“Hacking” Service of Process:  
Using Social Media as a Means to Provide Constitutionally Sufficient Notice

Angela Upchurch  
Associate Professor of Law  
Southern Illinois University School of Law  
aupchurch@siu.edu

On a fundamental level, the Due Process Clause requires that a defendant be provided with adequate notice of a proceeding that is to be accorded finality. The Supreme Court in *Mullane v. Central Hanover Bank & Co.* explained the chosen method of service of process must be “reasonably certain to inform those affected” of the lawsuit, and when “conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than any other feasible and customary substitutes.”¹ The plaintiff’s chosen method of service of process must be more than a “mere gesture” by the plaintiff to provide the defendant with notice.² Rather, it must be a method of service that “one desirous of actually informing the absentee might reasonably adopt.”³ While in-person service will remain the “gold-standard,” social media provides new avenues for achieving constitutionally sufficient notice.

I. Introduction

a. New methods for service of process are needed.
   i. Plaintiffs have long advocated for more efficient means of service of process when a defendant attempts to evade service or when service of process through in-person service would be too expensive or impractical. Traditionally, in such situations, courts would permit the use of an alternative method of service of process, such as publication in a newspaper.
   ii. Service through newspaper publication is a less reliable means of informing defendants of legal proceedings.

b. Technology provides new opportunities for serving defendants.
   i. Nearly two-thirds of Americans use at least one social networking site.⁴ What may be even more surprising is the growth in the use of social media by users aged 45-54. This group has seen some of the most significant growth in users in recent years; in fact, 55% of Americans aged 45-54 have a profile on a social networking platform.⁵
   ii. Social media tools are impacting the way we communicate and the way in which we obtain information. For example, in online activity, we know

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² *Id.* at 315.
³ *Id.*
that one in five webpages accessed in the United States is a Facebook page.\textsuperscript{6}

iii. Access to social media through mobile devices has increased its use as a source of information.\textsuperscript{7}

iv. The increase of use of technology, including social media, to communicate suggests there are more efficient ways of providing service to certain defendants.

II. Background – the History of Notice: Service of Process Law

a. Components of Notice

i. The plaintiff must use a method for service of process approved by the jurisdiction.

ii. The method chosen must conform to the constitutionality test in \textit{Mullane}.\textsuperscript{8}

b. Examining Approved Methods for Service of Process

i. Federal service rules on defendants located in the United States: Rule 4(e)
   1. Personal in-hand service of process\textsuperscript{9}
   2. Service at defendant’s dwelling if provided to someone of suitable age and discretion who resides there\textsuperscript{10}
   3. Through any method approved by the state in which the district court is located or by the state in which service is made.\textsuperscript{11}

ii. Federal service rules on defendants located in a Foreign Country: Rule 4(f)
   1. Exploring use of serving defendants through email.\textsuperscript{12}
   2. Exploring use of serving defendants through social media.\textsuperscript{13}

iii. Examples of state methods of service of process

\begin{itemize}
  \item \textsuperscript{7} 23\% of Facebook users report that they check their Facebook page five or more times every day. Jay Baer, 11 New Shocking Social Media Statistics in America, http://sumo.ly/4CzY (last visited January 18, 2016).
  \item \textsuperscript{8} 339 U.S. 306, 314 (1950).
  \item \textsuperscript{9} Fed. R. Civ. P. 4(e)(2)(A).
  \item \textsuperscript{10} Fed. R. Civ. P. 4(e)(2)(B).
  \item \textsuperscript{11} Fed. R. Civ. P. 4(e)(1).
\end{itemize}
1. In addition to those methods provided for in the federal rules, states often permit service via:
   a. Personal service by sheriff or appointed person
   b. Registered mail

2. Alternative methods permitted when other methods prove unsuccessful, futile or overly burdensome:
   a. First class mail
   b. Publication
   c. Service at a dwelling along with mailing
   d. Email and social media
   e. Catch all provisions which permit the court to order any method of service that it finds meets the constitutional level of notice in Mullane

iv. Movement toward permitting service of process through technology
1. Other nations, including Australia and Canada have permitted service through social media, such as Facebook, for several years. A High Court in the United Kingdom has even permitted service of an injunction via Twitter.

2. While the use of social media to provide service of process has not been widely embraced in the United States, there is movement in both state legislatures and courts towards accepting social media as a valid avenue for service of process. In April 2015, Texas

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14 Ark. R. Civ. P. 4(d)(8)(A)(i); see Patterson v. Bd. of Regents of Univ. of Wisconsin Sys., 103 Wis. 2d 358, 360, 309 N.W.2d 3, 4 ( Ct. App. 1981) (permitting service through registered mail when the statute required “certified mail,” explaining, “[t]he primary purpose behind the requirement of certified mail is to ensure delivery and to easily determine the date of delivery. Registered mail fulfills this purpose to an even greater degree. Registered mail requires a receipt of delivery; a receipt is optional when certified mail is used.”).

15 Ala. R. Civ. P. 4.3 (providing for service of process via mail in certain cases upon motion).


18 Utah R. Civ. P. 4(d) (provides for alternative service of process by motion through “publication or by some other means”). The Utah state courts webpage lists the following as permissible alternative forms of service “Utah Press Association's Legal Notices (utahlegals.com) webpage, text messaging, email, social media (Facebook, Twitter), or a combination of these methods.” http://www.utcourts.gov/howto/service/alternate_service.html.

19 735 Ill. Comp. Stat. Ann. 5/2-203.1 (West Supp. 2013). “If service upon an individual defendant is impractical ...the plaintiff may move, without notice, that the court enter an order directing a comparable method of service. ... The court may order service to be made in any manner consistent with due process.”


22 Blaney v. Persons Unknown (October 2009).
legislators introduced a bill that would explicitly permitted service of process through social media.\textsuperscript{23}

3. Most recently, a court in New York permitted a wife to serve her husband with notice of her divorce action through Facebook when he attempted to evade service of process.\textsuperscript{24}

\textbf{c. Examining the Constitutional Standard}

i. The chosen method of service of process must be “reasonably certain to inform those affected” of the lawsuit, and when “conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than any other feasible and customary substitutes.”\textsuperscript{25}

ii. The plaintiff’s chosen method of service of process must be more than a “mere gesture” by the plaintiff to provide the defendant with notice.\textsuperscript{26} Rather, it must be a method of service that “one desirous of actually informing the absentee might reasonably adopt.”\textsuperscript{27}

iii. Actual notice is not required; however, when the defendants have actual notice, the courts tend to forgive errors in the technical manner in which service occurred.\textsuperscript{28}

iv. Key Supreme Court decisions following Mullane


\textbf{III. Deconstructing the Constitutional Standard}

\textbf{a. A normative approach advocated}

i. While most advocates have utilized a piecemeal approach, focusing on each type of technology on an ad-hoc basis, this deprives judges and legislators with guidance on how to assess whether new technology can provide a means for constitutional service of process.

ii. Technology is evolving at such a rapid pace, approaches which focus on the operation of the communication tool in its current form quickly become outdated.

\textbf{b. Due process norms exist despite the “individualized” analysis in Mullane}

\textbf{c. Procedural Due Process Norms: The Aims of Notice}

i. Notice must be directed at the defendant

1. Due process encompasses an individualized right to be notified of claims being brought against you and the opportunity to present a defense to those claims

2. Notice usually must be provided to an individual defendant; however, there are times when notice can be provided when the plaintiff is unable to identify a specific defendant\textsuperscript{29}

\textsuperscript{23} Texas H.B. 241 (2015).


\textsuperscript{26} \textit{Id.} at 315.

\textsuperscript{27} \textit{Id.}

\textsuperscript{28} \textit{See} The Requirement of Reasonable Notice, 4A Fed. Prac. & Proc. Civ. § 1074 (4th ed.).
Notice must be a conspicuous event so that defendant is sufficiently aware of the need to seize his opportunity to defend

1. Role of formality in establishing the adequacy of notice
   a. Formality in the law serves to “set apart” an event
   b. Our cultural understanding of notice reflects an appreciation of the formality of notice. We have a shared understanding of service of process which is even found in its depiction in popular culture.
   c. The use of formal rules provides a clear understanding of whether service is adequate.
   d. For these reasons, the most favored method of service of process is in-person service of process by an approved agent.

2. Absent formality, the law favors service methods that provide a greater degree of assurance that process has been received
   a. States that permit service of process through mail typically require the plaintiff to use registered mail as opposed to first class mail. This is to obtain a signed acceptance of the process.
   b. In permitting service of process at a person’s dwelling, the server can only provide the process to restricted individuals (such as a person of suitable age and discretion residing at the dwelling). This is to maximize the chance the process will be provided to the defendant.

iii. The method of service of process must provide the defendant access to the content of process.
   1. A defendant must be able to access the summons and complaint to be apprised of the claims and the time and place he must appear.
   2. A defendant must be able to provide the process to his counsel so that he can obtain assistance in setting out his defense.

IV. Impact of Technology on the Procedural Due Process Norms
a. Technology can alter the ability to direct service of process to the defendant
   i. Identifying a defendant through social media may require the plaintiff to look at non-traditional information such as email addresses; listed occupations; associations with others; photographs and other content. However, social media often provides more visible information about the defendant than would otherwise be available to a plaintiff. This information is often easy and inexpensive to access.
   ii. Fraudulent accounts can be created. Neither the plaintiff nor the defendant might be aware that a fraudulent account has been created.
   iii. People can interact on social media as an individual or as part of a group. Group conversations have the potential to obscure identification of the defendant and his use of the social media platform.

See Mullane, 339 U.S. at 314-315 (providing service through publication to beneficiaries who could not with due diligence be identified).
iv. Many social media platforms are accessed on mobile devices. This provides greater opportunities to instantly reach the defendant.

b. Technology can impact the “conspicuousness” of the service of process event
   i. Because service through technology, such as social media, lacks the benefits of formality associated with traditional methods, a defendant might not be aware of the service of process event.
   ii. Users who receive messages from people they do not know may be concerned about opening the message. This may cause the user to delete or fail to read the service of process.
   iii. Some social media users receive and certain social media platforms host high volumes of content. This may cause service of process to go unnoticed.
   iv. Technology may filter service of process to a separate, less-accessed, forum.
   v. Certain social media users are more likely to receive service of process through a social media platform than through other methods because of the frequency with which they access the platform.
   vi. Courts have been moving away from more formal aspects of process. For example, e-filing and permitting court appearances via technology suggest that formalities are not required to ensure procedural soundness.

c. Technology can impact the ability of the defendant to access the content contained in process.
   i. A plaintiff must ensure that process is provided in a format that the defendant can access.
   ii. Additionally, the format must permit the defendant to easily share the content with his legal counsel.
   iii. Social media platforms offer the ability to share various forms of content. Because of universal ways to share information (such as .pdf or .jpeg files), it is easier to provide accessible content to a defendant.
   iv. When coupled with e-filing, it is easier to provide defendants with access to content.

V. Proposals
   a. Recommended statutory provision to permit e-service of process (including through social media)
   b. Recommendations for courts providing e-service of process (including through social media) under “catch-all” statutes
      i. Consider the defendant’s use of the social media platform (or other e-service platform that will serve as the basis for service of process)
         1. Can the plaintiff verify the defendant’s identity?
         2. Does the defendant access the social media platform in his individual capacity?
         3. How frequently does the defendant use the social media platform?
         4. Has the defendant used this platform in connection with any aspect of this case?
      ii. Consider the capacity of platform
1. Can the plaintiff transmit information in the form of an attachment?
2. What will be the format for the service of process materials?
3. Can the defendant be provided a link to a web filing (e.g., court e-filing)?
4. Does the platform store information received for a substantial period of time?
5. Will the defendant be able to share the information on the social media platform with his lawyer? In what format and through what process can this occur?

iii. Consider the conspicuousness of the service of process

1. Will the service of process be delivered in an individual message or on a public aspect of the platform?
2. Will the service of process be buried in a stream of information?
3. Is there evidence that the defendant has accessed the feature that will be used for service of process?
4. How many times will the plaintiff be providing service of process through the platform? Over what period of time?
5. Should a back-up service of process method be used in addition to the e-service of process?
6. How will the process be designated? For example, is there a message that can be titled?

c. **Recommended waiver of service of process rules**

VI. **Practical Considerations in Attempting Service of Process via Social Media Platforms**

a. Court and lawyer’s knowledge of operation of social media platforms
b. Ethical limitations on access to social media platforms of defendants
   
   c. Increasing use of privacy controls on social media

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