadings and discovery through an ESP eliminates expenses associated with traditional methods, including postage and courier fees, administrative time dedicated to duplication and preparing service packets, supply costs (paper, envelopes, labels, print cartridges, and toner), and copier wear and tear. In larger cases, the savings can be substantial. Additional benefits of using an ESP include eliminating service errors, avoiding service disputes, and alleviating the time crunch associated with bulk mailing. What previously may have been an expensive and time-consuming exercise can be reduced to completing a few fields on a service interface and clicking a mouse. These benefits, however, are only part of the story.

Many lawyers believe that online access to case documents is the biggest draw to using an ESP. An electronic pleading and discovery file cabinet ensures that an attorney's case documents are available anywhere, anytime through the Internet—at home, on the road, during a deposition, or at a client meeting. The online file renders paper pleading clips and the distribution of documents within a firm potentially unnecessary, thereby reducing office clutter and storage requirements.

These benefits are magnified when teams of attorneys, paralegals, and professional staff are working on a case, particularly when matters are staffed across offices and redundant paper files otherwise would be required. For traveling attorneys, documents served in their absence can be retrieved without delay. For parties to the litigation and a firm's experts and consultants, access to all or part of the online case file may be provided by ESPs. When Internet connectivity will not be available, records can be printed out or exported to a desktop or laptop computer in advance.

The overall value to attorneys is enhanced by additional features present in some ESPs. Counsel can efficiently use message boards to communicate administrative information, coordinate schedules, identify outstanding issues, and send reminders. Deposition libraries are another value-added service that can be used by firms to store transcripts for remote access by their litigation team.

Moreover, attorneys are not the only members of the legal profession benefiting from ESPs. Judges, particularly those presiding over complex litigation, have effectively used ESPs to manage the paper crush, access case records away from the courtroom, circulate orders and tentative rulings, and communicate efficiently with attorneys on case matters through message board postings.¹¹ In many proceedings, ESP services are provided free of charge to the court.

Given the range of potential benefits, an

ESP still has a place in federal practice, despite widespread adoption of the CM/ECF system by district courts. In courts in which the CM/ECF system has been implemented, the online case file is skeletal and does not support advanced searches. Also, many functions offered by commercial ESP providers are absent. Further, discovery not filed with the court is not served and made available through the system. The value added by an ESP, particularly in those cases coordinated under multidistrict litigation (MDL) and larger federal proceedings, merits consideration of this collaborative tool notwithstanding certain unavoidable redundancies present in using an ESP and the CM/ECF system.

Common issues raised in connection with the use of ESPs involve whether paper documents can be served electronically, whether an online case file is secure, and whether an ESP Web site can be accessed without interruption. These questions reflect valid concerns that ESPs can address, given that their purpose is to make service and document access easy and secure.

Documents in hard copy form, such as exhibits to motions, can be converted to electronic files through scanning capabilities already present at most law firms. If a scanner is not available, ESPs or third-party vendors can provide scanning services.

Access to court records over the Internet is commonplace. Many state courts, including the Los Angeles Superior Court, periodically scan case filings and make them available for sale over the Web. For federal cases, users can log on to the Pacer system and download district, appellate, and bankruptcy court records from across the country.¹² As court-filed documents are generally a matter of public record, making these documents available through an ESP affects only the ease of retrieval, not the scope of access.

Discovery documents, which are not publicly available unless included in a court filing, are a different matter. ESPs generally store discovery documents, as well as other case records, by using one of two secure methods. Some ESPs limit access to a particular online case file to individuals involved in the case, such as the judge, court clerks, the parties, attorneys of record, and their agents. Within this group, some ESPs permit document access to be further restricted. Other ESPs make each case file generally available to all users of their system but allow an attorney, when serving a document, to restrict access only to individuals being served. ESPs also use passwords, encryption technology, firewalls, and other security measures to protect online case files.

The possibility of an ESP's Web site becoming unavailable is an alarming prospect to most attorneys. If the Web site goes down, an

attorneys cannot serve or access case records, at least temporarily. Attorneys concerned with this possibility should request information about an ESP's server redundancies, method of data backup, and history, if any, of unscheduled downtime. Because the business of an ESP is to provide online service and document retrieval capabilities, appropriate safeguards should be in place to ensure uninterrupted access. Moreover, by periodically downloading and storing case documents on a local computer or external storage device, attorneys can maintain their own backup case file in case of an emergency.

Introducing an ESP into a Case

When use of electronic service is not mandatory, the manner and timetable in which an ESP is introduced into a proceeding varies on a case-by-case basis. Any civil proceeding currently being handled by an attorney is a potential candidate for an ESP, whose services can be valuable at any stage of a litigation.

Case management and status conferences are logical forums for considering an ESP during the early stages of the litigation process. All counsel generally are present, and threshold procedural issues are being discussed. Either the court or counsel may raise the matter for discussion. Alternatively, an attorney may broach the prospect of using an ESP informally with other counsel or coordinate a demonstration of a provider's capabilities. Use of an ESP may also be raised by motion in certain contexts.

Introducing the subject of an ESP also can occur later in the course of litigation. Events that may trigger a discussion about using an ESP in a case include the coordination of actions or the determination that other related actions have been filed, the addition of parties to a litigation, and an assessment that the document activity in the case is greater than originally anticipated.

Often, the need for an ESP is first recognized by counsel, who stipulate to the use of an ESP and seek issuance of a confirming court order. This order routinely designates the ESP as the exclusive means of serving documents in the litigation and covers various procedural details. The attorneys then provide basic contact information to the ESP, which establishes an online case file and issues user names and passwords to court and counsel. ESPs also can be introduced into a proceeding without judicial intervention. Agreement among attorneys of record is all that is typically required.

Notwithstanding the benefits of ESPs, some case attorneys may refuse to embrace electronic service. This does not have to derail the possibility of introducing an ESP into a litigation. The nonstipulating parties can serve and be served by traditional means while the

consenting parties serve one another through the ESP. Arrangements can be made to upload documents served by nonparticipants into the online system to maintain a complete electronic case file.

Selecting an ESP

Unless a court has entered into a contract with an ESP, selecting a commercial provider is generally left in the hands of counsel to determine on a case-by-case basis. ESPs differ significantly in terms of design, document management, advanced features, and access control. Although ESPs have been in existence for a number of years, new entrants are attracting the attention of judges and attorneys with their streamlined interfaces and suite of advanced functionality. In this developing marketplace, an ESP used by an attorney in one case may no longer be the best option for the attorney's next proceeding.

When evaluating an ESP, attorneys should consider a variety of factors. For design, attorneys should investigate:

- **Structure:** Does the ESP display all of the cases that it hosts—whether or not a user is related to a particular proceeding? Or does it employ a targeted approach, linking passwords to cases and displaying only matters in which the attorney is involved?
- **Ease of use:** Is the application interface intuitive, or is it cluttered and confusing? Are cases and records easy to find? How many screens, drop-down menus, and fields must be navigated to complete basic tasks such as locating and serving documents?
- **Complex cases:** In consolidated, coordinated, related, and other grouped matters, can individual proceedings be isolated from other cases?
- **Supported browsers:** Is the ESP system designed to fully support Internet Explorer as well as other PC and Macintosh browsers?
- **Online help:** Are help guides or pop-up instructions readily available?

For document management, attorneys should question an ESP regarding:

- **Case files:** Are documents organized in table fields, folders and subfolders, or in some other type of structure? Does the ESP organize documents in more than one way?
- **Customization:** Is the online case file tailored to the jurisdiction, or is it one-size-fits-all? Can the case file be customized to meet the requests of counsel in a particular proceeding?
- **Timing:** Is the document immediately available to counsel upon transmission through the service interface, or is access delayed until the document is manually posted by the ESP? If real-time access is not available, does the ESP guarantee posting within a specified period?
- **Categorization:** Does the ESP categorize documents? Or is categorization in the online

system dependent on selections made by the serving party? If the former, is a lawyer or trained legal professional employed by the ESP to correctly categorize documents in the online case file? If the latter, how straightforward is the user's selection decision, and what safeguards exist (if any) to correct mistakes and oversights from becoming a permanent part of the online record?

- **Document grouping:** Are related documents—such as all documents related to a motion or discovery request and responses—grouped together in the online system for easy retrieval?

- **Search fields and filters:** Can the case file be searched by party, firm, document type, date range, title, page length, document size, and other variables? Are filters available for combination searches?

- **Key words:** Does the ESP support key word searches? If so, are searches limited to document titles or can all or part of the online case file be queried for records containing specified internal text?

- **Party identification:** Are document listings color-coded or otherwise distinguished by party type?

- **Encryption:** Is encryption technology used to secure the transmission of documents to and from the ESP?

- **Offline access:** Can case documents be exported to a desktop or laptop for offline access? If so, can multiple or all case records be exported in a single transmission or must records be downloaded individually?

- **Sale of case documents:** Does the ESP take the documents served through its system and make them available for sale to third parties?

For advanced features, attorneys should research whether the ESP's offerings include:

- **Message boards:** Does the ESP have a case-specific message board? If so, can messages be limited to counsel only or will every posting also be made available automatically to the judge?

- **Calendars:** Does the ESP have one or more calendars? If a calendar function exists, can it be exported to Microsoft Outlook or other calendaring systems? Can reminder e-mail of calendar events be set up by individual users?

- **Deposition libraries:** Does the ESP have a deposition library? If so, can access be limited to particular users?

For access control, attorneys should inquire whether the ESP is structured to address:

- **Document restriction:** Can document service and access be restricted to certain organizations or individuals?

- **Roles:** Can a user role be limited? For example, can an expert be provided access to specific deposition transcripts while blocking access to the rest of the case file?

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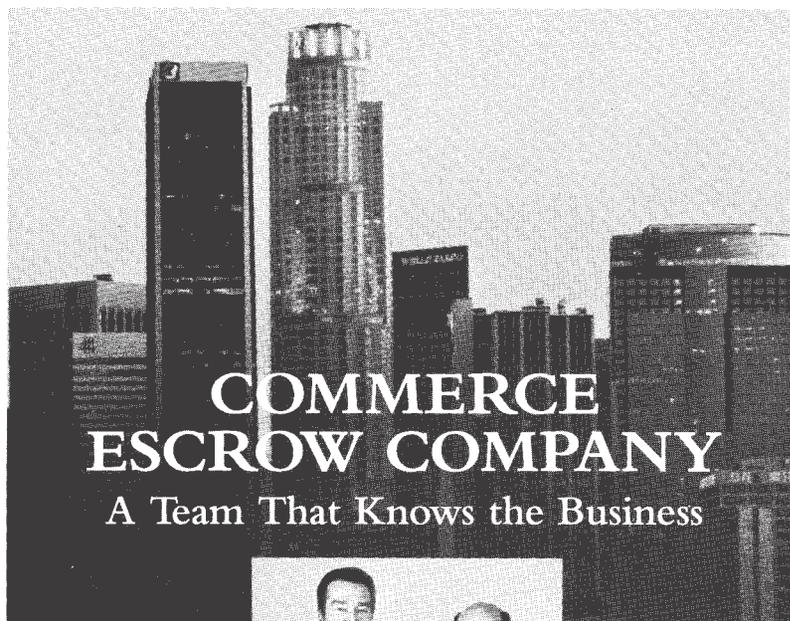
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- Parties and third-party agents: Will the ESP provide access to parties as well as their consultants and experts upon request? If so, is the online case file easy to locate?
- Administrative changes: Does the ESP require a firm designee to make administrative changes or may each user request a change?

Some of this information may be available on an ESP's Web site or through a discussion with an ESP representative. Nevertheless, the best method of evaluating a commercial provider's capabilities is to request a demonstration. The small amount of time devoted to researching ESP alternatives before making a decision will likely pay dividends at every login.

Widespread adoption of electronic service in federal court proceedings and a patchwork of rules mandating or permitting e-service in state courts have modified the flow of paper documents among counsel in litigation. ESPs take these changes to the next level. Much more than vehicles for serving documents, ESPs can function effectively as case management centers. For courts and counsel, managing litigation through the Internet has never made more sense. ■



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¹ CODE CIV. PROC. §1010.6(b) provides that "[b]y January 1, 2003, the Judicial Council shall adopt uniform rules for the electronic filing and service of documents in the trial courts of the state, which shall include statewide policies on vendor contracts, privacy, and access to public records." The "uniform rules" adopted by the Judicial Council for this purpose are found in Rules 2.250 through 2.260 of the California Rules of Court.

² CAL. R. OF CT. 2.260(a). Additional authority for electronic service by consent is found in local rules. *See, e.g.,* L.A. SUP. CT. R. 18.0(g).

³ CAL. R. OF CT. 2.253(a).

⁴ San Francisco Superior Court Amended General Order No. 158, rev'd effective Nov. 1, 2006 (Case No. 828684).

⁵ Construction defect cases in San Diego Superior Court are designated as Electronic Filing (EFile) cases and generally are governed by a form Electronic Filing and Service Order.

⁶ Contra Costa Superior Court Electronic Case File Standing Order, as amended effective Dec. 15, 2006, at §XII.

⁷ CAL. R. OF CT. 2.260(b)(1).

⁸ CAL. R. OF CT. 2.260(b)(2). The two-day extension does not apply to 1) a notice of intent to move for a new trial, 2) a notice of intent to move to vacate the judgment under Code of Civil Procedure §663a, or 3) a notice of appeal. *See* CAL. R. OF CT. 2.260(b)(3).

⁹ FED. R. CIV. P. 5(b)(2)(D) ("Service under Rule 5(a) is made by: Delivering a copy by any other means, including electronic means, consented to in writing by the person being served....").

¹⁰ *See, e.g.,* United States District Court, Central District of California General Order No. 06-07, at §§II(G), III(C).

¹¹ Communication between court and counsel on a message board does not raise ex parte concerns if all case attorneys receive the text of the postings.

¹² <http://pacer.psc.uscourts.gov>.