ANALYSIS OF PROPOSED LEGISLATION TO AMEND STATUTORY PROVISIONS REGARDING SERVICE OR PROCESS IN FLORIDA

White Paper
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I. Background and Introduction

In 2019, the Business Law Section of The Florida Bar (BLS) empaneled a Task Force to consider possible amendments to the statutes governing service of original process[1] in Florida. During the course of its review and analysis of the service of process provisions relating to corporations under Chapter 607, Florida Statutes, another BLS task force involved in a review and preparation of possible amendments to Chapter 607, Florida States, had requested the formation of a separate task force, comprised of business litigators as well as business transactional attorneys, to examine the subject of service of process on all types of business entities.

The Task Force was comprised of practitioners of diverse practices and legal backgrounds. The members conducted a detailed review of the applicable

[1] Original process is considered to be an original writ or summons issued by the authority of a court as the first step in a lawsuit, including a notice to the party being served when to appear and make a defense. Contrastingly, mesne process is process issued during the course of a legal proceeding, whereas final process is considered to be a writ of execution pursuant to a judgment issued at the conclusion of a legal proceeding.

statutes, researched pertinent judicial decisions, federal law, and the law of other states and held regular periodic meetings to discuss various proposals.

As a result of its study and deliberations, the Task Force adopted several primary goals: (1) simplify the methods of service of process on business entities to eliminate redundancies and inconsistencies, (2) clarify the statutory scheme to avoid confusion, (3) better elucidate the methods for effectuating service of process in foreign countries, and (4) modernize the methods and procedures for service of process on business entities, while ensuring compliance with fundamental notions of due process.

II. Consolidation of Statutory Provisions regarding Service of Process on Business Entities

In addition to Chapter 48, several substantive statutes addressing the formation, governance, and operation of domestic and foreign business entities in this state also include provisions setting forth methods and procedures for service of process on those entities. In some instances, this has led to confusion among practitioners and the courts, has created uncertainty, and has complicated compliance with the requirements of service of process in actions in Florida courts. *See*, *e.g., Green Emerald Homes, LLC vs. Nationstar Mortg., LLC*, 210 So.3d 263, 264-265 (Fla. 2d DCA 2017) (section 605.0117(3)

authorizing plaintiff to serve a limited liability company though substituted service on the Secretary of State did not create a new, independent method of effecting substituted service, and plaintiff must still comply with the notice requirements in section 48); *Jupiter House LLC v. Deustche Bank Nat'l Trust Co.*, 198 So.3d 1122 (Fla. 4th DCA 2016) (same); *but compare Magnolia Court, LLC v. Moon, LLC*, 299 So.3d 423 (Fla. 3d DCA 2019) (party serving Secretary of State as agent for unregistered foreign LLC under Section 605.904(6) was not required to comply with notice requirements of Chapter 48).

The Task Force believes that it would eliminate redundancies, uncertainties, and possible conflicts, as well as simplify and enhance compliance and improve the ability to effectuate valid service, if *all* of the requirements for service of process on business entities were placed within Chapter 48. Accordingly, the Task Force proposes to eliminate the provisions regarding service of process on limited partnerships under Chapter 620, limited liability companies under Chapter 605, and corporations under Chapter 607 and 617, and to instead simply cross-reference in these entity statutes to the applicable provisions under Chapter 48.

III. Changes to the Methods of Personal Service of Process on Business Enti

A. Service on the Registered Agent

Section 48.062, Florida Statutes, currently provides for personal service of process to be made upon the registered agent of a limited liability company (LLC), domestic or foreign, unless such service cannot be made because (i) the LLC has failed to comply with the requirements for establishment and maintenance of a registered agent, (ii) the LLC does not have a registered agent, or (iii) the registered agent cannot with "reasonable diligence" be served. In any such instance, service may be effectuated by personally serving a member of a member-managed LLC, a manager of a manager-managed LLC, or an employee that they designate, and, after one attempt to serve a member, manager, or designated employee has been made, process may be served on the person in charge of the LLC during regular business hours. Then, if after reasonable diligence personal service of process cannot be completed, substituted process may be effectuated on the Florida Secretary of State.

As for service on corporation, personal service of process currently may be effectuated under Section 48.081 either through a hierarchy of listed officers (president, vice president, or other head of the corporation, and, in his or her absence, on the cashier, treasurer, secretary, or manager, and, in his or her absence on the any director, etc.) *or*, *alternatively*, on the registered agent of the corporation (emphasis added). Substituted service of process may also be

made on the Florida Secretary of State under sections 48.161 if personal service cannot be made on any of these individuals after due diligence.

The Task Force believes that it would simplify service of process to require parties to initially attempt to effectuate service though the designated registered agent in respect to all business entities, domestic or foreign, that are required to have a registered agent or are permitted to have one and elect to do so. Moreover, a primary responsibility of a registered agent is to accept process on behalf of a business entity; thus, making the registered agent the primary designee for service of process should best ensure that those in charge of the entity receive actual notice of the lawsuit and understand the significance and consequences of the service of process.

The Task Force further proposes to expand Section 48.091, which sets forth the requirements for designation of registered agents and registered offices so as to specially apply to partnerships electing to register, limited partnerships, limited liability limited partnerships, and limited liability companies as well as to corporations.

B. Waterfall System

Of course, we are aware that business entities may not always comply with the requirements relating to designating or maintaining their registered agents and office, so that parties, as permitted under existing law, should also have the ability when there is no such designated registered agent in place to effectuate service of process by serving responsible individuals involved in the governance and operations of the entity, which also serves to provide actual notice of the lawsuit to the entity.

The Task Force believes that while an attempt should first be made to serve the registered agent, extensive searches and repeated attempts to serve the registered agent should not be required. A single good faith attempt should suffice. *See* proposed amendments to Sections 48.062(2) and 48.081(2), Florida Statutes.

Moreover, the existing requirements under Section 48.081 for securing personal service on a corporation, which can require repeated attempts to serve process though a hierarchy of designated officers and directors, can be overly time consuming, burdensome, and expensive, and, in the Task Force's view, are not necessary to comply with due process standards of notice. Instead, the Task Force purposes that, if service of process cannot be made on

the registered agent after a single attempt due to failure of the business entity to comply with the requirements regarding designation and maintenance of registered agents and registered offices, then service may be made on either "the chair of the board, the president, any vice president, the secretary, or the treasurer of the corporation" or on "any person listed publicly by the [corporation] on its latest annual report, as recently amended." See proposed Section 48.081(2)(ii), Florida Statutes. The party seeking to serve process therefore is not required to attempt *seriatim* to serve a lengthy list corporate officers or director, with the ability to serve the individual occupy the next position on the list only after attempting unsuccessfully to serve the higher-ranked individual. Instead, the proposed revised statute sets forth a list of positions among whom the party seeking to effectuate service can choose to serve without having to try to first serve any others on the list.

As for service on partnerships, since Chapter 620 now allows, but does not require, registration of general partnerships with the Florida Secretary of State and appointment of registered agents, the Task Force proposes to add a provision to section 48.061(1) allowing service of process on the registered agent, if one has been appointed. Furthermore, the Task Force proposes that a party seeking to serve a domestic limited partnership or a limited liability partnership (or a foreign

limited partnership or foreign limited liability partnership that conducts business in the state and that files a statement of foreign qualification) must first attempt service on the entity's designated agent for service of process prior to seeking to serve a general partner. *See* proposed Sections 48.061(2) and (3).

Finally, the provisions of Section 48.101, which by its terms expressly applies only to service on dissolved corporations, should be broadened to also apply to service on dissolved limited liability companies, limited partnerships, and limited liability partnerships.

IV. Serving Process through Substituted Service on the Secretary of State

A. Delivery of Substituted Process to the Secretary of State

Florida law has long allowed service of process to be effectuated on certain individuals and business entities through substituted process on the Secretary of State when a party is unable after due diligence to personally serve the individual or the business entity's representative. Section 48.161 provides the actual methodology for effectuating service by substituted process, whereas Section 48.181 provides the jurisdictional basis for substituted service of

process on nonresident individuals and business entities doing business in the state.[2]

With respect to the methodology for effectuating service of substituted process, the Task Force initially proposes to amend Section 48.161, as well as Section 15.16 (3), Florida Statutes, to permit the party seeking to effectuate service, as an alternative to using personal delivery or mail delivery to the Secretary of State as currently allowed, to submit the process to the Secretary of State, and to pay the requisite fee, electronically or to use a commercial courier service, such as UPS or Federal Express. The Task Force consulted the office of the Secretary of State, which concurs that allowing for delivery of process by these methods will be easier and more efficient, both for parties seeking to effectuate service and for the Secretary of State.

B. Delivery of the Notice of Service to the Opposing Party

Moreover, the Task Force believes that to better ensure the opposing party receives actual notice of the substituted service and initiation of the lawsuit, in addition to requiring that the party effectuating service send a notice and copy of

[2] These statutes seem to be out of order since, from a practical standpoint, the practitioner would generally need to consider the jurisdictional basis for service of process prior to determining the methodology to effectuate service. Nevertheless, given how long these sections have been in the Florida Statutes, we decided not to change the statute numbers.

the process to the opposing party at his, her, or its last known address by registered or certified mail, as currently provided under Section 48.161(2), the statute should be amended not only to *allow* the documents to be sent by commercial courier service in lieu of delivery by mail, but to also ***require*** that the documents be sent to opposing party electronically through email or through social media, if those means have been "recently and regularly used" by the parties to communicate between themselves. In this age of almost ubiquitous electronic communications, parties often exchange, prior to the filing of a lawsuit, many emails, text messages or other electronic communications during attempts to resolve their disputes. In such instances, why shouldn't the same method or methods of communication be used to inform the opposing party that the lawsuit has been filed and to send that party a copy of the summons and complaint?

Indeed, even in the absence of an express requirement under the statute, at least one Florida court has implied that a party using substitute service through the Secretary of State may be required to email the notice and a copy of the process to the opposing party. See *Crystal Springs Partners, Ltd. v. Michael R. Band, P.A.*, 132 So. 3d 1230, 1231 (Fla. 3d DCA 2014 (appellee was obligated to make an "honest and conscientious effort," using knowledge at its command,

to provide the defendant with actual notice of the lawsuit, and failure to mail a copy of the notice of process to defendant at an address for which it had contact information or to email the papers to the defendant at an email used to communicate with its director in the past invalidated the service). On the other hand, the Task Force concluded that it would be too stringent to require notice to be served electronically *whenever* the parties had used such a method to communicate *at any time*, and that imposing such a requirement could create a trap for an unwary plaintiff who may have sent only a single email, text message, or communication through social media to an opposing party years before the lawsuit was filed. Thus, we propose that the requirement to send notice of service electronically to the opposing party apply only if the parties "recently and regularly" communicated through those means.

C. Applicability of Substituted Service

Although courts have construed Section 48.181 as broadly applicable to all business entities despite its current express limitation only to corporations, the amendments proposed by the Task Force would make this expanded application explicit. The Task Force would also specifically require that the affidavit of compliance required to be filed by the party seeking to effectuate service under

Section 48.161(2) expressly set forth the facts that justify the need for using substituted service and show that due diligence was exercised in attempting to locate and effectuate personal service on the opposing party, requirements that Florida courts have imposed even in the absence of such a statutory mandate. *See Alvarado-Fernandez v. Mazoff*, 151 So.3d 816 (Fla. 4th DCA), *quoting Wiggam v. Bamford*, 562 So.2d 389, 391 (Fla. 4th DCA 1990) ("Before using the substitute service statutes, a plaintiff must demonstrate the exercise of due diligence in attempting to locate the defendant"). The Task Force also believes that Section 48.181(2), which seems to preclude the use of substituted service if a foreign corporation has a resident agent or officer in Florida, should be clarified to state that substituted service can still be used in such circumstances, but *only if* service of process is *first attempted in the manner required* under other provisions of Chapter 48 governing personal service of process on such entities.

The Task Force also proposes to eliminate the provision allowing substituted service on the Secretary of State for any Florida resident who subsequently becomes a non-resident of this state. The provision predates the adoption of Section 48.194, Florida States, which has authorized personal service effectuated outside the state on persons located outside of the state "in the

same manner as service within this state by any person authorized to serve process in the state where the person is served." Thus, given the ability to serve such persons extra-territorially, the Task Force believes that requiring such persons to be personally served at their new location outside of the state would better comport with standards of due process. Substituted service may still be used, however, with regard to any such person who conceals his, her, or its whereabouts and refuses to accept process.

V. Ability to Seek Leave of Court to Serve Process on Business Entities by "Alternative Means" including Electronic Service

One of the more significant changes proposed by the Task Force would permit a trial court to authorize personal service on a party though alternative methods, including through email or other electronic means, if traditional methods of service have not been effective, rather than requiring the person seeking to effectuate service to resort to substituted service of process through the Secretary of State. *See* proposed new Section 48.102, Florida Statutes.

The ability to obtain a court-authorized alternative procedure for service of process already exists in the federal courts at least in some instances. Under Federal Rule of Civil Procedure 4(f)(3), a federal district court may authorize service of process on persons located in foreign countries by alternative means

not prohibited by international agreement. At least when other methods of service have been shown to be ineffective, federal courts in Florida have often authorized service by email or other methods of electronic service upon a showing that such alternative methods of service are reasonably calculated to give actual notice to the party. *See, e.g.*, *Seaboard Marine, Ltd., Inc. v. Magnum Freight Corp.*, No. 17 CIV-21815, 2017 WL 7796153, at *2 (S.D. Fla. Sept. 21, 2017) (permitting service by email where it appeared the foreign defendant had been evading service); *see generally Foreign Defendants, You've Got Mail! Substitute Service by Email Increasingly Permitted*, 11 Nat'l L.R. 149 (May 29, 2021). Moreover, although there is no provision in the federal rules explicitly authoring domestic service of process by such means, some federal courts have authorized service by email or other alternative means of service within the United States on U.S. based attorneys or agents of foreign parties or even on opposing parties themselves. *See*, *e.g.*, *Bazarian Int'l Fin. Assoc., LLC v. Desarrollos Aerohotelco, C.A.*, 168 F.Supp.3d 1, 15 (D.D.C. 2016) (granting motion for alternative service by email on U.S. attorney for foreign corporation); *Transamerica Corp. v. TransAmerica Multiservices Inc.,* No. 1:18-cv-22483 (S.D. Fla. Sept. 18, 2018) (granting motion allowing electronic service

on Florida resident based on evidence that the individual was concealing his whereabouts and evading service).

Several states have also adopted provisions that permit a court to order other methods of service that meet constitutional standards regarding notice. *See*, *e.g.,* N.Y. C.P.L.R. Law § 308(5) (allowing the court to order any manner of service if it first finds that service is impracticable under the traditional methods set forth in the service statutes); Rule 106, Tex. R. Civ. P. (allowing courts to authorize service in any other manner, including electronically and by social media, email or other technology, that will be reasonably effective to give defendants notice of the suit); Rule 4(d)(5), Utah R. Civ. P. (authorizing courts, when other means of service are impracticable, to approve service by alternative means that are "reasonably calculated, under all the circumstances, to apprise the named parties of the action").

The Task Force believes that allowing Florida trial courts the flexibility to approve alternative methods of personal service, including by email or through social media, under proper circumstances consistent with due process notice standards, will enhance the ability of litigants to efficiently and effectively secure

service of process on business entities and more effectively provide actual notice to them of the existence of lawsuits.

VI. Service of Process in Foreign Counties

Under current Florida law, Section 48.194(1) contains the only provision applicable to judicial proceedings that addresses personal service of process on persons located in foreign countries. This provision, as currently in effect, merely states that service of process on persons outside Florida must be made in the same manner as service within Florida, while cautioning that "[s]ervice of process outside the United States may be required to conform to The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters."

In contrast, Federal Rule 4(f), sets forth a much more detailed protocol required to effectuate of service of process in foreign counties.

The International Law Section of The Florida Bar (ILS) submitted to the Task Force a proposed new statutory provision, based on Federal Rule 4(f), that would govern personal service of process on persons located in foreign countries. Given the expanding role of Florida as a center for international trade and commerce and a corresponding increase in lawsuits before Florida courts dealing with disputes involving international parties, the Task Force

agrees with the ILS that adoption of a new statute providing more detailed guidance about effectuating service of process in foreign countries would be beneficial to litigants and their counsel and to the courts.

The new statute proposed by the Task Force, and supported by the ILS, Section 48.197, closely follows the language of Federal Rule 4(f), and includes a similar provision as in the rule (and as in the proposed new Section 48.102), allowing the court to authorize service of process by alternative methods, including by electronic means, that are reasonably calculated to give actual notice of the proceedings and are not prohibited by international agreement.

In addition to a proposed independent statute governing the effectuating of service of process in foreign countries, the ILS also proposed limited changes to certain other statutes (Section 48.071, 48.131, and 48.194) that would allow copies of process and notices of service to be sent to persons outside of the state by commercial courier services in addition to continuing to allow such documents to be sent by registered or certified mail. This additional option is needed since certified and registered mail is not available in certain foreign countries. The Task Force agrees with these additional amendments proposed by the ILS.

It should be noted that the amendments regarding effectuating service of process in foreign countries would not change the ability to use substituted service of process through the Secretary of State under Sections 48.181 and 48.161 on nonresident parties in any dispute arising out of business conducted within the state of Florida where the party seeking to effectuate service has been unable despite due diligence to personally serve the opposing party.

VII. Conclusion

The Task Force believes that these proposed amendments to Chapter 48 and other statutory provisions relating to service of process would simplify the methods of service of process, eliminate redundancies and inconsistencies, provide greater clarity, and modernize methods and procedures for service of process on business entities in particular, while being cognizant of and attentive to fundamental notions of due process. We therefore respectfully request that the Executive Council of the Business Law Section approve the proposed amendments by triple motion.