

N.D.A.G. Letter to Kusler (Feb. 19, 1991)

February 19, 1991

Mr. Jim Kusler
Secretary of State
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505-0500

Dear Secretary Kusler:

Thank you for your January 22, 1991, letter concerning service of process for nonprofit corporations that do not have registered agents or whose registered agent cannot be found at their address.

The question you asks turns upon the meaning of the word "delivery." Mailing a summons and complaint does not constitute "delivery" for service of process purposes. "[T]he word 'delivering'. . . indicates that personal service should be made. . . ." 4A C. Wright & A. Miller, *Federal Practice and Procedure* 1109 (1987) (Footnote omitted.) Courts have also determined that "mailing" does not constitute "delivery."

In Cambridge Mutual Fire Insurance Co., v. City of Claxton, Ga., 720 F.2d 1230 (11th Cir. 1983), for example, the plaintiffs attempted to serve the defendant City of Claxton, Georgia, by sending a copy of the summons by certified mail to the Claxton Mayor. The defendant claimed that this service was defective because the plaintiffs had served the defendant by mail rather than personally. *Id.* at 1231. The Eleventh Circuit agreed with the defendant, holding that mailing did not constitute proper service under the federal rule because the federal rule required delivery of the summons. *Id.* at 1232. In other cases mailing a copy of the summons to the defendant's office and affixing a copy of the summons to the door at the defendant's place of employment also have been determined not to constitute delivery to the defendant. Babylon Milk & Cream Co. v. Rosenbush, 227 F.Supp. 471 (E.D.N.Y. 1964).

N.D.C.C. § 10-27-10 provides for service upon the Secretary of State when the registered agent of a foreign nonprofit corporation is not known or is unavailable for service. This statute provides, in part: "Service upon the secretary of state of any such process, notice, or demand must be made by delivering to and leaving with him, or any clerk having charge of the corporation department of his office, an original and two copies of such process, notice or demand."

The use of the term "delivering" requires personal delivery to the office of the Secretary of State to properly effectuate service. Although it is possible for a party to waive defects in service, because the Secretary of State is receiving service on behalf of a third party, it may be inappropriate to do so in this case.

I trust this answers your question.

Sincerely,

Nicholas J. Spaeth

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