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PERSPECTIVE

Texting, tweeting, liking...serving?

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Several years ago, serving a summons and complaint electronically (i.e., "e-service") was all but unknown. But for the latest generation of tech-savvy litigants — accustomed to being connected 24/7 to emails, text messages, and social media accounts through smart phones, laptops, and tablets — e-service may be just as reliable as having hard-copy papers served by traditional means. In many circumstances, e-service is the most effective way to reach defendants.

Courts are already increasingly comfortable with permitting email as an alternate form of service, especially if an email address can be verified as belonging to the defendant and the plaintiff has made reasonable efforts to serve process by other means. Recent trends indicate that litigants may soon be able to make use of other forms of e-service as well.

The international trend and *PCCare247*

Many international courts allow service through social media accounts when defendants attempt to dodge service. Courts in Australia, New Zealand, Canada and the U.K. have permitted service via social media messaging, including Facebook and Twitter. Judges in these common law jurisdictions flexibly adopt new technology when they consider it effective.

Here in the U.S., the Federal Rules of Civil Procedure do not yet expressly allow service of process by electronic means. U.S. courts, however, have shown in the past that they are willing to approve the use of new technology to serve defendants as long as such service is "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). Indeed, when allowing service via telex in 1980, the Southern District of New York explained that courts "cannot be blind to changes and advances in technology." *New England Merchs. Nat'l Bank v. Iran Power Generation and Trans. Co.,* 495 F. Supp. 73, 81 (S.D.N.Y. 1980). Subsequently, courts allowed service via fax and then email. Even service via television has been permitted.

Recently, a federal district court approved the use of Facebook messaging to serve an international defendant under Federal Rule of Civil Procedure 4(f)(3). See *FTC v. PCCare247 Inc.*, No. 12 Civ. 7189(PAE), 2013 WL 841037 (S.D.N.Y. March 7, 2013). Rule 4(f)(3) authorizes a court to order service on an individual in a foreign country in a manner that comports with due process and is not prohibited by international agreement. In *PCCare247*, the court held that service by Facebook messaging — in addition to service by email — comported with due process, particularly given the available evidence that the defendants regularly used Facebook.

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E-service in California

Like the federal rules, the California Code of Civil Procedure does not specifically authorize electronic service of process. The California Code does, however, contain a catch-all provision under which a court may direct service "in a manner which is reasonably calculated to give actual notice to the party to be served." Cal. Code Civ. Proc. Section 413.30. The Legislative Committee Comment explains that service under Section 413.30 may be appropriate when other service procedures cannot be followed in whole or in part.

California courts have not yet addressed whether Section 413.30 encompasses service by social media or other forms of e-service. But federal courts have already interpreted Section 413.30 fairly broadly (federal courts have found it necessary to examine Section 413.30 because, under Federal Rule of Civil Procedure 4(e)(1), federal litigants may follow state law to serve process domestically). For example, in *Facebook, Inc. v. Banana Ads, LLC*, the Northern District of California allowed service by email. The federal district court cited Section 413.30 to support its decision and explained that service by email was "reasonably calculated to give actual notice" to the defendants, who were "engaged in internet-based commercial activities and rely on email [for] communication." No. C-11-3619 YGR, 2012 WL 1038752 at *3 (N.D. Cal. March 27, 2012) (also noting that the defendants evaded attempts to contact them by email and telephone). In sum, federal courts in the Northern District and elsewhere in California have tended to allow service by email after plaintiffs make "reasonable and diligent" attempts to serve defendants by alternative means, such as retaining private investigators to locate them.

Concerns about e-service

Emails, text messages and Facebook messaging are instantaneous and cheap. Texting has the added advantage of not requiring Internet access. Nevertheless, courts continue to express some reservations about e-service. In *Fortunato v. Chase Bank USA*, for instance, the court described service through Facebook as "unorthodox" and worried that "anyone can make a Facebook profile using real, fake, or incomplete information." No. 11 Civ. 6680(JFK), 2012 WL 2086950, at *2 (S.D.N.Y. June 7, 2012). Similarly, the 9th U.S. Circuit Court of Appeals explicitly noted that it was "cognizant of [the] limitations" of service by email in *Rio Prop., Inc. v. Rio Int'l Interlink, Inc.*, 284 F.3d 1007, 1018 (9th Cir. 2002).

Importantly, however, the 9th Circuit recognized in the Rio case that the due process principle — as articulated in Mullane and codified in both federal and state rules — ultimately "unshackles the federal courts from anachronistic methods of service and permits them entry into the technological renaissance." This proposition should not be limited to "entry" into new technology, but rather should also apply to advances and developments in existing technology. For example, the 9th Circuit expressed its concern in Rio that it could not confirm receipt of an email. There are now several ways to do so, such as by attaching a "Delivery" or "Read" receipt to an email sent via Microsoft Outlook. Facebook messages likewise have a "Seen" date. Other worries about social media and texting — such as whether defendants would dismiss text messages as spam, fail to check "backup" email accounts, or fail to take Facebook service "seriously" — might also be resolved with new technology or court creativity. For instance, a judge could order emails or messages to be sent more than once over a period of time. The upshot is that "as methods of communicating continue to evolve, disallowing service of process by [new technology] seems antiquated and out of step with the modern world." *Denlinger v. Chinadotcom Corp.,* 110 Cal. App. 4th 1396, 1405 (2003).

Based on the trend in recent cases, it is becoming more common for courts to permit service by email or social media. Until e-service is expressly authorized in state and federal rules, however, litigants should be aware that, at this time, courts tend to allow e-service only if there is evidence demonstrating that: (a) an individual defendant or corporate defendant's business relies upon or regularly uses email or social media; and (b) e-service is accompanied by reasonable and diligent efforts to serve by traditional methods.

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