

Electronic Service

Question Presented

What is the legality of electronic service through email or social media in the criminal justice system?

Short Answer/Research Points

Analogy to Civil Cases

Over the past decade, many courts have embraced service of process via email, where due process is satisfied and the relevant state or international statutes or treaties allow for it.¹

Some plaintiffs, when unable to perfect service through traditional means, have sought court approval to serve process using social media platforms such as Facebook and LinkedIn. Under this type of proposal, a plaintiff would send a message via the social media platform, attaching the summons and complaint, which the account holder could access upon logging into the site. Courts have denied these requests to serve process through social media sites for a number of reasons, including:

- Uncertainty surrounding the authenticity of social media accounts, given the potential for duplicate and false accounts.²
- A lack of confidence that a message posted to a social media account is highly likely to reach defendants or satisfy due process requirements, particularly given users' ability to alter or dismantle their alert settings and notification methods.³

However, some courts have allowed service of process via social media as an alternative method of service, particularly where defendants appear to have recently accessed and updated their social media accounts.⁴

¹See *Advanced Access Content Sys. Licensing Adm'r, LLC v. Shen*, 2018 WL 4757939, at *6 (S.D.N.Y. Sept. 30, 2018); *Fraserside IP LLC v. Letyagin*, 280 F.R.D. 630, 631 (N.D. Iowa 2012); *U.S. Commodity Futures Trading Comm'n v. Rubio*, 2012 WL 3614360, at *3 (S.D. Fla. Aug. 21, 2012); but see *Joe Hand Promotions, Inc. v. Shepard*, 2013 WL 4058745, at *1-2 (E.D. Mo. Aug. 12, 2013)).

² See *Fortunato v. Chase Bank USA, N.A.*, 2012 WL 2086950, at *2-3 (S.D.N.Y. June 7, 2012).

³ See *Miller v. Native Link Constr., L.L.C.*, 2016 WL 247008 (W.D. Pa. Jan. 21, 2016) (denying motion to serve process through LinkedIn); see also *FTC v. Pecon Software Ltd.*, 2013 WL 4016272, at *8 (S.D.N.Y. Aug. 7, 2013).

⁴ See *E.L.V.H. Inc. v. Bennett*, 2018 WL 6131947, at *3 (C.D. Cal. May 2, 2018); *Kipu Sys., LLC v. ZenCharts, LLC*, 2018 WL 8264634, at *2 (S.D. Fla. Mar. 29, 2018); *Ferrarese v. Shaw*, 164 F. Supp. 3d 361 (E.D.N.Y. 2016).

Practice Pointers

Considering these cases, litigators seeking to serve via a social media platform should be prepared to:

- Prove the authenticity of related or associated email accounts.
- Demonstrate that the proposed service:
 - is not prohibited by applicable statutes or rules;
 - strictly complies with due process standards; and
 - is highly likely to reach the defendant (for example, by showing that the defendant regularly views and maintains the social media account).
- Serve through email or another method in addition to social media.⁵

Statutes

FED. R. CRIM. P. 4. ARREST WARRANT OR SUMMONS ON A COMPLAINT

(a) Issuance. If the complaint or one or more affidavits filed with the complaint establish probable cause to believe that an offense has been committed and that the defendant committed it, the judge must issue an arrest warrant to an officer authorized to execute it. At the request of an attorney for the government, the judge must issue a summons, instead of a warrant, to a person authorized to serve it. A judge may issue more than one warrant or summons on the same complaint. If an individual defendant fails to appear in response to a summons, a judge may, and upon request of an attorney for the government must, issue a warrant. If an organizational defendant fails to appear in response to a summons, a judge may take any action authorized by United States law.

(b) Form.

(1) Warrant. A warrant must:

- (A)** contain the defendant's name or, if it is unknown, a name or description by which the defendant can be identified with reasonable certainty;
- (B)** describe the offense charged in the complaint;
- (C)** command that the defendant be arrested and brought without unnecessary delay before a magistrate judge or, if none is reasonably available, before a state or local judicial officer; and
- (D)** be signed by a judge.

(2) Summons. A summons must be in the same form as a warrant except that it must require the defendant to appear before a magistrate judge at a stated time and place.

(c) Execution or Service, and Return.

(1) By Whom. Only a marshal or other authorized officer may execute a warrant. Any person authorized to serve a summons in a federal civil action may serve a summons.

(2) Location. A warrant may be executed, or a summons served, within the jurisdiction of the United States or anywhere else a federal statute authorizes an arrest. A summons to an organization under Rule 4(c)(3)(D) may also be served at a place not within a judicial district of the United States.

(3) Manner.

⁵ *Social Media: What Every Litigator Needs to Know*, Practical Law Practice Note 3-568-4085.



AEQUITAS

(A) A warrant is executed by arresting the defendant. Upon arrest, an officer possessing the original or a duplicate original warrant must show it to the defendant. If the officer does not possess the warrant, the officer must inform the defendant of the warrant's existence and of the offense charged and, at the defendant's request, must show the original or a duplicate original warrant to the defendant as soon as possible.

(B) A summons is served on an individual defendant:

(i) by delivering a copy to the defendant personally; or

(ii) by leaving a copy at the defendant's residence or usual place of abode with a person of suitable age and discretion residing at that location and by mailing a copy to the defendant's last known address.

(C) A summons is served on an organization in a judicial district of the United States by delivering a copy to an officer, to a managing or general agent, or to another agent appointed or legally authorized to receive service of process. If the agent is one authorized by statute and the statute so requires, a copy must also be mailed to the organization.

(D) A summons is served on an organization not within a judicial district of the United States:

(i) by delivering a copy, in a manner authorized by the foreign jurisdiction's law, to an officer, to a managing or general agent, or to an agent appointed or legally authorized to receive service of process; or

(ii) by any other means that gives notice, including one that is:

(a) stipulated by the parties;

(b) undertaken by a foreign authority in response to a letter rogatory, a letter of request, or a request submitted under an applicable international agreement; or

(c) permitted by an applicable international agreement.

(4) Return.

(A) After executing a warrant, the officer must return it to the judge before whom the defendant is brought in accordance with Rule 5. The officer may do so by reliable electronic means. At the request of an attorney for the government, an unexecuted warrant must be brought back to and canceled by a magistrate judge or, if none is reasonably available, by a state or local judicial officer.

(B) The person to whom a summons was delivered for service must return it on or before the return day.

(C) At the request of an attorney for the government, a judge may deliver an unexecuted warrant, an unserved summons, or a copy of the warrant or summons to the marshal or other authorized person for execution or service.

(d) Warrant by Telephone or Other Reliable Electronic Means. In accordance with Rule 4.1, a magistrate judge may issue a warrant or summons based on information communicated by telephone or other reliable electronic means.





FED. R. CRIM. P. 49. SERVING AND FILING PAPERS

(a) Service on a Party.

(1) *What is Required.* Each of the following must be served on every party: any written motion (other than one to be heard *ex parte*), written **notice**, designation of the record on appeal, or similar paper.

(2) *Serving a Party's Attorney.* Unless the court orders otherwise, when these rules or a court order requires or permits service on a party represented by an attorney, service must be made on the attorney instead of the party.

(3) *Service by Electronic Means.*

(A) Using the Court's Electronic-Filing System. A party represented by an attorney may serve a paper on a registered user by filing it with the court's electronic-filing system. A party not represented by an attorney may do so only if allowed by court order or local rule. Service is complete upon filing, but is not effective if the serving party learns that it did not reach the person to be served.

(B) Using Other Electronic Means. A paper may be served by any other electronic means that the person consented to in writing. Service is complete upon transmission but is not effective if the serving party learns that it did not reach the person to be served.

Case Law

Development of Social Media Service through e-mail and International Defendants

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

Standing for the proposition that electronic service can be allowed via email to notify international defendants under Federal Rule of Civil Procedure 4(f)(3). *Id.* at 1018-19.

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. *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.* 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 notify the defendant and was not prohibited by any international agreement. *Id.* at 1018. 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. *Id.* at 1017-18. 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." *Id.* at 1018.





***Ryan v. Brunswick Corp.*, No. 02-CV-0133E(F), 2002 WL 1628933, at *1 (W.D.N.Y. May 31, 2002).**

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. *Id.* at *2.

***Hollow v. Hollow*, 193 Misc. 2d 691, 747 N.Y.S.2d 704 (Sup. Ct. 2002).**

New York Supreme Court approved e-mail service where a defendant fled to Saudi Arabia and communicated with a plaintiff exclusively through e-mail. *Id.* at 708.

***Ehrenfeld v. Salim a Bin Mahfouz*, No. 04 Civ. 9641(RCC), 2005 WL 696769, at *1 (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 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.

***Mpafe v. Mpafe*, 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](http://www.scribd.com/doc/70014426/Mpafe-v-Mpafe-order) [hereinafter *Mpafe Order*].**

Minnesota district court authorized a plaintiff to serve a foreign defendant through e-mail, Facebook, Myspace, “or other social networking site[s].” 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. The court held that online service was sufficient where the defendant could not be located and other attempts at service were unsuccessful. The court considered service by publication in a legal newspaper, but concluded that service by publication “is antiquated and is prohibitively expensive.” 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].”

***F.T.C. v. PCCare247 Inc.*, No. 12 CIV. 7189 PAE, 2013 WL 841037, at *1 (S.D.N.Y. Mar. 7, 2013).**

New York District Court authorized alternative service after the defendants failed to comply with a preliminary injunction and did not respond to the plaintiff's motions. The court began its analysis by examining whether the Federal Rules of Civil Procedure authorized service by Facebook or e-mail. Citing Rule 4(f)(3), the court determined that the proposed means of service were not prohibited by any international agreement; thus, the court could allow the proposed service if it met the due process requirements compulsory under the Constitution.



F.T.C. v. Pecon Software Ltd., No. 12 CIV. 7186 PAE, 2013 WL 4016272, at *1 (S.D.N.Y. Aug. 7, 2013).

New York District Court held that the plaintiffs could not serve the defendants via Facebook message. The plaintiffs made multiple attempts to serve the defendants by traditional methods, but the defendants' addresses could not be verified. In contrast to *PCCare247*, the court in *Pecon Software* was unable to confirm that the defendants actually operated the Facebook accounts in question. The court noted that it could not “say with confidence, without actually viewing the Facebook pages and verifying 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.

Advanced Access Content Sys. Licensing Adm'r, LLC v. Shen, No. 14-CV-1112 (VSB), 2018 WL 4757939, at *1 (S.D.N.Y. Sept. 30, 2018).

New York District Court denied Defendant's motion to dismiss the complaint pursuant to Federal Rules of Civil Procedure 12(b)(2), 12(b)(4) and 12(b)(5). Defendant argued that the service of process was inadequate because serving documents by email in English on a Defendant in China did not comply with Rule 4(f)(3) and due process. The judge disagreed. Service of process by email complied with Rule 4(f)(3) because there was no international agreement that prohibited service. Service of process by email does not interfere with due process because there was substantial evidence that the Defendant conducted his business in English and could understand previous court documents that were given to him.

Fraserside IP LLC v. Letyagin, 280 F.R.D. 630 (N.D. Iowa 2012).

Plaintiff filed a motion to permit alternate service of summons and complaint on international defendants, who were using false addresses to evade liability for their illegal activities to evade service of process. Plaintiff asked the court to authorize service of summons and complaint on the Defendant by email to his published and last known valid email address without requirement of return receipt. The court noted that while authorizing service by email is not traditional, it does not appear to be unequivocally prohibited by any court. Therefore, the court limited approving the method of service that fulfills due process requirements under Rule 4(f)(3), where the method is reasonably calculated to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections.

U.S. Commodity Futures Trading Comm'n v. Rubio, No. 12-CV-22129, 2012 WL 3614360, at *1 (S.D. Fla. Aug. 21, 2012).

District Court in Florida held that Plaintiffs showed good cause why leave should be granted to allow service of the Summonses, Complaint, and all subsequent filings upon Defendants via email. Defendant was located outside of the United States, plaintiff had reason to believe that the Defendants email address was operation and a reliable means of communicating with the Defendant. The court further noted that service of process was not prohibited under international agreement and email was reasonably calculated to give notice to the Defendant.

Kipu Sys., LLC v. ZenCharts, LLC, No. 17-24733-CIV, 2018 WL 8264634, at *1 (S.D. Fla. Mar. 29, 2018).

District Court in the Southern District of Florida granted Plaintiff's order asking for authorization of service of process via Defendant's email addresses, LinkedIn account and publication on Plaintiff's file sharing website. The court noted that notice was reasonable because the Defendant's email addresses were known and operational, there was evidence Defendant used LinkedIn, and Defendant's would get a link to Plaintiff's website which would have a link to all the documents.

Electronic Service on Domestic Defendants

Fortunato v. Chase Bank USA, N.A., No. 11 CIV. 6608 JFK, 2012 WL 2086950, at *1 (S.D.N.Y. June 7, 2012).

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.

The defendant, Chase Bank, sought to implead Fortunato into the action against it. Chase hired a private investigator but was unable to locate Fortunato or discern her physical address. Thus, Chase sought leave to serve Fortunato by e-mail, Facebook message, publication, and delivery to Fortunato's mother.

The court began by determining that the alternative methods of service proposed by Chase were authorized by Federal Rules of Civil Procedure 4(e). 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." The court held that serving Fortunato by traditional means was indeed impractical. Thus, Rule 4(e)(1) authorized service by any nontraditional method.

The court then analyzed which, if any, of the alternative methods of service met the constitutional due process standard. 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. 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. 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.

After similarly dispensing of delivering service to Fortunato's mother, the court resorted to allowing service by "the only remaining method": publication.

Joe Hand Promotions, Inc. v. Shepard, No. 4:12CV1728 SNLJ, 2013 WL 4058745, at *1 (E.D. Mo. Aug. 12, 2013).

Missouri district court 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.

Plaintiffs first attempted to serve the defendants at multiple vacant addresses. 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. 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.

The court began by evaluating whether domestic service through Facebook was authorized under the Federal Rules of Civil Procedure. 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." 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. 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.

The court further noted that the plaintiffs did not exhaust traditional methods of service because they attempted service at 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. 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. Thus, the court stated in dicta that it would not order service via Facebook in this case even if state law allowed it.

Miller v. Native Link Constr., L.L.C., No. 15-1605, 2016 WL 247008, at *1 (W.D. Pa. Jan. 21, 2016)

District Court in Pennsylvania denied Plaintiff's motion of alternative service via LinkedIn because: (1) plaintiff failed to show that service could not be made on defendant pursuant to the methods set forth in Pennsylvania Rule 404(1)–(3), i.e., personal service, direct mailing of the complaint and summons, or a method prescribed by the law of the state in which service is to be effected; (2) plaintiff failed to submit an affidavit stating the nature and extent of the investigation that had been made to determine the whereabouts of the Defendant and the reasons why service could not be made as required under Pennsylvania Rule 430(a); (3) plaintiff failed to show that service directly through a LinkedIn message to defendant is reasonably calculated, under all circumstances, to apprise Defendant of the pendency of the action and to afford Defendant an opportunity to present objections.

E.L.V.H. Inc. v. Bennett, No. 218CV00710ODWPLA, 2018 WL 6131947, at *1 (C.D. Cal. May 2, 2018).

California District Court granted Plaintiff's application to authorized electronic service via email or Facebook Messenger on Defendant. The court noted that the Plaintiffs demonstrated that conventional service was impracticable as Plaintiff's were unable to locate Defendant despite (1) attempting personal service at his probable offices/residences in New York City and San Diego; (2) hiring a private investigator; and (3) performing online public records and searches, Westlaw database searches, and reviewing Bennett's social media profiles. The court also noted that alternative service via email or Facebook Messenger complies with due process because (1) service by email service by email was reasonably calculated to give the defendants notice of the action and (2) service via Facebook Messenger, while non-traditional, also complies when it is reasonably calculated to give Defendants notice, specifically because there was evidence that the page was operated by the Defendant, that the page was public, and that Defendant was a zealous poster on his page.

Ferrarese v. Shaw, 164 F. Supp. 3d 361 (E.D.N.Y. 2016).

District Court in the Eastern District of New York held that prescribed methods of service were impracticable and alternative methods of service satisfied due process. Father sought immediate return of his child and restoration of custody rights brought action against child's mother under Convention on Civil Aspects of International Child Abduction and International Child Abduction Remedies Act. The court noted that the alternative service of process on mother of child by certified mail at mother's last known address and on mother's sister who resided at such location, and additional methods of service by e-mail and through social media website, was reasonably calculated, under circumstances, to provide mother with notice of action, thus satisfying due process requirements for alternative service under New York law. The court further noted it was reasonable to conclude that service by certified mail upon mother and her sister at mother's last known address would likely reach mother since father had success in reaching mother by mailing papers to such last known address in the past.

State Rules (Allowing Service of Process via Social Media)



AEQUITAS

UTAH. URCP(D)(4)

Where the identity or whereabouts of the person to be served are unknown and cannot be ascertained through reasonable diligence, where service upon all of the individual parties is impracticable under the circumstances, or where there exists good cause to believe that the person to be served is avoiding service of process, the party seeking service of process may file a motion supported by affidavit requesting an order allowing service by publication or by some other means.

The alternative means chosen has to be the method most likely to give actual notice of the document being served. Serving someone by publishing the summons in a newspaper has been for many years the most common means of alternative service. However, the courts are more frequently using electronic communications and social media to publish the complaint and summons or to notify the person being served that the documents have been published.

Even though you cannot find the person to be served, you may know where they accept communications: email; mail to a friend or relative; a social network, such as Facebook; a text number or phone number; or a Twitter name. With the court's permission, you might be able to send the complaint and summons directly to the person by mail, email or social media.

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