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## Rethinking the Process of Service of Process

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## COMMENT

### RETHINKING THE PROCESS OF SERVICE OF PROCESS

MARY K. BONILLA\*

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## I. INTRODUCTION

Substance always yields to procedure.<sup>1</sup> More specifically, prior to a court hearing the merits of a legal argument, that argument must first meet requisite procedural requirements in its presentation.<sup>2</sup> In federal courts, civil actions must conform to the Federal Rules of Civil Procedure.<sup>3</sup> To successfully initiate a lawsuit, Federal Rule of Civil Procedure 4<sup>4</sup> (Federal Rule 4) requires providing sufficient notice to a defendant through service of process.<sup>5</sup> However, technology continues to rapidly improve,<sup>6</sup> while our procedural rules, including Federal Rule 4, have been slow to adapt to those changes.<sup>7</sup> In light of these considerations, it is time we start allowing electronic service of process.

If we do not take the time to modernize our procedural law, procedural shortcomings could cause extremely persuasive substantive arguments to fail through no fault of their own. Regarding procedure, strong substantive arguments may not succeed in the initial hurdle of even getting to the court,

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1. See Don Wolfensberger, *Long-Serving Dingell Is a Master of House Traditions*, ROLL CALL (June 11, 2013, 12:12 PM), <https://www.rollcall.com/2013/06/11/long-serving-dingell-is-a-master-of-house-traditions-wolfensberger/> [<https://perma.cc/55GB-RHB3>] (“[Representative John Dingell] is often quoted to the effect: ‘If you let me write the procedure and I let you write the substance, I’ll beat you every time.’ (Only he used a more colorful verb than ‘beat.’)”; *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (finding the federal rule of procedure controlling, thus allowing for the case to proceed on substantive grounds, where the applicability of the state rule would have barred the claim).

2. Although Federal Rule of Civil Procedure 1 explains how these rules “should be” administered in federal court proceedings, recent amendment notes emphasize the advisory committee’s disapproval of procedural misconduct by parties, indicating a preference towards strict application of the rules. FED. R. CIV. P. 1. FED. R. CIV. P. 1 advisory committee’s note to 2015 amendment.

3. FED. R. CIV. P. 1.

4. FED. R. CIV. P. 4.

5. An exception to this rule may apply if a plaintiff requests that a defendant waive service under Federal Rule 4(d). However, requesting a waiver of service still involves providing notice of an action to a defendant, albeit in a different manner than actual service of process. FED. R. CIV. P. 4(d).

6. See Carla Tardi, *Moore’s Law*, INVESTOPEDIA (Aug. 27, 2020), <https://www.investopedia.com/terms/m/mooreslaw.asp> [<https://perma.cc/YX2Y-BHJF>] (defining Moore’s Law as the proposition that computer speed and capability is expected to increase exponentially every few years).

7. See Henry H. Perritt Jr., *Jurisdiction in Cyberspace*, 41 VILL. L. REV. 1, 113 (1996) (“[T]echnology makes communication tantamount to service of process in remote places much easier, although the law of service of process is adapting slowly to recognize electronic methods as good service.”); see also Robert M. Bloom & Janine A. Hanrahan, *Back to the Future: The Revival of Pennoyer in Personal Jurisdiction Doctrine and the Demise of International Shoe*, 56 SAN DIEGO L. REV. 581, 584 (2019) (discussing tensions between traditional notions of jurisdiction and our increasingly mobile society).

regardless of the case's merit. This could result in vacated or dismissed judgments.<sup>8</sup> Further, procedural shortcomings can result in unfairness.

For example, Federal Rule 4(e)(1) allows for domestic<sup>9</sup> service of process by “following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made.”<sup>10</sup> However, several states recently began reforming their state rules of civil procedure, including adding amendments to allow for electronic service.<sup>11</sup> In a set of federal rules premised upon uniformity,<sup>12</sup> there should not be different standards for what is deemed “reasonably calculated”<sup>13</sup> based upon which state an action is brought in.

There will always be cases of first impression<sup>14</sup> in our court system that can result in unpredictable outcomes, but procedural requirements should not create an insurmountable burden. Our judicial system should strive to achieve judgments based on the merits of an argument, rather than default judgements for lack of procedural compliance.

This Comment proposes that service of process<sup>15</sup> should be allowed, even encouraged, through electronic transmission. Electronic methods can be more efficient—and cheaper—than using a process server, but these

8. See *In re Adoption of K.P.M.A.*, 341 P.3d 38, 51–52 (Okla. 2014) (holding notice through Facebook message failed to satisfy due process requirements and consequently vacating a judgment terminating a father's parental rights); FED. R. CIV. P. 12(b)(5) (allowing for a party to assert a motion to dismiss for “insufficient service of process”).

9. Compare FED. R. CIV. P. 4(e) (referring to service methods for an individual “in a judicial district of the United States”), with FED. R. CIV. P. 4(f) (providing methods to serve individuals within a foreign country).

10. FED. R. CIV. P. 4(e)(1).

11. Texas and Alaska amended their state civil procedure rules on service in 2020, while Utah provided for service through e-mail in 2019. See ALASKA R. CIV. P. 4(e); TEX. R. CIV. P. 106(b); see also UTAH R. CIV. P. 5(b)(3)(B)(i)–(ii). California initially temporarily amended their laws during COVID-19 to allow electronic service with consent and has since extended the effective date of this statute. CAL. CODE CIV. PROC. § 1010.6.

12. See Katherine A. Rocco, Note, *Rule 26(a)(B) of the Federal Rules of Civil Procedure: In the Interest of Full Disclosure*, 76 FORDHAM L. REV. 2227, 2230 (2008) (discussing procedural uniformity in federal courts as a primary duty of the Advisory Committee appointed to draft the Federal Rules of Civil Procedure).

13. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950).

14. A case of first impression presents an issue that the court has not previously addressed prior to the current instance at hand. In the context of service of process, matters of first impression generally dealt with requests to utilize new methods of service. See, e.g., *In re Int'l Telemedia Assocs., Inc.*, 245 B.R. 713, 716 (Bankr. N.D. Ga. 2000) (describing a motion to authorize service by e-mail as “a matter of first impression”).

15. FED. R. CIV. P. 4.

methods might be more prone to being contested by an opposing party.<sup>16</sup> Part I of this Comment discusses the benefits of moving to a modern means of serving parties to lawsuits. Part II presents a historical overview of service of process and explains landmark cases which shaped the foundation of our current system. Part III examines shortcomings in this system, including the implicit limitations of Federal Rule 4 as well as difficulties with personal or in-person service.

Part IV begins by discussing the development and immediate effect of the COVID-19 pandemic. Further, Part IV highlights how COVID-19 exposed the need to improve and modernize the current requirements for effective service of process. While considering potential takeaways from COVID-19, Part IV of this Comment poses potential solutions to the aforementioned flaws and assesses potential arguments against implementing modern changes.

## II. HISTORICAL OVERVIEW

### A. *Background of Federal Rule of Civil Procedure 4*

Several procedural rules work together to ensure parties receive adequate notice of lawsuits brought against them.<sup>17</sup> First, the Due Process Clause of the Fourteenth Amendment to the United States Constitution commands “nor shall any State deprive any person of life, liberty, or property, without due process of law.”<sup>18</sup> The protections in the Due Process Clause “require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.”<sup>19</sup> The effect of notice prior to deprivation is to give an individual the information necessary to prepare and defend against claims brought against them.<sup>20</sup>

In addition to the procedural constraints of the Fourteenth Amendment, further procedural requirements are found in the Federal Rules of Civil

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16. Generally, this can include a defendant filing a “motion to dismiss for insufficient service of process . . . .” *Rio Props., Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1013 (9th Cir. 2002).

17. This Comment focuses on procedural rules governing service of process supplied by the United States Constitution’s Fourteenth Amendment, Federal Rule of Civil Procedure 4, and the *Mullane* constitutional standard.

18. U.S. CONST. amend. XIV, § 1.

19. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950).

20. *See Greene v. Lindsey*, 456 U.S. 444, 449 (1982) (“The fundamental requisite of due process of law is the opportunity to be heard.” (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914))).

Procedure and, in particular, Federal Rule 4.<sup>21</sup> To analyze the requirements of Federal Rule 4, attention should first focus on the Rules Enabling Act (the Act).<sup>22</sup> Congress passed this Act in 1934,<sup>23</sup> and delegated to “[t]he Supreme Court . . . the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . .”<sup>24</sup> Three years later, under the authority of the Act, the Supreme Court adopted the Federal Rules of Civil Procedure.<sup>25</sup> As explained in Federal Rule 1 (“Scope and Purpose”), the Federal Rules of Civil Procedure “should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”<sup>26</sup>

Federal Rule 4 sets forth all the practicalities of service of process.<sup>27</sup> To properly file suit,<sup>28</sup> Federal Rule 4 requires plaintiffs to provide alleged defendants with notice of the action against them. This entails delivering both the summons and complaint to that party within a certain amount of time, generally ninety days from the time the complaint is filed.<sup>29</sup> In some instances, the defendant may agree to waive this formal notification.<sup>30</sup> Timely returning a waiver results in the defendant receiving more time to

21. FED. R. CIV. P. 4.

22. 28 U.S.C. § 2072 (containing the Act that includes the Supreme Court’s power to prescribe “[r]ules of procedure and evidence”). See generally Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982) (tracing the history of the Act in light of the “abbreviated” 1934 legislative record).

23. See Rocco, *supra* note 12, at 2230 (stating the Rules Enabling Act came “in response to pressure from an influential group of leaders from the legal community who pressed for uniformity in the federal courts and outcomes based on merit, rather than pleading skill”).

24. 28 U.S.C. § 2072(a).

25. See Jay Tidmarsh, *Procedure, Substance, and Erie*, 64 VAND. L. REV. 875, 878 n.5 (2011) (detailing the enactment of the Rules Enabling Act that led to the creation of the Federal Rules of Civil Procedure); see also Rocco, *supra* note 12, at 2231 n.31 (describing the history of the Federal Rules of Civil Procedure); FED. R. CIV. P. 1 advisory committee’s note to 1937 adoption (“These rules are drawn under the authority of the Act of June 19, 1934 . . .”).

26. FED. R. CIV. P. 1 (explaining the purpose of the Federal Rules of Civil Procedure).

27. FED. R. CIV. P. 4.

28. See Keely Knapp, Comment, *#serviceofprocess @socialmedia: Accepting Social Media for Service of Process in the 21st Century*, 74 LA L. REV. 547, 549 (2014) (“In the context of litigation, service of process is essential to the initiation of a suit.”).

29. Federal Rule 4(m) declares service is required within ninety days of filing the complaint (unless good cause is shown by the plaintiff for failing to meet this deadline), lest the action potentially face dismissal. FED. R. CIV. P. 4(e)–(m).

30. FED. R. CIV. P. 4(d)(1) (explaining the process of requesting a waiver).

answer the complaint.<sup>31</sup> Consequently, Federal Rule 4 contains provisions that govern both what and who must be served<sup>32</sup> to properly comport with the demands of the Fourteenth Amendment. Alongside Federal Rule 4 and the Constitution, there is also a constitutional standard concerning proper service of process.

B. *The Constitutional Standard for Adequate Service of Process*

In *Mullane v. Central Hanover Bank & Trust Co.*,<sup>33</sup> the Supreme Court established that due process requires “notice 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>34</sup> There, the defendant bank acted as trustee of a common trust fund comprising of 113 smaller trusts.<sup>35</sup> After “petition[ing] the Surrogate’s Court for settlement of its first account,”<sup>36</sup> the bank relied on a New York banking law to provide notice of such settlement to beneficiaries<sup>37</sup> through newspaper publication.<sup>38</sup> As to beneficiaries with a known location, the Court held statutory notice through newspaper publication was “not reasonably calculated to reach those who could easily be informed by other means at hand.”<sup>39</sup> By its holding in *Mullane*, the Court reinforced that the use of

31. Federal Rule 12(a)(1)(A)(i)–(ii) states a defendant must answer the complaint “within 21 days after being served with the summons and complaint,” unless they “timely waived service under Rule 4(d).” In the latter instance, they have 60 days after the waiver request was sent. *See* FED. R. CIV. P. 12(a) (“Time to Serve a Responsive Pleading.”); *see also* FED. R. CIV. P. 4(d)(3) (allowing a defendant who timely waives service prior to being served additional time to answer the complaint).

32. FED. R. CIV. P. 4.

33. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306 (1950).

34. *Id.* at 314 (describing reasonably calculated, adequate notice as “[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality . . .”).

35. *Id.* at 309.

36. *Id.*

37. The *Mullane* Court notes the record before it lacked identifying information for some beneficiaries. *Id.* Thus, the trust had two classes of beneficiaries: those with a known location and beneficiaries whose “interests or whereabouts could not with due diligence be ascertained . . .” *Id.* at 309–10, 317.

38. *Id.* at 309–10. Pursuant to the statute’s minimum requirements, the newspaper publication provided the trust company’s name and address, and included minimal information regarding the common trust fund itself, such as its name and establishment date. *Id.* at 310. The only information serving to alert beneficiaries was “a list of all participating estates, trusts or funds.” *Id.*

39. *Id.* at 319. That other means existed to easily inform locatable beneficiaries was more than a mere hypothetical. Upon investment in the common trust fund, participating beneficiaries received notice by mail. *Id.* at 310, 318–19. The Court made it abundantly clear the bank knew of a way to directly and reliably contact some beneficiaries, which it could have utilized in this instance. *Id.*

service of process ensures a party receives actual notice<sup>40</sup> of a pending lawsuit. Proper service of process ensures parties are given protection under the Constitution; those standards are met<sup>41</sup> by the requirement that the actual service of the summons and complaint complies with due process.<sup>42</sup> As time passes, and as technology evolves, what qualifies under the standard of “reasonably calculated” notice has, and will continue to, change.<sup>43</sup>

### C. *Analyzing Landmark Decisions*

Requests for innovative methods of substituted service usually arise in the context of a plaintiff’s attempts to effectuate service on international defendants.<sup>44</sup> Federal Rule 4(f)<sup>45</sup> allows a foreign individual to be served “by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention . . . .”<sup>46</sup> Further, “[Article 10 of the Hague Convention] permits service of process through alternative means like ‘postal channels’ . . . provided that the destination state does not object to those means.”<sup>47</sup> However, there are

40. See *Pennoyer v. Neff*, 95 U.S. 714, 727 (1878), *overruled in part by Shaffer v. Heitner*, 433 U.S. 186 (1977) (invalidating a judgment rendered on a non-resident party, as service of process through publication was ineffective in providing them notice).

41. U.S. CONST. amend. XIV, § 1.

42. See *Rio Props., Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1016 (9th Cir. 2002) (“Even if facially permitted by Rule 4(f)(3), a method of service of process must also comport with constitutional notions of due process.”).

43. See *Grannis v. Ordean*, 234 U.S. 385, 395–96 (1914) (discussing the role of constructive notice in due process).

44. See *SEC v. Anticevic*, No. 05 CV 6991(KMW), 2009 WL 361739, at \*3 (S.D.N.Y. Feb. 13, 2009) (permitting service on a foreign defendant through publication where the defendant’s address is unknown and the means chosen complied with the constitutional standard of due process); *Hardin v. Tron Found.*, No. 20-CV-2804(VSB), 2020 WL 5236941, at \*1 (S.D.N.Y. Sep. 1, 2020) (authorizing service of process through alternative electronic means after plaintiff could not locate foreign defendant, despite using a private investigator).

45. See Ronald J. Hedges, Kenneth N. Rashbaum & Adam C. Losey, *Electronic Service of Process at Home and Abroad: Allowing Domestic Electronic Service of Process in the Federal Courts*, 4 FED. CTS. L. REV. 55, 56 n.5 (2010) (comparing electronic service means allowed internationally to the prevention of those means domestically).

46. FED. R. CIV. P. 4(f)(1). The advisory committee notes to Federal Rule 4’s 1993 amendment “calls attention to the important effect of the Hague Convention and other treaties bearing on service of documents in foreign countries and favors the use of internationally agreed means of service.” FED. R. CIV. P. 4 advisory committee’s note to 1993 amendment. This verbatim helps explain the role of the Hague Convention, which is referred to as a “multi-lateral treaty.” Ronald J. Hedges, Kenneth N. Rashbaum & Adam C. Losey, *Electronic Service of Process at Home and Abroad: Allowing Domestic Electronic Service of Process in the Federal Courts*, 4 FED. CTS. L. REV. 55, 64–65 (2010).

47. *WhosHere, Inc. v. Orun*, No. 1:13-cv-00526-AJT-TRJ, 2014 WL 670817, at \*3 (E.D. Va. Feb. 20, 2014) (indicating Turkey’s objection “is specifically limited to the enumerated means of service



instances where the [Hague] Convention does not apply, such as “where the address of the person being served is unknown.”<sup>48</sup> Consequently, when faced with these circumstances, Federal Rule 4(f) can step in to assist with effectuating service, leading to these groundbreaking decisions.<sup>49</sup>

In *New England Merchants National Bank v. Iran Power Generation & Transmission Co.*,<sup>50</sup> the court permitted plaintiffs to serve pleadings on foreign defendants through telex.<sup>51</sup> Telex subscribers can use teleprinters, or other telegraphic machines, over a two-way international switching network.<sup>52</sup> This provided a secure and direct communication service between parties.<sup>53</sup> The court in *New England Merchants* reasoned, “[c]ourts, 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.<sup>54</sup> Electronic communication via satellite can and [does] provide instantaneous transmission of notice and information.”<sup>55</sup> Ironically, this decision arrived

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in Article 10” and consequently finding proposed electronic means of service did not contravene the Hague Convention).

48. Hedges, Rashbaum & Losey, *supra* note 45, at 65.

49. FED. R. CIV. P. 4(f)(1)–(3). Of these subsections, Federal Rule 4(f)(3) grants a court considerable discretion to “tailor the method of service to the circumstances so long as that method [(1)] is not prohibited by international agreement and [(2)] comports with constitutional notions of due process.” *WhosHere, Inc. v. Orun*, No. 1:13-cv-00526-AJT-TRJ, 2014 WL 670817, at \*3 (E.D. Va. Feb. 20, 2014) (citing *SEC v. Anticevic*, No. 05 CV 6991(KMW), 2009 WL 361739, at \*3 (S.D.N.Y. Feb. 13, 2009)).

50. *New Eng. Merch. Nat'l Bank v. Iran Power Generation & Transmission Co.*, 495 F. Supp. 73 (S.D.N.Y. 1980).

51. *See id.* at 81 (emphasizing that having little precedent for its decision did not preclude the court from making such a decision).

52. *See* Svetlana Gitman, Comment, *(Dis)Service of Process: The Need to Amend Rule 4 to Comply with Modern Usage of Technology*, 45 J. MARSHALL L. REV. 459, 464 n.20 (2012) (explaining the role of telex in the Iranian hostage crisis); *see also* Knapp, *supra* note 28, at 555 n.50 (“The Telex system transmitted typed messages over a network, usually a telephone line, and then printed or displayed the messages on a monitor.”).

53. *See* Elizabeth Neuffer, *Telegrams Are on the Wane*, N.Y. TIMES (Aug. 7, 1987), <https://www.nytimes.com/1987/08/07/style/telegrams-are-on-the-wane.html> [https://perma.cc/WXC8-JYXI] (evaluating the decline of the telegram in favor of the “swifter telex”); Peter H. Lewis, *THE EXECUTIVE COMPUTER; Sending a Telex From Your Desk*, N.Y. TIMES (Aug. 14, 1988), <https://www.nytimes.com/1988/08/14/business/the-executive-computer-sending-a-telex-from-your-desk.html> [https://perma.cc/9ZEH-2C4X] (highlighting “greater security” as a benefit of telex use).

54. *See* Adam Liptak, *How to Tell Someone She's Being Sued, Without Really Telling Her*, N.Y. TIMES (Nov. 19, 2007), <http://www.nytimes.com/2007/11/19/us/19bar.html> [https://perma.cc/P3BV-5G7N] (“Even as symbolism, legal notice advertising in newspapers smells of another era, of telegrams and carbon paper.”).

55. *New England Merchants*, 495 F Supp. at 81.

in 1980, the same decade in which telex use began to decline in favor of newer, high-speed methods of communication.<sup>56</sup>

With technology continuously developing quickly,<sup>57</sup> federal courts are inevitably addressing the question of whether new technological methods of communication satisfy the *Mullane* standard in various contexts.<sup>58</sup> This includes assessing the viability, for service of process purposes, of technologies such as facsimile (fax),<sup>59</sup> e-mail,<sup>60</sup> and social networking websites like Facebook<sup>61</sup> and LinkedIn.<sup>62</sup> Yet, this has largely been in a reactive, rather than proactive, manner.<sup>63</sup> For example, the fax machine emerged as a popular method of business communications in the 1980s.<sup>64</sup> By 1997, fax machine sales peaked at 3.6 million stand-alone machines.<sup>65</sup>

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56. Lewis, *supra* note 53 (categorizing the system as extinct, and the machinery as “bulky, noisy and exasperatingly slow”).

57. Moore’s Law predicts “the number of transistors that can be packed into a given unit of space will double about every two years.” As of 2020, this doubling may occur at an even quicker pace than two years. Tardi, *supra* note 6.

58. See *New England Merchants*, 495 F. Supp. at 81 (directing plaintiffs serve Iranian defendants by sending a telex message); *In re Int’l Telemedia Assocs., Inc.*, 245 B.R. 713, 720 (Bankr. N.D. Ga. 2000) (finding Federal Rule 4(f)(3) authorized serving a defendant through fax and e-mail due to the defendant’s unknown physical whereabouts); *Rio Props., Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1017–18 (9th Cir. 2002) (allowing service by e-mail when the defendant communicated solely through e-mail); *FTC v. PCCare247 Inc.*, No. 12 Civ. 7189(PAE), 2013 WL 841037, at \*6 (S.D.N.Y. Mar. 7, 2013) (permitting service by Facebook and e-mail when plaintiffs’ “good faith efforts to serve defendants by other means” failed); *WhosHere, Inc. v. Orun*, No. 1:13-cv-00526-AJT-TRJ, 2014 WL 670817, at \*4 (E.D. Va. Feb. 20, 2014) (permitting service by e-mail, Facebook, and LinkedIn, given “defendant himself provided plaintiff with these e-mail contacts, and also referred plaintiff to the social networking profiles which appear to be regularly viewed and maintained by defendant”).

59. See generally *Int’l Telemedia*, 245 B.R. at 720 (permitting service by e-mail and fax).

60. See generally *Rio Props., Inc.*, 284 F.3d at 1017 (allowing service by e-mail).

61. See generally *Baidoo v. Blood-Dzraku*, 5 N.Y.S.3d 709, 716 (N.Y. Sup. Ct. 2015) (granting service by Facebook message).

62. See generally *WhosHere, Inc.*, 2014 WL 670817, at 1 (allowing service “by [e-mail] and through two social networking sites, Facebook and LinkedIn”).

63. To clarify, this Comment advocates for proactive recognition of trusted and secure electronic methods of service—like e-mail, Facebook, or LinkedIn—in certain circumstances. This is contrary to desiring predictive recognition of new or upcoming electronic communication services that may lack security features.

64. By the late 1980s, telex use began declining. In 1988, “modern electronic message systems [reduced] the telex universe by 10 percent to 15 percent a year.” Lewis, *supra* note 53.

65. These sales figures relate only to stand-alone machines and do not include multiuse machines, which can fax and copy documents, amongst other capabilities. Robert Johnson, *The Fax Machine Refuses to Die*, N.Y. TIMES (Mar. 29, 2005), <https://www.nytimes.com/2005/03/29/technology/the-fax-machine-refuses-to-die.html> [https://perma.cc/NVX6-MX86].

However, it was not until the 2000s when federal courts began permitting service of process by fax.<sup>66</sup>

In 2002, the United States Court of Appeals for the Ninth Circuit allowed service of process through e-mail as an alternate method in *Rio Properties, Inc. v. Rio International Interlink*.<sup>67</sup> The court observed that the defendant created a scenario in which e-mail was the only way to reach it.<sup>68</sup> This is because the defendant acquiesced in a business structure where they not only desired contact through e-mail but also declined to list an “easily discoverable street address in the United States or in Costa Rica.”<sup>69</sup> Thus, the defendant’s use and preference of e-mail communication supported the likelihood of an e-mail actually supplying notice to it.<sup>70</sup> Given the circumstances, the court considered “[e-mail] may be the only means of effecting service of process.”<sup>71</sup> Although *Rio Properties, Inc.* was a step in the right direction towards allowing electronic service, it still represents a reactive decision.<sup>72</sup>

Over ten years later, in *Baidoo v. Blood-Dzraku*,<sup>73</sup> the New York Supreme Court found that “[u]nder the circumstance presented here, service by Facebook, albeit novel and non-traditional, is the form of service that most comports with the constitutional standards of due process.”<sup>74</sup> To assist the court in arriving at this conclusion, the plaintiff in *Baidoo* proved they could not locate the defendant to use “nail and mail” or other alternate service

66. Angela Upchurch, “Hacking” Service of Process: Using Social Media to Provide Constitutionally Sufficient Notice of Process, 38 UALR L. REV. 559, 568–69 (2016) (“In fact, federal courts did not begin ordering service of process via facsimile (a technology similar to telex) until the early 2000s.”).

67. *Rio Props., Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1017–18 (9th Cir. 2002) (holding service through e-mail was both proper and “the method of service most likely to reach” the defendant).

68. Contrary to previous cases cited by the Ninth Circuit, this defendant “had neither an office nor a door; it had only a computer terminal.” *Id.* at 1018.

69. *Id.*

70. The Ninth Circuit opined “[i]f any method of communication is reasonably calculated to provide RII with notice, surely it is email.” *Id.*

71. *Id.*

72. As with the decision to allow service through telex in *New England Merchants*, e-mail use became popular some time before the 2002 decision in *Rio Properties, Inc.* See Zoe Niesel, *Machine Learning and the New Civil Procedure*, 73 SMU L. REV. 493, 504 (2020) [hereinafter *Machine Learning*] (“In 2002, 9.1% of the entire global population was using the internet—approximately 569 million people.”).

73. *Baidoo v. Blood-Dzraku*, 5 N.Y.S.3d 709 (N.Y. Sup. Ct. 2015).

74. See *id.* at 716 (finding the plaintiff lacked knowledge of the defendant’s location to utilize substitute service and allowing service of a divorce summons through Facebook).

methods.<sup>75</sup> Notwithstanding the plaintiff's diligent efforts, they were unable to obtain a physical address to reach the defendant.<sup>76</sup> The court made clear "[i]nasmuch as plaintiff is unable to find defendant, personal delivery of the summons to [the defendant] is an impossibility."<sup>77</sup> Following this discussion, the court shifted its focus to whether the plaintiff's proposed means of service through Facebook were "reasonably calculated to apprise defendant that he is being sued for divorce."<sup>78</sup>

In allowing service through Facebook message, the court in *Baidoo* emphasized their decision would be based on constitutional principles rather than precedent—or lack thereof.<sup>79</sup> To satisfy the requirements of due process, the plaintiff submitted an affidavit showing the account truly belonged to the defendant, and the defendant logged in often enough to see the message.<sup>80</sup> Finally, the court addressed whether a backup method of service was necessary.<sup>81</sup> While the court directed the plaintiff to notify the defendant of the pending summons via call and text, it refused to prescribe publication as an additional backup method of service.<sup>82</sup>

Likewise, the court in *WhosHere, Inc. v. Orun*<sup>83</sup> utilized a similar test before allowing LinkedIn as a method of alternate service.<sup>84</sup> Here too, the court sought proof of actual account ownership and regular use.<sup>85</sup> Although

75. Despite their marriage in 2009, the parties in *Baidoo* never lived together. *Id.* at 712. Further, the plaintiff possessed no knowledge of the defendant's physical location. *Id.*

76. Among other avenues, plaintiff attempted to locate the defendant by hiring an investigator, searching for a forwarding address, and contacting the DMV. *Id.* at 712. Further, the defendant "refused to make himself available to be served with divorce papers." *Id.*

77. *Id.*

78. *Id.* at 713.

79. *See id.* at 714 ("The central question is whether the method by which plaintiff seeks to serve defendant comports with the fundamentals of due process by being reasonably calculated to provide defendant with notice of the divorce.").

80. This evidence revealed frequent Facebook exchanges between the parties to show the defendant regularly used that specific account. *Id.* at 714–15.

81. *Id.* at 714–15.

82. The court discussed that publication in a widely circulated newspaper, one that theoretically could reach the defendant, such as the New York Post, is expensive, costing nearly \$1,000 a week, and even then, extremely unlikely to provide any notice to the defendant. *Id.* at 716.

83. *WhosHere, Inc. v. Orun*, No. 1:13-cv-00526-AJT-TRJ, 2014 WL 670817 (E.D. Va. Feb. 20, 2014).

84. *See id.* at \*4 (holding service through a defendant's e-mail, LinkedIn, and other accounts was permissible and likely to provide notice, given defendant regularly contacted plaintiffs through these accounts).

85. *See Upchurch, supra* note 66, at 573 ("[T]he court required some proof that the defendant owned the social media account and made regular use of it."); *WhosHere, Inc.*, 2014 WL 670817, at \*4

*Baidoo* did not involve Federal Rule 4,<sup>86</sup> the court conscientiously required the plaintiff to answer several key questions raised in prior cases.<sup>87</sup> Further, these cases created a standard of proof by requiring the plaintiffs in *Rio Properties, Inc.* and *Baidoo* to persuade the court that the desired methods of service were “reasonably calculated.”<sup>88</sup> Thus, this line of cases established a test that could translate well to a federal level.<sup>89</sup>

In these cases, the courts often noted whether parties made previous attempts at in-person service or service by publication (traditional methods), why those attempts failed, and occasionally still required traditional methods<sup>90</sup> alongside those ultimately allowed.<sup>91</sup> Eventually, federal courts, in certain circumstances, appeared to relax the need for an additional traditional method to be utilized before it would consider allowing service via a modern alternative method.<sup>92</sup> Most often, such a situation arose when a defendant communicated with the plaintiff through an e-mail account or otherwise demonstrated regular use of that account (despite avoiding in-person service).<sup>93</sup>

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(finding “the social networking profiles . . . appear to be regularly viewed and maintained by defendant”).

86. New York’s Domestic Relations Law governed service of the divorce summons in this case. *Baidoo*, 5 N.Y.S.3d at 711.

87. Previous courts emphasized desiring proof of the defendant’s actual ownership of a Facebook account, given “anyone can make a Facebook profile using real, fake, or incomplete information, and thus, there is no way for the Court to confirm’ whether the Facebook page belongs to the defendant to be served.” *FTC v. PCCare247 Inc.*, No. 12 Civ. 7189(PAE), 2013 WL 841037, at \*5 (S.D.N.Y. Mar. 7, 2013) (quoting *Fortunato v. Chase Bank USA, N.A.*, No. 11 Civ. 6608(JFK), 2012 WL 2086950, at \*2 (S.D.N.Y. June 7, 2012)).

88. *See id.* at \*5 (quoting *Fortunato*, 2012 WL 2086950, at \*2).

89. *See id.* (quoting *Fortunato*, 2012 WL 2086950, at \*2).

90. Use of the phrase “traditional methods” refers to those prescribed by the text of Federal Rule 4. *See generally* FED. R. CIV. P. 4(e).

91. *See Rio Props., Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1013 (9th Cir. 2002) (reviewing plaintiff’s attempts at domestic service, including efforts taken to send copies of the summons and complaint to multiple parties involved); *SEC v. Anticevic*, No. 05 CV 6991(KMW), 2009 WL 361739, at \*4 (S.D.N.Y. Feb. 13, 2009) (considering among “discretionary factors” that plaintiff attempted to serve the defendant twice, and failed each time, weighing in favor of an alternate method); *Fortunato v. Chase Bank USA, N.A.*, No. 11 Civ. 6608(JFK), 2012 WL 2086950, at \*2 (S.D.N.Y. June 7, 2012) (stating the “[d]efendant’s process server made numerous attempts to serve” a party and hired an investigator).

92. *See PCCare247 Inc.*, 2013 WL 841037, at \*4–5 (supporting service through e-mail as a backup method of service alongside proposed service through Facebook, as together they would likely provide notice).

93. *See id.* at \*4 (discussing the likelihood of service through e-mail to provide sufficient notice when one defendant previously used their account in question to contact the court).

Consequently, the decision to allow service by nontraditional methods highlights a unique dilemma presented by *Mullane*.<sup>94</sup> When the Supreme Court decided *Mullane*, over seventy years ago, the Court's holding provided for flexibility,<sup>95</sup> yet no "modern technology" would have existed at that time for the Court to contemplate. "Reasonableness" is inherently subjective.<sup>96</sup> When lawyers propose substitute service methods, the *Mullane* standard adapts to provide for their request, so long as notice is "reasonably calculated, under all the circumstances."<sup>97</sup> This shows the standard can continue to work for the proposed modernized service<sup>98</sup> in that it is adaptable.

### III. COMPLICATIONS IN THE INTERPRETATION & APPLICATION OF FEDERAL RULE OF CIVIL PROCEDURE 4

While the constitutional standard is premised on flexibility,<sup>99</sup> there are inherent issues in interpreting and applying the federal rule controlling service of process, Federal Rule 4. First, some difficulties arise when interpreting Federal Rule 4, given its textual limitations.<sup>100</sup> Generally, when statutes are silent on a particular matter,<sup>101</sup> as Federal Rule 4 is with

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94. See generally *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 320 (1950) (holding notice of account settlement published in a newspaper pursuant to a New York banking law was insufficient to beneficiaries with known whereabouts).

95. See *Machine Learning*, *supra* note 72, at 533 ("At its heart, the *Mullane* standard is premised on flexibility.").

96. See Brandon L. Garrett, *Constitutional Reasonableness*, 102 MINN. L. REV. 61, 63 (2017) (describing concerns with subjective tests, including those expressed by the Supreme Court).

97. *Mullane*, 339 U.S. at 314.

98. Christopher M. Finke, Comment, *Friends, Followers, Connections, Lend Me Your Ears: A New Test for Determining the Sufficiency of Service of Process via Social Media*, 46 U. BALT. L. REV. 139, 145–46 (2016) (stating the Supreme Court considered and rejected a strict test in favor of the flexible *Mullane* standard).

99. See *Machine Learning*, *supra* note 72, at 533 (praising the *Mullane* standard for its flexibility as it "allows a court to look at societal context and available technology in deciding what counts as appropriate service under the circumstances"); see also Finke, *supra* note 98, at 145 (discussing the flexibility of the *Mullane* test).

100. The text of Federal Rule 4 speaks only to service by: (1) following state law, (2) personally delivering the summons and complaint, (3) leaving a copy "at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there," or (4) "delivering the summons and complaint to" an individual's registered agent. FED. R. CIV. P. 4 advisory committee's note to 1963 amendment.

101. That is, the statute does not directly provide an answer to the question at hand.

electronic service, lower courts are hesitant<sup>102</sup> to expand upon prior interpretations.

However, this reluctance is not devoid of merit. Without intervening guidance concerning a federal rule, different interpretations lead to varying results in otherwise similar cases. In that regard, “[e]ven within a single case, different interpretive canons are used as the case moves through the judicial system.”<sup>103</sup> This is the type of outcome the Federal Rules of Civil Procedure sought to avoid.<sup>104</sup>

Thus, determining the adequacy of particular service methods on a case-by-case basis can lead to wasted judicial resources, unfairness to parties, and uncertain judicial outcomes. The *Baidoo* opinion presents an example of how a case-by-case approach could lack administrative efficiency and waste judicial resources.<sup>105</sup> There, the court cites four prior judgments—all decided within a span of three years—on the issue of service via social media. Two of these courts declined to allow service through social media,<sup>106</sup> while two approved of service through social media.<sup>107</sup> Including *Baidoo*, this issue was litigated (at a minimum) five times in four

102. See *Baidoo v. Blood-Dzraku*, 5 N.Y.S.3d 709, 713 (N.Y. Sup. Ct. 2015) (“Thus, in seeking permission to effectuate service of the divorce summons by simply sending it to defendant through a private Facebook message, plaintiff is asking the court, already beyond the safe harbor of statutory prescription, to venture into uncharted waters without the guiding light of clear judicial precedent.”); see also *Rio Props., Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1017 (9th Cir. 2002) (“We acknowledge that we tread upon untrodden ground.”).

103. Aaron-Andrew P. Bruhl, *Statutory Interpretation and the Rest of the Iceberg: Divergences Between the Lower Federal Courts and the Supreme Court*, 68 DUKE L.J. 1, 7 (2018).

104. See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 409 (2010) (“A Federal Rule of Procedure is not valid in some jurisdictions and invalid in others—or valid in some cases and invalid in others—depending upon whether its effect is to frustrate a state substantive law (or a state procedural law enacted for substantive purposes).”).

105. See *Baidoo*, 5 N.Y.S.3d at 713 (evaluating precedent on the issue of service through social media).

106. See *Fortunato v. Chase Bank USA, N.A.*, No. 11 Civ. 6608(JFK), 2012 WL 2086950, at \*2 (S.D.N.Y. June 7, 2012) (deeming service through Facebook “unorthodox” and without precedent); *In re Adoption of K.P.M.A.*, 341 P.3d 38, 51 (Okla. 2014) (classifying notice sent through a Facebook message as “an unreliable method of communication if the accountholder does not check it regularly or have it configured in such a way as to provide notification of unread messages by some other means”).

107. See *FTC v. PCCare247 Inc.*, No. 12 Civ. 7189(PAE), 2013 WL 841037, at \*5 (S.D.N.Y. Mar. 7, 2013) (recognizing the viability of Facebook as a backup means of service); *WhosHere, Inc. v. Orun*, No. 1:13-cv-00526-AJT-TRJ, 2014 WL 670817, at \*4 (E.D. Va. Feb. 20, 2014) (explaining the defendant encouraged plaintiffs to locate the defendant’s social media accounts with the e-mail address provided).

years. This is hardly efficient and arguably contrary to the objective of Federal Rule 1.<sup>108</sup>

Moreover, requesting to serve an individual by e-mail depicts an example of the unfairness that could result from case-by-case decisions. Federal Rule 4 explicitly specifies only a few appropriate methods of service, none of which involve e-mail.<sup>109</sup> Nevertheless, as mentioned in Part II of this Comment, e-mail is an acceptable alternative method of service.<sup>110</sup> Even if it requires filing a motion to use e-mail for service, there is an element of unfairness to its conspicuous absence from the rule altogether.<sup>111</sup> With some states beginning to allow service of process through e-mail in their rules of civil procedure, this unfairness will only continue to expand.<sup>112</sup> An individual should not desire to be in a particular court merely to retain the ability to use e-mail for purposes of service.<sup>113</sup>

Furthermore, there can also be obstacles when attempting personal service or sending service through certified mail. These are hurdles encountered when applying Federal Rule 4 and thus are less involved with the interpretation of the Rule. Personal service can be expensive,<sup>114</sup> as process servers generally base their costs on the distance from the intended

108. See FED. R. CIV. P. 1 (encouraging inexpensive, timely, and fair determinations of actions and proceedings).

109. FED. R. CIV. P. 4(e). It is worth noting this statement is qualified, given subsection (e)(1) may implicitly allow for service through e-mail if applicable state law supplies this option.

110. There are multiple instances discussed earlier in this Comment of courts allowing service through e-mail alone, or alongside other methods. See, e.g., *Baidoo*, 5 N.Y.S.3d at 711 (“And while the legislature has yet to make [e-mail] a statutorily authorized method for the service of process, courts are now routinely permitting it as a form of alternative service.”).

111. Those who lack knowledge or understanding of relevant case law on the subject may find themselves disadvantaged if they are unaware of the availability of a certain method of service that could prove to be useful in their specific situation. Retaining counsel may lessen this unfairness, given lawyers are encouraged to diligently review applicable law. However, litigants can, and do, act pro se. Pro se legal representation should not be discouraged for lack of fairness. See, e.g., 28 U.S.C. § 1654 (designating a party “may plead and conduct their own cases personally or by counsel”).

112. See UTAH R. CIV. P. 5(b)(3)(B)(i)–(ii) (explaining requirements for e-mail as a service method); see also TEX. R. CIV. P. 106(b)(2) (permitting service through social media or e-mail in certain circumstances, namely where attempts at service by personal delivery or certified mail did not succeed).

113. Either a particular federal court with precedent allowing a method, or through use of Federal Rule 4(e)(1) in a certain state that allows a different method through their state laws. In each of these situations, Federal Rule 4 could produce different outcomes depending on what forum a plaintiff files in. As such, this could encourage forum shopping, otherwise described as a desire to avail oneself in a specific jurisdiction to achieve a favorable result.

114. See Gitman, *supra* note 52, at 470.



service location<sup>115</sup> and how long it takes to locate a party successfully. Although personal service or service through certified mail is the preferred method,<sup>116</sup> these still do not necessarily guarantee that a party to a lawsuit will receive notice. Documents are lost in the mail or simply fail to end up where they need to be. Additionally, they can fail to end up with the person who ultimately needs to receive them.<sup>117</sup> Many of these issues existed before COVID-19—a global pandemic—began,<sup>118</sup> which further highlighted our need to modernize existing laws.

#### IV. COVID-19—EXPOSING THE NEED TO MODERNIZE

##### A. *Development and Immediate Effect*

The sudden arrival of COVID-19 continues to devastate the United States.<sup>119</sup> Several qualities of the virus that make it quick to spread—and thus potentially very deadly—are that it is easily spread “[b]etween people who are in close contact with one another (within about [six] feet)” and through respiratory droplets.<sup>120</sup> These traits make it especially dangerous

115. *How Much Does It Cost to Hire a Process Server*, NAT'L ASS'N OF PROF'L PROCESS SERVERS, <https://napps.org/faq/how-much-does-it-cost-to-hire-a-process-server.aspx>. [<https://perma.cc/RM8A-HGEQ>].

116. *See* *Greene v. Lindsey*, 456 U.S. 444, 449 (1982) (“Personal service guarantees actual notice of the pendency of a legal action; it thus presents the ideal circumstance under which to commence legal proceedings against a person . . .”); Amanda Sexton, *Service of Process Via Social Media*, ABA L. PRAC. TODAY (Jan. 13, 2017), <https://www.lawpracticetoday.org/article/service-process-via-social-media/> [<https://perma.cc/5GVF-QFU7>] (classifying personal service as “the gold standard”).

117. *See* *Greene*, 456 U.S. at 453 (1982) (finding “merely posting notice on an apartment door does not satisfy minimum standards of due process” because children frequently tore down posts from apartment doors); *see also* *Jones v. Flowers*, 547 U.S. 220, 238 (2006) (“[W]e conclude . . . that someone who actually wanted to alert Jones that he was in danger of losing his house would do more when the attempted notice letter was returned unclaimed, and there was more that reasonably could be done.”).

118. *See, e.g.,* *Penny v. Neff*, 95 U.S. 714, 727 (1877), *overruled in part by* *Shaffer v. Heitner*, 433 U.S. 186 (1977) (“Publication of process or notice within the State where the tribunal sits cannot create any greater obligation upon the non-resident to appear.”).

119. Financially, as a result of COVID-19 the United States economy began to suffer, and the unemployment rate drastically rose. *See* Anton L. Janik, et al., *COVID-19 Commentaries*, 55 ARK. LAW. 10, 11 (2020). (noting a decline in state and national economies). Put simply, “[o]ur lives changed” due to the harsh realities of this disease. *Id.*

120. *See* *Coronavirus Disease 2019 (COVID-19)*, TEX. DEP'T OF STATE HEALTH SERVS., <https://www.dshs.state.tx.us/coronavirus/> [<https://perma.cc/H42V-W7GV>] [hereinafter *Coronavirus Disease 2019*] (describing how COVID-19 spreads, including from person to person and possibly through surfaces); *see also* *How to Protect Yourself & Others*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>

for groups, strangers or otherwise, to gather in person.<sup>121</sup> To mitigate the risk of contracting COVID-19, individuals are encouraged to wear a mask or other form of face covering and stay six feet apart from others.<sup>122</sup>

During the initial waves of COVID-19, many states issued guidelines to help stop the spread of the deadly virus.<sup>123</sup> As of January 2021, thirty-eight states continued to have guidelines in place.<sup>124</sup> However, these guidelines differ considerably from state to state concerning mandated versus recommended mask use.<sup>125</sup> Some states allow exemptions but deviate on who is exempt.<sup>126</sup> Alongside the variance between states, some counties within states chose to establish their own regulations.<sup>127</sup> Thus, although having various levels of safeguards in place is helpful, each set of guidelines is unlikely to achieve its purported purpose of ensuring safety without the assistance of a uniform federal order.<sup>128</sup>

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[<https://perma.cc/APC9-627C>] (providing recommendations to help prevent the spread of COVID-19) [hereinafter *How to Protect Yourself & Others*].

121. See 83 TEX. B.J. 329, 330 (2020) (displaying a copy of Governor Abbott's order limiting the ability of Texas courts to "conduct non-essential proceedings in person contrary to local, state, or national directives, whichever is most restrictive, regarding maximum group size"); Andrew Keh, *The Coronavirus and the Postponement of the Olympics, Explained*, N.Y. TIMES (Mar. 25, 2020), <https://www.nytimes.com/2020/03/25/sports/olympics/coronavirus-summer-olympics-postponed.html> [<https://perma.cc/2EDA-R66N>] (considering the International Olympic Committee's decision to postpone the 2020 Summer Olympics in light of knowing "[t]hey have been canceled only for world wars in 1916, 1940 and 1944, and never postponed").

122. *Coronavirus Disease 2019*, *supra* note 120.

123. See Andy Markowitz, *State-by-State Guide to Face Mask Requirements*, AARP, <https://www.aarp.org/health/healthy-living/info-2020/states-mask-mandates-coronavirus.html> [<https://perma.cc/N9V3-FR2N>] (listing the states that have enacted statewide orders or otherwise encouraged mask usage).

124. *Id.*

125. See Seth Tupper, *Two Rural States With GOP Governors and Very Different COVID-19 Results*, NPR (Nov. 20, 2020, 8:21 AM), <https://www.npr.org/2020/11/20/936800456/two-rural-states-with-gop-governors-and-very-different-covid-19-results> [<https://perma.cc/W4MJ-55WQ>] (underscoring differences in the approaches taken by officials in South Dakota and Vermont).

126. Compare Markowitz, *supra* note 123 (displaying the contents of Texas' statewide mask order that contains an exception for children under 10), with *How to Protect Yourself & Others*, *supra* note 120 (encouraging mask use for individuals over age two, unless they have specific medical conditions).

127. See Markowitz, *supra* note 123 (exhibiting various examples of these conflicting levels of law between state and county).

128. This Comment is not advocating for a federal mask mandate, rather it seeks to point out that the absence of a single unifying rule can create conflicts in laws. As discussed in Part III of this Comment, different interpretations of the same law can create discrepancies and confusion.

Moreover, there are likely to be additional waves of the disease<sup>129</sup> proving to be disruptive until a vaccine providing complete immunity is developed.<sup>130</sup> Nor has the creation of a vaccine represented an immediate cure.<sup>131</sup> As of the time of this writing, there are two approved versions of COVID-19 vaccines, which may be promising news for lightening social distancing guidelines in the long-term.<sup>132</sup> But effectively administering the vaccine to each member of a large population will involve roll-out plans.<sup>133</sup> Because of this, individuals will receive it at different times, and two doses are required for maximum effectiveness.<sup>134</sup> Additionally, vaccinated individuals will be encouraged to continue wearing a mask,<sup>135</sup> even after

129. See Lauren Leatherby, *U.S. Virus Cases Climb Toward a Third Peak*, N.Y. TIMES (Oct. 15, 2020), <https://www.nytimes.com/interactive/2020/10/15/us/coronavirus-cases-us-surge.html> [<https://perma.cc/5263-KAMR>] (examining the effect that colder temperatures may have on the virus, as the cold forces individuals to stay indoors); see also Dylan Scott, *Making Sense of the Recent COVID-19 Spike*, VOX, <https://www.vox.com/coronavirus-covid19/22576904/us-new-covid-cases-rising-again-delta-variant> [<https://perma.cc/B2E5-PX8V>] (illuminating the drastic rise in average new cases per day from 11,000 in June to 31,000 in July 2021).

130. Adding to an already complex situation, variants of the virus, notably the Delta variant, began to develop. *What You Need to Know about Variants*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/variants/variant.html> [<https://perma.cc/ETR2-WZTP>]. According to the CDC, “[v]iruses constantly change through mutation, and new variants of a virus are expected to occur.” *Id.*

131. *COVID-19 Vaccine Breakthrough Case Investigation and Reporting*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/vaccines/covid-19/health-departments/break-through-cases.html> [<https://perma.cc/9AEV-FQCP>] (“COVID-19 vaccines are effective and are a critical tool to bring the pandemic under control. However, no vaccines are 100% effective at preventing illness.”).

132. One vaccine is manufactured and distributed by Moderna, and the other by Pfizer-BioNTech (Pfizer). *Answers to Your Questions About the New Covid Vaccines in the U.S.*, N.Y. TIMES (Dec. 14, 2020), <https://www.nytimes.com/2020/12/14/well/live/covid-vaccine-questions.html> [<https://perma.cc/GE2D-XPGL>] [hereinafter N.Y. TIMES, *Answers to Your Questions*]. At the time of writing, neither is approved for children, although Pfizer “began studying their vaccine on children as young as 12” in September 2020. *Id.*

133. As of December 2020, it was “estimate[d] that 70 to 75 percent of the population needs to be vaccinated before people can start moving freely in society again.” *Id.* Thus, complete vaccination in the United States initially was not expected until the middle of 2021. See *id.* (describing how “many people likely will have to wait until at least May or June” of 2021 to receive the vaccine).

134. Each brand of vaccine requires two doses for maximum effectiveness. “[Pfizer’s] second dose comes three weeks after the first, and Moderna’s comes four weeks later.” *Id.*

135. Articles on the topic reiterate these vaccines were initially approved as emergency measures, leaving many lingering long-term questions without answers. See Apoorva Mandavilli, *Here’s Why Vaccinated People Still Need to Wear a Mask*, N.Y. TIMES (Dec. 8, 2020), <https://www.nytimes.com/2020/12/08/health/covid-vaccine-mask.html> [<https://perma.cc/TR6M-YFV6>] (stating there is uncertainty surrounding the question of whether newly vaccinated individuals are prevented from spreading the virus, and thus should continue to wear a mask).

receiving the vaccine, given they can still carry and transmit the disease.<sup>136</sup> Thus, even after vaccines become widely available, and even with health experts possessing the ability to anticipate the onset of future COVID-19 waves, this does not mean society is unequivocally safe from infection.<sup>137</sup> Waves may also affect certain areas of the country at different times,<sup>138</sup> further complicating the effectiveness of state and local mandates.<sup>139</sup>

Almost immediately, COVID-19 revealed shortcomings in particular areas of law. Contract law saw itself revisiting the question of impossibility or a legal inability to perform contractually obligated duties.<sup>140</sup> Meanwhile, the dangers of coming in close contact with others highlighted issues in additional legal areas, namely creating formal wills.<sup>141</sup> When courts resumed scheduling their criminal dockets, some previously on hold, COVID-19 forced many to consider the implications of conducting jury trials over Zoom.<sup>142</sup> Similarly, civil procedure also felt the effects of COVID-19.

136. See N.Y. TIMES, *Answers to Your Questions*, *supra* note 132 (explaining researchers are hopeful about vaccines preventing further transmission, but there is simply no certain answer yet).

137. The National Football League's efforts to control the spread of COVID-19 during its 2020 season presented a unique example of this proposition. Despite implementing a "leaguewide video system to monitor" compliance with COVID-19 protocol and imposing penalties ranging from high-dollar fines to the loss of draft picks, the league still faced "full-fledged outbreak[s]." Ken Belson, *N.F.L. Adds New Covid-19 Protocols to Keep Season on Track*, N.Y. TIMES (Oct. 5, 2020), <https://www.nytimes.com/2020/10/05/sports/football/nfl-covid-19-patriots-monday-night.html> [<https://perma.cc/M3UL-HY8U>].

138. See Leatherby, *supra* note 129 (explaining in October, cases were "shifting to the Midwest and to more rural areas").

139. See, e.g., Edgar Walters, *Texas Must Boost Coronavirus Control Efforts Amid "Full Resurgence" of Infections*, *White House Report Says*, THE TEX. TRIBUNE (Dec. 1, 2020, 11:00 AM), <https://www.texastribune.org/2020/12/01/texas-coronavirus-white-house-report/> [<https://perma.cc/3JXV-YJFC>] (discussing the severity of COVID-19 outbreaks in one region of Texas and detailing why this requires stricter statewide regulations in response).

140. Andrew A. Schwartz, *Contracts and COVID-19*, 73 STAN. L. REV. ONLINE 48, 49 (2020).

141. See David Horton & Reid Kress Weisbord, *COVID-19 and Formal Wills*, 73 STAN. L. REV. ONLINE 18, 22 (2020) ("This unforgiving rubric makes formal wills impractical for those who are sheltering in place or have contracted COVID-19.").

142. Carrying out jury proceedings through Zoom raises additional questions regarding whether this violates a defendant's Sixth Amendment rights. Specifically, concerning the right to an impartial jury, some noted jurors using electronic devices to connect to a criminal trial may create a scenario where they are exposed to outside information. See Jessica A. Roth, *The Constitution Is on Pause in America's Courtrooms*, THE ATLANTIC (Oct. 10, 2020), <https://www.theatlantic.com/ideas/archive/2020/10/constitution-pause-americas-courtrooms/616633/> [<https://perma.cc/59GU-GUGG>] ("But the risks of disobedience or inadvertent exposure seem heightened when jurors are in their home and must use electronic devices to take part in the judicial proceedings.").

B. *Intersection With Civil Procedure*

In 2015, the court in *Baidoo* stated, “[e]ven where a defendant’s whereabouts are known, there are times when it is logistically difficult, if not impossible, for a process server to gain the close proximity necessary for personal delivery.”<sup>143</sup> COVID-19 presents an example of just such a situation. Some of the guidelines issued suggest that personal service is not a safe option.<sup>144</sup> Aside from the inherent dangers of contracting the virus, there are also questions about the necessity of serving someone in person when other means exist.<sup>145</sup>

Opting to use personal service during this time poses numerous potential dilemmas. Individuals might have a weakened immune system due to their age or a prior medical condition which increases their susceptibility of contracting COVID-19.<sup>146</sup> Symptoms can take up to two weeks to manifest, or an individual may be asymptomatic while still having the disease and retaining the ability to spread it.<sup>147</sup> Process servers face unknown dangers every day in the scope of their employment, even without the threat of a pandemic,<sup>148</sup> and are likely aware of some potential risks. However, a server may never know when they could face a dangerous individual.<sup>149</sup>

143. *Baidoo*, 5 N.Y.S.3d at 711.

144. This is because guidelines, including those published by the CDC, emphasize keeping a six-foot distance from “people [who do] not live in your household,” and avoiding crowds whenever possible. *How to Protect Yourself & Others*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> [<https://perma.cc/APC9-627C>].

145. See, e.g., Schwartz, *supra* note 140, at 53. (“Another difficult type of case will be where [contractual] performance is legally possible, perhaps because a state’s stay-at-home order has expired, but the pandemic remains prevalent.”).

146. A CDC chart shows these risks, including requiring hospitalization or death, are magnified by each subsequent age group. *Older Adults*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html> [<https://perma.cc/WS88-XU44>]. Individuals aged 40–49 are three times more likely to require hospitalization and face a risk of death 10 times higher than the comparison group, young adults aged 18–29. *Id.* This chart’s final row reflects that older adults ages 85 and above are 13 times as likely to require hospitalization and an astounding 630 times more likely to risk death upon contracting COVID-19. *Id.*

147. *Coronavirus Disease 2019 (COVID-19)*, TEX. DEP’T OF STATE HEALTH SERVS., <https://www.dshs.state.tx.us/coronavirus/> [<https://perma.cc/H42V-W7GV>].

148. Stephanie Irvine, *Dangers of Process Serving Hit Home in Texas*, SERVENOW (Sept. 23, 2016), <https://www.serve-now.com/articles/2244/dangers-of-process-serving-hits-home-in-texas> [<https://perma.cc/8VY4-DZ66>] (recounting events surrounding the tragic death of one Texas process server).

149. Combined with the current unpredictable variables of COVID-19, this generates an unsafe situation for all parties involved.

One way of protecting process servers from a potentially dangerous person is to transition to electronic service.

### C. *Moving Forward From COVID-19*

Periods of social disruption happen.<sup>150</sup> If we modernize laws on our own terms versus out of necessity, we can avoid a mass disruption in our court system (like the one experienced at the beginning of the outbreak).<sup>151</sup> COVID-19 disrupted our court system by halting the scheduling of court dockets and in-person proceedings<sup>152</sup> and spurring hundreds of lawsuits against businesses.<sup>153</sup> Creating specific federal legislation for the allowed use of electronic service of process during this time and into the future will mitigate the impact of the next period of social disruption we experience, regardless of the event that triggers it or its permanence.

Although society is still adapting to the complexities presented by COVID-19, there is ample evidence showing we can emerge from this pandemic with an expanded perspective.<sup>154</sup> One such example involves the prevalence of businesses that encouraged teleworking throughout the pandemic.<sup>155</sup> In some areas of law, the benefits<sup>156</sup> of conducting

150. See Schwartz, *supra* note 140, at 52 (“Pandemics have happened before, such as the Spanish Flu of 1918, and scientists and others have repeatedly warned that a pandemic should be expected to eventuate one of these days.”).

151. See generally Zoe Niesel, *The AOC in the Age of COVID—Pandemic Preparedness Planning in the Federal Courts*, 53 ST. MARY’S L.J. (forthcoming 2021) (outlining the disparity in responses within the federal court system to the early COVID-19 outbreak).

152. See, e.g., Roth, *supra* note 142 (describing potential issues with criminal proceedings continuing via Zoom).

153. Listed among numerous categories are lawsuits “brought by a union representing state employees in Alaska” and lawsuits in California against “a yoga studio and a massage parlor.” See Shayna Jacobs, *771 Lawsuits—and Counting: Wave of Virus Litigation Hits Businesses Across the U.S.*, WASH. POST (May 1, 2020, 5:51 PM), [https://www.washingtonpost.com/world/national-security/771-lawsuits—and-counting-wave-of-virus-litigation-hits-businesses-across-the-us/2020/05/01/6f7c015c-89c3-11ea-9dfd-990f9dcc71fc\\_story.html](https://www.washingtonpost.com/world/national-security/771-lawsuits—and-counting-wave-of-virus-litigation-hits-businesses-across-the-us/2020/05/01/6f7c015c-89c3-11ea-9dfd-990f9dcc71fc_story.html) [https://perma.cc/6EC7-4BYX] (“Hundreds of lawsuits stemming from the coronavirus pandemic are rapidly amassing in state and federal courts, the first wave of litigation challenging decisions made early during the crisis by corporations, insurance companies and governments.”).

154. See, e.g., Janik et al., *supra* note 119, at 12 (“Environmentally, we saw the longest string of clear skies in Los Angeles, and cities in India reported their first clear views of the Himalayas in more than 30 years.”).

155. 29 C.F.R. § 826.10 (2020) (compensating employees who telework “for COVID-19 related reasons”).

156. But see Lindsey Mann et al., *Remote Depositions Bring Ethics Considerations for Lawyers*, LAW360 (May 5, 2020, 4:49 PM), <https://www.law360.com/articles/1269933/remote-depositions-bring-ethics-considerations-for-lawyers> [https://perma.cc/Y6P5-76SN] (examining how lawyers can

proceedings from home were immediately apparent. Further, the widespread use of remote depositions<sup>157</sup> during this time shows that lawyers are already expanding and improving traditional civil litigation practices in proceedings.<sup>158</sup> Finally, costs to clients are likely reduced because lawyers no longer have to travel as they previously did to conduct depositions or other meetings.

#### 1. A Proposal to Modernize Service of Process

Civil procedure is modernizing<sup>159</sup> in other areas to promote fairness and cost reduction.<sup>160</sup> In 2006, an amendment to Rule 34 of the Federal Rules of Civil Procedure added clarification that the Rule “confirm[s] that discovery of electronically stored information stands on equal footing with discovery of paper documents.”<sup>161</sup> Given that electronic discovery is allowed and, indeed, viewed as equal to its traditional counterparts, there is little reason to believe electronic service of process should be treated any differently. There are obvious security concerns that arise when dealing with transferring documents electronically and the risk of erroneous receipt.<sup>162</sup> The advisory committee likely considered these risks when providing for electronic discovery and still chose to advance these amendments to Federal Rule 34.<sup>163</sup>

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circumvent the Model Rules of Professional Conduct in remote depositions, such as secretly texting clients during the proceedings).

157. Darren Goldman, *Why Remote Depositions Are Likely Here to Stay*, LAW360 (Aug. 21, 2020, 3:38 PM), <https://www.law360.com/articles/1303302/why-remote-depositions-are-likely-here-to-stay> [<https://perma.cc/29WT-6UYG>] (indicating a preference towards retaining the use of remote depositions).

158. See *Machine Learning*, *supra* note 72, at 498 (“A similar response to technological changes is seen across multiple facets of civil procedure.”).

159. See Zoe Niesel, *#PersonalJurisdiction: A New Age of Internet Contacts*, 94 IND. L.J. 103, 105 (2019) (highlighting the need for a modern approach to personal jurisdiction).

160. See FED. R. CIV. P. 1 advisory committee’s note to 1993 amendment (“The purpose of this revision . . . is to recognize the affirmative duty of the court to exercise the authority conferred by these rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay.”).

161. FED. R. CIV. P. 34(a) advisory committee’s note to 2006 amendment (“Lawyers and judges interpreted the term ‘documents’ to include electronically stored information because it was obviously improper to allow a party to evade discovery obligations on the basis that the label had not kept pace with changes in information technology.”).

162. It is worth remembering these risks also exist with standard methods of service.

163. Concerning the risk of a party not receiving electronic discovery, author Angela Upchurch reasoned “electronic communication would not be embraced in e-filing or in e-discovery if it were perceived that the significance of these electronic communications would escape those involved in the process.” Upchurch, *supra* note 66, at 600 (discussing how the legal system began to embrace electronic storage and transmission of information).

So, it is time to consider whether Federal Rule 4 should be amended to allow service of process through electronic means.<sup>164</sup> Indeed, it is hardly cost-effective to continue litigating the validity of different electronic service methods, such as e-mail.<sup>165</sup> Instead, Federal Rule 4 should recognize an electronic alternative which, would be in line with numerous federal courts' decisions.<sup>166</sup> Moreover, electronic service likely comports with traditional notions of civil procedure.<sup>167</sup> Generally, these notions include promoting fairness and justice to parties and administrative efficiency.<sup>168</sup>

To make this work a dedicated website could be established for service of process in federal courts. Although COVID-19 delayed the date of effect,<sup>169</sup> Texas amended several state rules to create such a website.<sup>170</sup> Many of the citations currently viewable on Texas' website are attempting to provide notice to potential heirs of recently deceased individuals.<sup>171</sup> This shows that website publication may prove useful in a situation like COVID-19 where formal will creation experienced significant interference.<sup>172</sup> Additionally, Alaska also provides for service in this manner.<sup>173</sup> The

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164. See Sexton, *supra* note 116 (contemplating the future viability of serving an individual through social media, in response to several courts approving service through Twitter and Facebook).

165. See *Rio Props., Inc.*, 284 F.3d at 1016 (citing several prior decisions which authorized service by e-mail).

166. See John G. Browning, *Service of Process via Social Media Comes to Texas: A Look at Rules, Concerns, and What It Means Going Forward*, 83 TEX. B.J. 320, 320 (2020) (discussing how “the number of American state and federal courts to give their blessing to ‘service by Facebook’ has steadily grown” and includes the informal approval of Texas judges).

167. FED. R. CIV. P. 1 advisory committee's note to 2015 amendment (“[Emphasizing] that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, so the parties share the responsibility to employ the rules in the same way.”).

168. See *Machine Learning*, *supra* note 72, at 508 (citing the “traditional notions of fair play and substantial justice”); FED. R. CIV. P. 1 advisory committee's note to 2015 amendment (desiring inexpensive determinations of actions).

169. See 83 TEX. B.J. 490, 492 (2020) (displaying an order issued by the Supreme Court of Texas which delayed the “effective date of amendments to Texas Rules of Civil Procedure 116 and 117 and website for service of process”).

170. See *View Citation by Publication/Notices and Protective Orders*, TEX. JUD. BRANCH, <https://topics.txcourts.gov/> [<https://perma.cc/3G6U-5EWC>] (providing users with the ability to view citations, notices, and protective orders).

171. *Id.*

172. See Horton & Weisbord, *supra* note 141, at 23 (proposing alternatives to the formal requirements of the Wills Act in light of the COVID-19 pandemic).

173. Alaska also allows service by posting a notice continuously “for four consecutive weeks on the Alaska Court System’s legal notice website” in their state Rule of Civil Procedure 4(e)(2). ALASKA R. CIV. P. 4(e)(2). To use this service method, a party must file an “affidavit of diligent



existence of this type of website at a state level shows this can be done on a federal scale. Furthermore, a website could prove helpful to individuals seeking to initiate and are unsure of exactly who to direct the summons and complaint to (for example, within a large company).<sup>174</sup>

However, enacting legislation that creates a website, similar to those found in state rules, would likely only meet the standard of being “reasonably calculated” to provide notice if an alternate method is used alongside the digitally posted notice.<sup>175</sup> Certainly, a website may provide notice to a larger area, even beyond state lines, but there is no guarantee a specific individual will access any website within a set time limit unless they are advised to do so through another channel of notice.<sup>176</sup> Because of this, website publication would likely act as a modern means of digital publication, replacing costly newspaper publications as a method of backup service.<sup>177</sup> Still, in an increasingly globalized world, creating and maintaining a website for service of process could benefit all parties involved and lay the groundwork to ease the adaptation of technology going forward.<sup>178</sup> Such a system could also walk a prospective plaintiff through

inquiry” with the clerk showing the defendant cannot be served through personal service or certified mail. ALASKA R. CIV. P. 4(e).

174. In this example, Federal Rule 4(h)(1)(B) explains service is made to “an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process.” Yet individuals may still struggle with locating these particular members of large corporations, such as the agent authorized to receive service. FED. R. CIV. P. 4(h)(1)(B).

175. The text in Alaska’s rule on service of process navigated this issue quite well. Alaska Rule of Civil Procedure 4(e) requires all affidavits requesting website posting as a method of service to include “a discussion of whether other methods of service listed in paragraph (e)(3) may be more likely to give the absent party actual notice.” Paragraph (e)(3) lists various methods of service, including service by e-mail account, and traditional methods like physically posting service at an individual’s residence. The court retains discretion to order any of these additional methods of service alongside allowing a website post. ALASKA R. CIV. P. 4(e)(3).

176. Individuals using Alaska Rule of Civil Procedure 4(e)(2) must post notice on the website continuously for four consecutive weeks. Before the final week of posting, the party seeking to effectuate service must send a copy of the service documents by mail. These notice copies “must be addressed in care of the absent party’s residence or the place where the party usually receives mail, unless it shall appear by affidavit that the absent party’s residence or place is unknown or cannot be determined after inquiry.” ALASKA R. CIV. P. 4(e)(2).

177. Texas’ method of using website publication in Texas Rule of Civil Procedure 116 appears to follow this approach. Service of the citation by publication must appear on both the state website and in a newspaper, with a few enumerated exceptions concerning newspaper publication. These include circumstances such as where the cost of newspaper publication outweighs any potential benefits. TEX. R. CIV. P. 116(b)(1)–(2).

178. Depending on the website’s structure, it could even consolidate notice of suit for parties often on the receiving end of service, allowing them to obtain all documents in one location.

the appropriate steps of proper service, minimizing costly mistakes. Thus, establishing a centralized website presents a viable starting point when considering how exactly to modernize Federal Rule 4.

Aside from creating a website, there is always the prospect of amending Federal Rule 4 to allow for e-mail service alongside traditional methods.<sup>179</sup> A plaintiff could electronically file proof of all service methods implored to show they made “reasonably calculated” attempts to provide notice. Although this may not necessarily spare costs (as it involves some labor and operational costs), it could allow for an easier disposition should the defendant not answer. That is, the court has one less motion—one for substitute service—to review in each case where no answer is received, possibly resulting in a quicker judgment.<sup>180</sup> At the least, this would eliminate the burden on our federal court system of having to repeatedly litigate an already settled issue.

Finally, there is potential for an amendment that allows for service by e-mail alone. This proposal seeks to serve the function of allowing electronic service by consent.<sup>181</sup> An example of this manner of service is contained within Utah Rule of Civil Procedure 5. Utah’s Rule 5 allows service by e-mail to either an e-mail address on file with the court<sup>182</sup> or “to the [e-mail] address on file with the Utah State Bar.”<sup>183</sup> The latter likely means the defendant already retained counsel, and the plaintiff is aware of that. In light of this proposal requiring consent, it may have a narrow application.<sup>184</sup> Therefore, if someone consents to electronic service via the action of providing a suitable e-mail address, service in this manner is “reasonably calculated” to reach them.

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179. This is similar Texas’ approach in its newly amended Texas Rule of Civil Procedure 106, which will be analyzed later in this Comment. For now, it is worth noting Texas courts still retain discretion to permit or deny requests for innovative service methods, as the rule is framed permissively in that “the court may authorize service.” *See* TEX. R. CIV. P. 106(b)(2) (using subsection (b)(2) to electronically serve the defendant requires a party to submit an affidavit showing unsuccessful service attempts by personal delivery or certified mail).

180. Such an outcome follows the command of Federal Rule 1 by securing a quicker determination and may even spare costs when backup service costs are balanced against the cost of additional litigation. FED. R. CIV. P. 1.

181. Parties could send service documents to an e-mail address on file with the court, rather than guessing what e-mail address is “reasonably calculated” to provide notice to an individual.

182. Likely provided by the party, or their counsel. UTAH R. CIV. P. 5(b)(3)(B)(i).

183. UTAH R. CIV. P. 5(b)(3)(B)(ii).

184. Not every party will consent to service, given individuals do still attempt to avoid service altogether.

## 2. Support for This Proposal

Following this discussion about potential ways to modernize Federal Rule 4, it is worth looking at two recent additions to Texas law as case studies showing the viability of an amendment at the federal level. Beginning our analysis of Texas law with a focus on broader changes enacted by the Texas Legislature allows us to examine the authority providing for eventual groundbreaking amendments to the Texas Rules of Civil Procedure.<sup>185</sup> In 2019, the Texas Legislature passed Senate Bill 891,<sup>186</sup> which added, *inter alia*, Section 72.034 (“Public Information Internet Website”) to the Government Code,<sup>187</sup> and Section 17.033 (“Substituted Service Through Social Media Presence”) to the Civil Practice and Remedies Code.<sup>188</sup>

Procedurally, these two sections show: (1) it is not overwhelmingly difficult to amend rules to include modern solutions, and (2) how we can delegate responsibilities within these new and complex rules to achieve intended goals.<sup>189</sup> As an aside, the dates of these additions show the 2019 Texas legislative session pre-dated COVID-19 in the United States. This shows the Texas Legislature perceived electronic service of process as a workable method,<sup>190</sup> even prior to the added constraints of the pandemic.<sup>191</sup>

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185. There are four such amendments to the Texas Rules of Civil Procedure that are of particular relevance to this paper. Two of these added new methods of service, including by e-mail, social media, or website publication, and two concern the information that must be included on a return of service. TEX. R. CIV. P. 106 (“Method of Service.”); TEX. R. CIV. P. 116 (“Service of Citation by Publication.”); TEX. R. CIV. P. 107 (“Return of Service.”); TEX. R. CIV. P. 117 (“Return of Citation by Publication.”).

186. *See* Browning, *supra* note 166, at 320 (describing Texas Senate Bill 891 as “an omnibus bill that amends multiple statutes”).

187. *See* TEX. GOV'T CODE ANN. § 72.034 (authorizing the creation of “Public Information Internet Website”).

188. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 17.033 (adding the possibility of “Substituted Service Through Social Media Presence,” contingent upon the Texas Supreme Court’s approval).

189. *See, e.g.*, TEX. GOV'T CODE ANN. § 72.034(b) (“The [Office of Court Administration] shall develop and maintain a public information Internet website that allows a person to easily publish public information on the Internet website or the office to post public information on the Internet website on receipt from the person.”).

190. *See* John G. Browning, *Served without Ever Leaving the Computer: Service of Process via Social Media*, 73 TEX. B. J. 180, 184 (2010) (describing reasons which could lead to “the coming acceptance of service through social media”).

191. This is not the first time Texas considered adopting such an amendment for alternate service through social media, as the Texas Legislature did so in 2013. *See* Browning, *supra* note 166, at 320 (articulating factors proposed in Texas House Bill 1989, the 2013 legislative attempt to authorize

Substantively, these additions to Texas law paved the way for landmark amendments to the Texas Rules of Civil Procedure. These amendments lend support to the proposed changes to Federal Rule 4. Analyzing these in turn, we look first to Texas Rule of Civil Procedure 116, which broadened methods of service by publication to include “Public Information Internet Website Publication.”<sup>192</sup> Such publication appears on the website established by Section 72.034.<sup>193</sup> Similarly, Texas Rule of Civil Procedure 117 now reflects that return of citation<sup>194</sup> by website publication “must specify the dates of publication and be generated by the Office of Court Administration.”<sup>195</sup>

Next, Texas Rule of Civil Procedure 106 authorizes, with court approval, service “in any other manner, including electronically by social media, email, or other technology, that the [sworn] statement or other evidence shows will be reasonably effective to give the defendant notice of the suit.”<sup>196</sup> Finally, working alongside Texas Rule of Civil Procedure 106, newly amended Texas Rule of Civil Procedure 107 governs return of service,<sup>197</sup> and now includes situations where an alternate method is used.<sup>198</sup> Here, the courts retain discretion when service is made by an alternate method under Texas Rule of Civil Procedure 106, in that “proof of service shall be made in the manner ordered by the court.”<sup>199</sup>

The authority behind the amendments to Texas Rule of Civil Procedure 106, Section 17.033 of the Texas Civil Practice and Remedies Code, clearly delineates the responsibility of drafting these rules to the Texas

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electronic service, for Texas courts to consider when exercising their “discretion to order such service of process”); *see also* Knapp, *supra* note 28, at 575 (describing Texas House Bill 1989 as “precisely the change that is needed for service via social media to be permissible”).

192. TEX. R. CIV. P. 116(d).

193. TEX. GOV'T CODE ANN. § 72.034.

194. Serving the citation under Texas Rule of Civil Procedure 106 is the state equivalent of serving a summons in federal court. The citation supplies notice of a legal action and information for the defendant to prepare and defend against such action. TEX. R. CIV. P. 501.1.

195. TEX. R. CIV. P. 117(b).

196. TEX. R. CIV. P. 106(b)(2).

197. The return of service must contain information such as “the person or entity served,” when service was received, and “a description of what was served,” among other requirements. TEX. R. CIV. P. 107(b)(1)–(11).

198. TEX. R. CIV. P. 107(f).

199. *Id.*

Supreme Court.<sup>200</sup> As a result, this is similar to the federal rulemaking process, which also involves multiple levels of delegated responsibility.<sup>201</sup> Prescribing or amending federal rules begins with an advisory committee preparing a draft of an amendment.<sup>202</sup> Next, this draft is reviewed by a standing committee.<sup>203</sup> Drafts approved by the standing committee are forwarded to the Judicial Conference.<sup>204</sup> From there, if the Conference find changes to rules “desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay,” they are encouraged to forward drafts of the amendments to the Supreme Court for final approval.<sup>205</sup>

Subsequently, recent amendments to the Texas Rules of Civil Procedure,<sup>206</sup> alongside the federal rulemaking process,<sup>207</sup> support amending Federal Rule 4 to provide for service of process through electronic means. Additionally, Federal Rule 4 itself contains support for this perspective. Within advisory committee notes to the 1993 amendment, it is stated, “[w]hile private messenger services or electronic communications may be more expensive than the mail, they may be equally reliable and on occasion more convenient to the parties.”<sup>208</sup>

200. See TEX. CIV. PRAC. & REM. CODE ANN. § 17.033(b) (“The supreme court shall adopt rules to provide for the substituted service of citation by an electronic communication sent to a defendant through a social media presence.”).

201. At the top of the rulemaking process is the Supreme Court, followed by the Judicial Conference (Conference), several appointed standing committees, and finally advisory committees. 28 U.S.C. § 331 (establishing the Conference and describing its duties); *id.* § 2073 (delegating authority to create advisory and standing committees).

202. Advisory committees are appointed by the Conference under *id.* § 2073(a)(2) to assist with rule recommendation.

203. Standing committee appointments are authorized by *id.* § 2073(b). Further, they are tasked with reviewing “each recommendation of any other committees so appointed and recommend[ing] to the Judicial Conference rules of practice, procedure, and evidence and such changes in rules proposed by a committee appointed under subsection (a)(2) of this section.” *Id.* § 2073(b).

204. The Conference is an annual conference organized and presided over by the United States Chief Justice. Conference members must “carry on a continuous study of the operation and effect of the general rules of practice and procedure [reviewing rules].” *Id.* § 331.

205. The Supreme Court may adopt, modify, or reject the proposed rules it considers. *Id.*

206. Although Texas Rule of Civil Procedure 106(b)(2) still requires proof of prior failed attempts through traditional means this is still a step in the right direction. TEX. R. CIV. P. 106(b) (requiring for parties seeking use of electronic service to “[show] that service has been attempted under (a)(1) or (a)(2) at the location named in the statement but has not been successful”).

207. Allowing for electronic service of process likely falls within the category of a rule desirable to promote simplicity, fairness, and the elimination of delay and unjustifiable expense. 28 U.S.C. § 331.

208. FED. R. CIV. P. 4 advisory committee’s note to 1993 amendment.

Though it is impracticable to believe sentiments regarding a 1993 amendment would apply equally to social media, these should not be ignored altogether.<sup>209</sup> Allowing electronic service does not have to change everyday methods already in use, especially those implored by smaller firms. But having electronic methods available for serving process more safely could undoubtedly allow for timely flexibility when challenging circumstances arise. Alongside aiding during a public health crisis such as COVID-19, this could help in situations dealing with domestic violence, child abuse, or other unsafe atmospheres.<sup>210</sup>

Arguably, if a large number of states were to amend their rules of civil procedure to permit electronic service, there may be no need to formally amend the Federal Rules of Civil Procedure.<sup>211</sup> Federal Rule 4(e) incorporates service of process methods permitted by state law.<sup>212</sup> However, without a uniform federal law controlling in similarly situated cases that arise in different jurisdictions, this could prove to be a slippery slope.

### 3. Assessing Concerns With Contemporary Changes to Federal Rule 4

There are counterarguments to allowing electronic service of process.<sup>213</sup> Electronic service of process would mean we venture into unknown

209. These 1993 committee notes clearly speak to “electronic means such as facsimile transmission . . .” *Id.*

210. It is unlikely a federal court will often deal with family law cases, given the Constitution contains limitations on federal jurisdiction. However, federal statutes can provide a means of achieving federal jurisdiction and at times deal with extremely dangerous situations.

211. Presently, this appears to include states such as Alaska, Texas, and Utah. States are in the best position to tailor their service methods to the needs of their citizens. Federal Rule 4(e)(1) evinces that the federal government understood this relationship. But in our current digital era, the effect of any one state implementing uniquely tailored methods will stretch outside its borders. Digital methods, such as use of Facebook for service, can avail themselves in almost any state. The technological capabilities we possess in 2021 likely extend beyond the advisory committee’s recognition at the time of the last substantive change to Federal Rule 4 in 1993. *See, e.g.,* Knapp, *supra* note 28, at 574 (explaining states stand in the best position to evaluate “the more intricate needs of citizens, especially when the inquiry requires an assessment of the level of progression of citizens and their use of new technology”).

212. FED. R. CIV. P. 4(e)(1).

213. *See* Matthew R. Schreck, *Preventing “You’ve Got Mail” from Meaning “You’ve Been Served”: How Service of Process by E-Mail Does Not Meet Constitutional Procedural Due Process Requirements*, 38 J. MARSHALL L. REV. 1121, 1134 (2005) (explaining how service of process by e-mail fails to meet the constitutional standard and fails to comply with due process requirements); *see also In re Adoption of K.P.M.A.*, 341 P.3d 38, 51 (Okla. 2014) (“This Court is unwilling to declare notice via Facebook alone sufficient to meet the requirements of the due process clauses of the United States and Oklahoma Constitutions because it is not reasonably certain to inform those affected.” (citing *Booth v. McKnight*,

territory with less bright-line rules. Additional risks can include defendants avoiding service<sup>214</sup> or lacking a computer to receive electronic service. Further, with the use of innovative technology comes the risk of incurring higher costs that clients must bear.<sup>215</sup> Using a process server or a sheriff can guarantee that someone certifies the document was received. Adopting electronic service of process might dilute this personal accountability. Holding a human accountable for certification may protect our constitutional due process rights more than an electronic system.

However, it is unlikely that personal service would heighten due process protections in every instance of service. Moreover, it is worth remembering that an amendment to Federal Rule 4 would not force a lawyer to conduct service through electronic means.<sup>216</sup> They may still use any number of the allowed methods for service of process considered to meet the constitutional standard outlined in *Mullane*.

Throughout history, there have been arguments launched against new methods of service.<sup>217</sup> Electronic service of process will not be immune to similar resistance. Nevertheless, Federal Rule 4 has one universal goal: to ensure we know a party to a lawsuit ends up with a summons and complaint in hand. Just as previous methods initially faced critique, followed by acceptance, so too can the legal profession come to accept electronic service as a valid means of achieving the rule's goal. We merely need a system where we know that service of process ends up where it needs to be.

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70 P.3d 855, 862 (Okla. 2003) and *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 315 (1950))).

214. *See* *New Eng. Merchs. Nat'l Bank v. Iran Power Generation & Transmission Co.*, 495 F. Supp. 73, 81 (S.D.N.Y. 1980) (“This conduct can only be interpreted as an intentional avoidance on the part of Iran, its agencies and instrumentalities, of service of process in an effort to frustrate the instant suits.”); *In re Int'l Telemedia Assocs., Inc.*, 245 B.R. 713, 718 (Bankr. N.D. Ga. 2000) (“In short, notwithstanding the Trustee’s diligence, the physical whereabouts of [the defendant] could not be ascertained in order to effect service of process on him by traditional means.”).

215. When service attempts fail, Texas lawyers must either pay a second time to attempt service through similar means or file a motion for substitute service. *See* TEX. R. CIV. P. 106(b) (listing requirements to qualify for substitute service, including evidence of prior attempts and a sworn statement supporting the motion).

216. It is also essential to remember parties may retain the ability to file a motion to dismiss for “insufficient service of process” under Federal Rule 12(b)(5) if they believe a modern method of service was improper. FED. R. CIV. P. 12(b)(5).

217. *See, e.g.,* Schreck, *supra* note 213, at 1134 (“The main technological problem [with e-mail] is confirming that a defendant received notice of the claim against him.”).

## V. CONCLUSION

[A] concept should not be rejected simply because it is novel or non-traditional. This is especially so where technology and the law intersect. In this age of technological enlightenment, what is for the moment unorthodox and unusual stands a good chance of sooner or later being accepted and standard, or even outdated and passé. And because legislatures have often been slow to react to these changes, it has fallen on courts to insure that our legal procedures keep pace with current technology.<sup>218</sup>

Over a century ago, the Court in *Grannis v. Ordean*<sup>219</sup> perceptively remarked, “[t]he ‘due process of law’ clause, however, does not impose an unattainable standard of accuracy.”<sup>220</sup> Due process is invaluable, but Federal Rule 4 can adapt to the complexities presented in our modern era without sacrificing these constitutional protections. Although Federal Rule 4 may appear set in stone, it does not have to be.<sup>221</sup> We cannot remain limited to the standard of accepting a system simply because it works. A workable method does not mean it lacks room for improvement, and the same can be said about Federal Rule 4.

Furthermore, our rules should strive to seek uniform application, predictability, and fairness.<sup>222</sup> State amendments are slowly making it clear that unless there is some form of an amendment to Federal Rule 4, there is a chance the same rule could produce different results, depending on where the district court sits.<sup>223</sup>

COVID-19 disrupted our court system, but it did not have to disrupt service of process, and we can learn from that experience. There will always be arguments for and against allowing electronic service of process, but the exigent circumstances presented by COVID-19 show that now is the time to modernize Federal Rule 4.

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218. *Baidoo v. Blood-Dzraku*, 5 N.Y.S.3d 709, 713–714 (N.Y. Sup. Ct. 2015) (citing *New Eng. Merch. Nat’l Bank v. Iran Power Generation & Transmission Co.*, 495 F. Supp. 73, 81 (S.D.N.Y. 1980)).

219. *Grannis v. Ordean*, 234 U.S. 385 (1914).

220. *See id.* at 395 (finding “[i]f a defendant within the jurisdiction is served personally with process in which his name is misspelled, he cannot safely ignore it on account of the misnomer”).

221. Recent amendments to Federal Rule 4 have focused largely on resolving ambiguities and modifying the effect of prior amendments. FED. R. CIV. P. 4 advisory committee’s note to 2017 amendment.

222. FED. R. CIV. P. 1.

223. FED. R. CIV. P. 4(e)(1).