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14264 West Tierra Buena Lane
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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:)	Supreme Court
)	No. R-24-
PETITION TO AMEND)	
RULE 113)	Petition from the
of the JUSTICE COURT RULES)	Maricopa County
OF CIVIL PROCEDURE)	Justice Court Bench

BACKGROUND

The Petitioners request the Justice Court Rules of Civil Procedure be amended to specifically authorize service by e-mail or by other electronic means as an alternate form of service. This Petition is filed on behalf of the Justice of the Peace Bench in Maricopa County. It was drafted and discussed through the Maricopa County Justice Court Best Practices Committee. On October 11, 2023, it was presented at a bench meeting for discussion and then was endorsed by a vote of our bench at a bench meeting on November 8, 2023. We respectfully recommend the adoption of the proposed amendment.

I.

THE RECOMMENDED CHANGE PROVIDES A MUCH NEEDED ALTERNATIVE TO SERVICE BY PUBLICATION

Service by publication, while authorized, seldom provides meaningful notice of a lawsuit. On rare occasions, a defendant will appear at a default hearing. However, typically it is because he typed his name into a search engine and inadvertently discovered he had a court date. When service is accomplished by publication, it is common for a defendant to first discover that a lawsuit was filed against him when his wages are garnished. This process can often be unfair to both sides because if the defendant obtains relief through a motion to set aside the judgment, the plaintiff must now prove its case after evidence has become stale. Some states have attempted to establish service by publication on a web page,¹ but there is a better solution.

Written electronic communication is not new. Queen Elizabeth II sent an e-mail in 1976 and e-mail became common through AOL in 1993.²

¹ Cale J. Bradford & Michael Brian Coppinger, Jr., *Technology and Process: How Changing Rules and Technology Will Impact the Legal Profession, the Justice of Due Process Protections, and How We Judge Competence*, 55 Indiana L. Rev. 215 (2022)(Discusses service by publication on a web page designed for that purpose).

² Samuel Gibbs, *How Did Email Grow from Messages Between Academics to a Global Epidemic?* The Guardian, 7 Mar 2016.

Attachments to e-mails began in 1992.³ Free Hotmail accounts have been available since 1996 and free Gmail accounts have been available since 2004.⁴ Even so, courts continue to allow service by fine print in newspapers on pages that nearly everyone admits nobody reads.

II.

ALLOWING SERVICE BY E-MAIL AS A FORM OF ALTERNATE SERVICE IS CONSISTENT WITH DUE PROCESS AND WITH WHAT IS DONE IN LIMITED CIRCUMSTANCES IN FEDERAL COURT.

For several years, federal courts have allowed plaintiffs to serve international defendants by e-mail. The first case to do so was apparently from a bankruptcy court in Georgia in 2000.⁵ Since that time, the practice has gained general acceptance.⁶ In arguing for the expansion of electronic service of process, one set of commentators correctly noted the following.

³ *Id.*

⁴ *Id.*

⁵ *In re. Int'l Telemedia Assoc., Inc.*, 245 B.R. 713, 720 n.5 (Bankr. N.D. Ga. 2000)

⁶ *Douglas v. Cruise Yacht Op Co. Ltd.*, 2022 WL 1719312 (S.D. Fla. 2022); *Kelly Toys Holdings, LLC v. Top Dept. Store*, 2022 WL 3701216 (S.E. N.Y. 2022); *Sirius XM Radio v. Aura Multimedia Corp.*, 339 F.R.D. 592 (S.D. N.Y. 2021); *See generally, Melendez v. Melancon*, 2022 WL 554057 (Ariz. Ct. App. 2022)(Unpublished opinion; Infers service by social media and electronic communication is better than service by publication); *Hope v. Hope*, 2014 WL 860797 (Ariz. Ct. App. 2014)(Unpublished opinion; Family Court granted father's motion for alternative service, to serve mother with temporary order seeking physical custody of children, by e-mail and by Facebook).

[B]y instituting electronic filing, federal courts have dismissed the ritual importance of paper as relatively trivial. If the ritual weight of paper documents were a cardinal policy consideration, federal courts would mandate that important documents be filed in paper form, but that is not the case. Also, paper-based service of process is conducive to evasion--a calculating defendant can easily detect and evade a process server. This is not so with service via email.

Though a defendant could still delete an email that he suspects contains service of process, the very act of deletion would validate the fact that the defendant was aware of being served. Therefore, the deleting defendant would have been successfully served when the email went into his email inbox and he became aware it contained service of process. Deletion would be an ostrich-like attempt to evade. This is analogous to a defendant tearing up paper-based service of process after service was mailed to him or posted on his door.

Even if all the arguments against electronic service of process hold true, when electronic service of process is used as a secondary or tertiary channel of service it is more secure and more reliable than the channels currently used. Federal courts already allow service via means that are less reliable than normal channels, provided that more reliable channels are first exhausted.⁷

⁷ Ronald J. Hedges, Kenneth N. Rashbaum & Adam C. Losey, *Electronic Service of Process at Home and Abroad: Allowing Domestic Electronic Service of Process in the Federal Courts*, 4 Fed. Cts. L. Rev. 55, 73 (2010).

III.

THE PROPOSED LANGUAGE CONTAINS SIGNIFICANT SAFEGUARDS TO PREVENT SERVICE BY E-MAIL FROM EITHER BEING ABUSED OR BEING UNFAIR.

Service by e-mail satisfies due process when the plaintiff demonstrates that the e-mail address is valid and the defendant is successfully receiving messages at that address.⁸ The proposed amendment meets and exceeds this standard by containing four safeguards. First, service by e-mail would only be authorized as a method of alternative service. A plaintiff seeking to serve a defendant by e-mail would be required to file a motion for alternative service and to demonstrate that traditional methods of service have been unsuccessful. Second, the plaintiff would be required to show receipt of either an e-mail or other electronic communication from the defendant, using that specific e-mail address, within the previous 60 days. Third, if a plaintiff seeks a default judgment based on electronic service, a judge will have an opportunity to review the affidavit of service and to determine whether service is adequate on a case-by-case basis.⁹ Finally, even with electronic service, under the proposed amended rule, the plaintiff would still be

⁸ *Amazon.com Inc., v. Kexlewaterfilers*, 2023 WL 3902694 (W.D. Wash 2023).

⁹ JCRCP 140 (Entry of Default Judgment).

required to mail the summons and the complaint to the defendant's last known address.

CONCLUSION

The Petitioners respectfully request that the proposed amendment to Rule 113(a) of the Justice Court Rules of Civil Procedure be adopted. Doing so would modernize service of process standards. Due process requirements would be fulfilled while productivity and reliability would be increased.

RESPECTFULLY SUBMITTED, this 9th day of November 2023.

/s/ Anna Huberman
ANNA HUBERMAN
Presiding Justice of the Peace
Maricopa County
Justice Court Administration
222 North Central Ave., Suite 210
Phoenix, AZ 85004

Attachment:

Justice Court Rule of Civil Procedure 113:

a. Personal service on individuals in the State of Arizona. A CASE OR CLAIM AGAINST A DEFENDANT CANNOT PROCEED WITHOUT PROPER SERVICE.

(1) Except as stated in other sections of this rule, each defendant who is found in the State of Arizona must be personally served with the summons and complaint by a constable or by a certified private process server who is certified under Arizona law. “Personally served” means that the constable or private process server must deliver a copy of the summons and pleading to the individual defendant personally, or leave copies at the individual's residence with a person of suitable age and discretion who lives there, or deliver copies to an authorized agent of the defendant. Promptly after service upon a defendant, the constable or certified private process server must prepare an affidavit as proof that the defendant was served, and the proof of service must be filed with the court. An affidavit of attempted service should be filed with the court only as an exhibit to a motion. [ARCP 4(d), (g), 4.1(b), (d)]

(2) **Additional means of service.** In addition to any other available methods of alternative service, a plaintiff may file a motion to serve the summons and complaint by electronic means if that party can show other methods of service have been unsuccessful and that party can establish either:

(i) it has received a communication utilizing the proposed electronic means from the defendant within the previous 60 days, or

(ii) the defendant received a communication utilizing electronic means with the summons and complaint and opened it.

Electronic means includes the direct delivery to an e-mail address or to any other electronic method reasonably calculated to ensure the actual receipt of the documents.¹⁰

The court's order shall also require that the party additionally serve a copy by U.S. mail to the other party's last known address.

¹⁰ This definition is taken from the Servicemembers Civil Relief Act. 50 U.S.C. § 3955(c)(2)(D)(iii). The context, however, is very different. It is from a portion of federal law providing alternative methods for a military tenant to give a notice of lease termination to a landlord.