

## Far fewer formal faxes or letters

# OBA considering request to change email service rules

BY ALEX ROBINSON  
Law Times

As civil litigators and even judges warm to using technological tools, lawyers say the court's Rules of Civil Procedure need to be updated to keep up.

The Ontario Bar Association is currently considering a proposal to the province's Civil Rules Committee, which recommends rule changes to the attorney general, that would improve the ability of litigants to serve materials using email without requiring information from the opposite side or a court order. This would mean litigants would be allowed to serve materials — other than originating processes — via email as a matter of course.

"The issue with the rules is that they don't incorporate or



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reflect the way in which lawyers are communicating today," says Nadia Campion, a partner with Polley Faith LLP.

Under the current rules, lawyers cannot serve claims through email unless they receive a response confirming the service from the other side.

But Campion says lawyers today are communicating through email and text message more than ever. There are far fewer formal faxes or letters being sent between lawyers as there were 10 years ago, she says.

She adds that as the technology being adopted by a younger generation of lawyers is advancing so quickly, it is hard for the rules to keep up.

Using new tools to serve claims has been a hot topic of conversation in the bar since a Toronto lawyer recently received a court order allowing her to serve a lawsuit using social media app Instagram.

The topic came up at a panel discussion that Campion mod-

erated about civil litigation and the digitization of the courts at the OBA Institute conference in Toronto.

Campion says that another way the rules are lagging behind technologically is in how they treat electronic trials. She says that as the profession moves toward paperless trials, she expects to see changes to the rules that will assist and encourage lawyers to pursue the more technologically driven way of running cases. "You don't see any of that in the Rules of Civil Procedure," she says. "They were formulated on the basis of paper records — not digital records."

The Ministry of the Attorney General has made some progress recently in its attempts to further digitize and modernize the courts with the rollout of an online filing system for civil claims.

Critics have said MAG's attempts to digitize the courts have been slow and incremental.

Christopher Johns, from MAG's innovation office, said changes have been made incrementally to make sure the transition is smooth and the systems are implemented properly.

"Change is very hard in an organization this big from a process and a people perspective," he told the panel. "What we do, we have to do incrementally."

In family courts, MAG is going to launch a pilot project in April 2018 that will allow joint divorce filing online. And in criminal courts, Johns says, MAG is looking to expand remote video access, digitize the intake process and implement digital evidence management.

When asked about the province's service rules, Johns said he hopes the rules will catch up with technological advances.

"We have email available to us. We have lots of electronic services or technologies and we're hopping right to Instagram. So let's just go for it," he says.

Court of Appeal Justice David Brown, who has been an outspoken critic of the court's reliance on paper, predicted there is less than a 10-per-cent chance that the Ontario Superior Court will have advanced paperless capabilities provincially in four years.

However, he gave the Court of Appeal a 60-per-cent chance of attaining that goal, where he said movement appears to be underway.

At the OBA panel, Brown said Ontario's court system is "behind the curve" not because of the unavailability of technology but because "the problem is in our heads."

He said lawyers are having diminishing importance in the court system, being gradually replaced by self-represented litigants because practitioners are unable or reluctant to deliver services using contemporary delivery models. He said judges also share this inability and that their jobs are not safe either.

Brown noted that the Canadian Judicial Council does not require judges to have some technological competence. While lawyers are not subject to a professional obligation of technological competence either, Brown said, there have been some rumblings that such a change to obligations might be in the works in Ontario.

Brown said that the legal industry needs to realize it is a consumer retail business that is going to be in trouble if it does not develop an infrastructure and service mindset to serve litigants in the way they are expecting the delivery of services.

"There's no guarantee that we will necessarily be around in 25 years," he said. **LT**



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