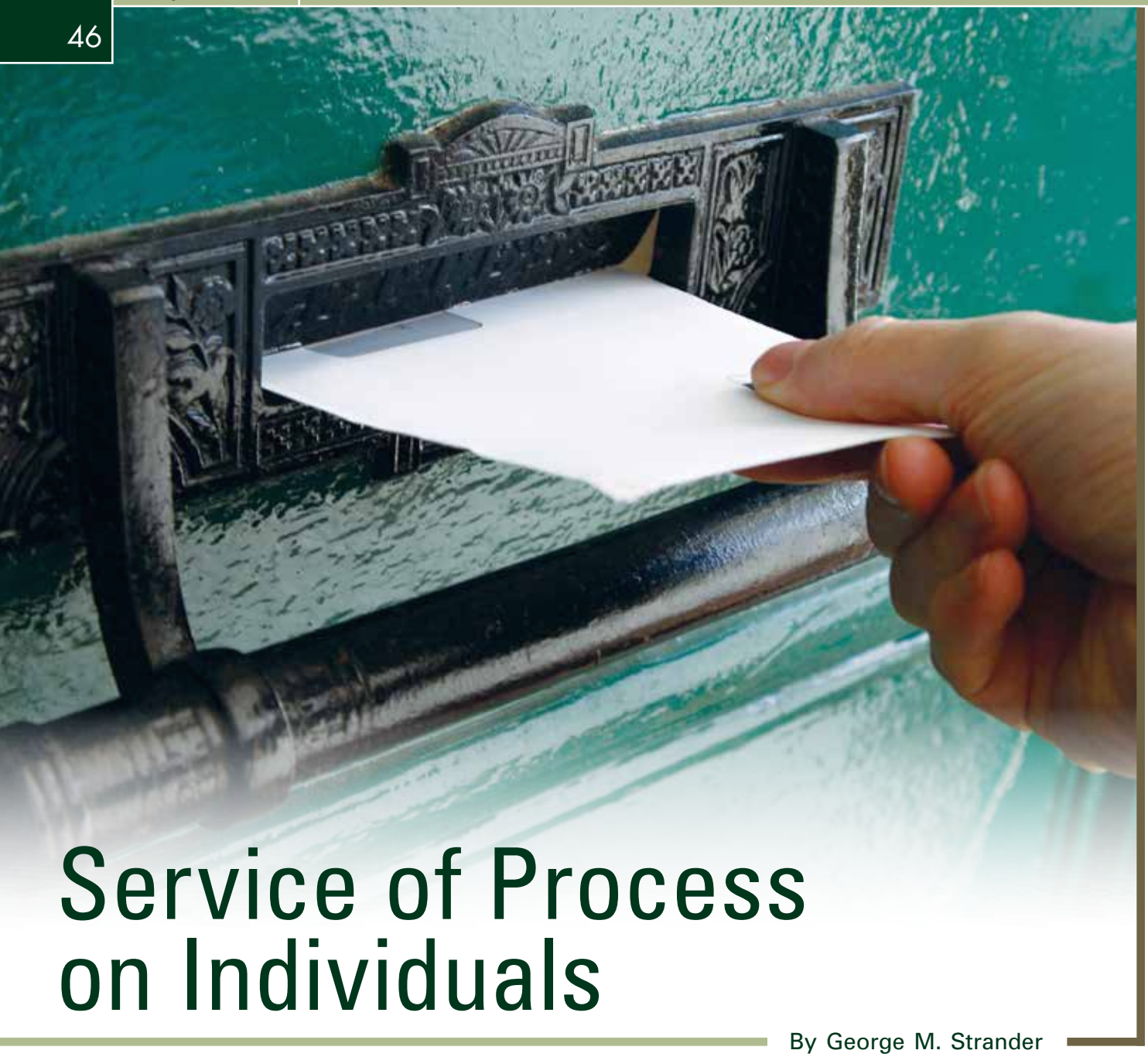

Service of Process on Individuals

By George M. Strander

FAST FACTS

Without proper service, or other behavior that properly informs the defendant of the action, a plaintiff's case will fail for lack of personal jurisdiction over the defendant.

Under the *Barclay* three-point rule for personal service, the process server must inform the defendant of the nature of the papers being served, offer them to the defendant, and leave them in the defendant's physical control.

One of the cornerstones of due process is a plaintiff's proper notification to the defendant of the plaintiff's suit. Without proper service, or other behavior that properly informs the defendant of the action, the plaintiff's case will fail for lack of personal jurisdiction over the defendant. Although corporations, partnerships, and other entities may be proper defendants, the classic case involves one individual suing another. Hence, understanding how to formally serve process on an individual defendant is crucial to understanding one of the procedural foundations of our legal system.

"Informing the defendant of the nature of the papers, offering them to the defendant, and leaving them within the defendant's physical control ought to [and does] suffice to constitute 'delivery.'"

Michigan Court Rule 2.105(A)

The required manner of service of process on individuals is outlined in the Michigan Court Rules at MCR 2.105(A):

> Process may be served on a resident or nonresident individual by
>
> (1) delivering a summons and a copy of the complaint to the defendant personally; or
>
> (2) sending a summons and a copy of the complaint by registered or certified mail, return receipt requested, and delivery restricted to the addressee. Service is made when the defendant acknowledges receipt of the mail. A copy of the return receipt signed by the defendant must be attached to proof showing service under subrule (A)(2).

As MCR 2.105(J)(3) makes clear, these (and other) criteria for process service are intended to capture, but not define, fundamental due process protections.[1] Indeed, under the rules, "[a]n action shall not be dismissed for improper service of process unless the service failed to inform the defendant of the action within the time provided in [the] rules for service."[2]

The potential cost to a plaintiff for failing to follow the provisions of MCR 2.105(A), or other actions contemplated under MCR 2.105(J)(3), is dismissal because "the defective service deprives the trial court of personal jurisdiction over the defendant and renders the trial court without legal authority to render a judgment (by default or otherwise)."[3] Appropriately then, one of the explicit grounds for dismissal through motion for summary disposition is the insufficiency of service of process.[4]

This article explores proper service of process under the Michigan Court Rules. In other words, what does MCR 2.105(A) mean?

Summons and Copy of Complaint

As a plain reading of MCR 2.105(A) indicates, to amount to service, the plaintiff must deliver a summons and a copy of the complaint to the adverse party. It is through filing a complaint that a civil action begins, and the complaint must state the plaintiff's claims in a concise and direct manner.[5] Once the plaintiff files the complaint, the court issues a summons informing the defendant of a variety of procedural rights and duties.[6]

In its 1991 opinion, *Holliday v Townley,*[7] the Michigan Court of Appeals has confirmed that both a copy of the summons and the complaint, and not some substitute, must be served pursuant to MCR 2.105(A). In *Holliday,* the plaintiff, Mable Holliday, sued Dr. Arthur Townley for dental malpractice, but sent the defendant by regular mail a copy of the complaint without the summons; the plaintiff's cover letter admitted that the mailing was not a formal service. After the trial court dismissed Holliday's suit for lack of service, she appealed, arguing under MCR 2.105(J)(3) that "defendant had actual notice of the suit."[8]

In affirming the lower court, the Court of Appeals ruled that MCR 2.105(J)(3) was inapplicable "where the question is not one of defects in the manner of service, but rather a complete failure of service of process."[9] The Court reasoned that the summons informs the defendant that an action has begun and describes the rights and duties in connection with the action, such as the time limits for responding to the complaint.[10]

The *Holliday* Court's emphasis on the necessity of a valid summons has been echoed in two unpublished Court of Appeals opinions: *Knasiak v Smith*[11] and *Daniels v Sinai Hospital.*[12] In *Knasiak,* the plaintiff, Bernard Knasiak, alleged that the defendant, Mary Smith, was involved in a conspiracy to extort and otherwise steal his property, conceal embezzled property, and invade his privacy. Knasiak sent a summons and complaint to Smith by certified mail with return receipt requested. Smith initially signed for the certified mail, but subsequently crossed out her signature and would not accept delivery. The trial court dismissed Knasiak's action for lack of service because the defendant had not acknowledged service.

On appeal, the Court of Appeals affirmed the lower court, finding that it was unnecessary to take up the issue of acknowledgment of service "because a review of the record establishes that plaintiff's alleged service of process was improper."[13] The *Knasiak* Court referenced MCR 2.105(A) and *Holliday* before noting that there was no record of a "valid summons" ever being issued or served, such lack constituting a "complete failure of service of process":

> Although plaintiff's complaint is entitled "Summons and Complaint," that document does not meet the requirements of a valid summons because it is not issued "[i]n the name of the people of the State of Michigan," it does not bear the seal of the court that issued it, and it does it [sic] contain the information required by MCR 2.102(B)(1)–(11) for a valid summons.[14]

The *Knasiak* Court specifically noted that the plaintiff's summons and complaint lacked various details required by MCR 2.102(B), including "a notice that if the defendant fails to answer or take other action within the time allowed, judgment may be entered against the defendant for the relief demanded in the complaint."[15]

In *Daniels,* the plaintiff in a medical malpractice action prepared a complaint naming Sinai Hospital; John Doe, D.O.; and Jane Doe, R.N. as defendants. The plaintiff ultimately served the complaint and summons for "Jane Doe, R.N." on the hospital. The Court found that Sinai had not been provided with proper service of process and the plaintiff appealed, arguing the trial court abused its discretion.

In affirming the lower court, the *Daniels* Court referenced *Holliday* and explained that MCR 2.105(J)(3) "assumes that the correct summons will be served with the complaint."[16] Further, the Court stated that "[b]ecause the wrong summons was provided, Sinai Hospital did not receive the requisite notice that it was being sued prior to the expiration of the summons. MCR 2.105(J)(3) does not excuse a failure of service."[17]

Thus, *Holliday,* as elaborated by the Court of Appeals in *Knasiak* and *Daniels,* confirms that MCR 2.105(A) requires service of a summons and a copy of the complaint; the documents must, at least largely, comport with the court rule provisions for their content and the summons must specifically name the defendant served.

Personal Delivery

As MCR 2.105(A)(1) specifies, one option for serving process is to *personally deliver* the summons and the copy of the complaint to the defendant. Although the court rules do not indicate what constitutes personal delivery, the Court of Appeals in *Barclay v Crown Building and Development, Inc*[18] has gone a long way toward doing so.

In *Barclay,* John Barclay and Gaye Snell had sued Crown Building and Development Corporation and its owner, Thomas Christenson, for slander of title and to quiet title arising out of a dispute over an extension to purchase property. In the suit, the plaintiffs hired a process server, but Christenson took measures to avoid personal service of their summons and complaint. Eventually, Christenson was confronted outside his business and followed to the door. Christenson locked the door after entering and the process server put the summons and complaint in the door handle, informing Christenson through the door that he had been served. After service was ruled proper and a default was entered against Christenson for failure to answer, he moved to set it aside, moved (unsuccessfully) to set aside the subsequent default judgment, and then appealed.

Personal delivery of a summons and complaint under the court rule does not require the "defendant affirmatively taking possession of the documents"—i.e., in-hand delivery...

After citing from Gilmore's *Michigan Civil Procedure Before Trial* and Dean & Longhofer's *Michigan Court Rules Practice* in a lengthy analysis, the *Barclay* Court affirmed the lower court, concluding:

> Thus, construing the language of the court rule reasonably and keeping in mind the purpose of the rule, we agree, as suggested by Dean & Longhofer, *supra,* that "[i]nforming the defendant of the nature of the papers, offering them to the defendant, and leaving them within the defendant's physical control ought to [and does] suffice to constitute 'delivery.'"[19]

Personal delivery of a summons and complaint under the court rule does not require the "defendant affirmatively taking possession of the documents"—i.e., in-hand delivery—not only because the term "in-hand delivery" is not used in the rule but also because requiring the alternative, "especially where the defendant refuses to accept service or evades service, places a gloss on the court rule that is inconsistent with its purpose of achieving actual notice and complying with the requirements of due process while securing the just, speedy, and economical determination of every action."[20]

The *Barclay* three-point rule for personal service—inform the defendant of the nature of the papers, offer them to the defendant, and leave them in the defendant's physical control—is elaborated in two unpublished Court of Appeals opinions. First, as *Alvin v Moore*[21] makes clear, the *defendant* must be served for the test to be met. In *Alvin,* Darnell Alvin sued two undercover police officers who arrested him for a criminal infraction, alleging violation of his constitutional rights and permanent injury. Alvin attempted personal service by leaving a summons and complaint with a police sergeant who indicated he supervised the officers and was authorized to accept service on their behalf. After the trial court dismissed Alvin's action for lack of service, he appealed. In affirming the lower court's ruling and citing *Barclay,* the *Alvin* Court made clear that personal delivery of a summons and complaint on the defendant cannot be through a representative of the defendant, even if avowedly "authorized."[22]

The Court of Appeals in *American Axle & Manufacturing, Inc v Murdock*[23] fleshes out the elements of the *Barclay* personal-service test. In the case, American Axle & Manufacturing sued Mark and Juanita Murdock for defamation following a dispute over tax withholding from Juanita's employee paychecks and

subsequent inflammatory communications from the Murdocks, and hired process servers to serve process. The process servers went to the Murdocks' home and announced their intention to serve process when Mark Murdock opened the door. He attempted to evade service by closing the door, but the summons and complaint became stuck in the door, at which point he grabbed the papers and, without reading them, threw them at one of the servers. Notwithstanding Mr. Murdock's actions, the trial court ruled that the Murdocks had been properly served and eventually issued a partial default judgment; the Murdocks appealed, alleging improper service.

Citing *Barclay,* the *American Axle* Court affirmed the trial court's ruling on service and found:

> Although they may have chosen not to read the papers served upon them, the process server left the papers with the Murdocks, and, at one point, Mark actually had the papers in his hands. That Mark attempted to throw the papers back at the server does not negate the fact that the Murdocks were given the opportunity to be informed of the pendency of this case.[24]

Thus, according to the Court in *American Axle,* the act of announcing service and holding out the summons and complaint so they were inadvertently jammed in the defendant's closed door satisfied the requirement to offer them and leave them in the defendant's control.

Sending By Mail

Instead of by personal delivery, process may be served by "sending a summons and a copy of the complaint by registered or certified mail, return receipt requested, and delivery restricted to the addressee. Service is made when the defendant acknowledges receipt of the mail."[25] Mail service, then, requires something at both the sending and receiving end. Looking first at the sending end, the Court of Appeals in *Bullington v Corbell*[26] suggests that strict adherence to the mailing provisions is necessary to comply with the court rule.

In *Bullington,* Derek Bullington filed a personal injury suit against Craig Corbell, Hunter Homes, and ChrisJack Properties for injuries sustained on the premises he rented from the defendants. Bullington's attorney served all three defendants by certified mail at a Pemberton Street address in Bloomfield Hills without any addressee delivery restriction. After the trial court issued an order for alternative service on the defendants, a default judgment against the defendants, and an order denying the defendants' motion for relief, the defendants appealed.

The *Bullington* Court reversed the lower court's ruling, indicating that a failure to restrict delivery to the addressee violated the court rule, stating:

> Although someone at the Pemberton address refused to acknowledge receipt of the certified letter, no evidence exists that *Corbell* refused it. By restricting delivery to a specifically identified person, the court rule avoids disputes about whether a *defendant* has deliberately refused service.[27]

Thus, *Bullington* suggests that the mail provisions of MCR 2.105(A)(2) must be strictly followed. In addition to restricting delivery to the addressee, the rule requires using registered or certified mail and requesting a return receipt.

Acknowledgment of Receipt

Compliance with MCR 2.105(A)(2) requires not only that mailing dictates be followed but also specifies that service is not complete until the recipient acknowledges receipt of the mailing. Again, a Court of Appeals opinion—*Hill v Frawley*[28]—helps flesh out what amounts to acknowledgement.

In *Hill,* Samuel Hill sued attorney John Frawley for legal malpractice. Hill mailed the summons and complaint to Frawley by registered mail, return receipt requested, "but someone other than [Frawley], who was on vacation, signed the return receipt."[29] The trial court dismissed Hill's suit for lack of service and Hill appealed.

The *Hill* Court reversed the trial court's ruling based on MCR 2.105(J)(3), reasoning that irrespective of the provisions of MCR 2.105(A)(2), Frawley did receive notice of the action and his due process protections were upheld. It explained that "*[a]lthough defendant did not sign the return receipt as prescribed in MCR 2.105(A)(2),* defendant acknowledged receiving the summons and complaint by retaining counsel and filing a summary disposition motion."[30] For purposes of understanding MCR 2.105(A)(2), what *Hill* makes clear is that acknowledgement requires the *signature of the defendant* on the receipt. This tenet is confirmed in the unpublished opinion *Jacobs v George,*[31] where the receipt and signature of the defendant's minor daughter failed to fulfill the acknowledgement of service requirement.

Conclusion

Service of process on an individual defendant, governed by MCR 2.105(A)(2), requires service of a summons directed to the defendant and a copy of the complaint, both of which at least largely comport with the court rule's standards for their content. Personal service of process must satisfy the *Barclay* rule—informing the defendant of the nature of the papers, offering them to the defendant, and leaving them in the defendant's physical control—which does not require in-hand delivery. If serving by mail, the court rules require service by registered or certified mail, return receipt requested, restricting delivery only to the addressee/defendant. Service is complete when the defendant acknowledges receipt of the mailing by signature. ■

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FOOTNOTES

1. See MCR 2.105(J)(1).
2. MCR 2.105(J)(3).
3. *Dogan v Michigan Basic Property Insurance Association,* 130 Mich App 313, 320; 343 NW2d 532, 535 (1984).
4. See MCR 2.116(C)(3).
5. See MCR 2.101(B); MCR 2.111(A) and (B).
6. See MCR 2.102(A) and (B).
7. *Holliday v Townley,* 189 Mich App 424; 473 NW2d 733 (1991).
8. *Id.* at 425.
9. *Id.*
10. *Id.*
11. *Knasiak v Smith,* unpublished opinion per curiam of the Court of Appeals, issued February 16, 1999 (Docket No. 201046).
12. *Daniels v Sinai Hospital,* unpublished memorandum opinion of the Court of Appeals, issued October 31, 2000 (Docket No. 215592).
13. *Knasiak,* n 11 *supra* at *1.
14. *Id.* at *2.
15. *Id.* at *2, n 2.
16. *Daniels,* n 12 *supra* at *1.
17. *Id.*
18. *Barclay v Crown Building & Development,* 241 Mich App 639; 617 NW2d 373 (2000).
19. *Id.* at 647.
20. *Id.* at 646.
21. *Alvin v Moore,* unpublished opinion per curiam of the Court of Appeals, issued August 23, 2012 (Docket No. 303163).
22. *Id.* at *3–*4; see also *Badour v Pyrski,* unpublished opinion per curiam of the Court of Appeals, issued August 26, 2004 (Docket No. 249726) (ruling that personal service on the defendant's employee is not personal delivery).
23. *American Axle & Mfg v Murdock,* unpublished opinion per curiam of the Court of Appeals, issued December 19, 2006 (Docket Nos. 262786, 265111).
24. *Id.* at *7.
25. MCR 2.105(A)(2). This article does not address the last sentence of MCR 2.105(A)(2), which concerns *proof* of service. As MCR 2.104(B) indicates, "(f)ailure to file proof of service does not affect the validity of service."
26. *Bullington v Corbell,* 293 Mich App 549; 809 NW2d 657 (2011).
27. *Id.* at 557 (emphasis added).
28. *Hill v Frawley,* 155 Mich App 611; 400 NW2d 328 (1986).
29. *Id.* at 612.
30. *Id.* at 613–614 (emphasis added).
31. *Jacobs v George,* unpublished opinion per curiam of the Court of Appeals, issued October 9, 2008 (Docket No. 276256).