

NAPPS Response to OASIS LegalXML Electronic Court Filing TC

Sections 3.2.1: The Filing and Service of Process and 6.1.5: ServeFiling

As an OASIS member, the National Association of Professional Process Servers (NAPPS) appreciates the opportunity to participate in the discussion concerning LegalXML ECF V5.0. We submit herewith comments to the proposal that we believe adds valuable insight to the document. We welcome any further discussions and conversation on this important topic if deemed necessary.

BACKGROUND

Founded in 1982, the National Association of Professional Process Servers (NAPPS) is the largest non-profit trade association for process servers in the United States. The association has a membership of over 2,200 members throughout the country. NAPPS is a trade organization with a primary focus on law, statutes and rules relating to the service of process. Through a vital legislative program, we have proactively protected due process and have directly impacted policy and procedure in the courts. Unlike sheriffs, who serve many functions in their capacity, process servers only serve legal process as an independent and trusted third party. We believe it is fair to say that as an Association, we are experts in the field of civil process, bringing decades of experience and valuable knowledge to the discussion.

The United States Constitution guarantees every citizen the right to due process of law. The Constitution, and the subsequent 5th and 14th amendments make it clear that the concept of “due process” was an important and basic right of all Americans. It has been widely held in case law that without proper service of process, our courts do not have jurisdiction over an American citizen. However, at any time that we consider matters relating to the originating service of process, by which the court obtains jurisdiction over an individual or entity, we would stand on the premise that the utmost level of concern for the law at this juncture is required. At the moment service upon an individual or entity is made and that party is placed under the jurisdiction of the court, basic rights and freedoms are at issue.

Essential to this conversation is to establish that secondary service of process and original service of process are distinctly different. For this reason, we would also assert that a generic reference to the “service of process” must be avoided. Original service of process also known as “Primary Service of Process” is governed by laws, rules and statutes because it is the origination of jurisdiction and control by the court over an individual or entity and as such, empowers the court to restrict personal rights and freedoms and allow for the forfeiture of property. In the present study, the assumption is that all conditions are favorable and the parties are mutually satisfied. In reality, there are often entangled legal battles over the issue of jurisdiction and improper service. It is the real world intricacies that arise in court that our members are witness to daily. Families lose businesses, parents lose the right to parent their children, and assets may be seized. Secondary service of process is generated after the fact; after original service of process has been confirmed and after any necessary motions to quash or otherwise oppose the service to obtain jurisdiction have been decided by the judiciary. For this reason, secondary service of process is administered by a completely different set of laws, rules and statute, and we believe there is a cause for concern when the two concepts are not clearly differentiated.

Original service of process should be accomplished by a trusted, disinterested third party. We would assert that if electronic delivery of service is the goal in this study, the service of original service of process by electronic means, if allowed, should without exception, be completed by a trusted, disinterested third party.

PROPOSAL

NAPPS understands how electronic service of process (eSOP) can benefit the originators and frequent recipients of service of process. We do not dispute that it would save both the sender and the recipient time and money in the preparation and intake of paper-based process. We understand that for a recipient that opts in to a dedicated, non-email driven, eSOP platform, proper notification of legal process is quite likely.

First: We believe that a trusted third party, such as a private process server is quite necessary.

The courts need the assurance from a trusted third party as to what documents were served, what entity was served, and exactly when and where it was served. One cannot seriously accept that the sender or the recipient of service should be given the power by the court to declare that service was made, and provide those assurances to the court. If the sender/server is NOT an independent trusted third party, it would be in their best financial interest for the recorded facts of service to be different than the truth. If the Sender/Recipient holds the records of service, and does not produce documents or appear in court in a timely manner, a strong incentive would be present to “lose” or misrepresent the records of service. The independent trusted third party does not have these incentives. They are paid for serving the papers and submitting the Affidavit or Return of Service detailing the facts of service to the court. They have no vested interest in the outcome of the case. In the alternative, although electronic services can be tracked with the date and time of receipt, there is no guarantee that the receiving party is the correct party for service.

Each state, through legislative, administrative or superior court rule has detailed exactly who shall serve process, or, in other words, who shall serve as the trusted third party. Our position is that all forms of electronic service are still service, and the Statutes or Administrative Rules still apply. We believe that the Trusted Third Party in eSOP should be a person that is an authorized process server under that state’s existing rules.

In summary, it is the position of NAPPS that centuries of precedent show that neither the party that initiates service of process, nor the party that receives service of process, should be the party that certifies to the court that legal service has taken place. That is the role of the Trusted Third Party, and in most states the Trusted Third Party is a Sheriff or private process server acting under that state’s Statutes, Administrative Rules or Rules of Civil Procedure. **Thus we suggest that appropriate elements of any XML or data definition include a slot for the Trusted Third Party.**

Second: It is our position that Email has no place as a valid form of eSOP in any system. In addition to the well-known reliability problems with email’s store and forward system such as lost email, email in SPAM folders, abandoned accounts, another individual opening the email, and many others: There is no place in an email based system for a Trusted Third Party to verify that the process was actually received by the intended recipient.

We appreciate your review of our position herein and consideration of the suggested revisions and comment provided to the LegalXML ECF V5.0. We welcome your responses and further inquiry. We are hopeful that this may result in ongoing dialogue on original service of process.