

Fw: Nail & mail service FW: following up

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Mon 5/18/2020 10:44 AM

To: Jaclyn Daumerie <Jaclyn.Daumerie@txcourts.gov>

From: Manny Newburger <mnewburger@bn-lawyers.com>**Sent:** Friday, May 15, 2020 10:52 AM**To:** Nina Hess Hsu <Nina.HessHsu@txcourts.gov>**Subject:** following up

I apologize for being slow to get back to you, but my practice is primarily a federal one spanning a fair number of jurisdictions, and I have cases that are still moving forward.

As I said, my concern is that service of process (until there is a COVID-19 cure or vaccine) presents certain risks. Process servers cannot maintain proper social distancing, and there is a risk that process-servers could infect litigants. I represent a national process service company that has spent considerable time and effort developing safety protocol. Nevertheless, there is an unavoidable risk that serving an infected person can result in transmission of the virus to others who are served. “Personal” service violates social-distancing recommendations. Contact by a process server with one infected person risks spreading the infection to everyone whom that process server subsequently serves.

My suggestion is that the court temporarily amend Rule 106 to allow service by what is commonly known as “nail and mail” in some jurisdictions. An example of the procedure is found in NY CLS CPLR § 308(4_:

§ 308. Personal service upon a natural person.

Personal service upon a natural person shall be made by any of the following methods:

1. by delivering the summons within the state to the person to be served;
- or
2. by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the

summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend “personal and confidential” and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such delivery and mailing to be effected within twenty days of each other; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing, whichever is effected later; service shall be complete ten days after such filing; proof of service shall identify such person of suitable age and discretion and state the date, time and place of service, except in matrimonial actions where service hereunder may be made pursuant to an order made in accordance with the provisions of subdivision a of section two hundred thirty-two of the domestic relations law; or

3. by delivering the summons within the state to the agent for service of the person to be served as designated under rule 318, except in matrimonial actions where service hereunder may be made pursuant to an order made in accordance with the provisions of subdivision a of section two hundred thirty-two of the domestic relations law;

4. where service under paragraphs one and two cannot be made with due diligence, by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by either mailing the summons to such person at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend “personal and confidential” and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such affixing and mailing to be effected within twenty days of each other; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such affixing or mailing, whichever is effected later; service shall be complete ten days after such filing, except in matrimonial actions where service hereunder may be made pursuant to an order made in accordance with the provisions of subdivision a of section two hundred thirty-two of the domestic relations law;

5. in such manner as the court, upon motion without notice, directs, if service is impracticable under paragraphs one, two and four of this section.

6. For purposes of this section, “actual place of business” shall include

any location that the defendant, through regular solicitation or advertisement, has held out as its place of business.

My suggestion is a variation on this process. If the court allows “nail and mail” without the need for in-person attempts but does not deem service effected until the mailed copy has not been returned for 14/21/30 days and an affidavit to that effect has been filed you would provide an alternative mechanism that protect the health, safety, and welfare of the persons served by such method.

Thank you for consideration of this suggestion.

Manny

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