Service of Process Via Social Media Comes to Texas

A look at rules, concerns, and what it means going forward.

BY JOHN G. BROWNING

Back in 2010, the *Texas Bar Journal* published my article *Served Without Ever Leaving the Computer: Service of Process Via Social Media*, in which I described the early but growing trend of various foreign countries and jurisdictions here in the United States recognizing the availability of using social networking platforms as a form of substituted service. Since then, the Texas Family Code (annotated) has cited this article approvingly, the Texas Legislature in 2013 considered a bill to expressly authorize service using social media as an alternative means of service, and the number of American state and federal courts to give their blessing to "service by Facebook" has steadily grown. And while a number of Texas judges have informally approved of such electronic notification as an acceptable form of substituted service, in 2019, the Legislature finally made it official: Service of process via social media is now a thing in Texas.

The text of SB 891 (an omnibus bill that amends multiple statutes) amends Chapter 17 of the Texas Civil Practice and Remedies Code specifically by adding Section 17.033, titled "Substituted Service Through Social Media Presence." It provides that, in cases that meet the requirements for substituted service under the existing Texas Rules of Civil Procedure, the court "may prescribe as a method of service an electronic communication sent to the defendant through a social media presence." The new 17.033, which was signed into law by Gov. Greg Abbott on June 10, 2019, also specifies that the Texas Supreme Court must adopt rules to provide for such "substituted service of citation by an electronic communication sent to a defendant through a social media presence" no later than December 31, 2020. In addition to this rule requirement, the new section will only apply to actions commenced "on or after the effective date of the rules adopted by the Supreme Court of Texas under that section."

What might such rules involve for determining the appropriate circumstances for serving someone via social media? For guidance, one might look to the criteria discussed in an earlier legislative effort to authorize substituted service through social networking platforms—2013's HB 1989. In HB 1989's language, a court would have discretion to order such service of process after determining several factors: (1) whether the party to be served has an active social media profile on the site selected for service; (2) whether the social media profile is actually the profile of the party; (3) whether the party uses the social media profile on a regular basis; and (4) whether the party could reasonably be expected to receive the notice if the electronic communication is sent to the party's social media account.

These factors make sense, since they address some of the chief concerns about service of process via social media. One of these concerns is the authenticity of the defendant's profile. Given the ease with which fake profiles can be created, it won't be enough to simply point to a profile that has a picture of the defendant. The court will need greater assurances of authenticity such as the age of the profile, quantity and history of posts, instances of direct communication with the subject through the social media account in question, etc. As one New York federal court noted in rejecting a request for service of process via social media, "anyone can make a Facebook profile using real, fake, or incomplete information, and thus there is no way for the Court to confirm whether the Facebook page belongs to the defendant to be served."[1] Another understandable concern is the extent to which the defendant regularly uses that social media profile and can reasonably be expected to get notice of the lawsuit. While the issue of

the service reaching its intended recipient exists with other forms of service, there are any number of ways an intended service of process via Facebook might go astray. For example, what if a Facebook account was left logged in on someone else's computer?

Concerns such as these, along with some discomfort with technology itself, were prominent when the Oklahoma Supreme Court addressed the issue of service of process via Facebook in a 2014 family law case.[2] *In re Adoption of K.P.M.A.* involved the termination of a father's parental rights for a child born out of wedlock and put up for adoption.[3] The father appealed the termination of his rights, arguing that he had received improper, inadequate notice that he was the father. The child's mother had sent him a Facebook message "informing him that she was pregnant and plan[ned] to give the child up for adoption."[3] The father testified that he didn't see the message until later and did not know how long it had been in his inbox. Holding that notice provided via Facebook did not satisfy the due process requirements of either the U.S. or Oklahoma constitutions, the Oklahoma Supreme Court noted that the mother could have used a more direct means of relaying the message. The court also observed that Facebook ". . . is an unreliable method of communication if the accountholder does not check it regularly or have it configured in such a way as to provide notification of unread messages by some other means."[4]

But other jurisdictions have been more willing to embrace the concept of service via social media, especially in family court cases or in scenarios involving international defendants. In *Baidoo v. Blood-Dzraku*, New York State Supreme Court Justice Matthew Cooper permitted a divorce summons to be served solely by private message to the spouse's account.[5] The court held that such service "is the form of service that most comports with the constitutional standards of due process" after the plaintiff established that the account belonged to her husband, that he regularly logged on to the account, and that she did not have his current email or street address (making personal service impossible). Cooper went on to note that regarding the idea of service via social media,

> . . . a concept should not be rejected simply because it is novel or non-traditional. This is especially so where technology and the law intersect. In this age of technological enlightenment, what is for the moment unorthodox and unusual stands a good chance of sooner or later being accepted and standard, or even outdated and passé. And because legislatures have often been slow to react to these changes, it has fallen on courts to insure that our legal procedures keep pace with current technology.[6]

Similarly, in another New York family court case, the court allowed a father seeking modification of child support payments to serve the mother via Facebook.[7] After multiple efforts using traditional means of service had failed, the court permitted service through Facebook after the father showed the mother's active use of her Facebook account (by pointing out the mother's "likes" of photos posted by the father's current wife). And in a New Jersey case of first impression, the court allowed the plaintiff to serve an out-of-state defendant through Facebook after traditional methods proved ineffective and the plaintiff demonstrated that the defendant had been communicating with her through his Facebook account.[8]

But when plaintiffs cannot establish that other avenues of service have proven ineffective and that service via social media will be reasonably calculated to apprise the defendant of the action against him or her, courts will not hesitate to deny permission to use social media as a form of substituted service. For example, one Pennsylvania court denied an application to serve the defendant via his LinkedIn account because the plaintiff failed to describe in sufficient detail the other efforts at effecting service.[9] And in *Qaza v. Alshalabi*, the court denied an application to perfect service through Facebook because the plaintiff couldn't establish that the defendant's Facebook account was still being used by the defendant, casting doubt on whether such service would have actually put the defendant on notice of the lawsuit against him.[10]

Substituted service via social media—a concept already recognized in eight countries and multiple state and federal courts here in the U.S.—has finally and officially come to Texas. Given the ubiquity of social media use and the advantages it offers over other alternatives like service by publication (read any good legal notices lately?), it may prove, in the proper circumstances, to be the only method to comply with due process and reasonably apprise the defendant of the legal proceedings against him. Courts might be hesitant at first, but as one federal court observed about the "relatively novel concept" of service by Facebook, "history teaches that, as technology advances and modes of communication progress, courts must be open to considering requests to authorize service via technological means of then-recent vintage, rather than dismissing them out of hand as novel."[11] **TBJ**

Notes

1. *Fortunato v. Chase Bank*, 2012 U.S. Dist. LEXIS 80594 (S.D.N.Y. June 7, 2012).
2. *In re Adoption of K.P.M.A.*, 341 P.3d 38 (Okla. 2014).
3. *Id.* at 40.
4. *Id.* at 51.
5. *Baidoo v. Blood-Dzraku*, 48 Misc.3d 309, 5 N.Y.S. 3d 709 (N.Y. Sup. Ct. 2015).
6. *Id.*
7. *Noel B. v. Anna Maria A.*, 2014 N.Y. Misc. LEXIS 4708 (Fam. Ct. Sept. 12, 2014).
8. *K.A. v. J.L*, 450 N.J. Super. Ct. 247 (Ch. Div. 2016).
9. *Miller v. Native Link Const. LLC*, 2016 WL 247008 (W.D. Pa. Jan. 21, 2016).
10. *Qaza v. Alshalabi*, 43 N.Y.S.3d 713, 717 (N.Y. Sup. Ct. 2016).
11. *FTC v. PCCare247 Inc.*, 2013 WL 841037 (S.D.N.Y. Mar. 7, 2013).

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