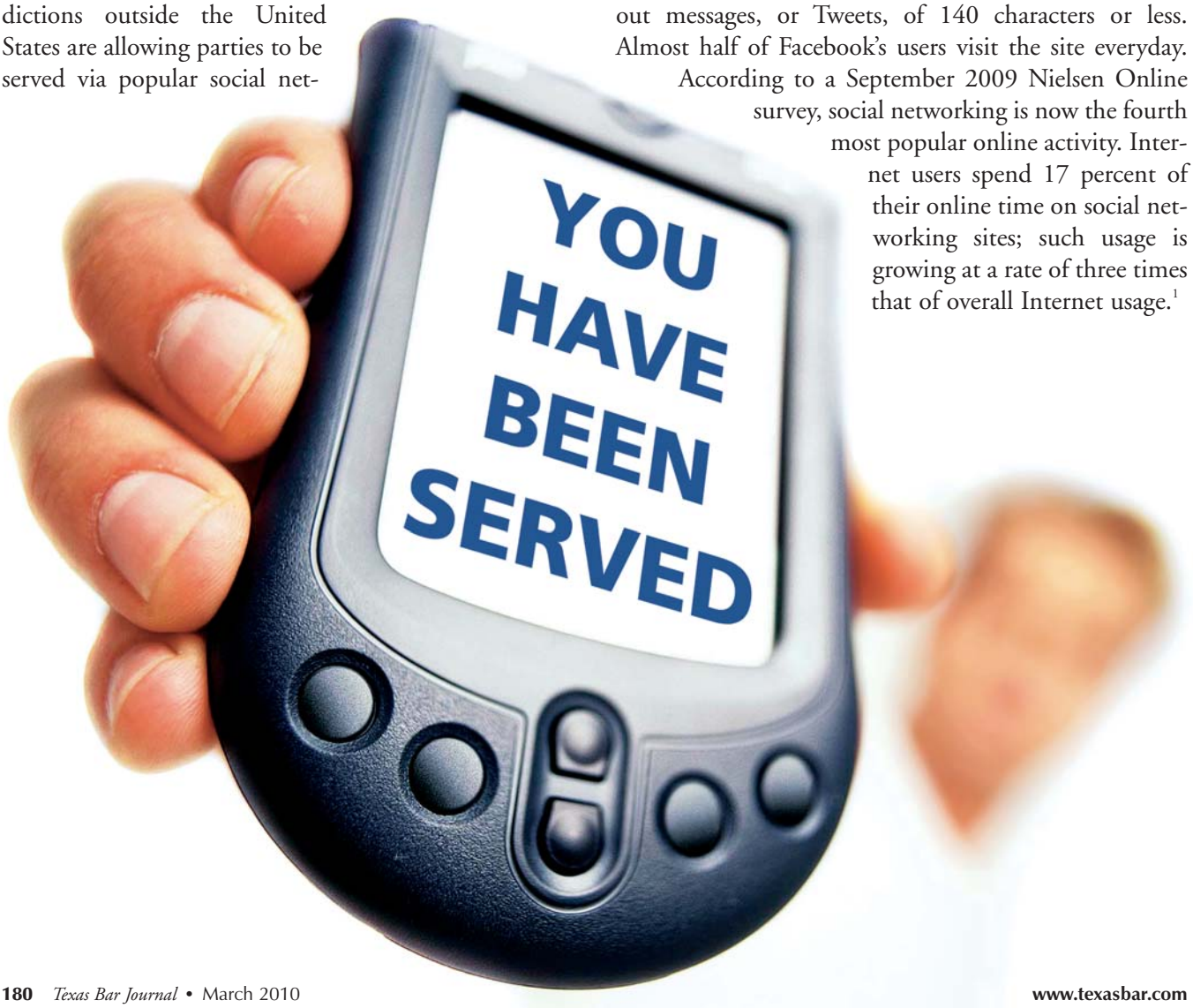
Served Without Ever Leaving the Computer

Service of Process Via Social Media

By John G. Browning

It's a familiar refrain to many litigators: Your usually reliable process server has had no luck serving an evasive defendant at his last known address, and you're about to file a motion for substituted service. But is there some other means of dragging this party into court than attaching the summons and suit papers to his front door or publishing a legal notice in the local newspaper, perhaps some method more in keeping with 21st century lifestyles and technology? A growing number of jurisdictions outside the United States are allowing parties to be served via popular social networking sites like Facebook. After all, the odds are pretty good that the person you're looking for will have a social networking presence of one kind or another: Facebook (created by Mark Zuckerberg in 2004 as a way for Harvard students to stay in touch) has more than 350 million users worldwide, while MySpace has approximately 250 million. The recent but rapidly growing microblogging site Twitter has more than 55 million users sharing information instantaneously and sending out messages, or Tweets, of 140 characters or less. Almost half of Facebook's users visit the site everyday.

According to a September 2009 Nielsen Online survey, social networking is now the fourth most popular online activity. Internet users spend 17 percent of their online time on social networking sites; such usage is growing at a rate of three times that of overall Internet usage.[1]



Australia was the first country to permit service via social networking, but it didn't come easily. Rule 116(1) of the Australian Uniform Civil Procedure Rules permit substituted service "where, in effect, there is a practical impossibility of personal service and that the method of service proposed is one which in all reasonable probability, if not certainty, will be effective in bringing knowledge or notice of the proceedings to the attention of the defendant."[2] In effect, attorneys seeking court approval to serve someone via a social networking site would have to demonstrate both 1) an inability to serve the defendant through a more traditional medium, and 2) that service through Facebook offered a reasonable chance of success. The Queensland District Court had rejected a previous request in another case to serve documents via Facebook, in part because of the concern about fake social networking profiles. In that decision, Judge Julie Ryrie said, "I am not so satisfied in light of looking at the uncertainty of Facebook pages, the facts that anyone can create an identity that could mimic the true person's identity and indeed some of the information that is provided there does not show me with any real force that the person who created the Facebook page might indeed be the defendant, even though practically speaking it may well indeed be the person who is the defendant."[3]

In the face of such concerns, it would be an uphill battle for the next attorneys seeking service via Facebook, but that same year the opportunity presented itself. In *MKM Capital v. Corbo*, Australian couple Carmel Corbo and Gordon Poyser defaulted on a six-figure loan to purchase a home.[4] After the default, mortgage lender MKM Capital filed suit and obtained a default judgment allowing seizure of the property when the defendants failed to appear. However, efforts at serving the judgment on Corbo and Poyser using traditional methods of service proved fruitless. The defendants weren't at either their residence or last known place of employment, having moved and changed both jobs and phone numbers. Personal service was unsuccessful, as was mail; even hiring private investigators and advertising in *The Canberra Times* led nowhere for the lender's attorneys. Corbo and Poyser, however, didn't count on the tech-savviness of Mark McCormack and MKM Capital's other lawyers.

Using Corbo's email address, the MKM legal team was able to locate her Facebook page. Because Corbo and Poyser had friended each other on the social networking site, and because neither defendant had chosen to use Facebook's various privacy settings to prevent others from seeing their information, the attorneys were able to match up personally identifiable information on the defendants' Facebook profiles (birth dates, lists of friends, and email addresses) with information disclosed in Corbo's and Poyser's loan applications. Armed with the evidence of names, birth dates, and email addresses listed on Facebook matching the information from the applications, McCormack was able to make the required showing under Australian law and assuage any of the court's concern that they indeed had the right people and that delivery via Facebook would be sufficient notice to the defendants. Master David Harper of the Australian Capital Territory Supreme Court approved MKM Capital's request and ordered that service could be perfected by sending a private electronic message, with the legal documents attached, to each defendant's Facebook page alerting them to the entry of the default judgment and disclosing its terms.

When the decision came down in December 2008, it was the shot heard 'round cyberspace, making international news. Facebook itself praised the decision. A spokesman for the site said, "We're pleased to see the Australian court validate Facebook as a reliable, secure, and private medium for communication. The ruling is also an interesting indication of the increasing role that Facebook is playing in people's lives."[5] Rather understandably, Corbo and Poyser were less enthusiastic about the novel method of serving a foreclosure notice: Following the widespread publicity about the court order, the couple implemented privacy restrictions that removed their Facebook profiles

from public view. McCormack, on the other hand, viewed the ruling and subsequent attempt via Facebook as vindicating his client's position that all reasonable steps had been taken to serve Corbo and Poyser, characterizing it as "a valid method of bringing the matter to the attention of the defendant."[6]

Although this Australian case made legal history as the first time service via a social networking site was allowed, it would not be the last. In a Canadian case, a judge entered an order for "substitutional service," ruling that the plaintiff could serve one of the multiple defendants by publication by forwarding a copy of the statement of claim to the HR department where the defendant had formerly worked, and *by sending notice to the defendant's Facebook page*.[7] The next month, in March 2009, the New Zealand High Court allowed an individual to be served with process via Facebook in commercial litigation over some failed business dealings. Arguing that more conventional efforts at service had been fruitless since the defendant's exact whereabouts were unknown, the New Zealand plaintiff's counsel pointed out that the defendant maintained a profile on Facebook. The court was persuaded.[8]

The trend has spread to the United Kingdom, where — in another first — the High Court in September 2009 permitted an injunction against an anonymous blogger to be served via Twitter.[9] Prominent British lawyer and conservative blogger Donal Blaney sought the injunction after an unknown blogger began impersonating Blaney on the Internet. The imposter set up a Twitter account using Blaney's own blog photo and links to Blaney's own blog posts, and then Tweeted in a writing style similar to Blaney himself. While parody can be legally permissible, Blaney took the position that the Twitter account was calculated to make readers think that it was Blaney himself Tweeting, and that the impersonator was infringing Blaney's copyrighted materials. Rather than wait for Twitter's California-based site administrators to take down the offending account, Blaney and his barrister, Matthew Richardson, went directly to court to obtain permission to serve the injunction through Twitter. They were fortunate enough to find a tech-savvy judge familiar not only with Twitter but also with the December 2008 Australian court's ruling allowing service by Facebook.

Courts abroad may be starting to embrace the potential of social networking sites as an alternate avenue for service of formal court documents, but no U.S. court has yet followed suit. Certainly, some of the factors accounting for the Australian courts' initial reluctance constitute grounds for equal concern here. For example, few controls exist to guarantee that a person registering for a social networking profile truly is who he or she claims to be. Celebrities have fallen prey to pranksters setting up fake Twitter accounts in their names, and, nationally, litigation has raged over fake MySpace and Facebook pages set up to defame others (many of which have involved students creating unflattering profiles of teachers or school administrators).[10] Another potential hurdle is whether or not "service by Facebook" will provide actual notice to the defendant, given the uncertainty of determining how frequently an individual uses his social networking page. While such service is reasonably calculated to reach a regular user, someone who checks his Facebook page more sporadically may not receive timely notice; in default judgment situations and others where timeliness of the notice is an issue, this can pose due process concerns.

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Nevertheless, the concept of "service by Facebook" may catch on in the United States sooner than one might think. Much has been written about how lawyers in various practice areas have mined the social networking sites of litigants and witnesses for valuable, often incriminating information.[11] Courts across the country have been admitting evidence (such as photos and blog postings) gleaned from sites like MySpace and Facebook in a wide variety of proceedings — everything from divorce and custody matters to sexual harassment litigation, insurance coverage disputes, and murder cases.[12] Viewed in the context of an age in which digital intimacy is rapidly becoming the social norm, those with due process concerns about the efficacy of service via social networking would do well to keep in mind the observations of former U.S. Supreme Court Justice Sandra Day O'Connor. In dissenting from a Supreme Court opinion that neither notice by publication or public posting provided actual notice to a mortgagee, Justice O'Connor[13] wrote that "notice is constitutionally adequate when the practicalities and peculiarities of the case … are reasonably met. … Whether a particular method of notice is reasonable depends on the outcome of the balance between the 'interest of the State' and 'the individual interest sought to be protected by the Fourteenth Amendment.'" In other words, she noted, "notice will vary with the circumstances and conditions."[14] Certainly, as courts in Australia, New Zealand, Canada, and the United Kingdom have recognized, circumstances can exist in which "service by Facebook" is the most likely avenue for ensuring actual notice.

Some courts already seem to acknowledge that social networking sites are viable avenues for communication and as subject to judicial oversight as their more traditional counterparts.

In October 2009, Shannon Jackson was charged with violating a Sumner County (Tenn.) General Sessions Court protective order to refrain from "telephoning, contacting, or otherwise communicating" with the petitioner when she "poked" the other woman on Facebook (a poke is a quick message sent by one Facebook user to another).[15] In July 2009, a Providence, R.I., judge imposed a gag order ordering Michelle Langlois not to post comments about a bitter child custody case involving her brother and his ex-wife (the complaint that prompted the order was later dismissed after the American Civil Liberties Union contested it on free speech grounds).[16]

And in a case of first impression, a Staten Island, N.Y., family court judge ruled that a MySpace friend request can constitute a violation of a temporary order of protection. Judge Matthew Sciarrino, Jr. noted that "while it is true that the person who received the 'friend request' could simply deny the request to become 'friends,' that request was still a contact," and that using MySpace as a "conduit for communication" was prohibited by the court's mandate that "Respondent shall have 'no contact' with Sandra Delgrosso."[17]

Another compelling reason for the coming acceptance of service through social media is the fact that many jurisdictions already acknowledge the potential need for alternative methods of serving a defendant. In New York, for example, service by email was permitted (along with standard and registered international mail) in a case where the defendant was employed in Saudi Arabia.[18] Another New York decision also upheld service by email, so long as other, more conventional methods were employed as well (it is worth noting here that prior to allowing service via social networking, courts in both Australia and the United Kingdom had permitted service by email).[19]

The Federal Rules of Civil Procedure explicitly approve of service of documents via email (except for initial pleadings), provided that the opposing party agrees in advance to this manner of service. In addition, the local rules in a number of Texas counties have been amended to permit parties to electronically serve legal documents other than citation.[20]

The Texas Family Code already allows service of citation by publication, provided that the person to be served "cannot be notified by personal service or registered or certified mail and to persons whose names are unknown."[21] The Texas Rules of Civil Procedure also provides for substituted service when the serving party can show the court that attempts at personally serving someone have been unsuccessful and that routine service would be improbable. Although it is virtually impossible for the law to keep pace with technological innovation, the rapid spread and ubiquitous nature of social networking sites, coupled with growing acceptance of them abroad as an alternative means of serving parties with legal documents, may soon alter the notion of just what constitutes valid service here in the United States. People who previously regarded their social networking presence as just a source of entertainment or a means of staying touch with friends and family may soon find that membership in sites like Facebook or Twitter come with an unexpected and dubious "privilege" — being more accessible to the legal system.

NOTES

1. David DiSalvo, "Are Social Networks Messing With Your Head?", *Scientific American Mind*, January 2010.
2. *Citigroup Party Ltd. V. Weerakoon* [2008] QDC 174, 1 (Austl).
3. *Id.* at 3–4.
4. *MKM Capital v. Corbo* [2008] ACTCA _____ (Austl).
5. See Rod McGuirk, "Australia OKs Facebook for Serving Lien Notice," Dec. 16, 2008, http://news.yahoo.com/s/ap/20081216/ap_on_re_as/as_australia_facebook (last visited Dec. 17, 2008).
6. *Id.*
7. *Knott v. Sutherland* (Feb. 5, 2009) Edmonton 0803 002267 (Alta.Q.B.M.) (emphasis added).
8. Ian Llewellyn, "NZ Court Papers Can Be Served Via Facebook, Court Rules," March 16, 2009, http://www.nzherald.co.nz/nz/news /article (last visited 3/23/09).
9. See Martha Neil, "UK's High Court OKs Serving Injunction on Anonymous Blogger Via Twittter," Oct. 2, 2009, http://www.abajournal.com/news/uk_high_court_uses_twitter_to_serve-Injunction_on_an (last visited 10/2/2009).
10. See, for example, *Draker v. Schreiber*, 271 S.W.3d 318 (Tex. App. — San Antonio 2008, no writ).
11. See, for example, John Browning, "From Lawbooks to Facebook: What You Need to Know About Using Social Networking Sites," *Voir Dire*, Vol. 16, Issue 1 (Spring 2009), at p. 6-13.
12. See, for example, *Mann v. Dept. of Family and Protective Services* 2009 WL 2961396 (Tex. App. — Houston [1st Dist.] 2009); *Hall v. State*, 283 S.W.3d 137 (Tex. App. — Austin, 2009); *Mackelprang v. Fidelity National Title Agency* 2007 U.S. Dist. LEXIS 2379 (D. Nev. Jan.9, 2007); *Wolfe v. Fayetteville*, 2009 U.S. Dist. LEXIS 15182 (D. Ark. Feb. 26, 2009).
13. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, at 801 (1983).
14. *Id.* at 802 (quoting *Walker v. City of Hutchinson*, 352 U.S. 112, 115 (1956).
15. See Martha Neil, "Did Court Order Ban Facebook 'Poke'?", Oct. 13, 2009, http://www.abajournal.com/news/did_court_order_ban_facebook_poke (last visited Oct. 14, 2009).
16. See Associated Press, "ACLU Fights Judge's Facebook Comments Ban," July 23, 2009, http://www.msnbc.com (last visited Jan. 4, 2010).
17. *People v. Fernino*, Case No. 07RI0073222 (Staten Island Family Court, February 2008).
18. *Hollow v. Hollow*, 193 Misc.2d 691, 696 (N.Y. Sup. Ct. 2002).
19. *Snyder v. Energy, Inc.*, 19 Misc.3d 954, 963–64 (N.Y. Div. Ct. 2008).
20. See, for example, Bexar County Local Rules of the District Courts concerning the electronic filing of court documents, Rule 5.1(b) ("Documents may be electronically served upon a party only where that party has agreed, in writing, to receive electronic service in that case.")
21. Tex. Fam. Code Ann. §102.010 (Vernon 2008).

JOHN G. BROWNING
is a partner in Thompson, Coe, Cousins & Irons, L.L.P. in Dallas, where he handles commercial litigation, employment, health care, and personal injury defense matters in state and federal court. He serves on the *Texas Bar Journal* Board of Editors.