**Notice and Service of Process**

**Due process restriction on notice**

Mullane v. Central Hanover Bank

* There is a discussion about whether this is a proceeding in rem or in personam. Thinking in terms of Pennoyer v. Neff it seems like an in rem proceeding. The court says it simply doesn’t matter how you characterize this action because the Due process analysis concerning notice does not depend on which way you characterize it.
* “An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is 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.”

What conclusion does the court come to?

* For those with contingent and future interests, the publication of notice is sufficient.
* For those with beneficiaries whose whereabouts couldn’t be found through due diligence, publication is also sufficient.
* But notice through publication is not sufficient with respect to known beneficiaries. For known beneficiaries, mailed notice is sufficient notice.
* This process of determining sufficiency of notice is a very fact intensive process.

What do you take into account?

* The cost of a better method of notice and the amount that it would increase the likelihood of actual notification
* The value of the interest of those who might not be notified
* Whether the interests of those who are not notified will be protected by those who are notified
* Whether other aspects of the case (such as attachment) might increase the possibility of notification
* Green mentions that another factor, not mentioned by the court, is how important it is to arrive at a binding judgment
	+ – this is important in Mullane and in in rem actions
	+ But if it is, say, a battery action in which the D cannot be found, there might be a reason not to allow publication until the statute of limitations is about to run out

**Fed Rules of Civil Procedure**

**Rule 3. Commencement of Action**

* Civil action is commenced by filing a complaint with the court.

**Rule 4. Summons**

* The summons is separate from the complaint, it shows that a court is claiming power over a defendant.

Waiver of service of summons

* Send to D
* D must return within 30 days
* If defendant doesn’t submit the waiver, then has to pay for actual service
* If defendant does submit, gets 60 days to answer vs. usual 20 days.
* Waiver can serve as proof of service. When you get it back and file it, that counts as time of service.
	+ Danger to doing waivers: statute of limitations often depends on time of service. Defendant could take his time.

**Methods of service**

What if the method of service is improper?

* + If you default you can
	+ go before that court and make a motion to set aside judgment
	+ Or make a collateral attack
		- If you default, and the plaintiff sues on the judgment. The D can collaterally challenge the judgment in those second proceedings

If you find out about the suit despite the inadequate service?

* You can make a motion to dismiss for inadequate service

A court will usually allow challenges of insufficient service by those who got notice.

Why allow the D to challenge service if they received notice?

Because if you didn’t allow this, the plaintiff would not have much of an incentive to adhere to the rules of service.

**Questions about rules for service for actions filed in federal court concerning individuals, corporations and unincorporated associations when service is done in the US:**

P files action against D in Va. For violation of federal law.

* D resides in Mass.
* P drives to D’s home in Mass and delivers complaint
* D appears in fed court in Va. and makes a motion to dismiss for insufficiency of process.

What results?

Dismissed b/c plaintiff cannot serve process b/c he is a party to the suit.

* Also inadequate process because no summons

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.

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…

Does Mass. Law on how to serve actually apply in federal courts in Massachusetts?

In other words, what’s going on here with the state law in 4(e)(1)?

* state does not have power over federal procedure - it is just incorporated into federal law.
* The language about state law in Federal rules of Civil Procedure is incorporating state laws to a federal rule, for federal purposes.

So why does rule 4(e)(1) make reference to state laws?

* to avoid confusion – process servers are most familiar with state law, because most actions are in state court
* also – states have detailed law on substituted service (like publication etc.) and irt is easier to borrow those standards than to come up with an independent federal standard

**Hypo:**

1.

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

Is this ok?

The question is whether this satisfies:

4(e)(2)

 doing any of the following:
    (A) ***delivering*** a copy of the summons and of the complaint to the individual ***personally***;

has been held to be OK’

D is aware he’s being served but will not answer door, so process server lets the copy of Summons and complaint fall at the D’s feet. Server returns a little later to find that the papers are gone.

Also has been held to be OK – but more iffy

2.P files action against D in E.D. of Va. For violation of fed law.

* D resides in Boston. But has a summer home in Martha’s Vineyard.
* P waits 3 months after filing complaint to serve summons and complaint to D at his summer home.
* D appears in E.D. for Va. And makes a motion to dismiss for insufficiency of service of process.

What result?

 Won’t be dismissed as long as the three months are no longer than 90 days.

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.. . . .

It doesn’t matter if D is served at his summer home, because he was served personally.

**HYPO**:

3) 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

- 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?

* + Is this someone who can serve? Is an employee of a party considered 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.

How to answer this question?

 Plain language of 4(c)(2) does seem to answer. Look to purposes of 4(c)(2)?

* Why can’t a party serve? If party serves, may be too tempted to falsify affidavit.
* Where to draw the line when you have a corp. as a plaintiff? Employees have a financial interest in the company. Maybe exclude all employees?

**HYPO**:

4) 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?

* + Not personal service. Not usual place of abode.
	+ Daughter old enough? Don’t know. Not mentioned in FRCP, flexible standard.

“suitable age and discretion”
16 years is generally considered OK

Either way, maybe she also doesn’t reside there.

* + Brother not a party, so he’s ok to serve.
	+ BUT must also look to state law, because of FRCP 4(e)(1)
	+ Won’t work…

**Mass. R. Civ. P. 4(d) Summons: Personal Service Within the Commonwealth.**…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….

**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…

**HYPO**:

What if P’s brother had knocked at the door of D’s home in Boston and finding no one there had left a copy of the summons and complaint attached to D’s front door?

* Ok according to MA statute to leave at the door.

**HYPO**:

5) 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?

* + Once all parties are aware they are part of a lawsuit, more generous rules apply for delivering subsequent materials (Rule 5 ).
	+ *Side note: Lawyer not an agent for service of process.*

Serving corporations or unincorporated associations

(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)(B) mail as well as serve on agent because agent under no obligation to tell corporation. Must satisfy Mullane.*

**HYPO**:

1) P files an action against the D Corp. in the E.D. Va. for violation of federal law.
- P serves the D Corp. 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?

* + Foreman is not a manager or general agent of D Corp…?
	+ Why inappropriate? Must make sure you give to an individual who will apprise the corporation of the lawsuit.
	+ Best person to serve: chief legal officer/general counsel.
	+ BUT still need to check state law: might be ok under PA/VA state law
	+ This is because of 4(h)(1)(A) which says that service of corp or unincorporated assn in the manner prescribed by Rule 4(e)(1) for serving an individual is OK
		- NOTE: this means you look to state law on service of corp or unincorporated assn not state law on serve on human being

**HYPO**:

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

P serves D by having his lawyer leave a copy of the summons and complaint at house of the CEO of the D. Corp. in Pennsylvania with his 18-year-old son

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?

* + P’s lawyer is not a party and so can serve
	+ 4(e)(2)(a) what does “delivery” mean? Left out “personally” – language used for service of an individual.
	+ Some courts have held that in hand service not necessary for delivery.
	+ Secretary of CEO would be ok - would be *delivering* it to CEO.
	+ This is still an open question. Why would this situation be problematic? Probably not answering purpose of the important rule: **making sure it gets to someone who will apprise the corp. of the lawsuit.** (i.e. CEO’s son might not be as likely to deliver to his father if he just saw that corp. was being sued).
	+ NOTE: must still look to see if it is allowed under state law

Substituted service under state law

* Court approves alternative methods of service.
* State laws may have detailed methods other jurisdictions can draw from

Service without Notice

* If service was proper but you didn’t find out and so defaulted, the judgment is valid, but you can sometimes get it set aside – you go to the rendering court

**Rule 60. Relief from a Judgment or Order**…
 (b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
(1) mistake, inadvertence, **surprise**, or excusable neglect;
(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)
(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
**(4) the judgment is void;**(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
(6) any other reason that justifies relief.
(c) Timing and Effect of the Motion.
(1) *Timing.* A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

* Judgment not always can be set aside.
* If service was adequate, then you have to appeal to surprise.
* You have one year before you are bound by judgment.

Service and Personal Jurisdiction

* Important to distinguish.

Venue in Federal Court

Why does venue exist?

* Restrict litigation to districts that are convenient.

What to remember about 28 USC 1391

* Statutory, not a constitutional issue
* About federal districts, not states
* Applicable only in federal court system
* Rough measure of convenience