TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

JOHN K. VAN DE KAMP
Attorney General

OPINION	:	No. 83-603
of	:	MARCH 7, 1984
JOHN K. VAN DE KAMP Attorney General	:	
ANTHONY S. DA VIGO Deputy Attorney General	:	

THE HONORABLE JAMES A. CURTIS, ACTING COUNTY COUNSEL, COUNTY OF NEVADA, has requested an opinion on the following question:

May the deputy in charge of the civil division of a sheriff's office execute a certificate of service with respect to a summons or subpena actually served by another deputy?

CONCLUSION

The deputy in charge of the civil division of a sheriff's office, being reliably informed in the matter, may execute a certificate of service with respect to a summons or subpena actually served by another deputy.

ANALYSIS

The inquiry presented is whether the deputy in charge of the civil division of a sheriff's office may execute a certificate of service with respect to process actually served by another deputy. We are advised that it is the practice of numerous county sheriffs' offices in making their return of service on various papers including summons and subpena to have the deputy in charge of the office civil division, or some other designated deputy, execute the certificate of service after a field patrol deputy has effected service. In making the return of service, the sheriff's office provides the name of the patrol deputy who effected the service.

Generally, a summons may be served by any person who is at least 18 years of age and not a party to the action. (Code Civ. Proc., § 414.10.)[1] Section 417.10 provides that "[p]roof that a summons was served . . . shall be made . . . by affidavit *of the person making such service*. . . ." (Emphasis added.) Service of a subpena may be made by any person. (§ 1987; 36 Ops.Cal.Atty.Gen. 4, 5 (1960).) With respect to section 417.10 pertaining to proof of service of summons[2], it is clear, at least with respect to persons other than designated peace officers, that the person making the delivery must make the affidavit. (*Sternbeck* v. *Buck* (1957) 148 Cal.App.2d 829, 838-839.) The court, in its opinion on denial of rehearing, stated (*id.*, 839):

> "For this court to hold that a process server can delegate his authority, as was done in the case at bar, and then legally execute and file the above affidavit, would be for us to encourage perjury in the filing of false affidavits. It matters not that the plaintiff in the instant case actually received the documents. To countenance the illegal practice in this case would be to invite every process server to delegate his authority and then file an affidavit based upon the hearsay and uncorroborated statement of the delegatee that he had properly made the service. An affidavit thus prepared might lead to an invalid default judgment."

Section 2009 expressly provides that proof of service of a "summons, notice, or other paper" may be made by affidavit. An affidavit is a written declaration under oath, made without notice to the adverse party. (§ 2003.)[3]

---

[1] Hereinafter, all section references not otherwise identified are to said code.

[2] No similar provision has been found respecting proof of service of subpena.

[3] An unsworn statement declared to be true under penalty of perjury may be substituted in lieu of an affidavit. (§ 2015.5.)

A sheriff, constable, or marshal is specially authorized to "serve all process and notices in the manner prescribed by law." (Gov. Code, §§ 26608, 71265.) Government Code section 26609 provides that the sheriff shall *certify* upon process or notices[4] the manner and time of service and return the process or notices without delay. Section 2015.3 provides that the *certificate* of a sheriff, marshal, or constable has the same force and effect as his affidavit. Thus, proof of service of process or notice must be made by affidavit under oath or declaration under penalty of perjury, unless a certificate of service is made by an officer authorized to serve the process or notice and certify to such service; unless a certificate is made by statute sufficient proof of the fact of service, it has no standing as proof. (*Harris* v. *Minnesota Investment Co.* (1928) 89 Cal.App. 396, 403.) An unverified statement of service by a person *other than sheriff*, constable, or marshal constitutes no proof of service. (*Woods* v. *Stallworth* (1960) 177 Cal.App.2d 517, 520.)

The sheriff may properly delegate the duty to serve a summons or subpena to a deputy, since, in such a case, the act of the deputy is the act of the sheriff. (Gov. Code, § 7, 1194, 24100; 36 Ops.Cal.Atty.Gen., *supra*, 6; 31 Ops.Cal.Atty.Gen. 121, 125-126 (1958).) The specific issue is whether the principle of delegation would permit the functions of service and certification to be dichotomized. This in turn depends upon the precise nature of a certificate as distinguished from an affidavit or declaration. Clearly, an affidavit made by an individual who does not have personal knowledge of the facts therein contained must be made upon information and belief. (Cf. 55 Ops.Cal.Atty.Gen. 309, 311 (1972).) But, as previously discussed, such an affidavit, based on hearsay, does not constitute proof of service. (*Sternbeck* v. *Buck*, *supra*; cf. *Tracy* v. *Tracy* (1963) 213 Cal.App.2d 359, 362; *Bank of America* v. *Williams* (1948) 89 Cal.App.2d 21, 29; *Jeffers* v. *Screen Extras Guild* (1955) 134 Cal.App.2d 622, 623; *Pratt* v. *Robert S. Odell & Co.* (1944) 63 Cal.App.2d 78, 82; *Kellett* v. *Kellett* (1934) 2 Cal.2d 45, 48.) Under this standard, an unverified certificate would fail *unless authorized by law*. (*Harris* v.

---

[4] Government Code section 26660 provides:

"As used in this title.

"(a) 'Process' includes all writs, warrants, summons, and orders of courts of justice, or judicial officers.

"(b) 'Notice' includes all papers and orders required to be served in any proceedings before any court, board, or officer, or when required by law to be served independently of such proceeding."

It is impossible to imagine any sort of a thing ordered by any court or judge to be executed by an officer that is not embraced in the statutory definition. (*Bruner* v. *Superior Court* (1891) 92 Cal. 239, 247.) See, e.g., Gov. Code, § 26738 referring to a return on "a *summons*, affidavit and order, order for appearance, *subpoena*, writ of attachment, writ of execution, order for delivery of personal property, *or other process or notice* required to be served . . . ." (Emphasis added.) Hence, "process" and "notice" include summons and subpena.

Minnesota Investment Co., *supra*; *Woods* v. *Stallworth*, *supra*.) In the case of a sheriff, constable, or marshal, such authority is expressly given. (Gov. Code, §§ 26609, 71265.)

Thus, nothing requires an unverified certificate to be founded upon personal knowledge. Rather, in accordance with the presumption that official duty has been regularly performed (Evid. Code, § 664; *Price* v. *Hibbs* (1964) 225 Cal.App.2d 209, 215), affecting the burden of proof (Evid. Code, §§ 660, 606; cf. 63 Ops.Cal.Atty.Gen. 95, 103 (1980)), Government Code section 26662 provides:

> "The return of the sheriff upon process or notices is prima facie evidence of the facts stated in the return."

Further, Evidence Code section 1280 provides:

> "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:
>
> "(a) The writing was made by and within the scope of duty of a public employee;
>
> "(b) The writing was made at or near the time of the act, condition, or event; and
>
> "(c) The sources of information and method and time of preparation were such as to indicate its trustworthiness."[5]

Hence, a certificate made as a record of the act of service is not, though based on information and belief, inadmissible as hearsay. This view is supported by the holding in *Colver* v. *W. B. Scarborough Co.* (1925) 73 Cal.App. 441, 453-454:

> "It is further contended by appellants that the trial court erred in its findings that 'the sheriff thereafter returned said writ of attachment with his written return endorsed thereon, certifying that he had levied said writ upon said property and that he had taken said property into his possession and custody,' for the reason, as assigned by appellants, that 'the said written return shows upon its face as executed by "Wm. I. Traeger, sheriff, by M. Q. Adams, deputy sheriff," and the testimony shows that one Tucker attempted to serve said writ of attachment and that M. Q. Adams, personally, knew

[5] "Public employee" includes an employee or officer of a public entity. (Evid. Code, § 195.)

nothing about what was done in the premises.' In support of such contention no authority is cited by appellants, nor is this court favored with any argument other than the statement that, although the rule is that a deputy performing the act must make the return thereof in the name of his principal, such rule does not extend to another deputy who has no personal knowledge of the facts.

"In the case of *Carter* v. *O'Bryan*, 105 Ala. 305 [16 South. 894, 897], it was held that 'the objection that the sheriff, who made the levy and who had failed to make the proper returns, could alone make them, and that his successor, in compliance with an order of the court to do so, could not make them, was without merit. The duty to be performed attached to the officer, and was an official, not personal, duty.' (See Pol. Code, sec. 4171.) If a successor in office, who was personally unacquainted with the facts, was qualified to make a return, it would appear plain that a deputy of the sheriff in office, although having no personal knowledge of the facts, would be equally competent."

While a certificate is not inadmissible as hearsay, it must be based upon such information and prepared in such a manner as to indicate its trustworthiness. (Cf. Evid. Code, § 1280, *supra*.) Hence, the deputy preparing the certificate must be reliably informed of the facts of such service. Further, since the sufficiency of service is subject to challenge in judicial proceedings, the identity of the deputy who effected service and who alone could testify under oath with respect thereto should be indicated upon the certificate or otherwise made available. The certificate could recite in part as follows:

"I certify that the attached summons was served by (*name of deputy making service*) by personally delivering a copy of the same to _____ at _____ on the __day of _____ , 19__, at __ o'clock __.m."

It is concluded that the deputy in charge of the civil division of a sheriff's office may, upon reliable information, execute a certificate of service with respect to a summons or subpena actually served by another deputy.

*****