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Litigation

# Electronic Service of Process: Are You Ready for It?

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The legal profession is not known for being ahead of the curve when it comes to utilizing new technology. In fact, the profession is more known to gravitate toward tradition over innovation. However, sometimes new technological/cultural norms force themselves upon the profession, and the courts are forced to deal with the issues. One of the issues courts are facing more and more is the issue of service of process via email or social media. While the cases below, one that permits service via email and social media and one that does not, are from outside of Pennsylvania, they illustrate an issue that will face all litigators in the near future; the tension created by trying to reconcile constitutional concerns pertaining to service of process and evolving technology/communication.

## The Case for Service

In *Baidoo v. Blood-Dzroky*, 5 NYS 3d 709 (Sup. Ct. NY Co. 2015), a New York trial court permitted service by Facebook Messenger. Baidoo was a divorce proceeding where the plaintiff wife applied to the court to permit her to serve her estranged husband with the divorce summons solely by serving it via Facebook Messenger, an instant messenger service that allows Facebook members who are connected as "friends" to privately message each other.

Like Pennsylvania, New York Civil Procedure prefers personal service over any other type of service. However, in the case of Baidoo's husband, personal service was futile. As the Baidoo court outlined, the husband's last known address was vacated by him four years prior to the suit. He also was unemployed so there was no place of employment available for service. Additionally, more "traditional" alternate service, like "posting," requires knowledge of the subject's address. In this case, posting would also be impossible.

As Baidoo was able to prove that: her husband—who she spoke to occasionally over the phone—refused to give her a good address or meeting place to be served; and that her personal investigators exhausted all reasonable means to find an address, the court had to address her

request for service by Facebook. Like Pennsylvania's Civil Procedure Rule 430, New York has a rule that allows its courts, upon application, to direct the manner upon which service is to be made should the plaintiff be able to prove that traditional service or alternative service is "impracticable"; a burden, the court noted, which had been met by Baidoo.

The court then noted that the prescribed method of service must pass constitutional muster. In other words, it had to be "reasonably calculated, under all circumstances, to apprise of the pendency of the action." With that in mind, the court analyzed the constitutionality of service via Facebook Messenger. The court had three main concerns that it needed resolved before it could allow for Facebook service. First, the plaintiff needed to prove that the defendant's Facebook account was indeed his personal Facebook account rather than just a fake or parody account. Second, the plaintiff had to prove that the defendant regularly logs into the account (the court was afraid that if the defendant was not diligent in checking his account, he runs the risk of not seeing the summons until it was too late to properly respond). Third, the court was concerned with whether a back-up means of service was required under the circumstance.

With respect to the first concern, the court noted that the plaintiff had satisfied her requirement of proving that the Facebook account belonged to the defendant by submitting an affidavit containing annexed copies of "exchanges that took place between her and defendant when she contacted him through his Facebook page." She also—in her affidavit—identified the defendant as the subject of photos on the proposed Facebook page's timeline. As for the second concern, the court noted that the plaintiff had satisfied that concern by showing that her Facebook exchanges with the defendant occurred on a regular basis; enough to demonstrate that the defendant did in fact log onto Facebook regularly. The court did note that since the plaintiff had the defendant's cellphone number, she or her attorney could leave a voicemail or text message alerting him to log onto Facebook. As for the court's third concern, a back-up means of service, the court noted that the plaintiff did not have the defendant's street or email address and therefore this particular plaintiff had a compelling reason to make Facebook the sole means of service of process.

Finally, the Baidoo court addressed the issue of why it preferred, at least in that case, service via Facebook over service by publication—which, like in Pennsylvania, is the most often prescribed method of service if more traditional methods are unsuccessful. The court noted that service by publication is a method that is "almost guaranteed not to provide a defendant with notice of an action for divorce, or any other lawsuit for that matter." The court further noted that the publications traditionally used to "publish" notices are publications which are likely not read by the defendant (such as legal journals). As such, the court noted that publication service "while neither novel nor unorthodox, is essentially statutorily authorized non-service," especially when "there is a readily available means of service that stands a very good chance of letting defendant know that he is being sued."

## The Case Against

In a more recent case, out of the same state (New York) but from a neighboring county, the trial court, sitting in judgment on another divorce case, did not permit Facebook service. In *Qaza v. Alshalabi*, 43 NYS 3d 713 (Sup.Ct. Kings Co. 2016), the court did not allow a plaintiff wife to serve a divorce complaint on her husband, who she believed was deported back to Saudi Arabia.

In Qaza, like in Baidoo, the plaintiff wife had identified Facebook profiles believed to have belonged to her estranged husband. However, unlike the plaintiff in Baidoo, Qaza was unable to "sufficiently authenticate" that the profiles were owned by her husband. In fact, the court noted that the Facebook profiles (there were two) proposed by the plaintiff were sparse and noted little more than a location in Saudi Arabia and the names of seven Facebook "friends." The court noted that very little activity appeared on the page and the page contained zero photos of the defendant. Also, the plaintiff was unable to say that she knew any of the "friends" on the proposed Facebook page. Moreover, unlike Baidoo, Qaza was unable to show that she had previously—or at any time—communicated with her husband via that Facebook page. Accordingly, the court noted that the constitutional concerns were not quelled sufficiently to allow for service via Facebook.

## Uniform Standards Needed

While there are still major concerns regarding widespread service of original process by electronic means (email, social media, etc.), there is no question that the use of this technology is overshadowing the use of standard mail and traditional forms of communication. In fact, email is now the preferred method of communication for most people. While the normalization of electronic service is still a few years away, the courts are beginning to become more comfortable with its use. In fact, a federal court recently allowed service via Twitter (*St. Francis Assisi v. Kuwait Finance House*, Case No. 3:16-cv-3240-LB (Sept. 20, 2016)). Accordingly, it would behoove the profession to stay ahead of the curve and begin thinking about uniform guidelines and procedures that ensure that when electronic service methods are authorized, the use of those service methods passes constitutional muster. •

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