

ELECTRONIC (E-MAIL AND WEB BASED) SERVICE

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The paperless family law office may be a step closer to reality. Service processes are adapting to stay abreast of busy law practices and electronic demand.

There are several benefits to serving electronically using electronic mail (e-mail) or web services. Serving by way of electronic means is more time-efficient for the busy law practice and a more cost-effective process for the client who saves the cost of using a process server or courier.

This article explores electronic service rules and precedent in jurisdictions including Ontario in an effort to determine the benefits of adopting electronic service procedures such as e-mail service or web service for the Ontario family law practitioner.

Ontario

While the Family Law Rules do not make any provision for e-mail or web service, Rule 16.05(1)(f) of the Rules of Civil Procedure allows a lawyer of record to be served by e-mail. Service by e-mail is effective however, only if the lawyer of record provides e-mail acceptance of the service and the date of the acceptance. There are other conditions that must be met in order to serve by e-mail and these are set out in Rule 16.05(4), which stipulates that the e-mail sent must include the following additional information:

- a. the sender's name, address, telephone number, fax number and e-mail address;
- b. the date and time of transmission; and
- c. the name and telephone number of a person to contact in the event of transmission problems.¹

Because the Family Law Rules do not contain a similar rule, family lawyers wishing to serve by way of e-mail, are going to have to take steps to obtain leave to serve by e-mail or take steps after the fact to have the court validate service. While we are likely to be met with some resistance at first, it should be fairly simple to convince a court to grant leave or to validate service by relying upon Rule 1(7) of the Family Law Rules and upon the principles behind the primary objective set out in Rules 2(2) and 2(3)(b) of the Family Law Rules. In other words, the argument you make will have to be twofold – first argue that the Family Law Rules do not make provision for service by e-mail and thus we are directed by Rule 1(7) to refer to the Rules of Civil Procedure for guidance. The second step in the argument will be to argue that adopting the same approach as set out in the Rules of Civil Procedure is appropriate because doing so is consistent with

¹ Rules of Civil Procedure, R.R.O. 1990, Reg. 194. <http://www.canlii.org/en/on/laws/regu/rro-1990-reg-194/latest/rro-1990-reg-194.html>

and promotes the primary objective of the rules because it saves the parties time and expense.

For further support, you can rely on the case of *Jolette v. Jolette* where Justice Del Frate of the Ontario Superior Court of Justice commented that “Rule 16 adopts the reality of today’s advances in communication and methods of doing business...” and that “The purpose of these Rules is to expedite in a reasonable and economic manner the conveyance of documentation between the parties.”²

Your argument may have to go further than convincing a court that you have complied or will comply with conditions set out in Rule 16 because the court may have some concerns about security and reliability that are not addressed by Rule 16 but which are shared by other courts and legal professionals in other jurisdictions. To be successful in your argument, you need to be aware of what those concerns are and about what steps you can take to deal with them.

Concerns about E-mail and Web Based Service in General

No doubt you have concerns about internet based methods of service, particularly service by e-mail. You are not alone. Many of the concerns about internet and in particular service by e-mail have been succinctly expressed by the Electronic Filing Committee (“EFC”) of the American Bar Association’s Science and Technology Law section. *Best Practice for Electronic Service of Process*³ outlines the EFC’s concerns for electronic service and offers guidance for the creation of model rules for electronic service of process.

As a result of the EFC’s concerns, the vast majority of the American states have rejected service by e-mail as an acceptable routine method of service electing instead to adopt a case by case approach with the courts allowing service by e-mail in special circumstances. The case of *Rio Properties Inc. v. Rio International Interlink*, 284 F.3d 1007 (2002)⁴, is a great read not just because it illustrates the case by case approach but because the court reviews many of the limitations of e-mail service in detail. In this case the plaintiff claimed a breach of its trademark and was unable to effect regular service upon the defendant. The court determined that the acceptability of e-mail service was case specific and dependent on the particularities of the situation.

With respect to the limitations of e-mail service, the court in *Rio Properties Inc. v. Rio International Interlink* identifies several risks. The risks identified include: the risk that confirming receipt of the email may not be possible; that verification requirements are difficult to meet (i.e. limited use of electronic signatures, etc); and issues of system

² *Jolette v. Jolette*, 2002 CanLII 2746 (ON S.C.), paras 25,28.

³ Electronic Filing Committee. “Best Practices for Electronic Service of Process”. [ABA Section of Technology and Law](http://www.abanet.org/scitech/BestPracticesElectronicService.html). 2006. American Bar Association. Mar. 2, 2010. <http://www.abanet.org/scitech/BestPracticesElectronicService.html>

⁴ “Rio Properties Inc. v. Rio International Interlink.” 2007. US Court of Appeals, Cases and Opinions. Mar. 2, 2010. <http://cases.justia.com/us-court-of-appeals/F3/284/1007/495529/>

compatibility that make it difficult for recipients to open or view attachments or even receive the e-mail. The court also noted that it becomes difficult to establish that service of process indeed took place, because it is unlikely in an adversarial process that the recipient will cooperate by sending confirmation of receipt of service (i.e. acknowledging the read receipt in Microsoft Outlook or Microsoft Outlook Express). Another issue identified by the court is that e-mail service is not a secure process and service can be compromised by cyber attacks, making it unreliable.⁵

Many of the concerns and best practices outlined in the foregoing case and in the EFC's *Best Practice for Electronic Service of Process* guide are not restricted to service by e-mail. They equally apply to other forms of electronic service such as service by facsimile; and although there was a time when the Bar was extremely reluctant to adopt service by facsimile as a reliable method of service, we now use it every day without giving any real thought to the concerns that still exist with respect to its reliability. Just as service by facsimile is not fool proof, neither will service by e-mail and just as this did not stop us from eventually accepting service by facsimile, this should not stop us from accepting service by e-mail as an alternate and desirable method of service.

While we do not hold the view that service by e-mail should be restricted to special circumstances, we are of the view that we need to do more to make sure that rules and practices are adopted that will address the most significant of the concerns so that the benefits of e-mail service to the client outweigh the potential risks. To do this, we need to understand what the risks are and what options exist to minimize the concerns.

The EFC's work in the area of best practices and guidelines is helpful. The best practice principles that the EFC offers as guidance can be loosely grouped into the categories below:

- Protection:
 - Service process should include prevention mechanisms for undetectable modifications to electronic files;
 - Electronic service must continue to preserve the protections of traditional service processes;
- Receipt:
 - Service must be in a manner that is reasonably calculated to provide notice;

⁵ Messing, John. "Two Methods of Electronic Service of Process". *The SciTech Lawyer*. 2.3 (2006): 14-17. Web. Mar. 2, 2010.

- Electronic documents must be made available to the recipient in a manner that enables the recipient to easily consult with counsel (i.e. readily able to print);
- Agreements for electronic service must be made knowingly and voluntarily with appreciation of consequences;
- Proof of service must be in a manner that preserves the court's neutrality, i.e. proof through automated mechanisms;
- Service should include reliable proof that notice was received by the person authorized to receive it;
- Notice should not be effected until all required documents are readily viewable by the recipient. The acknowledgment of receipt must establish the actual fact of this receipt;
- Electronic service should be receipted even where traditional paper service does not require receipts; and
- The identity and authority of the recipient to receive service must be established prior to service.³

Ontario's existing rules adequately address the foregoing guidelines. For example, the "receipt" issue is addressed by requiring that service is only effective if the lawyer on record provides e-mail acceptance of the service and the date of the acceptance.

The concerns about privacy, access and confidentiality are very significant however, and at present, are not adequately addressed by our rules in Ontario. Security policies or measures must be adopted in order to ensure:

- a. the privacy and confidentiality of the documents being electronically transferred; and,
- b. that the proof of receipt is reliable so that the electronic documents are not reported received by someone other than the intended recipient. There needs to be some way to safeguard against the possibility that the document was not actually received.

Rule 16.05 of the Ontario Rules of Civil Procedure do not include adequate security measure to address these concerns, and until we adopt policies that require that adequate security measures are taken, service by e-mail will not and ought not to be sufficiently reliable to establish service in the same way as service by facsimile.

Ontario's failure to adopt the type of security measures that will make service by e-mail as reliable and therefore as acceptable and widely available as service by facsimile, does not mean that we should simply throw the whole concept in the garbage. Both Ontario and other jurisdictions are addressing these security issues, albeit in a variety of different ways.

Security Concerns and How We Can Address Them

There are several ways in which we can address the security concerns. Some are technological or rooted in special services such as web-service providers (discussed below) while others are non technology based.

a. Non Technical Solutions

Most of the jurisdictions we looked at had adopted non-technology based security measures and in almost all of the jurisdictions that we looked at including Ontario, there was a blanket prohibition against serving an originating process (the pleading that starts the case) by e-mail. For example, the Utah's Rules of Civil Procedure provide that all documents to be filed in a case, after the initial pleadings, may be served by way of e-mail transmission subject to certain conditions.⁶

Examples of some other measures include the approaches adopted by the District Court of Western Australia and the United Kingdom. The District Court of Western Australia, in addition to those measures already provided for in our Rules of Civil Procedure, has determined that service by e-mail is acceptable, if the other party provides an e-mail address for service and the document being served is one which is capable of being filed electronically.⁷ In the United Kingdom, Rule 6.26 of their Civil Procedure Rules⁸ and Rule 4 of the Practice Direction to Rule 6 stipulate that for such service to be deemed appropriate, the following factors apply:

- a. There must be written agreement that the recipient solicitor is willing to accept service by way of electronic means;
- b. The recipient solicitor must indicate in writing the fax number, e-mail address or other electronic identification to which service must occur; (an e-mail address set out on the firm's letterhead is only sufficient if the recipient solicitor states that the e-mail address may be used for service);

⁶ "Service of Process". 2010. Utah States Court Judicial Council. Mar. 3, 2010.
http://www.utcourts.gov/howto/service/service_of_process.html#Alternate

⁷ "Lodging Documents - District Court" District Court of Western Australia. Mar. 3, 2010.
http://www.districtcourt.wa.gov.au/Lodging_documents_district_court.aspx?uid=1622-2642-4819-2961

⁸ "Service of Documents". Civil Procedure Rules. 2009. Ministry of Justice. Mar. 3, 2010.
http://www.justice.gov.uk/civil/procrules_fin/contents/parts/part06.htm

- c. An e-mail address must be set out on a statement of case or a response to a claim filed with the court (on the pleadings); and
- d. Where a party intends to serve a document by electronic means (other than by fax) that party must first ask the party who is to be served whether there are any limitations to the recipient's agreement to accept service by such means (for example, the format in which documents are to be sent and the maximum size of attachments that may be received).

These provisions address receipt and verification concerns as well as system compatibility issues but still do not go far enough to address the security concerns.

b. Encryption and Password Protection

Although no jurisdiction seems to have adopted a requirement that encryption and passwords be used to ensure the security of the transmission, this is routinely used in the corporate world to effectively address such concerns. There appears to be no good reason why we could not adopt into our rules a requirement that we use this technology when serving documents by e-mail.

Here is a thumbnail sketch of how encryption software and password protection works. Encryption allows only those with the secret code to codify or alter a file and makes the file unintelligible to unauthorized parties. Thus, if encryption is used, the body of the e-mail and its attachments are fully protected while in transit. When the recipient enters the correct access password, the message and its attachments are decrypted and rendered readable. Some software is designed to do this by first converting attachments to PDFs that are both password protected (the user is prompted to enter the appropriate password in order to access the document) and encrypted (rendered unintelligible until the password or code is entered). The PDF remains encrypted until the correct access password is used. Obviously, the transmission or communication of the passwords to the recipients needs to be done by separate e-mail or letter or better yet, over the telephone instead of in writing or via e-mail.⁹

c. Web Service Providers

A key concern of the EFC is that there is no way to prevent a litigious party from denying that the documents were ever received and thus, e-mail transmission cannot be guaranteed even where the sender does not receive an error message, and there is no neutral 3rd party (such as a process server or courier) to assist the court in deciding the matter. With web service, the service provider is considered a neutral 3rd party and this service is akin to the document exchange method contemplated by Rule 6(2)(c) of the

⁹ "Hassle-free proof of mailing and delivery for legal correspondence?" Your ABA e-news, 2009. American Bar Association. Mar. 2, 2010. <http://www.abanet.org/media/youraba/200902/article11.html>

Ontario Family Law Rules. The EFC and other legal commentators prefer web services as a method of allowing documents to be served electronically.

Unlike conventional email services, web services provide document verification, the ability to ensure the data is not compromised and secure transmission. Receipts are provided to the sender of the documents and enforced by the rules of the program. The documents are also automatically encrypted to ensure that they are not altered.⁵

There are many types of web services that are available for the purpose of serving court documents. The most popular sites in the United States seem to be RPost's Registered E-mail service and LexisNexis *File & Serve*.

With RPost's Registered E-mail service you get:

- Legally admissible tamper and counterfeit-proof evidence of an email's receipt by the intended recipients;
- Proof of content;
- Optional end-to-end encryption feature; and
- Conversion of attachments to PDF files that are password protected and encrypted.

LexisNexis *File & Serve* is another web service provider that is accepted by many US court systems and used by many law firms there. This service:

- Offers real-time electronic access to court filings and case information;
- Allows the user to create and serve court-issued documents online;
- Provides e-mail notification of new case developments, court filings, etc;
- Provides customized file management features to meet the court's specific needs;
- Enables document creation and delivery tools; and provides automatic document intake capabilities with the capability to accept or reject documents online (i.e. receiving filings from law firms).¹⁰

While web services are not free, they still remain a reliable, faster, efficient, cost-effective and environmentally friendly alternative to traditional paper based service.¹¹

¹⁰ "Litigation Document Management: Drafting, Filing & Service" 2010. LexisNexis. Mar. 3, 2010. <http://law.lexisnexis.com/full-service-law-firms/litigation-services-electronic-filing>

Sadly, there are no web service options currently available in Ontario. We contacted LexisNexis Canada and were informed that while they are working to set up a Canadian counterpart to their US based web service, this project has been delayed in part because of the official language translation requirements. No timeline was provided as to when we can expect the launch of web process service capabilities with LexisNexis Canada.

Conclusion

Web based service may be ideal for service, especially service of an originating process but it is not necessary to go this far in order to make service of non-originating documents by e-mail an effective and reliable alternative method of regular service. Using encryption and password protection along with adopting some of the other practices discussed in this article ought to be sufficient to bring the reliability of service by e-mail up to par with the reliability of service by facsimile.

Obviously our rules will have to be changed if we want to elevated e-mail service to the status of service by facsimile but there is no reason why we need to wait for web based services to arrive in Ontario before we can move forward. To pave the road to making service by e-mail a conventional rather than unconventional or exceptional means of service, we encourage family lawyers to take steps to introduce this method of service to our family courts by using this method of service and by taking the added precautions to address the concerns that may be raised by arguing that the Family Law Rules ought to adopt the approach in Rule 16.05 of the Rules of Civil Procedure. We also encourage you to lobby the government and Family Law Rules committee to adopt this method of service as a means of effecting regular service.

¹¹ "Hassle-free proof of mailing and delivery for legal correspondence?" Your ABA e-news, 2009. American Bar Association. Mar. 2, 2010. <http://www.abanet.org/media/youraba/200902/article11.html>