

This position paper is submitted by the **National Association of Professional Process Servers**. (NAPPS) NAPPS is a Worldwide Organization of the largest community of professional process servers and the first resource for credible information regarding service of process. Founded in 1982, NAPPS today has well over 2,200 members representing all 50 states, the District of Columbia, seven Canadian provinces and nearly two dozen foreign countries. **Our members serve many hundreds of thousands of services of process each year.** NAPPS members assure a citizen's right to due process and access to the legal system. We believe that NAPPS has more knowledge about service of process than any other organization in the United States. Based on our knowledge and experience we respectfully submit the following comments.

The following is from the NAPPS Best Practices:

SERVICE OF PROCESS

1. For purposes of these Best Practices, "Primary service" of process refers to the service of initial or other process intended to acquire jurisdiction over a person or property. "Secondary service" of process refers to the service of subsequent papers exchanged between the parties following service of initial process. These Best Practices refer to both Primary and Secondary service of process.
2. Service of process or other papers for the purpose of acquiring jurisdiction over a person or property should be performed by a disinterested third party.
3. The preferred and most effective method of service of process upon a party is **in-person** delivery of process to the named party.

Both the OASIS Group and the American Bar Association are opposed to service of process by electronic means for any document that gives the court jurisdiction of individuals or entities. We discuss both of their positions below.

OASIS is a nonprofit consortium that drives the development, convergence and adoption of open standards for the global information society.

OASIS promotes industry consensus and produces worldwide standards for security, Internet of Things, cloud computing, energy, content technologies, emergency management, and other areas. OASIS open standards offer the potential to lower cost, stimulate innovation, grow global markets, and protect the right of free choice of technology.

In the latest version of their report Version 5.0 that can be viewed at <https://docs.oasis-open.org/legalxml-courtfilling/ecf/v5.0/cs01/ecf-v5.0-cs01.docx> The following language appears on Page 15:

"In addition to filing of court case documents, this specification supports "secondary service" – the delivery of copies of filed documents to persons who have already been made parties to a case. This specification does NOT support "primary service," which entails the service of summonses, subpoenas, warrants and other documents that establish court jurisdiction over persons, making them parties to a case," (Emphasis added.)

We strongly urge you to stop using the term “service of process” and instead use the two terms “**primary service**” and “**secondary service**” as defined in the Oasis report quoted in the prior paragraph.

The American Bar Association, Electronic Filing Committee, Science and Technology Law Division has published **Best Practices of Electronic Service of Process.**” In this report See section 7b it says:

*“Consistent with the view that electronic mail never is sufficient as a general rule to reliably establish electronic service of process or a waiver..., 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.**”* (Emphasis added.)

The United States Supreme Court in Mullane v. Central Hanover Trust 339 U.S. 306 (1950) set forth the standard for alternate service of process when "due diligence" had been exhausted to serve a defendant: *"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.**"* (Emphasis added.)

There is no way to serve primary process by electronic means that can pass the Mullane test.

While there are some court decisions that have allowed electronic primary service of process, in each of these cases service had been attempted by traditional means and failed and only upon motion supported with declarations showing that personal service was not possible did courts grant an alternative means to serve in that specific case only.

There have been many articles posted on the internet about the problems of using electronic means to perform primary service of process.

Here are some quotes from one such article written by Steven W. Teppler and published in the National Law Review at: <https://www.natlawreview.com/article/continuing-relevance-personal-service-process> Note: His footnotes have been omitted.

“Personal service of process has been the hallmark for initialing litigation for nearly 100 years, primarily because it guarantees actual notice to a defendant of a legal action against him or her. It remains a touchstone, and the “ideal circumstance under which to commence legal proceedings” against a person.”

*“The author submits that the underlying reason for the continuing and near universal preference for personal service is that while electronic filing offers significant post-litigation commencement benefits, it fails to address issues uniquely inherent to *initial* service of process: adherence to the constitutionally mandated, jurisdictionally critical due process requirements of notice and opportunity to be heard.”*

"There is perhaps no set of acts more important in furtherance of commencing an action before a court than the filing of a complaint and the service of process on a defendant. Simply put, without proper service of process a Court has no jurisdiction over a defendant and may not proceed to judgment. Further, any such judgment rendered will in all likelihood be deemed void."

"The underlying rationale for personal service of process as a prerequisite to the valid exercise of a judicial tribunal over a defendant finds its source in the Due Process clause of the 14th Amendment. This rationale, most often characterized as "notice and opportunity to be heard." was discussed in the Mullane decision cited above.

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

Mullane then defines "notice" and "opportunity to be heard" as a requirement that a potential defendant be apprised of the nature of the proceedings against him or her, and that he or she have adequate time to mount objections thereto...

"The notice must be of such nature as reasonably to convey the required information..."

"...personal service of process remains the most effective, reliable, and trustworthy method for providing notice of a pending lawsuit and an opportunity to be heard."

"Emblematic of the reliability and trustworthiness of personal service of process, it is estimated that only a fraction of a percent of personal service of process events are seriously challenged, and even fewer succeed." Comment: If primary service is done be electronic means they will certainly be a large increase in Motions to Quash Service that will add a lot of judicial and clerical time to the courts.

If service is performed by electronic means here are some problems that may occur:

No way to prove the subject received it.

No way to prove when the subject received it.

Someone else using the same computer may think it is spam and delete it.

A spam filter may see the name of a bank in the title and think it is spam and delete it.

A subject may accidentally delete it and have no way to deal with it.

An email address on a collection case may be decades old.

Respectfully Submitted,

Andrew Estin, Legislative Chairperson,
National Association of Professional Process Servers

HB766 Senate Ways and Means Committee – February 11, 2020

This position paper is submitted on behalf of the Florida Association of Professional Process Servers (FAPPS) and the National Association of Professional Process Servers (NAPPS). I am currently the Vice President of both organizations.

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Comments on HB766

Who are FAPPS and NAPPS?

NAPPS is the largest professional association of process servers in the world with over 2,200 members. Our members abide by high standards of conduct and professionalism or face action by an Arbitration and Grievance process. NAPPS members serve over 14 million legal papers a year. NAPPS has 13 State Chartered Associations, of which one is FAPPS. Hawaii does not currently have a NAPPS Chartered State Association.

Purpose of this Bill

Clearly HB766 is intended to establish a body to evaluate Electronic Service, specifically Service of Process by Email. The bill's language is clear: Establishes a task force within the Judiciary to review allowing service of notice and process by electronic mail in civil and administrative proceedings.

Purpose of this Position Paper

1. To ask, if HB766 is passed, that NAPPS be allowed to participate as a member of this task force under Section 2(c) (the chair of the task force may invite other interested parties to join the task force).
2. To inform this body of existing experience and documentation regarding problems with Electronic Service, particularly Email as a form of Primary Service.
3. To summarize the importance of preserving the disinterested third party in protecting the rights of the American people
4. To define and explain the crucial differences between Primary and Secondary Service of Process

Why NAPPS should be assigned a seat on the task force

Our Board and committee chairs are experienced professionals in the world of process service. We know the history of process service, we know the successes and failures when personal service has been circumvented, and we have a broad knowledge of laws and practices in many states that might be used for comparison.

Problems with using Email as a form of Electronic Service

1. Most email is spam. The latest numbers from Statista (September 2019) show that the percentage of spam has been steady for about four years at 55% of all email traffic. 281 billion emails are sent and received every day.
2. Many desired business emails end up in spam folders or are deleted by email servers, spam blockers, and users reading subject lines in preview mode before they are opened.

3. Users are trained to not open email, much less attachments, that they were not expecting. Most notices of service would fall into that category. From personal experience, I get multiple IRS notices and Social Security "offers" every week. Most don't get even a cursory look before receiving the Delete key.
4. Many people use joint email addresses. The party being informed might not be the one to open a particular email. The other party might delete it as spam even though the intended party was expecting the service.
5. According to TechJury numbers regarding Gmail (the most popular online platform), users only read about 22% of the emails they receive in their Primary tab, with lower or similar numbers across the Social, Updates, Forums, and Promotions tabs.

In summary, if Electronic Service of any form of process is contemplated, the use of Email as a platform for Electronic Service is not recommended. With so much email not even making it to an inbox, and perhaps one fifth being opened by the user, clearly Email does not meet the goal of a method "likely to inform the accused".

The importance of Due Process and a disinterested third party

Since the 1200s (the time of the Magna Carta), the right of all people to a fair trial has been memorialized in law. In our American constitution, the 5th and 14th amendments mention Due Process and the 6th amendment clearly calls for the accused to be informed of the nature and cause of the accusation. Courts have consistently held that a person who is not informed properly of legal action is not under jurisdiction of the court. Properly informed is generally regarded as being served by a disinterested third party. Notice by the Plaintiff is never allowed, as that would lead to a conflict of interest since the Plaintiff might prefer a default judgement.

Hawaii Statutes and Court Decisions

Hawaii Statutes Title 34, Section 634

Section 634-21 conforms with the requirements of most states, in that the person serving process is a disinterested party, namely the sheriff or deputy; the chief of police or subordinate; some other person appointed by the court or a person authorized by the rules of court.

Hawaii Case Law dating back to 1902 (Hackfeld v. Hilo Railroad which references Hail v. Spencer) reaffirms that that Sheriffs, not Plaintiff, serve process 14 H. 448 (1902).

Allowing Electronic Service of primary service initiated or controlled by the Plaintiff would violate this well respected concept of a disinterested party performing the service.

Primary versus Secondary service

If this committee intends to implement Electronic Service in any form, we strongly urge you to carefully distinguish between Primary Service and Secondary Service. These two terms are in general use by such bodies as the OASIS LegalXML standards and the NAPPS Best Practices Standard.

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From the OASIS LegalXML standards:

In addition to filing of court case documents, this specification supports "secondary service" – the delivery of copies of filed documents to persons who have already been made parties to a case. This specification does NOT support "primary service," which entails the service of summonses, subpoenas, warrants and other documents that establish court jurisdiction over persons, making them parties to a case

Thank you for your interest, and for allowing our input,

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