

Electronic Filing Committee
Science and Technology Law Division
American Bar Association

2006 Revisions

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Best Practices for Electronic Service of Process

Adopted as of 9/1/04
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Introduction:

Electronic Service of Process (eSOP) is not permissible pursuant to existing sources of law. It is the intention of this committee to draft model rules for eSOP. On the other hand, it is less clear whether electronic waivers of Service of Process (SOP) are allowable under such authorities as Uniform Electronic Transactions Act (UETA). Therefore, these Best Practices are intended to address the legal and technical issues that need to be resolved in the creation of rules for eSOP establishing jurisdiction over the parties and other compulsory process, and for the use of electronic waivers of SOP regardless of the adoption of additional rules.

1. Service of process should include methods to prevent undetectable modifications to electronic files and identity spoofing of senders.
2. Scope
 - a. Service of process as used in these Best Practices includes in-person service of process by an official or private process server that files a return of service with the court.
3. Waiver of Service
 - a. Unless otherwise prohibited by statute or court rule, a waiver of service of process obtained through dispatch of pleadings by first class mail or other reliable means, including electronic

transmissions and the filing of a waiver, similar to FRCP Rule 4(d)(2), should be encouraged.

b. Valid waivers of service must be knowing and voluntary. Where the waiving party is a corporation or other legal entity, the person or agent giving the waiver must possess authority from the entity to waive service on behalf of it. Where the party served is an individual who lacks legal capacity to grant waivers, waivers may only be made by another individual who holds the authority to do so under applicable law. Meeting these requirements typically will require obtaining a waiver from a person or agent who would have been authorized pursuant to statute or court rule to receive service of process.

Commentary: It has come to the attention of this committee that certain web sites and/or agreements contain language to the effect that requires electronic service of process in the event of a dispute. The committee strongly believes that such language should be given heightened scrutiny in the event of litigation to ensure that the agreement was knowingly and voluntarily entered with an appreciation of the consequences.

4. Constitutional Requirements

a. "To be sure, the Constitution does not require any particular means of service of process, only that the method selected be reasonably calculated to provide notice and an opportunity to respond." *Hollow v. Hollow*, citing *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 at 314, 70 S.Ct. 652.

b. The opportunity to respond requires the ability of the recipient readily to print, or transfer to another portable medium, all of the process documents in a manner that will enable the recipient to retain and consult with legal counsel or other advisors.

5. Goal

A Goal of Best Practices is to retain the traditional advantages to courts associated with returns of service or waivers of service of process.

Commentary: While the Constitution does not provide any particular means of service of process, traditionally affidavits and/or proofs of service have been provided to the Court as evidence that service was effectuated in a manner consistent with due process.

a. *In the transition to electronic service of process, we believe it is important to preserve principles and protections afforded by existing legal authorities.*

b. *Courts generally are able to avoid costly evidentiary hearings about service of process issues because professional process servers are presumed trustworthy, or in the case of filed affidavits of waiver of service of process, costs of conventional service are awardable under comparable authority against non-cooperating parties and more severe remedies for false filings under Rule 11 or contempt powers are available.*

c. *Using affidavits and/or proofs of service in this fashion, a Court can remain neutral in a fact-finding inquiry regarding service of process even when its own jurisdiction is questioned.*

6. ABA Standards

Best Practices should be fashioned consistently with standards for electronic court filing processes and court automation approved by the ABA House of Delegates.

Commentary: Section 1.61c relating to comprehensive court automation applications refers to “electronic service” of documents other than eSOP establishing jurisdiction over the parties and other compulsory process. These Best Practices are intended to include such matters not covered by 1.61c.

7. Received transaction

Electronic service of process or waivers should include reliable proof that notice was actually received by a person who was authorized to accept it.

Commentary:

a. Requirements for receipted transactions are an essential part of traditional rules governing service of process.

*b. Consistent with the view that electronic mail never is sufficient as a general rule to reliably establish electronic service of process or a waiver (but see *Rio Properties, Inc. v. Rio International Interlink*, 284 F.3d 1007(9th Cir. 2002) allowing electronic mail service of process on a case by case basis), these Best Practices also require electronic service of process transactions to be receipted even where rules governing paper service of process or waivers do not require a receipt. Thus, for example, the Best Practices would disallow unreceipted electronic transmissions notwithstanding the specific language of F.R.C.P. Rule 4(d)(2)(b), applicable to waivers of service of process generally, which permits dispatch of a paper waiver “through first class postal mail or other reliable means.” The Best Practices require more reliable means to establish actual waiver than electronic mail.*

c. The “notice was actually received” concept requires that the complete process required by law must be successfully transmitted and acknowledged. Where process consists of multiple documents (e.g., summons and complaint), notice is not actually received unless all the required documents are received in a format that can be readily viewed by the recipient. Acknowledgment must establish the fact of such actual receipt.

d. The “reliable proof” concept requirement guards against the possibility that the process was not actually received or was improperly reported as received by someone other than the intended recipient. Reliable proof includes a tamper-evident audit trail, and in accordance with Section 8, Cryptographic Security. Electronic mail does not provide reliable proof.

e. The transaction receipt requirements include establishing the identity and authority of the person acting to make the waiver of service of process.

8. Cryptographic Security

a. Transmitted documents should be encrypted for privacy and confidentiality in transit, consistent with privacy and access policies governing Internet access to electronic court records.

b. Technological means are required to safeguard the authenticity of the transmitted documents and to reliably memorialize the receipt of notice by an authorized recipient, using tamper-evident seals as referenced by the ABA approved standards. (See Section 6)

9. These Best Practices require technology that is reliable and free of vendor-specific barriers.