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Service by Direct Message: Making a Record to Serve Parties by Alternative Means

It is essential to follow the necessary steps so that a court has the authority to authorize alternative service of process when that becomes the only remaining option.

By Joseph Shaeffer

Early in 2023, in a class action arising out of the collapse of the FTX cryptocurrency exchange, a Florida judge denied the plaintiffs' request for alternative service of the complaint on NBA legend (and one-time FTX pitchman) Shaquille O'Neal via social media. The judge held that the plaintiffs had not demonstrated that alternative service complied with Florida law—although perhaps he was simply skeptical that a 7-foot-1-inch, 325-pound former basketball star could not be personally served. Yet in another recent case—this one filed by two Georgia election workers against Rudy Giuliani—a District of Columbia judge *granted* the plaintiffs' request for alternative service of a subpoena on Jenna Ellis, a former attorney for President Trump. *Freeman v. Giuliani*, No. 1:21-cv-03354-BAH (D.D.C. May 10, 2023). Why the difference?

For one thing, District of Columbia law expressly authorizes alternative service. It in fact had been authorized earlier in the same case. And perhaps even more importantly, the plaintiffs established that they had exhausted efforts at traditional service. They had contacted Ellis's counsel and attempted to negotiate acceptance of service—until, that is, they learned that Ellis's counsel no longer represented her. They had made multiple attempts at service at Ellis's last listed address—until, that is, they learned that she had moved to Florida. And they made repeated, and unsuccessful, attempts to locate Ellis in Florida. Finally, the plaintiffs demonstrated that those efforts likely had made Ellis aware of the attempts to perform service. The court thus authorized *six* methods of alternative service:

1. email to Ellis's former counsel,
2. mail to Ellis's former Colorado address,
3. email to Ellis directly,

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4. direct message via Twitter,
5. direct message via Instagram, and
6. direct message via Facebook.

See Freeman, supra.

As always, the lesson here for practitioners is to know the governing law and build your record! Though serving process on an uncooperative party can be difficult and time-consuming, it is essential to follow the necessary steps so that a court has the authority to authorize alternative service of process when that becomes the only remaining option.

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