



# Texas Association of Defense Counsel

An Association of Civil Trial, Commercial Litigation & Personal Injury Defense Attorneys ~ Est. 1960

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December 1, 2020

Re: Proposed Amendment to Tex. R. Civ. P. Rule 106

To Members of the Texas Supreme Court:

The Texas Association of Defense Counsel is a statewide professional organization of civil trial attorneys dedicated to promoting excellence in its members, fairness in our judicial system, and preserving the right to jury trial for all citizens. Our members focus on civil litigation in state and federal courts throughout Texas. TADC has a strong history of working to support reform that strengthens the Texas civil justice system. Those efforts have long involved participation in the legislative process, as well as work with the judiciary. As always, TADC's goal is to assist the civil justice system in protecting the interests of all parties.

The text of the amendment to Tex. R. Civ. P. 106 (the "Proposed Rule") as proposed:

Upon motion supported by a statement - sworn to before a notary or made under penalty of perjury - listing any location where the defendant can probably be found and stating specifically the facts showing that service has been attempted under (a)(1) or (a)(2) at the location named in the statement but has not been successful, the court may authorize service:

- (1) By leaving a copy of the citation and of the petition with anyone older than sixteen at the location specified in the statement;
- (2) In any other manner, including electronically by social media, email, or other technology, that the statement or other evidence shows will be reasonably effective to give the defendant notice of the suit.

The proposed language fails to provide sufficient guidance to Texas courts and litigants on the proper use of electronic service, whether by social media, email, or other technology. Proper service of a lawsuit invokes a litigant's constitutional due process rights and litigants have a right to sufficient notice of lawsuits that have been filed against them. Notice and an opportunity to advocate your position to a judge or jury lie at the heart of due process.

The Proposed Rule would allow for the notice to be provided on a social media page or to an email address that might not be regularly monitored by a defendant, or might be shared with another who could alter, ignore, or delete the posting without notice to the potential litigant. People and companies often have numerous email addresses and multiple social media pages, some of which may be abandoned or not regularly monitored. A court faced with an *ex parte* "statement or other evidence" will have little opportunity to determine if electronic service "will be reasonably effective to give the defendant notice of the suit." The Proposed Rule fails to set forth a standard for the type of evidence necessary to invoke electronic service and leaves Texas courts dependent on the statement of an interested party as to how a defendant manages their social media, email, and other technology.

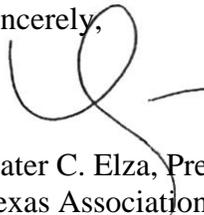
In addressing the Comment to the proposed amendment, a Court will be charged with determining the technology actually belongs to the defendant. While a party might provide a court “evidence” or a “statement” of the use of technology (recently or in the past) by a defendant, it is difficult to envision what would constitute proof of such ownership short of an affidavit from the technology company providing the social media, email, or other technology. Taken one step further, the requirements to secure a social media page or email today or in the past require little or no confirmation of the true identity of the person setting up such technology, much less their authority to do so. As a practical matter, this requirement of ownership makes the current version of the Proposed Rule difficult, if not impossible, for a court to navigate in protecting a defendant’s constitutional due process rights.

Similarly, social media pages and email addresses are often shared by friends, business associates, families, and people in (current or former) dating relationships. Millions of dormant social media pages and abandoned email addresses make electronic service an unreliable and imprecise method of providing notice. This is especially true if an account holder does not regularly check the technology or does not receive notification of new or unread postings or messages. Without some indicia of reliability that such substituted service is certain to inform those it affects, the due process rights of a defendant are potentially violated. A system that does not protect all litigants weakens our civil justice system.

This Proposed Rule, while understandable in its goals, does not serve to strengthen our civil justice system and fails to invoke proper constitutional safeguards for defendants. Such process is unnecessarily subject to a lack of uniform standards, mistakes, and manipulation. While there may come a time that technology advances allow for a change in this process, that time is not now. As such, the TADC requests that this proposed amendment be withdrawn until steps can be taken to set forth standards of evidence that courts can reasonably rely on in assessing the potential for actual notice to a defendant through such a procedure.

TADC brings forth these thoughts and concerns in hopes that the Supreme Court will consider such concerns and work to continue to develop a system of uniform and enforceable obligations that will benefit all litigants.

Sincerely,

A handwritten signature in black ink, appearing to read "Slater C. Elza". The signature is fluid and cursive, with a large loop at the beginning and a horizontal line extending to the right.

Slater C. Elza, President  
Texas Association of Defense Counsel