



Getting Served on Facebook?

Texas Supreme Court Issues Orders Amending the Texas Rules of Civil Procedure

In accordance with two acts passed by the [86th Texas Legislature](#), the Texas Supreme Court issued an [Order Amending Texas Rules of Civil Procedure 106 and 108a](#) and an [Order Amending Texas Rules of Civil Procedure 47, 169, 190, 192, 193, 194, and 195](#) (collectively referred to herein as the “TRCP Amendments”) on August 21, 2020. The TRCP Amendments will not take effect until the end of 2020, and are subject to revision based on public comment. Members of the public can voice concerns about any of the TRCP Amendments. The amendment to Rule 106 in particular, which allows for service of process by social media, should warrant the attention by businesses and attorneys alike.

A more detailed summary of the amendments to each rule, which are subject to public comment, can be found [here](#). In main part the TRCP Amendments:

1. Increase the monetary threshold for Level 1 cases which expands Level 1 discovery rules and rules for expedited actions to a larger number of lawsuits;
2. Modernize the methods of alternate service of process, most notably by allowing service of process by social media, email, or other technology; and
3. Change the discovery process and revise the duration of the discovery periods to more closely resemble the federal discovery rules by requiring, without discovery request, parties to automatically serve initial disclosures (Rule 194), pre-trial disclosures (Rule 194), and expert disclosures and reports (Rule 195) by certain deadlines.

While most of the TRCP Amendments track with the federal discovery rules, which have in most part been tested in practice, the changes to Rule 106 get into uncharted waters. Under the amended Rule 106, courts can authorize service of process on a defendant (individuals and companies alike) through social media, email, or other technology upon a motion to the court.

Service of process by social media raises several concerns that may merit public comment and/or revision. Some obvious issues are:

Qualifying Platforms

The list of existing social media platforms is plentiful and likely to grow (e.g. Twitter, Facebook, Instagram, LinkedIn, Pinterest, YouTube, Vimeo, Medium, Tumblr, TikTok, Reddit, Quora, discussion forums, blogs, etc.). The amended Rule 106 does not list the types of social media

that qualify, nor does it list the characteristics a platform must possess to qualify as a potential vehicle for service of process.

Ownership

The comment to the amended Rule 106 states that “a court should consider whether the technology actually belongs to the defendant and whether the defendant regularly uses or recently used the technology.” Yet, showing social media belongs to an individual can be difficult. What about duplicative names? Just on LinkedIn, for example, there are 975 John Smiths located in Houston and about 87,000 John Smiths located in the United States. What about generic usernames like BaylorBear123 or AstrosFan713? What about shared accounts like John and Jane Smith or company accounts? What about fake accounts or spoof accounts?

It’s not hard to create an account because the social media platforms do very little to confirm the creator is the person that their social media name purports, just ask the creator of Edgar Allen Poe’s twitter, any teenager with a “finstagram”, or ask Kevin Durant about his infamous “burner accounts.” How is the court going to confirm the account belongs to a defendant or registered agent of the defendant? Furthermore, there is no indication how the court should interpret regular use or recent use. Recent use does not necessarily equate to regular use. Even a millennial could be served and potentially defaulted in the time between his or her last post and subsequent log in.

Target of Service

The amended Rule 106 does not narrow who can properly accept service on behalf of a defendant when the defendant is not an individual. Can a business be served through social media accounts belonging to the business, accounts belonging to the registered agent, accounts belonging to the officers, or all of the above? A business may have accounts on several of the abovementioned social media platforms that might be monitored by neither a registered agent nor an officer of the company. Likewise, registered agents and officers of companies may have private accounts that are not affiliated with, or even mention, the defendant. Without more clarity, there could be ramifications for a company’s and even employees’ social media use and policies surrounding social media.

Method

The amended Rule 106 does not describe the mechanism in which service through social media should be executed. Each platform has varying methods of communication. On Facebook for example, people can communicate with a user by sending a direct message to the user, by posting on the user’s page, by commenting on a post by the user, or by tagging a user in the post of another user. Businesses and individuals may not appreciate a citation and pleading being posted to their public—or at least accessible to family and friends—page, especially with no guidance on whether deleting such a post is acceptable.

Service by posting on a user’s page seems more synonymous with service by publication. However, when the Texas Supreme Court completely restructured and rewrote the rules for service by publication —[Rules 116 and 117 of the Texas Rules of Civil Procedure](#) — earlier this year, the Supreme Court did not amend the process to include public or semi-public social media posts. If alternate service through social media can be executed by methods other than direct, private message to a user, then impacts on social media use, policies, and unfortunately abuses of this method are likely to follow.

Takeaway

Modernization and efforts to promote the prompt, efficient, and cost-effective resolution of civil actions are welcome steps, but the aforementioned concerns should be explored while the public still has the opportunity to help change or revise these TRCP Amendments.

In response to the TRCP Amendments to Rules 47 106, 108a, 169, 190, 192, 193, 194, and 195, members of the public can send written comments to rulescomments@txcourts.gov until **December 1, 2020**.

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