

Keep Your Facebook Friends Close and Your Process Server Closer: The Expansion of Social Media Service of Process to Cases Involving Domestic Defendants

ALYSSA L. EISENBERG*

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* © 2014 Alyssa L. Eisenberg. J.D. Candidate, University of San Diego School of Law, 2015; B.A. Sociology, Interdisciplinary Humanities, University of San Diego 2012. I am grateful to my Comments Editor, Qiva A. Dinuri, for her thoughtful feedback and exceptional support.

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I. INTRODUCTION

Congratulations, you successfully evaded service of process! You moved to a new city, secured a new job, changed your address, and made sure no one but your closest family members knew where to find you. After settling in to your new abode, you log into Facebook and notice you have a message waiting for you in your inbox. You click the bright icon and nanoseconds later a message arrives on your screen with an attachment. You have just been served.

As a growing resource for litigators serving defendants abroad, social media is becoming an important tool attorneys can use to serve difficult-to-find defendants.¹ International courts spearheaded a trend of allowing service of process via social media,² and courts in the United States, in limited situations, have slowly begun to follow suit.³ With the proliferation of social media in the modern world and technological modernization of courts, why do litigators not simply attempt to serve all defendants whom they cannot serve personally through social media?⁴

1. See Chris Chiou et al., *Texting, Tweeting, Liking . . . and Serving?*, LOS ANGELES DAILY J., July 12, 2013, at 1 (describing the international trend of allowing service through social media as an “alternative” form of service and discussing the acceptance of the trend in some U.S. courts to serve defendants abroad); see also Hans Van Horn, *Evolutionary Pull, Practical Difficulties, and Ethical Boundaries: Using Facebook To Serve Process on International Defendants*, 26 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 555, 566–68 (2013) (summarizing recent cases that allow service of process via social media for elusive defendants).

2. See Van Horn, *supra* note 1, at 566–68 (examining cases that allowed service via social media in New Zealand, Canada, and the United Kingdom).

3. See Stephanie Francis Ward, *Our Pleasure To Serve You: More Lawyers Look to Social Networking Sites To Notify Defendants*, A.B.A. J., Oct. 2011, at 14, 14 (discussing the seminal U.S. decision *Mpafe v. Mpafe* in which a Minnesota court authorized the plaintiff to serve an international defendant through social media).

4. As of January 2014, seventy-four percent of adult Internet users utilized social networking sites. *Social Networking Fact Sheet*, PEW RES. INTERNET PROJECT, <http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/> (last visited Sept. 11, 2014). This is a dramatic increase from 2005, when only eight percent of adult Internet users utilized

One obstacle blocking the widespread use of social media domestically is the reluctance of many courts to move away from the alternative method of service historically employed when a defendant cannot be served through other means—publication in a local newspaper.⁵ Traditionally, when a defendant cannot be found or is actively evading service, newspapers have been the primary method for providing constructive notice to a defendant in a way that comports with due process.⁶ Today, courts still authorize service by newspaper publication.⁷

As some courts begin to allow service via social media, service by social media and service by publication are competing for the last place in the service hierarchy. Courts only authorize both types of service as a last resort when traditional service, such as personal service or service by mail, is impracticable.⁸ In deciding which type of alternative service to authorize, courts are choosing between service by publication and social media,⁹ with some authorizing service by social media only after service by publication has been attempted.¹⁰ In today's world however, the use of social media is growing rapidly while newspaper readership is declining quickly.¹¹ When procedural safeguards are established, service

social networking sites. *Id.* For an explanation of other ways courts are engaging with social media, see generally John G. Browning, *Keep Your "Friends" Close and Your Enemies Closer: Walking the Ethical Tightrope in the Use of Social Media*, 3 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 204 (2013) (discussing the use of social media during discovery and trial, and the ethical quandaries it brings).

5. See, e.g., Lauren A. Rieders, Note, *Old Principles, New Technology, and the Future of Notice in Newspapers*, 38 HOFSTRA L. REV. 1009, 1010 (2010).

6. See *id.* at 1023.

7. See, e.g., *Hartford Cas. Ins. Co. v. Cardenas*, 292 F.R.D. 235, 237 (E.D. Pa. 2013); *Ptarmigan Owner's Ass'n v. Lewis H. Alton, LLC*, 2013 MT 69, ¶ 8, 369 Mont. 274, 298 P.3d 1140.

8. See Rieders, *supra* note 5, at 1025 (“*Mullane* stands for the principle that newspaper notice should only be used as a last resort . . .”).

9. See, e.g., *Fortunato v. Chase Bank USA N.A.*, No. 11 Civ. 6608(JFK), 2012 WL 2086950, at *2–3 (S.D.N.Y. June 7, 2012) (denying service of process through Facebook but allowing service by newspaper publication).

10. See *Van Horn*, *supra* note 1, at 566–67 (describing an Australian case where the court allowed service via Facebook after the defendants moved and changed jobs and phone numbers, service by publication failed, and hiring a private investigator turned up nothing).

11. See *Social Networking Fact Sheet*, *supra* note 4 (reporting the recent increase in social networking site usage by adults). In contrast to social networking, the percentage of Americans who read print newspapers has fallen over the last decade from forty-one percent to twenty-three percent. See *Number of Americans Who Read*

via social media is a method much more likely to notify a defendant of an action against him than service by publication.¹²

This Comment addresses why service by social media better meets the constitutional standard for service of process than publication and advocates change at the state level, including suggesting arguments attorneys can use to persuade courts to allow them to serve defendants over social media. Part II of this Comment discusses the constitutional and statutory evolution of service of process beginning with traditional personal service, moving on to service by publication, and ending with electronic service of process. Part III explores recent cases in which courts have authorized and denied social media service for serving both parties abroad and parties in the United States. Part IV analyzes why the reasoning behind the cases involving foreign parties can and should be applied to situations involving domestic parties. Part V discusses ethical concerns about authenticating a social media profile and determining whether a party is actually likely to receive service that suggest why some courts may be reluctant to allow social media service. Part VI discusses the benefits to social media service and why social media service is constitutionally superior to newspaper publication. Finally, Part VII proposes a judicial and a legislative change to move courts into the modern day.

II. STATUTORY AND CONSTITUTIONAL DEVELOPMENT OF SERVICE OF PROCESS

Service of process is rooted in both constitutional and statutory law.¹³ The Fourteenth Amendment of the U.S. Constitution guarantees that no state shall “deprive any person of life, liberty, or property, without due process of law.”¹⁴ In balancing the interests of the state with the interests of the individual, procedural due process mandates that an individual be afforded notice and an opportunity to be heard.¹⁵ To pass constitutional muster, notice must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action.”¹⁶ The due

Print Newspapers Continues To Decline, PEW RES. CENTER (Oct. 11, 2012), www.pewresearch.org/daily-number/number-of-americans-who-read-print-newspapers-continues-decline/.

12. Only twenty-three percent of the population read print newspapers. See *Number of Americans Who Read Print Newspapers Continues To Decline*, *supra* note 11; see also *Social Networking Fact Sheet*, *supra* note 4 (noting that seventy-four percent of adult Internet users use social networking sites). For a discussion about the ethical concerns and procedural issues of serving a defendant through social media, see discussion *infra* Part V; see also Van Horn, *supra* note 1, at 568–71.

13. See U.S. CONST. amend. XIV, § 1; FED. R. CIV. P. 4.

14. U.S. CONST. amend. XIV, § 1.

15. See *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313–14 (1950).

16. *Id.* at 314 (citing *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

process requirement also places jurisdictional limitations on the states to keep them from abusing their power.¹⁷ The Constitution requires that a court establish personal jurisdiction over an individual before a court can pass judgment on that individual.¹⁸ Therefore, notice and personal jurisdiction are intrinsically connected, and both are required for a court to issue a binding judgment.¹⁹

Historically, personal jurisdiction was rooted in state sovereignty and was based on territorial boundaries.²⁰ The Supreme Court laid out these bases in the central personal jurisdiction case *Pennoyer v. Neff*.²¹ *Pennoyer* established that a defendant must be personally served within the forum state in order to subject the defendant to the power of that state's courts.²² The Court discussed whether service by publication was acceptable to serve an out-of-state defendant.²³ It held that service by publication is permissible to bring the defendant within the court's jurisdiction in an in rem proceeding where an out-of-state resident owns property in the forum state.²⁴ In an in personam action to determine a defendant's personal rights and obligations, however, service by publication is never sufficient to subject the defendant to a binding judgment.²⁵ By placing such restrictions on service, *Pennoyer* greatly limited the scope of service, including service by publication.

As technological advancements made interstate travel and communication easier, the strict territorial standard set forth in *Pennoyer* became impractical.²⁶ Thus, in *International Shoe Co. v. Washington*,

17. See *id.* at 311–14 (describing how the personal jurisdiction requirement challenges the power of the state by limiting the court's right to adjudicate against parties who reside outside the state). The Court notes that the state has a "vital" interest in adjudicating cases involving its residents; however, this interest must be balanced by the individual interest protected by the Fourteenth Amendment. See *id.* at 313.

18. See *Pennoyer v. Neff*, 95 U.S. 714, 724 (1877), *overruled in part by* *Shaffer v. Heitner*, 433 U.S. 186 (1977).

19. See *id.* at 729.

20. See *id.* at 724.

21. See *id.*

22. *Id.* at 725.

23. *Id.* at 727.

24. See *id.* ("The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale.").

25. *Id.*

26. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316–17 (1945); see also Andriana L. Shultz, Comment, *Superpoked and Served: Service of Process via Social*

the Supreme Court established the modern standard for personal jurisdiction: for service to be proper, a defendant must have minimum contacts with the forum state.²⁷ In *International Shoe*, the Court held that where a defendant is not physically present in the forum state, he must have “certain minimum contacts with [the state] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”²⁸ Although the Court in *International Shoe* did not specifically address service by publication, it held that substituted service is proper where there is reasonable assurance that the defendant will actually receive notice.²⁹ Thus, although *International Shoe* expanded the standard for personal jurisdiction, it reaffirmed the requirements for service of process.³⁰

In 1950, the hallmark case *Mullane v. Central Hanover Bank & Trust Co.* expanded on *Pennoyer* and *International Shoe*, specifically addressing the constitutional standard for service by publication.³¹ The Court in *Mullane* held that where a defendant is missing or a defendant’s identity is not known service by publication is a constitutional alternative to other methods such as personal service, posting at the defendant’s residence, or service by mail.³² The Court acknowledged that although

Networking Sites, 43 U. RICH. L. REV. 1497, 1499–1500 (2009) (describing how growth and commercial expansion in the United States made the *Pennoyer* standard “unworkable”). Through advances in the twentieth century, people could more easily travel from one jurisdiction to another, making the territorial standard from *Pennoyer* a hindrance to the concept of personal jurisdiction and necessitating a move toward a more flexible standard. See Jeremy A. Colby, *You’ve Got Mail: The Modern Trend Towards Universal Electronic Service of Process*, 51 BUFF. L. REV. 337, 381 (2003) (explaining how mobility and globalization prompted an elastic standard for personal jurisdiction, which then necessitated an equally accommodating service of process standard).

27. 326 U.S. at 316.

28. *Id.* (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

29. See *id.* at 320 (holding that mailing notice to the defendant’s office was reasonably calculated to apprise it of the suit against it).

30. The Court noted that, historically, “[P]resence within the territorial jurisdiction of a court was a prerequisite to its rendition of a judgment personally binding.” *Id.* at 316. The Court expanded personal jurisdiction over people and entities with “minimum contacts” with the forum state based on the “quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.” *Id.* at 319. The Court also held that service by mail met the standards for proper service articulated in previous Supreme Court cases such as *Milliken*, 311 U.S. at 463, *McDonald v. Mabee*, 243 U.S. 90, 92 (1917), and *Conn. Mut. Life Ins. Co. v. Spratley*, 172 U.S. 602, 619 (1899). *Id.* at 320.

31. 339 U.S. 306, 316–17 (1950) (reasoning that although newspaper publication is much less likely than personal service to result in a party actually being notified of the action, where a defendant’s address or interest is unknown, service by publication meets the constitutional standard for service of process).

32. *Id.* at 318–19. The Court also held that service by publication is not appropriate where a defendant could be easily informed through other means. *Id.* at 319.

personal service is the preferred method of informing a defendant of an action, publication is an alternative method that in some situations is “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action.”³³ Because the beneficiaries in the case could not be ascertained with “due diligence,” the Court found that it was “not reasonably possible or practicable to give [a] more adequate warning [than service by publication].”³⁴ Service by publication was constitutionally acceptable because it was no more likely to fail to give actual notice than any other method that the legislature could potentially prescribe.³⁵

In addition to passing constitutional muster, notice must be authorized by the Federal Rules of Civil Procedure.³⁶ In 1934, Congress passed the Rules Enabling Act, giving the power of law to the Federal Rules of Civil Procedure.³⁷ Federal Rule of Civil Procedure 4(e) provides that service on a defendant located within the United States may be made by complying with the applicable state rules, personally serving the defendant, delivering the process to a residence, or leaving the process with someone authorized to receive it.³⁸ If a defendant resides abroad, Federal Rule of Civil Procedure 4(f) provides that a defendant may be served internationally by any “internationally agreed means of service” or by a method “reasonably calculated to give notice.”³⁹

33. *Id.* at 313–14 (citing *Milliken*, 311 U.S. at 463). The Court noted, however, “Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper [Thus, i]n weighing [publication’s] sufficiency on the basis of equivalence with actual notice we are unable to regard this as more than a feint.” *Id.* at 315.

34. *Id.* at 317.

35. *Id.* Actual notice is the goal because the right to be heard promised by the Fourteenth Amendment “has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.” *Id.* at 314.

36. *See* FED. R. CIV. P. 4.

37. 28 U.S.C. § 2072 (2012).

38. FED. R. CIV. P. 4(e).

39. FED. R. CIV. P. 4(f). “Internationally agreed means of service” includes those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention). FED. R. CIV. P. 4(f)(1). The Hague Service Convention does not prohibit service by e-mail. *See, e.g.,* *Lexmark Int’l, Inc. v. Ink Techs. Printer Supplies, LLC*, 295 F.R.D. 259, 261–62 (S.D. Ohio 2013) (allowing plaintiff to serve defendant companies in China and Poland by e-mail).

The Federal Rules of Civil Procedure do not explicitly state that newspaper publication is an acceptable means of serving a defendant, either domestically or internationally.⁴⁰ However, state law generally authorizes service by publication as an alternative means of serving an elusive defendant.⁴¹ Therefore, because Rule 4(e)(1) authorizes a party to serve a defendant by “following state law for serving a summons,” service by publication is authorized by the Federal Rules of Civil Procedure under Rule 4(e) when state law allows it.⁴² Additionally, because Rule 4(f) allows service on foreign defendants by any method reasonably calculated to give notice, any method that meets the constitutional standard, such as service by publication under *Mullane*, is also authorized under Rule 4(f) so long as it is not prohibited by international agreement.⁴³

Like service by publication, the Federal Rules of Civil Procedure do not explicitly authorize service via social media for serving a domestic or international defendant.⁴⁴ Like all forms of service, service via social media must meet constitutional and statutory standards.⁴⁵ When serving an elusive international defendant, the Federal Rules of Civil Procedure are relatively lax; service via social media is permissible so long as it meets *Mullane*’s constitutional standard and is not prohibited by international agreement.⁴⁶

Conversely, the Federal Rules of Civil Procedure present a taller hurdle to serving a domestic defendant via Facebook or other social media site than they do to serving an international defendant. Like the rules

40. FED. R. CIV. P. 4(e)–(f).

41. See, e.g., *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313–14 (1950); see also *infra* Appendix A (detailing which states allow service of process by newspaper publication). Twenty-five states and the District of Columbia specifically direct that a plaintiff serve an elusive defendant by publication, and the other twenty-five states have catchall provisions or provisions that do not foreclose service by publication. See *infra* Appendix A.

42. FED. R. CIV. P. 4(e)(1); see, e.g., *Fortunato v. Chase Bank USA N.A.*, No. 11 Civ. 6608(JFK), 2012 WL 2086950, at *3 (S.D.N.Y. June 7, 2012) (holding that where New York law allowed service by publication, publication was an acceptable means of serving the defendant).

43. FED. R. CIV. P. 4(f)(3).

44. FED. R. CIV. P. 4(e)–(f).

45. See U.S. CONST. amend. XIV, § 1; FED. R. CIV. P. 4.

46. FED. R. CIV. P. 4(f). This rule provides that the constitutional catchall provision in Rule 4(f)(3) is only applicable when the Hague Convention does not apply. *Id.* This is not a problem; if the address of the person being served is unknown, the Hague Service Convention does not apply. See Van Horn, *supra* note 1, at 560. Sixty-eight states are party to the Hague Service Convention. *Status Table*, HAGUE CONF. ON PRIVATE INT’L L., http://www.hcch.net/index_en.php?act=conventions.status&cid=17 (last updated Aug. 19, 2014). Thus, so long as there is no international agreement prohibiting service via social media, service via Facebook and similar sites is likely allowable. See Van Horn, *supra* note 1, at 560.

governing service on foreign defendants, Rule 4(e) neither explicitly permits nor prohibits service by social media.⁴⁷ However, unlike Rule 4(f), Rule 4(e) does not have a catchall provision to encompass any nonprohibited methods of service.⁴⁸ Instead, Rule 4(e) authorizes service by methods allowed under the law of the forum state or the state in which the defendant is being served.⁴⁹ Thus, when serving a domestic defendant, state law governs service via social media.⁵⁰ If a state explicitly allows social media service or has a catchall provision similar to the rule for serving an international defendant that allows any method of service that is constitutionally permissible, courts have the ability to order service through social media to serve an elusive defendant whose address is unknown.⁵¹ In these states, attorneys should seek the opportunity to serve elusive defendants through Facebook or other types of widely used social media.⁵² By contrast, social media service is impermissible

47. FED. R. CIV. P. 4(e).

48. *See id.* (listing four specific ways to serve a domestic defendant).

49. *Id.*

50. *Id.*

51. *See infra* Appendix A. Twenty-one states have catchall provisions, many of which allow any type of service “reasonably calculated to give the party actual notice of the proceedings and an opportunity to be heard.” *See, e.g., infra* Appendix A(2)(a); *see also* Snyder v. Alternate Energy Inc., 857 N.Y.S.2d 442, 450 (Civ. Ct. 2008) (“In the proper circumstances . . . plaintiffs need not wait for the [state’s service statute] to be amended in order to be able to resort to service by e-mail. Our state courts already have the power to grant them the relief they seek.”).

52. This Comment is not suggesting that Facebook is the only platform that could be used to serve defendants but is using Facebook as the prime example of a site that is widely used and reliable. Any type of widely used social media platform that has indicia of reliability similar to Facebook, as discussed in Part V, *infra*, falls under this Comment’s proposal. In order for courts to know which social media sites are broadly used, the court can examine a site’s traffic by downloading the statistics about a site’s “unique monthly visitors.” In July 2014, for example, Facebook had over 167 million unique monthly visitors. *Facebook.com*, COMPETE SITE ANALYTICS, <http://siteanalytics.compete.com/facebook.com/#.UxzmlwspuY> (last visited Sept. 11, 2014). In the same month, Twitter had over 51 million unique monthly visitors, and LinkedIn had almost 47 million. *Twitter.com*, COMPETE SITE ANALYTICS, <http://siteanalytics.compete.com/twitter.com/#.UxznblwspuY> (last visited Sept. 11, 2014); *LinkedIn.com*, COMPETE SITE ANALYTICS, <http://siteanalytics.compete.com/linkedin.com/?gateway=1#.UxzoclwspuY> (last visited Sept. 11, 2014). Sites that have usage statistics similar to these can be thought of as widely used. Additionally, the court can examine a site’s demographics to determine that adults in the country where the defendant resides use the site. Facebook, LinkedIn, Pinterest, and Twitter are popular among adults in the United States. *See* MAEVE DUGGAN & AARON SMITH, PEW RESEARCH CTR., SOCIAL MEDIA UPDATE 2013, at 1 (2013), *available at* www.pewresearch.org/2013/12/30/social-media-update-2013/ (reporting that seventy-one percent of online adults used

in states that do not have catchall provisions for allowing social media service.⁵³ In order for attorneys to affect more targeted, practical service on elusive defendants, these states must amend their civil procedure rules to include either a provision specifically allowing social media service or a catchall provision allowing service by any constitutionally permissible means.⁵⁴

III. DEVELOPMENT OF SOCIAL MEDIA SERVICE IN THE COURTS: THE EVOLUTION FROM E-MAIL SERVICE TO SERVICE VIA SOCIAL MEDIA

Courts set the stage for allowing social media service by allowing electronic service on international defendants under Federal Rule of Civil Procedure 4(f)(3).⁵⁵ For example, the Ninth Circuit upheld a trial court's decision to allow service via e-mail in the 2002 case *Rio Properties, Inc. v. Rio International Interlink*.⁵⁶ In *Rio Properties*, the appellate court held that the district court did not abuse its discretion when it allowed a plaintiff to serve an international defendant by e-mail after the plaintiff's initial attempts to serve the defendant failed.⁵⁷ The court reasoned that the trial court appropriately used its discretion to balance the limitations of e-mail service against its benefits and concluded that under Federal Rule 4(f) e-mail service was reasonably calculated to

Facebook in 2013, twenty-two percent used LinkedIn, twenty-one percent used Pinterest, and eighteen percent used Twitter). Other countries have additional popular social networking sites, such as Bebo in the United Kingdom, Orkut in Brazil, Badoo in Russia, SkyRock in France, Tuenti in Spain, Nasza-Klasa.pl in Poland, StudiVZ in Germany, and Renren in China. Sorav Jain, *40 Most Popular Social Networking Sites of the World*, SOC. MEDIA TODAY (Oct. 6, 2012), <http://socialmediatoday.com/soravjain/195917/40-most-popular-social-networking-sites-world>.

53. Twenty-five states and the District of Columbia specify publication as the method of serving an elusive defendant. *See infra* Appendix A(1).

54. Currently, twenty-one states have catchall provisions that allow service by any constitutionally permissible means. *See infra* Appendix A(2).

55. *See Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1018–19 (9th Cir. 2002); *Popular Enters., LLC v. Webcom Media Grp., Inc.*, 225 F.R.D. 560, 563 (E.D. Tenn. 2004); *D.R.I., Inc. v. Dennis*, No. 03 Civ. 10026(PKL), 2004 WL 1237511, at *2 (S.D.N.Y. June 3, 2004); *Viz Commc'ns, Inc. v. Redsun*, No. C-01-04235 JF, 2003 WL 23901766, at *6 (N.D. Cal. Mar. 28, 2003); *Ryan v. Brunswick Corp.*, No. 02-CV-0133E(F), 2002 WL 1628933, at *2 (W.D.N.Y. May 31, 2002); *In re Int'l Telemedia Assocs., Inc.*, 245 B.R. 713, 722 (Bankr. N.D. Ga. 2000); *Hollow v. Hollow*, 747 N.Y.S.2d 704, 708 (Sup. Ct. 2002).

56. 284 F.3d at 1018.

57. *Id.* Initially, the plaintiff attempted to serve the defendant in the United States, but the defendant's attorney and international courier both declined to accept service on the defendant's behalf. *Id.* at 1016. The plaintiff also hired a private investigator to locate the defendant in Costa Rica, but the investigator was unsuccessful. *Id.*

notify the defendant and was not prohibited by any international agreement.⁵⁸ The court in *Rio Properties* noted that e-mail service was not only proper in this case but because the defendant preferred to communicate through e-mail, it was the method most likely to notify the defendant of the pending action.⁵⁹ The court emphasized, “[W]hen faced with an international e-business scofflaw, playing hide-and-seek with the federal court, email may be the only means of effecting service of process.”⁶⁰

Following *Rio Properties*, courts in other circuits began to allow e-mail service on elusive foreign defendants.⁶¹ In *Ryan v. Brunswick Corp.*, the Western District of New York allowed service via e-mail, holding that Rule 4(f)(3) was an “independent basis for service of process,” and where a defendant regularly used e-mail, service via e-mail comported with the *Mullane* standard for due process.⁶² Similarly, in *Hollow v. Hollow*, a New York Supreme Court approved e-mail service where a defendant fled to Saudi Arabia and communicated with a plaintiff exclusively through e-mail.⁶³ Many other courts followed suit, employing the *Rio Properties* balancing test and recognizing a trend toward allowing electronic service.⁶⁴

58. *Id.* at 1018.

59. *Id.* at 1017–18.

60. *Id.* at 1018.

61. See *Popular Enters., LLC v. Webcom Media Grp., Inc.*, 225 F.R.D. 560, 563 (E.D. Tenn. 2004); *D.R.I., Inc. v. Dennis*, No. 03 Civ. 10026(PKL), 2004 WL 1237511, at *2 (S.D.N.Y. June 3, 2004); *Viz Commc’ns, Inc. v. Redsun*, No. C-01-04235 JF, 2003 WL 23901766, at *6 (N.D. Cal. Mar. 28, 2003); *Ryan v. Brunswick Corp.*, No. 02-CV-0133E(F), 2002 WL 1628933, at *2 (W.D.N.Y. May 31, 2002); *Hollow v. Hollow*, 747 N.Y.S.2d 704, 708 (Sup. Ct. 2002). At least one other court had previously decided the issue. See *In re Int’l Telemedia Assocs., Inc.*, 245 B.R. 713, 722 (Bankr. N.D. Ga. 2000).

62. 2002 WL 1628933, at *2.

63. 747 N.Y.S.2d at 708.

64. See Kevin W. Lewis, Comment, *E-Service: Ensuring the Integrity of International E-mail Service of Process*, 13 ROGER WILLIAMS U. L. REV. 285, 297 (2008). Since *Rio Properties*, several courts have authorized e-mail service by analogizing to that case. See *D’Acquisto v. Triffo*, No. 05-C-0810, 2006 WL 44057, at *2 (E.D. Wis. Jan. 6, 2006); *Williams v. Adver. Sex LLC*, 231 F.R.D. 483, 488 (N.D. W. Va. 2005); *Popular Enters.*, 225 F.R.D. at 563; *Viz Commc’ns*, 2003 WL 23901766, at *6; *Ryan*, 2002 WL 1628933, at *2; *Hollow*, 747 N.Y.S.2d, at 708. Some courts have also rejected e-mail service, distinguishing *Rio Properties*. See, e.g., *Ehrenfeld v. Salim a Bin Mahfouz*, No. 04 Civ. 9641(RCC), 2005 WL 696769, at *3 (S.D.N.Y. Mar. 23, 2005) (finding that contrary to *Ryan* and *Rio Properties* where the e-mail addresses of defendants were “the mechanisms by which the defendants conducted business, presumably on a daily basis,” service via e-mail was not constitutional where the plaintiff did not show that the

Expanding on this trend, courts recently began allowing plaintiffs to serve elusive foreign defendants through social media, using a balancing test similar to the method articulated in *Rio Properties*.⁶⁵ In 2011, a district court in Minnesota authorized a plaintiff to serve a foreign defendant through e-mail, Facebook, Myspace, “or other social networking site[s]” in *Mpafe v. Mpafe*.⁶⁶ The plaintiff in this case sought a divorce from her husband, but she had not seen him in years and believed that he had left the United States.⁶⁷ The court held that online service was sufficient where the defendant could not be located and other attempts at service were unsuccessful.⁶⁸ The court considered service by publication in a legal newspaper, but concluded that service by publication “is antiquated and is prohibitively expensive.”⁶⁹ The court stated that it was unlikely that the defendant would ever see the notice in a legal newspaper and technology “provides a cheaper and hopefully more effective way of finding [the defendant].”⁷⁰ Thus, the benefits of social media service far outweighed the burdens of publication to the *Mpafe* court.

Following *Mpafe*, the District Court for the Southern District of New York allowed a plaintiff to serve defendants in India via e-mail and Facebook.⁷¹ In the 2013 case *Federal Trade Commission v. PCCare247 Inc.*, the court authorized alternative service after the defendants failed to comply with a preliminary injunction and did not respond to the plaintiff’s motions.⁷² The court in *PCCare247* began its analysis by examining whether the Federal Rules of Civil Procedure authorized service by Facebook or e-mail.⁷³ Citing Rule 4(f)(3), the court determined that the

defendant would be likely to receive the notice if it were sent by e-mail); *Pfizer, Inc. v. Domains By Proxy*, No. Civ.A.3:04 CV 741(SR.), 2004 WL 1576703, at *1 (D. Conn. July 13, 2004) (finding that e-mail service was not permissible where the plaintiffs had not shown that the e-mail would be reasonably likely to reach the defendants).

65. See Order for Service by Publication on the Internet, No. 27-FA-11-3453 (Minn. 4th May 10, 2011), available at <http://www.scribd.com/doc/70014426/Mpafe-v-Mpafe-order> [hereinafter *Mpafe* Order]; Fed. Trade Comm’n v. Pecon Software Ltd., Nos. 12 Civ. 7186(PAE), 12 Civ. 7189(PAE), 12 Civ. 7192(PAE), 2013 WL 5288897, at *1 (S.D.N.Y. Sept. 18, 2013); Fed. Trade Comm’n v. PCCare247 Inc., No. 12 Civ. 7189(PAE), 2013 WL 841037, at *1 (S.D.N.Y. Mar. 7, 2013).

66. *Mpafe* Order, *supra* note 65.

67. See Van Horn, *supra* note 1, at 566.

68. See *Mpafe* Order, *supra* note 65.

69. *Id.*

70. *Id.*

71. See Fed. Trade Comm’n v. PCCare247 Inc., No. 12 Civ. 7189(PAE), 2013 WL 841037, at *3–4 (S.D.N.Y. Mar. 7, 2013). The plaintiff originally sought to serve the defendants via e-mail, Facebook message, and publication but narrowed its request after realizing the prohibitive cost of publication. *Id.* at *3.

72. *Id.* at *2.

73. *Id.*

proposed means of service were not prohibited by any international agreement;⁷⁴ thus, the court could allow the proposed service if it met the due process requirements compulsory under the Constitution.⁷⁵

The court held that the plaintiff's proposal to serve the defendants by e-mail and Facebook message together comported with due process.⁷⁶ Such service was "highly likely" to reach the defendants because they ran "an online business, communicate[d]. . . via e-mail, and advertise[d] their business on their Facebook pages."⁷⁷ The court first addressed e-mail service, reasoning that the court could be reasonably certain the e-mail would reach the defendants because the provided e-mail addresses were used to set up accounts for the defendants' business and one of the defendants e-mailed the court from his address.⁷⁸ In light of evidence that the defendants regularly used Facebook, service via Facebook also comported with due process.⁷⁹

In a related case, *Federal Trade Commission v. Pecon Software Ltd.*, the same court held that the plaintiffs could not serve the defendants via Facebook message.⁸⁰ The plaintiffs made multiple attempts to serve the defendants by traditional methods, but the defendants' addresses could not be verified.⁸¹ In contrast to *PCCare247*, the court in *Pecon Software* was unable to confirm that the defendants actually operated the Facebook accounts in question.⁸² The court noted that it could not "say with confidence, without actually viewing the Facebook pages and verifying

74. *Id.* at *3.

75. *Id.* at *4.

76. *Id.* at *6.

77. *Id.*

78. *Id.* at *4.

79. *Id.* at *5–6; *see also* Chiou et al., *supra* note 1, at 1 (describing the holding of the case). In some cases, courts have been more reluctant to authorize Facebook service. For example, in *Pecon Software*, the court denied service of process via Facebook, holding that the plaintiffs had not shown that service via Facebook would be "highly likely" to reach the defendants. Fed. Trade Comm'n v. Pecon Software Ltd., Nos. 12 Civ. 7186(PAE), 12 Civ. 7188(PAE), 12 Civ. 7191(PAE), 12 Civ. 7192(PAE), 12 Civ. 7195(PAE), 2013 WL 4016272, at *8 (S.D.N.Y. Aug. 7, 2013). The court held that although Facebook service was permissible under Rule 4(f)(3) it did not comport with due process under the circumstances of the case. *Id.* at *4–8. The court distinguished *PCCare247*, noting that unlike that case the plaintiffs did not provide the court with a screenshot of the Facebook pages at issue in order to enable the court to verify the information. *Id.* at *8.

80. *Pecon Software*, 2013 WL 4016272, at *8.

81. *Id.* at *2.

82. *Id.* at *8.

the information allegedly listed thereon, that service by Facebook message would be highly likely to reach defendants” because the individual defendants bore common names and their e-mail addresses varied over time.⁸³

The court in *Pecon Software* denied the plaintiffs’ motion without prejudice, and the plaintiffs thereafter submitted additional evidence and renewed their motion for alternative service.⁸⁴ This time, the court granted the plaintiffs’ motion to serve all defendants via Facebook and e-mail.⁸⁵ The plaintiffs offered evidence that the defendants’ e-mails were consistent with those registered to the Facebook accounts and the employers listed on the Facebook accounts were consistent with the defendants’ actual employers.⁸⁶ By curing the evidentiary defects in their initial motion, the Plaintiffs persuaded the court that social media service was reliable and beneficial.⁸⁷ Therefore, the court determined that service via Facebook was authorized under Federal Rule of Civil Procedure 4(f)(3) and that it met the constitutional standard for service of process because the plaintiffs showed that there was a “high likelihood” that such service would reach the defendants.⁸⁸

In contrast to permitting service on international defendants under Rule 4(f), courts have been reluctant to allow service via social media on domestic defendants under Rule 4(e). In a 2012 case, *Fortunato v. Chase Bank USA, N.A.*, the District Court for the Southern District of New York held that serving a domestic defendant by Facebook message was too unreliable and instead directed the plaintiff to publish notice in five different local newspapers.⁸⁹ In *Fortunato*, the defendant, Chase Bank, sought to implead Fortunato into the action against it.⁹⁰ Chase hired a private investigator but was unable to locate Fortunato or discern her physical address.⁹¹ Thus, Chase sought leave to serve Fortunato by e-mail, Facebook message, publication, and delivery to Fortunato’s mother.⁹²

83. *Id.*

84. Fed. Trade Comm’n v. Pecon Software Ltd., Nos. 12 Civ. 7186(PAE), 12 Civ. 7189(PAE), 12 Civ. 7192(PAE), 2013 WL 5288897, at *1 (S.D.N.Y. Sept. 18, 2013).

85. *Id.* at *3.

86. *Id.* at *2.

87. *Id.*

88. *Id.*

89. See No. 11 Civ. 6608(JFK), 2012 WL 2086950, at *2–3 (S.D.N.Y. June 7, 2012); see also David D. Siegel, *Court Refuses Service by Facebook as Too Unreliable; Instead Directs Service by Publication in Series of Local Newspapers*, SIEGEL’S PRAC. REV., June 2012, at 3 (summarizing *Fortunato*).

90. *Fortunato*, 2012 WL 2086950, at *1.

91. *Id.*

92. *Id.*

The court began by determining that the alternative methods of service proposed by Chase were authorized by Federal Rules of Civil Procedure 4(e).⁹³ The Federal Rules of Civil Procedure authorize these types of service because New York's civil procedure rules contain a catchall provision allowing service in any manner the court directs when service by traditional means is "impracticable."⁹⁴ The court held that serving Fortunato by traditional means was indeed impractical.⁹⁵ Thus, Rule 4(e)(1) authorized service by any nontraditional method.⁹⁶ The court then analyzed which, if any, of the alternative methods of service met the constitutional due process standard.⁹⁷ The court held that neither service by Facebook nor by e-mail was reasonably calculated to apprise the party of the action under the facts of the case.⁹⁸ The court reasoned that Chase failed to offer any facts indicating that Fortunato would likely receive the summons and complaint at the given e-mail address or the Facebook profile was in fact maintained by Fortunato.⁹⁹ The uncertainties of attempting service via Facebook were too concerning to convince the court to allow social media service on the facts of the case.¹⁰⁰ After similarly dispensing of delivering service to Fortunato's mother,¹⁰¹ the court resorted to allowing service by "the only remaining method": publication.¹⁰²

93. *Id.*

94. *See id.*; *see also infra* Appendix A(2)(n).

95. *Fortunato*, 2012 WL 2086950, at *2 (reasoning that Fortunato's history of providing fictional addresses coupled with Chase's attempts to personally serve Fortunato and diligent search for an alternative place of residence showed that Fortunato cannot reasonably be served using the traditional methods).

96. *Id.* at *1; *see* FED. R. CIV. P. 4(e)(1) (allowing domestic service of process according to the laws of the state where the district court is located).

97. *Fortunato*, 2012 WL 2086950, at *2.

98. *Id.* (citing the constitutional standard articulated in *Philip Morris USA Inc. v. Veles Ltd.*, No. 06. CV 2988(GBD), 2007 WL 725412, at *2 (S.D.N.Y. Mar. 12, 2007)).

99. *Id.* The court stated, "Service by Facebook is unorthodox to say the least, and this Court is unaware of any other court that has authorized such service." *Id.* Additionally, the court reasoned that because "anyone can make a Facebook profile using real, fake, or incomplete information," there is no way for the court to confirm that the profile belongs to Fortunato. *Id.*

100. *Id.*

101. *See id.* at *3 (reasoning that delivering the summons and complaint to Fortunato's mother did not meet the constitutional standard because Fortunato and her mother were estranged and had not been in touch for years).

102. *See id.* (authorizing service by publication in five local newspapers).

Following in New York's footsteps, in 2013, a Missouri district court addressed service via Facebook in *Joe Hand Promotions, Inc. v. Shepard*.¹⁰³ The court in *Joe Hand Promotions* held that Missouri law did not authorize electronic service, and thus service of process via Facebook was not permitted under the Federal Rules of Civil Procedure.¹⁰⁴ In *Joe Hand Promotions*, the plaintiffs first attempted to serve the defendants at multiple vacant addresses.¹⁰⁵ Additionally, the plaintiffs attempted to serve the defendants at their place of business, but the business was closed every time the process server attempted to serve the defendants.¹⁰⁶ After arguing that they had exhausted all of the standard service means and incurred substantial expense, the plaintiffs moved the court to allow them to serve the defendants by sending a message containing the summons and complaint to the Facebook accounts bearing the name of the defendants' businesses.¹⁰⁷

The court began by evaluating whether domestic service through Facebook was authorized under the Federal Rules of Civil Procedure.¹⁰⁸ The court reasoned that although Rule 4(f) authorizes electronic service on foreign defendants, Rule 4(e) authorizes service on domestic defendants "only on the individual, their agent, . . . delivery to their abode," or "by 'following state law.'"¹⁰⁹ Missouri law, however, provides that, if traditional methods of service fail and the defendant cannot be found, publication is the proper method of serving the defendant.¹¹⁰ Thus, because Missouri does not authorize electronic service, service by Facebook was not proper under the Federal Rules of Civil Procedure, and the plaintiffs' only option was publication.¹¹¹

The court also went beyond its holding by analyzing electronic service and considering the fact that the plaintiffs' efforts to serve the defendants were not comprehensive.¹¹² The court found that the plaintiffs did not exhaust traditional methods of service because they attempted service at

103. *Joe Hand Promotions, Inc. v. Shepard*, No. 4:12cv1728 SNLJ, 2013 WL 4058745, at *1 (E.D. Mo. Aug. 12, 2013).

104. *Id.* at *2.

105. *Id.* at *1.

106. *Id.*

107. *Id.* The plaintiffs discovered two Facebook pages for the defendants' businesses updated and actively used by one of the defendants. *Id.*

108. *Id.*

109. *Id.* at *2 (quoting FED. R. CIV. P. 4(e)–(f)).

110. *Id.* (reasoning that where Missouri law did not allow service via e-mail, service via Facebook is definitely prohibited). The relevant Missouri statute provides that where a defendant cannot be found, the court "shall issue an order of publication of notice." MO. R. CIV. P. 506.160(3).

111. *Joe Hand Promotions*, 2013 WL 4058745, at *2.

112. *Id.*

only one residential address, they used only one search engine to find the defendants, and they tried to serve the defendants' business only when it was closed.¹¹³ The court explained that even if state law did authorize social media service, the plaintiffs must first exhaust the traditional methods of serving a defendant before substitute service is proper.¹¹⁴ Thus, the court stated in dicta that it would not order service via Facebook in this case even if state law allowed it.¹¹⁵

The last few years of case law shows how the courts go about weighing of costs and benefits of nontraditional methods of service and how they decide what means of alternative service they will allow, both when service is authorized to serve international defendants under Rule 4(f) and when state law allows domestic service.¹¹⁶

IV. BRINGING THE INTERNATIONAL CASES HOME: HOW COURTS CAN LOOK TO CASES DECIDED UNDER FEDERAL RULE 4(F) TO ALLOW SERVICE VIA SOCIAL MEDIA UNDER FEDERAL RULE 4(E)

As the cases show, there are currently two ways plaintiffs can serve defendants via social media. So long as service comports with due process, a plaintiff can serve a foreign defendant under Rule 4(f)(3) when such service is not prohibited by international agreement. Additionally, a plaintiff can serve a domestic defendant under Rule 4(e)(1) when such service is permissible under state law.¹¹⁷ No state has a provision explicitly allowing service of process via social media.¹¹⁸ However, states that do have catchall provisions in their civil procedure rules generally allow service by any means "reasonably calculated to give notice."¹¹⁹ Thus, these state law catchall provisions merely require that a method of

113. *Id.*

114. *Id.*

115. *Id.* The court found the benefits of service via Facebook did not outweigh the facts that anyone can make a "fake" Facebook profile and the defendants may not actually receive a notification that they have a new Facebook message. *Id.* at *1 n.1, *2 n.2.

116. Though not explicitly, the courts in the above cases balanced the limitations of social media service with the benefits of social media service, similar to the analysis articulated in *Rio Properties*. See *Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1018 (9th Cir. 2002).

117. FED. R. CIV. P. 4(e)–(f).

118. See *infra* Appendix A.

119. See *infra* Appendix A(2) for a compilation of states that have catchall service of process rules.

service meet the constitutional standard articulated in *Mullane* before a court can allow its use.¹²⁰ Similarly, because Rule 4(f)(3) allows service by any method not prohibited by international agreement, a court may allow service by any method that meets the constitutional standard for due process provided the method is not prohibited by such an agreement.¹²¹ Thus, regardless of whether the court is deciding to allow social media service for an elusive defendant under Rule 4(f)(3) or by state law under Rule 4(e)(1), the determination often comes down to the same issue: whether social media service is reasonably calculated under all of the circumstances to apprise the defendant of the pending suit.¹²²

Facebook has significant user bases both in the United States and abroad.¹²³ Courts should use a similar analysis to determine whether social media service meets the *Mullane* requirements in cases decided under Rule 4(f) and cases decided under the catchall provision of Rule 4(e).¹²⁴ Although foreign and domestic service of process cases are

120. See *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313–14 (1950) (citing *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)) (explaining that a method must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action”).

121. See *Fed. Trade Comm’n v. PCCare247 Inc.*, No. 12 Civ. 7189(PAE), 2013 WL 841037, at *3 (S.D.N.Y. Mar. 7, 2013) (reasoning that because service via Facebook was not prohibited by any international agreement, the court would allow service via Facebook if it was constitutional).

122. See *supra* Part III, discussing how both the foreign and domestic cases turn on whether Facebook service meets the constitutional standard. This comparison, however, only applies to states that have catchall provisions in their civil procedure rules. As explained in *supra* Part II, states without catchall provisions would need to amend their civil procedure rules before service via social media could be authorized. On September 12, 2014, a New York family court became the first U.S. court to allow domestic service through Facebook. Julia Marsh, Reuven Fenton, & Bruce Golding, *Judge Oks Serving Legal Papers Via Facebook*, NEW YORK POST (Sept. 18, 2014), <http://nypost.com/2014/09/18/judge-oks-serving-legal-papers-via-facebook/>. In *Matter of Noel B. v. Maria A.*, a family court magistrate allowed a father to serve a petition to terminate child support on the mother via Facebook and mail after the mother moved without leaving a forwarding address, neither the mother nor her children would answer calls or text messages, a Google search was unsuccessful, and the mother maintained an active Facebook profile and “liked” pictures as recently as July, 2014. *Id.*

123. In September 2012, Facebook had over 243 million users in Europe, 236 million in Asia, 134 million in South America, and still more in Africa, Mexico, the Middle East, and Australia. *Facebook Users in the World*, INTERNET WORLD STATS, <http://www.internetworldstats.com/facebook.htm> (last updated May 12, 2014). Facebook, Inc. also has two offices abroad in Dublin, Ireland, and Hyderabad, India. See Press Release, IDA Ireland, Facebook Opens New EMEA Headquarters in Dublin (Oct. 27, 2009), <http://www.idaireland.com/news-media/press-releases/facebook-opens-new-emea-h/>; *Facebook Opens Office in India*, TIMES INDIA (Sept. 30, 2010, 7:03 PM), <http://timesofindia.india.com/tech/tech-news/Facebook-opens-office-in-India/articleshow/6659525.cms>.

124. For example, courts can balance the concerns they have about using social media with the benefits of social media service, like the Ninth Circuit did with e-mail

governed by different rules, concern about whether service is actually likely to reach a defendant is common to both types. The scarce case law on this issue demonstrates that the cases involving foreign and domestic defendants are more similar than different.¹²⁵ For example, *PCCare247*, *Pecon Software*, and *Fortunato* all turned on whether or not service by Facebook met the constitutional standard for due process.¹²⁶ The Federal Rules of Civil Procedure play an important role in determining whether or not social media service is authorized, but once the court determines that social media service is allowed under the Federal Rules of Civil Procedure, whether a defendant resides internationally or domestically carries little weight in the analysis.¹²⁷ The differences in the outcomes of the cases are not based on whether Rule 4(f) or a catchall provision under Rule 4(e) is applied but rather the facts of the cases.

In *PCCare247*, for example, the court found that service via Facebook comported with due process for three reasons.¹²⁸ First, service via Facebook would be effected simultaneously with service via e-mail.¹²⁹ Second, the defendants registered their Facebook accounts with verifiable e-mail addresses, suggesting that they actually operated the Facebook accounts identified.¹³⁰ Third, the defendants' Facebook pages listed their job titles at the defendant companies and the defendants were Facebook friends, demonstrating a likelihood that a Facebook message would reach the

service in *Rio Properties*. See *Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1018–19 (9th Cir. 2002).

125. See *PCCare247*, 2013 WL 841037, at *3 (citing analysis from *Fortunato* even though *Fortunato* involved a domestic defendant).

126. See *id.* at *5; *Fed. Trade Comm'n v. Pecon Software Ltd.*, Nos. 12 Civ. 7186(PAE), 12 Civ. 7189(PAE), 12 Civ. 7192(PAE), 2013 WL 5288897, at *2 (S.D.N.Y. Sept. 18, 2013); *Fortunato v. Chase Bank USA N.A.*, No. 11 Civ. 6608(JFK), 2012 WL 2086950, at *2 (S.D.N.Y. June 7, 2012). *Joe Hand Promotions* is distinguishable because the court ultimately held that service via Facebook was not authorized under state law. *Joe Hand Promotions, Inc. v. Shepard*, No. 4:12cv1728 SNLJ, 2013 WL 4058745, at *2 (E.D. Mo. Aug. 12, 2013). *Mpafe* is relatively unhelpful for this particular analysis because the court did not cite any facts of the case. See *Mpafe Order*, *supra* note 65.

127. The courts in the cases involving both foreign and domestic defendants gave weight to the fact that the defendant could not be found, regardless of the defendant's last known location. See, e.g., *Mpafe Order*, *supra* note 65.

128. *PCCare247*, 2013 WL 841037, at *5.

129. *Id.* (reasoning that “if the FTC were proposing to serve defendants *only* by means of Facebook, as opposed to using Facebook as a supplemental means of service, a substantial question would arise whether that service comports with due process”).

130. *Id.*

defendants.¹³¹ The combination of these three factors convinced the court that service via Facebook and e-mail comported with due process.¹³² *Pecon Software* turned on the same three factors.¹³³ First, the plaintiffs proposed to serve the defendants by both e-mail and Facebook.¹³⁴ Second, the court verified the defendants' e-mail addresses, and the plaintiffs showed that the Facebook accounts were registered to the same addresses.¹³⁵ Third, the defendants' Facebook profiles showed they worked for the defendant companies.¹³⁶ Although *Fortunato* involved domestic parties, it too turned on the same three factors as *PCCare247* and *Pecon Software*. Like the defendants in *PCCare247* and *Pecon Software*, the defendant in *Fortunato* requested to implead a third party plaintiff by both e-mail and Facebook message.¹³⁷ Unlike the two international cases, however, the defendants did not set forth any facts to show the court that the plaintiff actually operated the Facebook account or that she would access the site or the e-mail listed on it.¹³⁸

Further, in *PCCare247*, decided under Rule 4(f), the court went so far as to distinguish *Fortunato* even though that case was decided under Rule 4(e).¹³⁹ This shows that courts are aware that the analysis in the cases involving foreign defendants is applicable to cases involving domestic defendants.¹⁴⁰ The differences in the case outcomes are not based on the Federal Rules of Civil Procedure but on whether the court determines that social media service is actually likely to notify a defendant and that the profile in question actually belongs to the defendant

131. *Id.* The plaintiffs were able to offer this support by showing the court a screenshot of the defendants' Facebook pages. *See id.* at *5.

132. *Id.* at *5–6.

133. Fed. Trade Comm'n v. *Pecon Software Ltd.*, Nos. 12 Civ. 7186(PAE), 12 Civ. 7189(PAE), 12 Civ. 7192(PAE), 2013 WL 5288897, at *2 (S.D.N.Y. Sept. 18, 2013).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Fortunato v. Chase Bank USA N.A.*, No. 11 Civ. 6608(JFK), 2012 WL 2086950, at *2 (S.D.N.Y. June 7, 2012).

138. *Id.*

139. The court in *PCCare247* reasoned,

In *Fortunato*, the court denied authorization for service by Facebook because it found that plaintiff “has not set forth any facts that would give the Court a degree of certainty that the Facebook profile plaintiff’s investigator located is in fact maintained by defendant or that the email address listed on the Facebook profile is operational and accessed by defendant.”

The proposed Facebook service in this case does not suffer from that defect. Fed. Trade Comm'n v. *PCCare247 Inc.*, No. 12 Civ. 7189(PAE), 2013 WL 841037, at *5 (S.D.N.Y. Mar. 7, 2013) (quoting *Fortunato*, 2012 WL 2086950, at *2).

140. *See id.*

to be served.¹⁴¹ Thus, in the domestic arena where only one family court has not yet authorized service by Facebook, the foreign cases present a way to convince the courts to allow social media service. The cases suggest that, at a minimum, three factors must be present in order to convince a court under either Rule 4(f) or a state catchall provision that the benefits of social media service outweigh the risks.¹⁴² These requirements were applied to service via Facebook in the cases thus far, but can be applied to any type of widely used social media service.¹⁴³

First, the motion should clearly propose that social media service be effected along with e-mail service.¹⁴⁴ This double service increases the chances that the defendant will actually receive notice but is not enough to convince the courts to allow social media service.¹⁴⁵ Additionally, the plaintiff should present evidence that shows the Facebook page is actually the defendant's.¹⁴⁶ The plaintiff should offer a screenshot of the defendant's social media profile to the court and verify that profile's registered e-mail address belongs to the defendant.¹⁴⁷ Finally, the plaintiff should present some evidence that shows the defendant actually uses his or her Facebook profile.¹⁴⁸ The plaintiff can show the defendant's active status through a screenshot that reflects recently updated job titles,

141. These two qualifications are reminiscent of the Ninth Circuit's balancing test in *Rio Properties*, where the court held that any reservations about e-mail service were outweighed by the benefits because the defendant preferred to communicate by e-mail and it was clear that the e-mail address was actually registered to the defendant. *Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1017–18 (9th Cir. 2002).

142. *Pecon Software*, 2013 WL 4016272, at *8; *PCCare247*, 2013 WL 841037, at *5; *Fortunato*, 2012 WL 2086950, at *2.

143. See *supra* note 52 (explaining some criteria for how to determine if a social media site is widely used).

144. See *Pecon Software*, 2013 WL 5288897, at *2; *PCCare247*, 2013 WL 841037, at *5.

145. See *Fortunato*, 2012 WL 2086950, at *2 (denying the motion to allow social media service even though the plaintiffs proposed to serve the defendants through Facebook and e-mail).

146. See *Pecon Software*, 2013 WL 4016272, at *8; *PCCare247*, 2013 WL 841037, at *5; *Fortunato*, 2012 WL 2086950, at *2.

147. See *Pecon Software*, 2013 WL 4016272, at *8; *PCCare247*, 2013 WL 841037, at *5; *Fortunato*, 2012 WL 2086950, at *2. The screenshot of the profile shows personal information that evidences that the profile actually belongs to the defendant, such as their name, picture, job, and hometown, and the e-mail provides further evidence of the defendant's identity. *Fortunato*, 2012 WL 2086950, at *2.

148. See *Pecon Software*, 2013 WL 4016272, at *8; *PCCare247*, 2013 WL 841037, at *5; *Fortunato*, 2012 WL 2086950, at *2.

pictures, or friend acceptances.¹⁴⁹ By showing the defendant actually uses his or her profile, the plaintiff shows that service through a message on the profile would likely reach the defendant.¹⁵⁰

These minimum requirements go beyond the cases themselves to the heart of constitutional due process. Under *Mullane*, the goal of service of process is to actually inform the defendant of the action against him.¹⁵¹ Regardless of whether a plaintiff is serving a defendant in the United States or in a foreign jurisdiction, the goal of service is to notify the defendant that they have a lawsuit to defend.¹⁵² Therefore, it is logical that courts would inquire similarly into the nature of social media service for both foreign and domestic parties to determine whether social media service is likely to actually notify a defendant, or where actual notice may be impossible, at least whether social media is “not substantially less likely to bring home notice than other of the feasible and customary substitutes.”¹⁵³

A. *Arguing for the Courts To Order Service via Social Media*

In order for plaintiffs in domestic cases to serve elusive defendants via social media, plaintiffs in states with catchall provisions should argue to the courts that service should be effected via social media. They should do so by using the three factors articulated above and the successful evidence the parties presented in the Rule 4(f) cases. In most cases today, it makes sense for the parties to specifically argue for Facebook service to serve an elusive defendant rather than other social media platforms because some courts have already determined that Facebook can meet the *Mullane* standard.¹⁵⁴ Facebook is the preferred social networking

149. See *Pecon Software*, 2013 WL 4016272, at *8; *PCCare247*, 2013 WL 841037, at *5; *Fortunato*, 2012 WL 2086950, at *2.

150. See *Pecon Software*, 2013 WL 4016272, at *8; *PCCare247*, 2013 WL 841037, at *5; *Fortunato*, 2012 WL 2086950, at *2.

151. See *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950) (“But when notice is a person’s due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected . . .”).

152. *Id.*

153. *Id.*

154. See, e.g., *PCCare247*, 2013 WL 841037, at *5–6. This is not to say that attorneys should shy away from arguing for other widely used social networking sites such as Twitter or LinkedIn when there is evidence that service meets the three minimum requirements, especially where a defendant does not have a Facebook profile. See Van Horn, *supra* note 1, at 567 (describing a case in England where the court authorized service via Twitter on an anonymous blogger).

site in the United States where seventy-one percent of adult social media users have a Facebook profile.¹⁵⁵ This amount of site usage is followed by LinkedIn at twenty-two percent of adult social media users and Pinterest at twenty-one percent.¹⁵⁶ Facebook has about 500 million average monthly users with more than 125 billion friend connections.¹⁵⁷ Facebook is an ideal method for serving elusive defendants, not only because of its popularity but also because of its practicality. Facebook service is preferable because Facebook allows a user to send a private message to another user, even when the sender is not a Facebook friend of the recipient.¹⁵⁸ Thus, a lawyer would not need to request to be a defendant's Facebook friend—an action that would likely have both ethical and practical concerns—before serving a defendant over Facebook. Additionally, Facebook is convenient because Facebook allows message senders to attach documents.¹⁵⁹ Therefore, attorneys can attach the summons and complaint to the message, which is preferable not only to other social networking sites but also to newspapers where the complaint cannot be attached.

Serving a defendant via Facebook is comparable to personally serving a defendant or serving a defendant through mail. On Facebook, each user has a profile where they post personal information and pictures.¹⁶⁰ An attorney can use this profile to find the defendant who needs to be served, and the personal information contained makes it easy to verify a user's identity.¹⁶¹ On Facebook, anyone can send another user a personal message.¹⁶² That person is then notified over Facebook, and through e-mail alerts if they so choose, that they have a new message in their

155. *Social Networking Fact Sheet*, *supra* note 4. If another social media site becomes the preferred social media platform and is similarly reliable, lawyers should adapt and argue for service using that site.

156. *Id.*

157. MSN Money Partner, *Inside Facebook's Money Machine*, MSN MONEY (May 17, 2012, 11:28 AM), <http://money.msn.com/technology-investment/post.aspx?post=869a1b6c-0bb7-47b3-ac0a-25d10f6a5404>.

158. *Sending a Message*, FACEBOOK, <https://www.facebook.com/help/www/326534794098501> (last visited Sept. 11, 2014).

159. *How Do I Add an Attachment to My Message?*, FACEBOOK, <https://www.facebook.com/help/121288674619000> (last visited Sept. 11, 2014).

160. *How To Post and Share*, FACEBOOK, <https://www.facebook.com/help/333140160100643> (last visited Sept. 11, 2014).

161. For a discussion of concerns about fake profiles, see *infra* Part V.

162. *Sending a Message*, *supra* note 158.

inbox.¹⁶³ Similar to regular mail, this message system delivers notices straight to the user it is addressed to.¹⁶⁴ Also similar to personal service, a defendant on Facebook will be notified personally that they received a message.¹⁶⁵ All the defendant has to do is open the message to know that they have been served.

B. Amending States' Civil Procedure Rules To Authorize Substituted Service by Any Constitutional Means

Before attorneys can argue for social media service, suit must be brought in a state with a catchall provision in its civil procedure rules.¹⁶⁶ Suits brought in states without these catchall provisions should work at the legislative level to change the state service rules to include catchall provisions. Specifically, these state legislatures should draft service rules that allow for alternative service by any means reasonably calculated to notify the defendant. The challenge lies in convincing the state legislatures rather than convincing the courts to amend entrenched rules.

The legislature should amend the rules to include catchall provisions rather than explicitly authorizing service of process through social media because a general rule will likely be easier to pass. Newspapers often hold a monopoly on substituted service, with many states authorizing alternative service only by newspaper publication.¹⁶⁷ Newspaper lobbyists have successfully opposed legislation that would further decrease the revenue of print newspapers.¹⁶⁸ Newspapers receive some revenue from

163. *Id.*

164. *Id.*

165. *Id.*

166. *See infra* Appendix A(2); *see also supra* notes 39–53.

167. *See infra* Appendix A(1) (indicating that twenty-five states and the District of Columbia authorize service on an elusive defendant only by newspaper publication); *see also, e.g.,* Joe Hand Promotions, Inc. v. Shepard, No. 4:12cv1728 SNLJ, 2013 WL 4058745, at *2 (E.D. Mo. Aug. 12, 2013) (reasoning that the only method of service allowed on an elusive defendant under Missouri state law is service by newspaper publication).

168. *See* Amy Gahran, *Lobbying for Online-Only Legal Notices: How Community Publishers Can Take Action*, USC KNIGHT DIGITAL MEDIA CENTER (July 18, 2012), <http://www.knightdigitalmediacenter.org/blogs/kdmceditor/2012/07/lobbying-online-only-legal-notices-how-community-publishers-can-take-action> (detailing a 2012 bill that failed to pass in New York); Andria Krewson, *N.C. Legislators Turn Back Effort To Take Legal Notices Out of Newspapers*, GLOBAL VUE (May 14, 2011), <http://globalvue.Wordpress.com/2011/05/14/n-c-legislators-turn-back-effort-to-take-legal-notices-out-of-newspapers/> (discussing a North Carolina bill that died in the legislature); Jim Turner, *Online Foreclosure Notices Fail in House Committee*, SUNSHINE STATE NEWS (Feb. 1, 2012, 3:55 AM), <http://www.sunshinestatenews.com/story/online-foreclosure-notices-fail-house-committee> (detailing a Florida law that failed in the house committee).

government notices, which are funded by taxpayers.¹⁶⁹ Although many states have attempted to pass legislation requiring online-only legal notices—potentially saving the government millions of dollars—newspapers have aggressively lobbied to keep such laws from passing.¹⁷⁰ As a result of this lobbying, these bills have not passed.¹⁷¹ These same newspaper lobbyists may oppose any change to the rules that may negatively impact newspaper revenues, including a change from publishing private legal notices in newspapers to posting them online.¹⁷² As such, it would likely be easier for the legislature to pass a catchall provision than one explicitly allowing for substituted service via social media.

V. THE RELUCTANCE TO MOVE TOWARD SOCIAL MEDIA SERVICE: THE ETHICAL CONCERNS OF SERVING DEFENDANTS ONLINE

Even in the event that legislatures do pass catchall provisions, and even if parties do have the evidence required by the case law to pass constitutional muster, courts may still be reluctant to allow service via social media because of ethical concerns.¹⁷³

169. See Kevin O’Keefe, *Newspapers To Lose Their Monopoly on Publishing Legal Notices*, REAL LAW. HAVE BLOGS (Jan. 8, 2012), <http://kevin.lexblog.com/2012/01/08/newspapers-to-lose-their-monopoly-on-publishing-legal-notice/>.

170. *Id.* (mentioning how local governments strapped for cash argue that allowing them to post legal notices on their own websites could save millions of dollars, up to seventy million dollars a year).

171. See Gahrn, *supra* note 168; Krewson, *supra* note 168; Turner, *supra* note 168.

172. As a side effect of readership decline, newspaper revenue is suffering because newspapers do not have as many advertisers as they did in the past. See Better Know a Lobby—Newspaper Association of America, Colbert Nation (Mar. 31, 2009), <http://www.colbertnation.com/the-colbert-report-videos/223281/march-31-2009/better-know-a-lobby—newspaper-lobby>. In 2005, for example, the newspaper industry brought in \$47.4 billion in revenue from print advertising and \$2 billion from online advertising. Rick Edmonds et al., *Newspapers: By the Numbers*, State Media, <http://stateofthemediamedia.org/2012/newspapers-building-digital-revenues-proves-painfully-slow/newspapers-by-the-numbers/> (last visited Sept. 11, 2014). By contrast, in 2011, the industry made \$20.7 billion in revenue from print advertising and \$3.2 billion from online advertising, less than half of the total advertising revenue made in 2007. *Id.* Even though yearly online advertising revenue is steadily increasing, it is dwarfed by the reduction of yearly print advertisement revenue. *Id.*

173. See *Fortunato v. Chase Bank USA N.A.*, No. 11 Civ. 6608(JFK), 2012 WL 2086950, at *2 (S.D.N.Y. June 7, 2012) (reasoning that service by Facebook is “unorthodox”).

A. Authenticating a Facebook Profile

In denying the defendant's motion for substituted service to implead a third party plaintiff, the court in *Fortunato* announced its skepticism regarding the reliability of Facebook service, noting, "[T]he Court's understanding is that anyone can make a Facebook profile using real, fake, or incomplete information."¹⁷⁴ This is a legitimate concern because in order to authorize social media service in a manner consistent with due process, the court must be able to not only verify the profile the attorney plans on messaging is in fact the defendant's but also confirm the receipt of service.¹⁷⁵ However, in the cases where social media service has been allowed, the defendant's identity has been verifiable in some way.¹⁷⁶ Because users create personal profiles, usually by including pictures and personal information, authenticating a profile can be done circumstantially and relatively easily, especially if the plaintiff knows the defendant.¹⁷⁷

In *PCCare247*, for example, the defendants were active Facebook users.¹⁷⁸ In that case, the defendants had recently updated their professional and social activities and advertised their businesses on their Facebook pages.¹⁷⁹ The court was also able to crosscheck the defendants' Facebook, e-mail, and places of employment to confirm that the active users of the Facebook profiles were in fact the defendants in the case.¹⁸⁰ The ability to verify a defendant's identity gives social media service, like Facebook service, an edge over traditional alternative service. In service via publication, the publisher has no idea whether the defendant even reads the newspaper, much less if he will actually see the notice.¹⁸¹ With social media service, by contrast, the court can readily verify that a defendant uses his or her profile, giving a much greater chance that the defendant will actually see the service.¹⁸²

174. *Id.*

175. *See* Van Horn, *supra* note 1, at 568.

176. *See* *Mpafe* Order, *supra* note 65; Fed. Trade Comm'n v. PCCare247 Inc., No. 12 Civ. 7189(PAE), 2013 WL 841037, at *6 (S.D.N.Y. Mar. 7, 2013).

177. *See* Van Horn, *supra* note 1, at 568.

178. *See* *PCCare247*, 2013 WL 841037, at *6.

179. *Id.* at *5–6.

180. *Id.* at *6.

181. *See* *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950) (explaining that it is unlikely newspaper publication would actually notify a defendant of a lawsuit against him).

182. *See* Pedram Tabibi, *Facebook Notification—You've Been Served: Why Social Media Service of Process May Soon Be a Virtual Reality*, 7 PHOENIX L. REV. 37, 46 (2013) (discussing how the United States is moving toward a system where social media is more likely to apprise a defendant of a lawsuit than publication).

This is not to say that people cannot create fake or deceitful profiles. To create a Facebook profile, for example, a user only needs to enter a first and last name, e-mail address, gender, and date of birth, and create a password.¹⁸³ Facebook's Statement of Rights and Responsibilities require that a person who creates a profile provide "accurate and up-to-date" information.¹⁸⁴ Thus, the profile's creator should technically be the person that the profile details. These Terms of Use, however, are subject to the conspicuous disclaimer that Facebook is provided "as is without any express or implied warranties" and is not "responsible for the actions, content, information, or data" of its users.¹⁸⁵ In 2012, Facebook admitted that it had around eighty-three million fake profiles accounting for 8.7% of its global users.¹⁸⁶ These included duplicate profiles, "user-misclassified profiles," such as profiles created for businesses or pets, and "undesirable" profiles that breach Facebook's terms and conditions.¹⁸⁷ Still, attorneys should be able to confirm whether a profile actually belongs to the correct person. For example, the attorney can look at pictures, personal information such as birth date and name, and even crosscheck lists of Facebook friends with the defendant's known associates.¹⁸⁸ Similarly, by crosschecking information on Facebook with other verified information about the defendant, the court can authenticate the profile.¹⁸⁹ The more information is available to verify that a profile belongs to the correct person, the more likely a court will be convinced that social media service is actually likely to reach the defendant.¹⁹⁰ At a minimum, however, an attorney should be able to present evidence to a judge that a profile contains the defendant's name, a verifiable e-mail address, and at least one personal

183. See FACEBOOK, <http://www.facebook.com> (last visited Sept. 11, 2014).

184. *Statement of Rights and Responsibilities*, FACEBOOK, <http://www.facebook.com/terms.php> (last visited Sept. 11, 2014).

185. *Id.*

186. Mark Sweney, *Facebook Quarterly Report Reveals 83m Profiles are Fake*, GUARDIAN (Aug. 2, 2012), <http://www.theguardian.com/technology/2012/aug/02/facebook-83m-profiles-bogus-fake>.

187. *Id.*

188. See Noel Towell, *Lawyers To Serve Notices on Facebook*, SYDNEY MORNING HERALD (Dec. 16, 2008, 10:35 AM), <http://www.smh.com.au/news/technology/biztech/lawyers-to-serve-notices-on-facebook/2008/12/16/1229189579001.html>.

189. See *FTC v. PCCare247 Inc.*, No. 12 Civ. 7189(PAE), 2013 WL 841037, at *5-6 (S.D.N.Y. Mar. 7, 2013).

190. Pedram Tabibi, *supra* note 182, at 57.

detail such as job title or birthdate, similar to the evidence presented in *Pecon Software* and *PCCare247*.¹⁹¹

Moreover, although authorizing service via Facebook may discourage some potential defendants from using the website or encourage some to hide their profiles, this fear has not played out in reality.¹⁹² Additionally, Facebook privacy settings often have holes allowing for access.¹⁹³ For example, even if a defendant changes his or her profile to “private,” Facebook recently changed its privacy policy to allow Graph Search, a feature that permits users to search for any past posts that have been shared with them, including public posts by nonfriends.¹⁹⁴ When a person changes his or her profile to a private setting, they choose whom to share information with.¹⁹⁵ However, with the addition of Graph Search, any information posted prior to a person’s privacy setting change is still searchable and readable.¹⁹⁶ Thus, if a potential defendant was at one time a Facebook friend of the plaintiff, but the defendant decided that they would block the plaintiff so they could not view their profile, attorneys could still access the plaintiff’s profile.¹⁹⁷ In doing so, the attorneys could look through the defendant’s older posts to verify that the defendant’s profile actually belongs to the defendant before having a server contact the defendant.¹⁹⁸ In order to get around this hole, the defendant would have to go through any past posts that the plaintiff or members of the public could see and hide all of them. The more privacy settings a user employs, however, the more difficult it will be for the court to verify the defendant’s identity. In the event the defendant is unverifiable, service by publication may still be the preferred last resort option to constructively serve a defendant.

191. See Fed. Trade Comm’n v. *Pecon Software Ltd.*, Nos. 12 Civ. 7186(PAE), 12 Civ. 7189(PAE), 12 Civ. 7192(PAE), 2013 WL 5288897, at *2 (S.D.N.Y. Sept. 18, 2013); *PCCare247*, 2013 WL 841037, at *5.

192. See *PCCare247*, 2013 WL 841037, at *6; *Mpafe* Order, *supra* note 65.

193. See *3 Tips About Search Privacy*, FACEBOOK, <https://www.facebook.com/about/graphsearch/privacy> (last visited Sept. 11, 2014).

194. See *id.*

195. See *How Can I Make My Profile COMPLETELY Private and NOT Appear on Search?*, FACEBOOK, <https://www.facebook.com/help/community/question/?id=10151569502816839> (last visited Sept. 11, 2014).

196. See *3 Tips About Search Privacy*, *supra* note 193.

197. See *id.*

198. See *id.*

*B. The Likelihood that the Defendant Will Actually
Receive Notice via Facebook*

In addition to requiring a defendant to be verifiable, due process also requires that a defendant actually be likely to receive notice.¹⁹⁹ This requirement can often be satisfied when a message is sent through Facebook. In *Mpafe*, for example, a Minnesota court reasoned that serving a foreign defendant by Facebook message was the most practical method and the most likely method to comply with constitutional standards.²⁰⁰ Moreover, if a person opens a message on Facebook, the sender will always be notified.²⁰¹ This policy is another safeguard that makes service by Facebook superior to service by publication and many other social media platforms. Perhaps the most comparable social media site to serve a defendant on is LinkedIn. Although LinkedIn allows the court to verify a defendant's identity similar to Facebook, LinkedIn does not notify a sender if the receiver has opened a message.²⁰²

Even if an attorney cannot show that a defendant actually received notice through social media, the fact that the message was sent to the defendant's inbox may be sufficient in situations where the defendant has proven to be otherwise elusive.²⁰³ In some cases where courts have allowed service via e-mail, such as *Rio Properties*, courts have held that even though the plaintiff could not show the defendant received actual notice the likelihood of the defendant receiving electronic service was greater than receiving other types of service. Therefore electronic service was reasonably calculated to notify the defendant.²⁰⁴ Similarly, the court in *PCCare247* acknowledged that "Facebook is a relatively novel concept, and . . . it is conceivable that [the] defendants will not in fact receive notice by this means."²⁰⁵ This acknowledgement, however, did not preclude the court from authorizing service via Facebook, noting,

199. See *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314–15 (1950).

200. See *Mpafe* Order, *supra* note 65.

201. Messages can be sent to anyone on Facebook, and Facebook marks a message as "seen" when the person receiving the message has opened it. *Sending a Message*, *supra* note 158.

202. *Sending Messages to Connections and Contacts*, LINKEDIN, http://help.linkedin.com/app/answers/detail/a_id/1645 (last reviewed June 6, 2014).

203. See *Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1018 (9th Cir. 2002).

204. See, e.g., *id.*

205. Fed. Trade Comm'n v. *PCCare247 Inc.*, No. 12 Civ. 7189 (PAE), 2013 WL 841037, at *5 (S.D.N.Y. Mar. 7, 2013).

“[H]istory 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.”²⁰⁶

Although ethical concerns do exist when serving a defendant through social media, these concerns can be allayed with procedural safeguards in most cases.²⁰⁷ Thus, the fact that social media service must be affected carefully should not preclude the courts from implementing social media service.

VI. RAISING THE BAR: ESCAPING THE ENTRENCHMENT IN PUBLICATION, AND WHY SOCIAL MEDIA SERVICE BETTER MEETS *MULLANE*’S CONSTITUTIONAL STANDARD

Currently, many courts usually authorize service by publication as the preferred method for alternative service when a defendant cannot be served through traditional means.²⁰⁸ Service by publication, however, is becoming an outdated method of service that is constitutionally inferior in many cases to service via social media.

A. *Social Media Service Is More Economical than Service by Publication*

Some courts that have allowed service via Facebook have cited the prohibitive cost of service by publication.²⁰⁹ In *Mpafe*, for example, the court reasoned that publication in a newspaper is “antiquated and prohibitively expensive.”²¹⁰ Comparatively, publishing notice in newspapers is more expensive than sending a message over the Internet.²¹¹ Newspapers charge varying amounts to publish legal notices.²¹² While the cost of

206. *Id.*

207. In addition to due process considerations, other ethical considerations arise when an attorney seeks to serve a defendant on social media regarding privacy concerns and ethical representation. For a discussion of these issues, see Van Horn, *supra* note 1, at 570.

208. See *infra* Appendix A(1); see also, e.g., Joe Hand Promotions, Inc. v. Shepard, No. 4:12cv1728 SNLJ, 2013 WL 4058745, at *2 (E.D. Mo. Aug. 12, 2013) (holding that where a defendant cannot be found the proper method of alternative service is publication).

209. *Mpafe* Order, *supra* note 65.

210. *Id.*

211. *Does It Cost Money To Use Facebook? Is It True That Facebook Is Going To Charge To Use the Site?*, FACEBOOK, <https://www.facebook.com/help/186556401394793> (last visited Sept. 11, 2014) [hereinafter *Does It Cost Money To Use Facebook?*].

212. In Wisconsin, for example, the cost for publishing six lines in one column in 2013 was \$10 per day. DEP’T OF ADMIN., STATE BUREAU OF PROCUREMENT, LEGAL

newspaper notice can add up if a plaintiff is forced to publish for long periods of time in multiple jurisdictions, the cost is negligible in the context of litigation cost as a whole.²¹³ Moreover, courts often require evasive defendants to bear the cost of publication, so the cost is not placed on the plaintiff anyways.²¹⁴

Although the cost of newspaper service may be small compared to the cost of litigation, in contrast to newspaper notice, sending a message to a defendant over Facebook or LinkedIn is virtually free.²¹⁵ While there are costs associated with work and hiring attorneys, the costs associated with posting the notice are trivial compared to the rates newspapers charge.²¹⁶ Similar to newspapers, Facebook makes most of its money through paid advertisements.²¹⁷ In the first quarter of 2012, eighty-two percent of Facebook's revenue came from advertisers.²¹⁸ However, while newspaper's ad revenue is declining, Facebook's is steady.²¹⁹

NOTICES IN THE OFFICIAL STATE NEWSPAPER 2-3 (2013). By contrast, publication of legal notice in the Los Angeles Times starts at \$117 per day for one column of text. *Advertiser Services: Legal Notices*, LOS ANGELES TIMES, <http://placeanad.latimes.com/legal-notices> (last visited Sept. 11, 2014). Understandably, large newspapers charge more for their advertising space than smaller newspapers. Large newspapers, however, also have a larger circulation, and notice published in their papers or on their websites is calculated to reach more readers than smaller circulations. See Howard Fischer, *Legal Notice Changes Could Rock Newspapers, Taxpayers*, ARIZ. DAILY SUN (Mar. 16, 2013, 5:00 AM), http://azdailysun.com/news/local/state-and-regional/legal-notice-changes-could-rock-newspapers-taxpayers/article_fb7ac280-17f1-52de-9ae4-74cd7b775bac.html.

213. In 2012, the median cost of litigation ranged from \$43,000 to \$122,000 depending on case type. Paula Hannaford-Agor & Nicole L. Waters, *Estimating the Cost of Civil Litigation*, COURT STATISTICS PROJECT7 (Jan. 2013), http://www.courtstatistics.org/~media/microsites/files/csp/data%20pdf/csph_online2.ashx. The median automobile suit cost \$43,000; the median premises liability suit cost \$54,000; the median real property suit cost \$66,000; the median employment suit cost \$88,000; and the median medical malpractice suit cost \$122,000. *Id.*

214. FED. R. CIV. P. 4(d)(2), (d)(5).

215. *Does it Cost Money to Use Facebook?*, *supra* note 211; Randy Duermyer, *Introduction to LinkedIn*, ABOUT.COM, <http://homebusiness.about.com/od/linkedin/a/how-does-linkedin-work.htm> (last visited Sept. 11, 2014).

216. Facebook, for example, asserts that it is a "free site and will never require that [users] pay to continue using the site." *Does it Cost Money to Use Facebook?*, *supra* note 211. Setting up a profile is free, and sending messages to other users, even someone the user is not connected with, is also free. *Id.*

217. See MSN Money Partner, *supra* note 157.

218. *Id.* In 2012, Facebook recorded fifty-three million dollars in net income. Facebook Inc., Annual Report (Form 10-K), at 36 (Feb. 1, 2013).

219. Over the past few years, a number of newspapers have declared bankruptcy and many more are in deep financial water. See *Tribune Files for Bankruptcy*, N.Y. TIMES

Additionally, while the future of newspapers is uncertain, Facebook continues to hold the top social media spot, as well as a stable stock price.²²⁰ Thus, notifying users on Facebook is a financially secure way to provide notice for the foreseeable future.

*B. Social Media Service Is More Likely To Be Reasonably
Calculated To Inform a Defendant of a Lawsuit than
Newspaper Publication*

In contrast to print or online newspapers, a defendant is much more likely to actually receive notice via social media. Instead of reading newspapers, many people get their news through social media.²²¹ In 2012, only thirty-eight percent of Americans said they regularly read any type of daily newspaper, and twenty-three percent of the population said they read a print newspaper the day before.²²² Moreover, in 2012, Americans spent an average of thirty-five percent of their daily allotted time for news consumption reading print newspapers.²²³ By contrast, they spent an average of eight percent of their news consumption time using computers, phones, or tablets.²²⁴ Therefore, this limited amount of time likely will not be enough to click through a newspaper website to

(Dec. 8, 2008, 1:55 PM), http://dealbook.nytimes.com/2008/12/08/tribune-files-for-bankruptcy/?_r=0; see also *Better Know a Lobby—Newspaper Association of America*, *supra* note 171. In 2008, for example, The Tribune Company, owner of several prominent newspapers such as the Los Angeles Times and the Chicago Tribune, filed for bankruptcy. *Tribune Files for Bankruptcy*, *supra*. At the time of filing, the Tribune Company had almost \$13 billion in debt and only \$7.6 billion in assets to cover a portion of that debt. *Id.* By contrast, in the third quarter of 2013, Facebook's revenues doubled, and most of that money, about \$1.8 billion, came from advertisers. Vindu Goel, *Mobile Ads Fuel a Jump in Profit at Facebook*, N.Y. TIMES (Oct. 30, 2013), http://www.nytimes.com/2013/10/31/technology/rising-mobile-ad-sales-propel-facebook-profit.html?_r=0.

220. When Facebook went public in May 2012, its average monthly adjusted close stock price was \$29.60. *Facebook Historical Prices*, YAHOO FINANCE, <http://finance.yahoo.com/q/hp?s=FB&a=04&b=1&c=2012&d=11&e=27&f=2014&g=m> (last visited Sept. 11, 2014). Facebook's stock price remained steady until July 2013 when it jumped to \$36.80. *Id.* The stock price has since risen steadily, closing with an average monthly adjusted stock price of \$77.89 on September 2, 2014. *Id.*

221. Thirty percent of U.S. adults get news on Facebook, ten percent get news on YouTube, and eight percent get news on Twitter. Jesse Holcomb et al., *News Use Across Social Media Platforms*, PEW RES. JOURNALISM PROJECT (Nov. 14, 2013), <http://www.journalism.org/2013/11/14/news-use-across-social-media-platforms/>.

222. *Number of Americans Who Read Print Newspapers Continues to Decline*, *supra* note 11.

223. Rick Edmonds, *New Research Finds 92 Percent of Time Spent on News Consumption Is Still on Legacy Platforms*, POYNTER, <http://www.poynter.org/latest-news/business-news/the-biz-blog/212550/new-research-finds-92-percent-of-news-consumption-is-still-on-legacy-platforms/> (last updated May 16, 2013, 9:32 AM).

224. *Id.*

find out whether a reader has been served via publication.²²⁵ In today's fast-paced world where newsreaders can quickly check updates on their preferred topics, legal notices are even less likely to be read by either print or online newsreaders.²²⁶

In contrast to newspapers and newspapers' websites, social media is in its heyday. Eighty-five percent of adult Americans use the Internet, and seventy-two percent of adult Americans use social networking sites.²²⁷ In contrast to the decline in newspaper readership, this percentage of adult social media users has rapidly increased from eight percent in 2005.²²⁸ Social media's popularity among American adults stands in stark contrast to newspapers; social media users spend an average of 3.2 hours per day on social networking sites.²²⁹ Although young adult social media users ages eighteen to thirty-four spend the most time on social media at 3.8 hours per day, middle age adult users are not far behind at 3 hours per day, and even older adult users ages fifty to sixty-four spend an average of 2.4 hours each day on social media.²³⁰ Thus, the amount of time social media users spend on social networking sites is about seven times the amount of time they spend reading print newspapers and almost 192 times the amount of time they spend reading online newspapers.²³¹ With this huge

225. In fact, fifty-two percent of newsreaders in 2012 stated that they followed news about the weather "very closely." *In Changing News Landscape, Even Television Is Vulnerable*, PEW RES. CENTER FOR PEOPLE & PRESS (Sept. 27, 2012), <http://www.people-press.org/2012/09/27/section-3-news-attitudes-and-habits-2/>. The second most popular news topic is "crime," and the third is "people and events in their community." *Id.* Even "business and finance" and "politics" are only followed closely by fifteen and seventeen percent of newsreaders, respectively. *Id.*

226. Legal news or legal notices did not make the list of news topics that people follow. *Id.*

227. Joanna Brenner & Aaron Smith, *72% of Online Adults Are Social Networking Site Users*, PEW RES. INTERNET PROJECT (Aug. 5, 2013), <http://pewinternet.org/Reports/2013/social-networking-sites.aspx>; Kathryn Zickuhr, *Who's Not Online and Why*, PEW RES. INTERNET PROJECT (Sept. 25, 2013), <http://www.pewinternet.org/Reports/2013/Non-internet-users.aspx>.

228. See Brenner & Smith, *supra* note 227.

229. *Social Networking Eats Up 3+ Hours per Day for the Average American User*, MARKETING CHARTS (Jan. 9, 2013), <http://www.marketingcharts.com/wp/interactive/social-networking-eats-up-3-hours-per-day-for-the-average-american-user-26049/>.

230. *Id.*

231. See Paul Grabowicz, *The Transition to Digital Journalism*, U.C. BERKELEY GRADUATE SCH. OF JOURNALISM (last updated Sept. 7, 2014), <http://multimedia.journalism.berkeley.edu/tutorials/digital-transform/websites/>. People spend an average of twenty-seven minutes a day reading print newspapers on weekdays and fifty-seven minutes on Sundays. *Id.* (citing Mary Nesbitt, *News Flash: Readers Have NOT Left the Building*,

disparity between newspaper readership and social media usage, people are much more likely to be on social media, and thus more apt to receive service on social media than they are to receive service in print or online newspapers. Courts are aware of the ramifications of such disparities; as the court noted in *PCCare247*, “Particularly where defendants have ‘zealously embraced’ a comparatively new means of communication, it comports with due process to serve them by those means.”²³²

A defendant is no more likely to see a legal notice in an online newspaper than in a print newspaper. The reader of an online newspaper has to deliberately find the “legal notices” section of the newspaper, often hidden under a subheading rather than placed in plain view on the icon bar, click on the link, and then weed through a list of dry legal notices.²³³ It is unlikely that someone who is not very worried about being sued or is not interested in legal updates would check the legal notices icon on a regular basis. Because the defendant has to weed through an online newspaper to find notice, it is unlikely that even an online newspaper is “reasonably calculated” to apprise a defendant of a lawsuit against them.²³⁴

American social media statistics are comparable to foreign country social media statistics, suggesting that there is no statistical reason to allow service through social media for foreign defendants but disallow it for domestic defendants. In a study of twenty-four countries, including countries that have allowed social media service such as Australia, Canada, and Great Britain, seventy-one percent of those surveyed reported using social networks for an average of 3.6 hours a day, not much less than the United States average.²³⁵ Moreover, print newspaper readership is actually

NW. U. READERSHIP INST. (July 9, 2008), <http://getsmart.readership.org/2008/07/news-flash-readers-have-not-left.html>). By contrast, people spend only a little over one minute a day on newspaper websites. *Id.* This difference may be due to the fact that most people view online news at work and read print newspapers at home for leisure. *Id.*

232. Fed. Trade Comm’n v. *PCCare247 Inc.*, No. 12 Civ. 7189(PAE), 2013 WL 841037, at *5 (S.D.N.Y. Mar. 7, 2013) (citing *Rio Props., Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1017 (9th Cir. 2002)).

233. Texas state representative republican John Stickland opined that “[w]e’d reach more of the public by putting ads on milk cartons than in newspapers.” *Stickland Bill Would End Taxpayer Waste to Newspapers*, JONATHAN STICKLAND (Jan. 29, 2013), <http://jonathanstickland.com/2013/29/stickland-bill-would-end-taxpayer-waste-to-newspaper/#sthash.5wFqn8cM.dpuf>.

234. See *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (citing *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

235. *Social Networking Eats Up 3+ Hours per Day for the Average American User*, *supra* note 226. In 2008, Australia became the first jurisdiction to allow service by Facebook on foreign defendants. See John G. Browning, *Served Without Ever Leaving the Computer: Service of Process via Social Media*, 73 TEX. B.J. 180, 181 (2010). Courts in New Zealand, the United Kingdom, and Canada quickly followed suit, allowing secondary

increasing in Asia and Latin America.²³⁶ Approximately 2.3 billion people worldwide read some kind of newspaper, whether print or digital.²³⁷ Where similar numbers of adults abroad are using social networking sites as people in the United States, it makes sense that where courts find that social media is reasonably calculated to serve defendants abroad social media is also calculated to reasonably serve defendants in the United States.²³⁸

VII. CONCLUSION

Social media service of process, especially through platforms such as Facebook, is a way for courts to keep pace with the changing technological times and allow a practical method for alternative service. Generally, the courts have moved at a much slower pace than the rest of the world with embracing technology. In cases involving international parties, however, many courts have recognized the sensible benefits of social media service and allowed plaintiffs to serve defendants abroad when the plaintiffs can authenticate defendants' profiles and show that notice is likely to reach them. Plaintiffs seeking to serve domestic defendants have been left in the dust, however, and only one family court has yet authorized social media service on a domestic party. Although many of the same considerations apply to both foreign and domestic defendants, courts have been much more reluctant to allow plaintiffs to serve domestic defendants through social networking platforms and have instead resorted to ordering service by newspaper publication.

service by e-mail, Facebook, and in England, by Twitter. *See id.* at 182; Ian Llewellyn, *NZ Court Papers Can Be Served via Facebook, Judge Rules*, NEW ZEALAND HERALD (Mar. 16, 2009, 2:22 PM), http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10561970; *see also* Van Horn, *supra* note 1, at 566–68 (describing the above cases in detail).

236. Larry Kilman, *World Press Trends: Newspapers Still Reach More than Internet*, WORLD ASS'N NEWSPAPERS & NEWS PUBLISHERS (Oct. 12, 2011), <http://www.wan-infra.org/Press-releases/2011/10/12/world-press-trends-newspapers-still-reach-more-than-internet>. Additionally, readership remains very high in some countries, such as Iceland, in which ninety-six percent of the population read a daily newspaper. *Id.* Some other countries are not far behind. *See id.* (noting Japan at ninety-two percent, Norway, Sweden, and Switzerland at eighty-two percent, and Finland and Hong Kong at eighty percent). By contrast, in 2012, only thirty-eight percent of Americans regularly read newspapers. *See Number of Americans Who Read Print Newspapers Continues To Decline*, *supra* note 11.

237. Kilman, *supra* note 236.

238. *See supra* note 235 and accompanying text.

Service by publication, however, is quickly becoming outdated and is prohibitively expensive compared to social media service. With domestic newspaper readership and advertisement revenue declining and online newspapers unable to make up the difference, service by publication does not meet *Mullane*'s "reasonably calculated to inform" standard, especially when other types of service better meet the standard. Social media, on the other hand, has grown over the past decade, in both the amount of users and the revenues it generates. With more people using social media platforms, especially Facebook, every day for dramatically more time than they read newspapers, people with active profiles are more likely to be reasonably notified by Facebook service than publication.

Although social media service may not be practical for everyday service, it is the most practical method available for alternative service when an elusive defendant cannot be served through traditional means, such as personal service. Compared to publication, service via social media has more in common with personal service, especially where a party can attach the summons and complaint, such as through Facebook. For states that have catchall provisions in their civil procedure rules that allow service on elusive defendants by any means that comply with due process, attorneys should argue that the court should order social media service rather than service by publication. Using as tools the cases that allowed Facebook service on international defendants, attorneys can argue to the court why social media service is the better method of serving elusive defendants domestically and why it is reasonably calculated to notify defendants of a lawsuit against them.

For states that do not have catchall provisions in their rules, or even automatically order service by newspaper publication for elusive defendants, change will first have to come from the legislature. Although changing state civil procedure rules to explicitly allow social media service may face strong backlash from newspaper lobbyists, and courts may have ethical concerns as well, amending the rules to include catchall provisions is practical and reasonable. Additionally, courts' ethical concerns can be allayed through procedural safeguards to ensure that the person being served is the correct person. By taking these small steps, attorneys and legislatures can make important, cost-efficient, and practical changes to the way we serve defendants. The tagline from the popular film "The Social Network" says it all: "You don't get to 500 million friends without making a few enemies."²³⁹

239. THE SOCIAL NETWORK (Columbia Pictures 2010).

APPENDIX A

1. States that allow service to be made on an elusive defendant only by newspaper publication:
 - a. ALABAMA: The Alabama Rules of Civil Procedure direct, “When a defendant avoids service and that defendant’s present location or residence is unknown . . . the court may, on motion, order service by publication.” ALA. R. CIV. P. 4.3(c).
 - b. ARKANSAS: When, after “diligent inquiry, the identity or whereabouts of a defendant remains unknown,” the Arkansas Rules of Civil Procedure provide that a warning order be published in “a newspaper having general circulation in the county where the action is filed.” ARK. R. CIV. P. 4(f)(1)–(2).
 - c. CALIFORNIA: “A summons may be served by publication if upon affidavit it appears to the satisfaction of the court in which the action is pending that the party to be served cannot with reasonable diligence be served in another [specified] manner.” CAL. CIV. PROC. CODE § 415.50(a) (West Supp. 2014).
 - d. DISTRICT OF COLUMBIA: “In actions specified by subsection (b) of this section, publication may be substituted for personal service of process upon a defendant who can not be found and who is shown by affidavit to be a nonresident, or to have been absent from the District for at least six months, or against the unknown heirs or devisees of deceased persons.” D.C. CODE § 13-336(a) (2001).
 - e. FLORIDA: “Where personal service of process . . . cannot be had, service of process by publication may be had upon any party, natural or corporate, known or unknown . . .” FLA. STAT. ANN. § 49.021 (West Supp. 2014).
 - f. GEORGIA: “When the person on whom service is to be made resides outside the state, or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself or herself to avoid the service of the summons . . . the judge or clerk may grant an order that the service be

made by the publication of summons [in the newspaper]”
GA. CODE ANN. § 9-11-4(f) (2006).

- g. HAWAII: Hawaii provides that the court may order service by publication when “a defendant is unknown or does not reside within the State or if, after due diligence, the defendant cannot be served with process within the State.” HAW. REV. STAT. § 634-23(2) (Supp. 2012).
- h. IDAHO: “When the person on whom the service is to be made resides outside of the state, or has departed from the state, or cannot after due diligence be found within the state, or conceals himself therein to avoid the service of summons . . . the court may make an order for the publication of the summons . . .” IDAHO CODE ANN. § 5-508 (Supp. 2013).
- i. INDIANA: The Indiana Rules of Trial Procedure provide that when a defendant cannot be found, he can be served consistent with service of process for in rem actions. IND. R. TRIAL P. 4.5. The methods for in rem actions are personal service, mail, and newspaper publication. IND. R. TRIAL P. 4.9.
- j. KANSAS: The Kansas Statutes Annotated provides that alternative service “may be made by publication.” KAN. STAT. ANN. § 60-307 (2005).
- k. MINNESOTA: When a defendant has departed from the state to avoid service, “[s]ervice by publication shall be sufficient to confer jurisdiction.” MINN. R. CIV. P. 4.04(a)(1).
- l. MISSISSIPPI: When a defendant cannot be found “on diligent inquiry,” the clerk shall publish the summons “once in each week during three successive weeks in a public newspaper.” MISS. R. CIV. P. 4(c)(4).
- m. MISSOURI: Notice shall be published “in [a] newspaper of general circulation” where a defendant has concealed themselves or cannot be found. MO. REV. STAT. § 506.160(3) (2000).
- n. MONTANA: Montana provides that for certain actions, such as in rem actions, marriage, and custody actions, a party may serve a defendant by publication. MONT. R. CIV. P. 4(o). In other types of actions, where a defendant cannot be found, the Secretary of State is designated as an agent to receive service of process. MONT. R. CIV. P. 4(p)(2).

- o. NEVADA: When a defendant “has departed from the state, or cannot, after due diligence, be found within the state, or by concealment seeks to avoid the service of summons . . . [the court] may grant an order that the service be made by the publication of summons.” NEV. R. CIV. P. 4(e)(1)(i).
- p. NEW JERSEY: New Jersey does not have one specific provision for service of process. However, many of its rules direct that service by publication may be made on an elusive defendant. *See e.g.*, N.J. STAT. ANN. §§ 40:65-4, 54:8-6 (Supp. 2013).
- q. NORTH CAROLINA: “A party that cannot with due diligence be served by personal delivery, registered or certified mail, or by a designated delivery service . . . may be served by publication.” N.C. R. CIV. P. 4(j1).
- r. NORTH DAKOTA: “A defendant, whether known or unknown, who has not been served . . . may be served by publication.” N.D. R. CIV. P. 4(e)(1).
- s. OHIO: The Ohio Rules of Civil Procedure direct service by publication where a defendant cannot be found within the state or the defendant’s residence is unknown. OHIO R. CIV. P. 4.4(a)(1).
- t. PENNSYLVANIA: If a plaintiff, after a good faith effort, is unable to serve a defendant, the plaintiff “may move the court for a special order directing the method of service.” Specifically, this section refers to and is titled “Publication.” PA. R. CIV. P. 430.
- u. RHODE ISLAND: When “complete service cannot with due diligence be made by another prescribed method, the court shall order service by publication of a notice of the action in one or more newspapers.” R.I. R. CIV. P. 4(i).
- v. SOUTH DAKOTA: “Where the person on whom the service of the summons . . . cannot, after due diligence, be found within the state . . . such court or judge may grant an order that the service be made by publication of the summons” S.D. CODIFIED LAWS § 15-9-7 (2004).

- w. VIRGINIA: When a party has been unable to make service or “diligence has been used without effect to ascertain the location of the party to be served,” an “order of publication may be entered.” VA. CODE ANN. § 8.01-316 (2007).
 - x. WEST VIRGINIA: West Virginia’s Rules of Civil Procedure direct that where “the plaintiff has used due diligence to ascertain the residence or whereabouts of the defendant, without effect,” service shall be made by publication. W. VA. R. CIV. P. 4(e)(1)(C).
 - y. WISCONSIN: If “with reasonable diligence” a defendant cannot be served, “service may be made by mailing and publication.” WIS. STAT. ANN. § 799.12(4) (West 2012).
 - z. WYOMING: If the defendant cannot be served with reasonable diligence or if their address cannot be ascertained, upon affidavit “the party may proceed to make service by publication.” WYO. R. CIV. P. 4(f).
2. States that have catchall provisions:
- a. ALASKA: “In its discretion the court may allow service of process to be made upon an absent party in any other manner which is reasonably calculated to give the party actual notice of the proceedings and an opportunity to be heard, if an order permitting such service is entered before service of process is made.” ALASKA R. CIV. P. 4(e)(3).
 - b. ARIZONA: The Arizona Rules of Civil Procedure provide, “If service by one of the means set forth [above] proves impracticable, then service may be accomplished in such manner, other than by publication, as the court, upon motion and without notice, may direct.” The rules also require that, under this rule, “reasonable efforts shall be undertaken by the party making service to assure that actual notice of the commencement of the action is provided to the person to be served.” ARIZ. R. CIV. P. 4.1(m).
 - c. COLORADO: The Colorado Rules of Civil Procedure allow service by newspaper publication only for “actions affecting specific property or status or other proceedings in rem.” COLO. R. CIV. P. 4(g). When a party is not authorized to publish service and is otherwise unavailable to accomplish service, the court may authorize substituted service

“reasonably calculated to give actual notice.” COLO. R. CIV. P. 4(f).

- d. CONNECTICUT: The court may “make such order as is deemed reasonable, in regard to the notice which shall be given of the institution or pendency of all complaints . . . when the adverse party, or any persons so interested therein that they ought to be made parties thereto, reside out of the state, or when the names or residences of any such persons in interest are unknown to the party instituting the proceeding.” CONN. GEN. STAT. § 52-68(a) (2013).
- e. DELAWARE: Providing that substituted service outside the state when “reasonably calculated to give actual notice” may be made “[a]s directed by a court.” DEL. CODE ANN. tit. 10, § 3104(d) (2013).
- f. ILLINOIS: “If service upon an individual 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.” 735 ILL. COMP. STAT. ANN. 5/2-203.1 (West Supp. 2013).
- g. IOWA: The Iowa Code of Civil Procedure directs that any individual, representative, partnership, or corporation may be served in any manner “consistent with due process of law proscribed by order of the court” when service cannot be made by the methods proscribed by the rule. IOWA R. CIV. P. 1.306.
- h. MAINE: “The court, on motion upon a showing that service cannot with due diligence be made by another prescribed method, shall order service . . . by publication . . . or . . . to be made electronically or by any other means not prohibited by law.” ME. R. CIV. P. 4(g)(1).
- i. MARYLAND: The Maryland Rules of Civil Procedure direct that when a party has made good faith efforts to serve a defendant and it is impracticable to leave service at the defendant’s last known residence or place of business, “the court may order any other means of service that it deems

appropriate in the circumstances and reasonably calculated to give actual notice.” MD. R. CIV. P. 2-121(c).

- j. MICHIGAN: “On a showing that service of process cannot reasonably be made as provided by this rule, the court may by order permit service of process to be made in any other manner reasonably calculated to give the defendant actual notice of the proceedings and an opportunity to be heard.” MICH. R. CIV. P. 2.105(I)(1).
- k. NEBRASKA: “Upon motion and showing by affidavit that service cannot be made with reasonable diligence by any other method provided by statute, the court may permit service to be made . . . by publication, or . . . by any manner reasonably calculated under the circumstances to provide the party with actual notice of the proceedings and an opportunity to be heard.” NEB. REV. STAT. § 25-517.02 (2008).
- l. NEW HAMPSHIRE: In New Hampshire, when a defendant is not an inhabitant of the state and service cannot be made, the court may order “such notice . . . as the case requires.” N.H. REV. STAT. ANN. § 510:8 (2010).
- m. NEW MEXICO: “Upon motion, without notice, and showing by affidavit that service cannot reasonably be made as provided by this rule, the court may order service by any method or combination of methods, including publication, that is reasonably calculated under all of the circumstances to apprise the defendant of the existence and pendency of the action and afford a reasonable opportunity to appear and defend.” N.M. R. CIV. P. 1-004(J).
- n. NEW YORK: New York statute provides that if service is “impracticable,” service shall be made “in such a manner as the court . . . directs.” N.Y. C.P.L.R. 308(5) (McKinney Supp. 2014).
- o. OKLAHOMA: “If service cannot be made by personal delivery or by mail, a defendant . . . may be served as provided by court order in any manner which is reasonably calculated to give the defendant actual notice of the proceedings and an opportunity to be heard.” OKLA. STAT. tit. 12, § 2004(c)(6).
- p. OREGON: The Oregon Rules of Civil Procedure provide that if a defendant cannot be served by any other provided method, “the court, at its discretion, may order service by

any method or combination of methods which under the circumstances is most reasonably calculated to apprise the defendant of the existence and pendency of the action, including but not limited to: publication of summons.” OR. R. CIV. P. 7(D)(6)(a).

- q. SOUTH CAROLINA: “Whenever a statute or an order of court provides for service of a summons and complaint or of a notice, or an order upon a party not an inhabitant of or found within the State, service shall be made under the circumstances and in the manner prescribed by the statute, rule, or order.” S.C. R. CIV. P. 4(e).
- r. TENNESSEE: Tennessee does not provide a specific rule for defendants who cannot be found. It does, however, provide that defendants outside the state, “when reasonably calculated to give actual notice” may be served “as directed by the court.” TENN. R. CIV. P. 4.05(1)(c).
- s. TEXAS: When the plaintiff shows that personal service or service by mail has been attempted, the court may authorize service “in any other manner that the affidavit or other evidence before the court shows will be reasonably effective to give the defendant notice of the suit.” TEX. R. CIV. P. 106(b)(2).
- t. UTAH: Utah provides that if a defendant’s whereabouts are unknown or cannot be “reasonably ascertained,” the court “shall order service of process by means reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action to the extent reasonably possible or practicable.” UTAH R. CIV. P. 4(d)(4)(B).
- u. WASHINGTON: “Whenever a statute or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or not found within the state, service may be made under the circumstances and in the manner prescribed by the statute or order, or if there is no provision prescribing the manner of service, in a manner prescribed by this rule.” WASH. SUP. CT. CIV. R. 4(e)(1).

3. States with miscellaneous provisions or without specific provisions:
- a. KENTUCKY: An elusive defendant is “deemed to have been summoned on the 30th day” after the clerk files a warning order. The Kentucky Rules of Civil Procedure do not specify the manner in which a warning order should be issued if any address for the defendant is unknown. KY. R. CIV. P. 4.08.
 - b. LOUISIANA: Louisiana does not provide specific civil procedure rules for substituted service. It merely provides that “[s]ervice of citation or other process may be either personal or domiciliary, and except as otherwise provided by law, each has the same effect.” LA. CODE CIV. PROC. ANN. art. 1231 (2005).
 - c. MASSACHUSETTS: “If the person authorized to serve process makes return that after diligent search he can find neither the defendant, nor defendant’s last and usual abode, nor any agent upon whom service may be made in compliance with this subsection, the court may on application of the plaintiff issue an order of notice in the manner and form prescribed by law.” MASS. R. CIV. P. 4(d)(1).
 - d. VERMONT: Vermont provides that if no address is known for a defendant, service shall be made “by leaving it with the clerk of the court.” VT. R. CIV. P. 5(b).