**Lect 8**

How to serve,

We will study rules for service for actions filed in ***federal court*** concerning defendants that are ***individuals***, ***corporations, and unincorporated associations*** when service is effectuated ***in the United States*** - we will ignore:  
service in other countries  
service when the United States, a state, or a local government is the defendant  
service on infants or incompetent persons

**Examples of service on individuals**

**One**

* P files an action against D in the E.D. Va. for violation of federal law.
* D resides in Boston, Massachusetts.
* P drives to D’s home in Massachusetts and delivers the complaint to D personally at his home.
* D appears in the E.D. Va. and makes a motion to dismiss for insufficiency of service of process and insufficiency of process.
* What result?
* insuff process (no summons)
* insuff service – can’t serve if a party
* *4(c) Service.  
  (2) By Whom. Any person who is at least 18 years old and not a party may serve a summons and complaint.*
* Q – what about state law?
* *(e) …may be served in a judicial district of the United States by:  
  (1) 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…*What are the relevant states? MA and VA
  + - * What does MA and VA about who may serve?
        + MA only sheriff deputy
        + Va - sheriff or any person of age eighteen years or older and who is not a party or otherwise interested in the subject matter in controversy....
      * What if MA or VA law had said a party may serve? Would that mean service was OK?

Arguably not– R 4(c)(2) is an independent federal requirement on who may serve

the standard in R 4(e)(1) incorporating state law is only for how service is effected, not who may serve

we shall return to this question

General question – when 4(e)(1) refers to state law, is it recognizing state lawmaking power over the procedure of federal courts?

Big issue – it used to be that lawmaking power was considered exclusive.

E.g. Federal government’s power to regulate interstate commerce meant that it alone had that power. State’s power to regulate *intra*state commerce was likewise exclusive.

Same between the states. Only California had power to regulate activities of Nevadans in California.

But now it is assumed that power can be concurrent rather than exclusive. Both California and Nevada can regulate the activities of Nevadans in California. Federal and state power to regulate commerce is concurrent.

But then what happens when laws conflicts? One solution is to let courts make their own decisions. A California court might apply California law and a Nevada court might apply Nevada law to Nevadans’ activities in Calif.. To a large extent that is what happens with concurrent state power. BUT with federal/state conflicts, federal law trumps, even in state court.

To return to our question – does Mass/Virg state law actually apply in federal court, such that 4(e)(1) is recognizing state lawmaking power?

I would say no – it is choosing to borrow state law standards in order to satisfy federal purposes. This is common – federal law borrows state standards, for example, because people are used to them and would be confused by a different federal rule. Federal goals would be frustrated by such confusion.

That is probably what is going on here – people serving generally do it for state courts and so are used to those standards – the feds don’t want lots of cases dismissed for inadequate service when state law standards are used, so they borrow state standards.

That is different from Mass/Virg law actually applying and the federal government recognizing state lawmaking power.

BUT it is not clear to me that states have no power to regulate the procedure of federal courts. It is simply that service is probably not one of those areas. We will deal with this later.

**Two**

* P files an action against D in the E.D. Va. for violation of federal law.
* D resides in Boston, Massachusetts and has a summer home in Martha’s Vineyard.
* P waits 3 months after filing to have a process server deliver a copy of the summons and complaint to D at his summer home.
* D appears in the E.D. Va. and makes a motion to dismiss for insufficiency of service of process.
* What result?
* OK because delivering a copy of the summons and of the complaint to the individual personally in keeping with R 4(e)(2)
  + Might think not OK because not at dwelling place
  + But that’s not relevant when in hand
  + Can have in hand service anywhere

THREE

* P files an action against D in the E.D. Va. for violation of federal law.
* D resides in Boston, Massachusetts and has a summer home in Martha’s Vineyard.
* P waits 2 months after filing to have a process server deliver a copy of the summons and complaint to D at his summer home.
* D appears in the E.D. Va. and makes a motion to dismiss for insufficiency of service of process.
* What result?
* wait is OK (have 90 days) 4(m)
* R 4(m) Time Limit for Service.   
  If a defendant is not served within 90 days after the complaint is filed, the court — on motion or on its own after notice to the plaintiff — must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.. . . .

The P Corp. files an action against D in the E.D. Va. for violation of federal law.  
- D resides in Boston, Massachusetts and has a summer home in Martha’s Vineyard.  
- The P Corp. has an employee deliver a copy of the summons and complaint to D at his summer home.  
- D appears in the E.D. Va. and makes a motion to dismiss for insufficiency of service of process.  
- What result?

May an employee of P Corp. serve?

* Is an employee of a corporate plaintiff a party under 4(c)(2)
* We had a discussion pro and con
  + Purpose of prohibition on parties serving is the conflict of interest that would arise otherwise – the party would be tempted to serve improperly and get a default judgment
  + There is an argument that an employee might have the same conflict of interest
  + But in fact those individuals working for a corporate plaintiff who are a “party” for the purpose of 4(c)(2) has been understood by those federal courts that have addressed the matter more narrowly (includes only officers and directors - CEO, CLO)
  + Perhaps an analogy with 4(h)(2) can get you to this?
  + 4(h) Serving a Corporation, Partnership, or Association.   
    …must be served:  
    (1) in a judicial district of the United States:  
        (A) in the manner prescribed by Rule 4(e)(1) for serving an individual; or  
        (B) by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and — if the agent is one authorized by statute and the statute so requires — by also mailing a copy of each to the defendant...

Who may be served for a corporate defendant can be used to determine who may not serve for a corporate plaintiff?

P files an action against D in the E.D. Va. for violation of federal law.

* D resides in Boston, Massachusetts and has a summer home in Martha’s Vineyard
* P has his brother leave a copy of the summons and complaint with D’s 16 year-old daughter who is staying for the summer at his summer home.
* D appears in the E.D. Va. and makes a motion to dismiss for insufficiency of service of process.
* What result?

- brother not a party so no 4(c)(2) problem

Is there a problem under 4(e)?

4(e) Serving an Individual Within a Judicial District of the United States.   
Unless federal law provides otherwise, an individual — other than a minor, an incompetent person, or a person whose waiver has been filed — may be served in a judicial district of the United States by:

(1) 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; or…

(2) doing any of the following:  
    (A) delivering a copy of the summons and of the complaint to the individual personally;  
    (B) leaving a copy of each at the individual’s dwelling or usual place of abode with someone of suitable age and discretion who resides there; or  
    (C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

- summer home not a dwelling house or usual place of abode? – might be if D was living there at the time?

* Question of whether daughter is of suitable age and discretion (probably is)
* Also question whether she is residing there

Assume that 4(e)(2) is not satisfied, because summer home is not D’s dwelling or usual place of abode – does that mean service is inadequate?

* No – look to 4(e)(1) – can satisfy 4(e) if you satisfy state law

Mass law?

* **4 (d) Summons: Personal Service Within the Commonwealth.**The summons and a copy of the complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:
* (1) Upon an individual by delivering a copy of the summons and of the complaint to him personally; or by leaving copies thereof at his last and usual place of abode; or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by statute to receive service of process, provided that any further notice required by such statute be given…

Probably not his “last and usual place of abode”

Virginia law

**Va.Code § 8.01-296**

**MANNER OF SERVING PROCESS UPON NATURAL PERSONS.**

A. In any action at law or in equity or any other civil proceeding in any court, process, for which no particular mode of service is prescribed, may be served upon natural persons as follows:

    1.         By delivering a copy thereof in writing to the party in person; or

    2.         By substituted service in the following manner:

        a.         If the party to be served is not found at his usual place of abode, by delivering a copy of such process and giving information of its purport to any person found there, who is a member of his family, other than a temporary sojourner or guest, and who is of the age of sixteen years or older; or

        b.         If such service cannot be effected under subdivision 2 a, then by posting a copy of such process at the front door or at such other door as appears to be the main entrance of such place of abode…

again – problem because not usual place of abode

assume P’s brother had attached summons and complaint to the *door* of D’s home in Boston

Would that be OK because it satisfied Mass. state law and so satisfied 4(e)(1)?

* does it matter that it is service not by a sheriff etc. as required under Mass law?
* Mass. R. Civ. P. 4(c) By Whom Served.   
  Except as otherwise permitted by paragraph (h) of this rule, service of all process shall be made by a sheriff, by his deputy, or by a special sheriff; by any other person duly authorized by law; by some person specially appointed by the court for that purpose...
* Argument that it does not matter
  + Fed. R. Civ. P. 4(c)(2) is a general standard on who may serve and it was satisfied
    - 4(e) is merely about how to serve
  + Green thinks the structure of R 4 (in which 4(c) is separated from 4(e)) suggests this reading
* Argument that it does matter
  + Mass law is generous about how to serve (allows posting on door of home) because it is restrictive about who may serve
  + Arguably the two should be used together
  + But that argument would be stronger if Massachusetts lawmaking power was actually being recognized in 4(e)(1) – it probably isn’t
* VA law ?
* Posting is OK and don’t need the sheriff
  + **Va.Code § 8.01-293**  
    **WHO TO SERVE PROCESS.**A.  The following persons are authorized to serve process:  
        1.  The sheriff within such territorial bounds as described in § 8.01-295; or  
        2.  Any person of age eighteen years or older and who is not a party or otherwise interested in the subject matter in controversy…
  + **Va.Code § 8.01-296**  
    **MANNER OF SERVING PROCESS UPON NATURAL PERSONS.**  
    A. In any action at law or in equity or any other civil proceeding in any court, process, for which no particular mode of service is prescribed, may be served upon natural persons as follows:  
        1.         By delivering a copy thereof in writing to the party in person; or

By substituted service in the following manner:  
        a.         If the party to be served is not found at his usual place of abode, by delivering a copy of such process and giving information of its purport to any person found there, who is a member of his family, other than a temporary sojourner or guest, and who is of the age of sixteen years or older; or  
        b.         If such service cannot be effected under subdivision 2 a, then by posting a copy of such process at the front door or at such other door as appears to be the main entrance of such place of abode…

BUT Va law does not allow anyone who is “or otherwise interested in the subject matter in controversy” to serve and we are assuming that brother of P is serving. So we again have the question about whether, if relying on state law methods of service pursuant to FRCP 4(e)(1) one must also satisfy state law methods about who may serve or whether one can simply look to FRCP 4(c)(2)

Green thinks you don’t (Glannon assumes – without argument – that you do).

Assume…

- Defendant is aware that he is being served but will not take them  
- Process server lets them fall at the Defendant’s feet  
- Server returns a little while later to find that the papers are gone.

OK – this is delivering personally

Novak v. World Bank, 703 F.2d 1305, 1310 n. 14 (D.C. Cir. 1983)

- Defendant is aware that he is being served but will not answer door  
- Process server lets them fall at the doorstep  
- Server returns a little while later to find that the papers are gone

Is this delivering personally?

Has been so held – though tougher case

Williams v. Harris, 1988 WL 78849 (D.D.C. 1988)

* P files an action against D in the E.D. Va. for violation of federal law.
* P serves D in accordance with Fed. R. Civ. P. 4
* D files a counterclaim against P and serves P by mailing a copy of the counterclaim to P’s attorney
* P appears in the E.D. Va. and makes a motion to dismiss the counterclaim for insufficiency of service of process.
* What result?

- OK under R. 5 – do not need to satisfy R 4

- WHY?

- P already knows there is a lawsuit going on, so more relaxed methods of service in R 5 are used

But R 4 must be satisfied if bringing in new party

Suing Corps. (and unincorporated ass’ns)

(h) Serving a Corporation, Partnership, or Association.   
…must be served:  
(1) in a judicial district of the United States:  
    (A) in the manner prescribed by Rule 4(e)(1) for serving an individual; or  
    (B) by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and — if the agent is one authorized by statute and the statute so requires — by also mailing a copy of each to the defendant...

...

4(h)(1)(A) refers to state law methods for serving *corporations or unincorporated associations*

* P files an action against the D Corp. in the E.D. Va. for violation of federal law.
* P serves D by having a process server leave a copy of the summons and complaint with a foreman at a D. Corp. plant in Pa.
* The D. Corp. appears in the E.D. Va. and makes a motion to dismiss the complaint for insufficiency of service of process.
* What result?

- OK?

- not officer managing or general agent or agent for service of process