

COMPLETING SERVICE OF PROCESS AND ESTABLISHING PROOF OF DELIVERY IN LIGHT OF COVID-19 SOCIAL DISTANCING ORDERS

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The novel coronavirus (COVID-19) outbreak and response will require businesses to adapt to novel regulations of physical interaction and movement in space. This article focuses on the “social distancing” requirements imposed on the public generally and how those requirements effect two critical points of contact for commercial businesses, namely service of legal process and delivery of products to customers. In particular, this article addresses how commercial businesses can establish they effected service of process and delivered products ordered by customers while complying with social distancing requirements.

Social Distancing Requirements Generally

Jurisdictions throughout the nation have imposed novel social distancing requirements in response to the COVID-19 outbreak. These derive mostly from the Center for Disease Control's ("CDC") [Interim Guidance](#) postings, which advise employers and other entities to impose policies that avoid creating large gatherings and that help individuals maintain a distance of approximately six feet from others when possible.

In considering the CDC's guidance, Dallas County has ordered that, “[t]o the extent individuals are using shared or outdoor spaces, they *must* at all times as *reasonably as possible* maintain social distancing of at least six feet from any other person when they are outside their residence.” Dallas Cty., Office of Cty. Judge Clay Jenkins, Amended Order, Stay Home Stay Safe (Mar. 31, 2020) (emphasis added).

In light of the foregoing, businesses must ensure their policies permit or require their employees and agents to maintain six feet of distance between themselves and other individuals with whom they are interacting.

Completing (and Proving) Service of Process under COVID-19 Orders

Businesses must take care they do not order agents to violate the social distancing requirements, and this includes their attorneys. In order to initiate a lawsuit, attorneys typically will employ an agent unrelated to the plaintiff(s) or defendant(s) who will “serve” process — a copy of citation and the pleadings (usually a “petition” or “complaint”) — on the defendant(s). Servers often will serve process by delivering the papers by hand to the defendant(s). Obviously, hand delivery would create compliance issues in the current environment. Fortunately, other methods are available under Texas law.

Plaintiffs must ensure service of process is done correctly because the United States Constitution requires at a minimum that a defendant to a lawsuit receive “notice reasonably calculated, under all the circumstances, to apprise [it] of the pendency of the action and afford [it] an opportunity to present [its] objections.” *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). Federal Rule of Civil Procedure 4 adds to this, providing that a plaintiff may serve process in one of four ways, one of which is to “follow state law.” Fed. R. Civ. P. 4(e). In Texas, state law generally requires either of the following: (1) personal service, or (2) service by registered or certified mail, with return receipt requested, though a plaintiff may petition a court to permit service by alternative means. Tex. R. Civ. P. 106. Caleb Malone, owner and manager of Malone Process Service, LLC and a certified process server in the state of Texas, says “the focus at a time like this needs to be on the spirit of the rule, which is providing the defendant proper notice within the bounds of the law.”

In this vein, businesses and their attorneys and agents should know that “personal service” does *not* require hand delivery under Texas law, though it does in certain other states. Texas courts of appeal have long held a defendant is “personally served if [it] physically refuses to accept the papers and they are then deposited in an appropriate place in [its] presence or near [it] where [it] is likely to find them, [i]f [the defendant] is also informed of the nature of the process and that service is being attempted.” *Dosamantes v. Dosamantes*, 500 S.W.2d 233, 237 (Tex. App.—Texarkana 1973, writ *dism'd*); see also *Summersett v. Jaiyeola*, 438 S.W.3d 84, 92 (Tex. Corpus Christi 2013, *pet. denied*) (same); *Red Hot Enters., LLC v. Yellow Book Sales & Distribution Co.*, No. 04-11-00686-CV, 2012 WL 3025914, at *2 (Tex. App.—San Antonio July 25, 2012, no *pet.*) (same); *Rogers v. Moore*, No. 05-05-01666-CV, 2006 WL 3259337, at *1 (Tex. App.—Dallas Nov. 13, 2006, no *pet.*) (same); *Davis v. Ross*, 678 S.W.2d 636, 638-39 (Tex. App.—Houston [14th Dist.] 1984, no writ) (same, in *dicta*).

Under this precedent, a server could leave the papers near a defendant or in a place the defendant will be able to retrieve them so long as the server ensures the defendant is informed it is being served. This would include leaving process the defendant’s porch or elsewhere at the defendant’s home after informing the defendant of the nature of the papers being served. *Red Hot Enters., LLC*, 2012 WL 3025914, at *2 (porch); *Smith v. Gulf States Utilities Co.*, 616 S.W.2d 300, 302–03 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ *ref’d N.R.E.*) (home). Malone says this method called “drop service” was already a tool in process servers’ arsenal pre-Coronavirus.

This manner of service of process likely would be appropriate as a prophylactic measure under the current social distancing orders, though Malone acknowledges that much personal service under COVID-19

social distancing orders is within a grey area. Because a person *must* maintain a distance of at least six feet unless such is not reasonably possible, a court likely would find a person subject to the order could not — or would not — physically accept service of process. Further, so long as the server leaves the papers near the defendant or in a place the defendant likely would find the papers *and* informs the defendant it is being served, a court likely would find person service is perfected. This all hinges, of course, on a competent affidavit from the server describing precisely how service was effected.

The same measures may be employed in serving a defendant's registered agent at an office, though the current social distancing requirements have forced many businesses to close their offices. In situations like these — or in situations where individual defendants refuse even to acknowledge a server's presence at the front door of a home — businesses should discuss alternatives, such as seeking permission from a court to serve by alternative means or delaying service of a lawsuit, with their attorneys.

Ultimately, courts decide whether service was properly effected in any given case, given that the question is a matter of law. And the present circumstances make that question a novel one.

Proving Delivery of Commercial Products under COVID-19 Orders

Historically, commercial product and materials suppliers have established proof of delivery through a receipt or delivery ticket signed at their counter, at their warehouse docking bay, or at the place of delivery by a customer representative. Under COVID-19 social distancing orders, this approach likely will not work. The requirement to maintain a distance of at least six feet from others poses evidentiary issues for essential businesses needing to establish they delivered certain products in order to collect or claim payment is due.

In order to comply with social distancing requirements and maintain consistent, supportable proof of delivery procedures **at a place of business or warehouse**, essential businesses may consider implementing the following policies:

- Require that the customer provide a reference number associated with the order (e.g., invoice or order number);
- Require that the customer's representative retrieving the products provide identifying information, such as his or her full name and phone number;
- Take a picture of the license plate of the vehicle used to retrieve the products;
- Ask the customer representative for permission to sign his or her name to the delivery ticket or acknowledgment of receipt; and
- If the dollar value of the order merits it, also take pictures of the products being loaded onto the vehicle.

In order to comply with social distancing requirements and maintain consistent, supportable proof of delivery procedures **at a jobsite**, essential businesses may consider implementing the following policies:

- Take a picture of the address at which the products are being delivered;
- If customer representative(s) are present at the jobsite when delivering products:
- Require that a customer representative provide a reference number associated with the order;
- Obtain identifying information from the representative receiving the products at the jobsite, such as his or her full name and phone number;
- Ask the customer representative for permission to sign his or her name to the delivery ticket or acknowledgment of receipt; and
- If the dollar value of the order merits it, also take pictures of the products being delivered at the jobsite.

These suggested policies aim to provide businesses a means of proving materials ordered by a customer actually were furnished given that requiring signatures on order or pickup forms could result in violations of the social distancing requirements. If an essential business implements these (or similar) policies while the social distancing requirements are in place, it should make sure to document the steps taken in each case carefully and to alert customers of the (hopefully temporary) change in its operating procedure.

Conclusion

The fact of the social distancing requirements is that critical points of contact for essential businesses will look different than usual for the time being. This does not mean business cannot proceed, but it does mean businesses must heed new legal requirements governing their agents' physical interactions with other entities and individuals. If you have questions or would like to discuss further, please contact [Randall Lindley](#) or [T.J. Hales](#).

Related Practices

Litigation

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