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### TEXAS SUPREME COURT WEIGHS IN ON A BLOGGER DISPUTE OVER PRE-SUIT DISCOVERY

In a mandamus proceeding, the Texas Supreme Court held that a court *may not* order pre-suit discovery by agreement of the witness over the objections of other interested parties without making the findings required by Rule 202.4(a) of the Texas Rules of Civil Procedure.

Phillip R. Klein owns (1) PRK Enterprises, Inc. and (2) Klein Investments, Inc. These two corporations (“PRK”) operate or have operated a blog called The Southeast Texas Political Review. Operation Kleinwatch and Sam the Eagle Weblog (“Relators”) have been known to criticize Klein extensively. Relators subscribe to Blogger.com. Blogger.com is a subsidiary of Google, Inc. (“Google”), which hosts them on the Internet.

PRK had enough of the Relators’ efforts and sought to put an end to it. PRK petitioned the district court under Rule 202 to order discovery from Google of Relators’ identities in anticipation of a lawsuit by Klein and PRK. The suit was for copyright violations, defamation, and invasion of privacy.

Klein did not personally join in the Petition. The Petition named (1) Google and (2) Relators as defendants. After Google was served, it agreed with PRK that it would respond to PRK’s subpoena duces tecum. The exhaustive subpoena duces tecum requested information on the identity of the Relators. Since there was an agreement, PRK did not ask for a hearing on the Petition.

After getting notice of Google’s receipt of the subpoena, Relators argued that the Petition’s allegations were insufficient to show that PRK had a cause of action against Relators. PRK moved to compel discovery. After a brief hearing, at which the Relators did not appear, the court denied Relators’ motions and granted PRK’s. The court of appeals denied mandamus relief.

Relators argued that the trial court abused its discretion by failing to comply with Rule 202. Rule 202.4(a), “Require Findings,” states:

The Court must order a deposition to be taken if, but only if, it finds that:

allowing the petitioner to take the requested deposition may prevent a failure or delay of justice in an anticipated suit; or

the likely benefit of allowing the petitioner to take the requested deposition to investigate a potential claim outweighs the burden or expense of the procedure. TEX. R. CIV. P. 202.4(a).

The trial court did not make either of the Rule 202 findings noted above. PRK argued that compliance with Rule 202 was excused because of its agreement with Google. The Texas Supreme Court did not agree.

It noted that PRK and Google were not the only parties to the proceedings. It also referenced Rule 202.3(a) requiring that “all persons petitioner expects to have interests adverse to petitioner’s in the anticipated suit” be served with the Petition and given a notice of hearing. TEX. R. CIV. P. 202.3(a).

PRK tried to assert that Relators would be Defendants in the anticipated lawsuit, and by their motions to quash, made an appearance in the proceeding. The Texas Supreme Court was not impressed by this argument. It held that PRK and Google **could not** modify the procedures prescribed by Rule 202 with an agreement that did not include Relators.

It was clear that PRK made no attempt to present the trial court with a basis for the findings. The Texas Supreme Court was not inclined to extend Rule 202.

The Texas Supreme Court also made the point that the intrusion into the otherwise private matters authorized by Rule 202 outside a lawsuit is not to be taken lightly. In fact, it referenced noted commentator, Professor Lonny Hoffman, who has observed there is “cause for concern about inefficient judicial attention to petitions to take presuit discovery” and that “judges should maintain an active oversight role to ensure that [such discovery is] not misused.” *Access to Information, Access to Justice: The Rule of Presuit Investigatory Discovery*, 40 U. MICH J.L. REFORM 217, 273 – 74 (2007).

The Texas Supreme Court held that the trial court **abused its discretion** by failing to follow Rule 202. Thus, the Relators were entitled to mandamus relief. The trial court was directed to vacate its order dated January 29, 2010, and to grant Relators’ Motions to Quash.

## WHAT DOES THIS MEAN?

Litigants need to be mindful of the Texas Supreme Court's position on pre-suit discovery. Rule 202.4(a) of the Texas Rules of Civil Procedure mandates that the trial court must make the "required findings" before ordering pre-suit depositions.

It is imperative that litigants pursuing pre-suit depositions make sure that they present the trial court with a basis for the Rule 202 findings.

Further, litigants also need to be mindful that agreements with folks concerning pre-suit discovery need to involve *all persons who have interests adverse to theirs* in the anticipated suit. Without doing so, you are merely delaying the inevitable.



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