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Legal notice via Facebook message?

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BY PETER A.T. CARLSON

Texas proposal begs question in Minnesota

As people "friend" on Facebook, follow Pinterest and flock to Twitter, their online presence grows exponentially. However, should an individual's online presence become fair game for service of a lawsuit?

A Texas state lawmaker is proposing legislation to allow a plaintiff to seek substitute service via social media — including Facebook. According to a story published by Bloomberg, under the proposed legislation, substitute service via social media would be available where the "defendant could reasonably be expected to receive actual notice." This would entail a showing that the social media account is authentic and regularly used by the defendant.

While cutting a slightly different path, this issue was also recently addressed by the U.S. District Court for the Southern District of New York. In an order issued March 7, the court in *Federal Trade Commission v. PCCARE247, Inc., et al.*, ruled that service of motions and post-complaint documents could be made via email and Facebook. There, the defendants were alleged to be involved in a business scheme that duped consumers into paying money to fix nonexistent computer problems. (Given the allegations involving computers, it is perhaps fitting that the PCCARE247 court would issue an order allowing alternative service of certain defendants through social media.) After an injunction was issued, plaintiff Federal Trade Commission sought the court's leave to serve motions and post-complaint documents via email and social media on certain of the defendants, all of whom were located in India.

In ruling on the motion, the PCCARE247 court first determined that the particular service sought by the FTC was not barred by an international treaty or Indian law (the location of the defendants). Second, the proposed service would also need to comport with constitutional notions of due process, which require service to be reasonably calculated to apprise interested parties of the lawsuit and allow them an opportunity to defend themselves. The PCCARE247 court even elaborated on the mechanics of service via Facebook:


"For the uninitiated, such service would work as follows: The FTC would send a Facebook message, which is not unlike an email, to the Facebook account of each individual defendant, attaching the relevant documents. Defendants would be able to view these messages when they next log on to their Facebook accounts (and, depending on their settings, might even receive email alerts upon receipt of such messages)."

In order to meet the requirements of due process, the PCCARE247 court explained that the movant would need to establish facts that demonstrate a likelihood that service via Facebook would be successful. In concluding the requisite showing was made, the court considered the fact that 1) the defendants' known email addresses were registered to their Facebook profile; 2) the defendants listed their jobs with PCCARE247 on their Facebook profile; and 3) the defendants were friends with each other.



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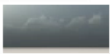


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The significance of its decision allowing service via Facebook and email was not lost on the PCCARE247 court. It expounded that "history teaches that as technology advances and modes of communication progress, courts must be open to considering requests to authorize service via technological means of then-recent vintage, rather than dismissing them out of hand as novel ... [T]he due process reasonableness inquiry unshackles the federal courts from anachronistic methods of service and permits them entry into the technological renaissance."

What will Minnesota courts do?

While the decision from the PCCARE247 court is notable in the breadth of its decision (though limited by its facts), one of Minnesota's own courts has already recognized the utility in service via Facebook. In a 2011 decision in *Mpafe v. Mpafe* issued by Judge Kevin S. Burke of Hennepin County District Court, the petitioner in a family court matter had been unable to locate respondent and accomplish service. As a result, Judge Burke allowed the petitioner to serve the summons and petition by Facebook, Myspace or other social media, by email or by posting information that would appear in an internet search engine, like Google. The order provides:

"The Rules of Civil Procedure permit service by publication. While the court considered publication in a legal newspaper, it is unlikely that Respondent would ever see this. It is more likely that respondent could receive notice on the internet. The traditional way to get service by publication is antiquated and is prohibitively expensive. Service is critical, and technology provides a cheaper and hopefully more effective way of finding respondent."

Judge Burke's rationale is persuasive. Under Rule 4.04 of the Minnesota Rules of Civil Procedure, in certain circumstances, service of the summons and complaint may be accomplished by publication. The clear purpose of the publication is intended to provide notice of the legal action to the defendant. However, where the publication is done by means of formal or legal newspaper publication, the likelihood of the defendant receiving notice seems, as Burke described, rather low; after all, besides lawyers, how many people read the legal-notice sections of the newspapers? An ongoing decline in the prominence of print media appears poised to further erode the utility of these already "antiquated" procedures.

Courts cannot ignore the expanding front of technology and social media. Indeed, the option of service via Facebook or parallel social media platforms in lieu of publication in a newspaper may actually be beneficial to Minnesota courts and litigants. There can be no denying that service of a lawsuit improves the function of the courts. Notice of a suit allows parties to a dispute to obtain a resolution before the court based on the merits of the claims, and not on one party's failure to appear. The public's perception that lawsuits are resolved based on the law and facts, as compared with a failure to appear or timely answer, may also improve confidence in the court system. This will come with its own challenges, however. Courts may need to hear additional motions seeking permission for this type of publication, or expend additional time reviewing fact disputes over proof of service.

Although the notion of service via Facebook may seem far-fetched, it may be becoming a reality, particularly where the party requesting permission from the court can make the requisite showing of facts demonstrating that service via Facebook, email or social media will likely be successful. It would take some time and effort to sort out the right circumstances, types of showing necessary to meet the due process requirements, and available means of social media. Nevertheless, doing so could keep Minnesota's justice system in line with the new age of technology.

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