Texas Supreme Court Issues

RULES FOR SERVICE VIA SOCIAL MEDIA

A LOOK AT WHAT A MOVANT WILL HAVE TO SHOW TO SUCCESSFULLY OBTAIN PERMISSION TO SERVICE A DEFENDANT ELECTRONICALLY.

WRITTEN BY **JOHN G. BROWNING**

EARLIER THIS YEAR, I wrote about how Texas has joined a number of jurisdictions around the U.S. (as well as seven other countries) in formally recognizing the use of social media platforms as an accepted form of substituted service of process.[1] With the adoption of Senate Bill 891, the Texas Civil Practice and Remedies Code was amended by adding Section 17.033, titled "Substituted Service Through Social Media Presence." It provides that, in cases meeting the requirements for substituted service, a court "may prescribe as a method of service an electronic communication sent to the defendant through a social media presence." However, the new law left it up to the Texas Supreme Court to formulate and adopt rules providing for such service and further noted that the new rule would only apply to actions commenced "on or after the effective date of the rules adopted by the Supreme Court of Texas."

Well, the Supreme Court has now spoken, providing guidance for Texas lawyers in the form of rules issued on August 21, 2020, and which take effect on December 31, 2020 (the court is accepting public comments on the changes through December 1, 2020). In its "Order Amending Texas Rules of Civil Procedure 106 and 108a," the court amended Rule 106(b)(2) by stating that a court "may, in proper circumstances, permit service of citation electronically by social media, email, or other technology."[2] Of course, this applies only to substituted service—after traditional methods of personal service have failed and where the plaintiff files a motion (supported by a sworn statement) seeking the court's authorization for such alternative service.

What will a movant have to show to successfully obtain permission to serve a defendant electronically? According to the Supreme Court, "[i]n determining whether to permit electronic service of process, a court should consider whether the technology actually belongs to the defendant and whether the defendant regularly uses or recently used the technology."[3] In other words, a Texas litigant seeking authorization for substituted service via social media or other electronic means will need to be prepared to show that the party being served has an active presence on the platform selected for service and that this presence or profile actually belongs to the defendant. Additionally, a litigant must be prepared to demonstrate that the party regularly uses the social media presence in question and that the defendant could reasonably be expected to receive notice of the suit if served through that social media platform.

Some of the courts faced with requests to authorize service via social media have rejected them when there isn't evidence tying the account to the defendant or showing that the defendant checks or uses the profile regularly.[4] Because of this, Texas lawyers seeking authorization for substituted service via electronic means will need to be prepared to show both ownership and regular use by the defendant of the account in question. And while courts have permitted service via email, Facebook, Twitter, Instagram, LinkedIn, and other popular platforms, remember that the new rules allow "other technology" as well. Perhaps we will see our first service through TikTok video in the months to come! **TBJ**

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NOTES

1. John G. Browning, *Service of Process Via Social Media Comes to Texas,* 83 Tex. B.J. 320 (May 2020).
2. The Supreme Court of Texas, Misc. Docket No. 20-9103 (Aug. 21, 2020).
3. *Id.*
4. *See, e.g., Qaza v. Alshalabi,* 43 N.Y.S.3d 713, 717 (N.Y. Sup. Ct. 2016); *Miller v. Native Link Constr., LLC,* Case No. 15-1605 (W.D. Pa. Aug. 17, 2017) (federal court rejected service via LinkedIn due to a lack of evidence that the defendant regularly viewed his account).

JOHN G. BROWNING serves on the 5th Court of Appeals in Dallas. He is the immediate past chair of the State Bar of Texas Computer & Technology Section. Browning is the author of four books and numerous articles on social media and the law. He is a nationally recognized thought leader in technology and the law.