SERVICE OF PROCESS AND DEFAULT JUDGMENTS;

ARTICLE AND FORMS

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COLLECTIONS AND CREDITORS' RIGHTS

STATE BAR OF TEXAS

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Mark P. Blenden received his Juris Doctor degree with honors from Washburn Law School of Topeka, Kansas in 1973. After serving four years in the United States Air Force - Judge Advocate General Corp., he joined Houston's Lapin, Totz and Mayer law firm, becoming a partner and the senior litigator in the commercial collection section. In 1987 he founded the Blenden Law Firm, now the Blenden Roth Law Firm, in Dallas. The firm's practice is primarily commercial collections, commercial litigation and judgment enforcement.

Mr. Blenden is a frequent author and lecturer for seminars sponsored by the State Bar of Texas and University of Texas Law Foundation. Topics include service of process and default judgments, creditor's claims, trial techniques. He is a former chairman of the state bar's Advanced Creditor's Rights Course. Mr. Blenden serves on the Texas Supreme Court's Process Server Review Board. The board's mission is to improve standards for service of process in Texas.

OVERVIEW AND COMMON TOPICS

OVERVIEW

COMMON TOPICS	Section	
Return of Service	II (C)	14
Service of Amended Petition	II (A)2	12
Amending a Defective Citation or Return	II (E)	19
Mail Service	III	21
Substituted Individual Service, Rule 106(b)	IV	23
Service on Entity, Officer or Registered Agent	V	28
Service on an Entity through Secretary of State	VI	31
Finality of Default Judgment	Part Two, VII	54
Default Judgment On Liquidated Damages	Part Two, X	59
Default Judgment On Unliquidated Damages	Part Two, XI	60
Attacks On Default Judgments	Part Two, XX	71

Practice Tip: Precision is required as to service of process. 1)Review citation, before it is served with the petition, on defendant. The 12 requirements of citation, rule 99, are discussed at page 50. 2) Scrutinize a copy of the return, before it is filed. The most common attack on a default judgment is based on defects in return of citation; see page 14.

SERVICE OF PROCESS AND DEFAULT JUDGMENTS IN TEXAS

TABLE OF CONTENTS

INTRODUCTION

What's New:

1) Casual to Casualty.

Routine collection lawsuit was based on credit card agreement and guaranty. Default judgment against primary obligor only, inadvertently included finality language. The judgment is erroneous but final; guarantor is dismissed with an apparent $700,000 windfall. "Even if dismissal [of guarantor] was inadvertent, as American Express insists, it was nonetheless unequivocal, and therefore, effective". *In re Daredia*, 317 S.W.3d 247, 249 (Tex. 2010)(see discussion, page 54).

2) Business Organizations Code.

Be aware of the importance of the Business Organizations Code. Service on the secretary of state has changed. See page 31. No longer is the secretary of state to send notice to the registered office. Service is now generally to the most recent address of the entity on file with the secretary of state. This address can be difficult to determine. When accurate, assert that the principal place of business, and most recent address on file with the secretary of state are the same address. The BOC intends no substantive change, and became effective as to all entities on January 1, 2010. See discussion at page 28 and excerpts at pages 76 and 77.

3) Service of Amended Petition.

An amended petition seeking a more onerous judgment may be served pursuant to Rule 21a. Include a certificate of service on the pleading. See *In re E.A.*, 287 S.W.3d 1 (Tex. 2009), discussed at page 12.

Quotes:

1. "For well over a century, this court has required that strict compliance with the rules for service of citation affirmatively appear on the record in order for a default judgment to withstand direct attack. There are no presumptions in favor of valid issuance, service, and return of citation..." *Primate Const., Inc. v. Silver*, 884 S.W.2d 151 (Tex.1994); *Ins. Co. of Penn. V. Lejeune*, 297 S.W.3d 254 (Tex. 2009).

2. "While diligence is required from properly served parties or those who have appeared...those not properly served have no duty to act, diligently or otherwise. *Ross v. Nat'l Ctr. for the Empl. of the Disabled*, 197 S.W.3d 795, 798 (Tex. 2006)(per curiam).

3. "...[T]he law abhors a default because equity is rarely served by a default", *Benefit Planners v. Rencare, Ltd.*, 81 S.W.3d 855 (Tex. App. - - Corpus Christi May 8, 2002, pet. denied).

4. "[Though strict compliance]... sometimes leads the courts to rather weird conclusions, preventing us from making the most obvious and rational inferences, we believe good public policy favors the standard. The end effect of our application of the strict compliance standard is an increased opportunity for trial on the merits. This policy justifies what may at first blush seem a hyper-technical rule," *Verlander Enterprises, Inc. v. Graham*, 932 S.W.2d 259, 262 (Tex. App. - - El Paso 1996, no writ).

5. "Even strict compliance does not require such absolute obeisance to the minutest detail." *Williams v. Williams* 150 S.W.3d 436(Tex. App. - Austin 2004, pet. denied) (citation variance, reversed on other grounds); *Blackburn v. Citibank (South Dakota) N.A.*, No. 05-05-01082-CV (Tex. App. - - Dallas, June 14, 2006,no pet.)(2006 Tex. App. Lexis 5062)(mem. op.)(return variance); *Herbert v. The Greater Gulf Coast Enters., Inc.*,915 S.W.2d 866, 871(Tex. App. - - Houston [1st Dist.] 1995, no writ); *Momentum Motor Cars, Ltd. v. Williams*, No. 13-02-00042-CV (Tex. App. - - Corpus Christi, November 10, 2004, pet. denied) (2004 Tex. App. Lexis 9940)(mem. op.).

This Article:

This article has been revised by this author annually following 1987, when it was presented to the Advanced Civil Trial Course by former Chief Justice Thomas R. Phillips, Texas Supreme Court. Justice Phillips does not participate in the revisions, and has requested that he therefore not be shown as an author of the revised articles.

Organization: This paper is in three parts: the law relating to service of process, pages 11-44; the law relating to default judgments, pages 45-79; forms,

pages 83-124.

Technical deficiencies are often no longer determinative -- unless the issue is service of process. Proper service is both technical and critical, as a trial court's jurisdiction is dependent upon it. *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 108 S. Ct. 896, 99 L.Ed.2d 75 (1988). Precise returns of service are required. A "minor" error generally results in reversal of the default judgment. *See, Primate Const., Inc. v. Silver*, 884 S.W.2d 151 (Tex. 1994). The Default Judgment Checklist at page 82, will aid in detecting common errors in this important area. Errors occur -- see defective service returns, pages 114-116. A default judgment is no stronger than the citation and return on which it is based. Review and have corrected before filing, all returns of citation. If an erroneous return is filed, consider simply serving defendant a second time; see also Amendment of Returns, page 19.

This article is based on an annual review of Texas case law and is intended as a departure point--not a destination. The reader is urged to read the original sources of authority. Neither this article, nor the attached forms, are intended as legal advice; the reader should verify all statements with original sources. No representations or warranties as to forms except that they are generally used in the author's practice. Verify accuracy and applicability of forms before using. Other sources are cited throughout the paper and at page 78. Another extensive article on default judgments, including a discussion of attacks on default judgments, is *Dealing With Default Judgments*, 35 St. Mary's L.J. 1 (2003), Pendery, McCaskill and Cassada; see also Texas Collections Manual, State Bar of Texas and O'Connor's Texas Rules (Chapters 2H, 7A, 10B).

References: Rule -- Texas Rules of Civil Procedure; TRAP--Texas Rules of Appellate Procedure; CPRC--Civil Practice & Remedies Code; Bus. Org. Code and BOC - - Texas Business Organizations Code; Tex. Lit. G.--W. Dorsaneo III, Texas Litigation Guide; McDonald TCP--R. McDonald, Texas Civil Practice; O'Connor's CPRC -- O'Connor's Annotated CPRC Plus; O'Connor's Texas Rules -- O'Connor's Texas Rules * Civil Trials. O'Connor's Texas Rules is an excellent treatise on the Texas Rules of Civil Procedure, trial procedure, service of process and default judgments. See chapters 2(H), Serving the Defendant With Suit; 7(A) Default Judgments; 10(B) Motion for New Trial.

Opinions not designated for publication are referred to as "unpublished". The 2003 amendment to TRAP 47 authorizes citation to unpublished opinions. However, such cases have no precedential value and must include the notation "(not designated for publication)". Pursuant to TRAP 47 civil case opinions dated after January 1, 2003 are designated "Opinion" or "Memorandum Opinion"; there is no longer an unpublished designation.

Regarding Forms: The forms are continually evolving, are used in my practice, and have overcome appellate attacks on default judgments: 1) *Continental Carbon Company v. Sea-Land Service, Inc.*, 27 S.W. 3d 184 (Tex. App. - - Dallas 2000, pet. denied); 2) *Fluty v. Simmons Co.* 835 S.W.2d 664 (Tex. App.-- Dallas 1992, no writ); 3) *Riggs v. Tech/III, Inc.*, No. 05-92-01053-CV (Tex. App. - - Dallas, Oct. 30, 1992, no writ)(unpublished). Consider also the well organized forms in Texas Collections Manual and O'Connor's Texas Civil Forms.

We serve discovery, including requests for admission, with the citation. Our returns of citation reflect this, and references to plaintiff's discovery to defendant should be deleted or modified as required.

Please direct comments and suggestions regarding this article to mark@blendenlawfirm.com.

Dedication: Process servers perform a critical, challenging, but often thankless function. They often must deal with evasive and hostile persons, see *Thomas v. State*, No. 2-05-186-CR (Tex. App. - - Fort Worth, July 6, 2006, pet. ref'd) (2006 Tex. App. Lexis 5823)(mem. op.)(process server shot after attempting to serve subpoena on assailant). This paper is dedicated to the process servers of Texas.

Acknowledgment: A special thanks to David Roth for his editing and proofreading, and to Debra Sims for her assistance in preparing this article.

PROFESSIONAL RESPONSIBILITY AND OTHER MATTERS

I. POP QUIZ

1. The Secretary of State's service on a corporation should generally be forwarded: 1) to the most recent address of the corporation on file with the Secretary of State; or 2) to the corporation's registered office.

2. (True or False) An amended petition seeking a more onerous judgment must be served with a citation on the defendant.

3. (True or False) To extend trial court's jurisdiction after dismissal, a motion to reinstate must be verified.

4. Identify three traps for a busy collection lawyer.

ANSWERS:

1. Forwarded to the most recent address of the corporation on file with the Secretary of State, for all corporations, January 1, 2010, Bus. Org. Code §5.253; see Service on Entity Through Secretary of State at page 31. Previously, it was forwarded to the corporation's registered office.

2. False, see Service of Amended Petition at page 12 and *In re E.A.*, 287 S.W.3d 1 (Tex. 2009). Serve per Rule 21a with a certificate of service on the amended pleading.

3. True, *Midland Funding NCC-2 Corp. v. Azubogu*, No. 01-06-00801-CV (Tex. App. - - Houston [1st Dist.] December 13, 2007, no pet.) (2007 Tex. App. Lexis 9810)(mem. op.) citing Rule 165a(3). As with an order granting a new trial, an order granting reinstatement must be signed within the court's plenary jurisdiction, Rule 165a(3) *Martin v. H&S Kadiwala, Inc.*, No. 05-06-00113-CV (Tex.App. -Dallas April 3, 2007, no pet.)(2007 Tex. App. Lexis 2591)(mem. op.).

4. a) Dismissal: taking a nearly time-barred case and having it dismissed for want of prosecution by the court. See page 69, Dismissal, Reinstatement and Default Judgment.
b) Wrong Party: taking a nearly time-barred case and suing the wrong party. *Seidler v. Morgan*, No. 06-08-00107-CV (Tex. App. - - Texarkana, February 12, 2009, pet. denied)(2009 Tex. App. Lexis 911)(plaintiff sued current owner of property and learned too late, identity of proper defendant that owned property at time of injury).
c) Diligent Service: taking a nearly time-barred case and failing to get valid service either before the time-bar date or nearly immediately thereafter. See Beating Limitations Requires Diligent Service, page 4, V.

II. TEXAS LAWYER'S CREED

A. The Texas Lawyers' Creed states:

> 11. I will not take advantage, by causing any default or dismissal to be rendered, when I know the identity of an opposing counsel, without first inquiring about that counsel's intention to proceed. (Texas Lawyer's Creed, III. Lawyer to Lawyer)

B. Case Law:

There are no cases reversing a default judgment based on failure to give notice of intention to take a default judgment. "These standards are not a set of rules that lawyers can use and abuse to incite ancillary litigation or arguments over whether or not they have been observed", Order of Adoption, Texas Lawyer's Creed. Paragraph 11 is discussed in two reported cases: *Owens v. Neely*, 866 S.W.2d 716 (Tex. App.-- Houston [14th Dist.] 1993, writ denied); *Continental Carbon Co. v. Sea-Land Serv., Inc.* 27 S.W.3d 184 (Tex. App. - - Dallas 2000, pet. denied).

The Creed was a minor part of the *Owens* case. The court condemned plaintiff's counsel for outrageous conduct, including filing a false motion for default judgment and wrongfully withdrawing funds from the registry of the court before the judgment was final. The court noted that counsel's reprehensible actions were not reversible error. The court went on to reverse the judgment because defendant satisfied the three elements of *Craddock v. Sunshine Bus Lines, Inc.*..134 Tex. 388, 133 S.W.2d 124 (1939).

In *Continental Carbon*, counsel signed a Rule 11 agreement allowing an additional 30 days for defendant's answer. Defendant failed to answer within the extended time and plaintiff took a default judgment without prior notice to defendant's counsel. The court held that defendant was not entitled to

additional notice prior to entry of default judgment. "...[T]he Texas Lawyer's Creed is not a proper vehicle for the legal enforcement of a party's desire to receive notice regarding the taking of a default judgment." 27 S.W.3d at 190. The appellate court found that the trial court did not abuse its discretion in finding that the *Craddock* elements were not satisfied and denying the new trial.

III. TLIE'S TOP TEN WAYS TO ATTRACT A LEGAL MALPRACTICE LAWSUIT

From Texas Lawyer's Insurance Exchange, TLIE Malpractice Advisory, used with permission.

Number 10: Work for An Unscrupulous Client.
Number 9: Fail to Document Who You Are Not Representing.
Number 8: Fail to Document the Scope of Representation.
Number 7: Leave Loose Ends in Personal Injury Settlements.
Number 6: Represent Both Sides in a Business Transaction.
Number 5: Fail to Give the Client a Basis for Making A Cost/Benefit Analysis.
Number 4: Take a Case that is Beyond Your Expertise.
Number 3: Fail to Document the Client's Choice of an Economic Decision.
Number 2: Fail to Sue [and Serve] the Proper Defendants in a Timely Manner.
Number 1: Sue for Fees.

IV. DON'T EMBARRASS THE JUDGE

Rogers v. Stover, No. 06-05-00065-CV (Tex. App. - - Texarkana, April 5, 2006, no pet.)(2006 Tex. App. Lexis 2677)(mem. op.)(six defects in return including ". . . the return of service is completely void of any information concerning the date, hour, and method of service; . . ."). *Chase Manhattan Mortg. Corp. v. Windsor*, No. 2-05-427-CV (Tex. App. - - Fort Worth, May 4, 2006, no pet.)(2006 Tex. App. Lexis 3767)(mem. op.)(certified mail service defective because return of citation was blank).

There is an apparent trend of abandoning default judgments upon attack. Respect service of process, default judgments, and the judge to whom you present default judgments for entry. You are at least impliedly representing, by submitting a default judgment, that: 1) you have a valid cause of action; 2) court's file establishes that defendant has been properly served; 3) the default judgment is in proper form and should be signed; 4) you will defend any attack on the judgment. Often, plaintiff's lawyer is aware during the trial court's plenary power, that a valid attack is being made on service of process.

If there is an error as to service of process or a default judgment, attempt to resolve it in the trial court. Don't ignore the matter only to later admit error, and have the trial court reversed. See for example: *Jernigan Realty Partners, L.P. v. City of Dallas*, No. 05-09-00389-CV (Tex. App. - - Dallas September 18, 2009, n.p.h.)(2009 Tex. App. Lexis 7342)(mem. op.)(parties agreed that default judgment should be reversed and case remanded); *Sailstar USA, Inc. v. Samaha Enters., Inc.*, No. 2-09-269-CV (Tex. App. - - Fort Worth, November 12, 2009, n.p.h.) (2009 Tex. App. Lexis 8817)(mem. op.)(same); *Vanderbilt Mortg. & Fin., Inc. v. Wadsworth*, No. 10-06-00261-CV (Tex. App. - - Waco, November 15, 2006, no pet.)(2006 Tex. App. Lexis 9939)(mem. op.)(same). *Paradise Vill., Inc. v. Finova Capital Corp.*, No. 07-06-0298-CV (Tex. App. - - Amarillo, October 25, 2006, no pet.)(2006 Tex. App. Lexis 9171)(mem. op.)(appellee agreed service defective).

V. BEATING LIMITATIONS REQUIRES DILIGENT SERVICE

O'Connor's Rules Chap. 2 H, §7
(See also Appendix at page 75, additional cases)

Practice Tip: *Avoid cases that are within 12 months of limitations. Monitor service, as if service must be obtained before the limitations date. Plaintiff's counsel is responsible for proper and timely service of process.*

A. Malpractice Trap

Failing to diligently obtain service on a case filed near a limitations date is a lethal litigation trap. Since 1998, there have been over 80 cases dealing with the failure to diligently obtain service. Yet the plaintiff has been found diligent in only one - - *Harrell v. Alvarez*, 46 S.W.3d 483, (Tex. App. - - El Paso 2001, no pet.).

Bringing suit within a limitations period requires both filing a petition and diligently serving the defendant with the citation and petition. *Gant v. De Leon*, 786 S.W.2d 259 (Tex. 1990)(per curiam). When a plaintiff files a petition within the limitations period, but does not serve the defendant until after the statutory period has expired, the date of service relates back to the date of filing if the plaintiff exercised diligence in effecting service. *Zale Corp. v. Rosenbaum*, 520 S.W.2d 889, 890 (Tex. 1975)(per curiam).

> "If a party files its petition within the limitations period, service outside the limitations period may still be valid if the plaintiff exercises diligence in procuring service on the defendant (citations omitted). When a defendant has affirmatively pleaded the defense of limitations, and shown that service was not timely, the burden shifts to the plaintiff to prove diligence (citations omitted). Diligence is determined by asking "whether the plaintiff acted as an ordinary prudent person would have acted under the same or similar circumstances and was diligent up until the time the defendant was served." *Ashley v. Hawkins*, 293 S.W.3d 175, 179 (Tex. 2009).

Proving diligence in obtaining service is more difficult than negating conscious indifference to obtain a new trial under *Craddock v. Sunshine Bus Lines, Inc.*.134 Tex. 388, 133 S.W.2d 124 (1939). Admitting negligence may be helpful in obtaining a new trial. But failing to diligently obtain service after the limitations date, is never excused. Diligent service is a tough standard, rarely proven.

The diligent service standard is discussed in *Seagraves v. City of McKinney*, 45 S.W.3d 779, 782 (Tex. App. - - Dallas 2002, no pet.). "The two controlling factors that establish due diligence are: 1) whether the plaintiff acted as an ordinary prudent person would act under the same circumstances; and 2) whether the plaintiff acted diligently up until the time defendant was served."

Do not allow informal agreements or professional courtesy to delay service. See *Rodriguez v. Tinsman & Houser, Inc.* 13 S.W.3d 47 (Tex. App. - - San Antonio 1999, pet. denied). Plaintiff's attorney filed suit 11 days before limitations ran, but did not request issuance of citation. The attorney notified the defendant law firm in a malpractice action of the lawsuit by letter, as a courtesy. Defendant was served three weeks after limitations ran, but summary judgment affirmed, for failure to diligently obtain service. See also *El Paso Indep. Sch. Dist. v. Alspini*, 315 S.W.3d 144 (Tex. App. - - El Paso 2010, n.p.h.)(oral agreement insufficient to justify service delay); *Mitchell v. Timmerman*, No. 03-08-00320-CV (Tex. App. - - Austin, December 31, 2008, no pet.)(2008 Tex. App. Lexis 9710)(mem. op.)(unenforceable oral agreements and settlement negotiations are insufficient to justify delay; gamesmanship unfortunate).

B. File and Serve All Defendants Before Limitations Date

Treat all exceptions as a crisis. Forward the citation to the constable or private process server with a letter indicating why immediate service of process is necessary. Understand that you remain responsible for timely service of process, even after citation is forwarded to a process server. Have it calendared, discussed, and a letter or memorandum generated on a weekly basis. This may create evidence establishing diligent efforts to locate and serve the defendant. Know that your efforts and reports may be "graded" for diligence by the trial court. Confirm the accuracy of the citation and return of citation as defective service may be treated as no service.

C. Cases Relating to Diligently Obtaining Service on a Case Filed Near Limitations Date

1. Summary Judgment Against Plaintiff Reversed

Proulx v. Wells, 235 S.W.3d 213 (Tex. 2007)(nine month delay, 30 service attempts at five addresses using two process servers and two investigators); *Elam v. Armstrong*, No. 03-07-00565-CV (Tex. App. - - Austin, August 14, 2008, no pet.)(2008 Tex. App. Lexis 6227)(mem. op.)(record confirmed service by publication at a date earlier than that stated in motion for summary judgment); *Mena v. Lenz*, No. 13-08-00137-CV (Tex. App. - - Corpus Christi, March 5, 2009, no pet.)(2009 Tex. App. Lexis 1585)(mem. op.); *Franklin v. Bullock*, No. 03-07-00511-CV (Tex. App. - - Austin, August 14, 2008, no pet.)(2008 Tex. App. Lexis 6239)(mem. op.); *Bolado v. Speller*, No. 04-06-00535-CV (Tex. App. - - San Antonio November 7,

2007, no pet.)(2007 Tex. App. Lexis 8801)(mem. op.); *McGowan v. Meridian Precast & Granite, Inc.*, No. 10-06-00364-CV (Tex. App. - - Waco July 18, 2007, no pet.)(2007 Tex. App. Lexis 5654)(mem. op.)(27 day delay).

2. Summary Judgment Against Plaintiff Affirmed:
Ashley v. Hawkins, 293 S.W.3d 175 (Tex. 2009)(eight-month delay, court critical of mail-service only attempts); *Parmer v. DeJulian*, No. 12-07-00479-CV (Tex. App. - - Tyler, September 17, 2008, no pet.)(2008 Tex. App. Lexis 6875)(mem. op.)(flurry of ineffective activity does not constitute due diligence if easily available and more effective alternatives are ignored); *Neal v. Garcia-Horrerios*, No. 01-07-01103-CV (Tex. App. - - Houston [1st Dist.], May 8, 2008, no pet.)(2008 Tex. App. Lexis 3312)(mem. op.)(4-month delay); *Cunningham v. Champion Tech., Inc.*, No. 10-06-00365-CV (Tex. App. - - Waco, March 12, 2008, no pet.)(2008 Tex. App. Lexis 1856)(mem. op.)(no explanation for three month delay); *Berry v. Pampell*, No. 03-07-00216-CV(Tex. App. - - Austin February 13, 2008, no pet.)(2008 Tex. App. Lexis 1133)(mem. op.)(tendered explanation "affirmatively establishes a lack of diligence").

See Additional Diligent Service Cases at Appendix, page 75.

D. Effect of Appearance Before Limitations Date

Practice Tip: *A general appearance in the case before limitations has run generally waives any defect in the manner of service. When defendant's counsel requests additional time to file a response to a lawsuit, the better practice is to require that an answer to the lawsuit be filed, and thereafter, if at all, the case be temporarily abated. This practice would have avoided the adverse result in Rodriguez v. Tinsman & Houser, Inc.* 13 S.W.3d 47 (Tex. App. - - San Antonio 1999, pet. denied).

In *Baker v. Monsanto Co.*,111S.W.3d158 (Tex. 2003) (per curiam) intervenor served defendant before defendant had been served by plaintiff. The court of appeals held that intervenor failed to diligently obtain proper service on defendant, and granted summary judgment against the intervenor, but the supreme court reversed. If Monsanto had any complaint about the intervenor's premature service under Rule 21a, its recourse was a motion to quash. See *Kawasaki Steel Corp. v. Middleton,* 699 S.W.2d 199, 203, 28 Tex. Sup. Ct. J. 607(Tex.1985)(motion to quash is appropriate device to object to procedural error in service). Because Monsanto generally appeared in the case before limitations had run on intervenors' claims, intervenors' action was not barred, and the summary judgment rendered in this case was therefore erroneous.

E. Effect of Appearance After Limitations Date

Filing an answer does not waive defects in service when those defects are alluded to in an effort to show limitations period expired. Defendant did not waive limitations when it filed a general appearance after limitations has run. *Ramirez v. Consol. HGM Corp.*,124 S.W.3d 914 (Tex. App. - - Amarillo 2004, no pet.); *Seagraves v. City of McKinney,* 45 S.W.3rd 779, 782-83 (Tex. App. - - Dallas 2001, no pet.); *Taylor v Thompson*, 4 S.W.3rd 63, 66(Tex. App. - - Houston [1st Dist] 1999, pet. denied).

VI. OTHER MATTERS

A. Discovery

1. Deemed Admissions - Proof Required

The party relying on deemed admissions must establish service and deeming; for example, by failing to timely respond. In this summary judgment case, movant failed to establish that no response was received. *Guidry v. Wells,* No. 09-05-182-CV(Tex. App.--Beaumont, February 2, 2006, no pet.)(2006 Tex. App. Lexis 884)(mem. op.) For use of deemed admissions to bolster default judgment, see *Continental Carbon Co. v. Sea-Land Serv., Inc.*, 27 S.W.3d 184 (Tex. App. - - Dallas 2000, pet. denied); *Kheir v. Progressive County Mut. Ins. Co.*, No. 14-04-00694-CV (Tex. App. - - Houston [14th Dist.], June 13, 2006, pet. denied)(2006 Tex. App. Lexis 5029)(mem. op.)(affirmed trial court's refusal to "undeem," because seller's absence from country did not establish he was unaware of the admissions or unable to communicate with counsel; answers were twenty days late and motion to "undeem" filed 6 months after requests served).

2. Emasculation of Deemed Admissions

Key "undeeming" case is *Wheeler v. Green* 157 S.W.3d 439 (Tex. 2005). When deemed admissions preclude presentation of merits of the case due-process concerns arise. Extraordinary facts: mother was two days late in responding to requests and apparently lost custody of children; (summary judgment reversed and remanded). But see *Unifund CCR Partners v. Weaver*, 262 S.W.3d 796 (Tex. 2008). Pro se evasions stated as a form objection to all requests could not be construed as proper objections, and requests for admission were properly deemed admitted.

See also: 1)*Thompson v. Woodruff*, 232 S.W.3d 316 (Tex. App. - - Beaumont 2007, no pet.)(one of several cases citing *Wheeler* to undeem admissions with lesser facts); 2) *In re Rozelle*, 229 S.W.3d 757(Tex. App. - - San Antonio 2007, no pet.) (mandamus to undeem granted); 3) *In re Reagan*, No. 09-07-113-CV (Tex. App. - - Beaumont March 13, 2007, no pet.)(2007 Tex. App. Lexis 2783)(mem. op.). Court grants mandamus to strike deemed admissions; defendant's counsel "informed the trial court that each time she examined the petition, she failed to notice the requests..."; 4) *Daniels v. Lavery*, No. 05-06-00216-CV (Tex. App. - - Dallas February 23, 2007, no pet.)(2007 Tex. App. Lexis 1382)(mem. op.). Suit on sworn account, judgment reversed and rendered for defendant. The court of appeals found that defendant rebutted the rule 21a presumption of receipt by testifying that he never received the requests, which had been returned "unclaimed". Creditor/plaintiff did not file a brief.

3. Discovery Responses in Defendant's Answer, an Aberration

Landaverde v. Centurion Capital Corp., No. 14-06-00712-CV(Tex. App. - - Houston [14th Dist.] June 28, 2007, no pet.)(2007 Tex. App. Lexis 4992)(mem. op.) Though rule 198.2(b) requires a party to "specifically admit or deny the request..." *Landaverde* allows an answer to the complaint to constitute a discovery response. "[defendant] filed an answer...to [plaintiff's] complaint...and included denials: 1) that [plaintiff] or its predecessors extended credit to him; 2) that [plaintiff] demanded payment of the debt." Defendant's answer is held to have doubled as a discovery response, constituting a denial of requests for admission 1 and 8, which requests an admission as to extension of credit and demand! Must trial courts apply all denials found in pleadings to discovery requests? Should an answer be captioned Defendant's Original Answer and Denial of Discovery Requests?

4. Trial Witnesses

A party may request disclosure of the name, address and telephone number of any person who may be designated as a responsible third party, Rule 194.2(l), and trial witnesses by interrogatory, Rule 192.3(d).

B. Surety's Liability for Judgment

"Whether a default judgment is conclusive of the surety's liability or only prima facie evidence depends on what type of bond is at issue. A general undertaking bond only creates a prima facie liability against the surety. However, if the bond is a judgment bond...a surety is bound by the default judgment against the principal." *Old Republic Sur. Co. v. Bonham State Bank*, 172 S.W.3d 210(Tex. App. - - Texarkana 2005, no pet.).

As to judgment against sureties and increasing the amount of supersedeas bond, see *Whitmire v. Greenridge Place Apts.*, No. 01-09-00291-CV (Tex. App. - - Houston [1st Dist.], February 18, 2010, n.p.h.)(2010 Tex. App. Lexis 1123)(trial court properly increased supersedeas bond to cover rental amounts which accrued during pendency of appeal from justice court; judgment affirmed).

C. No Default Judgment Against Plaintiff; No DWOP with Prejudice

Though dismissal after non-suit should be without prejudice, order dismissing with prejudice must be attacked directly, or it is erroneous but effective. See *Travelers Ins. Co. vs. Joachin*, 315 S.W.3d 860, 863 (Tex. 2010).

Plaintiff failed to appear for trial and court entered a take nothing judgment. Court should have dismissed for want of prosecution and judgment reformed. A dismissal for want of prosecution is not a trial on the merits and a dismissal with prejudice is inappropriate, see *Leeper v .Haynsworth*, 179 S.W.3d 742 (Tex. App. - - El Paso 2005, no pet.); *Beller v. Fry Roofing, Inc.* No. 04-05-00159-CV(Tex. App. - - San Antonio, November 23, 2005, no pet.)(2005 Tex.

App. Lexis 9790)(mem. op.); *Almanera World Class Rest., Inc. v. Caspian Enters.*, No. 14-02-00347-CV (Tex. App. - - Houston [14th Dist.] March 6, 2003, no pet.)(2003 Tex. App. Lexis 1918) citing *Massey v. Columbus State Bank*, 35 S.W.3d 697,700 (Tex. App.- - Houston [1st Dist.] 2000, pet. denied); *Patterson v. Herb Easley Motors, Inc.*, No. 2-04-351-CV(Tex. App. - - Fort Worth, August 25, 2005, no pet.)(2005 Tex. App. Lexis 6995)(mem. op.)

D. "Guaranteed Admission"- Business Records Affidavit (Debt cases are business records cases)

The business records predicate is onerous. Why go to trial without a business records affidavit having been filed and served, pursuant to T.R.E. 902(10)? Since an affidavit cannot be cross examined, it is a safer predicate than a witness. File and serve the affidavit on counsel 14 days prior to trial. Either forward a copy of the records to counsel or make them available pursuant to the rule. T.R.E. 902(10) includes a proposed affidavit form.

Third-party business records can be problematic. See *Simien v. Unifund CCR Ptnrs.*, 321 S.W.3d 235, 240 -245 (Tex. App. - - Houston [1st Dist.] 2010 n.p.h.)(allowed business records of assignor to be admitted by business records affidavit after conducting three-step analysis to determine whether documents created by third-party were admissible, when affiant did not state that he had knowledge of third-party business's recordkeeping practices or events or conditions memorialized in third-party business's records); *Rodriguez v. Citimortgage, Inc.*, No. 03-10-00093-CV (Tex. App. - - Austin January 6, 2011, n.p.h.)(2011 Tex. App. Lexis 171)(mem. op.) (affidavit signed by paralegal employed by law firm was admissible, and case discusses numerous business-records cases relating to foreclosures and assigned debt); see also *March v. Victoria Lloyds Ins. Co*, 773 S.W.2d 785(Tex. App. - - Fort Worth 1989, writ denied); *Payne & Keller Co., v. Word*, 732 S.W.2d 38 (Tex. App. - - Houston [14th Dist.]1987, writ ref'd n.r.e.).

E. CPRC §18.001 Affidavit (Amended)

Civil Practice & Remedies Code, §18.001 provides for an affidavit concerning costs and necessity of services. Though routinely used by personal injury attorneys, it is rarely employed by commercial litigators. If one serves the affidavit on the other parties at least 30 days before trial, its contents are incontrovertible, unless a counter-affidavit is served at least 14 days before trial. It presumably could be used to prove a debt based on services rendered; or attorney's fees in virtually any case except a sworn account action. The affidavit cannot be used in sworn account actions. However, one could amend, abandon the sworn account action, and proceed to trial on breach of contract, common law account, quantum meruit and other claims, employing this weapon. The statute, amended in 2007 to delete filing requirement, arguably still requires filing of controverting affidavit, see 18.001(b).

F. Defenses:

1) Accord and Satisfaction by use of instrument. Tex. Bus. & Com. Code § 3.311.

If a check is tendered on a disputed claim, with a conspicuous statement that it is tendered in full payment of all claims, cashing the check probably gives the debtor an accord and satisfaction defense. In *Grynberg v. Grey Wolf Drilling Co., L.P.*, 296 S.W.3d 132 (Tex. App. - - Houston [14th Dist.] 2009, no pet.)(debtor failed to communicate in a conspicuous statement that the instrument was tendered in full satisfaction of all claims).

2. Quasi-estoppel.

Clayton v. Parker, No. 13-09-00399-CV (Tex. App. - - Corpus Christi August 12, 2010, n.p.h.)(2010 Tex. App. Lexis 6467)(mem. op.). "Defense of quasi-estoppel precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken." (Citations omitted). This equitable doctrine operates "...as an affirmative defense, quasi-estoppel must be pleaded or it is waived", citing Rule 94.

G. Attorney Fee Affidavit

Law firm sued client based on breach of contract and sworn account, for failure to pay fees. The entire summary judgment affidavit proving fees is recited. The affidavit specifies the pleadings filed and services rendered, but does not state time devoted to the case. The affidavit lists the familiar factors from *Arthur Anderson & Co. v. Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997) and states: "the attorney's fees and expenses of $75,887.50 incurred in this case are reasonable and necessary for cases of this type in