

CIVIL CONDUCT

Are you being served

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By **Seamus Smyth**

Seamus Smyth explains the best steps to take to avoid accepting e-service

Service by electronic means, including fax – i.e. e-service – is a bit of a mess. Can we avoid accepting e-service? Should we?

Most legislation on service refers, at least impliedly, only to physical service of paper documents. Where service is paper/physical, or, for example, by a contractually agreed method (including agreed arbitral rules) or pursuant to a court order, we are probably stuck with the means of service. Surprisingly little legislation refers to electronic methods.

The language in this legislation is not uniform and the provisions are not consistent, but they all – with one quasi-exception – seem to allow potential recipients to avoid e-service by taking certain steps.

At present the two most popular electronic methods are fax and email, but the methods will change as surely as telegrams and telexes are now obsolete; already Facebook may be displacing email, and soon electronic communications may be entirely different. The safest course today is to think of electronic communications generically.

Relevant rules

For e-service the relevant legislation seems to be confined to the following:

- CPR 6.3(d) and 6.7 – of claim form, and on an authorised solicitor.
- CPR 6.20(d) – of other documents subject to the requirement (6.23(5)) that the fax number be at the address for service.
- CPR PD62.1(1) – in arbitration claims by “fax, electronic mail or other means of electronic communication”.
- Arbitration Act 1996 section 72(3) – “by any effective means” but this does not apply to documents in legal proceedings where court rules apply.
- FSMA 2000 (Service of Notices) Regulations 2001:a) by or on a relevant authority by fax provided a copy is simultaneously sent by any method other than fax (which could be another form of e-service); b) on a relevant authority by other electronic means provided (if service is required within a specified period) confirmation of receipt is obtained.
- HMLR (Practice and Direction) Rules 2003 – by fax and email only.
- The Faculty Jurisdiction Rules 2000 – by fax only, and only between solicitors.

Potential hurdles

Can we avoid receiving e-service? Theoretically, yes, but it may be difficult.

- CPR 6.3(1)(d) and 6.20(1)(d) permit e-service only in accordance with PD6A which in turn (PD6A, 4.1) requires a written expression of willingness to accept e-service. Merely setting out your fax number on writing paper or your fax number or e-address in court documents without qualification is deemed to amount to expression of willingness (unlike the mere setting out of an email address on writing paper unless it is stated – i.e. expressly – that the email address may be used for service).
- The FSMA regulations require from the recipient both a written statement of willingness and the relevant fax number or e-address, though providing these alone for the purposes of accepting service is sufficient.
- The HMLR adjudication rules and the Faculty Jurisdiction Rules require a written statement of willingness.
- The Arbitration Act is the quasi-exception: it does not provide expressly for exclusion but section 72(3) applies only in the absence of any other agreement about service, so the opportunity exists in the arbitration agreement to exclude e-service.

Going ahead

Deciding whether to exclude e-service is not straightforward. First, being successfully served is seldom good news for solicitor or client. E-service makes it easier for opponents and may accelerate service by two days. If this enables an opponent to serve successfully rather than out of time, or accelerate the client’s deadline for compliance, our client might be prejudiced. Arguably, solicitors could be criticised for voluntarily permitting e-service. Do we need clients’ authorisation to accept e-service (as we do for CPR 6.7)?

Second, physical service and paper documents are understood and predictable, whereas e-communications are bedevilled by unforeseen and unpredictable factors: idiosyncratic filters, computer failures, faxes transmitted only electronically to someone who is not at his desk, mobile devices on which attachments cannot be opened, etc. But, refusal might look curmudgeonly/unreasonable, or attract adverse costs.

Can our clients exclude e-service? In theory they can, but for most clients any published statement expressing unwillingness to receive e-service would look very odd.

If you wish to exclude e-service:

- DO make an exclusion statement (that your firm is not willing to accept service by fax or other electronic means) on writing paper – and preferably wherever fax and e-address are shown.
- DO NOT include your fax number and email address in court documents.
- DO NOT supply to any relevant FSMA authority or to the parties to an HMLR adjudication or to proceedings relating to faculties a fax number or other electronic address without an exclusion statement.
- DO make sure that everyone in your firm complies.

If you decide not to exclude e-service:

- DO ensure your clients will not object.
- DO ensure that no incoming e-communication is accidentally ignored.

Postscript:

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