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Electronic Service of Process: A Practical and Affordable Option

Service of Process: a Primer

It is not enough that courts have the ability to exercise control over persons and property.ⁱ The Supreme Court has held that at a minimum, the due process requirement of the Fourteenth Amendment includes notice of the proceedings.ⁱⁱ Thus before a State can legitimately exercise such power its jurisdiction must be perfected by effectuated service of process.ⁱⁱⁱ Service of process is the formal presentation of instruments that initiate legal action against a person or property.^{iv} It is the method by which a defendant is formally notified that an action against her is pending and marks the beginning of a defendant's involvement.^v In most instances, service must be in person by delivery of the complaint and summons.^{vi} The noted advantage is that personal service better guarantees actual notice of the pendency of a legal action.^{vii}

Since the middle of the 20th century, service of process – and personal jurisdiction – have evolved to accommodate practical obstacles of personal service arising from the increased mobility of individuals and the rise of interstate commerce by permitting more indirect methods of service, substituted and constructive service.^{viii} The Court announced the standard in *Mullane v. Central Hanover Bank & Trust Co.* that notice to the parties must be “reasonably calculated under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”^{ix} With this standard, the Court authorized notice by publication and held that such a method satisfied due process when the relevant parties' addresses were unknown and could not be discovered with due diligence.^x

Since *Mullane*, courts have not only authorized alternative methods of service but have held that such approaches satisfy due process where more traditional methods -- personal,

published, and registered mail – are inadequate.^{xi} Requirements for service of process have been relaxed concurrently with a trend towards increasing mobility.^{xii}

Changing Times: Harnessing Modern Day Technological Developments

Today, domestic service of process is for the most part governed by Rule 4 of the Federal Rules of Civil Procedure (FRCP), and to some extent, state law. When the FRCP were first drafted in 1938, the drafters were understandably constructed the rules within the technologic confines of the time; the typewriter and telephone comprised the forefront of office technological development.^{xiii} Modern computing technology and the Internet had yet to be invented.^{xiv} Since then, technology has entirely revolutionized communication, providing an easy way to exchange information across vast distances. Email has become an almost inescapable method of modern communication whereas business-to-business mail has dropped by substantially.^{xv} An amendment to the FRCP would reflect the technologically advanced times we currently live in while upholding and maintaining the core purposes of traditional service of process.

Policy Reasons to Adopt Electronic Service of Process

With the expansion of the Internet, electronic service of process offers many advantages both to individual litigants and to society as a whole. Electronic communication is **time-efficient** – one click and information transmits – and with the notoriously long court proceedings in the United States,^{xvi} increasing efficiency could offset more difficult to address sources of inefficiency like a backlog of cases. Electronic communication is also **inexpensive**. That is not to say that the more traditional alternative of service by mail is cost-prohibitive, but unlike traditional post, email requires only the initial cost of acquiring the equipment/hardware

necessary to access the Internet; each email costs little, if anything.^{xvii} There is no need for spent man-hours in locating, traveling, serving to effectuate manual delivery.

In looking at the benefits to electronic service against other permissible methods, it is comparably **reliable**. For example, mail service is open to serious flaws; the Postal Service relies on people to transport physical documents and is subject to human error. This could result in lost mail or incorrect deliveries. Similarly, service on the domicile is premised on the assumption that an occupant of the domicile will behave accordingly by passing on process to the defendant. By contrast, electronic service is not subject to human error in the same way. It relies on programmed/automated infrastructure that is becoming more reliable by the day. Electronic service of process is also **targeted**. An email account is exclusive to the individual and duplicative social media profiles could be addressed with emerging cybersquatting laws that defend against imposters and related trademark issues. In comparison to publication, electronic service of process is more likely to apprise the defendant of legal proceedings against him as publication is not targeted towards an individual but broadcasted out to a community (like a newspaper). If publication remains a constitutionally valid method for rendering service, electronic service of process should pass constitutional muster.

Electronic communication also has the benefit of creating a **record**. Courts have acknowledged that unlike traditional forms of communication, email systems capture a complete record of the communication, preserving the exact text.^{xviii} The storage of information regarding transmission and receipt – which may include the date and time the messages were sent and received and an acknowledgment that the email was retrieved – is a tool that can assist in checking for actual notice and furthers Due Process interests. And where paper documents can be shredded, email records are more difficult alter. In that way, electronic communication makes

it easier to demonstrate **actual notice**. For example, if a user logs into Facebook to view her profile and sees that process has been posted to her “wall,” deletion of the process-post would compellingly indicate actual service. From Service of Process origins, process for in rem legal proceedings concerning property was once served by “posting” the relevant documents to the property itself— for land, postings were made at the four corners of the property; for ships, service was effectuated by posting to a ship’s mast.^{xix} A public “post” had an added benefit: such service could potentially effectuate notice in two different ways: the defendant herself could personally be notified or the defendant could be notified by a third-party.^{xx}

Public “posting” on a social media platform functions in a similar way to effectuate notice, perhaps even more effectively. For example, a key user-function of Facebook is that it provides the ability to post photos, messages, documents, and Internet links on other users’ walls. A post on an individual’s verified Facebook account could potentially reach the defendant personally, or could reach those in the defendant’s vicinity who might then be apt to put the defendant on notice. Compared to a physical post that may or may not be seen by relevant third parties that might assist in effectuating notice, a public electronic “post” would be more likely to reach the defendant through third parties should the defendant not personally be notified, as social media spheres are individualized platforms in which a person cultivates a personal society.

Electronic Service of Process in Practice under the FRCP: International Service of Process

As mentioned previously, domestic service of process is governed by FRCP 4(e) and provides no other means of accomplishing proper service outside of paper-based service of process—but notably, under the FRCP electronic service of process *is* permitted in the context of “Serving an Individual in a Foreign Country” under Federal Rule of Civil Procedure 4(f)(3).^{xxi}

FRCP 4(f)(3) allows service of process “by other means not prohibited by international agreement, as the court orders” which permits a court the discretion to determine a method of service within constitutional bounds.

Through the cases that arose from FRCP 4(e), federal courts have articulated advantages of using electronic communications starting as far back as 1980.^{xxii} In *New England Merchants National Bank v. Iran Power Generation and Transmission Co.*, a number of American plaintiffs sought to serve process on Iranian defendants, but were stymied by a diplomatic breakdown between the U.S. and Iran.^{xxiii} The district court ordered service of process via telex, a now obsolete fax-based form of electronic communication.^{xxiv} The court noted that the use of electronic service of process had “little or no precedent” in the jurisprudence, but nonetheless authorized electronic service of process on the reasoning that the world had changed such that written communications were no longer conducted solely by mail.^{xxv} Expressively, the court stated that “no longer must process be mailed to a defendant’s door when he can receive complete notice at an electronic terminal inside his very office, even when the door is steel and bolted shut.”^{xxvi}

In 2000, the United States Bankruptcy Court for the Northern District of Georgia also authorized international service of process via email.^{xxvii} In that case a trustee of International Telemedia Associates, Inc. (Broadfoot), sought damages for mismanagement by Diaz, a former director of the company.^{xxviii} Despite best efforts, the trustee was unable locate Diaz to effectuate service.^{xxix} The trustee had only a number and an email address, so the court held that Rule 4(f)(3) authorized service to the defendant’s email address.^{xxx} The court noted the flexibility of Rule 4(f)(3) and its wide scope that permits the “utilization of modern communication technologies to effectuate service when warranted by the facts.”^{xxxi}

In 2002, the Ninth Circuit further expanded the tools of international service in *Rio Properties, Inc. v. Rio International Interlink*^{xxxii} by authorizing electronic service via email on an international defendant. In that case, two online-based casino companies operated under the name “Rio.”^{xxxiii} The plaintiff, a Las Vegas casino, had several registered trademarks associated with the name, and sought to sue the defendant – a Costa Rican entity – for infringement, but was unable to locate Rio International.^{xxxiv} The Ninth circuit affirmed the trial court’s order sanctioning email service and delineated three considerations: (1) prior attempts by the plaintiff to effectuate service by traditional methods, (2) the defendant’s use of email for communication, and (3) evasion of service by the defendant. The court noted that email service was warranted because Rio International had created a business model where it was exclusively reachable by email.^{xxxv}

Social networking websites, such as Facebook, have provided other alternative methods to consider. In *Mpafe v. Mpafe*, a U.S. family court in Minnesota in 2011 authorized a plaintiff to serve process through email, Facebook, or any other social networking site.^{xxxvi} There, the court notably favored social media options over service of process by publication for the plaintiff who sought to effect divorce on the reasoning that “it [would be] unlikely that the Respondent would ever see.”^{xxxvii} The court also asserted “the traditional way to get service by publication is antiquated and is prohibitively expensive” and that “technology provides a cheaper and hopefully more effective way.”^{xxxviii}

Addressing Perceived Limitations of Electronic Service of Process

A perceived limitation that the Ninth Circuit noted in *Rio* was the lack of confirmation that a defendant has received the message.^{xxxix} The court was concerned that there could be no

way to verify that an electronic message has been opened.^{x1} However, since *Rio*, online communication has evolved. Today, a notification to the sender displaying that the message has been “read” by the recipient is widely incorporated and reliably available across a number of platforms, such as Facebook, Android and Imessage.^{x1i} In regards to email, free online services are available that automatically track receipt of an email and are able to show whether the intended target has opened the email.^{x1ii} Application of such software could be mandated by a court that seeks to allow electronic service of process.

The criticism that may hold the most weight is that the adoption of electronic service of process removes formality from the procedure—formality that may give weight to the documents and the legal proceedings in the eyes of the defendant. This reason may have been the reason that, in the process of amending service of process to incorporate mail service, the Rules were instead amended to create the option of waiver; Rule 4(d) allows defendants to avoid the cost of personal service by waiving service, the process of which uses mail to send and return the judicial documents.^{x1iii} The rule provides that a plaintiff can notify the defendant of the commencement of the action and request the defendant waive formal service. But on its face, it is illogical that with waiver, the FRCP allows defendants who are *actually* notified of the commencement of legal proceedings through receipt of a waiver notification to refuse waiver for personal service. In short, why do the Federal Rules allow a defendant who has notice of proceedings against her to demand formal service? The answer is best attributed to the compliance pull that arises from the increased legitimacy that comes from the formality in personal service of process.

The adoption of electronic service of process would supersede the function of waiver and eliminate the use of the provision—but it is nonetheless the better choice in light of its numerous

benefits and the future capacity to build electronically based legitimizing characteristics that can exert a similar compliance pull; there is an open-ended future potential for the creation of electronically based legitimizing features that can exert a compliance pull.

Adoption Proposal

It might seem service of process would best be streamlined such that domestic and international service of process procedure were the same. However, it is difficult to capture domestic and international concerns within the same language because FRCP 4(f)(3), which allows service of process “by other means not prohibited by international agreement, as the court orders,” displays the intention to make international accommodations of the laws of other nations—a comity concern that is not relevant in domestic service of process.

We could amend the FRCP to incorporate electronic service of process domestically by looking to federal rules in other nations. A modification of the Federal Rules would have an immediate impact on all federal courts, and thus, effectuate new procedure in the entire nation. The benefit of a blanket application of the service amendments to the federal system is that it could perhaps spur state legislatures to follow suit with amendments to their own civil procedure rules. The disadvantage, of course, is that implementation of electronic service of process in all federal courts through the FRCP rather than on a state-by-state basis results in forfeiture of the “laboratory of the states” benefit that could come from gradual implementation. Of course, I would espouse adoption on both the state and federal level, but this proposal addresses an amendment to the FRCP as a starting template.

One source that provides a potential model is Australia. The United States could cherry-pick Australia’s approach to first craft a template-type rule and then adapt it with any other

considerations in mind. Rule 10.24 of the Federal Rules of Australia governs substituted service of process in Australia.^{xliv} The Rule provides that “If it is not practicable to serve a document on a person in a way required by these Rules, a party may apply to the Court . . . for an order . . . substituting another method of service.”^{xlv} Such a flexible rule provides that where it is impractical, the court may use its discretion to execute an order for a suitable substituted service.^{xlvi} An example of its broad application: in 2008, in *Child Support Registrar Applicant v. Leigh*, the Federal Magistrates Court in Australia pursuant to Rule 10.24 ordered that the plaintiff may notify the defendant of the pendency of proceedings against him through text message.^{xlvii} As a rough proposal, Federal Rule 4(e) could be amended with several provisions to address domestic electronic service of process.

The amendment could include a safeguard requirement that the online address is actually used by the defendant, which would provide that the plaintiff must make an affirmative showing that the defendant has accessed the electronic profile/platform/communication device previously within a certain number of days. This construction would import the “reasonably calculated” flexible standard articulated in *Mullane*^{xlviii} and would give a court the discretion to interpret whether a given technological communication mechanism in a given case is a constitutional method for service of process. Additionally, this safeguard along with adopting a model similar to Australia’s would be consistent with the requirement within *Mullane* that the means employed to effect service be one in which a person desiring to contact the defendant would use.^{xlix}

Conclusion

In 2012, a judge in the District Court of the Southern District of New York denied a request to allow service via Facebook.¹ In denying the request, the judge described the request as

“unorthodox” and found that Chase bank did not provide “a degree of certainty” about both the Facebook profile *and* the email address that was attached to it that would ensure that the defendant would receive and read the process.^{li} Instead, the judge allowed service of process by publication in newspapers. It is ironic that the judge adhered to a method of service that was first deemed permissible by *Mullane*; in *Mullane* the court trail-blazed in setting a new standard by expanding the scope of traditional methods of service. I would assert that the court in *Mullane* would have permitted electronic service by the same reasoning it provided for allowing service by publication; by contrast the judge in *Fortunato* woodenly clutched to the specific method of service that had progressively offered then, *in light of the time*, but today, is woefully behind.

In many ways, the legal field is one that is steeped in tradition and arguably one of the most resistant to change.^{lii} Even beginning with legal education, there are deep roots and global traditionalist characteristics of a law school curriculum that evidence how resistant the field is to reform.^{liii} Undoubtedly there is a ritual function that paper-based service provides which may increase the solemnity of service so as to impress upon individuals-cum-defendants the seriousness of the legal actions they are being served with.^{liiv} And undoubtedly there are going to be limitations and set-backs with the implementation of nation-wide electronic service of process. However, implementation costs of electronic service of process should not deter its adoption where there is no indication that digitization of communication will fall out of use or is slowing down. Lag or resistance in adopting electronic service of process constitutes a derogation of the public interest in having service be effectuated in the most cost-efficient, timely, and reliable manner. For the policy reasons outlined above and in light of the functionality and workability demonstrated in both the international sphere, electronic service of process should be adopted into domestic U.S. law.

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- ⁱ *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).
- ⁱⁱ *See, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (“ there can be no doubt that at a minimum [the Due Process clause] [requires] that deprivation of life, liberty, or property by adjudication be preceded by notice.
- ⁱⁱⁱ *Id.*
- ^{iv} *Bouvier’s Law Dictionary and Concise Encyclopedia*, Service of Process
- ^v See FED. R. CIV. P. 4(a)(1)(E) (requiring a summons of service to notify a defendant that a failure to appear will result in default judgment).
- ^{vi} *Id.*
- ^{vii} *McDonald v. Mabee*, 243 U.S. 90, 92 (1971).
- ^{viii} *Hanson v. Denckla*, 357 U.S. 235, 260 (1958) (Black, J., dissenting); *Greene v. Lindsey*, 456 U.S. 444, 449 (1982)
- ^{ix} 339 U.S. at 314.
- ^x *Id.* at 317-18.
- ^{xi} *See Levin v. Ruby Trading Corp.I*, 248 F. Supp. 537 (S.D.N.Y. 1965) (holding that service by ordinary mail was sufficient where service by registered mail and personal service had both proven to be ineffective).
- ^{xii} Jeremy A. Colby, *You’ve Got Mail: The Modern Trend Towards Universal Electronic Service of Process*, 51 Buff. L. Rev. 337, 381 (2003) (stating that *Mullane’s* reasonably calculated test was necessary in light of the expanding notions of personal jurisdiction).
- ^{xiii} *E-Ethics: The Ethical Dimension of the Electronic Discovery Amendments to the Federal Rules of Civil Procedure*, 20 GEO. J. LEGAL ETHICS 613, 613 (2007).
- ^{xiv} M. Leiner et. al., *A Brief History of the Internet*, Jan. 23, 1999, <http://arxiv.org/html/cs/9901011v1> (last visited Oct. 20, 2009).
- ^{xv} Suniel Ratan, *Snail Mail Struggles to Survive*, Time, Special Issue: Welcome to Cyberspace, Spring 1995, at 40.
- ^{xvi} AAA Handbook on International Arbitration Practice, pg 132.
- ^{xvii} Ronald J. Hedges et al., *Electronic Service of Process at Home and Abroad: Allowing Domestic Electronic Service of Process in the Federal Courts*, 4 Fed. Cts. L. Rev. 55, 69 (2010).
- ^{xviii} *Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1279 (D.C. Cir. 1993).
- ^{xix} Clermont’s Civ Pro Book, find later
- ^{xx} *Id.*
- ^{xxi} FED. R. CIV. P. 4(f)(3).
- ^{xxii} *New England Merchants National Bank v. Iran Power Generation and Transmission Co.*, 495 F. Supp. 73, 76 (S.D.N.Y. 1980).
- ^{xxiii} *Id.* at 75.
- ^{xxiv} *Id.* at 81.
- ^{xxv} *Id.*
- ^{xxvi} *Id.*
- ^{xxvii} *In re Int’l Telemmedia Assocs., Inc.*, 245 B.R. 713, 720 n.5 (Bankr. N.D. Ga. 2000)
- ^{xxviii} *Broadfoot*, 245 B.R. at 715 - 721.
- ^{xxix} *Id.* at 718.
- ^{xxx} *Id.* at 720-721.
- ^{xxxi} *Id.* at 720.
- ^{xxxii} *Rio Props., Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1017 (9th Cir. 2002).
- ^{xxxiii} *Id.* at 1012
- ^{xxxiv} *Id.* at 1012 – 13.
- ^{xxxv} *Id.* at 1018.
- ^{xxxvi} *Mpafe v. Mpafe*, No. 27-FA-11 (4th Dist. Family Ct. of Minn. May 10, 2011).
- ^{xxxvii} *Id.*
- ^{xxxviii} *Id.*

^{xxxix} *Rio Props.*, 284 F.3d at 1018.

^{xl} *Id.*

^{xli} Facebook Messenger Now Shows Whose Read Your Messages, VentureBeat at: <http://venturebeat.com/2012/05/04/facebook-messenger-seen-by/>; *See*, How to Tell if Someone has Seen Your Text: Get Delivery Receipts and Read Receipts, PC Advisor at: <http://www.pcadvisor.co.uk/how-to/mobile-phone/how-tell-if-someone-has-seen-your-text-3605143/>

^{xlii} *See* SpyPig Requirements & Limitations, <http://www.spypig.com/requirements.php>

^{xliii} 29 Tort & Ins. L.J. 521, 29 Tort & Ins. L.J. 521; FED. R. CIV. P. 4(d)(2).

^{xliv} Federal Court Rule 10.24 (2011) (Austl.), available at <http://www.comlaw.gov.au/Details/F2011L01551>.

^{xlv} *Id.*

^{xlvi} *Id.*

^{xlvii} 2008 WL 5543896, at para. 47

^{xlviii} *Mullane*, 339 U.S. at 314.

^{xlix} *Id.* at 315.

^l *Fortuanto v. Chase Bank U.S.A.*

^{li} *Id.*

^{lii} *See* Greenberg Traurig, *Invocation Awards* (noting how the legal market and profession is developing everyday but the field lags behind); a precursory online search confirms that pantyhose is recommended in the workplace only for the most traditional occupations/professions, including the legal field.

^{liii} *See* Dunne, *The Third Year Blahs: Professor Frankfurter After Fifty Years*, 94 HARV. L.

REV. 1237 (1981); Stolz, *The Two-Year Law Schook The Day the Music Died*, 25 J. LEGAL EDUC.

37 (1973) (discussing the concept of a two-year curriculum in light of the general consensus that the third-year of law school has little functional purpose).

^{liv} *See generally* Hagmeyer v. U.S. Dep't of Treasury, 647 F. Supp. 1300, 1303

(D.D.C. 1986) (noting that one of the functions of service of process is to provide “a ritual that marks the court’s assertion of jurisdiction over the lawsuit.”).