ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

LOS ANGELES

SUMMER 2017

COURTS MOVE CLOSER TO ALLOWING "E-SERVICE" OF PROCESS

David Fuad

After a plaintiff files a complaint, the next step is to serve the defendant. If the defendant is a corporation with an agent for service of process, service is a simple matter. But what if the defendant cannot be physically located? Basic due process considerations require that service be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Most communication today takes place online. If a plaintiff has reliable information about a defendant's internet presence, including his or her social media accounts and e-mail addresses, why shouldn't courts permit electronic service of process when all other efforts have failed?

In fact, courts have recently crept closer to allowing service of process via social media and e mail. While this may sound problematic—nobody wants to be hit with a default judgment because they haven't checked Facebook in a while—it is a far more sensible and practical method of notifying a defendant about a lawsuit than other service-of-last-resort devices such as publication. Courts must balance a defendant's right to receive proper notice of a lawsuit against the plaintiff's right to have his or her case heard. Today, both of those rights are better protected by authorizing service in a manner consistent with how people actually communicate.

In California, there is no statute expressly permitting service by e-mail or social media. Code of Civil Procedure section 413.30, however, permits a court to authorize service in any manner "reasonably calculated to give actual notice." Under the Federal Rules of Civil Procedure, several avenues allow service by electronic means. For domestic defendants, Rule 4(e) permits service of process on an individual in the United States under the laws of the state where the district court is located. If a state permits e-service, the district court can also authorize it. As to foreign defendants, the federal rules afford more leeway. Courts have wide discretion to allow any means of service on a foreign defendant so long as the ordered method: (1) is not prohibited by international agreement; and (2) comports with constitutional requirements of due process. *See, e.g., S.E.C. v. Anticevic*, No. 05 CV 6991 (KMW), 2009 WL 361739, at *3 (S.D.N.Y. Feb. 13, 2009).

While no published California state court opinion has authorized e-service of process under Code of Civil Procedure section 413.30, at least two federal courts have allowed it under Rule 4(e) to permit service by email where the defendant's physical location could not be found using "reasonable and diligent attempts." *See Facebook, Inc. v. Banana Ads, LLC*, No. C-11-3619 YGR, 2012 WL 1038752, at *3 (N.D. Cal. Mar. 27, 2012); *Miller v. Ceres Unified Sch. Dist.*, No. 1:15-CV-0029-BAM, 2016 WL 4702754, at *3 (E.D. Cal. Sept. 7, 2016).

Other courts around the country have also permitted service by email and social media where the defendant could not be located using traditional means. In *WhosHere, Inc. v. Orun*, No. 1:13-CV-00526-AJT-TRJ, 2014 WL 670817, at *1 (E.D. Va. Feb. 20, 2014), the court permitted service via two email accounts believed to belong to the foreign defendant, as well as via Facebook and LinkedIn. The court found that the defendant had previously identified himself in response to an email sent to one email address, had provided an alternate email address, and had stated he was on several social media sites. In addition, the email addresses and social media sites all contained personal information consistent with the defendant's identity. The court found that the "defendant is presumably abreast of both [sic] the subject matter of the litigation and is likely already in receipt of the complaint. For these reasons, the court finds that the proposed methods of service comport with due process because they are reasonably calculated to give defendant notice of the suit." *Id*. at *4. Other courts have

permitted service by email and social media on foreign defendants who could not be served otherwise. *See, e.g., Lipenga v. Kambalame*, No. GJH-14-3980, 2015 WL 9484473, at *4 (D. Md. Dec. 28, 2015) (holding that service on defendant located in Malawi via email and Facebook was appropriate where defendant was recently actively using both accounts); *U.S. ex rel. UXB Int'l, Inc. v. 77 Insaat & Taahhut A.S.*, No. 7:14-CV-00339, 2015 WL 4208753, at *3 (W.D. Va. July 8, 2015) (holding that email service on owner of Iraqi and Afghan corporate defendants was proper where owner and defendants were "more than likely" already aware of litigation); *St. Francis Assisi v. Kuwait Fin. House*, No. 3:16-CV-3240-LB, 2016 WL 5725002, at *2 (N.D. Cal. Sept. 30, 2016) (holding that service via Twitter was proper on defendant in Kuwait).

In other cases, federal courts have refused to allow service on domestic defendants via email or social media where electronic service is not permitted. For example, in *Joe Hand Promotions, Inc. v. Shepard*, No. 4:12CV1728 SNLJ, 2013 WL 4058745, at *2 (E.D. Mo. Aug. 12, 2013), the court held that a domestic defendant could not be served electronically because "the federal rules do not permit electronic service," and under Rule 4(e), Missouri law authorizing substitute service by mail or publication did not extend to "electronic mail." The Oklahoma Supreme Court has stated that "[t]his Court is unwilling to declare notice via Facebook alone sufficient to meet the requirements of the due process clauses of the United States and Oklahoma Constitutions because it is not reasonably certain to inform those affected." *In re Adoption of K.P.M.A.*, 2014 OK 85, ¶ 37, 341 P.3d 38, 51. In *Fortunato v. Chase Bank USA, N.A.*, No. 11 CIV. 6608 JFK, 2012 WL 2086950, at *2 (S.D.N.Y. June 7, 2012), the court, applying New York law, rejected service of process via Facebook where the party attempting service did not provide "any facts that would give the Court a degree of certainty that the Facebook profile its investigator located is in fact maintained by [the defendant]," or that "the email address listed on the Facebook profile is operational and accessed by [the defendant]." The court noted that anyone could create a fake profile, and therefore "there is no way for the Court to confirm" whether the person located by an investigator was in fact the defendant. *Id*. Instead, the court allowed service by publication, reasoning that "under the circumstances presented, a local newspaper is the most likely means by which to apprise" the defendant of the complaint. *Id*. at *3. Ironically, the court used the location listed in the ostensibly-unreliable Facebook profile to determine where the summons should be published. *Id*.

For anyone wondering how service by publication in a newspaper is more likely to apprise a defendant of pending litigation than an email or message to the defendant's social media account, you are not alone. A recent decision from New York authorized service of a divorce summons solely by Facebook under a New York statute that permits courts to fashion a method of service where the plaintiff can demonstrate that personal service, substitute service, or "nail and mail" service are "impracticable." *See* N.Y. C.P.L.R. 308(5) (McKinney 2017); *Baidoo v. Blood-Dzraku*, 5 N.Y.S.3d 709, 712 (Sup. Ct. 2015). The defendant had no address or place of employment, and the plaintiff's investigators were unable to locate him. The court found that personal service was "an impossibility" and that attempting substitute or "nail and mail" service would be an "exercise in futility." *Baidoo*, 5 N.Y.S.3d at 712-13. The plaintiff provided evidence that she had previously communicated with the defendant through his Facebook account, and that she had a phone number for him that she could use to text or leave a voicemail alerting him to the Facebook message. The court recognized that service by publication "is essentially statutorily authorized non-service" and declined to require backup service by publication, reasoning it was both useless and unduly expensive for the plaintiff. *Id*. at 715. The court ordered the plaintiff's attorney to log into the plaintiff's Facebook account, identify himself, and send the summons to the defendant once a week for three weeks, along with calls and text messages to the defendant's cell phone alerting him to the Facebook message. *Id*. at 716.

While service by email or social media may be novel and unorthodox, it is also a practical and realistic method for notifying defendants of pending litigation. Email and social media accounts are free, widely used, and accessible anywhere at any time. Furthermore, a defendant's account is often known to the plaintiff before litigation arises. Legislatures and courts should therefore consider whether in the twenty-first century anachronistic and ineffective methods of service such as service by publication are still "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action." *Mullane*, 339 U.S. at 314.

David Fuad is a senior associate with Orrick, Herrington & Sutcliffe LLP in Los Angeles.