KILPATRICK TOWNSEND

Insights: Alerts

Texas Supreme Court Authorizes Substituted Service Via Social Media

Written by **Kirk T. Florence** and **Hannah J. Corning**

On August 21, 2020, the Texas Supreme Court announced an amendment to Texas Rule of Civil Procedure 106 that authorizes courts in Texas to order substituted electronic service of process via "social media, email, or other electronic technology." This move responds to Tex. Civ. Prac. & Rem. Code § 17.033, which called for the update to the rule. This change explicitly allows what a handful of courts throughout the country have permitted under catch-all substituted service provisions.

The amended rule will take effect on December 31, 2020. However, the amendments may be revised in response to public comments. Written comments should be submitted by December 1, 2020 to rulescomments@txcourts.gov.

The rule change does not disturb the primary and even secondary preferred methods of service— personal service or service via registered or certified mail. A comment to the amended Rule 106 instructs that "a court should consider whether the technology actually belongs to the defendant and whether the defendant regularly uses or recently used the technology." The Supreme Court did not offer additional guidance about what social media platforms or technology may be utilized for alternative service.

A Few Courts Have Previously Considered Service by Social Media

Courts in New York have been particularly receptive to requests for alternative service via social media. One opinion in particular provides some insight into how Texas courts might go about determining whether service on Facebook, LinkedIn, or Twitter, for example, would be appropriate. In *Baidoo v. Blood-Dzraku*, 48 Misc. 3d 309, 5 N.Y.S.3d 709 (N.Y. Sup. Ct. 2015), the New York Supreme Court authorized service through Facebook where the plaintiff was unable to effect service on her ex-husband through ordinary methods of service and demonstrated to the court that service through social media was reasonably calculated actually to reach the defendant. She established that she had actually been in contact with the defendant through the proposed social media account and that the account was recently active.

In another case, *Federal Trade Commission v. PCCare247 Inc.*, Case No. 12 Civ. 7189 (PAE), 2013 WL 841037 (S.D.N.Y. March 7, 2013), the Southern District of New York authorized service on defendants who were in India via both Facebook and email after the plaintiff was unable to effect service through traditional methods,

including those authorized by the Hague Convention. Important in the court's analysis were the facts that the proposed Facebook accounts were associated with email addresses used in the scheme alleged in the litigation, the accounts contained several verifiable personal details of the defendants, and the accounts appeared to have recent activity indicating the defendants accessed them regularly. Although the revisions to the Texas Rules do not sanction substituted service via social media for defendants located in foreign countries, this case is illustrative of a nearly perfect factual case in favor of allowing service through social media as it was almost certain that service would reach the defendants.

A previous case in New York denied a similar request where the plaintiff did not satisfy the court that the Facebook account actually belonged to the defendant, the plaintiff's estranged daughter. The court instead ordered service by publication in a local newspaper, a method explicitly authorized under New York rules, and which the judge thought would be more likely to reach the defendant. *Fortunato v. Chase Bank USA, N.A.*, No. 11 Civ 6608 (JFK), 2012 WL 2086950, (S.D.N.Y. June 7, 2012).

Although the New York rules explicitly authorize service by publication, other courts have questioned whether publication in local newspapers is in fact reasonably likely to reach defendants today. The Texas Supreme Court recognized this trouble with service by publication in a 2012 case saying that “publication should be a last resort, not an expedient replacement for personal service.” *In re E.R.*, 385 S.W.3d 552, 561 (Tex. 2012). And a court in Minnesota expressed a similar sentiment in 2011 when it authorized service through social media: "The traditional way to get service by publication is antiquated and is prohibitively expensive. Service is critical, and technology provides a cheaper and hopefully more effective way of finding respondent." *Mpafe v. Mpafe*, Hennepin County, MN No. 27-FA-11-3453 (4th Minn., May 10, 2011).

The limited cases testing service by social media show that it is possible for courts to apply predictable analyses to requests for service by social media while recognizing the difficulties inherent in substituted service. And the Texas Supreme Court's comment to the rule change indicates that Texas courts should follow suit. If they do, we may find that service via social media in proper cases is in fact more reliable than traditional methods of substituted service.

Open Questions About Social Media Substituted Service

At a time when even major publications are struggling to survive in print, can courts really say that publication in local papers is reasonably likely to notify defendants of lawsuits affecting their rights? And if not, is it more reasonable to try out mostly untested methods, like Facebook, LinkedIn, or Twitter? For many people, it might be simple to identify a social media account that is regularly accessed and deliver process by private message. For others, fake profiles or common names may prevent social media accounts from being verifiable.

For most cases, there are several questions implicated by a potential request to serve someone through social media:

- What if defendants simply don't check their messages or they assume the message is spam and delete or ignore it?
- Will process servers need to maintain accounts on social media in order to effect service?
- What if the message is not routed to a regularly accessed folder or inbox, or is thrown out by a spam filter?
- What kind of verification will be required to prove service? Should courts require read receipts?
- What if service is sent to an account not owned by the defendant? Could privacy or other protected interests be implicated in certain cases, such as divorce or child custody?
- Should social media be allowed as a sole method of delivery or should courts require several methods at once?

Cases from other states indicate that plaintiffs hoping to effect substituted service via social media should be prepared to demonstrate to the court that the proposed social media accounts are actually owned, controlled, and regularly accessed by the defendant. The type of proof may be easier in cases where the plaintiff and defendant have been in contact through the social media accounts or where a business maintains an active social media presence. Courts are also likely to consider ordering service by multiple electronic methods, such as directly to email accounts as well as through social media accounts.

As requests for alternative service begin to work their way through the courts starting next year, we will see whether Texas courts employ the same analyses we have seen in other states. And while service by social media raises unique issues, one wonders whether we may see reconsideration of other methods of alternative service perhaps even less likely to reach a defendant, such as publication in newspapers that fewer and fewer people receive today.

Related People

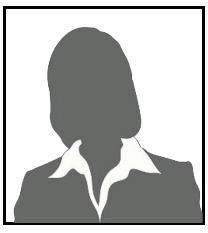
Kirk T. Florence

Partner

Dallas, TX

t 214.922.7139

kflorence@kilpatricktownsend.com



Hannah J. Corning

Associate

Dallas, TX

t 214.922.7115

hcorning@kilpatricktownsend.com