

Litigation in the Digital Age: New Rules on the Service of Court Documents in Ontario

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There is a new but little-known way to serve court documents in Ontario. Ontario Regulation 170/14 enacted under the *Courts of Justice Act* amended the *Rules of Civil Procedure* to allow documents that do not require personal service to be served by way of electronic document exchange (“EDX”). The court system in Ontario has a long way to go before truly entering the digital age, and this is but a small step in the right direction.

Subrule 16.01(4) was amended as follows:

(4) Any document that is not required to be served personally or by an alternative to personal service,...(b) may be served on a party acting in person or on a person who is not a party,...(iii) by use of an electronic document exchange of which the party or person is a member or subscriber, but, where service is made under this subclause between 4 p.m. and midnight, it is deemed to have been made on the following day.

Similarly, subrule 16.05(1), which prescribes the manner in which service can be effected on a lawyer of record, was amended to allow for service of a document by use of an EDX system of which the lawyer is a member or subscriber.

These new rules came into force on January 1, 2015.

EDX services are web or cloud-based, and provide law firms and self-represented individuals with an alternative to service by mail, fax or email. Individuals who wish to serve documents by way of EDX must subscribe to the service through an accredited provider of such a service. Documents can only be served on another party if that party is also a member of the same EDX system. As a result of being browser-based, EDX services do not require additional downloads or software to run.

The new rules are apparently largely the result of lobbying efforts by CourtSide EDX, which is currently the only EDX platform that complies with the *Rules*.

CourtSide EDX offers two types of membership: standard and premium. There is no monthly fee for a standard membership, which charges \$3.00/service/party for documents up to 40 pages, and \$8.00/service/party for documents more than 40 pages. A premium membership costs \$15.00/month, but service fees are reduced to \$2.00/service/party for documents up to 40 pages, and \$5.00/service/party for documents exceeding 40 pages. Premium memberships are individual (i.e.: each lawyer at a firm must pay the monthly membership fee); if one lawyer at a firm elects to be a premium member, all other subscribers at that particular firm must also have premium memberships.

Courtside EDX is touted as making the service of documents more affordable, efficient and reliable. The benefits of EDX are two-fold. First, CourtSide EDX organizes all sent and received documents pertaining to each matter or case into a single PDF document with a corresponding table of contents. These documents are subsequently stored in the cloud and can be accessed at any time from any computer with internet access. Second, CourtSide EDX automatically produces a record of service, which eliminates the need for an affidavit of service in order to prove service.

Rule 16.09(4.1) confirms that service through an EDX system may be proved by a record of service that indicates the following:

- a. the total number of pages served;
- b. the name of the person who served the document and, if the person served the document on behalf of a party, the name of the party and the nature of the relationship;
- c. the name of the person on whom the document was served; and
- d. the date and time at which the document was served.

Services such as CourtSide EDX may add value to lawyers practicing on the Commercial List, which generally hears cases such as large national insolvencies and other high stakes commercial matters. On such cases, the list of parties to be served are often very long, court records are voluminous, and matters are often brought on for hearing on very short notice. However, even in the Commercial List context, EDX may be of marginal benefit, given that the E-Service Guide, which came into effect July 1, 2014, permits service by email on Commercial List matters (even without acknowledgment of receipt of the email).

In addition, EDX may not ultimately achieve mainstream use for a number of other reasons. There is currently very little cost associated with serving court documents that do not require personal service. While couriering documents may be costly depending on location, number of parties being served and urgency, documents can also be faxed, mailed or emailed (so long as the recipient acknowledges receipt) at very little cost. Moreover, unless and until lawyers

subscribe to the new service and the system receives widespread acceptance, very few litigants will be able to be served through EDX, as it is unlikely that unrepresented litigants would ever subscribe.

Ultimately, the success and effectiveness of CourtSide EDX, and EDX systems in general, will depend on the number of lawyers subscribing to the service. Right now, there is little incentive for law firms to subscribe, and therefore EDX will likely not substantially alter existing practices. However, this may change when the courts truly decide to become fully digital. If that were to happen, litigants will not only be able to serve court documents electronically, but, at the same time, will also be able to file them with the court electronically without the need to file paper copies. In addition, court records will be accessible to litigants, and perhaps even the public at large, through web-based browsers. There is no indication yet as to when such wholesale, but badly needed, upgrades to the court system may be on the horizon.