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# Evolutionary Pull, Practical Difficulties, and Ethical Boundaries: Using Facebook to Serve Process on International Defendants

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# Evolutionary Pull, Practical Difficulties, and Ethical Boundaries: Using Facebook to Serve Process on International Defendants

*Hans Van Horn\**

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## I. INTRODUCTION

After landing your dream job overseas, your remarkable streak of luck continues. Your college sweetheart, the one that you have not talked to in fifteen years—the one that got away—just “friend requested” you on Facebook. Without hesitation, you accept. Thirty seconds later, a message arrives with an attachment. You have been served.

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One U.S. court described service of process abroad as “the most challenging [question] a district court can be called upon to face.”<sup>1</sup> As an emerging trend among some foreign and U.S. courts suggests,<sup>2</sup> under certain circumstances, service via Facebook may be an additional tool for international litigators to use abroad. As courts in Australia, New Zealand, Canada, and the United Kingdom have allowed service of process via Facebook,<sup>3</sup> and as more and more courts in the United States allow service via email,<sup>4</sup> some commentators have pointed out that the same rationale exists for the use of social media and email to serve process.<sup>5</sup> Indeed, given the proliferation of social media and its prevalence in the

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1. *Mayoral-Amy v. BHI Corp.*, 180 F.R.D. 456, 458 (S.D. Fla. 1998).

2. *See* Order for Service by Publication on the Internet, MN No. 27-FA-11-3453 (4th Minn., May 10, 2011) *available at* <http://www.scribd.com/doc/70014426/Mpafe-v-Mpafe-order> (Minnesota state court order allowing service by publication on the Internet via social networking sites) [hereinafter *Mpafe Order*]; *see* Pamela D. Pengelley, *Fessing Up to Facebook: Recent Trends in the Use of Social Network Websites for Civil Litigation*, 7 CAN. J. L. TECH. 319 (2008) (describing an unreported decision of an Australian court permitting service of a default judgment by posting its terms on the defendant’s Facebook “Wall”); *see* Shaunna Mireau, *Substitutional Service via Facebook in Alberta* (Sept. 24, 2009), <http://www.slaw.ca/2009/09/24/substitutional-service-via-facebook-in-alberta/> (discussing a Canadian unreported court order allowing substitutional service via Facebook); Stephanie Francis Ward, *Our Pleasure to Serve You*, A.B.A. J. (Oct. 1 2011, 2:49 AM), [http://www.abajournal.com/magazine/article/our\\_pleasure\\_to\\_serve\\_lawyers\\_social\\_networking\\_sites\\_notify\\_defendants/](http://www.abajournal.com/magazine/article/our_pleasure_to_serve_lawyers_social_networking_sites_notify_defendants/) (describing a U.S. district court order in *Mpafe* case allowing her to serve notice of process to her husband by any social networking site, including Facebook); Martha Neil, *UK’s High Court OKs Serving Injunction on Anonymous Blogger via Twitter*, A.B.A. J. (Oct. 2, 2009, 11:29 AM), [http://www.abajournal.com/news/article/uk\\_high\\_court\\_uses\\_twitter\\_to\\_serve\\_injunction\\_on\\_anonymous\\_blogger/](http://www.abajournal.com/news/article/uk_high_court_uses_twitter_to_serve_injunction_on_anonymous_blogger/) (describing the first U.K. case where the court allowed service of injunction via the social network Twitter); John. G. Browning, *Served Without Ever Leaving the Computer*, 73 TEX. B.J. 180, 181 (2010) (discussing the first cases in Australia, Canada, New Zealand, and the United Kingdom which allowed plaintiffs to serve defendants via social media); Ian Llewellyn, *NZ Court Papers Can be Served via Facebook, Judge Rules*, NEW ZEALAND HERALD (Mar. 16, 2009, 2:22 AM), [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10561970](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10561970) (describing the first New Zealand case where a judge approved service via Facebook).

3. Pengelley, *supra* note 2; Mireau, *supra* note 2 (discussing a Canadian unreported court order allowing substitutional service via Facebook); Browning, *supra* note 2; Llewellyn, *supra* note 2; *see* Ward, *supra* note 2 (stating that “the courts in Australia, Canada, New Zealand and the United Kingdom embrace electronic legal notice”).

4. *Rio Properties, Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1016 (9th Cir. 2002) (allowing service via e-mail in the case where the defendant was “elusive” and “striving to evade service of process”); *In re Int’l Telemedia Assocs.*, 245 B.R. 713, 720, 722 (Bankr. N.D. Ga. 2000) (finding that service of process by facsimile transmission, e-mail and mail to the last know address provided a sufficient basis for personal jurisdiction); *but see* *Ehrenfeld v. Salim A Bin Mahfouz*, No. 04 Civ. 9641 (RCC), 2005 WL 696769, at \*3 (S.D.N.Y. Mar. 23, 2005) (disallowing service of process by e-mail where e-mail address was “only used as an informal means of accepting requests for information”); *U.S. Aviation Underwriters, Inc. v. Nabtesco Corp.*, No. C07–1221RSL, 2007 WL 3012612, at \*2 (W.D. Wash. Oct. 11, 2007) (finding insufficient cause to authorize service by e-mail).

5. *See* Andriana L. Shultz, *Superpoked and Served: Service of Process via Social Media Sites*, 43 U. RICH. L. REV. 1497, 1520 (2009) (discussing that in the U.S. federal courts service by e-mail and service via social media such as Facebook would both require the same framework and would have to comport with (a) the Federal Rules of Civil Procedure, and (b) due process); *see* Browning, *supra* note 2, at 181 (discussing an Australian court case where the court allowed service by sending a private electronic message, with the legal documents attached, to the defendants’ Facebook pages after concluding that the Facebook pages in fact belonged to the defendants and that they would receive a sufficient notice if served in this manner).

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day-to-day lives of people all over the world, service via Facebook has the potential to fit within the legal framework of the United States' current constitutional standard for service of process: "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."<sup>6</sup>

Nonetheless, effectuating service of process via Facebook for international defendants, while possible, may be difficult given current constitutional requirements and professional standards.<sup>7</sup> While it may be possible under Federal Rule of Civil Procedure 4(f)(3)<sup>8</sup> and the Hague Convention,<sup>9</sup> due process concerns will only be satisfied under certain narrow factual circumstances.<sup>10</sup> Sending process via Facebook might pass constitutional muster if, as in the cases authorizing service via email, (1) a court is reasonably certain the Facebook page creator and the defendant are one and the same, (2) assurances are made that the defendant received notice, and (3) traditional methods of service are unworkable due to the fault of the defendant.<sup>11</sup> However, even if these factors are satisfied, growing ethical and privacy concerns about how and when attorneys and others obtain information of Facebook users also must be addressed. Under limited circumstances, using Facebook to serve process might be possible under current statutory and constitutional standards and may be exercised under a court's discretion.<sup>12</sup> Given the difficulty of serving process on defendants abroad, courts should begin to use this tool.<sup>13</sup>

Part I of this Comment begins by discussing the statutory requirements of serving defendants abroad before exploring the evolution of service of process

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6. *Mullane v. Central Hanover Trust & Bank Co.*, 339 U.S. 306, 314 (1950); *see also* Shultz, *supra* note 5, at 1511, 1523, 1528; *see* Browning, *supra* note 2, at 181.

7. *See infra* Part II.

8. FED. R. CIV. P. 4(f)(3) (2006).

9. Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.N.T.S. 163.

10. *See* *Rio Properties, Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1018 (9th Cir. 2002) (authorizing alternative method of service when defendant was an online business without a physical location and when e-mail was defendant's way of doing business and a preferred method of communication); *see In re Int'l Telemedia Assocs.*, 245 B.R. 713, 720, 722 (Bankr. N.D. Ga. 2000) (authorizing service of defendant at his designated electronic address as his preferred means of communication); *see 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 service via e-mail did not meet the constitutional standard because e-mail in this case was used only for informal requests of information and was not undisputedly connected to the defendant); *see U.S. Aviation Underwriters, Inc. v. Nabtesco Corp.*, No. C07-1221RSL, 2007 WL 3012612, at \*2 (W.D. Wash. Oct. 11, 2007) (finding insufficient cause to authorize service by e-mail when "the requirements for due process and respect for international law outweigh plaintiff's desire to proceed expeditiously").

11. *See Rio Properties*, 284 F.3d at 1018; *In re Int'l Telemedia*, 245 B.R. at 721-22; *see* Browning, *supra* note 2, at 181 (discussing an Australian court case where the court allowed service by sending a private electronic message, with the legal documents attached, to the defendants' Facebook pages after concluding that the Facebook pages in fact belonged to the defendants).

12. *See infra* Part VI.

13. *See infra* Part VI.

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from early case law, to service by publication, and through to the advent of electronic service of process. Part II of the Comment explores the continued expansion of the Internet, the enormous growth of Facebook, and the implications that this has in the larger historical discussion of the evolution of service of process. Part II also touches on recent cases in which Facebook has been used to serve process both domestically and abroad. Part III explores the factual conditions under which service of process via Facebook may work, analogizing to the precedent cases for service via email in the United States as well as case law abroad, while also exploring potential answers to the inherent problems in effectuating service via Facebook. Part IV deals with the ethical implications that arise when attempting to solve the difficulties that develop when attempting to effectuate service via Facebook. Part V discusses circumstances in which Facebook should be allowed to effectuate service of process and suggests some ways that attorneys and courts can address these concerns.

## II. STATUTORY AND CONSTITUTIONAL EVOLUTION OF SERVICE OF PROCESS

As the ways in which society travels and communicates change, the legal community in the United States has evolved its understanding of what is statutorily and constitutionally required when apprising a defendant of an action against them and allowing an opportunity to be heard.<sup>14</sup> This Part explores how due process jurisprudence has evolved since the drafting of the Constitution and provides a framework for exploring how using social media to effectuate service of process may be permissible.

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14. *See generally* Pennoyer v. Neff, 95 U.S. 727, 733 (1877) (observing that validity of out-of-state judgments may be directly questioned and enforcement resisted if due process is violated); *see generally* Int'l Shoe v. State of Wash., 326 U.S. 310 (1945) (holding that the court had personal jurisdiction over appellant due to their systematic and continuous activities in the state); *see generally* New England Merchants Nat'l Bank v. Iran Power Generation & Transmission Co., 495 F. Supp. 73 (S.D.N.Y. 1980) (holding that because Iran intentionally avoided service of process that justice demands a substitute form of service); *see generally In re Int'l Telemedia*, 245 B.R. at 717-22 (authorizing service of defendant at his designated electronic address as his preferred means of communication); *see generally Rio Properties*, 284 F.3d at 1017-18 (authorizing alternative method of service when defendant was an online business without a physical location and when e-mail was defendant's way of doing business and preferred method of communication); *see generally Williams v. Adver. Sex LLC.*, 231 F.R.D. 483, 488 (N.D. W. Va. 2005) (ruling that plaintiff's prior attempts at serving a defendant gave him direct knowledge of a lawsuit, allowing service of process via international mail and email); *see generally Nanya Tech. Corp. v. Fujitsu Ltd.*, No. 06-00025, slip op. at 8 (D. Guam Jan. 26, 2007) (holding that the Hague Convention does not prohibit serving a Japanese citizen by international mail); *see generally Bank Julius Baer & Co. v. Wikileaks*, No. C 08-00824 JSW, slip op. at 4 (N.D. Cal. Feb. 13, 2008) (holding that service via email is warranted when plaintiffs prove defendant cannot be served at their physical address or defendant's agents refuse service); *see generally In re LDK Solar Secs. Litig.*, No. C 07-05182 WHA, slip op. at 6 (N.D. Cal. June 12, 2008) (declaring that service of defendants who were difficult to locate abroad through a California subsidiary is constitutional and facially permitted by Rule 4(f)(3)).

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A. *Statutory Basis for Allowing Service: Federal Rule of Civil Procedure 4(f) and the Hague Convention*

Initial statutory hurdles in using Facebook to effectuate service include meeting the requirements of Federal Rule of Civil Procedure 4(f) (“FRCP 4(f)”)<sup>15</sup>, serving an individual in a foreign country, and the 1965 Hague Convention on the Service of Judicial and Extra-Judicial Documents in Civil or Commercial Matters (“Hague Convention”).<sup>16</sup> The Federal Rules provide that the service on defendants abroad may be effected (1) according to the Hague Convention if the defendant is to be served in a signatory country;<sup>17</sup> (2) in countries not signatories to the Hague Convention as directed by the foreign country’s law, personally or by mail if not prohibited by the foreign country’s law, or as prescribed by the foreign authority;<sup>18</sup> and finally, (3) when the Hague Convention is inapplicable or when there is no relevant international law “by means not prohibited by international agreement as may be directed by the court.”<sup>19</sup>

The Hague Convention, a multi-lateral treaty with sixty-nine signatory countries,<sup>20</sup> provides for internationally agreed-upon methods of transmitting requests for service on defendants.<sup>21</sup> In dicta in *Volkswagenwerk Aktiengesellschaft v. Schlunk*, the U.S. Supreme Court stated that “compliance with the [Hague] Convention is required in all cases to which it applies.”<sup>22</sup> Article 10(a) of the Convention allows the sending of judicial documents “by post channels, directly to persons abroad” so long as there is no objection by the state of destination.<sup>23</sup> While the unamended and currently-in-force 1965 treaty unsurprisingly makes no mention of service by any electronic means, so long as “post channels” encompasses electronic mediums, the Convention may allow it.<sup>24</sup> The Hague Convention also provides that service may be made in any manner so long as the jurisdiction does not object to that particular method of service where

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15. FED. R. CIV. P. 4(f).

16. Hague Convention on the Service Abroad, *supra* note 9.

17. FED. R. CIV. P. 4(f)(1).

18. FED. R. CIV. P. 4(f)(2).

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

20. *Status Table: Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, HAGUE CONF. ON PRIVATE INT’L L., [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=17](http://www.hcch.net/index_en.php?act=conventions.status&cid=17) (last updated Mar. 31, 2013).

21. Hague Convention on the Service Abroad, *supra* note 9.

22. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 705 (1988).

23. Hague Convention on the Service Abroad, *supra* note 9.

24. See Ronald J. Hedges, et al., *Electronic Service at Home and Abroad: Allowing Domestic Electronic Service of Process in Federal Court*, 4 FED. CT. L. REV. 65 (2010) (citing Richard J. Hawkins, Comment, *Dysfunctional Equivalence: The New Approach to Defining “Post Channels” Under the Hague Service Convention*, 55 UCLA L. REV. 205, 224 (2007)).

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the defendant can be found,<sup>25</sup> perhaps making it permissible to serve via Facebook.<sup>26</sup> Finally, if the address of the person being served is unknown, the Hague Convention does not apply and would not be an impediment to effectuating service via Facebook at all.<sup>27</sup> Thus, Facebook may be a viable means to provide service abroad, in particular where the defendant has proved especially elusive and a current address is unavailable.

Only an international agreement barring a court from exercising discretion would disallow service via Facebook under the broad FRCP 4(f)(3) catch-all provision.<sup>28</sup> Indeed, courts may be more likely to give some latitude as the evolution of FRCP 4(f)(3) is telling of the flexibility that it was meant to provide litigators.<sup>29</sup> The original 1963 law<sup>30</sup> was adopted to “add flexibility by permitting the court by order to tailor the manner of service to fit the necessities of a particular case.”<sup>31</sup> Later versions of the law allowed service “as directed by order of the court,”<sup>32</sup> maintaining that degree of flexibility. The current law retains the flexibility of its precursors by disallowing service only when it is “prohibited by international agreement.”<sup>33</sup> Within this history is a tolerance for allowing the rules to fit modern forms of communication so as not to derail a lawsuit for want of service of process.<sup>34</sup> Thus, so long as the guidelines of the Hague Convention are followed or are inapplicable and there is not a prohibition, service via Facebook is likely allowable.

#### *B. The U.S. Constitution*

To gain a proper understanding of the historical underpinnings of the notice requirement, it is necessary to discuss the concept within the context of personal jurisdiction.<sup>35</sup> Under nineteenth century traditional territorial power theory, the only way to gain personal jurisdiction over a non-consenting nonresident defendant was to personally serve process within the forum state.<sup>36</sup> Thus, the concepts of personal jurisdiction and service of process were sometimes confused

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25. See David P. Stewart & Anna Conley, *E-mail Service on Foreign Defendants: Time for an International Approach?* 38 GEO. J. INT'L L. 1755, 759 (2007).

26. See *id.*

27. *Id.*

28. *Id.* at 761.

29. *Id.* at 763.

30. FED. R. CIV. P. 4(i)(1)(E) (1963) (repealed 1992).

31. FED. R. CIV. P. 4 (see advisory committee's note, subdivision (i)(1)); FED. R. CIV. P. 4(i)(1)(E) (1993) (repealed 2006).

32. *Id.*; FED. R. CIV. P. 4 (see advisory committee's note, subdivision (f)).

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

34. See Hedges, *supra* note 24 (discussing cases that ruled that electronic service of process is acceptable when defendant evades traditional service or defendant uses email for business purposes).

35. See JAMES WM. MOORE, ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 108.01(2)(c) (3d ed. 1997).

36. *Id.*

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for one another.<sup>37</sup> This is most readily seen in the U.S. Supreme Court decision *Pennoyer v. Neff*, which held that service of process must be effectuated within the state for *in personam* actions because presence was required to give validity to the court's exercise of power.<sup>38</sup> However, as the economy began to expand nationally and more business was done across state lines, this requirement became impracticable.<sup>39</sup>

To address these concerns, the Court expanded *Pennoyer's* narrow concept of personal jurisdiction in *International Shoe Co. v. State of Washington* by employing the modern "minimum contacts" analysis for personal jurisdiction, allowing for jurisdiction as long as "maintenance of the suit does not offend traditional notions of fair play and substantial justice."<sup>40</sup> While still relying on a sovereignty theory,<sup>41</sup> the Court applied this standard by looking to whether the defendant maintained "systematic and continuous" contacts such that the defendant availed itself of the benefits and privileges of doing business in the forum.<sup>42</sup> The Court also held that serving process on the defendant within the forum state established the defendant's presence in the forum and therefore provided sufficient notice of the suit.<sup>43</sup> The Court went further by stating that "substitute service" is adequate where it "gives reasonable assurance that the notice will be actual" and that sending notice of the suit by registered mail is "reasonably calculated to apprise" defendant of the suit.<sup>44</sup> Thus, just as *International Shoe* expanded *Pennoyer's* narrow concept of personal jurisdiction because prevailing economic and social conditions necessitated it, the scope of service of process was forced to expand with it.<sup>45</sup>

This constitutional expansion of the notice requirement continued when the Court decided *Mullane v. Central Hanover Trust & Bank Co.* just five years

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37. *Id.*

38. *See Pennoyer v. Neff*, 95 U.S. 727, 733 (1877).

39. Shultz, *supra* note 5, at 1499-1500; *see In re DES Cases*, 789 F. Supp. 573, 577-79 (1993) (noting that "[a] legion of commentators and judges have demonstrated that the mid-nineteenth century territorial nexus requirement needs modification for end-of-twentieth century litigation. The growing interconnectedness of the national economy and increased social mobility often have rendered the requirement unworkable in its original form.").

40. *Int'l Shoe v. State of Wash.*, 326 U.S. 310, 316 (1945); *see In re DES Cases*, 789 F. Supp. at 579.

41. *Int'l Shoe*, 326 U.S. at 316-17 (Black, J., concurring). Justice Black noted that it was "unthinkable" that a state could not protect its citizens simply because a defendant having systematic contacts in the state was located outside its borders. In fact, he regarded it as a deprivation of the state's own citizens due process rights because the state would be powerless to protect them from those outside. He concluded: "Nothing could be more irrational or more designed to defeat the function of our federative system of government." Some commentators suggest this strong language has allowed for the jurisprudence to evolve more smoothly into electronic service. *See MOORE, ET AL.*, *supra* note 35.

42. *Int'l Shoe*, 326 U.S. at 320.

43. *Id.*

44. *Id.*

45. Shultz, *supra* note 5.



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later.<sup>46</sup> The Court held that it was constitutionally permissible to notify unknown beneficiaries by publication because that method was reasonably calculated under all the circumstances “to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”<sup>47</sup> In this fashion, the *Mullane* Court recognized that new avenues of process must be tested; that is, as long as notice was given, unknown beneficiaries could be served with process via modern forms of publication.<sup>48</sup>

Electronic service was first tested in U.S. federal court in 1980 when a group of American plaintiffs could not serve process on Iranian defendants due to a breakdown in diplomacy between the respective party’s countries in *New England Merchants National Bank v. Iran Power Generation and Transmission Co.*<sup>49</sup> The district court allowed service of process to be effectuated via Telex, a now obsolete form of electronic communication, stating:

I am very cognizant of the fact that the procedure which I have ordered in these cases has little or no precedent in our jurisprudence. Courts, however, cannot be blind to changes and advances in technology. No longer do we live in a world where communications are conducted solely by mail carried by fast sailing clipper or steam ships. Electronic communication via satellite can and does provide instantaneous transmission of notice and information. No longer must process be mailed to a defendant’s door when he can receive complete notice at an electronic terminal inside his very office, even when the door is steel and bolted shut.<sup>50</sup>

Recognizing the changing landscape of communication and technology, while simultaneously touching upon the inherent difficulties that can arise while attempting to serve process, the court modernized the concept of personal service of process through its recognition of technological advances.<sup>51</sup>

In 2000, the U.S. Bankruptcy Court for the Northern District of Georgia authorized the service of process to be effectuated on an international defendant via email for the first time.<sup>52</sup> Other federal courts have since followed its lead.<sup>53</sup>

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46. *Mullane v. Central Hanover Trust & Bank Co.*, 339 U.S. 306 (1950).

47. *Id.* at 314-15, 317.

48. *See id.*; *see also* *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980); *Rio Properties, Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1017 (9th Cir. 2002).

49. *New England Merchants Nat’l Bank v. Iran Power Generation & Transmission Co.*, 495 F. Supp. 73, 76, 78 (S.D.N.Y. 1980).

50. *Id.* at 76.

51. *Id.*

52. *Barefoot v. Diaz (In re Int’l Telemedia Assocs., Inc.)*, 245 B.R. 713, 720 (Bankr. N.D. Ga. 2000).

53. *See In re LDK Solar Secs. Litig.*, No. C 07-05182 WHA, slip op. at 6 (N.D. Cal. June 12, 2008); *Bank Julius Baer & Co. v. Wikileaks*, No. C 08-00824 JSW, slip op. at 4 (N.D. Cal. Feb. 13, 2008); *Williams v. Adver. Sex LLC.*, 231 F.R.D. 483, 488 (N.D. W. Va. 2005); *Nanya Tech. Corp. v. Fujitsu Ltd.*, No. 06-00025,

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The federal appellate court in *Rio Properties, Inc. v. Rio International Interlink* recognized that under certain factual circumstances, not only was sending an email reasonably calculated to apprise defendants of the pendency of the action and afford them an opportunity to respond, but also that it could be the method of service most likely to reach a particular defendant.<sup>54</sup> While recognizing the stature of email in the business world, the court set out that the defendants left no effective avenue to serve process by traditional means, and, with those two considerations in mind, it was able to allow alternative service of process by the email address provided on the defendants' website.<sup>55</sup> The Ninth Circuit affirmed the decision, noting that "when 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."<sup>56</sup>

However, the court also acknowledged the limitations of service of process by email.<sup>57</sup> Specifically, there was no way to confirm receipt of an email message, controversies could arise about whether a document was actually received, and, given differences in computer systems as well as the limited use of electronic signatures, there could be problems with complying with verification requirements found in other sections of the federal rules.<sup>58</sup> These concerns will have to be addressed if service via Facebook is to be effective. Ultimately, the Ninth Circuit gave discretion to the lower court's balancing of the limitations of service by email against the benefits, given the entirety of the circumstances, noting that the defendants seemed to purposely evade traditional service and made email the only means by which they could be contacted.<sup>59</sup>

Though there has been an expansion toward greater liberalization of service of process, not all courts have concluded that service by email passes constitutional muster in all circumstances.<sup>60</sup> In *Ehrenfeld v. Salim A Bin Mahfouz*, the court refused to authorize email service because the defendant's email address was "only used as an informal means . . . [of] business communications."<sup>61</sup> Similarly, the court in *U.S. Aviation Underwriters, Inc. v. Nabtesco Corp.* refused to allow service of process via email because the factual situation was "unlike *Rio Properties* where the defendant was 'elusive' and

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slip op. at 8 (D. Guam Jan. 26, 2007).

54. *Rio Properties, Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1013 (9th Cir. 2002).

55. *Id.*

56. *Id.* at 1018.

57. *Id.*

58. *Id.* (citing FED R. CIV. PROC. 4(a), 11).

59. *Id.*

60. *Ehrenfeld v. Salim A Bin Mahfouz*, No. 04 Civ. 9641 (RCC), 2005 WL 696769, at \*3 (S.D.N.Y. Mar. 23, 2005); *U.S. Aviation Underwriters, Inc. v. Nabtesco Corp.*, No. C07-1221RSL, 2007 WL 3012612, at \*2 (W.D. Wash. Oct. 11, 2007).

61. *Ehrenfeld*, No. 04 Civ. 9641(RCC), 2005 WL 696769 at \*3.

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‘striving’ to evade service of process.”<sup>62</sup> Because the limitations outlined in *Rio* outweighed the benefits given the facts of each particular case, these courts held that service via email failed to pass constitutional muster.<sup>63</sup> Those seeking to effectuate service of process via Facebook must keep these considerations in mind as well.<sup>64</sup>

III. THE CONTINUED GROWTH OF THE WEB, THE EMERGENCE OF SOCIAL MEDIA, AND TRENDS IN USING SOCIAL MEDIA TO SERVE PROCESS

The courts in *Rio* and *New England Merchants*, and *Mullane* and *International Shoe* prior, recognized that as technology advances and the way we communicate evolves, so too must service of process. International, and now domestic, decisions allowing service of process to be effectuated via social media are coming down as the profound growth of the Internet takes root in day-to-day life and the ubiquitous stature of social networking takes hold.<sup>65</sup>

The number of Internet users worldwide has doubled to over two billion people since the last time the Federal Rules of Civil Procedure underwent substantial changes in 2006.<sup>66</sup> By the end of 2010, thirty percent of the world’s population was online, up from twelve percent in 2003, and six percent in 2000.<sup>67</sup> However, that expansion has not been uniform throughout the world, leading to what has been dubbed the “digital divide.”<sup>68</sup> While sixty-seven percent of people in the most developed post-industrial nations had access to the Internet, only 3.4 percent, 15.9 percent, and 24.5 percent of peoples in Sub-Saharan Africa, the Middle East, and Latin America, respectively, had access to the Internet.<sup>69</sup> The “digital divide” may have implications for how and when defendants in certain countries may be served via Facebook because there is less of a chance that defendants will maintain a profile, and thus, Facebook may not be a reasonable medium to comprise them of the action and allow them the opportunity to respond.<sup>70</sup>

62. *U.S. Aviation Underwriters*, No. C07-1221RSL, 2007 WL 3012612, at \*2.

63. *Ehrenfeld*, No. 04 Civ. 9641(RCC), 2005 WL 696769 at \*3; *U.S. Aviation Underwriters*, No. C07-1221RSL, 2007 WL 3012612, at \*2.

64. *See Ehrenfeld*, No. 04 Civ. 9641(RCC), WL 696769 at \*3; *U.S. Aviation Underwriters*, No. C07-1221RSL, 2007 WL 3012612, at \*2.

65. *See supra* notes 61-64; *see infra* notes 66-80.

66. INT’L TELECOMM. UNION, MEASURING THE INFORMATION SOCIETY 3 (2011), available at [http://www.itu.int/dms\\_pub/itu-d/opb/ind/D-IND-ICTOI-2011-SUM-PDF-E.pdf](http://www.itu.int/dms_pub/itu-d/opb/ind/D-IND-ICTOI-2011-SUM-PDF-E.pdf) (last visited Mar. 31, 2013).

67. *Id.*

68. Amir Hatem Ali, *The Power of Social Media in Developing Nations: New Tools for Closing the Global Digital Divide and Beyond*, 24 HARV. HUM. RTS. J. 185, 189-90 (2011).

69. *Id.* at 189.

70. *See infra* Part II.

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In the United States on the other hand, 75.5 percent of households had computers in 2010, up from 72.5 percent in 2008, and 71.6 percent of households had Internet access in 2010, up from 63.6 percent in 2008.<sup>71</sup> In addition, the number of active mobile-broadband subscriptions per 100 inhabitants went from 26.9 to fifty-four from 2008 to 2010.<sup>72</sup> The sheer numbers of people online, and the ever-expanding growth in both the way people access the web as well as the amount of time spent online, make it more likely that service via online mediums will provide constitutional notice of a pending action.

Facebook was launched in 2004 and has seen unprecedented growth.<sup>73</sup> By 2006, the site had twelve million<sup>74</sup> users and took over the top spot in unique visitors of social network sites in one month in 2009 with nearly sixty-nine million.<sup>75</sup> By the end of that year it boasted 350 million active users<sup>76</sup> and has surged since. The site ballooned to more than 800 million active users by the end of 2011, and in October of 2012 the site reached one billion active users.<sup>77</sup> Eighty-one percent of users reside outside of the United States and the site is available in more than seventy languages.<sup>78</sup> Worldwide, more than 600 million active users access Facebook using a mobile device.<sup>79</sup>

One of the largest emerging trends among Internet users is social networking.<sup>80</sup> Americans spend more time on social networking than any other activity.<sup>81</sup> Facebook.com alone has more traffic than any other website and the site reaches seventy percent of active U.S. Internet users.<sup>82</sup> Social networks and blog sites account for 22.5 percent of time spent online, more than twice the amount of the second leading category.<sup>83</sup> Nearly four in five active Internet users visit social networks and blogs.<sup>84</sup> Those numbers are mirrored globally in developed countries: social networks and blogs reach over three in five active

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71. INT'L TELECOMM. UNION, *supra* note 66, at 1-3.

72. *Id.*

73. *Key Facts*, FACEBOOK, <http://newsroom.fb.com/content/default.aspx?NewsAreaId=22> (last visited Mar. 31, 2013).

74. *Number of Active Users at Facebook Over the Years*, ASSOCIATED PRESS (Oct. 23, 2012), <http://finance.yahoo.com/news/number-active-users-facebook-over-230449748.html>.

75. Andy Kazeniak, *Social Networks: Facebook Takes Over Top Spot, Twitter Climbs*, COMPETE.COM (Feb. 9, 2009, 2:01 PM), <http://blog.compete.com/2009/02/09/facebook-myspace-twitter-social-network/>.

76. *Number of Active Users at Facebook Over the Years*, *supra* note 74.

77. *Id.*

78. *Id.*

79. *Id.*

80. *See infra* notes 81-86.

81. NIELSON, STATE OF THE MEDIA: SOCIAL MEDIA REPORT (2011), *available at* <http://www.nielsen.com/content/dam/corporate/us/en/reports-downloads/2011-Reports/nielsen-social-media-report.pdf>.

82. *Id.*

83. *Id.*

84. *Id.*

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Internet users on average in ten major global markets.<sup>85</sup> As unprecedented growth continues in both the number of people who access the Internet and spend their time using social media, courts in the United States and abroad have begun to recognize that using this medium can provide reasonable notice of a pending action under the right circumstances.<sup>86</sup>

In what is thought to be the first time Facebook was allowed to be used to serve process in the United States, Minnesota resident Jessica Mpafe wanted a divorce in May 2011, but she had just one problem: she had not seen her husband in years and did not know how to locate him.<sup>87</sup> She needed to serve him with divorce papers and the only lead she had was a suspicion he had moved back to the Ivory Coast.<sup>88</sup> She asked the court to allow service by general delivery, but the court believed that would be a waste of resources.<sup>89</sup> In considering notice by publication in a newspaper, the judge concluded that “nobody, particularly poor people, is going to look at the legal newspaper to notice that their spouse wants to get divorced.”<sup>90</sup> The judge ordered service by publication on the Internet, by contact via “[F]acebook, [M]yspace, or other social networking site . . . email . . . or though information that would appear through an [I]nternet search engine such as Google.”<sup>91</sup> However, not all U.S. courts have agreed that effectuating service via Facebook is reasonably calculated to apprise a defendant of the pendency of an action and provide them an opportunity to respond.<sup>92</sup> The U.S. District Court for the Southern District of New York did not allow service via Facebook for a domestic defendant because the plaintiff could not set forth facts that could give the court “a degree of certainty that the Facebook profile its investigator located is in fact maintained by [the defendant].”<sup>93</sup>

While case law in the United States remains uncertain, serving process via social media has emerged as a trend among international courts. In 2008, an Australian court was the world’s first to allow service to be effectuated via Facebook in *MKM Capital v. Corbo*.<sup>94</sup> The decision came down despite a case earlier in the year that voiced concerns on whether defendants’ profiles on Facebook could be authenticated.<sup>95</sup> The court allowed service of a default judgment via Facebook after the plaintiff’s attorneys were able to make the

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85. *Id.*

86. *See supra* notes 81-82.

87. Mpafe Order, *supra* note 2.

88. Ward, *supra* note 2.

89. Mpafe Order, *supra* note 2; Ward, *supra* note 2.

90. Mpafe Order, *supra* note 2; Ward, *supra* note 2.

91. Mpafe Order, *supra* note 2.

92. *See Fortunato v. Chase Bank*, 2012 U.S. Dist. LEXIS 80594 (S.D.N.Y. June 7, 2012).

93. *See id.*

94. *MKM Capital Pty Ltd. v Corbo & Poyser* [2008] ACTCA (Unreported, Master Harper, 12 Dec. 2008) (Austl.); Browning, *supra* note 2, at 181.

95. *Citigroup Party Ltd. v Weerakoon*, [2008] QDC 174, 1 (Austl.); Browning, *supra* note 2, at 181.

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required showing that enough of the information on the defendants' public Facebook pages matched the information in their home loan applications.<sup>96</sup> The court reasoned that doing so would provide sufficient notice to the defendants of the action against them.<sup>97</sup> The defendants proved especially elusive in that case because they moved and changed jobs and phone numbers, advertising in local newspaper failed, and hiring a private investigator turned up nothing.<sup>98</sup> Like later cases, the judge seemed to be swayed by the difficulty of serving the defendants in more traditional ways.<sup>99</sup>

The following year, a New Zealand court followed suit.<sup>100</sup> While living abroad in England, the defendant allegedly took \$241,000 from his family business's account.<sup>101</sup> Because his exact whereabouts were unknown, making service by traditional means more unlikely to reach him, and because the defendant had a Facebook page and corresponded by email, the plaintiff asked for the approval of a secondary service order via those mediums.<sup>102</sup> The judge obliged, after being convinced that service by publication in a newspaper could not be effectively targeted, and approved the order.<sup>103</sup> Later in 2009, the U.K. High Court allowed service of an injunction on an anonymous blogger to be effectuated via Twitter.<sup>104</sup> The injunction sought to put a stop to the blogger, who was impersonating a prominent right-wing blogger and lawyer, Donal Blaney.<sup>105</sup> Rather than waiting for the California company to take down the account, which would have allowed for the defendant to continue to use the allegedly defamatory account in the interim, the plaintiff and his barrister went straight to the High Court.<sup>106</sup> Blaney argued the use of the picture from his blog and actual blog content went beyond mere parody and was intended to make readers think it was really him, which, according to Blaney, was a violation of British copyright law.<sup>107</sup> The court agreed, approving the order and noting that the only way the anonymous blogger could be communicated with was via his Twitter account.<sup>108</sup>

Finally, in *Knott v. Sutherland*, a Canadian court allowed the plaintiffs to substitutionally serve one of multiple defendants by (1) publishing a notice in the

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96. *Id.*

97. *Id.*

98. *Id.*

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

100. Llewellyn, *supra* note 2.

101. *Id.*

102. *Id.*

103. *Id.*

104. Neil, *supra* note 2.

105. *Id.*

106. Paul Lambeth & Jonathan Coad, *Serving the Internet—Nowhere to Hide in Cyberspace from a Cyber Lawyer*, LECTLAW.COM, <http://www.lectlaw.com/files/elw07.htm> (last visited Mar. 31, 2013).

107. Neil, *supra* note 2.

108. Lambeth & Coad, *supra* note 106.

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newspaper; (2) sending a copy of the claim to the human resources department where the defendant formerly worked; and (3) sending notice to the Facebook profile of the defendant.<sup>109</sup> Each of these cases shows that given narrow factual circumstances where the defendant is striving to avoid traditional means of service, Facebook can and should be an effective tool to use in effectuating service of process.

## IV. FACING DUE PROCESS: HURDLES TO SERVICE VIA FACEBOOK

Once the initial hurdles of getting past the Hague Convention and the relevant Federal Rules of Civil Procedure are addressed, the central problems in effectuating service via social media are similar to those of email—namely, confirmation of receipt of service and verification of the identity of the account holder.<sup>110</sup> As a threshold matter, it must be proven that the Facebook page actually belongs to the defendant.<sup>111</sup> In other words, to be effective, it must be shown that the information provided by the creator of the page is such that a court can be reasonably certain that the defendant and creator are one and the same.<sup>112</sup>

However, because Facebook users create personal pages called “profiles” on which they post information on any topic, sometimes including highly personal information, this authentication can be achieved circumstantially.<sup>113</sup> Depending on the amount of information a defendant places on their profile, the possibility exists that it may be cross-referenced with other information known about the defendant such as their address, phone number, email address(es), relatives, friends, and personal history, including attendance at different academic institutions, where they have traveled, and various other significant life events.<sup>114</sup> This could provide a high level of reliability in terms of showing that the owner of the Facebook page is actually the defendant and give a court reasonable certainty that the defendant will be apprised of the proceeding and allow them the opportunity to respond.<sup>115</sup>

Another foundational issue is providing a court with assurance that the defendant retrieved the relevant documents while accessing their account.<sup>116</sup> Users can be contacted in a number of ways on Facebook.<sup>117</sup> Other users may

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109. *Knott v. Sutherland*, 2009 Edmonton 0803 02267 (Can. Alta. Q.B.M.).

110. *Shultz*, *supra* note 5, at 1525.

111. *Id.* at 1526.

112. *Id.* at 1527-28.

113. *Browning*, *supra* note 2.

114. *Shultz*, *supra* note 5; *see* *Browning*, *supra* note 2; *How to Post and Share, Facebook Help Center*, FACEBOOK, <http://www.facebook.com/help/sharing> (last visited Mar. 31, 2013).

115. *See* *Browning*, *supra* note 2.

116. *Shultz*, *supra* note 5.

117. *How to Post and Share*, *supra* note 114.

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send personal messages that go to the user's inbox, much in the form of an email, or, if they are online, in the form of an instant message.<sup>118</sup> Users may attach documents to email messages in a similar fashion to other web-based email providers making it possible to serve official court documents in the form of PDF files.<sup>119</sup>

Other ways of contacting Facebook users include posting on their "wall" in which a message is only visible as outlined in the user's privacy settings, commenting on user generated "status updates," and posting messages on the user's or others' pictures.<sup>120</sup> However, some foreign courts have been reluctant to allow the public posting of service of process on Facebook pages due to privacy concerns.<sup>121</sup> Nearly all activities of Facebook users are time-stamped, making it possible to show that the defendant performed activities on the site before and after service was sent, and it is possible to verify when a message was "seen" by a Facebook user because the sender is notified when the user opens the message.<sup>122</sup> Nonetheless, while it may not always be possible to show a defendant received actual notice, under the right factual situation, particularly where the defendant has proved elusive, it may be enough to satisfy due process, similar to *Rio*, through weighing the relevant considerations.<sup>123</sup>

In reality, however, authentication may be exceedingly difficult as Facebook users have access to a variety of privacy settings.<sup>124</sup> These settings allow users to control who has access to the information on their pages and the information that is posted by them on others' pages.<sup>125</sup> A user may grant access to their page with almost no information reaching beyond those they accept as "friends,"<sup>126</sup> or they may permit nearly all of their information to be accessible to the public through a routine Google search.<sup>127</sup> From 2006 to 2008, the amount of users who used Facebook's default privacy settings dropped from sixty-four percent to forty-

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118. See *The New Messages*, FACEBOOK, <https://www.facebook.com/about/messages/> (last visited Mar. 31, 2013) (describing Instant Messaging). Instant messages are also automatically archived. *Id.*

119. *Sending a Message*, Facebook Help Center, FACEBOOK, <http://www.facebook.com/help/messages/sending> (last visited Mar. 31, 2013).

120. *How to Post and Share*, *supra* note 114.

121. MKM Capital Pty Ltd v Corbo & Poyser [2008] ACTCA (Unreported, Master Harper, 12 Dec. 2008) (Austl.); Browning, *supra* note 2.

122. *Sending a Message*, *supra* note 119; Browning, *supra* note 2.

123. See *Rio Properties, Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1018 (9th Cir. 2002); Browning, *supra* note 2.

124. See *Privacy*, Facebook Help Center, FACEBOOK, <https://www.facebook.com/help/445588775451827> (last visited Mar. 31, 2013).

125. See *id.*

126. See *id.* Users may also limit the amount and types of information friends can see. *Id.*

127. Cliff Lampe, et al., *Changes in Use and Perception of Facebook*, in PROCEEDINGS OF THE 2008 ACM CONFERENCE ON COMPUTER SUPPORTED COOPERATIVE WORK 721, 721 (2008), available at <http://gatortracks.pbworks.com/f/facebook+changes+in+use.pdf>; see also *Online Exposure*, CONSUMER REP. MAG., June 2011, at 39, 40, available at <http://www.consumerreports.org/cro/magazine-archive/2011/june/electronics-computers/state-of-the-net/online-exposure/index.htm>; see *Privacy*, *supra* note 124.



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eight percent.<sup>128</sup> The more restrictive the privacy settings the user selects, the more difficult it will be to gather the necessary information to verify that the profile is that of the defendant and find a degree of reliability that they received service of process. That being said, gaining access to a user with restrictive privacy settings can be resolved by becoming “friends” with the user. If the information can be lawfully accessed,<sup>129</sup> it is more likely that service via Facebook can be effectuated because a court will be given greater assurance that the owner of the profile page and the defendant are one and the same.

## V. DEALING WITH THE DIFFICULTIES IN THE FACE OF ETHICAL OBLIGATIONS

The inherent privacy issues of social media in general, and Facebook specifically, have created practical problems gaining access to defendant’s information in order to satisfy Due Process.<sup>130</sup> To that end, ethical considerations will be implicated based on whether the information is public or private information, and, if they are private, whether it is ethical to gain access through the use of “friending.”<sup>131</sup>

Viewing content that is considered “public” will most likely allow an attorney to avoid being subject to disciplinary action in jurisdictions whose ethical rules mirror that of the Model Rules of Professional Conduct (“Model Rule(s)").<sup>132</sup> Courts and state bars addressing the issue have considered accessing an opposing party’s website acceptable because the attorney is viewing information that is accessible to the general public.<sup>133</sup> However, some courts have considered friend requests to be “communications among members,” which is expressly prohibited under Model Rule 4.2. Pursuant to Model Rule 4.2, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.<sup>134</sup> Another means an opposing attorney may use to gain information to authenticate the defendant’s Facebook page is through “pretexting,” or the use of impersonation or fraud to trick another person into releasing personal information.<sup>135</sup>

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128. Lampe, et al., *supra* note 127, at 726.

129. *See infra* Part V.

130. *See infra* Part V.

131. *See infra* Part V; *see generally* *Adding Friends and Friend Requests*, Facebook Help Center, FACEBOOK, <http://www.facebook.com/help/friends/requests> (last visited Mar. 31, 2013).

132. *See* *Yath v. Fairview Clinics, N.P.*, 767 N.W.2d 34, 43 (Minn. Ct. App. 2009).

133. Or. State Bar Legal Ethics Comm., Op. 2005-164 (2005).

134. MODEL RULES OF PROF'L CONDUCT R. 4.2 (2002); *e.g.*, Or. State Bar Legal Ethics Comm., Op. 2005-164.

135. Steven C. Bennett, *The Ethics of “Pretexting” in a Cyber World*, 41 MCGEORGE L. REV. 271 (2010); N.Y.C. Bar Assn. Comm. on Prof'l & Judicial Ethics, Op. 2010-2 (2010), *available at* <http://www>.

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While the Model Rules do not specifically address the use of social media by counsel to obtain information to be used for litigation purposes by pretextual means, several state bar ethics opinions suggest that the sections are implicated with regard to information gained from social media sites.<sup>136</sup> For example, the Model Rules prohibit a lawyer or their agents from making false statements of material fact to a third person.<sup>137</sup> Making contact with a third party in the form of a friend request may constitute a “false statement” in violation of the Rule because the sole purpose for doing so is to gain information to use in future litigation, a fact which, in most circumstances, the recipient would be unaware.<sup>138</sup> In addition, Model Rule 8.4(c) bans conduct by a lawyer that involves dishonesty, fraud, deceit, or misrepresentation.<sup>139</sup> Thus, this Rule may also prohibit “friending” an adverse party because the practice inherently involves dishonesty, fraud, or deceit. The strategy may be necessary to gain the required information to obtain permission from the court to serve via Facebook and the fact that the defendant is abroad would seemingly make little difference as Model Rule 8.5(a) provides that lawyers are subject to discipline authority “regardless of where the conduct occurs.”<sup>140</sup> However, some jurisdictions have held that when deceptive practices are not used, obtaining information through “friending” may be permitted.<sup>141</sup> In the few jurisdictions that allow this, effectuating service of process via Facebook is much more likely because “friending” will allow access to the information that will be necessary to authenticate and verify that the Facebook profile page is actually that of the defendant and allow a court to make the relevant balancing analysis to allow Facebook to be used to serve process.<sup>142</sup>

*A. The New York City Approach*

The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics (“New York Committee”) faced the issue of “friending” head-on in its Formal Opinion 2010-2, *Obtaining Evidence from Social Networking Websites*.<sup>143</sup> The New York Committee concluded that a

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nycbar.org/ethics/ethics-opinions-local/2010-opinions/786-obtaining-evidence-from-social-networking-websites (discussing lawyers obtaining information from social networking websites); Phila. Bar Assn. Prof'l Guidance Comm., Op. 2009-02 (2009), available at [http://www.philadelphiabar.org/WebObjects/PBARReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion\\_2009-2.pdf](http://www.philadelphiabar.org/WebObjects/PBARReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf).

136. N.Y.C. Bar Assn. Comm. on Prof'l & Judicial Ethics, Op. 2010-2, *supra* note 135; Phila. Bar Assn. Prof'l Guidance Comm., Op. 2009-02, *supra* note 135.

137. MODEL RULES OF PROF'L CONDUCT R. 4.1(a), 8.4. These prohibitions against deceptive practices also apply to a lawyer's agents and thus would apply to those employed to gain such information.

138. *Id.* at R. 4.1(a).

139. *Id.* at R. 8.4.

140. *Id.* at R. 8.5(a).

141. *See infra* Part V.B.

142. *See infra* Part VI.

143. N.Y.C. Bar Assn. Comm. on Prof'l & Judicial Ethics, Op. 2010-2, *supra* note 135.

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lawyer, either directly or through an agent, may contact an unrepresented person through a social networking website and request permission to access her web page to obtain information for use in litigation, without disclosing the reasons for the request, if that attorney or her agent used her real name and profile to send the “friend request.”<sup>144</sup> The New York Committee noted that “while there are ethical boundaries to such ‘friending,’ in our view they are not crossed when an attorney or investigator uses only truthful information to obtain access to a website, subject to compliance with all other ethical requirements.”<sup>145</sup> The New York Committee suggested that lawyers can and perhaps should seek the valuable information contained on unrepresented party’s Facebook pages, but, rather than engage in “trickery,” using truthful information promoted the expeditious resolution of disputes by opening avenues of information and uncovering relevant facts.<sup>146</sup> However, they noted that there are ethical “pitfalls” that arise from the informality of communicating over the web because it may be easier to deceive a person over the Internet than in the real world.<sup>147</sup> Thus, even in jurisdictions that allow “friending” using truthful information, precautions should be taken so that any communications could not be viewed as deceptive.

The use of “friending” gets more complicated when a party is represented by counsel. New York Professional Conduct Rule 4.2 requires the prior consent of the party’s lawyer be obtained or the conduct must be authorized by law.<sup>148</sup> Therefore, a lawyer is permitted to view and access the Facebook page of a represented party other than his or her client in pending litigation in order to secure information about that party for use in the lawsuit only if the lawyer does not “friend” the party and only accesses public pages posted by the party.<sup>149</sup> While it is more likely that the information required to effectuate service via Facebook could be obtained in jurisdictions that follow this approach because they have seemingly placed a greater emphasis on judicial economy rather than on providing strict ethical guidelines for attorneys, “friending” would require the use of only truthful means and only in the case that the defendant is not represented by counsel.<sup>150</sup> This would make it significantly more difficult to provide the court with enough information to authenticate that the page was that of the defendant and with information to verify to a reasonable certainty that the defendant had received noticed and was allowed an opportunity to be heard.<sup>151</sup>

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144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* However, accessing a witness’ public profile may be acceptable if no “subterfuge” were involved.

150. *Id.*

151. *See infra* Part VI.

*Global Business & Development Law Journal / Vol. 26**B. The Philadelphia Approach*

The Philadelphia Bar Association Professional Guidance Committee (“Philadelphia Committee”) addressed whether “friending” an adverse party would constitute an ethical violation and came to a contrary result.<sup>152</sup> There, an inquirer sought guidance on whether he could employ a third person to “friend” an adverse witness on Facebook to gain access to information without using a false name of a witness he knew to grant access to nearly everyone.<sup>153</sup> If the third party was granted access, the inquirer proposed that he would then evaluate the information for possible use in the pending litigation.<sup>154</sup> The Philadelphia Committee disposed of the issue of whether a third party could be employed by concluding that the lawyer would be responsible for the conduct under Rule 5.3 of the Pennsylvania Rules of Professional Conduct (“PRPC”) because he would have “ordered” the conduct, or, at the very least, “ratified the specific conduct involved with knowledge,” either of which would violate the rule.<sup>155</sup>

As to the central issue of whether the “friending” would run afoul of PRPC Rule 8.4, which prohibits dishonesty, fraud, deceit, or misrepresentation, or PRPC 4.1, which prohibits a lawyer from knowingly making a false statement of material fact to a third person, the Philadelphia Committee reasoned that even if it was obtained using the true name and account of the third party, the course of conduct would be deceptive.<sup>156</sup> The committee noted that the planned communication omitted a highly material fact: that the third party was doing so only because she wished to obtain information for the purpose of sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness.<sup>157</sup> The only reason for taking this back channel, rather than asking the witness directly for access, was indicative of the deceit involved.<sup>158</sup> Additionally, the fact that the witnesses’ information could be readily obtained by others who either could or could not be deceiving her did not alleviate the inquirer of the ethical responsibility not to engage in the same deception.<sup>159</sup> Because it would be difficult for an attorney to gather enough information to satisfy due process concerns unless the party has set limited or no privacy settings, and thus the information could be considered public, it would likely be difficult to effectuate service via Facebook in jurisdictions that follow this line of reasoning.

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152. Phila. Bar Assn. Prof’l Guidance Comm., Op. 2009-02 (2009), *supra* note 135.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

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### C. Other Approaches

Other jurisdictions make similarly strict interpretations of their ethical rules.<sup>160</sup> The Colorado Supreme Court held that no deception whatsoever is allowed under the Colorado Rules of Professional Conduct, saying that “[p]urposeful deception by an attorney licensed in our state is intolerable, even when undertaken as part of attempting to secure the surrender of a murder suspect . . . [and] we stand resolute against any suggestion that licensed attorneys in our state may deceive or lie or misrepresent, regardless of their reasons for doing so.”<sup>161</sup> A greater priority is seemingly placed on the ethics of the profession and how the profession is viewed publicly, rather than on the efficient resolution of claims. In these jurisdictions, gaining access to information for use in service via Facebook may only be allowed in situations in which the defendant has put in place limited or no privacy settings, or the attorney is completely forthcoming about the reasons for “friending” him or her.<sup>162</sup> If the latter avenue is taken, it seems unlikely a defendant would “add” the attorney or her agent as a friend. While the possibility exists for service via Facebook in each jurisdictional approach, some have considered the ethical implications to be outweighed by judicial economy, thereby making it easier to for attorneys and their agents to access defendants’ personal Facebook information in preparation for litigation.<sup>163</sup>

### V. HOW FACEBOOK COULD BE USED IN FEDERAL COURT FOR SERVING DEFENDANTS ABROAD

Problems serving elusive defendants abroad have long plagued the federal court system, and Facebook may be an effective way of providing litigators an avenue to get over the initial hurdle in bringing suit.<sup>164</sup> As the world has grown smaller and the ways in which we communicate have increased, courts have slowly modernized the concept of service of process.<sup>165</sup> After the relevant statutory requirements have been met, the constitutional aspects of service, given the entirety of the circumstances, must be considered. The ubiquitous stature of Facebook may provide not only a reasonable means of apprising a defendant abroad of an action against her, but it also may be the most likely avenue to

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160. See, e.g., *In re* Conduct of Gatti, 8 P.3d 966, 976 (Or. 2000) (holding that no deception at all is permissible by a private or a government lawyer, even rejecting proposed carve-outs for government or civil rights investigations); *In re* Pautler, 47 P.3d 1175 (Colo. 2002) (holding that no imminent public harm exception existed to the ethical principle that a lawyer may not engage in deceptive conduct).

161. *In re Pautler*, 47 P.3d at 1176, 1182.

162. Phila. Bar Assn. Prof'l Guidance Comm., Op. 2009-02, *supra* note 135.

163. N.Y.C. Bar Assn. Comm. on Prof'l & Judicial Ethics, Op. 2010-2, *supra* note 135.

164. See *New England Merchants Nat'l Bank v. Iran Power Generation & Transmission Co.*, 495 F. Supp. 73, 76 (S.D.N.Y. 1980); *Mayoral-Amy v. BHI Corp.*, 180 F.R.D. 456, 458 (S.D. Fla. 1998).

165. See *New England Merchants Nat'l Bank*, 495 F. Supp. at 78.

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achieve service of process. This is particularly true when a current address is unavailable, and the defendant has taken affirmative steps to elude being served.

Problems outlined by the *Rio* court in authenticating that the owner of the email account and the defendant are one and the same<sup>166</sup> is in many ways easier for a Facebook profile because the amount of information provided by users is much greater.<sup>167</sup> Verification can be achieved at multiple levels: photographs, personal relationships, information about education, and outdated addresses can all be cross-checked. In addition, because time-stamp software is now currently available for Facebook messages,<sup>168</sup> and may be possible for email,<sup>169</sup> a court may be reasonably certain that the owner of the Facebook page has in fact received the relevant documents based upon whether their message was “seen,” as well as their other time-stamped activities: responses to messages, status update posts, and comments made on friends’ posts.<sup>170</sup> Due Process would be satisfied because it would pass constitutional muster: a court could be reasonably certain that the defendant was apprised of the action against her and was allowed the opportunity to be heard.

Ethical and privacy issues associated with obtaining enough information from a defendant’s Facebook profile for a court to engage in the *Rio* Due Process balancing can be solved by weighing the judicial efficiency aspects of allowing service via Facebook over ethical considerations in allowing attorneys or their agents to “friend” foreign defendants. While it may be imprudent to allow the practice across the board due to the privacy and ethical concerns inherent in social media and litigation, courts could allow the practice for the sole purpose of gaining information to serve process and could limit it further by only allowing the relevant information to be seen *in camera* by the court before service is sent. Either approach would narrow the scope of problems arising from the ethical and privacy concerns laid out earlier, while simultaneously allowing for greater judicial efficiency in serving defendants abroad, and ultimately tipping the policy considerations towards allowing Facebook for service of process.<sup>171</sup>

## VII. CONCLUSION

Continuing the expansion of electronic service of process by allowing Facebook to be used in limited circumstances is the next step in the evolution of the jurisprudence. As evidenced by the 2012 initial public offering of

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166. See *Rio Properties, Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1018 (9th Cir. 2002).

167. Shultz, *supra* note 5.

168. *Sending a Message*, *supra* note 119.

169. Hedges, *supra* note 24.

170. Shultz, *supra* note 5.

171. See N.Y.C. Bar Assn. Comm. on Prof’l & Judicial Ethics, Op. 2010-2, *supra* note 135.

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Facebook,<sup>172</sup> as well as the one billion active-user milestone, the company continues to cement itself in global culture.<sup>173</sup> As more people around the globe interact daily with the site, the greater the chances that it can be used to achieve the central aspects of Due Process: notice and the opportunity to be heard.

While the problems of authenticating and verifying that notice was provided to the defendant may be unsolvable in certain situations, there are many other situations in which Facebook could be used—namely, when privacy settings are limited or non-existent, or when ethical rules do not preclude the use of “friending” by litigators. In these situations, it makes sense from a position of judicial economy to allow international litigators another avenue to achieve service of process abroad and effectively obtain relief for their clients. However, if service of process via Facebook becomes common practice, one thing may still remain uncertain: whether you accept that next friend request.

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172. Evelyn M. Rusli & Peter Eavis, *Facebook Raises \$16 Billion in I.P.O.*, N.Y. TIMES (May 17, 2012), <http://dealbook.nytimes.com/2012/05/17/facebook-raises-16-billion-in-i-p-o/>.

173. *Key Facts*, *supra* note 73.