

# **“You’ve Been Served! LOL”:**

## **Is Service Through Facebook Really Possible?**

By Eric Michael Liddick



**T**ry and imagine the following scenario: You are trying to serve a surprisingly evasive defendant. You have his last-known address, but the sheriff's return reads "unable to serve." Much to your chagrin, the private process server appointed by the court is equally unsuccessful and neither the Louisiana Code of Civil Procedure nor the Federal Rules of Civil Procedure provide alternative means. But, on a hunch, you decide to search for the defendant on Facebook, a popular social-networking Web site. After locating the defendant's Facebook page, you decide to do the unthinkable: serve the defendant via Facebook. "You've been served! LOL."<sup>1</sup>

Surely this scenario is a far-fetched scheme that could never succeed in advanced judicial systems that begin — and end — with the basic dictates of fairness. Yet, this scenario came to fruition recently when the Supreme Court of the Australian Capital Territory permitted service of a default judgment through Facebook.

Now, before you take to the streets in revolt or begin staging a coup d'état over this seemingly ridiculous procedure, step back and consider whether our judicial system, which increasingly, if not reluctantly, accepts technological advances, will give in to additional, substitute means of service. Although the use of Facebook to effectuate substitute service seems suspicious, closer analysis reveals that use of social-networking Web sites as a means for service is not entirely foreign to current methods of service.

## A Facebook Tutorial

For many young adults, gone are the days of networking at high-priced, fancy cocktail receptions. Instead, many are turning to the Internet as a means of

cyber-networking.

Created in 2004, Facebook is a social-networking Web site that has amassed more than 140 million members to date.<sup>2</sup> This site generally operates as a collection of mini-pages in a larger database where each registered member manages his/her own site and chooses to provide public access to some (or all) of his/her personalized information. Facebook allows users to join groups with whom they share common beliefs, add "friends," write "notes" on each others' cyber-wall, upload personal photographs of themselves and others, "poke" (electronically) each other, and send internal e-mails to other users. And, where a member foregoes privacy protections, any user can locate that member by a simple name search.

The information that any given member posts on Facebook, moreover, can range from the extremely personal to the extremely professional. Many members supply their date of birth, current residence, place of employment, e-mail address, phone number and relationship status. In short, the wealth of information that one may glean from social-networking Web sites like Facebook is remarkable.

## ***MKM Capital v. Corbo***

In what may become known as the "service heard round the world," the Supreme Court of the Australian Capital Territory permitted service of a default judgment through Facebook.<sup>3</sup>

*MKM Capital v. Corbo* involved Carmel Rita Corbo and Gordon Kingsley Maxwell Poyser, an Australian couple who entered into a six-figure loan to purchase a home.<sup>4</sup> After they defaulted on the loan, the mortgage lender filed suit and then obtained a default judgment permitting seizure of the property when the defendants failed to appear in court.<sup>5</sup> But, when the attorneys sought to serve

the judgment upon the defendants, the defendants were, predictably, nowhere to be found.

To be sure, MKM Capital's attorneys attempted more traditional means of service.<sup>6</sup> They sought to serve the petition personally, but were unable to find the defendants at their residence or their last-listed place of employment.<sup>7</sup> Since the defendants moved to a different address and changed their phone number, the mortgage lender could not serve the default judgment by mail or telephone the defendants for an updated address.<sup>8</sup> The lender's attorneys even hired private investigators and advertised the default judgment in *The Canberra Times*, but to no avail.<sup>9</sup> Without service, the mortgage lender appeared out of luck.

While the two defendants managed to evade service by moving their house and changing jobs, they were less diligent in concealing their Facebook pages.<sup>10</sup> Here is where a few entrepreneurial young lawyers entered the mix.

In a final effort to render MKM Capital whole, two young lawyers decided to search for the defendants on Facebook.<sup>11</sup> Using one of the defendant's e-mail addresses, the lawyers were able to locate that defendant's Facebook page.<sup>12</sup> As luck would have it, each defendant had confirmed the other as a "friend" on the Web site.<sup>13</sup>

Because neither defendant utilized the various security options available to members to shield information, the attorneys were able to compare biographical information listed on the Web site to information provided in the lender's loan applications.<sup>14</sup> After confirming the defendants' identity by comparing birth dates, e-mail addresses and "friend" lists, the lender's attorneys made application to the court for permission to serve the default judgment through Facebook's internal e-mail,<sup>15</sup> an innovative means of substitute service.

Rule 116(1) of the Australian Uniform Civil Procedure Rules permits

substituted service “where, in effect, there is a practical impossibility of personal service and that the method of service proposed is one which in all reasonable probability, if not certainty, will be effective in bringing knowledge or notice of the proceedings to the attention of the defendant.”<sup>16</sup> Thus, in seeking the court’s permission, the attorneys needed to show that (1) they had been unable to serve the defendants through traditional means, and (2) service through Facebook had a reasonable prospect of success.

While there was little doubt that the mortgage lender could not serve the defendants through traditional means, the attorneys faced considerable difficulty in demonstrating a “reasonable probability” of success. In a prior decision, *Citigroup Party Ltd. v. Weerakoon*, the Queensland District Court denied a similar request to serve documents via Facebook. Judge Ryrie, in denying the request, highlighted a chief concern attendant to social-networking Web sites:

I am not so satisfied in light of looking at the uncertainty of Facebook pages, the facts that anyone can create an identity that could mimic the true person’s identity and indeed some of the information that is provided there does not show me with any real force that the person who created the Facebook page might indeed be the defendant, even though practically speaking it may well indeed be the person who is the defendant.<sup>17</sup>

Faced with the *Citigroup Party Ltd.* decision, MKM Capital’s attorneys informed the court that the defendants’ names, birth dates and e-mail addresses listed on Facebook matched identically those listed on the lender’s application.<sup>18</sup> This information satisfied the court’s concern over achieving sufficient notice to the defendants.<sup>19</sup> As such, Master David Harper granted the lender’s request, concluding that service could be effectuated by sending a private, electronic message (with the documents attached) to both defendants’ Facebook pages informing them of the entry of

and the terms of the default judgment.<sup>20</sup>

This is not the first time, though, that Australian courts have surrendered to technology. Indeed, Australian courts are by no means reluctant to exploit technological innovations. Australian courts have previously issued orders permitting substitute service of documents by e-mail and text message.<sup>21</sup> *MKM Capital*, however, represents the first time that an Australian court has permitted service via a social-networking Web site.<sup>22</sup>

But, how much can the decision in *MKM Capital* inform attorneys about the future of service of process in the United States? As preposterous as it may seem, “service by Facebook” might just make a future appearance in American litigation.

## A Possibility for U.S. Civil Procedure?

Many of my more senior colleagues may find offensive the thought of service of process through Internet Web sites that they, until now, may have heard little about absent passing conversations with their children. But the possibility of service of process through Facebook, which amounts to little more than an electronic transfer of information, is not entirely implausible given certain protections.

Domiciliary (or personal) service is the preferred means of service of process under both the Louisiana Code of Civil Procedure and the Federal Rules of Civil Procedure. However, alternative means of service exist under both sets of rules. Indeed, the Federal Rules of Civil Procedure explicitly recognize service of documents (except for initial pleadings) via e-mail, but only when the opposing party agrees in advance to this form of service.<sup>23</sup>

While the days of “tacking” a summons to the courthouse door are past, certain jurisdictions permit even less reliable forms of service under certain circumstances. By way of example, the Texas Family Code allows for service of citation by publication if a person entitled to service “cannot be notified by

personal service or registered or certified mail and to persons whose names are unknown.”<sup>24</sup> Similarly, the Local Rules of Court in Geauga County, Ohio, provide for service by publication “if the residence of a defendant is unknown.”<sup>25</sup> In order to effect service by publication, a party must submit an affidavit averring that the defendant’s place of residence is unknown, detailing the efforts made to ascertain the defendant’s location, and averring that the party cannot locate the defendant with reasonable diligence.<sup>26</sup> In Wisconsin, a party may serve divorce, legal separation or annulment actions by publication if, “after reasonable diligence, the respondent cannot be served personally.”<sup>27</sup>

Texas, Ohio and Wisconsin by no means constitute an exhaustive list of jurisdictions permitting service by publication. But these states’ substitute procedures help illustrate the “constructive notice” end of the service spectrum. The issue posed by the decision in *MKM Capital*, and the question of whether such service is possible in the United States, is how (and where) “service by Facebook” falls on the service of process spectrum. This method of service is certainly not akin to personal or domiciliary service; however, it is more likely to provide actual, as opposed to constructive, notice of a proceeding than service by publication. If we allow service by publication in limited circumstances, why is the notion of “service by Facebook” so incomprehensible?

The answer to this question might be rooted in traditional notions of due process. In *Mennonite Board of Missions v. Adams*, the United States Supreme Court held that neither notice by publication nor posting ensured actual notice to a mortgagee who stood to suffer adverse effects to property interests from notice to the property owner alone.<sup>28</sup> Justice O’Connor writing in dissent, however, stated that:

notice is constitutionally adequate when the practicalities and peculiarities of the case... are reasonably met.... The key focus is the “reasonableness” of the

means chosen by the State.... Whether a particular method of notice is reasonable depends on the outcome of the balance between the “interest of the State” and “the individual interest sought to be protected by the Fourteenth Amendment.”<sup>29</sup>

In short, “notice will vary with the circumstances and conditions.”<sup>30</sup>

Circumstances may arise, then, that justify “service by Facebook,” albeit as a last resort. Undoubtedly, a colorable argument can be made that service in this manner is more likely to ensure the minimum constitutional precondition to a proceeding affecting life, liberty or property: actual notice.

Courts, though, may be reluctant to accept this argument at present. Certain challenges exist to the claim that one can reasonably presume that “service by Facebook” will provide actual notice. For example, little controls exist to ensure that the person registering for a Facebook account is actually who he/she claims to be. A real possibility exists that highly devious miscreants might surreptitiously create Facebook pages in the name of random defendants for purposes of sabotage.<sup>31</sup> Another example of a problem with this means of service is the potential difficulty in determining the frequency with which any individual uses Facebook. That is, if the defendant is not a Facebook “addict,” then timely receipt of notice may be less certain. Where timeliness of notice matters, such as in default judgment scenarios, this uncertainty presents serious due process concerns.

As it stands, these two concerns alone are sufficient to abate attempts to effectuate service via Facebook at present. Given the pace of technology, though, these concerns could be addressed with relative ease. Facebook could adopt certain protocols or programs that ensure that the user is actually who he/she claims to be. Additionally, Facebook already includes a feature that indicates the user’s most recent visit to the Web site. This feature, then, might conveniently serve as a factor for determining the reasonable likelihood

of receipt of service because it indicates approximately how often a particular user visits the Web site. But, one point remains clear: If jurisdictions in this country can allow service by publication, surely “service by Facebook,” with the addition of adequate safeguards, could become a legitimate form of substitute service of process that comports with basic notions of due process.

## Conclusion

The recent Australian decision permitting service of a default judgment via a popular social-networking Web site appears facially preposterous. It is quite easy to dismiss this decision out-of-hand. Yet, deeper inspection reveals that “service by Facebook” may, in the future, be considered a valid form of substitute service and adopted by those states that frequently embrace, rather than shun, technological advances. With proper safeguards and enhanced security measures, “service by Facebook,” whether we like it or not, and as unlikely as it may seem, could become a future means of substitute service. In the future, if your client gets that private Facebook e-mail reading “re: You’ve been served,” don’t say I didn’t warn you.

## FOOTNOTES

1. “LOL” is common Internet slang for “laugh out loud.”

2. See Facebook Home Page, <http://www.facebook.com>. Other examples of popular social-networking Web sites include MySpace and LinkedIn.

3. See *FoxNews.com, Australian Couple Loses Home Via Facebook*, Dec. 16, 2008, <http://www.foxnews.com/story/0,2933,467525,00.html> (last visited Dec. 17, 2008). See also *MKM Capital v. Corbo* [2008] ACTCA \_\_ (Austl.) (not yet released for publication).

4. See Agnes Gajewska, *Facebook the new frontier for default judgements*, Dec. 17, 2008, <http://au.ibtimes.com/articles/20081216/facebook-the-frontier-for-default-judgements.htm> (last visited Dec. 17, 2008).

5. See *FoxNews.com, supra* note 3.

6. See Norrie Ross, *Lawyers given permission to serve debtors with default judgement through Facebook*, Dec. 16, 2008, <http://www.news.com.au/technology/story/0,28348,24806438-5014239,00.html> (last visited Dec. 17, 2008).

7. See *id.*

8. See Alison Caldwell, *The World Today – Facebook features as long arm of the law*, Dec. 16, 2008, <http://www.abc.net.au/worldtoday/content/2008/s2447627.htm> (last visited Dec. 17, 2008). See also Kate Scroggins, *Facebook OK for legal documents: Australian court*, Dec. 17, 2008, <http://www.nationalpost.com/news/world/story.html?id=1084050> (last visited Dec. 17, 2008).

9. See Noel Towell, *You’ve been served: court approves Facebook notice*, Dec. 16, 2008, <http://www.canberratimes.com.au/news/local/news/general/youve-been-served-court-approves-facebook-notice/1387146.aspx> (last visited Dec. 17, 2008).

10. See *id.*

11. See *id.*

12. See *id.*

13. See *id.*

14. See *id.*

15. See Caldwell, *supra* note 8.

16. See *Citigroup Party Ltd. v. Weerakoon* [2008] QDC 174, 1 (Austl.).

17. *Id.* at 3-4.

18. See Gajewska, *supra* note 4.

19. See Scroggins, *supra* note 8 (“It was enough to convince the judge . . . that the profiles belonged to the defendants and that social networking was an appropriate way to contact them.”).

20. See *FoxNews.com, supra* note 3.

21. See *id.*

22. See Ross, *supra* note 6.

23. See Fed. R. Civ. P. 5(b)(E) (2008).

24. Tex. Fam. Code Ann. § 102.010 (Vernon 2008).

25. *Geauga County L.R.* 29.

26. See *id.*

27. Wis. Stat. Ann. § 801.11(1)(c) (West 2008).

28. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 799-800 (1983).

29. *Id.* at 801 (O’Connor, J., dissenting) (internal quotation marks and citations omitted).

30. *Id.* at 802 (O’Connor, J., dissenting) (quoting *Walker v. City of Hutchinson*, 352 U.S. 112, 115 (1956)).

31. See, e.g., *Draker v. Schreiber*, No. 04-07-00692, 2008 WL 3457023 (Tex. App. Ct. 2008) (involving a fake MySpace page created by students in the name of their principal). Although I doubt that attorneys (or their clients) would go to great lengths to fraudulently create a page for purposes of service, it appears that I am less cynical than many of my colleagues.

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