

Thought – Service of Process by Email?

Putting aside the fact that the rules (NY/NJ) don't currently allow for service by e-mail, what are people's thoughts on such service? The way I see it, service by email is possibly the most effective way to ensure that the intended party receives notice. It does not seem to "offend" the *Int'l Shoe*, "traditional notions of fair play and substantial justice." Most email providers have some form of email tracking built in or accessible via extension/plugin, so you can establish that the notice was opened. On top of that, email is secured by password and can be encrypted so as to prevent anyone other than the owner from accessing it.

Just wondering if anyone has thoughts on the topic... I've been thinking about it since I am currently dealing with a *pro se* defendant who is actively attempting to avoid service.

I do not think that email is a reliable enough to insure receipt. What if the email goes to a junk/spam folder? What if the person does not check their email regularly.

If you are having service issues, because of avoidance, and you have a good address, there are already ways to solve this in most (if not all) jurisdictions. Seek to have the party served by publication. Its already accepted and there is case law on it.

Some will ask that alternative service be done by Fed Ex/UPS, or even certified mail. Certified mail may be avoided by a person avoiding service, but Fed Ex and UPS may be less likely since they will not expect service in that manner.

If you are having issues with service ask to serve by publication and that a copy be mailed and email as well. If no response after that then move forward to default, etc.

Phil A. Taylor, Massachusetts

https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/04/09/divorce-papers-can-be-served-via-facebook-n-y-court-rules-if-thats-the-best-practical-alternative/?utm_term=.02cda44aeba7

If you can serve via Facebook, why not email?

Erin M. Schmidt, Ohio

There are some cases in NY that allow it, I believe. I once had a person that refused to be served. I had email address. I argued instead of requiring service by publication, court should allow service by email. I was denied. However, I think there are a couple cases that allow it.

Nick Bowers, New York

The cases in NY and I believe in PA have involved family law where one party had avoided service and the Court allowed for substitute service beyond nail and mail or publication since the party had been posting reliably to Facebook. There's also another case in NY where one of the big banks tried service like this without leave from the Court (I think it was Chase) and the Court threw it out. YMMV.

Sarah Gold

Phil, there are various ways by which you can track whether an email was actually opened by the recipient. For example, there is a service that's called "whoreadme" which will insert a tracking cookie into an email you send. When the recipient opens the email, the sender gets a notification that the email was opened as well as the IP address through which the email was accessed. That's not going to give you a specific street address but will often give you the city or town where the recipient opened it. The tracker can be defeated, but if you do get a confirmation that the email was opened I'd say that's at least as reliable as posting on someone's door, because you wouldn't get a "false positive" (an indication the email was opened when it wasn't).

Kevin W. Grierson, Virginia

Phil - you make a good point about junk/spam. But that's similar to posting on their door - theoretically the notice can blow away, get pulled down, etc. Same thing with service on a household member. The intended recipient still may not actually get notice (E.g. "oops, I saw something here for you but threw it out" or "oh yeah, I totally forgot about that").

Nick - I wonder if you did service by publication AND email if the court would have allowed it? In NJ, in *Egbert v. Egbert*, 125 N.J. Super. 171 (Ch. Div. 1973), the court allowed service by publication and service on the husband's mother. The court found that because the defendant and mother were regularly in communication, the marital home had been in NJ, and the mother lived in NJ, due process was satisfied. From what Sarah said and from my own research, it seems like the courts are more likely to allow "creative" methods of service in family cases.

My feeling is that service by publication will either be phased out eventually or else will be expanded to include publication via social media, etc. (#YouveBeenServed)

Shlomo Himmel, New Jersey

Suppose the class of persons to be noticed by publication are "does" associated with a decedent defendant? Would posting to ((shudder)) Facebook be enough?

Joseph Melino, California

What didn't make any sense to me in my case was how the defendant was supposed to actually get more notice by publishing in a random newspaper than by sending to email address that one the defendants in the case regularly responded with the person on. That just does not line up with real life.

Nick Bowers

Exactly. If we're going for something that's "reasonably calculated to apprise" you would think email would do the trick.

Shlomo Himmel

In principle, I disagree completely. Email is simply too "virtual". Personal service of process, with a signed affidavit of a witness who can be dragged into court to describe the details, that's the ticket. Helps weed out the frivolous as well.

Robert Link

Shlomo's not comparing e-mail service to service in person, but to less preferred forms of service like posted service and service by publication (which is probably about as useless as it gets, though most states still permit it if a defendant can't be found).

Take a divorce case where one party moves out for parts unknown. What's more likely to actually get them a copy of the divorce complaint--posting someplace they don't appear to live anymore, advertising in a paper you hope is near where they are actually living, or sending an email to a known email address and verifying that that the email was opened?

Kevin W. Grierson

A) No court should allow this. B) One might argue service-by-publication at a site like MySpace or Twitter or Zuckerberg's but it should not be confused with actual service, were such a provider held to the same requirements as other service-by-publication providers.

Robert Link

My argument is service by publication is not any more reliable (and likely far less reliable) than by publication. I don't think one can honestly argue that publication is more likely to apprise the party (particularly in my case where there was a long history of the other party responding via email to another defendant (which was part of discovery).

Nick Bowers

...meant than by email.

Nick Bowers

I think as fewer and fewer people are subscribing to print newspapers, and getting their news online, and with more and more papers shutting down at least the print versions, the idea of service by publication will have to change. It was fine when everyone used to get the daily paper, but now there is no dominant local news media where such publication would have any real likelihood of reaching the intended recipient.

Michael D. Caccavo, Vermont

Even 20 years ago the idea that service by publication would give actual notice to a defendant was laughable. Who is going to check the legal notices section of a paper regularly to see if they've been sued?

On the other hand, personal email and FB accounts aren't location dependent and sending notices to them is at least addressing them directly.

Kevin W. Grierson

The law/rules already allow it. There are cases on it the court can rely upon.

My main point is to ask that an established alternative method be used and the other methods be tacked on for good measure.

Phil Taylor

I was comparing email to alternative means of service.

Going as far back as 1950, the Court was saying that service by publication [alone] may not necessarily comport with due process requirements. I especially like the below quote:

It would be idle to pretend that publication alone as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. *It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. *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. The chance of actual notice is further reduced when as here the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. *In weighing its sufficiency on the basis of equivalence with actual notice we are unable to regard this as more than a feint.*

Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 315, 70 S. Ct. 652, 658, 94 L. Ed. 865 (1950)

Also, found this law review article if anyone cares to read 20 pages on service by e-mail:

<http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1932&context=plr>.

I guess someone beat me to the thought...

Shlomo Himmel
