SERVICE OF PROCESS AND DEFAULT JUDGMENTS;

ARTICLE AND FORMS

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OVERVIEW AND COMMON TOPICS

OVERVIEW

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INTRODUCTION

The law abhors a default. See quotes, page 2. This alone, explains the success of many attacks on default judgments. Build a record establishing that defendant "knew it was sued but did not care" – that defendant was consciously indifferent, see page 85(A). Consider conscious indifference letters, see pages 117, 118. Consider also dual service, e.g. personal service; and mail service by court clerk, see page 28 (D). Dual service is an attempt to overcome defendant's possible new trial motion, by establishing it was consciously indifferent.

What's New:

1. E-Filing and E-Serving
See Rule 21(f), Electronic Filing, and electronic service under Rule 21a(a)(1). Excerpts of these rules appear at page 90. These rules compel major changes in our practice and create new issues, see page 4, II, Electronic Filing Issues. Rule 107, Return of Service is amended to allow, but not require, the e-filing of the return of citation by a process server. Rule 107 is discussed at page 18 and appears at page 89. E-filing generally is beyond the scope of this article. Understand that prior case law may be impacted by e-filing, and other statutory and rule changes.

2. Expect E-Filing Issues
Respect the intricacy and importance of mandatory e-filing. See O'Connor's Texas Rules, Filing Documents, ch. 1-C. Anticipate problems with the new procedure and technology. File early and confirm the filing. Confirm returns of service are file-stamped. See page 62,V.

3. 2014 Changes to Rules 21a, Methods of Service, and New Rule 21c, Privacy Protection
Note important changes to Rule 21a, effective January 1, 2014, see page 90. Generally documents filed electronically are served electronically. Electronic service is complete on transmission to the serving party's electronic filing service provider. Three days are added to prescribed period for action, for mail service only. Service by commercial delivery service is complete upon deposit with the delivery service. Rule 21a(b)(l). Service by fax is complete upon receipt. As to e-serving, see O'Connor's Texas Rules, Serving Documents, ch. 1-D. Rule 21c requires redaction of sensitive data.

4. *Practice Tip: Respect E-mails*
Though you may receive dozens per day, e-mails can now be as important as certified mail. Consider periodically reviewing the on-line Court Registry - Docket to verify documents filed, and case status.

5. Registered Agent - Organization
Service on a registered agent that is itself an organization was difficult. Serving employees of the registered agent-organization was insufficient. That is remedied by BOC 5.201(d) allowing service on employees, at the registered office during business hours. See discussion at page 37, paragraph 4, and statute at page 91.

6. Secretary of State Service - Change
Service by the Secretary of State on an entity is now generally mailed to the most recent address of the entity on file with the secretary of state (BOC § 5.253); no longer to the registered office address. See discussion at page 38 and BOC excerpts at page 91.

7. 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 17.

8. New Justice Court Rules
See Rules 500-510. For a summary and index see pages 94-98. Service rules are primarily in Rule 501. For alternative service in Justice Court, see Rule 501.2(e).

9. Casual to Casualty
Obligor and guarantor sued; default judgment against obligor only; inadvertent finality language in judgment. The judgment is erroneous but final; guarantor is dismissed with an apparent $700,000 windfall. *In re Daredia*, 317 S.W.3d 247, 249 (Tex. 2010)(discussed at page 64, *In re Daredia*).

1. Quotes:

Strategic Defaults

"...During cross examination, however, Caldwell admitted that in the past he had purposely allowed approximately a dozen default judgments to be taken against him, even after properly being served with process, because defaulting was often less costly than defending the underlying suits." *Caldwell v. Barnes*, 154 S.W.3d 93, 96 (Tex. 2004), discussed at page 24 (D)(2).

2. Abhor a Default

"...[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).

3. Strict Compliance

"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). "In Texas, an adjudication on the merits is preferred." *Milestone Operating, Inc. v. ExxonMobil Corp.,* 388 S.W.3d 307, 310 (Tex.2012)(per curiam).

4. Hyper-technical, Rules

"[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. No Duty to Act

"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).

6. No Obeisance to Minutia

"...But the cases justifying slight deviations from the procedural rules under this rationale, [no obeisance to minutia] mostly concern misnomer, misspelling, mistaken capitalization, or similar errors..." *Indus. Models, Inc. v SNF, Inc.,* No. 02-13-00281-CV (Tex. App. - - Fort Worth, July 24, 2014, n.p.h.)(2014 Tex. App. Lexis 8063)

"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.).

7. Negligent Defendant

"Campus... had failed to update addresses for its registered agent and registered office - it never received anything the secretary [of state] sent. Accordingly, *Campus* was negligent in failing to comply with its statutory duties." See, e.g. Tex Bus. Corp. Act. Arts. 2.10, 2.10-1, 8.09 [now Bus. Org. Code 5.201]; *Campus Invs., Inc.* v. *Cullever*, 144 S.W.3d 464, 466 (Tex. 2004)(discussed at page 42), Proof of Service.

8. Pro Se Litigants

"There cannot be two sets of procedural rules, one for litigants with counsel, and the other for litigants representing themselves. Litigants who represent themselves must comply with the applicable procedural rules, or else they would be given an unfair advantage over litigants represented by counsel." *Bank v Cohn* 573 S.W.2d 181,184-85 (Tex.1978).

This Article:

This article has been revised by this author nearly annually following 1987, when it was written and 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, the law relating to default judgments, and forms. See Overview and Common Topics, page i.

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). A default judgment is no stronger than the citation and return on which it is based. Review a copy of all returns of citation before filing. If an erroneous return is filed, consider simply serving defendant a second time. See Amendment of Process, page 25, though Rule 118 is vague.

This article is based on an annual review of Texas case law and is intended as a departure point--not a destination. The changes created by the Texas Business Organizations Code and amended Rule 107 require time to be interpreted by appellate courts. See 2012 changes to Rule 107, at page 89. The reader is urged to read the original sources of authority. Neither this article, the Practice Tips or the attached forms, are intended as legal advice; the reader should verify all statements with original sources. No representations or warranties as to content or forms. Verify accuracy and applicability of forms before using. Additional sources are cited throughout the paper and at page 99.

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 COA - - O'Connor's Texas Causes of Action.

Other Sources: O'Connor's Texas Rules is a helpful 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. Texas Collections Manual, State Bar of Texas is excellent and includes helpful forms. As to defending default judgments against motions for new trial, appellate attacks, and bill of review, see Pat Dyer's article, Defending Default Judgments, Collections and Creditor's Rights 2015, State Bar of Texas. Another extensive default judgment article is *Dealing With Default Judgments,* 35 St. Mary's L.J. 1 (2003), Pendery, McCaskill and Cassada.

Opinions not designated for publication are referred to as "unpublished". The 2003 amendment to TRAP 47 authorizes citation to unpublished opinions. Civil case opinions dated after January 1, 2003 are designated "Opinion" or "Memorandum Opinion"; TRAP 47.2.

Regarding Forms: The forms are continually evolving. Many are used in our 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.

Dedication: Process servers are a critical link in the judicial system. Their service-returns must withstand strict scrutiny because the law abhors a default. They often 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 was 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. Please direct comments and suggestions regarding this article to mark@blendenlawfirm.com.

PROFESSIONAL RESPONSIBILITY AND OTHER MATTERS

I. POP QUIZ

1. Define Conscious Indifference.

2. What is the best discovery request (and most often omitted)

3. 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; 2) to corporation's registered office; 3) both addresses.

4. (True or False) A CFO who signs credit application as agent of disclosed principal is liable on a personal guaranty imbedded in the document.

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

6. Identify three traps for a busy collection lawyer.

ANSWERS:

1. "...that the defendant knew it was sued but did not care". See *Levine*, cited at page 85, A. Motion for New Trial.

2. Request for disclosure, 190.2(b)(6) "...disclosure of all documents, electronic information and tangible items that the disclosing party has... and may use to support its claims or defenses." For expedited actions only, Rule 169. This is not included in a standard Request for Disclosure under Rule 194.2. Consider Motion in Limine to exclude everything not produced.

3. Forwarded to the most recent address of the corporation on file with the Secretary of State, January 1, 2010, Bus. Org. Code §5.253; see Service on Entity Through Secretary of State at page 38. Previously, it was forwarded to the corporation's registered office. We generally have process forwarded to both addresses, if the addresses are not identical.

4. True, see Imbedded Guaranty Sentence, page 13.

5. True, *In re Valliance Bank,* No. 02-12-00255-CV (Tex. App. -- Fort Worth, November 15, 2012, no pet.)(2012 Tex. App. Lexis 9491); *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.).

6. a) Dismissal: taking a nearly time-barred case and having it dismissed for want of prosecution by the court. See Dismissal, Reinstatement and Default Judgment, page 81.
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, 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 6.

II. Electronic Filing Issues – Service of Process

Electronic filing causes a number of issues:
1) Does citation contain seal of court, as required by Rule 99b(2) . See discussion page 60(C)(2). A court seal may be electronic, Rule 21(f)(10).
2) Must a process server efile? No, per Rule 107(g), the return and any document to which it is attached "may be filed electronically..." Documents are not required to be electronically filed by a process server. The server may file electronically; only attorney's must electronically file documents, Rule 21(f)(1). A process server is generally certified by the Supreme Court of Texas and should not be an agent or representative of the attorney. Such would violate Rule 103, requiring the process server to be disinterested in the suit.

It is difficult to determine whether documents are attached when electronically filing. A default judgment was reversed because the return was not file-stamped, even though the citation to which it was probably attached, was file-stamped. *Midstate Envtl. Servs., LP v. Peterson*, 435 S.W.3d 287 (Tex. App. - - Waco 2014, n.p.h.). If the return is attached to citation, the return should so state. Remember, there are no staples in an electronic court file. Better practice is probably to do comprehensive return under Rule 107(b) stating all information needed for the return to be independently filed. See, e.g., form return, page 123. Formerly, the cause number, case name, and court was stated on the citation, not on the return. In a comprehensive return, under Rule 107(b), the return contains all the information. But consider doing a comprehensive return, such as that at page 123; attaching it to citation, expressly noting the attachment on the return. The comprehensive return is not required to be attached to the citation, since it contains all required information. But attaching it to citation may further insure all information is supplied as required by Rule 107(b)

Before taking a default judgment, verify that the return is file-stamped establishing that the return has been filed for eleven days (10 days excluding day of service and date of filing, Rule 107).

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. DON'T EMBARRASS THE JUDGE

Practice Tip: Set Aside Your Judgment.

If a valid appeal attacks service, consider extending trial court jurisdiction by plaintiff's motion to set aside its judgment. "An order granting a new trial deprives an appellate court of jurisdiction over the appeal." Yan v. Jiang, 241 S.W.3d 930 (Tex. App. -- Dallas 2008, no pet.). See Attacks on Default Judgments, page 84.

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.

In re Farmers Ins. Exch., No. 02-13-00144-CV (Tex. App. - - Fort Worth, May 23, 2013, n.p.h.)(2013 Tex. App. Lexis 6413)(mem. op.)(plaintiff admitted that defendant was "inadvertently and incorrectly named" in the $20 million judgment). *Deutsche Bank Nat'l Trust Co. v. Lewis*, No. 12-12-00198-CV(Tex. App. - - Tyler, November 30, 2012, no pet.)(2012 Tex. App. Lexis 9947)(mem. op.)(service of "a copy of the 24071067" was insufficient and plaintiff concedes trial court erred.) *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).

Default judgments are often reversed by agreement. See for example: *Mission Cemetery Co. v. Morrell Masonry Supply, Inc.,* No. 04-11-00355-CV (Tex. App. - - San Antonio, February 1, 2012, no pet.)(2012 Tex. App. Lexis 795)(mem. op.)(admitted defective service); *3TI, Inc. v. Palos & Guzman Servs.* No. 04-1100518-CV(Tex. App. - - Fort Worth, September 21, 2011, no pet.)(2011 Tex. App. Lexis 7625)(mem. op.)(admitted defective service); *Jernigan Realty Partners, L.P. v. City of Dallas*, No. 05-09-00389-CV (Tex. App. - - Dallas September 18, 2009, no pet.)(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, no pet.) (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).

IV. 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.

V. BEATING LIMITATIONS REQUIRES DILIGENT SERVICE

O'Connor's Rules Chap. 2 H, §7
(See also Additional Diligent Service Cases, page 93)

Practice Tip: Practice as if service must be obtained before the limitations date. Avoid cases that are within 12 months of limitations. Plaintiff's counsel is responsible for proper and timely service of process. Plaintiff proves diligent service in less than 2% of cases. See Additional Diligent Service Cases, page 93. If near time-bar date, consider extraordinary service efforts, such as: retaining an investigator; retaining two process servers; dual service on entity - defendants, see Dual Service, page 35.

A. Malpractice Trap

Failing to diligently obtain service on a case filed near a limitations date is a lethal litigation trap. Since **2000**, there have been over 100 cases dealing with the issue. Plaintiff was found diligent in only two: 1) *Harrell v. Alvarez,* 46 S.W.3d 483 (Tex. App. - - El Paso 2001, no pet.); 2) *NETCO, Inc. v. Montemayor,* 352 S.W.3d 733 (Tex. App. - - Houston[1st Dist.] 2011, no pet.)(defendant failed to keep current service

address on file with Secretary of State; trial court correctly denied motion for judgment NOV). In *NETCO*, there was a lapse of approximately six months in service attempts. However, the jury found service within four months of limitations expiring was diligent service. Dissent by Raddick, C.J. asserted that, as a matter of law, plaintiff did not exercise due diligence.

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 much 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.

Defective service is arguably no service, so scrutinize service documents. However, in *Narnia Invs., Ltd., v. Harvestons Secs., Inc*., No. 14-10-00244-CV (Tex. App. - - Houston [14th Dist.] August 9, 2011, no pet.)(2011 Tex. App. Lexis 6182)(mem. op.), the court held that defective service was sufficient to avoid defendant's limitations defense.

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, no pet.) (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 "strictly graded" for diligence by the 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 Affirmed: *Ashley v. Hawkins*, 293 S.W.3d 175 (Tex. 2009)(eight-month delay, court critical of mail-service only attempts); *Quezada v. Fulton,* No. 05-13-01545-CV (Tex. App. - - Dallas, December 18, 2014, n.p.h.)(2014 Tex. App. Lexis 13632)(mem. op.)(unexplained delay of six weeks); *Jackson v. Saia Motor Freight Line, LLC*, No. 14-13-00968-CV (Tex. App. - - Houston [14th Dist.], December 30, 2014, pet. filed)(2014 Tex. App. Lexis 13837)(mem. op.)(no explanation of eight-month delay); *Waggoner v. Sims*, 401 S.W.3d 402 (Tex. App. -- Texarkana 2013, n.p.h.) (lapses between service efforts were unexplained or unreasonable); *Villanueva v. McCash Enters*., No. 03-13-00055-CV (Tex. App. - - Austin, August 15, 2013, n.p.h.)(2013 Tex. App. Lexis 10149)(mem. op.)(reliance on employee or process server not due diligence); *Cooper v. Walgreens Co.,* No. 01-11-00024-CV(Tex. App. - - Houston [1st Dist.] March 1, 2012, no pet.)(2012 Tex. App. Lexis 1596)(mem. op.)(18-month service delay); *Slagle v. Prickett*, 345 S.W.3d 693 (Tex. App. - - El Paso 2011, no pet.)(three-month delay in issuance of citation);(*Hamilton v. Tex. Ces*, No. 02-10-00142-CV (Tex. App. - - Fort Worth, April 14, 2011, no pet.)(2011 Tex. App. Lexis 2844)(mem. op.)*; (nine-month delay); 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").

2. 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); *Fontenot v. Gibson,* No. 01-12-00747-CV (Tex. App. - - Houston [1st Dist.] May 16, 2013, n.p.h.)(2013 Tex. App. Lexis 6069)(delays didn't conclusively demonstrate lack of diligence, *citing Proulx*); *Vasquez v. Aguirre*, No. 04-11-00736-CV (Tex. App. - - San Antonio, June 6, 2012, no pet.)(2012 Tex. App. Lexis 4449)(mem. op.)(lack of diligence not conclusively established); *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).

3. Failed Interlocutory Appeal; Well-settled law: Defendant/appellant, Target Corp. asserted lack of diligent service. Target filed interlocutory appeal, TRAP 28.3, asserting that the order denying summary judgment, involves a controlling question of law as to which there is substantial ground for difference of opinion. Held, attorney error in failing to timely serve defendant constitutes lack of due diligence as a matter of law. Because the law is well settled, interlocutory appeal is inappropriate, appeal dismissed. *Target Corp. v. Ko*, No. 05-14-00502-CV (Tex. App. - - Dallas, July 21, 2014, n.p.h.)(2014 Tex. App. Lexis 7894)(mem. op.).

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.3d 779, 782-83 (Tex. App. - - Dallas 2001, no pet.); *Taylor v Thompson*, 4 S.W.3d 63, 66(Tex. App. - - Houston [1st Dist] 1999, pet. denied).

VI. OTHER MATTERS

A. Sworn Account

1. Defective Answer

"A sworn general denial does not constitute a denial of the account and is insufficient to remove the evidentiary presumption created by a properly worded and verified suit on an account." *Panditi v Apostle*, 180 S.W.3d 924, 927 (Tex. App. - - Dallas 2006, no pet.) Expanding *Panditi* is *Woodhaven Partners, Ltd. v. Shamoun & Norman, L.L.P.,* 422 S.W.3d 821 (Tex. App. - - Dallas 2014, n.p.h.). In *Woodhaven*, the answer denied that appellants are "indebted for the amounts alleged...pursuant to Rules 93(10) and 185 of the Texas Rules of Civil Procedure." "The defendant's written denial must state more than a broad generalization that he specifically denies the sworn account allegations; instead, the verified affidavit must address the facts on which the defendant intends to rebut plaintiff's affidavit." *Id., citing Andrews v East Tex. Medical Center-Athens*, 885 S.W.2 264, 267 (Tex. App. - - Tyler, 1994, no pet.)

2. Amended Account May Require Amended Answer

Suit on sworn account, verified denial filed. Plaintiff then amended petition with a reduced sworn account. "Because the amended account was substantially different, we hold that defendant's denial of the original account was ineffective to counter the evidentiary effect of the amended account". Rule 92, general denial, is presumed to extend to all matters subsequently alleged, but does not apply to denials required to be denied under oath. *Southern Mgmt. Servs. v. SM Energy Co.*, 398 S.W.3d 350, 356 (Tex. App. - - Houston [14th Dist.] 2013, n.p.h.). See Sworn Accounts as Liquidated Claim at page 72. Also, see Creditors' Causes of Action, David Roth, Collections and Creditors' Rights Course, 2015.

B. 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.

Deemed admissions are easily waived. *Naan Props., LLC v. Affordable Power, LP,* No. 01-11-00027-CV (Tex. App. - - Houston [1st Dist.]January 12, 2012, no pet.)(2012 Tex. App. Lexis 271)(mem. op.)(waiver by creditor introducing contract different than "deemed" contract); *GE Money Bank v. Sharif,* No. 05-10-01222-CV(Tex. App. - - Dallas, November 10, 2011, no pet.)(2011 Tex. App. Lexis 8979)(mem. op.)(admissions waived when defendant testified without objection, that he was identity-theft victim

and did not make the charges.)

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 trial court granted summary judgment terminating her rights as joint managing conservator of her daughter, judgment reversed and remanded. *Marino v. King,* 355 S.W.3d 629 (Tex. 2011)(per curiam) is similar to Wheeler. Answers by pro se defendant were one day late to merits-preclusive requests. The Supreme Court, in both cases, cites due process concerns and reverses summary judgments. 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. Parties who fail to timely respond to requests for admission could not raise issue for the first time in motion for new trial, because they waived the issue by not raising it before judgment. *Viesca v. Andrews,* No. 01-13-00659-CV (Tex. App. - - Houston [1st Dist.], August 28, 2014, n.p.h.)(2014 Tex. App. Lexis 9683).

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).

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

Practice Tip:
See recent changes to affidavit form, T.R.E. 902(10), Business Records Accompanied by Affidavit (applies to suits filed on or after 9/1/14). See also order as to re-styling of Texas Rules of Evidence, Tex. Sup. Ct. Order Misc. Docket No. 14-9232 (effective April 1, 2015).

The business records predicate is onerous. Why go to trial without a business records affidavit pursuant to recently revised T.R.E. 902(10)? Since an affidavit cannot be cross examined, it is a safer predicate than a witness. Serve the records and affidavit on all parties pursuant to Rule 21a, at least 14 days before trial. Though not required under amended rule, consider attempting to e-file the affidavit and records during this transitional period.

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 no pet.)(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 record-keeping 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, no pet.)(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, no pet.)(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's Fee Affidavit

Paez v. Trent Smith Custom Homes, LLC, No. 04-13-00394-CV (Tex. App. - - San Antonio, March 19, 2014, n.p.h.)(2014 Tex. App. Lexis 2993)(mem. op.). This is a "garden-variety breach of contract claim" at

which prevailing party sought to recover fees under chapter 38, CPRC. Affidavit is brief, but court notes that the trial court can take judicial notice of usual and customary attorney's fees under 38.004 CPRC. Held, *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757 (Tex. 2012) relating to employment discrimination is inapplicable. Appellate fees at $15,000 also affirmed. See also Attorney's Fees at page 76(H).

Law firm sued client based on breach of contract and sworn account, for failure to pay fees. The 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 Houston, Harris county, Texas". Considering the presumption under TPRC 38.003 that usual and customary fees are reasonable fees, and considering the lack of controverting proof, the trial court could consider and rely on the affidavit as competent summary judgment evidence. *Haden v. Sacks*, No. 01-01-00200-CV (Tex. App. - - Houston [1st Dist.], May 7, 2009, pet. denied)(2009 Tex. App. Lexis 3199). See Attorney's Fees As Unliquidated Damages, at page 72. See also Proving Attorney Fees, M. H. Cersonsky, Collections and Creditors' Rights Course, 2015; and O'Connor's Texas Rules, ch. 1-H, §10; O'Connor's Texas COA, ch. 45-B.

H. Offer of Settlement (O'Connor's Texas Rules Chapter 7-H)

The offer of settlement process is codified in Civil Practices & Remedies Code Chapter 42, amended, 2011; and see related Rule 167. This procedure shifts litigation expenses if a party rejects a pre-trial settlement offer and the subsequent judgment is "significantly less favorable" than the rejected offer.

I. Interest at 18% Without Agreement

Section 28.004 of the Texas Property Code requires prompt payment to contractors and sub-contractors, and allows 18% interest. Use with caution because of usury issue. *Eagle Commer. Builders v. Milam & Co. Painting*, unpublished, 2002 Tex App. Lexis 5851(Tex. App. - - Amarillo 2002, pet. denied).

J. Post-Judgment Interest

If prime rate as published by the Board of Governors of Federal Reserve System is less than 5%, post-judgment interest rate is 5%; when prime is more than 15%, the rate is 15%. Fin. Code 304.003(c), applicable to judgments signed on or after September 1, 2005. To check the current interest rate, call the Public Information Officer at the Office of Consumer Credit Commissioner, (512) 936-7600. The rate is published each month and can be checked online at www.occc.state.tx.us, by selecting "Interest Rates". See also O'Connor's Texas Rules, Chap. 9C§4.6(2). The online procedure is best.

Post-judgment interest is compounded annually, Fin. Code § 304.006. If contract provides for interest or time price differential, post-judgment interest accrues at contract rate, limited to 18%, Fin. Code § 304.002.

K. Usury Cure and Crediting Debtor's Fees Against Claim

Upon receipt of a letter or pleading threatening or pleading excess interest or usury, promptly review usury cure procedures. See Identifying and Curing Usury, Robert R. Wisner, State Bar of Texas, Collections and Creditors' Rights Course, 2013. See also Tex. Fin. Code § 305.103 (correcting not later than 60 days after creditor actually discovers usury violation);§ 305.006(b)(correcting within 60 days of written notice of usury); § 305.006(d)(correcting after usury counter-claim).

Though a usury-cure procedure may require creditor to pay debtor's attorney's fees relating to usury, trial court could properly order the fees to be offset against the money debtor owes creditor. *Lagow v. Hamon*, 384 S.W.3d 411 (Tex. App. - - Dallas 2012, no pet.). See excellent discussion of abatement and usury cure procedure, 384 S.W.3d at 415, 416.

L. Post-judgment Procedures and Appeal

Defendants (appellants) filed no supersedeas bond and ignored order to answer post-judgment discovery. Appeal dismissed, based on TRAP Rule 42.3 authorizing dismissal if appellant fails to comply with a court order, *Ark O Safety Christian Church, Inc. v. Church Loans & Investments Trust* 279 S.W.3d

775 (Tex.App. -- Amarillo, 2007, no pet.) Unless the judgment is superseded, the appeal does not suspend the right to seek turnover. See also TRAP 25.1(h), enforcement of judgment not suspended by appeal.

M. 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, no pet.)(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).

N. Guaranty-Surety Cases

Consider the need to sue and serve both principal and surety. Rule 30 states "Assignors, endorsers and other parties not primarily liable upon any instruments named in the chapter of the Business and Commerce Code dealing with commercial paper may be jointly sued with their principal obligors or may be sued alone in the cases provided for by statute." Rule 31 states "no surety shall be sued unless its principal is joined with him... except in cases otherwise provided for in the law and these rules." See Tex. Bus. & Com. Code §3.419, CPRC § 17.001; *Vela v. Colina,* No. 13-11-00052-CV (Tex. App. - - Corpus Christi-Edinburg, October 13, 2011, no pet.)(2011 Tex. App. Lexis 8168)(mem. op.)(judgment against guarantor only affirmed because he was sued as a co-principal). See also *Hopkins v. First Nat'l Bank*, 551 S.W.2d 343, 345 (Tex. 1977)(guarantor of payment is primarily liable and may be sued apart from maker).

Guarantor signed "Jorge Lopez Ventura, General Manager". Because guaranty language stated "I personally guarantee..." it constituted the personal guaranty of Mr. Ventura. *Material P'ships v. Ventura,* 102 S.W.3d 252, 2003 Tex. App. Lexis 1936 (Tex. App. Houston [14th Dist.] 2003, pet. denied).

O. Imbedded Guaranty Sentence

An officer or credit manager signing a credit application in an agency capacity can be trapped by language in the application. *Taylor-Made Hose v. Wilkerson*, 21 S.W.3d 484, (Tex. App. - - San Antonio, 2000)(pet. denied)(though officer signed as vice-president, majority finds her liable and reversed summary judgment in her favor; dissent, Lopez, J.). See also *84 Lumber Co, L.P. v. Powers,* No. 01-09-00986-CV(Tex. App. - - Houston [1st Dist.] January 26, 2012,pet. denied)(2012 Tex. App. Lexis 590). Agent should consider alleging that creditor misrepresented or defrauded, by stating that the document is a credit application. The document is generally titled Credit Application, but may contain a single sentence imposing individual liability on the agent, even if he signs as agent of disclosed principal.

P. Agency - Agent's Burden of Proof

"When an agent seeks to avoid personal liability on a contract he signs, it is his duty to disclose that he is acting in a representative capacity and the identity of his principal". Disclosure of trade name or assumed name of principal was insufficient. *Ferrant v. Graham Assocs., Inc.*, No. 02-12-00190-CV(Tex. App. - - Fort Worth, September 26, 2013, n.p.h.)(2013 Tex. App. Lexis 12156)(mem. op.), citing *Southwestern Bell Media v. Trepper,* 784 S.W.2d 68, 71 (Tex. App. - - Dallas 1989, no writ)(even though alleged agent signed as president, he "failed in his second duty, because he did not disclose his true principal"). See also *John C. Flood of DC, Inc. v. Supermedia, L.L.C.* 408 S.W.3d 645, 657-658 (Tex. App. - - Dallas 2013, n.p.h.)(reaffirming *Trepper*).

Q. Maximizing Damages

1) Debt to Fraud.

Plaintiff-attorney brought breach of contract action for failure to pay fees and alleged fraud. The court affirms the trial court's finding that client defrauded the attorney by assuring payment of fees at closing, never intending to pay them. Exemplary damages affirmed. *Yeldell v. Goren*, 80 S.W.3d 634 (Tex. App. - - Dallas May 28, 2002, no pet.). "A promise to do an act in the future is actionable fraud when made with the intention, design and purpose of deceiving, with

no intention of performing the act", *Spoljaric v. Percival Tours, Inc.* 708 S.W.2d 432, 434 (Tex. 1986) citing *Stanfield v. O'Boyle*, 462 S.W.2d 270, 272 (Tex. 1971).

2) Treble Damages for Sales Representative.
The Texas Sales Representative Act, Tex. Bus & Com. Code Ann. Section 35.81-86 applies only to sales representatives acting within Texas. The act allows recovery of treble damages by a sales representative for unpaid commissions. *PennWell Corp. v. Ken Assocs.,* 123 S.W.3d 756, 769 (Tex. App - - Houston [14th Dist.] 2003, pet. denied).

R. Maximizing Defendants

See Fraudulent Transfers/ Piercing the Corporate Veil, John Mayer, Collections and Creditors' Rights Course, State Bar of Texas, 2012.

1) Restrictive Trend.
As to the apparent trend of restricting the spreading of liability to related persons and entities, see *SSP Partners v. Gladstrong*, 275 S.W.3d 444 (Tex. 2008); *Big Easy Cajun Corp. v. Dallas Galleria Ltd.*, 293 S.W.3d 345 (Tex. App. - - Dallas 2009, pet. denied). The cases discuss the difficulty in spreading liability through single business enterprise or implied partnership, both cases decided against the creative creditor.

2) Continuing liability.
Sole proprietor can be held liable for purchases of goods by successors operating under the same name when he fails to provide notice to third parties with whom the company had prior dealings. *Coffin v. Finnegan's, Inc.*, No. 06-01-00171-CV (Tex. App. -- Texarkana July 31, 2003, no pet.)(2003 Tex. App. Lexis 6535)(mem. op.).

3) Alter ego based on asset transfer.
Creditor sued debtor company and its principals individually for unpaid debt. Corporate assets transferred to competing creditor, which had claim against corporate principals, also. The trial court held principals liable based on alter ego. *Carter v. Jeb Lease Serv., Inc.*, No. 10-02-034-CV (Tex. App.- - Waco Feb. 4, 2004, no pet.)(2004 Tex. App. Lexis 1168)(mem. op.).

4) Money had and received.
Debtor sold assets to third party. Plaintiff sued third party asserting assumpsit and money had and received. Third party's summary judgment reversed. All plaintiffs need to show to recover under a claim of money had and received is that the defendant holds money which in equity and good conscience belongs to the plaintiff, *Tri-State Chemicals, Inc. v. Western Organics, Inc.*, 83 S.W.3d 189(Tex. App. - - Amarillo June 7, 2002, pet. denied) citing *Staats v. Miller,* 243 S.W.2d 686, 687 (Tex. 1951). For an excellent discussion of fraudulent transfers, see John Mayer *Fraudulent Transfers and Piercing the Corporate Veil, Conveyance, Collections and Creditors' Rights Course*, 2012; and Creed and Bayless, Fraudulent Transfers in Texas, 39 Houston Lawyer 28 (2001).

5) Corporation as individual's agent.
Paramount Pipe & Supply Co. v. Muhr, 749 S.W.2d 491, 494-495 (Tex. 1988). Creditor sued defendants based on invoices, which billed defendant corporation only. The petition, however, asserted that defendant corporation acted for itself and as the individual defendant's agent in accepting services and materials. The court noted that the invoices, which do not mention Muhr, "actually support the cause of action stated in the petition". The supreme court reversed the court of appeals and affirmed the default judgment against both the corporation and
the individual defendant.

6) Texas Tax Code Violation, § 171.255
Creditor obtained Utah judgment against corporation, and domesticated it in Texas. It then sued directors and officers pursuant to the tax code which imposes liability on individuals for debts of a corporation created or incurred after the date on which the report, tax, or penalty is due, and before corporate privileges are revived. *McCarroll v. My Sentinel, L.L.C.*, No. 14-08-01171-CV(Tex. App. - - Houston [14th Dist.]December 10, 2009, no pet.) (2009 Tex. App. Lexis 9363)(mem. op.)(judgment against individual affirmed). As to "bewildering array of veil-piercing theories" **see** *West and Bodamer Annual Survey of Texas Law: Corporations*, 59 SMU. L. Rev. 1143 (2006).

S. Creditor Pleading Trap

Creditor sues sole proprietor who properly denies liability in the capacity sued, and asserts that his

business is a corporation. What must creditor do? File verified plea that business is not a corporation, **see** Rule 93(6). Per Rule 52, allegation that a corporation is incorporated is taken as true unless denied by the affidavit of the adverse party, his agent or attorney. Judgment reversed and rendered against creditor who did not so plead. *Coffin v. Finnegan's,* No.06-01-00171-CV(Tex. App.---Texarkana July 31, 2003,no pet.)(2003 Tex. App. Lexis 6535)(mem. op.).

T. Foreign Judgments

CPRC, Chapter 35 was amended in 2011to require judgment creditor (not court clerk) to mail notice of filing of foreign judgment to debtor and file proof of mailing.

Cantu v. Howard S. Grossman, P.A., 251 S.W.3d 731 (Tex. App.- - Houston[14th Dist.], 2008, pet. denied). Domestication of two large Florida judgments, appealed and affirmed in Florida, under the Uniform Enforcement of Foreign Judgments Act. *Cantu* considers for the first time whether the filing of foreign judgments are subject to Texas venue statutes. The majority finds they are. The well-reasoned dissent argues that venue concepts do not apply to the post-judgment procedure of domesticating judgments. See also Penny Habbeshaw's article, Foreign Judgments, Collections and Creditors' Rights Course 2009; and Hon. Mike Englehart's article, Domesticating Judgments, Renewal and Revival, Collection and Creditors' Rights Course, **2013**.

U. Foreign Country Judgments

Naves v. Nat'l W. Life Ins. Co., No. 03-08-00525-CV (Tex. App. - - Austin, September 10, 2009, pet. denied)(2009 Tex. App. Lexis 7153)(mem. op.). Discusses Uniform Foreign Country Money-Judgment Recognition Act, CPRC 36.001-.008, translation of foreign judgments, Tex. R. Evid. 1009(a), and foreign law. Defendant was not served according to Brazilian law; non-recognition of Brazilian judgment affirmed. Note the venue provisio in CPRC 36.0041, generally defendant's country of residence.

V. Affidavit,"To Best of My Knowledge"

Affidavits must be based on personal knowledge; statements made "to the best of my knowledge and belief" are legally insufficient. *Winnard v. J. Grogan Enters., LLC,* No. 05-10-00802-CV (Tex. App. - - Dallas, April 30, 2012, no pet.)(2012 Tex. App. Lexis 3363)(mem. op.), citing *Humphreys v Caldwell*, 888 S.W.2d 469, 470 (Tex. 1994)(per curiam).

W. Rules 735 and 736

Rules were substantially amended and relate to expedited proceedings to foreclose home equity liens, tax liens, and liens of homeowners' associations. The court clerk serves citations and special service rules apply, see Rule 736.3.

X. E-mailed Rule 11 Agreement Ineffective

Attorney's e-mail did not satisfy Rule 11 requirements; no evidence that signature block was intended as signature. Request that agreements be signed, per Rule 11. *Cunningham v. Zurich Am. Ins. Co*., 352 S.W.3d 519 (Tex. App. - - Fort Worth 2011, pet. filed). See also Rule 21(f)(7). An electronic signature includes: a "/s/" and typed name; or scanned image of signature.

Y. Rule 168. Permission To Appeal

"On a party's motion or on its own initiative, a trial court may permit an appeal from an interlocutory order... Permission must be stated in the order to be appealed...The permission must identify the controlling question of law as to which there is a substantial ground for difference of opinion, and must state why an immediate appeal may materially advance the ultimate termination of the litigation."

PART ONE: SERVICE OF PROCESS

See generally Tex. Lit. G. Chapters 31, 32; McDonald TCP Chapters 11, 27; O'Connor's Texas Rules, Chapter 2-H.

KEY TOPICS

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I. TYPES OF SERVICE

A. Personal Service

Personal service is service that is delivered to the defendant personally. Defendants who are natural persons must be served by personal service unless substituted service is effected on an agent of the defendant designated by court order or by statute. Personal service may only be made on defendants who are natural persons.

B. Substituted Service

Substituted service is service that is delivered to an agent of the defendant. Natural persons may be served by substituted service, but defendants who are not individuals, such as corporations, must be served by substituted service.

C. Acceptance or Waiver, Rule 119

Practice Tip: Instead of waiver agreement, safer procedure to serve defendant, or request that defendant file answer. An answer dispenses with need to serve defendant with citation, Rule 121. However, defendant is then entitled to notice of proceedings.

"Defendant may accept service of process or waive the issuance or service thereof..." after suit is filed, by signing a sworn memorandum acknowledging receipt of the petition. See Rule 119; O'Connor's Texas Civil Forms, 2 H:1. *Garduza v. Castillo*, No. 05-13-00377-CV (Tex. App. - - Dallas, June 25, 2014, n.p.h.)(2014 Tex. App. Lexis 6903)(mem. op.) (waiver failed to include waiver as to amended petition; no Rule 21a service of Amended Petitions, reversed and remanded). The court notes that the waiver could have expressly waived service of amended petitions as in *In re J.P.*,196 S.W.3d 434, 437 (Tex. App. - - Dallas 2006, no pet.).

Safer generally, to serve defendant or get waiver and also serve. Or request that answer be filed. One court of appeals held that the affidavit should expressly state that defendant waives service. *Wilson v. Dunn*, 752 S.W.2d 15, 17 (Tex. App.--Fort Worth 1988)(affirmed, without discussion of waiver issue, 800 S.W.2d 833 (Tex. 1990)). Rule 119 appears to allow a defendant to either accept service or waive service, however. The memorandum may be signed by defendant's agent, should be filed with the court, and in divorce actions must contain defendant's mailing address. By executing an instrument before suit is brought, a person may not accept service, waive process, enter an appearance or confess a judgment. CPRC §30.001. See *also* McDonald TCP 11:7-11:9. But see *Rodriguez v. Lutheran Social Services of Texas, Inc.*, 814 S.W.2d 153, 154 (Tex. App.--San Antonio 1991, writ denied) (discussion of pre-suit waiver of citation and service in suit to terminate parental relationship); *Temperature Systems v. Bill Pepper, Inc.,* 854 S.W.2d 669 (Tex. App.-- Dallas 1993, writ dism'd by agr.) (complaints as to jurisdictional allegations, service of process or citation prior to or in a special appearance constitutes a general appearance).

The trial court erroneously held that a signed document filed by defendant which stated, "agree with divorce" constituted a waiver. Appellate court affirmed as to the divorce, but reversed as to other requested relief, because defendant received no notice of trial. *Travis v. Coronado*, No. 2-03-023-CV (Tex. App. - - Fort Worth Feb.5, 2004, no pet.)(2004 Tex. App. Lexis 1142)(mem. op.).

D. Appearance, Rule 120

A default judgment may be rendered only if Defendant has not answered or otherwise appeared. See Defendant Must Not Have Answered, page 54 and Appearance, page 57.

II. GENERAL REQUIREMENTS FOR ALL SERVICE

A. Requisites of Service

1. Necessary papers. The defendant must be served with "a true copy of the citation with the date of delivery endorsed thereon with a copy of the petition attached thereto." Rule 106(a)(1). See *Willacy County v. South Padre Land Co.*, 767 S.W.2d 201 (Tex. App.--Corpus Christi 1989, no writ) (defendants' argument that citations they received were facially invalid because date of delivery was not endorsed thereon could not be raised for the first time on appeal. Rule 107 states that a default judgment may be obtained when defendant is served with process in another state, or in a foreign country pursuant to Rule 108 or 108a.

Deanne v. Deanne, 689 S.W.2d 262 (Tex. App.--Waco 1985, no writ) (no default can be taken in the absence of service even if defendant has actual notice of the pendency of the suit against him); *Heth v. Heth*, 661 S.W.2d 303 (Tex. App.--Fort Worth 1983, writ dismissed) (same).

2. Service of amended petition.
Practice Tip: When amending a petition, remember to add a certificate of service, confirming service on all parties, pursuant to Rule 21a.

A citation and personal service are no longer required. Assuming a defendant is properly served with citation and the original petition, the amended petition, even if it requests a more onerous judgment, can be served pursuant to Rule 21a, and no additional citation is required. *In re E.A.,* 287 S.W.3d 1, 4 (Tex. 2009). There, because the amended petition did not include a certificate of service, plaintiff did not make a prima facie case of the fact of service of the amended pleading. Three justices opposed abandoning the citation requirement, noting that unsophisticated litigants may be victimized by a plaintiff "raising the stakes" after a defendant failed to respond to the citation and original pleading.

Previously there was uncertainty as to the method of serving an amended petition. A determination had to be made as to whether the amended petition requested a more onerous judgment. See *Weaver v. Hartford Accident & Indem. Co.*, 570 S.W.2d 367,370(Tex. 1978). But *In re E.A.* notes that Rule 21a as amended in 1990, eliminates the need to serve a defendant with citation when serving an amended petition, even if it requests a more onerous judgment. See *also Pride v. Williams*, No. 05-11-01189-CV, 2013 Tex. App. Lexis 8834 (Tex. App. Dallas July 17, 2013, op. filed) inexplicably applies "more onerous judgment test", ignoring *In Re E.A.*); *Rios v. Rios,* No. 13-09-00437-CV (Tex. App. - - Corpus Christi July 15, 2010, no pet.)(2010 Tex. App. Lexis 5539)(mem. op.)(same.). See *also Olive Tree Apts. v. Trevino,,* No. 04-09-00740-CV(Tex. App. - - San Antonio May 5, 2010, no pet.)(2010 Tex. App. Lexis 3354)(mem. op.). A default judgment taken without proper service of the pleading upon which it was based, is void. Rule 21a service would have been sufficient, but there was no service of the amended pleading.

3. Service on Sunday. Service cannot be made on Sunday except in actions where plaintiff seeks an injunction, attachment, garnishment, sequestration or a distress warrant. Rule 6. *In re J.T.O.*, No. 04-07-00241-CV (Tex. App. - - San Antonio January 16, 2008, no pet.)(2008 Tex. App. Lexis 303)(mem. op.)(defendant served on Sunday, and citation defect, judgment reversed).

4. Copies to multiple defendants. Where multiple defendants are named in the citation, each defendant must be served with a copy of the citation. *American Spiritualist Assoc. v. Ravkind*, 313 S.W.2d 121, 124 (Tex. Civ. App.--Dallas 1958, writ ref'd n.r.e.).

5. No trickery. Service of process on a defendant who has been decoyed, enticed, or induced to come within its reach by false representation may compel a court not to exercise jurisdiction. See Justice O'Connor's dissent in *Goldwait v. State,* 961 S.W.2d 432, 437 (Tex. App.--Houston [1st Dist.] 1997, no writ).

B. Persons Authorized to Effect Service

1. Disinterested. No officer or other person who is a party to or interested in the outcome of the suit may effect service. Rule 103. A related provision is found in Rule 108, Service in Another State. See *Indus. Models, Inc. v SNF, Inc.,* No. 02-13-00281-CV (Tex. App. - - Fort Worth, July 24, 2014, n.p.h.)(2014 Tex.

App. Lexis 8063)(mem. op.)(out of state service pursuant to Rule 108 requires affirmation that server is disinterested). The case is discussed at page 48. In *Uvalde Country Club v. Martin Linen Supply Co.*, 685 S.W.2d 375, 378 (Tex. App. - - San Antonio 1984), (rev'd. on other grounds, registered agent's name-issue) 690 S.W.2d 884 (Tex. 1985), the San Antonio court held that the Rule 103 "disinterested provision" is a designated disqualification, not a requirement that must be repeatedly established.

2. Officials. Where public officials such as sheriffs, constables and clerks are authorized to effect service, it is clear that they may act personally or by and through their deputies. *Cortimiglia v. Miller*, 326 S.W.2d 278, 284 (Tex. Civ. App.--Houston 1959, no writ). Note, however, that returns served by deputies may require the signature of the sheriff or constable, see Signature of Officer, page 22.

3. Other authorized persons. A person not less than 18 years of age, who is disinterested in the outcome of a suit may serve process, if authorized by written order of the court. The order authorizing service may be made without a written motion and no fee shall be imposed for issuance of the order. See Rules 103 and 501.2(a)(4). At least one court holds that the 103 order must be in the record to support default judgment, *Rundle v. Commission for Lawyer Discipline*, 1 S.W. 3d 209 (Tex. App –Amarillo 1999, no pet.); but see *Conner v. West Place Homeowners Ass'n,* No.14-99-00659-CV(Tex. App.–Houston [14th Dist.] May 11, 2000 pet. denied)(unpublished,2000 Tex. App. Lexis 3053) (contra). Sheriffs, constables, and others authorized by law, are not restricted to service in their county. The return of citation by an authorized person, however, shall be verified, or signed under penalty of perjury. Rule 107.

a. Supreme Court Order. The Texas Supreme Court may certify persons as process servers. The Supreme Court issues an "SC" or "SCH" number to authorized persons to confirm certification. On September 1, 2014, the Judicial Branch Certification Commission (JBCC) assumed the responsibilities of the Process Server Review Board, Senate Bill 966, 83rd Legislature, 2013. The JBCC oversees certification and licensing of process servers, guardians, court reporters and court interpreters. A list of certified process servers and a process server complaint form can be found at http://www.txcourts.gov/jbcc, then select Process Server Certification. The telephone number for the JBCC is (512) 475-4368. A process server may also be certified to serve process by other court order, per Rules 103 and 501.2(a)(4).

b) Rule 103 Expansion of Papers To Be Served. Former Rule 103 stated that "citations and other notices" could be served by officers and authorized persons. Rule 103 now states that "Process - including citation and other notices, writs, orders, and other papers" may be served. However, unless authorized by court order, only a sheriff or constable may serve: a)citation in forcible entry and detainer, b) writ requiring taking possession of a person, property or thing, c) process requiring physical enforcement by process server. The rule infers that an authorized person may serve a writ of garnishment. But see Rule 663, next paragraph.

4. Garnishment. Traditionally only a sheriff or constable could serve garnishee with a writ of garnishment. Rule 663 states "The sheriff or constable...shall immediately [serve garnishee]." Rule 103, amended 2005, and discussed in preceding section, may allow an authorized person to serve a writ of garnishment. Safest to use officer to serve garnishments until disparity in Rules 103 and 663 is resolved. Former cases include *Para Dryden v. Am.Bank,* No. 13-02-00379-CV (Tex. App. -- Corpus Christi, August 26, 2004, no pet.) (2004 Tex. App. Lexis 7671)(mem. op.)(creditor ordered to pay bank's fees of $7500, because of improper service by private process server). *Requena v. Salomon Smith Barney, Inc.,* No. 01-00-00783-CV(Tex. App.--Houston[1st Dist.] March 7, 2002, no pet.)(unpublished, 2002 Tex. App. Lexis 1701). As to serving banks as garnishees, see Banks as Garnishee, page 44.

C. Return of Service

Rules 16, 105, 107, 118; Tex. Lit. G. § 31.02[3]; McDonald TCP 11:25-11:30, 27:53, 27:54.

Practice Tip 1:
Rule 107 Return of Service. The 2012 Amendment to Rule 107 Return of Service substantially revised this critical rule. See Rule 107 at page 89. Primary changes are: 1) Electronic and facsimile filing of

returns is authorized. 2) The return may, but need not be endorsed on or attached to the citation. 3) If the process server is certified by the Supreme Court, the return must contain the server's identification number and certification - expiration date. 4) The return of a private process server can be signed under penalty of perjury, or verified. 5) When signing under penalty of perjury, include name, birth date, address, including country; penalty of perjury form appears in Rule 107. See also Amendment of Process at page 25.

Practice Tip 2:
a) under Rule 107(g). The return may, but is not required, to be electronically filed, Rule 107(g). See page 89. Some court clerks mistakenly require that a process server electronically file returns.

Practice Tip 3:
The return should be file stamped by the court upon filing. If the return is attached to the citation and only the citation is file stamped, the court may reverse and remand, see page 62,V(A). For this reason, the independent Return of Citation authorized by Rule 107(b) is a safer procedure. See form at page 123. In Midstate Envtl. Servs., LP v. Peterson, the return of citation was probably attached to the citation, but because of electronic filing, such could not be determined, see page 62,V .

Practice Tip 4:
When electronically filing an independent return (not attached to citation) comply with Rule 107(b), requiring that the return include specified information, some of which was previously stated in the citation. Traditionally, returns were simply endorsed on a citation which was filed with the court. To allow electronic filing, the amended rule allows the return to either be endorsed on or attached to the citation, or not.

Practice Tip 5:
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 60.
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. For discussion of returns after Rule 106(b) substituted service, see Return of Service, page 32.

"The return of service is not a trivial, formulaic document. It has long been considered prima facie evidence of the facts recited therein. ...The recitations in the return of service carry so much weight that they cannot be rebutted by uncorroborated proof..." *Primate Const., Inc. v. Silver*, 884 S.W.2d 151 (Tex.1994).

1. Preparation. The officer or other authorized person executing the citation must complete a return of service. Rule 107(a). The petition, citation, and return should be compared and default judgment taken only if they are consistent. If there is doubt as to the accuracy of the return, consider: re-serving the party with an additional citation and pleading; amendment of process, Rule 118, but see discussion at page 25.

2. Placement. The return may be endorsed on or attached to the citation, or filed independently. Rule 107(a)(b), page 89. "Attached to" impossible with electronic filing.

3. Requisites of Return.

Practice Tip: Rule 107 Return of Service was rewritten effective January 1, 2012, see page 89. Most of the following return-of-service cases are based on former Rule 107. There is an apparent conflict between amended Rule 107 which allows but does not require endorsement of return on citation; and Rule 16 shall endorse All Process, which requires endorsement "on all process and precepts coming to his hand the day and hour on which he received them, the manner in which he executed them, and the time and place the process was served and shall sign the returns officially." New and former Rule 107 appear at page 89.

a. Papers delivered. The return must state that both a true copy of the citation and a copy of the petition were delivered to defendant or his agent for service. See *Woodall v. Lansford*, 254 S.W.2d 540 (Tex. Civ. App.--Fort Worth 1953, no writ) (officer's return stating that defendant was served with "a true copy of this citation, together with the accompanying true and

correct copy of the Citation to Plaintiff's Petition," was fatally defective). *But* see *Preusser v. Sealey,* 275 S.W.2d 83 (Tex. Civ. App.--Beaumont 1955, writ ref'd n.r.e.) (return stating that each defendant was served with "a true copy of this citation . . . and the accompanying copy of --" was not fatally defective where the citation itself referred to the petition). Distinguishing *Primate* is, *Heggen v. Graybar Elec. Co.,* No. 14-06-00058-CV (Tex. App. - - Houston [14th Dist.], January 9, 2007, no pet.)(2007 Tex. App. Lexis 79)(mem. op.). In *Primate* the citation and return conflicted, because the citation stated "Plaintiffs' Second Amended Petition" and the return stated that "Plaintiffs' Original Petition" was served. In *Heggen*, however, the citation stated, "Plaintiffs' Second Amended Petition" and the return simply stated, "Petition attached" was served. Held, sufficient service.

b. Date and time of receipt by server. Rule 105 states that "the officer or authorized person to whom process is delivered shall endorse thereon the day and hour on which he received it...." See also Rules 16 and 107(b)(4). The court clerk's failure to note the hour of her receipt of citation for service by mail was fatal error. *Ins. Co. of Penn. v. Lejeune* 297 S.W.3d 254, 256 (Tex. 2009); *Business Staffing, Inc. v. Gonzales,* 331 S.W.3d 791(Tex. App. - - Eastland 2010, no pet.)(same); *Bank of Am. v. Estate of Hill*, No. 06-10-00053-CV (Tex. App. - - Texarkana November 3, 2010, no pet.)(2010 Tex. App. Lexis 8770)(mem. op.)(same); *In re Z.J.W.*, No. 12-05-00053-CV (Tex. App. - - Tyler, January 31, 2006, no pet.)(2006 Tex. App. Lexis 831)(process server failed to state date and hour of receipt of citation; reversed and remanded). In *West Columbia Nat'l Bank v. Star Griffith*, 902 S.W.2d 201 (Tex. App.-- Houston [1st Dist.] 1995, writ denied) the court held that even though the lines were not completed which stated "came to hand" on a specific date and time, that a stamped date and time appearing over the lines, and which was not initialed or signed, was sufficient. *McGee v. McGee,* No. 07-12-00475-CV (Tex. App. - - Amarillo, June 6, 2014, n.p.h.)(2014 Tex. App. Lexis 6153) (error in date of receipt of citation by process server was explained by affidavit, judgment affirmed.)

c. Date of service, Rule 107(b)(7). Rule 16 requires the "time and place the process was served." A return stating inconsistent dates of service is defective. *McGraw Hill, Inc. v. Futrell*, 823 S.W.2d 414, 417 (Tex. App. -- Houston [1st Dist.] 1992, writ denied). The court used logic and reasoning to affirm a judgment in which the date of service was ambiguous because the officer had a "unique handwriting style in denoting double zeros" in *Conseco Fin. Servicing Corp. v. Klein Indep. Sch. Dist*., 78 S.W. 3d 666 (Tex. App. - - Houston [14th Dist.] 2002, no pet.). Logic often has little to do with determining whether a return can stand the test of strict compliance mandated by *Primate Const.,Inc. v. Silver,* 884 S.W. 2d 151 (Tex. 1994).

d. Place of service. The return must state the place of service. See Rule 107(b)(6), Rule 16; *Landagan v. Fife*, No. 01-13-00536-CV (Tex. App. - - Houston [1st Dist.], June 19, 2014, n.p.h.)(2014 Tex. App. Lexis 6674)(mem. op.).

If the place is not stated in the return, however, it will be presumed in the absence of a contrary showing that service was made where the officer was authorized to act. *Hudler-Tye Const., Inc. v. Pettijohn & Pettijohn Plumbing, Inc.*, 632 S.W.2d 219, 221 (Tex. App.--Fort Worth 1982, no writ). See *also Jacksboro Nat. Bank v. Signal Oil & Gas Co.*, 482 S.W.2d 339 (Tex. Civ. App.--Tyler 1972, no writ) ("return should recite at least that the writ was served within the State of Texas"). An authorized person or officer is no longer restricted to service within his county. (Rule 103).

e. Person or entity served, Rule 107(b)(5).
Practice Tip: "Default Judgment Mirror Image Rule": Defendant's name in: 1) petition; 2) citation; 3) return; and 4) judgment should mirror each other. If not, probably fatal error. See also "3" below, Suits in An Assumed Name.

1. Precision required. The defendant's name should appear exactly as in the petition and citation. *N.C. Mut. Life Ins. Co. v. Whitworth,* 124 S.W.3d 714 (Tex. App. - - Austin 2003, pet. denied). Default judgment of $1.7 million dollars reversed because of improper return of citation. Petition and citation named North Carolina Mutual <u>Life</u> Insurance Company; return of citation reflected service on North Carolina Mutual Insurance Company. *Hendon v. Pugh*, 46 Tex. 211

(1876) (service on "J. N. Hendon" rather than "J. W. Hendon" invalid); *Rone Engineering Ser. v. Culberson,* 317 S.W.3d 506 (Tex. App. - - Dallas 2010, no pet.)(citation and petition naming Rone Engineers, Ltd. insufficient for judgment against Rone Engineering Service, Ltd.)*; Deutsche Bank Nat'l Trust Co. v. Kingman Holdings, LLC*, No. 05-13-00943-CV (Tex. App. - - Dallas, July 8, 2014, n.p.h.)(2014 Tex. App. Lexis 7357)(mem. op.)(citing Rone, the named defendant in default judgment differs from named defendant in return of service, reversed and remanded); *Hercules Concrete Pumping Serv. v. Bencon Mgmt. & Gen. Contr. Corp.*, 62 S.W.3d 608(Tex. App. - - Houston [1st Dist.]2001, writ denied)(service on "Hercules Concrete Pumping" rather than "Hercules Concrete Pumping Services, Inc."(judgment reversed). See *also Uvalde Country Club v. Martin Linen Supply Co.*, 690 S.W.2d 884 (Tex. 1985); *Carl J. Kolb, P.C. v. River City Reporting & Records*, *Inc.,* No. 04-02-00919-CV (Tex. App. - - San Antonio, June 30, 2004, no writ) (2004 Tex. App. Lexis 5723)(mem. op.)(Carl J. Kolb insufficient for service on Carl J. Kolb P.C.).

2. Allowable variances. Variance in the names of defendants is sometimes allowed. However, because of the precision required in service of process, these opinions appear questionable. See, for example, *Sutherland v. Spencer,* No. 13-09-00198-CV(Tex. App. - - Corpus Christi August 12, 2010, pet. granted)(2010 Tex. App. Lexis 6563)(mem. op.). Citation named Jesse Garza, but the return confirmed service on Jesse de la Garza. Citation also named Southern Customs Paint and Body, but return reflected service on Southern Custom's (reversed on other grounds, *Sutherland v. Spencer*, 376 S.W.3d 752, 753-761 (Tex. 2012).

See *also 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.)(petition and citation named defendant "David Brian Blackburn"; return reflected service on David B. Blackburn; held the difference did not alter the identity of the party sued, default judgment affirmed); *Myan Mgmt. Group, L.L.C. v. Adam Sparks Family Revocable Trust,* 292 S.W.3d 750 (Tex. App.-- Dallas 2009, no pet.). Citation named Myan Management Group LLC; citation return named Myan Management; held an allowable variance. See also *Mantis v. Resz*, 5 S.W.3d 388 (Tex.App.–Fort Worth 1999, pet. denied)(petition, citation, and return naming defendant Michael Mantis sufficient, though defendant's name is Michael Mantas).

3. Suits in assumed name, Rule 28
Any partnership, unincorporated association, private corporation, or individual doing business under an assumed name may sue or be sued in its partnership, assumed or common name for the purpose of enforcing for or against it a substantive right, but on a motion by any party or on the court's own motion the true name may be substituted.

Kensington Park Homeowners Ass'n v. Newman, No. 01-12-00750-CV (Tex. App. - - Houston [1st Dist.] May 1, 2014, n.p.h.)(2014 Tex. App. Lexis 4724)(mem. op.). Default judgment against "Defendant New Kensington Park Homeowners Association, Inc." d/b/a Kensington Park Homeowner's Association". Appellant is Kensington Park Homeowners Association, Inc. which filed a restricted appeal claiming that a default judgment was improperly taken against it when it was neither named nor served in the lawsuit. The court dismissed the appeal for lack of jurisdiction because the appellant "was not a party to the underlying suit..." But see Rule 28, Suits in Assumed Name. The opinion does not discuss whether Appellant filed a verified denial of the assumed name as required by Rule 93(14). If no verified denial, the assumed name ("d/b/a") apparently should be established.

f. Manner of service.

1. Inconsistent statements. Beware of Forms. Failure to strike through inapplicable form language may invalidate service. *Primate Const., Inc. v. Silver*, 884 S.W.2d 151(Tex. 1994) requires a precise return; return fatally defective where form language recited that defendant was served with original, instead of amended petition. See also *Dolly v. Aethos Communs. Sys.,* 10 S.W.3d 384 (Tex. App. - - Dallas 2000, no pet.)(return defective as it stated defendant served "in person" but note at bottom states "posted to front door"); *Houston Welding Supply Co., Inc. v. Johnson,* No. 14-04-00205-CV (Tex. App. - - Houston [14th Dist.], November 30, 2004, no pet.)(2004 Tex. App.

Lexis 10658)(mem. op.)(return defective as it failed to state that the petition was served with the citation); *Preston v. Price*, No. 14-94-00890-CV(Tex. App.--Houston [14th Dist.] April 11, 1996, no pet.) (unpublished) 1996 Tex. App. Lexis 1407 (service insufficient where it stated defendant was served in person at post office box). *Payne v. Payne*, No. 14-05-00738-CV (Tex. App. - - Houston [14th Dist.], October 5, 2006, no pet.)(2006 Tex. App. Lexis 8573)(mem. op.)(service insufficient where return stated that it was delivered ". . . in person or by registered or certified mail, return receipt requested. . .", as return states three methods of service).

Apparently conflicting with the precision required by *Primate* and *Preston* is *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.). There "B/S Ricardo Weitz, registered agent" was construed to mean by serving Richardo Weitz, registered agent.

Earlier cases, now questionable because of Primate's precise-return requirement, were less demanding and held that a return is not fatally defective if it inadvertently states more than one method of service. See *Maritime Services Inc. v. Moller Steamship Co.,*702 S.W.2d 277, 278-79 (Tex. App.--Houston [lst Dist.] 1985, no writ) (return was not fatally defective where the officer merely failed to strike out pre-printed language regarding an alternate method of service); *Houston Pipe Coating Co. v. Houston Freightways. Inc.*, 679 S.W.2d 42, 44 (Tex. App.--Houston [14th Dist.] 1984, writ ref'd n.r.e.) (same); *Gibraltar Sav. Ass'n v. Kilpatrick*, 770 S.W.2d 14, 15 (Tex. App.--Texarkana 1989, writ denied) (return was not defective, though it stated that "writ" was "executed").

2. No legal conclusions. A statement that defendant was served is a conclusion and does not state the manner of delivery as required by Rule 107(b)(8). *U.S. Bank, N.A. v. Pinkerton Consulting & Investigations*, No. 05-13-00890-CV (Tex. App. - - Dallas, August 22, 2014, n.p.h.)(2014 Tex. App. Lexis 9366)(mem. op.)

The return should state that citation and petition were "delivered" to the defendant or other person accepting service. See *Wohler v. La Buena Vida in W. Hills*, 855 S.W.2d 891 (Tex. App.-- Ft. Worth 1993, no writ). The return should not state that it was "served" on a defendant, because that is a legal conclusion rather than a factual statement.

(3) Defendant refuses process, "drop serve".

A person cannot defeat valid service by simply refusing to accept the papers. *Summersett v. Jaiyeula*, No. 13-12-00442-CV(Tex. App. -- Corpus Christi-Edinburg, July 18, 2013, pet. denied)(2013 Tex. App. Lexis 8882). *Summersett* quotes *Dosamantes v. Dosamantes*, 500 S.W.2d 233, 237 (Tex. Civ. App. - - Texarkana 1973, writ dism'd):

> A defendant who does not physically accept citation is held to have been personally served as long as the return affirmatively shows the papers were deposited in an appropriate place in his presence or near him where he is likely to find them, and he was informed of the nature of the process and that service is being attempted. *Dosamantes*, 500 S.W.2d at 237.

g. Signature of officer.

Practice Tip: the cases below were decided under former Rule 107. But see current Rule 107(e), "[t]he officer or authorized person who serves or attempts to serve a citation must sign the return." Perhaps safest to have both the person serving [Deputy] as well as Sheriff or Constable sign officers' returns.

The return must be signed. Rule 107. *Amer. Bankers Ins. Co. of Fla. v. State,* 749 S.W.2d 195, 197 (Tex. App.--Houston [14th Dist.] 1988, no writ). When service is effected by an official, the signature required by prior case-law is that of the sheriff, constable or clerk, not that of the deputy who actually executes the return. But see Practice Tip, above, as to amended Rule 107. *Cortimiglia v. Miller*, 326 S.W.2d 278, 284 (Tex. Civ. App.--Houston 1959, no writ); *Smith v U.S. Auto. Acceptance 1995-I, Inc.,*No. 05-98-00061-CV (Tex. App.–Dallas, April 13, 2000, no pet.)(unpublished, 2000 Tex. App. Lexis 2434). Thus a return signed only by the deputy is invalid, as the deputy's signature is unnecessary. *Travieso v. Travieso,* 649 S.W.2d 818, 819-20 (Tex. App.--San Antonio 1983, no writ), *Houston Pipe Coating Co. v. Houston Freightways Inc.,* 679 S.W.2d 42, 44-45 (Tex. App.--Houston [14th Dist.] 1984, writ ref'd n.r.e.). This is not an onerous requirement, as the sheriff, constable or clerk's signature may actually be

accomplished by the deputy, *Heye v. Moody*, 67 Tex. 615, 4 S.W. 242 (1887), and it may be "written by hand, printed, stamped, typewritten, engraved, photographed, or cut from one instrument and attached to another". *Houston Pipe Coating Co. v. Houston Freightways Inc. supra,* 679 S.W.2d at 45.

h. Signature of authorized person.
Practice Tip: An authorized person may either verify the return or, effective January 1, 2012, sign under penalty of perjury. Rule 107(e), page 89. If process server is certified under Supreme Court order, the person's identification number and expiration date must be stated. Rule 107(b)(10) and Landagan v. Fife, No. 01-13-00536-CV (Tex. App. - - Houston [1st Dist.], June 19, 2014, n.p.h.)(2014 Tex. App. Lexis 6674)(mem. op.)(failure to state expiration date, reversed and remanded).

A return made by a person other than an officer or clerk of court must either be verified or signed under penalty of perjury. Rule 107. *Goodman v. Wachovia Bank, N.A.,* 260 S.W.3d 699 (Tex. App. - - Dallas 2008, no pet.)(explanation of verification); *Ameriquest Mortg. Co. v. Ashworth,* No. 01-08-00544-CV (Tex. App. - - Houston [1st Dist.] April 15, 2011, pet. denied)(2010 Tex. App. Lexis 2732)(mem. op.);(*Flanigan v. Schneider,* No. 09-04-491-CV (Tex. App. Beaumont, July 14, 2005, no pet.)(2005 Tex. App. Lexis 5519)(mem. op.); *Carter v. Estrada,* No. 13-02-568-CV (Tex. App. - - Corpus Christi Oct. 30, 2003, no pet.)(2003 Tex. App. Lexis 9330)(mem. op.); *McGraw-Hill, Inc. v. Futrell*, 823 S.W.2d 414 (Tex. App.--Houston [1st Dist.] 1992, writ denied); *Bautista v. Bautista*, 9 S.W.3d 250 (Tex.App.–San Antonio 1999, no pet.). *Deckard v. Long*, No. 12-05-00191-CV (Tex. App. - - Tyler, April 28, 2006, no pet.)(2006 Tex. App. Lexis 3591)(mem. op.)(return defective, because signature illegible and the return did not establish whether person signing was sheriff, constable, or process server; return not verified).

The courts disagree as to whether a Rule 103 order authorizing the private process server must be in the record to support a default judgment. *Rundle v. Commission for Lawyer Discipline*, 1 S.W.3d 209 (Tex. App. - - Amarillo, 1999, no pet.)(order required); *Duncan v. Perry Co.*, No. 05-01-01245-CV (Tex. App. - - Dallas, May 14, 2002, no pet.) (unpublished, 2002 Tex. App. Lexis 3395)(order required); but see *Conner v. West Place Homeowners Ass'n*., No. 14-99-00659-CV (Tex. App.–Houston [14th Dist.] May 11, 2000, pet. denied)(unpublished, 2000 Tex. App. Lexis 3053)(order not required); *Color Smart, Inc. v. Little,* No. 04-00-00294-CV (Tex. App. - - San Antonio October 17, 2001, no pet.) (unpublished, 2001 Tex. App. Lexis 6913)(order not required).

i. Other matters - returns of service. Writing. If the officer's writing is ambiguous, the trial court will be presumed, in the absence of an express contrary finding, to have impliedly found that the disputed letter or word was the same in the return as in the petition and citation. *Solis v. Garcia*, 702 S.W.2d 668, 670 (Tex. App.--Houston [14th Dist.] 1985, no writ); *Popkowski v. Gramza*, 671 S.W.2d 915, 917-18 (Tex. App.--Houston [lst Dist.] 1984, no writ).

Entities. Service on entities can be troublesome; a valid return cannot indicate that process was delivered to the registered agent. Instead, the return must state that it was delivered to a defendant entity through its registered agent. See *Benefit Planners v. Rencare, Ltd.,* No. 04-01-00369-CV (Tex. App. - - Corpus Christi May 8, 2002, no pet.)(2002 Tex. App. Lexis 3195), citing *Barker CATV Const. Inc. v. Ampro, Inc.,* 989 S.W.2d 789, 791 (Tex. App. - - Houston [1st Dist.] 1999, no pet.) The *Barker* court noted that "the return did not state,"as it must, that it was delivered to the defendant, Barker CATV Construction, Inc., through its registered agent James M. Barker." Id. *Hercules Concrete Pumping Serv. v. Bencon Mgmt. & Gen. Contr. Corp.,* 62 S.W.3d 608(Tex. App. - - Houston [1st Dist] 2001, writ denied)(return "failed absolutely" to show service on defendant Hercules Concrete Pumping Service, Inc. when it simply stated that it was executed by delivering to the registered agent, and failed to name the party served).

Service on multiple defendants. When service on more than one person is included in a single return, the return must show that each defendant received a copy of the citation with a copy of the petition attached. See *Preusser v. Sealey*, 275 S.W.2d 830, 833 (Tex. Civ. App.--Beaumont 1955, writ ref'd n.r.e.).

j. Unsuccessful service.

"When the officer or authorized person has not served the citation, the return shall show the diligence used by the officer or authorized person to execute the same and the cause of failure to execute it, and where the defendant is to be found, if ascertainable." Rule 107(d).

An unexecuted return should be signed. *Hot Shot Messenger Service v. State*, 818 S.W.2d 905 (Tex. App.--Austin 1991, no writ), citing Rule 107.

D. Factual Issues Regarding Service

(1) Generally

"The return of service is not a trivial formulaic document. It has long been considered prima facie evidence of the facts recited therein. The recitations in the return of service carry so much weight that they cannot be rebutted by the uncorroborated proof of the moving party", *Primate Const., Inc. v. Silver,* 884 S.W.2d 151, 152 (Tex.1994).

"...[T]he jurisdictional power of the court derives from the fact of service and not the return itself." *Min v. Avila*, 991 S.W.2d 495, 501 (Tex. App.--Houston [1st Dist.] 1999, no pet.) citing *Ward v. Nava*, 488 S.W.2d 736, 738 (Tex.1972). The prima facie fact of service, as established by the recitals in the return will remain undefeated when the record shows only that the challenger denies service and the serving officer cannot recall serving that particular defendant.

"The veracity of the officer's statements of his own actions, may be challenged by a defendant, but the courts do not permit such an attack to degenerate into a swearing match between the officer and the defendant..." McDonald's TCP §11:25; *Cortimiglia V. Miller,* 326 S.W.2d 278 (Tex. App.-- Houston [1st Dist] 1959, no writ); *Gatlin v. Dibrell* ,74 Tex. 36, 11 S.W. 908 (1889). The recitations in the return of service carry so much weight that they cannot be rebutted by the uncorroborated proof of the moving party. *Primate Constr. v. Silver*, 884 S.W.2d 151 (Tex.1994); *Alexander v. Alexander*, No.03-09-00158-CV (Tex. App. - - Austin, February 19, 2010, pet. denied)(2010 Tex. App. Lexis 1176)(mem. op.); see also *Krivka v. Hlavinka*, No. 04-08-00865-CV (Tex. App. - - San Antonio, November 11, 2009, no pet.)(2009 Tex. App. Lexis 8689)(mem. op.).

(2) Corroborated attacks on return

Seaprints, Inc. v. Cadleway Props., 446 S.W.3d 434 (Tex. App. - - Houston [1st Dist.], n.p.h.)(receipt corroborated defendant's denial of service; second defendant established that he moved from residence at which he was purportedly served, corroborating his denial of service, bill of review).

P & H Transp., Inc. v. Robinson, 930 S.W.2d 857 (Tex. App.--Houston [1st Dist.] 1996, writ denied). Defendant was purportedly served at his place of employment, but three persons testified that he quit prior to the service date. The process server swore that he served the papers in his usual manner, asking the man served if he was the person named in the suit. The opinion contained some troublesome language, "[the process server] could not testify that he served [defendant] and did not ask for any form of identification from the person he served." The court held that the record did not clearly establish that defendant was served "in person". The decision implies a duty to obtain identification from recipients, which is unrealistic. The case may be distinguished based on the extensive corroborating evidence from disinterested witnesses.

Judgment defendant has a right to a jury trial in a bill of review action to determine question of material fact, whether he was served with process. *Caldwell v. Barnes*, 154 S.W.3d 93(Tex. 2004). The court notes that corroborated proof is required to overcome presumption that defendant was served as stated in return, citing *Primate.*

Purportedly, judgment defendant, bill of review plaintiff, Mr. Caldwell, was served in Colorado by private process server Mr. Perdew, and a $15.5 million default judgment was entered. Nearly four years later, in the bill of review proceeding, Mr. Caldwell submitted: 1) an affidavit denying he had been served; 2) an affidavit from Mr. Perdew in which he contradicted his earlier affidavit by stating that he had not actually served defendant; 3) affidavit from Perdew's prior girlfriend corroborating Perdew's retraction by stating that on the alleged date of service, they were in Cheyenne, Wyoming at a George Strait concert; 4) affidavits of four other litigants in unrelated cases, whom Perdew claimed to have served,

but who also denied service.

"During cross-examination, however, Caldwell admitted that in the past he had purposely allowed approximately a dozen default judgments to be taken against him, even after properly being served with process, because defaulting was often less costly than defending the underlying suits." 154 S.W.3d at 96, the supreme court reverses and remands to the trial court for a jury trial on the issue of service of process.

See *also: Garza v. Phil Watkins, P.C.,* No. 04-07-00848-CV (Tex. App. - - San Antonio, March 4, 2009, pet. dism'd.)(2009 Tex. App. Lexis 1588) (mem. op.)(insufficient corroboration, default judgment affirmed against individual); *In re Botello,* No. 04-08-00562-CV (Tex. App. - - San Antonio, November 26, 2008, no pet.)(2008 Tex. App. Lexis 8875)(mem. op.)(mandamus conditionally granted, bill of review improperly granted based on defendant's uncorroborated denial of service); *Gruensteiner v. Cotulla Indep. Sch. Dist*., No. 04-07-00847-CV (Tex. App. - - San Antonio, October 15, 2008, no pet.)(2008 Tex. App. Lexis 7787)(mem. op.)(bill of review in tax case; uncorroborated claim of no service insufficient); *Soto v. Soto*, No. 04-05-00659-CV (Tex. App. - - San Antonio, May 10, 2006, no pet.)(2006 Tex. App. Lexis 3911)(mem. op.)(process server did not recall defendant, but stated, "if I put here that I served him I served him." Bill of review denied); See *also, Garza v. AG of Tex,* 166 S.W.3d 799(Tex. App. - - Corpus Christi 2005, no pet.)(bill of review denied, which asserted false return of citation).

E. Amendment of Process, Rule 118 (Not recommended)

> At any time in its discretion and upon such notice and on such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued. TRCP 118.

Practice Tip: Available since 1941, the few cases interpreting the vague rule are inconsistent. Safer practice to: 1) review all returns prior to filing; 2) if error, have return corrected before filing; 3) if defective return is filed, simply obtain issuance of another citation and again serve defendant, reviewing the return prior to filing. Additional citations shall be issued upon request, Rule 99(a). Amendment procedure is nebulous, see Higginbotham and M.C.B. at paragraph 4, both allowing amendment by implication. Notice of amendment may not be required, see paragraph 5. Do not casually amend returns.

Defendant filed bill of review, attacking default judgment based in part on the process server's failure to verify the return of citation, generally a fatal error. After the court's plenary power expired and after the hearing on bill of review, plaintiff filed a motion to amend proof of service. The trial court granted the motion to amend and denied the bill of review, based on the server's affidavit confirming that he delivered citation to the defendant. The court notes that in *Walker*, see paragraph 3(b) below, amendment was allowed 22 months after a default judgment became final, *Gonzalez v. Tapia,* 287 S.W.3d 805 (Tex. App. - - Corpus Christi 2009, pet. denied). But avoid using this nebulous remedy to correct errors.

As to informal supplements and amendments of returns, see *Inv. Ideas, Inc. v. Ellekay, LLC*, No. 13-10-208-CV (Tex. App. - - Corpus Christi November 18, 2010, no pet.)(2010 Tex. App. Lexis 9171)(mem. op.)(casual supplement ineffective, process server simply filed an affidavit after judgment, attempting to bolster unverified return of citation); *Williams v. Nexplore Corp.* No. 05-09-00621-CV (Tex. App. - - Dallas December 7, 2010, pet. filed)(2010 Tex. App. Lexis 9627)(mem. op.) (supplemental return ineffective, reversed based on defective substituted service affidavit); *Krivka v. Hlavinka*, No. 04-08-00865-CV (Tex. App. - - San Antonio, November 11, 2009, no pet.)(2009 Tex. App. Lexis 8689)(mem. op.)(plaintiff filed server's affidavit to establish date of service after judge noted the deficiency in return of citation); *Park v. W. Union Fin. Servs.*, No. 03-08-00292-CV (Tex. App. - - Austin, October 30, 2009, no pet.)(2009 Tex. App. Lexis 8320)(mem. op.)(reversed because garnishment was not filed in the court which rendered the underlying judgment).

1. Service is requestor's responsibility. It is the responsibility of the one requesting service, not the process server, to see that service is properly accomplished. Rule 99(a); *Primate Const., Inc. v. Silver*, 884 S.W.2d 151, 153 (Tex. 1994); *Benefit Planners v. Rencare, Ltd.,* 81 S.W.3d 855(Tex. App. -

- San Antonio 2002, pet. denied). *Benefit Planners* quotes *Primate,* "[plaintiff's] attorney should have discovered the defect in the return and obtained an amended return to reflect proper service." But this ignores the hazards of amending a return. The better practice is to re-serve an additional citation.

2. Scope of amendment. The amendment cannot cure a void citation, and cannot create service where there was none; but it can cure any defect of form that would not have materially misled the defendant. *See generally* McDonald TCP 11:16, 11:25, 11:30. "The return itself is mere evidence: the power of the court rests on the fact of service, not the officer's report thereof." McDonald TCP 11:25. "For decades the Texas courts have followed without serious reconsideration the doctrine that virtually any deviation from the statutory requisites of a citation will destroy a default judgment on appeal or writ of error. The impact of this rule, however, may yet be somewhat mitigated by full use of the power of amendment conferred by the rules..." McDonald TCP 27:53.

3. Time for filing.

a. Traditional rule:

If the facts as recited in the return are incorrect and do not show proper service, the one requesting service "must amend the return prior to judgment", *Primate Constr. v. Silver*, 884 S.W.2d 151 (Tex. 1994). But see *Higginbotham v. General Life & Acc. Ins.*, 796 S.W.2d 695 (Tex. 1990), discussed below.

The amended return should be on file as of the date the judgment is signed, although courts may deem it to have been filed when the original return was filed. *Laas v. Williamson,* 156 S.W.3d 854 (Tex. App. - - Beaumont, 2005, no pet.) (amended return filed after judgment was too late, restricted appeal); *Bavarian Autohaus, Inc. v. Holland*, 570 S.W.2d 110 (Tex. Civ. App.--Houston [lst Dist.] 1978, no writ); *Nash v. Boyd*, 225 S.W.2d 649 (Tex. Civ. App.--El Paso 1948, no writ). The amendment must be filed before the court loses jurisdiction over the case. See *Firman Leather Goods Corp. v. McDonald & Shaw*, 217 S.W.2d 137, 140 (Tex. Civ. App.--El Paso 1948, no writ).

The trial court cannot supplement the record after writ of error appeal by ordering a file mark placed on the citation. *Gerdes v. Marion State Bank*, 774 S.W.2d 63 (Tex. App.-- San Antonio 1989, writ denied).

b. Liberal rule.

The Austin Court of Appeals took the "at any time" language in Rule 118 literally in a bill of review action, and allowed substantial amendment of a return 22 months after a default judgment became final. *Walker v. Broadhead*, 828 S.W.2d 278 (Tex. App.--Austin 1992, writ denied). *Walker* may be a great aid to plaintiff's counsel when faced with alleged defects in returns of citation after default judgment is entered. See also *Higginbotham v. General Life & Acc. Ins.*, 796 S.W.2d 695 (Tex. 1990), discussed below.

4. Amendment by implication. The majority, in *Higginbotham v. General Life & Acc. Ins.*, 796 S.W.2d 695 (Tex. 1990)(5-4 decision, dissent by Phillips, C.J.), holds that the deficiencies in two erroneous returns were cured by an implied amendment. The trial court found facts constituting proper service and its order denying defendants' motion for new trial was "tantamount to an order amending the returns under Rule 118." *Id.* at 697. The majority expressly limits its holding to "situations in which there is a record... showing strict compliance with a valid method of service and an order expressly amending the return or that is tantamount to an order amending the citation."*Id.* The dissent accurately points out that there is no valid service of either defendant and finds the court's implied amendment of defective process remarkable. 796 S.W.2d at 669.

Higginbotham is an anomaly, which seems to allow amendment without restriction. See also *In re M.C.B.* 400 S.W.3d 630 (Tex. App. - - Dallas 2013, n.p.h.)(op. on reh'g). Defendant was served through substituted service under Rule 106(b). The return stated that the server delivered a copy of the citation and petition, "by 106 to door" of defendant's address. Such was conclusory and probably insufficient. However, the process server testified at the default judgment hearing that he did duct-tape citation to front door of defendant's residence. Plaintiff therefore argues that the requirements of the order authorizing substituted service were strictly followed and cites *Higginbotham* for the proposition that service was made in strict compliance of the requirements and impliedly amended the return.

But see *N.C. Mut. Life Ins. Co. v. Whitworth,* 124

S.W.3d 714 (Tex. App. - - Austin 2003, pet. denied)(no implied amendment to cure error in defendant's name); *Laas v. Williamson,* 156 S.W.3d 854 (Tex. App. - - Beaumont, 2005,no pet.)(amended return filed after judgment was too late, restricted appeal).

5. No additional notice. *LEJ Dev. Corp. v. Southwest Bank*, 407 S.W.3d 863 (Tex. App. - - Fort Worth 2013, n.p.h.). Rule 118 states that the court may allow amendment "...upon such notice...as it deems just..." Plaintiff filed motions to amend returns, with amended returns attached, and a motion for default judgment. The court entered an order that the returns were thereby amended to reflect service on L.E. Jowell, Jr, not L.E. Jowell, as stated in the original returns. The default judgment was affirmed.

Appellants argued that amendment without notice was error. The court disagreed, citing *Continental Carbon*, 27 S.W.3d 184, 188-89 (Tex.App.-- Dallas 2000 pet, denied)(defendant "received all the notice to which it was entitled when it was originally served with process.") The court held that the amended returns need not be endorsed on or attached to the citation. Note that the current Rule 107 now states that the return "may, but need not, be endorsed on or attached to the citation."

6. Form of amendment. While *Higginbotham,* supra, allowed amendment by implication, the El Paso court of appeals goes to the other extreme in *Verlander Enterprises v. Graham*, 932 S.W.2d 259 (Tex. App.--El Paso 1996, no writ). The case illustrates the danger of allowing a return of citation to be filed with the court, prior to reviewing same. Plaintiff's counsel diligently attempted to amend the return, and filed a Motion for Correction of Return with a supporting officer's affidavit. However, the amended return was not attached to a validly issued citation. The court holds that the amendment is invalid because Rule 107 then required that the return be endorsed on or attached to the citation. Rule 118 allows the court, "on such terms as it deems just" to allow proof of service to be amended and *Verlander* appears excessively restrictive. Another failed attempt at amending the return is *Barker CATV Constr., Inc. v. Ampro, Inc.*, 989 S.W.2d 789, 792 (Tex. App.--Houston [1st Dist.] 1999, no pet.). Plaintiff did not obtain an order amending the return.

7. Standard of review. The court's ruling on whether to permit an amendment will be reviewed on appeal under an abuse of discretion standard. See *Mylonas v. Texas Commerce Bank- Westwood,* 678 S.W.2d 519, 523(Tex. App--Houston [14th Dist.]1984, no writ).

F. Particular Requirements for In-State Personal Service

Scope of service. Any individual defendant is amenable to personal service if he may be found within the state's territorial limits, whether or not such defendant is a resident of Texas. Rule 102. (repealed, 1988). See *Franklin v. Wolfe*, 483 S.W.2d 17 (Tex. Civ. App.--Houston [14th Dist.] 1972, no writ)(defendant entering state to participate in another lawsuit is not immune from service); *but* see *Oates v. Blackburn*, 430 S.W.2d 400 (Tex. Civ. App.--Houston [14th Dist.] 1968, writ ref'd n.r.e.)(defendant entering state solely for Rule 120a special appearance is privileged against process).

III. MAIL SERVICE (Not recommended)

(See also Substituted Service by Mail, page 34)
JUSTICE COURT: See Rule 501.2(b)(2) page 94, requires registered or certified mail, restricted delivery, with return receipt or electronic return receipt.

Practice Tip: As noted in F. Proof of Delivery, mail service requires that the return receipt, signed by defendant or defendant's agent, be affixed to the return, see Rule 107(c). Such legible signatures are rare. Court-ordered mail service is more effective. In substituted service - mail cases, Rule 106(b), a signed return receipt is generally not required. See Substituted Service by Mail at page 34. A strong record is suggested for such service.

Mail Service (other than Substituted Service by Mail) is generally defective because:
1) signature on mail receipt is unreadable;
2) signature on mail receipt is not that of defendant;
3) signature on mail receipt is not a proper appointee designated to receive service for an entity-defendant;
4) the clerk or other person fails to properly complete

the return of citation.
Most cases reversed, see F (4) below, Return receipt signature, insufficient service cases.

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A. Scope and Territorial Limits

Both personal and substituted service apparently may be accomplished by mail. *Cf. Advertising Displays, Inc. v. Cote*, 732 S.W.2d 360 (Tex. App.--Houston [14th Dist.] 1987, no writ); *United States v. Charter Bank Northwest*, 694 S.W.2d 16 (Tex. App.--Corpus Christi 1985, no writ). Service by mail may be made on defendants either within or outside the state's territorial limits.

B. Defendant Must Be Addressee

Defendant's name must appear on the envelope exactly as it appears on the citation and petition. *Mega v. Anglo Iron & Metal Co.*, 601 S.W.2d 501 (Tex. Civ. App.--Corpus Christi 1980, no writ) (service was invalid where suit against "Alejandro Morales Mega" was delivered in an envelope to "Alejandro Morales Meza").

C. Citation

The language of the citation must generally comply with the general requirements for citations, but it must not follow the citation used in personal service so closely that it leaves the impression that service will subsequently be effected by personal delivery. See *Smith v. Commercial Equip. Leasing Co.*, 678 S.W.2d 917 (Tex. 1984).

D. Persons Authorized To Make Service

Service by mail may be effected by any person authorized under Rule 103 or the court clerk, Rule 106. *P & H Transp., Inc. v. Robinson,* 930 S.W.2d 857 (Tex. App.--Houston [1st Dist.] 1996, writ denied). The court clerk must attempt to effect mail service when requested, Rule 103.

E. Type of Mail

Mail service is made by registered or certified mail, return receipt requested. Rule 106(a)(2). *But* see F. Proof of Delivery and G. Return of Mail Service.

F. Proof of Delivery

1) Rule 107(c) requires that the return receipt containing the addressee's signature (defendant's or defendant's agent) be affixed to the return. These issues can be avoided if substituted service is used pursuant to Rule 106(b), in which the court specifically orders service by mail. See Substituted Service By Mail at page 34 and *State Farm Fire & Casualty Co. v. Costley* 868 S.W.2d 298 (Tex. 1993)(per curiam). Service by mail, without substituted service authority pursuant to Rule 106(b) is not recommended, see the following cases.

2) Exception. Return receipt is not required in expedited foreclosure proceeding under Rules 735, 736 (effective January 1, 2012.)

3) Return receipt signature, sufficient service cases. Most recent cases appear in paragraph 4, below, as insufficient service cases. *Payless Cashways, Inc. v. Hill*, 139 S.W.3d 793 (Tex. App. - - Dallas 2004, no pet.). Defendant Payless was served through its corporate registered agent, Corporation Service Company. The return receipt is signed Loreen Flores. Held, because there is no showing that Flores "could not sign for the [corporate] registered agent" service is sufficient. But see cases in paragraph "4" this section, requiring that person signing be defendant's officer or authorized agent. Note the latter cases are not corporate registered agent cases, as is *Payless.*

See also *Warren v. Zamarron,* No. 03-03-00620-CV (Tex. App. - - Austin, May 5, 2005, no pet.)(2005 Tex. App. Lexis 3378)(mem. op.) A certified mail green card signed "Byron Warren" was sufficient, even though the citation named Nolan Byron Warren. "Nolan Bryon Warren was hand printed in the "Received By" block on the green card. The court stated that a process server cannot be responsible for how a defendant signs his name. The opinion details the process server's extreme effort to have the certified mail delivered to Nolan Byron Warren only**.**

4) Return receipt signature, insufficient service cases. *Lee Hoffpauir, Inc. v. Kretz*, 431 S.W.3d 776 (Tex. App. – Austin 2014, n.p.h.)*(signature of office manager, instead of registered agent); Reliant Capital Solutions, LLC v. Chuma-Okorafor,* No. 03-11-00422-CV (Tex. App. - - Austin, August 14, 2013, n.p.h.)(2013 Tex. App. Lexis 10115)(mem. op.)(no signature, CT Corporation Sys.); *United Servs. Auto. Ass'n v. McGuire*, No-09-10-00256-CV (Tex. App. - - Beaumont, June 16, 2011, no pet.)(2011 Tex. App. Lexis 4511)(mem. op.)(no showing that person who

signed green card was authorized to accept for defendant); *Santex Builders, LLC v. Guefen Constr., LLC,* No. 14-08-00840-CV (Tex. App. - - Houston [14th Dist.], December 15, 2009, no pet.)(2009 Tex. App. Lexis 9463)(mem. op.)(same); *PPI Tech. Servs., LP v. Christian Operating Co.,* No. 09-09-00022- CV (Tex. App. - - Beaumont, July 9, 2009, no pet.)(2009 Tex. App. Lexis 5852)(mem. op.) (same); *Mena v. Lenz,* No. 13-08-00137-CV (Tex. App. - - Corpus Christi, March 5, 2009, no pet.)(2009 Tex. App. Lexis 1585)(mem. op.)(same); *Houston Precast, Inc. v. McAllen Constr., Inc.,* No. 13-07-135-CV (Tex. App. - - Corpus Christi, September 25, 2008, no pet.)(2008 Tex. App. Lexis 7129)(mem. op.)(same); *Lynd Co. v. Chapman*, No. 04-06-00439-CV (Tex. App. - - San Antonio March 14, 2007, no pet.)(2007 Tex. App. Lexis 1951)(mem. op.) (same); *Boyd v. Kobierowski*, No. 04-06-00411-CV (Tex. App. - - San Antonio February 7, 2007,no pet.)(2007 Tex. App. Lexis 873)(mem. op.)(same); *Southwestern Sec. Servs. v. Gamboa,* 172 S.W.3d 90 (Tex. App. - - El Paso 2005, no pet.)(same); *Gibson v. Zo-Vac, Inc.*, No. 04-03-00884-CV (Tex. App. - - San Antonio, January 19, 2005, no pet.)(2005 Tex. App. Lexis 362)(mem. op.)(same); *Vasquez v. Vasquez*, No. 13-03-00299-CV (Tex. App. - - Corpus Christi, July 22, 2004, no pet.)(2004 Tex. App. Lexis 6618)(mem. op.)(same); *Johnson v. Johnson*, No. 09-03-00537-CV (Tex. App. - - Beaumont, November 18, 2004, no pet.) (2004 Tex. App. Lexis 10343)(mem. op.)(signature on return receipt illegible); *Bradley Wells Corp. v. Higginbotham,* No. 12-04-00114-CV (Tex. App. - - Tyler, October 29, 2004, no pet.)(2004 Tex. App. Lexis 9667)(mem. op.)(mail directed to entity officer signed by another); *Laredo Metro, Inc. v. Martinez,* No. 04-03-00423-CV (Tex. App. - - San Antonio, September 22, 2004, no pet.)(2004 Tex. App. Lexis 8423) (mem. op.)(service on entity insufficient because person signing green card not shown to be defendant corporation's president, vice-president, or registered agent).

5) Return receipt signature; more insufficient service cases. The signature on the return receipt must be that of defendant or its authorized agent for service; *Ramirez v. Consol. HGM Corp.,*124 S.W.3d 914 (Tex. App. - - Amarillo 2004, no pet.); *All Commer. Floors v. Barton & Rasor,* 97 S.W.3d 723, 727 (Tex. App. - - Fort Worth 2003, no pet.); *Keeton v. Carrasco,* 53 S.W.3d 13, 19 (Tex. App. - San Antonio 2001, pet. denied).

Other cases holding that signature on the return receipt must be that of defendant or its authorized agent for service include *Union Pac. Corp. v. Legg,* 49 S.W.3d 72,79(Tex. App. - - Austin 2001, no pet.)(stamped name of CT Corporation on return receipt was insufficient); *Integra Bank v. Miller,* No. 05-95-01477-CV (Tex. App. –Dallas, Dec. 16, 1996, no writ)(unpublished 1996 Tex. App. Lexis 5654); *American Universal Ins. Co. v. D.B. & B. Inc.*, 725 S.W.2d 764 (Tex. App.--Corpus Christi 1987, writ ref'd n.r.e.); *Pharmakinetics Laboratories Inc. v. Katz*, 717 S.W.2d 704, 706 (Tex. App.--San Antonio 1986, no writ); *American Bankers Ins. Co. of Fla. v. State*, 749 S.W.2d 195, 197 (Tex. App.--Houston [14th Dist.] 1988, no writ). See *also United States v. Charter Bank Northwest*, 694 S.W.2d 16, 18 (Tex. App.--Corpus Christi 1985, no writ).

6) Unclaimed mail:"Returned unclaimed" may be sufficient, *Wright v. Wentzel,* 749 S.W. 2d 228, 232 (Tex. App.--Houston [1st Dist.], 1988, no writ)(notice of rescheduled hearing was sufficient even though the notice was returned unclaimed); *Banda v. Zadok,* No. 14-96-00611-CV (Tex. App.--Houston [14th Dist.], Sept. 18, 1997, pet denied) (unpublished, 1997 Tex. App. Lexis 5017) ("refused" or "unclaimed" is sufficient if it is apparent that the address was valid and could be located by post office).

G. Return of Mail Service

1. Requisites. A proper return of citation is required. *Deutsche Bank Trust Co. v. Hall,* 400 S.W.3d 668 (Tex. App. - - Texarkana 2013, pet. denied)(clerk failed to complete return); *JPMorgan Chase Bank, N.A. v. Tejas Asset Holdings, LLC,* No. 05-11-00962-CV (Tex. App. - - Dallas, September 10, 2012, no pet.)(2012 Tex. App. Lexis 7702)(mem. op.)(same); *Select Portfolio Servicing, Inc. v. Martinez*, No. 13-06-113-CV(Tex. App. - - Corpus Christi, March 29, 2007, no pet.)(2007 Tex. App. Lexis 2412)(mem. op.) (when preparing record for appeal, clerk completed the blank return in a mail-service case; judgment reversed, record insufficient, at time judgment signed, to support default judgment); *David H. Arrington Oil & Gas, Inc. v. Coalson*, No.02-07-268-CV(Tex. App. - - Fort Worth, March 13, 2008, no pet.)(2008 Tex. App. Lexis 1931)(return

mail receipt alone, insufficient); *Laidlaw Waste Sys. v. Wallace*, 944 S.W.2d 72 (Tex. App.--Waco 1997, writ denied)(same); *Henry v. Fest,* No. 10-03-00313-CV(Tex. App. - - Waco, April 13, 2005, no pet.) (2005 Tex. App. Lexis 2852)(mem. op.)(same); *Fowler v. Quinlan Indep. Sch. Dist*., 963 S.W.2d 941 (Tex. App.--Texarkana 1998, no pet.)(return form language referenced personal service). The return must meet all the requirements governing the return of personal service. Rule 107. *Deutsche Bank Trust Co. Ams. v. Mahoney,* No. 03-05-00058-CV(Tex. App. - - Austin, February 10, 2006, no pet.)(2006 Tex. App. Lexis 1117)(mem. op.)(blanks for required information on return not completed); *Metcalf v. Taylor*, 708 S.W.2d 57, 58-59 (Tex. App.--Fort Worth 1986, no writ) (return failed to show either when citation was served or manner of service and was not signed by officer); *Melendez v. John R. Schatzman, Inc.*, 685 S.W.2d 137, 138 (Tex. App.--El Paso 1985, no writ) (blank return). However, the return need not state the actual date of delivery if the postmark on the return receipt is clear. *Nelson v. Remmert*, 728 S.W.2d 171 (Tex. App.--Houston [14th Dist.] 1987, writ ref'd n.r.e.).

2. Return receipt attached. If substituted service is authorized under a Rule 106(b) order the return receipt may not be required. See Substituted Service By Mail at page 34 and *State Farm Fire and Casualty Co. v. Costley,* 868 S.W.2d 298 (Tex.1993)(per curiam). Otherwise, the return receipt containing the addressee's signature must be affixed to the return. Rule 107(c). The return receipt must be attached to the return of citation. *Hollister v. Palmer Indep. Sch. Dist*., 958 S.W.2d 956(Tex. App.--Waco 1998, no pet.) Rule 107. *American Bankers Ins. Co. of Fla. v. State*, 749 S.W.2d 195, 197 (Tex. App.--Houston [14th Dist.] 1988, no writ); *Melendez v. John R. Schatzman Inc.*, 685 S.W.2d 137, 138 (Tex. App.--El Paso 1985, no writ) (return receipt elsewhere in transcript will not be presumed to be part of citation). The receipt need not disclose what documents have been delivered if this information otherwise appears on the return. See *Nelson v. Remmert*, 726 S.W.2d 171 (Tex. App.--Houston [14th Dist.] 1987, writ ref'd n.r.e.). As to sufficiency of signature on return receipt, see preceding paragraph F. Proof of Delivery.

IV. SUBSTITUTED INDIVIDUAL SERVICE

Rule 106(b) Tex. Lit. G. 31.02[2][a]; McDonald TCP 11:14.

JUSTICE COURT, see pages 94-98 and Rule 501, 502, 509, 510, particularly 501.2(e), Alternative Service of Citation, requiring additional service by first class mail.

Practice Tip:

Do not assume that the Rule 106(b) order is "standard". Plaintiff's counsel and process server should read the order, comply with the order, and confirm that return of service complies precisely with the order. Citibank N.A. v. Estes, 385 S.W.3d 671(Tex. App. - - Houston [14th Dist.] 2012, no pet.) Sanctions against attorney for "wasting court's time". Several service attempts and requests for default judgment were made. Counsel and server overlooked the terms of the Rule 106 order. Sanctions reversed, case remanded.

Rule 106(b). Upon motion supported by affidavit stating the location of the defendant's usual place of business or usual place of abode or other place where the defendant can probably be found and stating specifically the facts showing that service has been attempted [by personal delivery or registered or certified mail to defendant] at the location named in such affidavit but has not been successful, the court may authorize service; (1) by leaving a true copy of the citation, with a copy of the petition attached, with anyone over sixteen years of age at the location specified in such affidavit, or (2) in any other manner that the affidavit or other evidence before the court shows will be reasonably effective to give the defendant notice of the suit. (emphasis added) Rule 106(b).

A. Generally

Substituted service on individual defendants may be effected only pursuant to court order. Rule 106, 108, 108a. The order should specifically state the method or methods of service which are approved. *Steinke v. Mann,* 276 S.W.3d 608 (Tex. App. - - Waco 2008, no pet.)(general order which simply grants motion "in all respects" invalid). Strict compliance with rules of procedure are required, and actual notice to defendant does not validate improper service. *Wilson v. Dunn,* 800 S.W.2d 833, 836 (Tex. 1990) (court issued order for substituted service, but no

affidavit was filed as required by Rule 106(b); the court lacked jurisdiction to enter default judgment).

B. Place of Service - Traditional View

Service may be effected at defendant's usual place of business, usual place of abode, or some other place where he can probably be found. Rule 106(b). See *Light v. Verrips*, 580 S.W.2d 157 (Tex. Civ. App.--Houston [lst Dist.] 1979, no writ) (default judgment not proper where letter in transcript from defendant's father to trial judge indicated that defendant probably could not be found at the place where substituted service was made).

C. Place of Service - Expanded View Substituted Service of Citation, Email

Rule 106(b) may support substituted service of citation by email. Consider Rule 106(b), noting that the court may authorize service "... in any other manner that the affidavit or other evidence before the court shows will be reasonably effective to give the defendant notice of the suit." Rule 106(b)(2). If plaintiff or server affirmed by affidavit recent communication with defendant through a specified email address, wouldn't Rule 106(b)(2) be satisfied? Though not required, consider a "dual-service 106 order", requiring service by both email and certified mail, stating the email and physical addresses of defendant. See Substituted Service By Mail at page 34.

House Bill 241 (2015) would add section 17.032 to the CPRC and permit a court to authorize service of process electronically through a "social media presence", if substituted service is authorized under the Texas Rules of Civil Procedure. A similar bill died in committee in 2013.

Perhaps Rule 106(b)(2) can be expanded to obtain service on evasive defendants. It states that the court may authorize service in any other manner that the affidavit or other evidence shows will be reasonably effective to give the defendant notice of the suit. This rule may justify serving defendant pursuant to Rule 106(b) by serving: 1) the person in charge of defendant's private post office box; 2) defendant's father, who refuses to reveal his son's address (*Isaac v. Westheimer Colony Ass'n Inc.*, 933 S.W.2d 588 (Tex. App.--Houston [1st Dist.] 1996, writ denied) (plaintiff improperly used Rule 109a, which requires attorney ad litem; the court infers son's address is required for 106(b) service, but see next paragraph); 3) defendant's attorney, *Leach v. City Nat. Bank of Laredo,* 733 S.W.2d 578, 580 (Tex. App.--San Antonio 1987, no writ). See Service on Attorneys, page 47. The process server's affidavit should state facts which establish that defendant is evading.

See McDonald Texas Civil Practice §11:19, which explains that Rule 106(b) provides discretion to the court for service on evasive defendants. "When the defendant conceals himself or herself, frustrating personal service, and there is some doubt as to defendant's usual place of abode, the trial court, on an adequate showing of the circumstances, may authorize service of process by delivery to someone over 16 years of age at the address where the defendant receives mail, and to other persons, at different addresses, whose relationships with the defendant give reasonable assurance that actual notice will reach the defendant." *Sgitcovich v. Sgitcovich*, 241 S.W.2d 142 (Tex.1951) cert.den. 342 US 903. But there are limits, *De Leon v. Fair*, No. 04-06-00644-CV(Tex. App. - - San Antonio July 18, 2007, no pet.)(2007 Tex. App. Lexis 5572) (substituted service on defendant's insurance adjustor insufficient.)

D. Affidavit Rule 106(b)

Hubicki v. Festina, 226 S.W.3d 405 (Tex. 2007)(per curiam). Default judgment reversed based on insufficient substituted service affidavit. Affidavit stated "that defendant was currently in Mexico and can usually be found at [address]...when he is in Mexico." The petition alleged that defendant also had a residence in Dallas. There was no evidence that defendant was in Mexico at the time plaintiff attempted service there. See also *Torres v. Haynes,* 432 S.W.3d 370 (Tex. App. - - San Antonio 2014, n.p.h.)(no motion supported by affidavit, reversed and remanded).

The court order may be granted only upon motion supported by affidavit stating both the location for service and specific prior service attempts. *Wilson v. Dunn, supra.* Substituted Service is not authorized under Rule 106(b) without an affidavit that meets the requirements of the rule demonstrating the necessity for other than personal service. *Olympia Marble & Granite v.Mayes,* 17 S.W.3d 437(Tex. App.– Houston [1st Dist.] 2000, no pet.)*; Barker CATV Constr. Inc. v. Ampro, Inc.*, 989 S.W.789,792 (Tex. App. –Houston [1st Dist.] 1999, no pet.); *Putz v. Putz*, 2002 Tex. App.

Lexis 7270, unpublished (Tex. App.- Houston [1st Dist.] 2002, no pet.).

On appeal, the standard of review as to the affidavit's sufficiency is de novo, and not abuse of discretion. The trial court is not making factual determinations, but applying the law to the facts and de novo standard is appropriate. *Coronado v. Norman*, 111 S.W.3d 838(Tex. App.- Eastland 2003, pet. denied).

1. Service location. The affidavit must state the location of defendant's usual place of business, or usual place of abode or other place where the defendant can probably be found. Rule 106(b). *Titus v. Southern County Mut. Ins.*, No. 03-05-00310-CV (Tex. App. - - Austin, July 24, 2009, no pet.)(2009 Tex. App. Lexis 5697)(mem. op.)(record failed to establish the location was usual place of business, usual place of abode, or place where defendant could probably be found); *Hunt v. Yepez,* No. 03-04-00244-CV(Tex. App. - - Austin, August 24, 2005, no pet.)(2005 Tex. App. Lexis 6964)(mem. op.)(same)*; Garrels v. Wales Transp. Inc.*, 706 S.W.2d 757 (Tex. App.--Dallas 1986, no writ)(same); *Christian Bros. Auto Corp. v. DeCicco*, No. 14-03-00997-CV (Tex. App. - - Houston [14th Dist.], August 24, 2004, no pet.)(2004 Tex. App. Lexis 7565)(mem. op.)(same; distinguishes strict compliance standard for substituted service under Rule 106(b) with reasonable diligence standard, Tex. Bus. Corp. Act Ann. art 2.11(B)).

The affidavit may be sufficient though it does not specifically state whether the address is defendant's usual place of business, abode, or other place where defendant can probably be found. The affidavit established that the address was either defendant's usual place of abode or a place where defendant can probably be found in *Goshorn v Brown,* No. 14-02-00852-CV (Tex. App. - - Houston [14th Dist.] Sept. 23, 2003, no pet.)(2003 Tex. App. Lexis 8181)(mem. op.); *McCluskey v. Transwestern Publ'g LLC*, No. 05-06-01444-CV (Tex. App. - - Dallas December 4, 2007, no pet.)(2007 Tex. App. Lexis 9451)(mem. op.)(attempts at both debtor's business address and home address are not required).

2. Specific prior attempts. The affidavit must recite specific facts showing that service has been unsuccessfully attempted either by process server's personal delivery or by certified mail, return receipt requested, at the location named in the affidavit. Rule 106(b); *Williams v. Nexplore Corp.*, No. 05-09-00621-CV (Tex. App. - - Dallas December 7, 2010, pet. filed)(2010 Tex. App. Lexis 9627)(mem. op.)(form affidavit insufficient, it failed to specify address attempted, $7 million judgment reversed; see suggested affidavit at page 113). Dates and times of attempted service, though not absolutely required by Rule 106(b), are important to establish sufficient facts to uphold a default judgment. *Coronado v. Norman*, 111 S.W.3d 838 (Tex. App. - - Eastland 2003, pet. denied). See *also Mylonas v. Texas Commerce Bank -Westwood*, 678 S.W.2d 519 (Tex. App.--Houston [14th Dist.] 1984, no writ) (recital of number of attempts and results of those attempts was sufficiently specific); *Mackie Const. Co. v. Carpet Services, Inc.*, 645 S.W.2d 594 (Tex. App.--Eastland 1982, no writ) (conclusory statement that attempted service has been unsuccessful was insufficient); *Medford v. Salter*, 747 S.W.2d 519, 520 (Tex. App.--Corpus Christi 1988, no writ)(conclusory affidavit of plaintiff's attorney insufficient); *Wilson v. Dunn*, 800 S.W.2d 833 (Tex. 1990) (affidavit required, though defendant had actual knowledge of suit).

E. Return of Service, Rule 106(b)

(See also Return of Service, generally, page 18)

Practice Tip: Review a copy of the return before it is filed. The return should establish that service complied precisely with the court's order. Avoid "served per 106 order" as it is conclusory. Compare the affidavit, order and return, and confirm each is consistent with the other. If a filed return is conclusory or otherwise defective, consider re-serving the defendant and obtaining a proper return. If belated attack is made on a filed return, consider amending pursuant to Rule 118, discussed at page 25.

1. Strict compliance with order.

The person effecting service must strictly comply with the terms of the court order to effect valid service. The return should confirm service exactly as authorized in the court's order. *Dolly v. Aethos Communs. Sys.* 10 S.W.3d 384 (Tex. App.--Dallas 2000, no pet.)(return stated that defendant was served with a copy of the citation by delivery "in person," while a type-written note at the bottom states "*posted to front door*"). The return held inherently

inconsistent, and also failed to establish that a copy of the 106 order was served, as required by the order. See *also Vespa v. Nat'l. Health Ins. Co.,* 98 S.W.3d 749(Tex. App. - - Fort Worth 2003, no. pet.)(return failed to state that Rule 106 order was posted at front door, with citation and petition, as required by order); *Becker v. Russell*,765 S.W.2d 899 (Tex. App .--Austin 1989, no writ)(same); *Armstrong v. Minshew,* 768 S.W.2d 883 (Tex. App.--Dallas 1989, no writ) (service at address other than that stated in order insufficient and record could not be supplemented after judgment to establish alleged clerical error); *Heth v. Heth*, 661 S.W.2d 303 (Tex. App.--Fort Worth 1983, writ dism'd) (no court order authorizing substituted service); *Hurd v. D.E. Goldsmith Chem. Metal Corp*., 600 S.W.2d 345 (Tex. Civ. App.--Houston [lst Dist.] 1980, no writ) (return failed to show strict compliance with order). The trial court may not subsequently ratify non-conforming service. *Grasz v. Grasz*, 608 S.W.2d 356, 358 (Tex. Civ. App.--Dallas 1980, no writ). The court may, however, authorize service in more than one manner in more than one location. See *generally Mega v. Anglo Iron & Metal Co.*, 601 S.W.2d 501, 503 (Tex. Civ. App.--Corpus Christi 1980, no writ).

Other defective returns under rule 106(b) include *Todd v. Sport Leasing & Fin. Servs. Corp.*, No. 01-10-00608-CV (Tex. App. - - Houston [1st Dist.] November 17, 2011, no pet.)(2011 Tex. App. Lexis 9176)(mem. op.)(posted to wrong address); *In re M.C.B.*, No. 05-10-00158-CV (Tex. App. - - Dallas, February 28, 2012, n.p.h.)(2012 Tex. App. Lexis 1522)("by 106 to door [at address]" insufficient; should use Rule 106 order's language, "securely attach to front door [at address]"); *Haider v. R.R.G Masonry, Inc.,* No. 03-04-00309-CV(Tex. App. - - Austin, July 7, 2005, no pet.)(2005 Tex. App. Lexis 5269)(mem. op.) (private process server failed to verify; no date citation served or manner of service; no affidavit supporting substituted service as to one defendant). *Coker Equip., Inc. v. Blevins,* No. 04-04-00776-CV(Tex. App. - - San Antonio, October 19, 2005, no pet.)(2005 Tex. App. Lexis 8582)(mem. op.)(bill of review action based on process server's defective return, stating that he posted to gate when he was authorized to post to door. The *Coker* court states that the order authorizing substituted service must be specific; "... or in any other manner as a court finds will be reasonable effective" too general.

2. Margin for error. Unless the record affirmatively shows strict compliance with the provided manner and mode of service of process, a default judgment will not withstand an attack based upon a claim of invalid service. *McKanna v. Edgar*, 388 S.W.2d 927, 929 (Tex. 1965); *Becker v. Russell*, 765 S.W.2d 899 (Tex. App.--Austin 1989, no writ); *Hunt v. Yepez,* No. 03-04-00244-CV(Tex. App. - - Austin, August 24, 2005, no pet.)(2005 Tex. App. Lexis 6964)(mem. op.)(return stating that service was on November 39 was fatal error).

But see *Pratt v. Moore*, 746 S.W.2d 486, 487 (Tex. App. - -Dallas 1988, no writ), which recognizes the former rule. Where no other reasonable interpretation can be given to the return of citation, other than that the defendant was properly served, the court appears less strict when reviewing returns of citation. In *Pratt*, the return stated it "came to hand on the 30th day of November, 1986 . . ." and was "[e]xecuted . . . on the 11th day of November, 1986 . . ." . The court held the record reflected that no reasonable interpretation could be made, other than that the return was received October 30, 1986 and executed November 11, 1986. The court holds that irregularity does not constitute a fatal defect when in all other respects the citation is in compliance with Rule 107.

3. Substituted service by authorized person Rule 103. Where the court's order allows substituted service by a specific person, the name of the person effecting service must be stated in the return exactly as in the court's order. *Cates v. Pon*, 663 S.W.2d 99, 102 (Tex. App.--Houston [14th Dist.] 1983, writ ref'd n.r.e.) (return was invalid where court order authorized service by Leonard Green, but return was signed by Lindsey E. Siriko); *Mega v. Anglo Iron & Metal Co.*, 601 S.W.2d 501 (Tex. Civ. App.--Corpus Christi 1980, no writ)(return was invalid where court order authorized service by A. R. "Tony" Martinez, but return was signed by A. R. Martinez, Jr.). *Davis v. County of Dallas*, No. 05-95-00600-CV (Tex. App.--Dallas Jan. 8, 1998, no pet.)(unpublished, 1998 Tex. App. Lexis 59)(fatal error where John Mathis West, Sr. was authorized and return was signed by John M. West). Remember that the return of citation by an authorized person must be verified. Rule 107. *Haider v. R.R.G Masonry, Inc.,* No. 03-04-00309-CV(Tex.

App. - - Austin, July 7, 2005, no pet.)(2005 Tex. App. Lexis 5269)(mem. op.).

4. Service at authorized location. The return must state that service was effected at the location authorized in the court order. *Armstrong v. Minshew*, 768 S.W.2d 883 (Tex. App.--Dallas, 1989, no writ); *Mylonas v. Texas Commerce Bank -Westwood,* 678 S.W.2d 519 (Tex. App.--Houston [14th Dist.] 1983, no writ); *Hurd v. D. E. Goldsmith Chemical Metal Corp.*, 600 S.W.2d 345 (Tex. Civ. App.--Houston [lst Dist.] 1980, no writ) (return was invalid where it did not indicate that the place where service was made was defendant's usual place of business). *Brown v. Magnetic Media, Inc.*, 795 S.W.2d 41 (Tex. App.--Houston [1st Dist.] 1990, no writ) (limits *Hurd* to cases where neither the court order nor return states that the place of service was defendant's usual place of abode or business).

But see *Pratt v. Moore*, 746 S.W.2d 486 (Tex. App.--Dallas 1988, no writ) where the order stated that service should be made at 10001 **Woodlake,** failing to specify whether the address is a street, road, avenue, or drive; and the return reflected service at 10001 **Woodlake Drive.** The court stated that neither Rule 106, nor case law required an order for substituted service to have an accurate address in the order for substituted service. The record established that defendant was served at his usual place of abode, 10001 Woodlake Drive, and the default judgment was affirmed as to the defendant so served. *Pratt* also discusses the reoccurring problem of a return which fails to state the city as part of the address where service was made. The return otherwise established the city, stating, "[e]xecuted at Dallas, within the County of Dallas. . ." (at 487).

F. Substituted Service By Mail

No mail receipt needed if proper 106(b) order and strong record.

Substituted service often involves posting process to the door, but may also include service by mail. *State Farm Fire and Casualty Co. v. Costley,* 868 S.W.2d 298 (Tex.1993)(per curiam). In *Costley,* plaintiff filed a motion for substituted service under Rule 106(b) with an affidavit as to the location of defendant's place of abode and specific facts as to 10 prior unsuccessful service attempts. The court authorized substituted service by certified mail and first-class mail to defendant's mailing address. The court of appeals held that first-class mail service was not reasonably effective to give notice of the suit. The supreme court reversed, holding that substituted service by mail was effective; to require proof of actual notice would defeat the purpose of Rule 106(b).

Another no mail receipt case is *Singh v. Trinity Mktg. & Distrib. Co.* 397 S.W.3d 257 (Tex. App. - - El Paso 2013, n.p.h.). Rule 106 order permitting service by serving a person over 16, posting, or by sending citation, pleadings and order by first- class mail without the need for a receipt, Bill of Review relief denied. No showing that grounds for substituted service were inappropriate.

For a discussion of these important cases, see *Rowsey v. Matetich*, No. 03-08-00727-CV (Tex. App.-- Austin, August 12, 2010, no pet.)(2010 Tex. App. Lexis 6532)(substituted service by first class mail was sufficient). Personal service attempts failed, because defendant resided in a gated community. Defendant refused to accept certified mail service. The court finds that proper attempts were made to serve defendant on specified dates. The court does not require a properly signed green card, as first class mail alone, in similar circumstances, is sufficient. Mail service was sufficient because of substituted service order, citing *Costley*, *supra*. But see *Hubicki v. Festina*, 226 S.W.3d 405 (Tex. 2007)(per curiam)(no evidence defendant was at substituted service address in Mexico at time of mail service).

The Austin court of appeals criticizes substituted service by regular mail in *Titus v. Southern County Mut. Ins.*, No. 03-05-00310-CV (Tex. App. - - Austin, July 24, 2009, no pet.)(2009 Tex. App. Lexis 5697)(mem. op.). Defendant did not pick up the certified mail and the court notes that there are not repeated efforts to serve defendant, as in *Costley.* Also, the server's affidavit did not establish that defendant resided at the address or that the address was the usual place of business. Judgment reversed, the court noting that there is a heavy burden to support substituted service by regular mail. Relying on *Titus*, the Austin court again struck down substituted service by first class mail in *Luby v. Wood*, No. 03-12-00197-CV(Tex. App. - - Austin, April 2, 2014, n.p.h.)(2014 Tex. App. Lexis 3538). The server made one attempt to serve defendant by certified mail at a post office box before requesting a 106(b) order. The certified

mail was returned unclaimed. The court found the single attempt and the 106(b) affidavit insufficient. The affidavit did not establish that mailing the process to the post office box which was "in current use" was a location that was Luby's usual place of abode, usual place of business, or a location where he could probably be found. Nor does the affidavit "...demonstrate that mailing the citation and the petition to the post office box was a reasonably effective manner to provide Luby notice of the suit" pursuant to Rule 106(b). The court found such Rule 106(b) service is insufficient to bestow on the court jurisdiction over defendant. The default judgment was deemed void. Therefore, the court also lacked jurisdiction over the Motion for Writ of Scire Facias action filed to revive the dormant default judgment.

G. Non-Resident Individual Defendants Rule 106(b)

Substituted service may be obtained on non-residents under Rule 108 and 108a in the same manner as provided for substituted service on residents in Rule 106. See *generally Clayton v. Newton*, 524 S.W.2d 368 (Tex. Civ. App.--Fort Worth 1975, no writ). However, when serving the defendant out of state, pursuant to Rule 108, the sworn return must include a statement that the process server is a disinterested person. *Harper v. Ivans,* No. 05-95-01694-CV(Tex. App- Dallas, Oct. 8, 1999, no pet.)(unpublished)1999 Tex. App. Lexis 7548.

H. Use of Rule 106(b) as to Corporations

Rule 106(b) should not be used to serve corporations. Instead, see Service on Entity through Secretary of State, at page 38. As to dual service employing both methods, see Dual Service, this page.

A reasonable diligence standard applies to service under Article 5.251 Bus. Org. Code, formerly 2.11(B) of the Texas Business Corporations Act. But a strict compliance standard applies to substituted service under Rule 106 (b). All one needs to prove to serve the secretary of state under Article 5.251 is that reasonable diligence was used to serve the corporation's registered agent at the registered office. In the following cases, counsel attempted to serve a corporation pursuant to Rule 106(b). The efforts were unsuccessful and the judgments were reversed and remanded. *Brown Consulting & Assocs. v. Smith*, No. 05-12-00543-CV (Tex. App. - - Dallas, May 28, 2013, n.p.h.)(2013 Tex. App. Lexis 6498)(mem. op.)(Rule 106 affidavit failed to establish that address attempted was usual place of business or usual place of abode of either defendant, or of the registered agent; nor does affidavit establish that address is a place where registered agent could probably be found). *Christian Bros. Auto. Corp. v. DeCicco*, No. 14-03-00997-CV (Tex. App. - - Houston [14th Dist.], no pet.)(2004 Tex. App. Lexis 7565)(mem. op.)(plaintiff failed to establish location of defendant's usual place of business or other place where Christian Brothers can probably be found, as required by Rule 106(b)); *Disc. Rental, Inc. v. Carter*, No. 10-03-00276-CV (Tex. App. - Waco, May 5, 2004, pet. denied)(2004 Tex. App. Lexis 4203)(mem. op.)(return failed to state that service was on a person over 16 years of age, as required by the 106(b) order).

I. Dual Service

If the registered agent cannot be served at the registered office, the corporation should generally be served pursuant to Article 5.251, Bus. Org. Code through the Secretary of State. See page 92. Serving the defendant corporation both through the Secretary of State, and pursuant to Rule 106(b) which is normally used for individual defendants, may also be considered. With such dual service, the default judgment should survive attack, if either method of service is properly completed. See *West, Inc. v. Salinas*, 690 S.W.2d 30 (Tex. App. [Houston 14th Dist.] 1985 writ ref'd n.r.e.). Attempts were made to serve defendant corporation by serving the registered agent at the registered office. These attempts were unsuccessful and counsel apparently proceeded to attempt service using both substituted service under Rule 106(b) and by serving the secretary of state through article 2.11(B)(now 5.251 BOC). The court found that even if the constable's affidavit was insufficient under Rule 106(b), plaintiff satisfied article 2.11 by establishing reasonable diligence to serve the registered agent at the registered office. The court held that service on the Secretary of State was authorized under article 2.11, and affirmed the default judgment.

One may alternatively serve a corporation by serving its president or vice president, 5.255 BOC.

J. Prior Service Method

Before the court may order substituted service, the plaintiff must demonstrate that either personal service or mail service has been attempted and was unsuccessful. Rule 106(b). The current language of the rule, effective since 1981, overrules a line of cases that interpreted the previous rule as requiring that both alternative methods be shown to be impractical before substituted service could be ordered. These obsolete cases include *Devine v. Duree*, 616 S.W.2d 439 (Tex. Civ. App.--Fort Worth 1981, writ dism'd); and *Grasz v. Grasz*, 608 S.W.2d 356, 358 (Tex. Civ. App.--Dallas 1980, no writ).

K. Optional Conscious Indifference Letter

If the defendant establishes that he was not consciously indifferent to service of process, his motion for new trial will probably be granted under *Craddock v. Sunshine Bus Lines*, 133 S.W.2d 124 (Tex.1939). Therefore, consider mailing a courtesy copy of the citation and petition to the defendant. Defendants often assert that they did not receive the process which was served either on the secretary of state or served pursuant to Rule 106(b). In response, a diligent plaintiff can produce proof of certified mail directed to the defendant at an address known to be good -- often an alternate address with which counsel has been corresponding with defendant. Proposed "conscious indifference" letters are attached at pages 117 and 118. The court will consider whether defendant had knowledge of the pending suit in determining whether defendant was consciously indifferent. *Osborne v. Cooperative Computing*, No.03-97-00374-CV (Tex. App.--Austin Nov. 20, 1997, no pet.)(unpublished, 1997 Tex. App. Lexis 5989). Defendant’s inaction after receiving a telephone call from plaintiff’s counsel providing additional actual notice of a possible default judgment, constituted conscious indifference. *Fiske v. Fiske*, No. 01-03-00048-CV (Tex. App. -- Houston [1st Dist.], August 19, 2004, no pet.)(2004 Tex. App. Lexis 7483)(mem. op.).

V. SERVICE ON ENTITY THROUGH ITS OFFICERS OR REGISTERED AGENT

McDonald TCP 11:45; McDonald TCP 11:28
O'Connor's Texas Rules, Ch 2(H)
See Bus. Org. Code excerpts at pages 91,92. There are few cases interpreting service provisions of the Bus. Org. Code which became effective as to all entities January 1, 2010.

Business Organizations Code

§ 5.255. Agent for Service of Process, Notice, or Demand As Matter of Law

> For the purpose of service of process, notice, or demand:
> (1) the president and each vice president of a domestic or foreign corporation is an agent of that corporation;
> (2) each general partner of a domestic or foreign limited partnership and each partner of a domestic or foreign general partnership is an agent of that partnership;
> (3) each manager of a manager-managed domestic or foreign limited liability company and each member of a member-managed domestic or foreign limited liability company is an agent of that limited liability company;
> (4) each person who is a governing person of a domestic or foreign entity, other than an entity listed in Subdivisions (1)--(3), is an agent of that entity; and
> (5) each member of a committee of a nonprofit corporation authorized to perform the chief executive function of the corporation is an agent of that corporation.

Service on registered agent is authorized by BOC § 5.201(b).

A. Officers and Agent Upon Whom Substituted Service May Be Made

Entities may be served through their registered agent (BOC 5.201) or on the president or each vice president of a domestic or foreign corporation.

Prior law: If the corporation maintained a registered agent within the State as required by Tex. Bus. Corp. Act art. 2.09 (domestic corporation) or art. 8.08 (foreign corporation), service was made on the president, any vice president, or the registered agent of the corporation. Tex. Bus. Corp. Act art. 2.11, §A; art. 8.10, §A. and Bus. Org. Code §5.255. *Leonard Manor,*

Inc. v. Century Rehab. of Tex., L.L.C., No. 06-09-00036-CV (Tex. App. - - Texarkana, August 19, 2009, pet. denied)(2009 Tex. App. Lexis 7142)(mem. op.)(service on business manager insufficient under either statute).

B. Conformity of Petition and Citation

1. Service on unnamed officer or agent. Service may be accomplished upon an authorized officer or agent who is not actually named in the petition or citation if the face of the record otherwise affirmatively shows the person's authority. *Pleasant Homes v. Allied Bank of Dallas*, 776 S.W.2d 153 (Tex. 1989) (return reciting service on defendant bank's named "V.P.", held sufficient; it is not necessary for petition or citation to designate officer to be served; plaintiff need not provide independent proof that named person was one of defendant's vice presidents.) See *also Dentex Shoe Corp. v. F.E. Schmitz Co.*, 745 S.W.2d 503 (Tex. App.--Fort Worth 1988, writ denied); *American Universal Ins. Co. v. D.B. & B. Inc.*, 725 S.W.2d 764 (Tex. App.--Corpus Christi 1987, writ ref'd n.r.e.)(service improper where face of record does not show authority of person who signed return receipt for mail service). *NRTRX Corp. v. Story*, 582 S.W.2d 225 (Tex. Civ. App.--Fort Worth 1979, writ ref'd n.r.e.)(proper service by delivery to corporate president, who was not named in the citation).

2. Incorrect or incomplete allegation of office or agency. Service may be accomplished on an authorized officer or agent even if that officer or agent's position has been incorrectly or incompletely designated in the petition or citation as long as the return shows the person's authority. *Helfman Motors, Inc. v. Stockman*, 616 S.W.2d 394, 396 (Tex. Civ. App.--Fort Worth 1981, writ ref'd n.r.e.) (even though the petition designates the person to be served only as defendant's "agent for service," service is proper where the return shows that he was the registered agent and service was accomplished on him). The record was insufficient in *Employers Reinsurance Corp. v. Am. Southwest Ins. Managers, Inc.,* No. 05-04-00044-CV(Tex. App. - - Dallas, April 27, 2005, no pet.)(2005 Tex. App. Lexis 3145)(mem. op.)(petition alleged person served was "attorney for service"; record did not otherwise establish that she was the president, vice-president or registered agent; reversed and remanded).

3. Name of officer or agent. Where the person designated as the officer or agent for service in the petition or citation is the person upon whom service is made, the name must be stated in the return precisely as it is stated in the petition. See *Uvalde Country Club v. Martin Linen Supply Co.*, 690 S.W.2d 884 (Tex. 1985)(service was invalid where "Henry Bunting, Jr." was named as registered agent in petition but return recited that process was delivered to "Henry Bunting"). See *also Lytle v. Cunningham,* 261 S.W.3d 837 (Tex. App. - - Dallas 2008, no pet.) (citation directed to defendant by serving registered agent Chris Lytle, but return insufficient as it recited service on Christopher Lytle).

Of questionable authority is *NBS Southern, Inc., v. Mail Box, Inc.*, 772 S.W.2d 470 (Tex. App.--Dallas 1989, writ denied), which held that independent proof is required that the person served was defendant's agent for service of process. *NBS* is contrary to the Texas Supreme Court holdings in *Pleasant Homes,*776 S.W.2d 153, 154; and *Primate Const. v. Silver,* 884 S.W.2d 151,152 (Tex.1994)(return is prima facie proof of matters stated in it).

4. Service on registered agent which is an organization.

Previously, service on a registered agent that was itself an organization was difficult. See *Reed Elsevier, Inc. v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 180 S.W.3d 903 (Tex. App. - - Dallas 2005, pet. denied).

An officer or registered agent of the registered agent-organization was rarely available to receive service. Serving employees of the registered agent-organization was previously insufficient. That is remedied by BOC 5.201(d) (effective September 1, 2011) allowing service on employees, see statute at page 92.

If an employee is not available during normal business hours to receive process, file the server's affidavit of attempts and serve the Secretary of State under BOC 5.251. Specific times should be stated as to service attempts. Avoid merely stating "during normal business hours," as such may be conclusory. See form affidavit at page 113.

C. Proof of Service

1. Limited to the record. The sufficiency of service must be determined from the record before the court on the date of judgment. See *Advertising Displays, Inc. v. Cote,* 732 S.W.2d 360 (Tex. App.--Houston [14th Dist.] 1987, no writ) (change of address certificate from Secretary of State, which was not on

file at time of judgment, will not be considered on appeal). See *also Maritime Services, Inc. v. Moller Steamship Co.*, 702 S.W.2d 277, 278 (Tex. App.--Houston [lst Dist.] 1985, no writ); *Cox Mktg., Inc. v. Adams*, 688 S.W.2d 215 (Tex. App.--El Paso 1985, no writ); *Tankard-Smith, Inc. v. Thursby*, 663 S.W.2d 473, 476 (Tex. App.--Houston [14th Dist.] 1983, writ ref'd n.r.e.). But see discussion of electronic record, infra, page 63--court's electronic data was considered without data input date.

2. Recitals as prima facie evidence. As to attacks on returns, see Factual Issues Regarding Service, page 24. To determine whether service has been properly effected, the court may consider as prima facie evidence the recitals in the petition, citation and return of service. See *Pleasant Homes v. Allied Bank of Dallas*, 776 S.W.2d 153 (Tex. 1989); *Advertising Displays, Inc. v. Cote,* 732 S.W.2d 360 (Tex. App.--Houston [14th Dist.] 1987, no writ); *Southland Paint Co. v. Thousand Oaks Racket Club*, 724 S.W.2d 809 (Tex. App.--San Antonio 1986, writ ref'd n.r.e.); *K-Mart Apparel Fashions Corp. v. Ramsey*, 695 S.W.2d 243, 246 (Tex. App.--Houston [lst Dist.] 1985, writ ref'd n.r.e.); *National Medical Enterprises of Texas, Inc. v. Wedman*, 676 S.W.2d 712, 715 (Tex. App.--El Paso 1984, no writ); *Gerland's Food Fair, Inc. v. Hare*, 611 S.W.2d 113, 116 (Tex. Civ. App.--Houston [lst Dist.] 1980, writ ref'd n.r.e.); *Labor Force, Inc. v. Hunter, Farris & Co.*, 601 S.W.2d 146 (Tex. Civ. App.--Houston [14th Dist.] 1980, no writ); *Sheshunoff and Co. v. Scholl*, 560 S.W.2d 113, 116 (Tex. Civ. App.--Houston [lst Dist.] 1977), *rev'd on other grounds*, 564 S.W.2d 697 (Tex. 1978); McDonald TCP 11:25. The necessary recitals may be in an amended petition not served on defendant. *TXXN, Inc. v. D/FW Steel Co.*, 632 S.W.2d 706 (Tex. App.--Fort Worth 1982, no writ). Statements of counsel in the record apart from those in the pleadings, however, are not prima facie evidence. See *Kay's Jewelers, Inc. v. Sike Senter Corp.*, 444 S.W.2d 219 (Tex. Civ. App.--Fort Worth 1969, no writ)(letter from plaintiff's attorney to district clerk designating defendant's registered agent was not an affirmative showing of such agency).

The few cases holding that the authority of the person served must be established by evidence are implicitly overruled by *Pleasant Homes, supra*, which notes that defendant has the burden to present evidence that the person served was not a proper officer for service. The cases that misplace the burden of proof include: *NBS Southern, Inc., v. Mail Box, Inc.*, 772 S.W.2d 470 (Tex. App.--Dallas 1989, writ denied); *Hanover Modular Homes of Taft, Inc. v. Corpus Christi Bank & Trust*, 476 S.W.2d 97, 99 (Tex. Civ. App.--Corpus Christ 1972, no writ); and *Anglo Mexicana de Seguros, S.A. v. Elizondo*, 405 S.W.2d 722, 725 (Tex. Civ. App.--Corpus Christi 1966, writ ref'd n.r.e.).

VI. SERVICE ON ENTITY THROUGH SECRETARY OF STATE

See excerpts, Bus. Org. Code at pages 91-92.
McDonald TCP 11:29.
O'Connor's Texas Rules, Ch. 2(H)§5.

Practice Tip: Statutory address change: Pursuant to Texas Bus. Org. Code § 5.253, see page 91, the statutory address for service by the secretary of state is the "most recent address of the [defendant entity] on file with the secretary of state". See page 41, C. Secretary of State's Duties. Previously, the Texas Bus. Corp. Act, required the registered office address. Include in an affidavit the most recent address on file with the secretary of state, see affidavit, page 112, paragraph 5.

A. When Authorized

The Secretary of State is the deemed agent of an entity when: l) the entity fails to appoint or does not maintain a registered agent in Texas; 2) with reasonable diligence, the registered agent cannot be found at the registered office; 3) the certificate of authority of a foreign filing entity has been revoked, or the entity transacts business in Texas without being registered as required by Chapter 9. (emphasis added) Bus. Org. Code 5.251.

1. No registered agent. The Secretary of State is the deemed agent for substituted service whenever the domestic or foreign entity fails to appoint or does not maintain a registered agent within the state. Bus. Org. Code §5.251(1)(A). Formerly Tex. Bus. Corp. Act art.2.11(domestic corporation), art. 8.10 (foreign corporation).

2. Unlocated registered agent. The Secretary of State is the deemed agent for substituted service whenever the registered agent of the entity cannot with reasonable diligence be found at the registered office. Bus. Org. Code §5.251(1)(B). Formerly Tex. Bus. Corp. Act art. 2.11, § B(domestic corporation), art. 8.10,§B. (foreign corporation). Though diligence may be established through the unexecuted return, an affidavit is more effective, see pages 112, 113.

a. Reasonable diligence.

In order to exercise reasonable diligence, the officer must attempt to effect service on the registered agent, and such attempt must be made at the registered office. See *Paramount Credit, Inc. v. Montgomery,* 420 S.W.3d 226 (Tex. App. -- Houston [1st Dist.] 2013, n.p.h.)(no reasonable diligence where record did not establish attempt to serve registered agent at registered office); *Legends Landscapes LLC v. Brown*, No. 06-13-00129-CV (Tex. App. - - Texarkana, March 27, 2014, n.p.h.)(2014 Tex. App. Lexis 3276)(mem. op.)*(same); Humphrey Co. v. Lowr Water Wells*, 709 S.W.2d 310 (Tex. App.--Houston [14th Dist.] 1986, no writ)(same); *David A. Carl Enterprises, Inc. v. Crow-Shutt #14*, 553 S.W.2d 118 (Tex. Civ. App.--Houston [14th Dist.] 1977, no writ) (same). Thus, while service on a proper officer or agent may be effected anywhere, if unsuccessful it will support substituted service on the Secretary of State only if it has been attempted on the registered agent at the registered office. *Ingram Indus. Inc., v. U.S. Bolt Mfg.,* 121 S.W.3d 31, 33-34 (Tex. App. - - Houston [1st Dist.] 2003, no pet.)(reasonable diligence established by one attempt to serve registered agent at registered office). See *Global Truck & Equipment, Inc. v. Plaschinski*, 683 S.W.2d 766 (Tex. App.--Houston [14th Dist.] 1984, no writ).

A corporation has a duty to keep the Secretary of State apprized of its current registered office address and is negligent if it fails to do so. *Campus Invs. , Inc. v. Cullever*, 144 S.W.3d 464 (Tex. 2004)(per curiam) citing Tex. Bus. Corp. Act arts. 2.10, 2.10-1, 8.09. Note that these statutes are now replaced by the Business Organizations Code. See, for example, § 5.201, § 5.253 requiring secretary of state to forward process to entity's most recent address on file. (See appendix, page 89)

Even if the plaintiff has knowledge of another location where an agent for service might be found, he does not have to attempt service at any address other than the registered office in order to exercise reasonable diligence. *See Ingram Indus., Inc. v. U.S. Bolt Mfg., Inc.* , 121 S.W.3d 31 (Tex. App. - - Houston[1st Dist.] 2003, no pet.); *State v. Interaction, Inc.,* 17 S.W.3d 775 (Tex. App.–Austin, 2000, pet. denied); *RWL Construction v. Erickson* 877 S.W.2d 449 (Tex. App.--Houston [1st Dist.] 1994, no writ); *Harold-Elliott Co. v. K.P./Miller Realty*, 853 S.W.2d 752, 755 (Tex. App.--Houston [1st Dist.] 1993, no writ) (calling for statutory amendment to require service attempt at alternate known address); *Advertising Displays, Inc. v. Cote*, 732 S.W.2d 360 (Tex. App.--Houston [14th Dist.] 1987, no writ); *TXXN, Inc. v. D/FW Steel Co.*, 632 S.W.2d 706, 708 (Tex. App.--Fort Worth 1982, no writ); *Houston Int'l Film Festival v. Fogarty & Klein, Inc.*, No. 14-95-00402-CV (Tex. App.--Houston [14th Dist.] March 28, 1996, no pet.)(unpublished, 1996 Tex. App. Lexis 1196).

b. Proof of reasonable diligence.

Practice Tip: Use an affidavit instead of an unexecuted return to prove reasonable diligence. It is a better means of establishing the facts. Use an affidavit as a predicate for substituted service on an individual (required); and for secretary of state service on a corporation (preferred). Be factual and specific, avoid conclusions. See forms, pages 112, 115.

Reasonable diligence must be established from the face of the record -- either from the unexecuted return or process server's affidavit. Plaintiff's counsel must guard against reliance on conclusory returns or affidavits, as statements in the returns and affidavits must be factual. Reasonable diligence may be established from the information on the unexecuted return, which is prepared pursuant to Rule 107 ("When the officer or authorized person has not served the citation, the return shall show the diligence used by the officer or authorized person to execute the same and the cause of failure to execute it, and where the

defendant is to be found, if ascertainable"). The unserved citation must be on file at the time the default judgment was rendered." *AAA Navi Corp. v. Parrot-Ice Drink Prods. of Am.*, 119 S.W.3d 401 (Tex. App. -- Tyler 2003, no pet.). The unserved citation must be signed. *Hot Shot Messenger Service v. State*, 818 S.W.2d 905 (Tex. App.--Austin 1991, no writ), citing Rule 107.

1. Unexecuted Return. The unexecuted return must demonstrate on its face that service on the registered agent at the registered office was actually attempted. *RWL Construction v. Erickson*, 877 S.W.2d 449 (Tex. App.--Houston [1st Dist.] 1994, no writ); *Bilek & Purcell Ind., Inc. v. Paderwerk Gebr. Benteler GmbH & Co.*, 694 S.W.2d 225 (Tex. App.--Houston [lst Dist.] 1985, no writ).

2. Affidavit - Recommended Method. See form, page 112. Proof may also be established by an affidavit from the officer or authorized person explaining his diligence, but the affidavit must give specific information and may not be simply conclusory in nature. *Beach, Bait & Tackle, Inc. v. Holt, supra*; *General Office Outfitters, Inc. v. Holt*, 670 S.W.2d 748, 749-50 (Tex. App.--Dallas 1984, no writ); *Travis Builders, Inc. v. Graves*, 583 S.W.2d 865, 867 (Tex. Civ. App.--Tyler 1979, no writ). Unsuccessful attempts at substituted service by mail which appear in the record may also be evidence of reasonable diligence. See *Advertising Displays, Inc. v. Cote*, 732 S.W.2d 360 (Tex. App.--Houston [14th Dist.] 1987, no writ); *National Multiple Sclerosis Society v. Rice*, 29 S.W.3d 174(Tex. App.--Eastland 2000, no pet.)(mail returned "attempted not known" did not establish diligence). Affirm in this or another affidavit, defendant's "most recent address on file with the Secretary of State, see affidavit, page 112, paragraph 5.

c. Location of registered office.

If the location of the registered office is not otherwise established by the recitals in the petition, citation or return, it may be established by a certificate from the Secretary of State certifying to the registered agent and the location of registered office. *Humphrey Co. v. Lowry Water Wells*, 709 S.W.2d 310, 312 (Tex. App.--Houston [14th Dist.] 1986, no writ). However, the certificate of the Secretary of State showing that the Secretary of State mailed process to a particular address does not, standing alone, establish that such address was in fact the defendant's registered office. *Humphrey Co. v. Lowry Water Wells, supra* at 311; *Global Truck & Equipment, Inc. v. Plaschinski*, 683 S.W.2d 766, 768 (Tex. App.--Houston [14th Dist.] 1984, no writ).

Corporations have the responsibility of notifying the Secretary of State when it changes the address of its registered agent. Failure to do so is negligence and a corporation cannot complain that it did not have notice of suit, when the Secretary of State attempts to forward process to the address of the registered office that was on file with the Secretary of State. *Campus Invs., Inc. v. Cullever,* 144 S.W.3d 464 (Tex. 2004), citing Tex. Bus. Corp. Act arts. 2.10, 2.10-1, 8.09, repealed; see BOC 5.201(a), page 91.

3. <u>Revoked certificate.</u>

If the certificate of a foreign (but not domestic) corporation has been revoked. Tex. Bus. Corp. Act art. 8.10.

B. Perfecting Service On the Secretary of State

1. <u>Duplicate copies.</u>

Duplicate copies of the citation and petition must be served on the Secretary of State.

2. <u>To whom delivered.</u>

Of course, the secretary will be unavailable to personally receive countless citations. Previously, Tex. Bus. Corp. Act art. 2.11 and art. 8.10 allowed service on the secretary, the assistant secretary, or any clerk having charge of the corporation department. At least one court held service on any other employee invalid, *Travis Builders, Inc. v. Graves*, 583 S.W.2d 865 (Tex. Civ. App. - - Tyler 1979, no writ). There is therefore an issue as to validity of service of process that is not "deliver[ed] to the secretary" per Bus. Org. Code § 5.252(a), see page 91.

Validity of service delivered to an employee of the secretary of state's office is indirectly supported by *Campus Invs., Inc. v. Cullever,* 144 S.W.3d 464 (Tex. 2004)(per curiam). In *Campus*, the Supreme

Court noted that "A certificate... from the secretary of state conclusively establishes that process was served." *Campus* was decided under the Business Corporations Act, not the Business Organizations Code. The certificate will hopefully remain conclusive as to service.

C. Secretary of State's Duties

Bus. Org. Code §5.253 now requires the Secretary of State to immediately forward process by certified mail, return receipt requested to the "most recent address of the entity on file with the secretary of state" (see page 91). The Secretary of State requires plaintiff to designate the specific address to which defendant's documents are to be mailed. Thus plaintiff apparently must search Secretary of State records, determine "the most recent address of the entity on file"; and advise the Secretary of State of that address. This can be difficult. To bolster the record, include the most recent address in an affidavit, filed before entry of judgment.

Previously, to serve a domestic corporation, the Secretary of State sent a copy of the citation and the petition by registered mail to the corporation at its registered office. Tex. Bus. Corp. Act art. 2.11. For a foreign corporation, the Secretary of State forwarded process to the corporation's principal office. Tex. Bus. Corp. Act. art 8.10. Service is invalid if the Secretary of State forwards process to the wrong address. *Westmont Hospitality Group, Inc. v. Morris*, No. 07-07-0173-CV (Tex. App. - - Amarillo, April 14, 2009, no pet.)(2009 Tex. App. Lexis 2530)(mem. op.); *Texas Inspection Services, Inc. v. Melville*, 616 S.W.2d 253, 254 (Tex. Civ. App.--Houston [lst Dist.] 1981, no writ).

D. Most Recent Address on File

El Paisano Northwest Highway, Inc. v. Arzate, No. 05-12-01457-CV (Tex. App. - - Dallas, April 14, 2014, n.p.h.)(2014 Tex. App. Lexis 4055)(mem. op.) Defendant filed motion for new trial after being served through the Secretary of State. Plaintiff attempted to serve the defendant at the registered office. After four failed attempts, an affidavit detailing each attempt was filed and Plaintiff served the Texas Secretary of State. Because the registered agent could not, with reasonable diligence be found at the registered office, the Secretary of State is an agent for service of process on the corporation, 5.251(1)(B). The Secretary of State's certificate conclusively establishes that process was served as is required by statute, citing *Campus Invs.* 144 S.W.3d at 466. The Secretary of State's certified mail to the registered office was effective, even though returned "unclaimed".

> The statute requires the secretary of state send the process to "the most recent address of the entity *on file with the Secretary of State*." Section 5.253(b)(1) (emphasis the court's). There is no evidence in this record that the [alternate address urged by defendant] was the most recent address *on file with the secretary of state*..."

The *El Paisano* court uses the secretary of state's certificate to establish the most recent address on file with the secretary of state.

> ...because the secretary of state's certificate conclusively establishes the process was served as required by the statute, and the statute requires the process to be sent to the most recent address of the entity on file with the secretary of state, we assume the Catalina [registered office] address was the most recent address of the entity on file...

Remaining Questions:

> 1) Is it defendant's burden to prove that there is a more recent address on file, as held in *El Paisano*?
>
> 2) Is it plaintiff's burden to establish the most recent address on file to prove defendant was properly served according to law, BOC 5.253?
>
> 3) If, after establishing its registered office address with the secretary of state, defendant forwarded a later report with another address for defendant, is that address the "most recent address on file with the secretary of state?" This is a vague standard on which default judgments will apparently rest.

A cautious plaintiff serving a defendant through the secretary of state should consider checking the secretary of state records and establishing in the trial court record the "most recent address on file with the secretary of state". This could be done in the original petition in which an address is pleaded as defendant's registered agent address, and "most recent address on

file with the secretary of state" if true. If not, then both the registered office address, and the most recent address could be pleaded. Default judgment admits all factual allegations in the petition. *Stoner v. Thompson*, 578 S.W.2d 679 (Tex. 1979). See page 70, IX.

Practice Tip: Remind your corporate clients at least annually to verify: 1) their registered office address and 2) "most recent address" is current. The courts forgive a defendant that forgets it was served, Sutherland v. Spencer, 376 S.W.3d 752 (Tex. 2012). But a defendant which fails to keep its registered office address updated is negligent, and generally gets no relief. Campus Invs., Inc. v. Cullever, 144 S.W.3d 464 (Tex. 2004).

E. Proof of Service

The Secretary of State certificate alone, establishes service of process.

> When substituted service on a statutory agent is allowed, the designee is not an agent for the *serving* but for *receiving* process on the defendant's behalf...A certificate... from the Secretary of State conclusively establishes that process was served... As the purpose of Rule 107 is to establish whether there has been proper citation and service, the Secretary's certificate fulfills that purpose.
>
> We recognize that service of a defective citation through substituted service on the Secretary of State could mislead a defendant and lead to an improper default judgment. In such cases, a defendant may bring a bill of review and establish those facts... But *Campus* was not misled here because - as it had failed to update addresses for its registered agent and registered office - it never received anything the Secretary sent. Accordingly, *Campus* was negligent in failing to comply with its statutory duties. See, e.g., Tex. Bus. Corp. Act arts 2.10, 2.10-1, 8.09). *Campus Invs., Inc. v. Cullever*, 144 S.W.3d 464 (Tex. 2004).

See also *El Paisano Northwest Highway, Inc. v. Arzate*, No. 05-12-01457-CV (Tex. App. - - Dallas, April 14, 2014, n.p.h.)(2014 Tex. App. Lexis 4055)(mem. op.)(discussed in "D." supra); *Catalyst Partners, Inc. v. BASF Corp.*, No. 02-10-00377-CV (Tex. App. - - Fort Worth, June 9, 2011, no pet.)(2011 Tex. App. Lexis 4430)(mem. op.)(though process returned "Attempted - Not Known" certificate conclusively establishes that process was served, citing *Campus* 144 S.W.3d at 466); *Autodynamics Inc. v. Vervoort*, No. 14-10-00021-CV (Tex. App. - - Houston [14th Dist.], April 5, 2011, no pet.) (2011 Tex. App. Lexis 2474)(mem. op.)(attempt to serve registered agent at registered office constituted reasonable diligence; defendant properly served through Secretary of State; certificate conclusive that process was served, though not conclusive as to reasonable diligence. Establishing diligence is discussed at Service on Entity Through Secretary of State, page 36, 37.

Some trial court judges may still require the filing of the citation and return of citation, as that was the common practice.

The Secretary of State certificate may be purchased from the Secretary of State for a nominal fee. The certificate must establish to whom and where the Secretary of State forwarded process. It need not state that the person to whom the process was directed was the registered agent or that the place to which it was directed was the registered office, so long as the information appears elsewhere in the record. *Advertising Displays, Inc. v. Cote*, 732 S.W.2d 360(Tex. App. --Houston[14th Dist.]1987,no writ). The certificate must be on file when the judgment is signed. *Southern Gulf Operators, Inc. v. Meehan*, 969 S.W.2d 586 (Tex. App.--Beaumont 1998, no pet.).

Service on a security-dealer defendant through the Texas Securities Commissioner was insufficient when neither the citation nor return stated title or affiliation of person served, or that the person served was authorized to accept service for the Commissioner. *Harvestons Secs. v. Narnia Invs.,* 218 S.W.3d 126(Tex. App. - - Houston [14th Dist.] January 11, 2007, pet. denied).

F. Returnable "in not less than 30 days":

Practice Tip: To avoid the Applied Health Care issue, below, file proof of service on the Secretary of State, including Secretary of State certificate, only after 30 days from date of service. For contrary authority, supporting the filing of proof of service in less than 30 days, see American Discovery, below.

American Discovery Energy, Inc., v. Apache Corp., 367 S.W.3d 704 (Tex. App. - - Houston [14th Dist.] 2012, no pet.). The court finds a substantive change in the Bus. Org. Code. "The predecessor to BOC 5.252(b) provided that "[a]ny service so had on the Secretary of State shall be returnable in not less than thirty (30) days." But BOC 5.252(b) now states, "Notice on the secretary of state under Subsection (a) is returnable in not less than 30 days." (Emphasis added). The court holds that the requirement now applies only to "notice" and not "process" or "demand" delivered to the Secretary of State. The court distinguishes Applied Healthcare, below, because it was decided under the previous statute. The court affirms the default judgment finding that the return of citation, filed 12 days after service, did not violate the 30-day requirement. The court reasoned that the requirement applies to notices only, not to process. Though the decision may be well reasoned, safer procedure is to file proof of service on the Secretary of State more than 30 days after service.

See Bus. Org. Code § 5.252(b), based on former Tex. Bus. Corp. Act art. 2.11(b) *Applied Health Care Nursing Div.,Inc. v. Lab Corp. of Am.*, 138 S.W.3d 627, 629 (Tex. App. - - Dallas 2004, no pet.)(service did not strictly comply with article 2.11 because return was filed 19 days after service on Secretary of State). Former Tex. Bus. Corp. Act art. 2.11(b) stated "any service so had on the Secretary of State shall be returnable in not less than thirty (30) days". See also *Paul Michael Constr. Inc. v. Pines of Westbury, Ltd.*, No. 01-97-00533-CV (Tex. App. - - Houston [1st Dist.] October 1, 1998, pet. denied) (unpublished) 1998 Tex. App. Lexis 6435. Appellant argued the 30 day rule, but the court found that the return was filed more than 30 days after service.

Applied Health Care deals with a return of citation, not a Secretary of State certificate which conclusively establishes that process was served. *Campus Invs. , Inc. v. Cullever*, 144 S.W.3d 464 (Tex. 2004), discussed in D. Proof of Service. However, the *Applied Health Care* reasoning may apply to a certificate as well as a return of service.

G. Optional "Conscious Indifference" Letter

If the defendant establishes that he was not consciously indifferent to service of process, his motion for new trial will probably be granted under *Craddock v. Sunshine Bus Lines*, 133 S.W.2d 124 (Tex.1939). Therefore, consider sending a courtesy copy of the citation and petition to the defendant at an address other than the registered office or substituted service address. Defendants often assert that they did not receive the process which was served either on the secretary of state or served pursuant to Rule 106(b). In response, a diligent plaintiff can produce proof of certified mail directed to the defendant at an address known to be good -- often an alternate address with which counsel has been corresponding with defendant. Proposed "conscious indifference" letters are attached at pages 117, 118.

The court will consider whether defendant had knowledge of the pending suit in determining whether defendant was consciously indifferent. *Paul Michael Construction, Inc. v. Pines of Westbury, Ltd.*, No. 01-97-00533-CV (Tex. App.–Houston [1st Dist.] Oct. 1, 1998, pet. den.)(unpublished, 1998 Tex. App. Lexis 6435); *Osborne v. Cooperative Computing*, No.03-97-00374-CV (Tex. App.--Austin Nov. 20, 1997, no pet.)(unpublished, 1997 Tex. App. Lexis 5989). Defendant's inaction after receiving a telephone call from plaintiff's counsel providing additional actual notice of a possible default judgment, constituted conscious indifference. *Fiske v. Fiske*, No. 01-03-00048-CV (Tex.App. - - Houston [1st Dist.], August 19, 2004, no pet.)(2004 Tex. App. Lexis 7483)(mem. op.).

A conscious indifference letter to a corporate defendant's president may avoid the bizarre result in which a $26 million judgment was set aside in a bill of review action, *Seacoast, Inc. v. Lacouture,* No. 03-00-00178-CV (Tex. App. - - Austin, Dec. 21, 2001, no pet.)(unpublished, 2000 Tex. App. Lexis 8486). The registered agent was properly served but failed to answer or forward the process to the new corporate officers. After judgment was entered, the current president of the corporation obtained a new trial, asserting a change in ownership, and that he and the corporation were unaware of the lawsuit.

H. Scope

The Bus. Org. Code applies to filing entities and foreign filing entities, see, for example, Bus. Org. Code 5.201(a) and 5.251(1).

I. Alternate Method of Service on Secretary of State Pursuant to §17.026, Texas Civil Practice & Remedies Code

An alternative method of service on the Secretary of State is provided which allows certified mail service by the clerk of the court, by a party, or the party's representative:

(a) In an action in which citation may be served on the secretary of state, service may be made by certified mail, return receipt requested, by the clerk of the court in which the case is pending or by the party or the representative of the party.

(b) The method of service of citation provided by this section is in addition to any other method authorized by statute or the Texas Rules of Civil Procedure for service on the secretary of state.

VII. SERVICE ON PARTNERSHIPS

A. Regular Partnerships

1. CPRC §17.022 provides:

"Citation served on one member of a partnership authorizes a judgment against the partnership and the partner actually served." The citation must be directed to the defendant. Rule 99(b)(8); *ISO Prod. Mgt. 1982 v. M & L Oil & Gas*, 768 S.W.2d 354 (Tex. App.--Waco 1989, no writ) (citation erroneously directed to president of corporate general partner).

2. CPRC §31.003 provides:

"If a suit is against several partners who are jointly indebted under a contract and citation has been served on at least one but not all of the partners, the court may render judgment against the partnership and against the partners who were actually served, but may not award a personal judgment or execution against any partner who was not served."

B. Limited Partnerships

A limited partnership may apparently be served by serving any general partner in the partnership. Bus. Org. Code §5.255; *Fairdale Ltd. v. Sellers*, 640 S.W.2d 627 (Tex. App.--Houston [14th Dist.]), *rev'd on other grounds*, 651 S.W.2d 725 (Tex. 1982). See also *ISO Prod. Mgt. 1982, supra.*

Kao Holdings, L.P. v. Young, 261 S.W.3d 60 (Tex. 2008). Judgment reversed as to partner in limited partnership, who was not named as a defendant, and who was not served with citation as a defendant. Inexplicably, the court of appeals had affirmed the judgment against both the limited partnership and the unnamed partner, individually. Rule 239 provides for default judgment only against "a defendant". Rule 301 requires that "the judgment of the court conform to the pleadings". Judgment modified and default judgment against individual partner reversed.

C. Limited Liability Company

§5.255, Bus. Org. Code states:

> For the purpose of service of process,...
>
> (3) [E]ach manager of a manager-managed domestic or foreign limited liability company and each member of a member-managed domestic or foreign limited liability company is an agent of that limited liability company.

VIII. OTHER STATUTES REGARDING PERSONAL OR SUBSTITUTED SERVICE

A. Banks as Garnishees

Regions Bank v. Centerpoint Apts., 290 S.W.3d 510 (Tex. App. - - Amarillo 2009, no pet.). Discussion of Tex. Fin. Code Ann. § 276.002(a) limiting a default judgment against a financial institution to liability and prohibiting the award of damages. Damages remanded for further evidence to establish the extent of the financial institution's indebtedness to its customer, per 276.002(b), (c). *Invesco Inv. Servs. v. Fid. Deposit & Disc. Bank*, No. 01-10-01126-CV (Tex. App. - - Houston [1st Dist.] June 16, 2011, no pet.)(2011 Tex. App. Lexis 4554)(mem. op.)(same). The statute exempts financial institutions from Rule 667 which allows a judgment against garnishee for the full underlying judgment balance. Consider serving garnishee with brief requests for admission, to establish debtor's balance with garnishee bank.

The following is used with permission from Donna Brown's excellent article on Post Judgment Remedies. Collections and Creditors' Rights Course, State Bar of Texas, 2014, page 26; dbrownlaw.com. See also 4. Garnishment, at page 18. Safest to have writ of garnishment served by sheriff or constable instead of private process server.

Writs of garnishment served on garnishee banks have been traditionally served on bank presidents and vice presidents. With the advent of branch banking, banks have attempted to better control the handling of these writs by designating a specific bank location in the city for accepting service of these writs. Civil Practice and Remedies Code Section 63.008, now provides that service of a writ of garnishment on a financial institution is governed by Section 59.008 of the Finance Code. The same bill enacting §63.008 made similar provision for service of orders appointing receivers in turnover proceedings, service of writs of attachment for personal property, notices of receivership and restraining orders and injunctions affecting a customer of the financial institution.

Finance Code Section 59.008 provides that a claim against a customer, defined in Section 59.001(2) to include writs of garnishment and notices of receivership among other actions, shall be delivered to the address designated as the address of the registered agent of the financial institution in its registration statement filed with the Secretary of State pursuant to Section 201.102 or 201.103 of the Finance Code. Section 201.102 provides that out-of-state financial institutions must file an application for registration with the secretary of state by complying with the laws of this state for foreign corporations doing business in this state, i.e. designating an agent for process. Section 201.103 provides that Texas financial institutions may file a statement with the Secretary of State appointing an agent for process.

Section 59.008 goes on to provide that if a financial institution complies with Section 201.102 or 201.103, a claim against a customer of the financial institutions, i.e. a writ of garnishment, is not effective if served or delivered to an address other than the address designated. Section 59.008 goes on to provide that it is the financial institution's customer who bears the burden of preventing or limiting a financial institution's compliance with or response to a claim subject to Section 59.008. It appears then that a financial institution complying with the provisions regarding designation of a registered agent can elect to declare the claim against its customers ineffective if the claimant fails to comply with service. And, further, if the financial institution slips up and honors a claim against its customer that is incorrectly served, it appears to have no exposure to its customer, who has the burden to prevent or suspend the financial institution's response to the claim.

Paragraph (d) of Section 59.008 provides that, if the financial institution does not comply with Section 201.102 or 201.103, the financial institution is subject to service of claims against its customers as otherwise provided by law.

Tex. Civ. Prac. & Rem. Code's provisions for service on a financial institution were clarified by SB. No. 422 effective September 1, 2013. Perhaps so that service on financial institutions of claims against its customers be found in a more logical place, subsection (f) was added to Section 17.028 to direct readers to Finance Code 59.008 for service of claims against customers.

Before garnishing a judgment debtor's bank account, one must check with the Secretary of State to determine if a registered agent and registered office have been designated. If so, the writ of garnishment should be served per the designation. If no designation is made, service should be made as otherwise provided by law.

B. Insurance Companies

See generally McDonald TCP 11:34 *et. seq.* The law as to service of process on insurance companies is unclear. Tex. Ins. Code, art. 1.36 was held to be the exclusive method of service in *Commodore County Mut. Ins. Co. v. Tkacik,* 809 S.W.2d 630 (Tex. App.--Amarillo 1991, writ denied). *But* see *Higginbotham v. General Life & Acc. Ins.*, 796 S.W.2d 695 (Tex. 1990) (dissent -- method not exclusive). Art. 1.36 authorizes process to be served on the president, any active vice-president, secretary, or attorney in fact at the home office or principal place of business of a domestic carrier; or at the home office or principal business office of the carrier during regular business hours. The return should specifically state that the address is, for example, defendant's home office. See

Commodore.

C. County, City, School District

CPRC §17.024 requires that in suits against the following, citation be served on the individuals designated: against a county -- the county judge; against a city or town -- the mayor, clerk, secretary, or treasurer; against a school district -- the president of the school board or superintendent.

D. Municipalities

Service on an unincorporated city, town or village may be made on the mayor, clerk, secretary or treasurer of the municipality. TEX. REV. CIV. Stat. art. 2028, §1. See *City of Mesquite v. Bellinger*, 701 S.W.2d 335, 336 (Tex. App.--Dallas 1985, no writ) (service on city attorney ineffective); *Gonzalez v. Gutierrez*, 694 S.W.2d 384 (Tex. App.--San Antonio 1985, no writ); *but* see *City of San Antonio v. Garcia*, 243 S.W.2d 252, 253 n.l (Tex. Civ. App.--San Antonio 1951, writ ref'd)(service on mayor pro tempore apparently effective even where the mayor was in town).

E. Non-Profit Corporations

Service on a corporation (whether domestic or foreign) subject to the Texas Non-Profit Corporation Act may be made upon the president, any vice president or treasurer. Tex. Rev. Civ. Stat. art. 1396-2.07A. As to unincorporated nonprofit associations see Bus. Corp. C.§252.013. See also B.O.C. § 5.255(5) ; page 91.

F. Dissolved Corporations

McDonald TCP 11:36. Service on a dissolved corporation may be made on the president, directors, general manager, trustee, assignee, or other person in charge of the affairs of the corporation at the time it was dissolved. Rule 29. See *W. A. Green Co. v. Cope,* 466 S.W. 2d 860 (Tex. Civ. App.--Dallas 1971, no writ).

G. Corporations Charged with Criminal Acts

Service on a corporation charged with a criminal violation may be made by serving the registered agent. If a registered agent has not been designated or cannot, with reasonable diligence, be found at the registered office, service may be made upon the president or any vice president. CCP art. 17A.04, Water Code §21.559.

H. Permissible Methods of Service, Joint Stock Associations

CPRC §17.023.

1. Service may be made on the president, vice president, secretary, cashier, assistant cashier or treasurer of the association.
2. Service may be made on the local agent of the association in the county in which the suit is brought.
3. Service may be made by leaving a copy of the citation at the principal office of the association during office hours.
4. If no designated officer resides in the county in which suit is brought and the association has no agent in that county, service may be made on any agent representing the corporation or association in this state.

I. Certain Non-Corporate Business Agents

McDonald TCP 11:63. CPRC §17.021 provides in part:

a. In an action against an individual, partnership, or unincorporated association that arises in a county in which the individual, partnership, or association has an office, place of business, or agency for transacting business in this state, citation or other civil process may be served on an agent or clerk employed in the office, place of business, or agency if:

(1) The action grows out of or is connected with the business transacted in this state; and

(2) The individual, partnership, or association:

- (a) Is not a resident of the county;
- (b) Is not a resident of this state; or
- (c) Is a resident of the county but has not been found for service of process.

b. To serve process on an agent or clerk under subsection (a)(2)(c), the officer making the return of unexecuted process must certify that after diligent search and inquiry the individual, partnership, or association cannot be found and served. The process in the suit may be served on the agent or clerk in any succeeding term of court.

J. Unincorporated Associations

Service on an unincorporated joint stock company or association may be made on the president, secretary, treasurer or general agent. Tex.Rev.Civ. Stat.art. 6133, 6134. See *Vehle v. Brenner*, 590 S.W. 2d 147, 153 (Tex. Civ. App.-San Antonio 1979, no writ).

K. Service on Non-resident Bank or Trust Company Fiduciaries

Service on a non-resident bank or trust company acting in a fiduciary capacity in Texas may be made by serving the Secretary of State as deemed agent. Prob. Code §105A.

L. Non-resident Motorists

CPRC 17.061-17.069

McDonald TCP 11:41

1. Chairman of State Highway and Public Transportation as deemed agent. The Chairman of the State Highway and Public Transportation Commission is deemed to be the agent for service of process on any defendant who is a non-resident or agent of a non-resident in a suit against the non-resident or his agent growing out of a collision or accident in which the non-resident or his agent is involved while operating a motor vehicle, including a motorcycle, in Texas. CPRC §17.062, 17.061(3).

2. Service on Chairman. A certified copy of the process must be served on the Chairman at least 20 days prior to the return date. CPRC § 17.063(a).

3. Duties of Chairman. The Chairman must immediately mail a copy of the process and a notice that the process has been served on the Chairman to the defendant by registered mail or by certified mail, return receipt requested.§ 17.063(b) and (c). Upon request and payment of a fee by any party, the Chairman must prepare a certificate regarding the service or attempted service. CPRC §17.069.

M. Non-Resident Employers

Service on a non-resident employer may be made on the Chairman of the Industrial Accident Board as deemed agent in an action arising from an accident in the course of employment which resulted in an employee's injury or death. Tex. Rev. Civ. Stat. art. 8306, §2a.

N. Non-Resident Taxpayers

Service on a non-resident taxpayer may be made on the Executive Director of the State Property Tax Board as deemed agent. CPRC § 17.091. See McDonald TCP 11:62.

O. Non-Resident Utility Suppliers

Service on a non-resident individual or partnership that supplies gas, water, electricity or other public utility service to a municipality may be made by serving the local agent, representative, superintendent or person in charge of the non-resident's business. CPRC §17.092.

P. Foreign Railways

Service on a foreign railway may be made upon any train conductor meeting certain specifications or on an agent with an office in Texas who sells tickets or makes contracts for transportation of persons or property in the foreign railway. CPRC §17.093.

IX. SERVICE ON ATTORNEYS

Service on defendant's attorney, absent the express authorization of defendant, does not constitute service on the defendant. *City of Mesquite v. Bellingar*, 701 S.W.2d 335, 336 (Tex. App.--Dallas 1985, no writ); *H. L. McRae Co. v. Hooker Const. Co.*, 579 S.W.2d 62, 64 (Tex. Civ. App.--Austin 1979, no writ); *Neal v. Roberts*, 445 S.W.2d 58, 60 (Tex. Civ.

App.--Houston [lst Dist.] 1969, no writ). *But* see *Leach v. City Nat. Bank of Laredo*, 733 S.W.2d 578, 580 (Tex. App.--San Antonio 1987, no writ) (service on defendant's attorney proper pursuant to Rule 106(b)(2) because defendant concealed himself and attorney represented defendant on a related matter).

The practice of providing informal notice of the lawsuit to an attorney as a professional courtesy is to be encouraged. However one cannot rely upon such service to obtain a default judgment or as a substitute for diligent attempts to timely serve all defendants. *Rodriguez v. Tinsman & Houser, Inc.,* 13 S.W.3d 47 (Tex.App.–San Antonio, 1999, pet. denied). Actually, courtesy service on the attorney accomplishes nothing, other than promoting good relations between the lawyers. It is no substitute for proper service of process, which is the only service which can trigger a default judgement. When providing courtesy notice, or extending an answer date, one should perhaps clearly state an intention to proceed with default judgment if the matter is not either immediately settled and confirmed in writing; or an answer is not timely filed after formal service of process. The Texas Lawyers Creed, discussed at page 5, requires inquiry as to counsel's intention to proceed. However, a properly served defendant is not entitled to additional notice prior to entry of a default judgment. *Continental Carbon Co. v. Sea-Land Serv., Inc.*, 27 S.W. 3d 184, 190 (Tex. App. -- Dallas 2000, pet. denied).

X. IMPORTANT BUT LESSER USED SERVICE PROVISIONS

A. Out of State Personal Service

1. Scope of service. Any individual defendant outside the state may be personally served pursuant to Rule 108 if he is either a Texas resident temporarily absent from the state, *Miller v. Cowell*, 362 S.W.2d 345 (Tex. Civ. App.--Houston 1962, no writ); *Bonanza, Inc. v. Lee*, 337 S.W.2d 437 (Tex. Civ. App.--Dallas 1960, no writ), or a non-resident whose minimum contacts with the forum are sufficient to satisfy constitutional due process requirements. Rule 108; see discussion, long arm statute, paragraph D, infra; *Conlon v. Hecker*, 719 F.2d 788, 794-95 at n.6 (5th Cir. 1983); *U-Anchor Advertising, Inc. v. Burt*, 553 S.W.2d 760, 762 n.1 (Tex. 1977).

2. Persons authorized to make service. Service may be effected "by any disinterested person who is not less than 18 years of age in the same manner as provided in Rule 106." Rule 108.

3. Return. Rule 108 states that the return "shall be completed in accordance with Rule 107". Previously, Rule 108 required a verified return whether process was served by an officer or private server. *DRC Distribs. v. Joiner,* No. 13-04-038-CV (Tex. App. - - Corpus Christi, February 9, 2006, no pet.)(2006 Tex. App. Lexis 1168)(mem. op.)(sheriff failed to swear to return). For 2012, the verification requirement is deleted from Rule 108. Rules 107 and 108, effective January 1, 2012, require verification or signing under penalty of perjury for persons other than a sheriff, constable or court clerk. Apparently, a sheriff, constable or court clerk was required to verify an out-of-state return before January 1, 2012, but not thereafter. But perhaps safest to continue to obtain verification from all servers, verifying the return and that they are not a party to or interested in the outcome of the suit. See Rules 108, 103.

Disinterested Server Rule 108, Service in Another State.

Indus. Models, Inc. v SNF, Inc., No. 02-13-00281-CV (Tex. App. - - Fort Worth, July 24, 2014, n.p.h.)(2014 Tex. App. Lexis 8063). *Industrial Models* concerned a Illinois corporation which had allegedly committed a business tort in Texas, establishing minimum contacts. An Illinois private detective served citation on defendant's registered agent, affirming that the server was not a party to the lawsuit. However, the affidavit failed to state that the server was a "disinterested person" pursuant to Rule 108.

The case is based on Rule 108, service on non-resident. The court states that Rule 108 requires service, "... by any disinterested person ..." in the same manner as provided in Rule 106 hereof." Rule 106 states that citation "shall be served by any person authorized by Rule 103." Rule 103 states, in part, that "no person who is a party to or interested in the outcome of a suit may serve any process in that suit." Because the Illinois detective did not state that he was disinterested, the judgment was reversed and remanded, based on Rule 108.

Other Rule 108 cases required verification that

the process server is a disinterested person. *Scucchi v. Woodruff,* 503 S.W.2d 356, 359 (Tex. Civ. App.–Fort Worth 1973, no writ); *Harper v. Ivans,* No. 05-95-01694-CV (Tex. App.–Dallas, Oct.8,1999, no pet.) (unpublished, 1999 Tex. App. Lexis 7548).

The San Antonio Court of Appeals rejected the "disinterested requirement" in an in-state service case under Rule 103, *Uvalde Country Club v. Martin Linen Supply Co.*, 685 S.W.2d 375, 378 (Tex. App. - - San Antonio 1984), (rev'd. on other grounds, registered agent's name-issue) 690 S.W.2d 884 (Tex. 1985). The court of appeals found that the Rule 103 "disinterested provision" was a designated disqualification not a requirement. The court concluded that establishing disinterest "is ...not a mandatory requirement and failure to include it is not a defect that is apparent from the face of the record." Rule 103, after stating who may serve, states, "But no person who is a party to or interested in the outcome of a suit may serve any process in that suit." The *Uvalde* reasoning appears sound.

B. Out-of-Country Personal Service

Tex. Lit. G. § 32.02A; O'Connor's Texas Rules, Chapter 2-H §11, O'Connor's Federal Rules and Civil Trials, Chapter 2-H §7.

1. Scope of service. Any individual defendant served in a foreign country pursuant to Rule 108a is amenable to service if he is a Texas resident temporarily absent from the state or a non-resident whose minimum contacts with the forum are sufficient to satisfy constitutional due process requirements. See discussion, long arm statute, paragraph D, infra; The 1990 amendment to Rule 107 clarifies that a default judgment can be obtained based on foreign country service.

2. Methods of authorized service. Rule 108a authorizes service as follows:

a) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or b) as directed by the foreign authority in response to a letter rogatory or a letter of request; or c) in the manner provided by Rule 106; or d) pursuant to the terms and provisions of any applicable treaty or convention; or e) by diplomatic or consular officials when authorized by the United States Department of State; or f) by any other means directed by the court that is not prohibited by the law of the country where service is to be made. The method of service of process in a foreign country must be reasonably calculated, under all of the circumstances, to give actual notice of the proceedings to the defendant in time to answer and defend.

Defendant may also be served through the Secretary of State, via the long arm statute *Commission of Contracts v. Arriba, Ltd.* 882 S.W.2d 576 (Tex. App.--Houston[1st Dist.] 1994, no writ).

3. Return. Rule 108a provides that "[p]roof of service may be made as prescribed by the law of the foreign country, by order of the court, by Rule 107, or by any method provided in any applicable treaty or convention." *Chaves v. Todaro*, 770 S.W.2d 944 (Tex. App.--Houston [lst Dist.] 1989, no writ) (service insufficient where Secretary of State did not obtain defendant's home or home office address as required by CPRC §17.045(a)).

C. Service On Person In Charge of Business Where No Registered Agent Required By Law.

Long Arm Statute, CPRC §17.043). Service may be made upon the person in charge of any business in which the defendant is engaged in Texas if the defendant is not required to designate or maintain a resident agent for service of process in Texas but does engage in business in this state. CPRC §17.043. The person served must be in the defendant's service at the time that process is served. See *Minexa Arizona, Inc. v. Staubach*, 667 S.W.2d 563, 565-66 (Tex. App. --Dallas 1984, no writ); *Smith v. Nederlandsche Stoomvaart Mij. "Oceaan" N.V.*, 255 F. Supp. 548 (S.D. Tex. 1965). The plaintiff must allege sufficient facts in his petition to demonstrate the applicability of this section. See *Minexa Arizona, Inc. v. Staubach*, supra, 667 S.W.2d at 566. A copy of the process and notice of the service must be sent to the non-resident defendant or the non-resident defendant's principal place of business by registered mail, return receipt requested. CPRC §17.045(c)and (d).

D. Service on Secretary of State As Deemed Agent For Foreign Corporations, Partnerships or Non-resident Natural Person

O'Connor's Texas Rules, Ch. 2,H §5.3

Long Arm Statute, CPRC §17.041 et. seq; Tex. Lit. G.

32.03[2]; McDonald TCP 11:19-11:27; Note, *General Jurisdiction over Foreign Corporations: All That Glitters Is Not Gold Issue Mining,* 14 Rev. Litig. 741 (1995). See also Service on Entity Through Secretary of State at page 36 and O'Connor's Texas Rules, Special Appearance, ch 3-B.

1. When applicable.

a. No resident agent. Service may be made on the Secretary of State as deemed agent when a non-resident is required to designate or maintain an agent for service in this state or engages in business in this state and has not designated or maintained a resident agent for service of process. CPRC §17.044(a)(1).

b. Unlocated registered agent. Service may be made on the Secretary of State as deemed agent when a non-resident has one or more resident agents for service of process and two unsuccessful attempts have been made on different business days to serve each agent. CPRC §17.044(a)(2).

c. Former resident. Service may be made on the Secretary of State as deemed agent when a non-resident is not required to designate an agent for service of process in this state and becomes a non-resident after a cause of action arises in this state but before the cause is matured by suit in a court of competent jurisdiction. CPRC § 17.044(a)(3). See *generally Collin v. Mize*, 447 S.W.2d 674 (Tex. 1969).

d. Required pleading. Jurisdictional allegations must be stated in the petition. *Watts Water Techs., Inc. v. Farmers Ins. Exch.*, No. 03-09-00002-CV(Tex. App. - - Austin May 14, 2010, no pet.)(2010 Tex. App. Lexis 3638)(mem. op.).

Pleading allegation necessary to allow service on the secretary of state pursuant to CPRC 17.044(b) is:

> Defendant engages in business in the state, but does not maintain a regular place of business in this state or a designated agent for service of process.

(Additional factual jurisdictional allegations required by prior long-arm cases include):

> 1) The defendant purposefully did some act or consummated some transaction in Texas;
>
> 2) The cause of action arose from or was connected with such act or transaction;
>
> 3) The assumption of jurisdiction by the trial court will not offend "traditional notions of fair play and substantial justice." (Additional required jurisdictional allegations; see *Biotrace Int'l, Inc. v. Lavery*, 937 S.W.2d 146 (Tex. App. - - Houston [1st Dist.] 1997, no writ)]

e. No registered agent or regular place of business. Service may be made on Secretary of State as deemed agent when a non-resident engages in business in this state, does not maintain a regular place of business or a designated agent for service of process in this state, and the proceeding arises out of the business done in this state. CPRC §17.044(b).

Plaintiff may proceed under§17.044(b) only if §17.043 is not applicable, and his petition must allege facts that negate the applicability of §17.043 and establish the applicability of 17.044(b). That is, plaintiff must plead facts establishing, for example, that defendant currently has neither a place of business nor a designated agent in Texas. *MobileVision Imaging Servs., L.L.C. v. LifeCare Hosps. Of N. Tex., L.P.,* 260 S.W.3d 561 (Tex. App. - - Dallas 2008, no pet.)*; South Mill Mushrooms Sales v. Weenick,* 851 S.W.2d 346 (Tex. App. -- Dallas 1993, writ denied). Among the many cases under the predecessor statute holding that plaintiff must expressly allege that §2 of TEX. REV. Civ. Stat. art. 2031b (now §17.043, *supra*) is not applicable before proceeding under §3 (now 17.044(b), *supra*) are *McKanna v. Edgar*, 388 S.W.2d 927 (Tex. 1965); *Onnela v. Medina*, 785 S.W.2d 423 (Tex. App.--Corpus Christi 1990, no writ). *Fairmont Homes, Inc. v. Upchurch*, 704 S.W.2d 521, 523-24 (Tex. App.--Houston [14th Dist.], *rev'd on other grounds*, 711 S.W.2d 618 (Tex. 1986); *Public Storage Properties VII, Ltd. v. Rankin*, 678 S.W.2d 590, 593 (Tex. App.--Houston [14th Dist.] 1984, no writ) (pleading which failed to allege either that defendant was a corporation or that it did not maintain a regular place of business in Texas was insufficient); *Franecke v. Dolenz*, 668 S.W.2d 481 (Tex. App.--Austin 1984, writ dism'd)(pleading which failed to allege that defendant was a non-resident natural person was insufficient); and *Alpha Guard, Inc. v. Callahan Chemical Co.*, 568 S.W.2d 448 (Tex. Civ. App .--Austin 1978, no writ) (pleading that merely alleged

that defendant's headquarters was out of state did not sufficiently allege that defendant was a foreign corporation). The petition's allegations cannot be supplemented by proof at the default judgment hearing, *Gourmet, Inc. v. Hurley*, 552 S.W.2d 509 (Tex. Civ. App.--Dallas 1977, no writ), and defects in the petition cannot be cured by recitals in the judgment. *Curry v. Dell Publishing Co.*, 438 S.W.2d 887 (Tex.Civ. App.--Texarkana 1968, writ ref'd n.r.e.).

2. Doing business in state. For purposes of the Long Arm Statute, a non-resident does business in Texas by any of the following:

a. Contracting by mail or otherwise with a Texas resident and either party is to perform the contract in whole or in part in this state.

b. Committing a tort in whole or in part in this state.

c. Recruiting Texas residents, directly or through an intermediary located in this state, for employment inside or outside this state. CPRC §17.042.

3. Extent. The Texas Supreme Court has repeatedly held that the Long Arm Statute extends to the maximum limits of due process under the United States Constitution. See *e.g., Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 200 (Tex. 1985); *Hall v. Helicopters Nacionales de Columbia*, 638 S.W.2d 870, 872 (Tex. 1982), *rev'd on other grounds*, 466 U.S. 408 (1984); *U-Anchor Advertising, Inc. v. Burt*, 553 S.W.2d 760 (Tex. 1977); *Nikolai v. Strate*, 992 S.W.2d 229 (Tex. App.--Fort Worth 1996, no writ).

4. Pleading requirement. In actions against non-residents, the petition must make sufficient jurisdictional allegations to put the defendant on notice that he is responsible to answer. *Capitol Brick, Inc. v. Fleming Mfg. Co.*, 722 S.W.2d 399 (Tex.1986); *Whitney v. L & L Realty Corp*. 500 S.W.2d 94, 95 (Tex.1973); *McKanna v. Edgar*, 388 S.W.2d 927 (Tex.1965); *Redwood Group v. Louiseau,* 113 S.W. 3d 866 (Tex. App. - - Austin 2003, no pet.); *Biotrace Int'l, Inc. v. Lavery*, 937 S.W.2d 146 (Tex. App.--Houston [1st Dist.] 1997, no writ). A defendant may challenge a lack of requisite jurisdictional allegations by motion to quash, motion for new trial, appeal or writ of error, but not by special appearance. See *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199 (Tex.1985). Holding that a motion for new trial constituted consent to jurisdiction is *Health & Tennis Corp. of America v. Adams,* No. 14-97-00346-CV (Tex. App.--Houston [14th Dist.] Jan. 8, 1998, no pet.) (unpublished, 1998 Tex. App. Lexis 49).

To pass constitutional muster plaintiff must allege:

1) the defendant purposefully did some act or consummated some transaction in Texas;

2) the cause of action arose from or was connected with such act or transaction; and

3) the assumption of jurisdiction by the trial court will not offend "traditional notions of fair play and substantial justice." *Biotrace Int'l, Inc. v. Lavery*, 937 S.W.2d 146, 147 (Tex. App.--Houston [1st Dist.] 1997, no writ).

5. Perfecting service on the Secretary of State.

a. Duplicate copies.

Duplicate copies of the citation and petition must be served on the Secretary of State. CPRC § 17.045(a). See *Ratcliffe v. Werlein*, 485 S.W.2d 932 (Tex. Civ. App.--Houston [lst Dist.] 1972, no writ) (mandamus denied where return showed only "a true copy" of process served on Secretary of State).

b. To whom delivered.

Service may be made upon anyone in the Secretary of State's office, so long as proof of service is established by the certificate from the Secretary of State in the file showing that process was forwarded to the defendant. *Capitol Brick, Inc. v. Fleming Mfg. Co.*,722 S.W.2d 399(Tex. 1986).

c. Name and home or home office address of defendant--strict compliance required.

Plaintiff must accompany service upon the Secretary of State with a statement of the name and address of the home or home office of the defendant. Failure to designate an address as defendant's "home" or "home office" is a common fatal error. CPRC § 17.045(a). *Wachovia Bank of Del. v. Gilliam* 215 S.W.3d 848 (Tex. 2007)(in restricted appeal, record

must show service was forwarded to a statutorily required address; reversed and remanded for lack of designation of defendant's address as home, home office; or under Tex Bus. Corp. Act art. 8.10(B), principal office); *Tough Corp. PTY Ltd. v. Xplore Techs. Corp. of Am.,* No. 03-08-00368-CV (Tex. App. - - Austin, May 21, 2009, no pet.)(2009 Tex. App. Lexis 3778)(mem. op.)("place of business" insufficient); *Medtek Lighting Corp. v. Jackson,* No. 05-04-00335-CV (Tex. App. -- Dallas, August 22, 2005, pet. denied)(2005 Tex. App. Lexis 6802)(mem. op.) (mailing address was insufficient)*; Boyo v. Boyo*, 196 S.W.3d 409 (Tex. App. - - Beaumont, 2006, no pet.)(pleadings fail to state foreign corporation did not maintain regular place of business or designated agent for service in Texas; also, no pleading that address was defendant's home or home office address); *World Distributors, Inc. v. Knox*, 968 S.W.2d 474, 478 (Tex. App.--El Paso 1998, no pet.); *Whiskeman v. Lama*, 847 S.W.2d 327 (Tex. App.-- El Paso 1993, no writ). *Boreham v. Hartsell*, 826 S.W.2d 193 (Tex. App.--Dallas 1992, no writ). *Onnela v. Medina*, 785 S.W.2d 423 (Tex. App.--Corpus Christi 1990, no writ); *Bank of America, N.T.S.A. v. Love*, 770 S.W.2d 890 (Tex. App.--San Antonio 1989, writ denied); *Carjan Corp. v. Sonner*, 765 S.W.2d 553 (Tex. App.--San Antonio 1989, no writ); *Chaves v. Todaro*, 770 S.W.2d 944 (Tex. App.--Houston [1st Dist.] 1989, no writ) (million dollar default judgment set aside because plaintiff did not provide defendant's Brazilian home address); *Bannigan v. Market Street Developers*, 766 S.W.2d 591 (Tex. App.--Dallas 1989, no writ) (lessee's notice address as stated in lease was insufficient); *Lynn McGuffy Co. v. Perfected Indus. Products, Inc*., 683 S.W.2d 781, 782 (Tex. Civ. App.--Houston [14th Dist.] 1984, writ ref'd n.r.e.); *Verges v. Lomas & Nettleton Fin. Corp.*, 642 S.W.2d 820 (Tex. App.--Dallas 1982, no writ) (last known address rather than home address of defendant is not sufficient); *Norwood v. Hudson's Grill Int'l.*, 2002 Tex. App. Lexis 7493, unpublished (Tex. App.-- Amarillo 2002, no pet.). The statement may either be in plaintiff's petition or in a separate document. **See** *Public Storage Properties VII, Ltd. v. Rankin*, 678 S.W.2d 590, 593 (Tex. App.--Houston [14th Dist.] 1984, no writ).

Contrary view: a deviation from the "home" or "home office" requirement is *Mahon v. Caldwell, Haddad, Skaggs, Inc.*, 783 S.W.2d 769, 771 (Tex. App.--Fort Worth 1990, no writ). The court held that where only one address is given in a contract as the business address it is the "home office" of the party using the address. *Mahon* is of questionable authority, see *Boreham v. Hartsell*, 826 S.W.2d 193, 196 (Tex. App.--Dallas 1992, no writ).

6. Secretary of State's duties.

a. Delivery of process.

The Secretary of State must send one copy of the citation and the petition to the non-resident (if an individual), the person in charge of the non-resident's business, or to a corporate officer (if a corporation). CPRC §17.045(b).

b. Immediate delivery.

The Secretary of State must forward process immediately. See *Bonewitz v. Bonewitz*, 726 S.W.2d 227, 229 (Tex. App.--Austin 1987, writ ref'd n.r.e.) (five day delay in forwarding papers still constituted immediate delivery).

c. Address.

The Secretary of State must forward process to the address provided by plaintiff by registered mail or by certified mail, return receipt requested. CPRC §17.045(d). See *Bonewitz v. Bonewitz,* 726 S.W.2d 227, 230-31 (Tex. App.--Austin 1987, writ ref'd n.r.e.)(delivery not required to be restricted to addressee).

A typographical error in the forwarding address typed by the Secretary of State is grounds to set aside default judgment. (proper address was Fair View; mail sent to Fairview.

d. Completion of service--answer date.

Service is not complete until the Secretary of State properly sends the process to defendant. *Whitney v. L & L Realty Co.*, 500 S.W.2d 94, 96 (Tex. 1973). However, the time period within which defendant must answer begins on the date the Secretary of State is served, not on the date the Secretary of State forwards process. *Bonewitz v. Bonewitz*, 726 S.W.2d 227, 230 (Tex. App.--Austin 1987, writ ref'd n.r.e.).

7. Proof of service.

Proof of substituted service is established by the Secretary of State's certificate regarding service. See *Campus Invs., v. Cullever* 144 S.W.3d 464 (Tex. 2004) discussed at page 40, Location of Registered Office. See *also Orgoo, Inc. v. Rackspace US, Inc.*, No. 04-09-00729-CV, No. 04-10-00058-CV (Tex. App.- -San Antonio January 5, 2011, no pet.)(2011 Tex. App. Lexis 22)(mem. op.) (reversed on other grounds); *G.F.S. Ventures v. Harris,* 934 S.W.2d 813, 817 (Tex. App.--Houston [1st Dist.] 1996, no writ). *Harris* cites *Capital Brick, Inc. v. Fleming Mfg. Co.*, 722 S.W.2d 399, 401 (Tex.1986) for the proposition that proper long arm service is established by a certificate from the Secretary of State alone.

8. Lack of actual service.

Service is valid even if the certificate reflects that process was not actually received by defendant, so long as the certificate or the record as a whole reflects that it was forwarded to the address provided by plaintiff. See *Zuyus v. No'Mis Communications, Inc.,* 930 S.W.2d 743 (Tex. App.--Corpus Christi 1996, no writ)(unclaimed); *BLS Limousine Service, Inc. v. Buslease, Inc.*, 680 S.W.2d 543, 546 (Tex. App.--Dallas 1984, writ ref'd n.r.e.) ("refused"); *TXXN, Inc. v. D/FW Steel Co.*, 632 S.W.2d 706 (Tex. App.--Fort Worth 1982, no writ) ("not deliverable as addressed, unable to forward"). *But* see *Barnes v. Frost Nat. Bank*, 840 S.W. 2d 747, 750 (Tex. App.--San Antonio 1992, no writ). Majority holds that process returned to Secretary of State "unclaimed" is insufficient; but case appears to turn on failure to plead defendants' home or home office address.

See also, *Dispensa v. University State Bank,* 987 S.W.2d 923 (Tex. App.--Houston [14th Dist.] 1999, no pet.). Here, the majority assumes that certified mail returned "unclaimed" is insufficient but affirms. At the time the Secretary of State mailed the citation to defendant, he had moved from that address. Dispensa, who did not receive service of process prior to judgment attacks a six year old judgment. The court holds that the judgment is not void and cannot be successfully attacked collaterally or by bill of review. The majority note that Dispensa had notice of judgment within a few days of the judgment. He therefore had "notice at a meaningful time and in a meaningful manner that would have given him an opportunity to be heard" and the due process requirements of *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 108 S. Ct. 896, 99 L.Ed.2d 75 (1988) are satisfied. The dissent effectively argues that there is no bar date for a collateral attack, that failure to provide notice prior to judgment denies defendant due process, and that Peralta requires reversal of the judgment. Possible lesson: judgments of questionable validity improve with age.

9. Service by publication.

See discussion at page 80, XV.

PART TWO: REQUIREMENTS FOR GRANTING A DEFAULT JUDGMENT

O'Connor's Chapter 5-A, Tex. Lit. G. Chapter 100 (Attacks on Default Judgments, Tex. Lit. G. 100.10)

KEY TOPICS

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I. THE DEFAULT JUDGMENT MUST BE TAKEN ON OR AFTER DEFENDANT'S APPEARANCE DATE

Rule 239, McDonald TCP 27:59.

A. Appearance Date

Unless otherwise prescribed by statute, a defendant's answer or other appearance must be "filed on or before 10 o'clock a.m. of the Monday next after expiration of twenty days from the date of service." Rule 99b(12). If the twentieth day falls on a Monday, the appearance date is the following Monday. *Proctor v. Green*, 673 S.W.2d 390, 392 (Tex. App.--Houston [lst Dist.] 1984, no writ). For justice court cases, appearance date is the 14th day after the day of service. Rule 502.5(d).

B. Effect of a Holiday

If the Monday on which an answer is due is a legal holiday, the answer date is extended to the next day which is not a Saturday, Sunday or legal holiday. Rule 4; *Solis v. Garcia*, 702 S.W.2d 668, 671 (Tex. App.--Houston [14th Dist.] 1985, no writ)(answer was due on Tuesday where the Monday on which the answer was regularly due was President's Day); *Conaway v. Lopez,* 880 S.W.2d 448 (Tex. App.-- Austin 1994, writ ref'd) (answer is due at the end of the next day, rather than at 10:00 a.m.).

II. THE DEFENDANT MUST NOT HAVE ANSWERED OR OTHERWISE APPEARED

Practice Tip: Issues related to e-filing an answer will be determined by the appellate courts. Answer early and verify answer filed. Effect of rejected "e-filed" answer is uncertain, see Rule 21(f) and Effect of Defective Answer, at page 56.

A. No Default Judgment Where Answer on File

A default judgment cannot be taken where an answer is on file, even if the answer is filed after appearance date. Rule 239. *Davis v. Jefferies*, 764 S.W.2d 559 (Tex. 1989); *World Co. v. Dow,* 116 Tex. 146, 287 S.W. 241 (1926); *Schulz v. Schulz*, 726 S.W.2d 256(Tex. App.--Austin 1987, no writ); *Reitmeyer v. Charm Craft Publisher*, 619 S.W. 2d 441 (Tex. Civ. App.- - Waco 1981, no writ); *Palacios v. Rayburn*, 516 S.W.2d 292 (Tex. Civ. App.--Houston [lst Dist.] 1974, no writ).

1. <u>When is an answer "filed"?</u>

a. E-filing is mandatory for many counties. Rule 21(f) states in part:

(5) Timely filing. Unless a document must be filed by a certain time of day, a document is considered timely filed if it is electronically filed at any time before midnight (in the court's time zone) on the filing deadline. An electronically filed document is deemed filed when transmitted to the filing party's electronic filing service provider, except: ...[holidays or if order required, to allow filing]

(6) Technical failure. If a document is untimely due to a <u>technical failure</u> or a <u>system outage</u>, the filing party may seek appropriate relief from the court. If the missed deadline is one imposed by these rules, the filing party must be given a reasonable extension of time to complete the filing. Rule 21(f).

b. Generally.

See Rule 21(f)(5) above as to E-filed documents

An instrument which is not mailed nor e-filed, is filed when it is placed in the custody of the clerk for

filing, not when the file mark is affixed. *Warner v. Glass*, 135 S.W.3d 681,684(Tex. 2004). *Jamar v. Patterson* 868 S.W.2d 318, 319 (Tex.1993); *Texas Workers' Compensation Comm'n v. Hartford Accident & Indem. Co.* 952 S.W.2d 949, 952 (Tex. App.–Corpus Christi 1997, writ denied). The more common issue, however, is the precise time a default judgment is created. See next section and McDonald TCP 27:9-27:15.

c. Fax filing. But per Rule 21(f), E-filing is mandatory in many counties.

Texas Government Code §51.803 permits the Supreme Court to adopt rules to regulate the use of electronic devices. Filing by fax has been approved for most counties. But fax filing is not allowed by attorneys if e-filing has been mandated for the county, see Rule 21(f). There is no rule of civil procedure discussing filing by fax or determining when a faxed document is "filed". Therefore, caution should be used when filing by fax and one should refer to the local rules. One should use extreme caution when filing pleadings by fax. See *Ambassador Medical, Inc. v. Camacho,* No.13-99-753-CV (Tex. App.-- Corpus Christi May 4, 2000, no pet.)(unpublished, 2000 Tex. App. Lexis 2925) (partially received special appearance was deemed not filed; and answer, which was tendered "subject to special appearance" was held to be a general appearance.); *Allstate Ins. Co. v. Century Bank, N.A,* .No. 06-03-00140-CV (Tex. App. -Texarkana, June 4, 2004, no pet.)(2004 Tex. App. Lexis 4998)(mem. op.)(misrouted - faxed answer is ineffective; no approval of fax-filing system by supreme court).

A partially received answer could be deemed "not filed" by local rules. However, see "Effect of Defective Answer" at page 56, as "the courts have gone to great length to prevent the entry of default judgment against parties who have made some attempt [to answer]" *Hock v. Salaices,* 982 S.W.2d 591,593(Tex. App.–San Antonio 1998, no pet.).

d. Mailbox rule.

"If any document is sent to the proper clerk by first-class United States mail in an envelope or wrapper properly addressed and stamped and is deposited in the mail on or before the last day for filing same, the same, if received by the clerk not more than 10 days tardily, shall be filed by the clerk and shall be deemed filed in time." Rule 5, *Stokes v. Aberdeen Ins. Co.,* 917 S.W.2d 267 (Tex.1996); *Milam v. Miller*, 891 S.W.2d 1 (Tex. App.--Amarillo, 1994, writ ref'd); *$429.30 In U.S. Currency v. State* 896 S.W.2d 363 (Tex. App.--Houston [1st Dist.] 1995, no writ); *Thomas v. Gelber Group,* 905 S.W. 2d 786, (Tex. App.--Houston [14th Dist.] 1995 no writ); *Lofton v. Allstate Insurance Co.*, 895 S.W.2d 693 (Tex.1995)(per curiam) (relates to similar appellate Rule TRAP 4(b), in the absence of a postmark, attorney's uncontroverted affidavit may establish date of mailing); *Fountain Parkway, Ltd. v. Tarrant Appraisal Dist*. 920 S.W.2d 799, 802 (Tex. App.--Fort Worth 1996, writ denied)(the mailbox rule does not apply to couriers, such as Federal Express).

2. Precisely when is a judgment created? A judgment is created at rendition -- when judgment is officially announced. The three stages of a judgment are:

a. Rendition -- the official announcement of judgment, either orally in open court or by memorandum filed with the clerk. *Arriaga v. Cavazos*, 880 S.W.2d 830 (Tex. App.-- San Antonio 1994, no writ); *Bazan v. Canales,* 200 S.W.3d 844 (Tex. App. - - Corpus Christi 2006, no pet.)(trial court erred in dismissing case after default judgment rendered, though not signed).

b. Reduction to writing -- a ministerial act discussed in Rule 306a, requiring judgments and orders to be reduced to writing, signed, and dated; such does not change date of prior rendition to the date of signing, however.

c. Entry -- a judgment is "entered" when spread upon the minutes of the trial court by the court clerk's ministerial act. *Oak Creek Homes, Inc. v. Lester A. Jones*, 758 S.W.2d 288 (Tex. App.--Waco 1988, no writ).

Occasionally, not only the date, but the time judgment was either rendered or signed is important. See *Greenwood v. Lafond,* No. 04-97-00691-CV (Tex. App.--San Antonio Dec. 17, 1997, no writ)(unpublished, 1997 Tex. App. Lexis 6451). In *Greenwood*, the file stamps on answers indicated that they were filed at 9:28 a.m. and 9:29 a.m. The record

did not reflect the time the default judgment was signed. The judgment was affirmed because the record did not establish that the answers were on file at the time the default judgment was signed.

However, many trial courts will grant a new trial in such a case.

3. Races to the courthouse. *Davis v. Jefferies*, 764 S.W.2d 559 (Tex. 1989) (trial court erred in rendering judgment at 1:30 p.m. because, unknown to trial court, answer was delivered by air courier to district clerk at 11:10 a.m.); *Oak Creek, supra*. Defendant's answer and docket sheet reflecting default judgment were both filed at 1:38 p.m. Judgment affirmed because trial judge rendered judgment earlier by stating in open court "I'll grant all the relief you've asked for." *Dowell Schlumberger, Inc. v Jackson*, 730 S.W.2d 818 (Tex. App.--El Paso 1987, writ ref'd n.r.e.) (trial court was reversed for announcing and rendering judgment after answer filed); *Dan Edge Motors, Inc. v. Scott*, 657 S.W.2d 822 (Tex. App.--Texarkana 1983, no writ) (defendant did not waive defect in service of process by filing answer after rendition but before judgment was signed.) Remember that an answer may be deemed filed when mailed, see "Mailbox rule", page 55.

4. Effect of answer after judgment.

An answer filed after the default judgment is signed does not entitle defendant to any relief from the judgment. By filing such an answer, however, the defendant does not waive any rights to complain of any defects in the original default judgment. See *Copystatics, Inc. v. Bourn*, 694 S.W.2d 613, 615 (Tex. App. --Texarkana 1985, writ ref'd n.r.e.).

B. Effect of Defective Answer

"Texas courts have always been reluctant to uphold a default judgment without notice where some response from the defendant is found in the record"; *Sells v. Drott*, 259 S.W.3d 156 (Tex. 2008)(per curiam)(answer signed by third party was effective, default judgment reversed and remanded). This philosophy continues in Rule 21(f)(6). Extension of time to be given if deadline missed due to "technical failure or a system outage".

"The courts have gone to great lengths to prevent the entry of default judgments against parties who have made some attempt [to answer], albeit deficient, unconventional, or flat out forbidden under the rules of civil procedure." *Hock v. Salaices,* 982 S.W.2d 591, 593 (Tex. App.–San Antonio 1998, no pet.). Even a defective answer is sufficient to prevent a default judgment. Corporation's answer by non-lawyer prevents a default judgment, *Pagel & Sons v. Gems One Corp.*, No. 03-09-00138-CV (Tex. App. - -Austin, October 15, 2009, no pet.)(2009 Tex. App. Lexis 8035)(mem. op.); *Home Sav. of America FSB v. Harris Cty Water Control & Improvement Dist. #70*, 928 S.W.2d 217 (Tex. App.-- Houston [14th] 1996, no writ) ; *Computize, Inc. v. NHS Communs. Group,* 992 S.W.2d 608 (Tex. App.--Texarkana 1999, no pet.); *R.T.A. v. Cano,* 915 S.W.2d 149, (Tex. App.--Corpus Christi 1996, writ denied); *Home Grown Design, Inc., v. S. Tex. Milling, Inc.,* No. 13-07-00646-CV (Tex. App. - - Corpus Christi, July 3, 2008, no pet.)(2008 Tex. App. Lexis 5129)(mem. op.); plaintiff should file motion to strike answer, *Stinger v. Kaiser Engrs. Hanford,* 951 S.W.2d 159 (Tex. App.--Houston [14th Dist.], Feb. 27, 1997, writ denied); *Okpala v. Coleman,* 964 S.W.2d 698 (Tex. App.--Houston [14th Dist.] 1998, no pet.).

Other defective but sufficient answers include *Frank v. Corbett*, 682 S.W.2d 587 (Tex. App.--Waco 1984, no writ)(unsigned answer); *Corsicana Ready Mix v. Trinity Metroplex Division, General, Portland, Inc.*, 559 S.W.2d 423 (Tex. Civ. App.--Dallas 1977, no writ) (answers by partners as individuals only in a suit solely against the partnership); *Stanford v. Lincoln Tank Co.*, 421 S.W.2d 412 (Tex. Civ. App.--Fort Worth 1967, no writ) (unverified sworn denial).

A defendant who files an answer in the wrong cause number because it was not apprised of the new cause number created by severance, is not subject to default judgment. *Alvarez v. Kirk,* No. 04-04-00031-CV (Tex. App. - - San Antonio, November 4, 2004, no pet.) (2004 Tex. App. Lexis 9880)(mem. op.) citing *City of San Antonio v. Rodriguez* 828 S.W.2d 417, 418 (Tex. 1992). An answer by, for example, Alpha Company, division of Beta Inc. is an answer for both Alpha and Beta because a division is not a separate legal entity. *Matsushita Elec. Corp. of America v. McAllen Copy Data, Inc.*, 815 S.W.2d 850 (Tex. App.--Corpus Christi 1991, writ denied).

A signed statement with cause number and style

which states "agree with divorce" is an answer entitling defendant to notice of trial. Defendant may appear and contest plaintiff's entitlement to other requested relief. *Travis v. Coronado*, No. 2-03-023-CV (Tex. App. - - Fort Worth Feb.5, 2004, no pet.)(2004 Tex. App. Lexis 1142)(mem. op.)

But not every document is sufficient, see *Narvaez v. Maldonado*, 127 S.W.3d 313 (Tex. App. - - Austin 2004, no pet.). Defendant signed the officer's return which was attached to the citation, had the document notarized and mailed it to the clerk's office. The document was not designated as a response to the petition, offered no other response, and did not include defendant's address. Held, the document did not constitute an answer and default judgment affirmed. See *Daylin, Inc. v. Juarez*, 766 S.W.2d 347 (Tex. App.--El Paso 1989, writ denied). The registered agent apparently forwarded a "service of process transmittal form" which indicated that defendant had twice changed its name according to the Secretary of State. The document did not contain the salutation to the court, was not shown to be authorized to be filed by defendant or to be the product of defendant or defendant's attorney and for these reasons, it did not constitute an answer. *Cotton v. Cotton,* 57 S.W. 3d 506 (Tex. App. - - Waco, 2001, no pet.)(defendant had not been served and a letter from defendant, filed by unknown party and not directed to the court or clerk was insufficient to constitute general appearance; subsequent judgment reversed).

An instrument may be deemed an answer by the court even if it is not so styled. *Smith v. Lippmann*, 826 S.W.2d 137 (Tex. 1992) (per curiam). ("A defendant who timely files a signed letter that identifies the parties, the case and the defendant's current address has sufficiently appeared and deserves notice of any subsequent proceedings in the case".) *Armstrong v. Benavides,* 180 S.W.3d 359 (Tex. App. - - Dallas 2005, no pet.)(letter sufficient; evidence insufficient to prove conversion claim)*; Guadalupe Econ. Servs. Corp. v. Dehoyos,* 183 S.W.3d 712(Tex. App. - - Austin, 2005, no pet.)(letter sufficient)*; Home Sav. of America FSB v. Harris County Water Control & Improvement Dist.,* 928 S.W.2d 217 (Tex. App.-- Houston [14th Dist.], 1996 no writ)(same). A document supplying identification of the parties, the case and defendant's current address is sufficient to prevent a default judgment. *Hughes v. Habitat Apartments*, 860 S.W.2d 872 (Tex. 1993) (pauper's affidavit in county court appeal); *Harris v. Harris*, 850 S.W.2d 241 (Tex. App.-- Houston [1st. Dist.] 1993, no writ) (letter answer sufficient -- defendant's address supplied from envelope which was also filed.); *Santex Roofing v. Venture Steel*, 737 S.W.2d 55 (Tex. App.--San Antonio 1987, no writ) (letter admitting debt, but making vague counter-claim); *Terehkov v. Cruz*, 648 S.W.2d 441 (Tex. App.--San Antonio 1983, no writ) (ambiguous letter); *Martinec v. Maneri*, 494 S.W.2d 954 (Tex. Civ. App.--San Antonio 1973, no writ) (response styled plea in abatement). *Thottumkal v. Sidhu*, No. 14-13-00966-CV (Tex. App. - - Houston [14th Dist.], December 9, 2014, n.p.h.)(2014 Tex. App. Lexis 13083)(mem. op.)(motion to quash with request for take-nothing judgment). *But* see *First State Bldg. & L. v. B.L. Nelson*, 735 S.W.2d 287, 289 (Tex. App. --Dallas 1987, no writ) (defendant's argument that his motion for new trial constituted answer was rejected).

C. Appearance

1. Defined.

A party enters a general appearance when it:

a) invokes the judgment of the court on any question other than the court's jurisdiction;

b) recognizes by its acts that an action is properly pending; or

c) seeks affirmative action from the court.

A Rule 11 agreement extending defendant's time to file an initial appearance does not constitute a general appearance. *Exito Elecs. Co. v. Trejo*, 142 S.W.3d 302 (Tex. 2004); *see also Redwood Group v. Louiseau,* 113 S.W. 3d 866, 871 (Tex. App. - - Austin 2003, no pet.).

d. Effect of acts constituting appearance:

An appearance constitutes waiver of service of process. *Moreno v. Polinard,* No. 04-08-00493-CV(Tex. App. - - San Antonio, February 25, 2009, no pet.)(2009 Tex. App. Lexis 1263)(mem. op.)(party who actively participates in injunction hearing enters an appearance and is entitled to notice of future proceedings; default judgment reversed); *Sobol v. Sobol,* No.03-02-00293-CV (Tex. App. - - Austin, April 3, 2003, no pet.)(2003 Tex. App. Lexis 2838)(letter to court noting intent to resolve was appearance); *Adcock v. Sherling,* 923 S.W.2d 74, 79

(Tex .App.--San Antonio 1996, no writ); *Whoa-Soon Kang v. Rawar, Inc.,* No.05-95-01697-CV (Tex. App. --Dallas Aug. 22, 1997, no pet.)(unpublished, 1997 Tex. App. Lexis 4532)(motion for new trial as to interlocutory judgment is appearance and lack of service is waived); *Health & Tennis Corp. of America v. Adams,* No. 14-97-00346-CV (Tex. App.--Houston [14th Dist.] Jan. 8, 1998, no pet.)(unpublished, 1998 Tex. App. Lexis 49)(motion for new trial constitutes general appearance).

e. Other matters:

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 had run. *Ramirez v. Consol. HGM Corp.,*124 S.W.3d 914, 917(Tex. App. - - Amarillo 2004, no pet.); *Seagraves v City of McKinney*, 45 S.W.3d 779, 782-83 (Tex. App. - - Dallas 2001, no pet.); *Taylor v Thompson*, 4 S.W.3d 63, 66(Tex. App. - - Houston [1st Dist] 1999, pet. denied).

A garnishee cannot waive service. *Moody Nat'l Bank v. Riebschlager*, 946 S.W.2d 521 (Tex. App.--Houston [14th Dist.] 1997, writ denied).

Party filing appeal bond from justice court judgment is deemed to have answered and appeared and consented to the jurisdiction of the county court. *Montgomery v. Chase Home Fin., LLC,* No. 05-08-00888-CV(Tex. App. - - Dallas September 2, 2009, no pet.)(2009 Tex. App. Lexis 7020). When a defendant is deemed to have answered and appeared at court, she waives all complaints as to defects in service of process, Rules 120, 121; *Phillips v. Dallas County Protective Servs. Unit*, 197 S.W.3d 862, 865 (Tex. App. - - Dallas 2006, pet. denied), cert. denied, 552 U.S.952(2007).

2. <u>Effect of other appearances.</u>

Practice Tip: Use caution if filing motion to quash as it may lead to default judgment, see "b" below.

a. Defensive pleadings temporarily preventing default judgment. Appearances other than an answer, such as a plea in abatement, motion to quash, special appearance or plea to the jurisdiction, will also prevent a default judgment until the appearance is resolved. *Schulz v. Schulz*, 726 S.W.2d 256 (Tex. App.--Austin 1987, no writ) (plea in abatement); *Investors Diversified Services, Inc. v. Bruner*, 366 S.W.2d 810 (Tex. Civ. App.--Houston 1963, writ ref'd n.r.e.) (motion to quash); *Buhrman-Pharr Hardware Co. v. Medford Bros.*, 118 S.W.2d 345 (Tex. Civ. App.--Texarkana 1938, writ ref'd)(plea of privilege); *Dawson - Austin v. Austin,* 968 S.W.2d 319 (Tex. 1998); cert. denied, 525 U.S. 1067 (1999)(defendant did not enter a general appearance by filing unsworn special appearance, motion to quash service, plea to jurisdiction and plea in abatement); Pohl and Hittner, *Judgments by Default in Texas*, 37 S.W.L.J. 421, 432 (1983) (special appearance). Exception: Garnishee must be served with writ of garnishment and general rules, including Rules 121 and 122 are inapplicable. After citation or service is quashed, garnishee is not deemed to have entered appearance. *Moody Nat'l Bank v. Riebschlager,* 946 S.W.2d 521 (Tex. App.--Houston [14th Dist.] 1997, writ denied). When a motion to transfer venue is properly filed and hearing scheduled by movant, the trial court is required to hear and determine that motion before considering a default judgment, *Glover v. Moser*, 930 S.W.2d 940 (Tex. App.--Beaumont 1996, writ denied).

b. Default judgments allowed upon resolution of defensive matter. If a motion to quash is granted, the defendant will be deemed to have appeared on the next Monday after 20 days from the date of the granting of the motion. Rule 122. See *Portfolio Recovery Assocs., LLC v. Talplacido,* No. 05-10-01244-CV(Tex. App. - - Dallas, January 18, 2012, no pet.)(2012 Tex. App. Lexis 364)(mem. op.)(default judgment proper where defendants failed to appear and answer after court quashed citation); *Wells v. Southern States Lumber & Supply Co.*, 720 S.W.2d 227 (Tex. Civ. App.--Houston [14th Dist.] 1986, no writ) (same). *Allright, Inc. v. Roper*, 478 S.W.2d 245 (Tex. Civ. App.--Houston [14th Dist.] 1972, writ dism'd) (default judgment was proper following a successful motion to quash where the defendant, instead of filing a new answer, relied only on a conditional answer filed subject to the denial of a motion to quash). When any other motion or plea is overruled or denied, however, the defendant's answer is due immediately. See *Duplantis v. Noble Toyota, Inc.*, 720 S.W.2d 863 (Tex. App.--Beaumont 1986, no

writ)(default judgment proper where no answer filed after motion for transfer implicitly overruled); *Texas State Bd. of Pharmacy v. Martinez*, 658 S.W.2d 277, 279 (Tex. App.--Corpus Christi 1983, writ ref'd n.r.e.) (default judgment taken eighty minutes after the court overruled defendant's motion to dismiss for lack of jurisdiction was proper); *First State Bldg. & L. v. B. L. Nelson,* 735 S.W.2d 287, 289 (Tex. App.--Dallas 1987, no writ) (after defendant's motion for new trial granted, answer apparently due immediately).

c. Other appearances. An answer is an appearance and dispenses with a necessity for issuance or service of citation. Rule 121. *Burrow v. Arce*, 997 S.W.2d 229, 246 (Tex. 1999) An appearance constitutes a waiver of service. *Dodson v. Seymour*, 664 S.W.2d 158, 161 (Tex. App. - - San Antonio 1983, no writ) Signing an agreed judgment, which the court enters, constitutes an appearance. When an unserved defendant appears at a hearing, plaintiff should request that the appearance be noted on the docket and request that the proceedings be transcribed. Participating as a witness does not constitute a general appearance. *Werner v. Colwell*, 909 S.W.2d 866, 870 (Tex. 1995). Signing, but not filing, a Rule 11 agreement was insufficient to constitute appearance in *Redwood Group v. Louiseau,* 113 S.W.3d 866 (Tex. App. - - Austin 2003, no pet.).

Participating in hearing by answering court's questions and seeking continuance was appearance entitling party to notice of future hearings. *In the Interest of N.L.D.*, 344 S.W.3d 33 (Tex. App. - - Texarkana 2011, no pet.). Sending deposition notice and filing motion to compel was appearance. *De La Rocha v. Lee*, 354 S.W.3d 868, 873 (Tex. App. - - El Paso, 2011, no pet.).

But see *Bluebonnet Fin. Assets v. Miller*, 324 S.W.3d 603, (Tex. App. -- El Paso 2010, no pet.) Defendant's written objection to evidence, agreed motion for new trial, and post-trial brief, were held insufficient to constitute an answer or appearance. Trial court's take-nothing judgment reversed and rendered for creditor - assignee, on credit card case. Defendant appeared through his attorney, but did not offer any evidence in opposition to the claims. Defendant's attorney objected to documents offered as evidence and to creditor's witness.

d. Appeal constitutes appearance. If defendant obtains reversal of default judgment, he is generally deemed to have appeared and should usually file an answer immediately, Rule 123. But see Rule 120a, which allows a non-resident defendant to obtain reversal of a default judgment and yet assert a special appearance. *Boyd v. Kobierowski,* No. 04-08-00209-CV (Tex. App. - - San Antonio, February 25, 2009, no pet.)(2009 Tex. App. Lexis 1267)(non -resident failed to timely file special appearance after reversal).

e. Removal and remand. Citing Rule 237a and 239 it was held that a default judgment cannot be granted following remand until after 15 days from defendant's receipt of the remand notice from plaintiff. *HBA East, Ltd. v. Jea Boxing Co., Inc.,* 796 S.W.2d 534 (Tex. App.–Houston [1st Dist.] 1990, *cert denied*, 111 S. Ct. 2828 (1992). Of course the safer procedure would be to immediately file an answer upon learning of the remand.

f. Bankruptcy. If service of process is made while defendant is in bankruptcy, even by one without notice of the bankruptcy, such is void and without legal effect. *Wallen v. State*, 667 S.W.2d 621 (Tex. App. - - Austin, 1984, no writ); see also 11 U.S.C.A. §362(a), automatic stay bars continuation of a proceeding, including the issuance of process .

g. Filing Bond/ Pauper's Affidavit constitutes appearance.

Appeal bond and pauper's affidavit operate as an answer *Brown v. Apex Realty*, 349 S.W.3d 162 (Tex. App. - - Dallas 2011, pet. dism'd w.o.j.) citing *Hughes v. Habitat Apts*., 860 S.W.2d 872, 873 (Tex. 1993)(per curiam). Service may be unnecessary as to a surety on a bond filed of record in pending litigation. A surety is a "quasi party." *Pease v. Rathburn-Jones Engineering Company*, 243 U.S. 273, 277-78, 37 S.Ct. 283, 286, 61 L.Ed. 715 (1917). See *also Rodriguez v. Lutheran Social Services of Texas, Inc.*, 814 S.W.2d 153 (Tex. App.--San Antonio 1991, writ denied).

III. THE CITATION MUST HAVE BEEN PROPERLY ISSUED

McDonald's TCP 11:52, 11:53; O'Connor's Texas Rules 2 (H)(2)

Rule 99(a) Change: (effective January 1, 2012) "The clerk must retain a copy of the citation in the court's file." Returns are customarily made on the citation. However, Rule 107(a)(effective January 1, 2012) states that the return, "may, but need not, be endorsed on or attached to the citation." See Return of Service, page 18.

A. Purpose of Citation

The citation informs the defendant of the suit and advises when, where and how to answer. The citation together with plaintiff's petition is called "process." The purpose of citation is to give the court proper jurisdiction over the parties and to provide notice to the defendant that it has been sued, by a particular party asserting a particular claim, so that due process will be served and that defendant will have an opportunity to appear and defend the action. The requirement of due process is met if the notice affords the party a fair opportunity to appear and defend its interests. *Sgitcovich v. Sgitcovich,* 241 S.W.2d 142, 146 (Tex.1951).

B. Liberal or Strict Construction.

Strict compliance with the rules for service of citation is generally required. "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). But see *Bashir v. Khader*, No. 01-12-00260-CV (Tex. App. - - Houston [1st Dist.], October 4, 2012, no pet.)(2012 Tex. App. Lexis 8333)(mem. op.). "Although [Defendant] complained of clerical errors in the citation, he had the burden to prove that the errors misled him and caused him to fail to answer the suit." Such seems contrary to the strict compliance requirement of *Primate*, above. The facts in *Bashir* are unusual. Bashir failed to appear at the hearing on his new-trial motion. The court denied the motion and Bashir did not contend on appeal that he had satisfied the *Craddock* requirements for a new trial. Instead, his primary complaint was the misconduct of his trial attorney. The point was waived because it was not presented to the trial court.

C. Requisite Content of Citation

1. Style. The citation must be styled "The State of Texas." Tex. Const., Art. V, §12; Rule 15, 99b(1).

2. Signature and seal. The citation must be signed by the clerk under seal of the court. Rule 99b(2). *Midstate Envtl. Servs., LP v. Peterson*, 435 S.W.3d 287 (Tex. App. - - Waco 2014, n.p.h.)(lack of seal was "glaring defect"; also, citation was not directed to the defendant). But see, *Consol. Am. Indus. v. Greit-Amberoaks, L.P.*, No. 03-07-00173-CV, 2008 Tex. App. Lexis 9272 (Tex. App. – Austin, December 12, 2008, no pet.)(mem. op.)(seal- requirement met when citation is signed by a deputy of the district court, as "issued and given under my hand and seal of said court"). Note that TRAP 34.5(f), "on any party's motion or its own initiative, the appellate court may direct the trial court clerk to send it any original document". The trial court may also determine that original documents should be inspected by the appellate court. Inspection of original citation may reveal seal that did not appear on copy. The party requesting service should verify that the citation in the appellate court record shows a seal. *Wells v. Hudson & Keyse, LLP*, No. 05-08-00990-CV (Tex. App. - - Dallas, December 1, 2009, no pet.)(2009 Tex. App. Lexis 9160)(mem. op.); *Union Pac. Corp. v. Legg,* 49 S.W.3d 72 (Tex. App. - - Austin 2001, no pet.).

3. Location of court. The citation must contain the court's name and location. Rule 99b(3). *Faaborg v. Allcorn*, No. 11-05-00365-CV (Tex. App. - - Eastland, November 9, 2006, no pet.)(2006 Tex. App. Lexis 9700)(mem. op.)("county court at law #2 Williamson County, Texas" properly stated the name and location of the court - - though address not stated) see also 11, requiring court clerk's address.

4. Date of filing of petition. The citation must state the date of filing of the petition. Rule 99b(4). *In re J.T.O.*, No. 04-07-00241-CV (Tex. App. - - San Antonio January 16, 2008, no pet.)(2008 Tex. App. Lexis 303)(mem. op.)(wrong date was fatal error); *Garza v. Garza*, 223 S.W.2d 964 (Tex. Civ. App.--San Antonio 1949, no writ) (incomplete filing date).

5. Date of issuance. The citation must state the date of issuance. Rule 99b(5). The failure to do so, however, will not affect the validity of the default judgment unless harm is demonstrated. *London v. Chandler*, 406 S.W.2d 203 (Tex. 1966); *Wagnon v. Elam,* 65 S.W.2d 407 (Tex. Civ. App.--San Antonio 1933, no writ). The suit must be on file when the citation is issued. *McGraw-Hill, Inc. v. Futrell*, 823 S.W.2d 414, 417 (Tex. App.--Houston [1st Dist.] 1992, writ denied).

6. File number. Rule 99b(6). *Martinez v. Wilber*, 810 S.W.2d 461 (Tex. App.--San Antonio 1991, writ denied) (erroneous file number is fatal error); *Durham v. Betterton*, 79 Tex. 223, 14 S.W. 1060 (1891).

7. Names of parties. Rule 99b(7). *Union Pac. Corp. v. Legg,* 49 S.W.3d 72(Tex. App. - - Austin 2001, no pet.)($50 million judgment reversed because citation named Union Pacific Railroad Company, when Union Pacific Corporation was the named defendant); *Mantis v. Resz*, 5 S.W.3d 388 (Tex. App.–Fort Worth 1999, pet. denied)(petition and citation naming defendant Michael Mantis sufficient, though defendant's name is Michael Mantas); *Medeles v. Nunez*, 923 S.W.2d659(Tex.App.--Houston[1stDist.]1996,writ denied)(petition named Maria Medeles, citation directed to Maria Mendeles and the sheriff or constable is fatal error).

8. Directed to defendant. The citation must be directed to the defendant, Rule 99b(8). A citation directed to defendant and the sheriff or constable is sufficient. *Barker CATV Constr., Inc. v. Ampro, Inc*. 989 S.W.2d 789, 792 (Tex. App.--Houston [1st Dist.] 1999, no pet.). Earlier opinions held that citation to a defendant and sheriff or constable were confusing and insufficient, *Sports & Fitness Clubs, Inc. v. Tejas Masonry Contr., Inc.*, No. 07-96-0342-CV (Tex. App.-Amarillo Oct. 6, 1997, no writ)(unpublished, 1997 Tex. App. Lexis 6090); *Medeles v. Nunez,* 923 S.W. 2d 659 (Tex. App.--Houston [1st Dist.] 1996,writ denied). While the citation may, and in some cases must, be served on an agent, it is invalid if it is directed to the agent rather than his principal. See *ISO Prod. Management 1982, Ltd. v. M & L Oil & Gas Exploration, Inc.*, 768 S.W.2d 354 (Tex. App.--Waco 1989, no writ)(citation directed to president of limited partnership's corporate general partner); *Dan Edge Motors, Inc. v. Scott*, 657 S.W.2d 822 (Tex. App.-- Texarkana 1983, no writ)(registered agent); *Temple Lumber Co. v. McDaniel*, 24 S.W.2d 518 (Tex. Civ. App.--Beaumont 1930, no writ) (corporate officer); *Bynum v. Davis*, 327 S.W.2d 673 (Tex. Civ. App.--Houston 1959, no writ) (county judge).

9. Name and address of plaintiff's attorney. The citation must include the name and address of plaintiff's attorney, otherwise plaintiff's address. Rule 99b(9).

10. Time in which to answer. The citation must state the time in which the Texas Rules of Civil Procedure require defendant to file a written answer. Rule 99b(10).

11. Court clerk's address.

See Rule 99b(11).

12. Default judgment warning. The citation "shall notify the defendant that in case of failure of defendant to file an answer, judgment by default may be rendered for the relief demanded in the petition. The citation shall direct the defendant to file a written answer to the plaintiff's petition on or before 10:00 a.m. on the Monday next after the expiration of twenty days [ten days in justice court] after the date of service thereof. The requirement of subsections 10 and 12 of this section shall be in the form set forth in section c of this rule." (**see** next paragraph) Rule 99b(12).

13. Required notice pursuant to Rule 99(c). This rule requires that the citation include the following notice: "You have been sued. You may employ an attorney. If you or your attorney do not file a written answer with the clerk who issued this citation by 10:00 a.m. on the Monday next following the expiration of twenty days after you were served this citation and petition, a default judgment may be taken against you." Rule 99(c).

14. Petition copies. Plaintiff must provide sufficient copies for use in serving parties to be served. Rule 99(d).

15. Pauper's oath. The citation must be endorsed "pauper oath filed" and signed officially by the clerk if the suit is prosecuted upon an affidavit of inability to pay costs. Rule 126.

16. Plaintiff may prepare. Plaintiff or plaintiff's attorney may prepare the citation. The clerk may not charge a fee for signing and affixing a seal to such a citation. Civ. Prac. Rem. Code § 17.027; TLG 31.100.

D. Clerk's Duty

"Upon filing of the petition, the clerk, when requested, shall forthwith issue a citation and deliver the citation as directed by the requesting party... upon request...additional citations shall be issued by the clerk" The clerk must retain a copy of the citation, Rule 99(a). The citation is invalid if it is amended without the trial court's approval, Rule 118. *Plains Chevrolet, Inc. v. Thorne*, 656 S.W.2d 631, 633 (Tex. App.--Waco 1983, no writ) (amendment by serving officer to add second defendant's name to citation is invalid).

E. Suit on File

Suit must be on file when the citation is issued. Rule 99(a). See *McGraw-Hill, Inc. v. Futrell*, 823 S.W.2d 414 (Tex. App.--Houston [1st Dist.] 1992, writ denied); *Moorhead v. Transportation Bank*, 62 S.W.2d 184 (Tex. Civ. App.--Amarillo 1933, no writ).

F. Elements of Issuing Citation

The issuance of a citation includes preparing, dating, attesting to and delivering it to an officer or other appropriate person for service. *London v. Chandler*, 406 S.W.2d 203 (Tex. 1966).

G. Issuance on Sunday

The citation cannot be issued on Sunday except where the prayer seeks an injunction, attachment, garnishment, sequestration or distress proceedings. Rule 6.

H. Shall Not Mislead

In *Smith v. Commercial Equipment Leasing Co.*, 678 S.W.2d 917 (Tex.1984), defendant was served by certified mail. However, the citation directed that it be served on the defendant, in person. Held, default judgment void, because defendant could have believed subsequent personal service would occur.

IV. THE CITATION MUST BE PROPERLY SERVED AND RETURN FILED

This requirement is discussed in Part One, Service of Process, page 16.

V. RETURN MUST HAVE BEEN ON FILE FOR THE REQUISITE PERIOD, RULE 107(h)

Practice Tip: Rule 107 was amended for 2012 and no longer requires that the return be endorsed on or attached to the citation. "The return may, but need not be, endorsed on or attached to the citation." "The return and any document to which it is attached must be filed with the court and may be filed electronically or by facsimile, if those methods of filing are available." Rule 107(g). Per Rule 107(h) proof of service must be on file 10 days, exclusive of day of filing and day of judgment. The process server's decision to e-file or paper-file is important, because of Rule 107 requirements and the appellate record.

A. File-Stamp E-Filed Returns

No file-stamp on e-filed return, reversed and remanded. *Midstate Envtl. Servs., LP v. Peterson*, 435 S.W.3d 287 (Tex. App. - - Waco 2014, n.p.h.). Plaintiff unsuccessfully argued that return was attached to file-stamped citation.

B. File Mark

See Practice Tip, above. These cases may be obsolete since citation is no longer required to be filed with return under Rule 107.

The clerk's file mark showing the date of filing must appear on the citation and return. *Melendez v.*

John R. Schatzman, Inc., 685 S.W.2d 137, 138 (Tex. App.--El Paso 1985, no writ) (notation on fee docket is not probative evidence of the date of filing of citation and return); *Union Pac. Corp. v. Legg,* 49 S.W.3d 72 (Tex. App. - - Austin 2001, no pet.). The trial court cannot supplement the record after writ of error appeal by ordering a file mark placed on the citation. *Gerdes v. Marion State Bank*, 774 S.W.2d 63 (Tex. App.-San Antonio 1989, writ denied).

C. Electronic Record, 1989

Gibraltar Savings Association v. Kilpatrick, 770 S.W.2d 14 (Tex. App.--Texarkana 1989, writ denied). The tangible record before the court at the time judgment was entered did not include the date the citation was filed. The appellate record contained a verified copy of a computer printout entitled "Justice Information and Management Systems -- Service of Document". The printout indicated that the return of citation was filed with the clerk on November 30, 1987 and judgment signed February 8, 1988. The court of appeals justifies the apparent record-omission by noting that computer records may be displayed on screens for examination without printing a copy. The court concludes, "the fact that the computerized record has not yet been reduced to paper writing does not mean that it is not a part of the court record, so long as it is capable of being transcribed", 770 S.W.2d at 17. Rule 107 no longer requires that citation be filed with the return.

D. Lost Return

Burrows v. Miller, 797 S.W.2d 358 (Tex. App.--Tyler 1990, no writ) holds that absence of return is not fatal in direct attack on judgment through bill of review action. Service was by publication and defendants answered through their appointed attorney, though the affidavit for service by publication was apparently fraudulent. Though recital of service in default judgment creates no presumption of service, the recitation is some evidence of that fact. Recital of service had gone unchallenged for 70 years and return of service for another 1920 case was in the court's file. The court of appeals finds secondary evidence of the lost return sufficient and affirms the judgment, citing no Texas authority on this issue. Though not discussed, the need for finality in ancient judgments, and inevitable loss of records over decades, supports the decision.

NOTE: See Practice Tip at beginning of this section. Citations are no longer required to be filed. The clerk must retain a copy of the citation, Rule 99(a).

VI. THE PLAINTIFF MUST FILE A CERTIFICATE OF LAST KNOWN ADDRESS AND THE CLERK MUST PREPARE AND SEND NOTICE OF JUDGMENT

Tex. Lit. G. 100.102, McDonald TCP 27:64.

A. Duty to Prepare Certificate

At or immediately prior to the rendition of a final or interlocutory default judgment, the plaintiff or his attorney must certify in writing the last known mailing address of the party or parties against whom the default judgment is being taken. Rule 239a. See *Buddy "L", Inc. v. General Trailer Co.*, 672 S.W.2d 541, 545 (Tex. Civ. App.--Dallas 1984, writ ref'd n.r.e.) (plaintiff must certify the last known address even though defendant may have a different office registered for receipt of service); *Hillson Steel Products, Inc. v. Wirth, Ltd.*, 538 S.W.2d 162 (Tex. Civ. App.--Houston [lst Dist.] 1976, no writ) (same).

B. Clerk's Duty

Immediately after the signing of the judgment, the clerk shall notify the defendant thereof by mailing a postcard notice to the defendant at the address given in the certificate, stating the number and style of the case, the court where it pends, the names of the parties in whose favor and against whom the judgment was rendered, and the date of signing. The clerk shall also note the fact of such mailing on the docket. Rule 239a.

C. Effect of Failure to Comply

It is often stated that the finality of the judgment is not affected by the failure of either the plaintiff or the clerk to comply with Rule 239a. See *Clements v. Barnes*, 822 S.W.2d 658, 659-60, (Tex. App.--Corpus Christi 1991) *rev'd on other grounds*, 834 S.W.2d 45 (Tex. 1992); (court of appeals holds that failure to

comply is not reversible error; but see *Grayson Fire, infra*); *In re Collins*, 870 S.W.2d 682 (Tex. App.--Amarillo 1994, writ denied)(same);*City of Houston v. Arney*, 680 S.W.2d 867 (Tex. App.--Houston [lst Dist.] 1984, no writ) (Rule 239a is an administrative convenience only); *Grayson Fire Extinguisher Co. v. Jackson*, 566 S.W.2d 321, 323 (Tex. Civ. App.--Dallas 1978, writ ref'd n.r.e.) (defendant's remedy is to file a bill of review); *Sanchez v. Texas Ind., Inc.*, 485 S.W.2d 385 (Tex. Civ. App.--Waco 1972, writ ref'd n.r.e.). *Buddy "L", Inc. v. General Trailer Co., Inc.*, 672 S.W.2d 541 (Tex. App.--Dallas 1984, writ ref'd n.r.e.)(Rule239a omission supports bill of review)and *McDonough v. Williamson*,742 S.W.2d 737, 740 (Tex. App.-Houston [14th Dist.] 1987, no writ) (criticizing *Grayson* opinion, *supra,* for assuming 239a omission does not affect judgment's validity.)

D. Notice of Final Judgment

If the default judgment is a final judgment, the clerk must also give notice to all parties or their attorneys of record by first class mail advising of the signing. Rule 306a, §3; TRAP 5(b)(3). The failure of the clerk to comply with this rule also does not affect the finality of the judgment or the time periods for appeal, except that in the absence of actual knowledge of the signing, the adversely affected parties may obtain up to ninety additional days to complain of the judgment and perfect any appeals. Rule 306a, §4, 5; TRAP 5(b)(4) and (5). See *Mori Seiki Co. v. Action Mach. Shop, Inc.*, 696 S.W.2d 414 (Tex. App.--Houston [14th Dist.] 1985, no writ). The trial judge shall find the date upon which the party or his attorney first either received a notice of the judgment or actual knowledge of the judgment and include this finding in the court's order, TRAP 5(b)(5). The motion may be filed at any time within the trial court's jurisdiction measured from the date determined by Rule 306a(4). *John v. Marshal Health Servs.* 58 S.W.3d 738, 741 (Tex.2001).

VII. THE DEFAULT JUDGMENT IS NOT FINAL UNLESS IT ACTUALLY DISPOSES OF ALL PARTIES AND CLAIMS, OR CLEARLY STATES THAT IT DOES SO.

Practice Tip: the preferred finality language is "This judgment finally disposes of all parties and all claims and is appealable".

Finality of judgment appears simple, but is challenging. Explain to your staff the importance of the finality language, and why it should never be used in an interlocutory judgment. Proof each judgment carefully, comparing it to the petition, and determine whether it should be, and is, a final judgment. ***See*** *In re Daredia, 317 S.W.3d 247 (Tex. 2010)(per curiam), below. One error can be devastating.*

See O'Connor's Texas Rules,, Chapter 9, C§6. McDonald TCP 27:4-27:8.

A. *Lehman v. Har-Con Corp.* - the Deterioration of the Mother Hubbard Clause

Finality of a judgment was once assured by use of a Mother Hubbard clause - - a simple statement that all relief not expressly granted is denied. However, because the clause was abused and inserted in plainly interlocutory judgments, the Texas Supreme Court holds that a judgment issued without a conventional trial is final for purposes of appeal "if, and only if, either it actually disposes of all claims and parties then before the court, regardless of its language, or it states with unmistakable clarity that it is a final judgment as to all claims and all parties". *Lehman v. Har-Con Corp.*, 39 S.W.3d 191, 206 (Tex. 2001); accord *In re Burlington Coat Factory Warehouse of McAllen, Inc.*, 167 S.W.3d 827 (Tex. 2005). *Lehman* and *Burlington* suggest a revised clause for finality: "A statement like,'This judgment finally disposes of all parties and all claims and is appealable', would leave no doubt about the court's intention."

B. *In re Daredia*

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 (Tex. 2010)(per curiam)($700,000 inadvertent final judgment).

> If the language of the order is clear and unequivocal, it must be given effect despite any other indications that one or more parties did not intend for the judgment to be final. An express adjudication of all parties and claims in a case is not interlocutory merely because the record does not afford a legal basis for the adjudication. In those circumstances, the order must be appealed and reversed. (*In re Daredia,* 317 S.W.3d at 248-49.)
>
> Even if dismissal [of Daredia] was inadvertent, as American Express insists, it was nonetheless unequivocal and therefore effective." Id. at 249

Summary of Default Judgment's Finality.

1. A default judgment is final if it disposes of all parties and claims.

2. A default judgment is final, but erroneous, if it does not actually dispose of all parties and claims, but states with unmistakable clarity that it does so. A judgment stating, "this judgment finally disposes of all parties and all claims and is appealable" is a clear expression of the trial court's intent to render a final judgment. The judgment will be enforced as final, even though there are remaining parties or claims. *In re Daredia*, 317 S.W.3d at 248-249; *Lehman v. Har-Con Corp.*, 39 S.W.3d 191, 200 (Tex. 2001).

3. A simple statement that "all relief not granted is denied," is insufficient to indicate that the judgment is final. Such a default judgment is final, only if it actually disposes of all parties and claims.

Pre-*Daredia* cases (2010) must be reviewed, considering this important case. Per "2" above, a judgment previously held to be interlocutory may now be final, if the judgment clearly states an intention to dispose of all parties and claims.

C. Other Finality Matters

The finality issue remains troublesome. *Hest Techs., Inc. v. PC Connection Sales Corp.*, No. 02-13-00278-CV (Tex. App. - - Fort Worth, April 3, 2014, n.p.h.)(2014 Tex. App. Lexis 3599)(mem. op.)(judgment inadvertently interlocutory; failure to dispose of all claims and failure to use finality language); *Castle & Cooke Mortg., LLC v. Diamond T Ranch Dev., Inc.*, 330 S.W.3d 684 (Tex. App. - - San Antonio 2010, no pet.)($7 million judgment inadvertently interlocutory, for failure to use finality language, and failure to dispose of all claims); *Sudderth v. Phillips,* No. 05-02-01039-CV (Tex. App. - - Dallas April 3, 2003, pet. denied)(2003 Tex. App. Lexis 2898)(mem. op.)($1.4 million default judgment deemed interlocutory, based on failure to dispose of pre-judgment interest issue). *Hullaby v. Waters,* No. 01-12-00127-CV(Tex. App. - - Houston [1st Dist.], August 15, 2013, n.p.h.)(2013 Tex. App. Lexis 10310)(default judgment failed to dispose of all parties; interlocutory judgment)*; Whispering Pines Lodge v. Abercrombia,* No. 06-05-00127-CV (Tex. App. - - Texarkana, November 23, 2005, no pet.)(2005 Tex. App. Lexis 9791)(mem. op.)(same); But see *Southern Mgmt. Servs. v. SM Energy Co.*, 398 S.W.3d 350 (Tex. App. - - Houston [14th Dist.] 2013, n.p.h.). The judgment stated that it is "final, disposes of all parties, and is appealable." However, the judgment did not address defendant's third-party claims against two individuals. The judgment is affirmed against defendant, but reversed and remanded as to defendant's third-party claims. No discussion of appellate review of interlocutory judgment.

An appellate court is permitted to "abate the appeal to permit clarification by the trial court" citing *Lehmann v. Har-Con. Corp.*, 39 S.W.3d at 206. Tex. R. App. P. 27.2 allows an appellate court to allow an appealed order which is not final to be modified so as to be made final. *Dion's of Tex. v. Shamrock Econ. Dev. Corp*, No. 07-04-00050-CV (Tex. App. - - Amarillo, August 16, 2004, no pet.)(2004 Tex. App. Lexis 7408)(mem. op.).

A notice of non-suit of other defendants, alone, does not finalize a judgment against a remaining defendant. An order of dismissal is required as to the non-suit in order to finalize the case. *In Re Bro Bro Properties, Inc.*, 50 S.W.3d 528 (Tex. App. - - San Antonio 2000, orig. proceeding) citing *In Re Bennett*, 960 S.W.2d 35, 38 (Tex. 1997).

Likewise, the court may grant only an interlocutory default judgment against a defaulting defendant if certain issues not disposed of by the judgment remain in the case. The remaining issue is

usually damages on an unliquidated claim, Rule 243, but it may be a defectively pleaded cause of action or a claim added in an unserved amended petition. *In re Burlington Coat Factory Whs.*, 167 S.W.3d 827 (Tex. 2005)(exemplary damage claim remained); *Zamarripa v. Sifuentes*, 929 S.W.2d 655, 657 (Tex.App.-- San Antonio 1996, no writ) (interest claim remained); *Navarra v. Landeen,* No. 03-97-00456-CV (Tex. App.--Austin Oct. 1, 1998, pet. denied.)(unpublished, 1998 Tex. App. Lexis 6141)(pre-judgment interest issue remained); *Chase Manhattan Mortg.Corp. v.Manning,* No. 05-04-00295-CV(Tex. App. - - Dallas May 31, 2005, no pet.)(2005 Tex. App. Lexis 4162)(mem. op.) (attorney fee issue remained); *In re Zurich Am. Ins. Co.*, No. 07-07-0121-CV(Tex. App. - - Amarillo July 5, 2007, no pet.)(2007 Tex. App. Lexis 5307)(mem. op.)(court costs and attorney fees remained).

D. Correction of Clerical Mistakes, Rule 316

The trial court may correct clerical errors in a judgment even after plenary power has expired. A clerical error is a discrepancy between the judgment rendered and the entry of judgment in the record. A judicial error is an error which occurs in the rendering of the judgment, and cannot be corrected nunc pro tunc. See *Texas DOT v A.P.I. Pipe & Sup.* 397 S.W.3d 162, 167 (Tex. 2013).

E. Interest

To avoid issues as to finality of judgment, the judgment should dispose of all issues, and specifically state how interest is to be computed. Without such specificity, the judgment is vague and may be deemed interlocutory as discussed in the next paragraph. However, interest may be simply a creature of statute and omissions related to interest may not necessarily render a judgment interlocutory. As Justice O'Connor stated in *Olympia Marble & Granite v. Mayes*, 17 S.W.3d 437 (Tex. App.–Houston [1st Dist.] 2000, no pet.):

> We construe Zamarripa, [citations omitted], as standing for the proposition that if the record reveals facts that call into question the date on which prejudgment interest should accrue, then the calculation of prejudgment interest is not a simple ministerial act. We construe Zamarripa and H.E. Butt as standing for the proposition that, in such a case, the judgment is not final. On the other hand, if there are no facts in the record to call into question the date on which prejudgment interest should accrue, then the calculation of prejudgment interest is a mere ministerial act.

F. Vague Judgment

A final judgment must be certain and enforceable by ministerial officers. *H.E. Butt Grocery Co. v. Bay, Inc.*, 808 S.W.2d 678 (Tex. App.--Corpus Christi 1991, writ denied) (judgment that recites that plaintiff "recover pre-judgment and post-judgment interest on their accounts as provided by the laws of Texas" uncertain because pre-judgment interest could be 6% or 10% per annum; judgment interlocutory and appeal dismissed for want of jurisdiction). *Romero v. Hussein*, No. 05-02-00468-CV (Tex. App. - - Dallas Aug. 4, 2003, no pet.)(2003 Tex. App. Lexis 6683)(mem. op.) Judgment failed to state which of two claimants recovered $25,000; judgment interlocutory and appeal dismissed for want of jurisdiction.

G. No Presumption of Finality

The presumption that a court intended to and did dispose of all parties and issues in its judgment does not apply to default or summary judgments. *Houston Health Clubs, Inc. v. First Court of Appeals*, 722 S.W.2d 692 (Tex. 1986); *Chase Manhattan Bank, N.A. v. Lindsay*, 787 S.W.2d 51 (Tex. 1990). However, the presumption of finality applies to a post-answer default judgment. *Thomas v. Dubovy-Longo*, 786 S.W.2d 506 (Tex. App.--Dallas 1990, writ denied) (judgment against defendant-counter plaintiff failed to dispose of counterclaim, but judgment presumed final).

H. Interpleader

A post judgment interpleader is a new filing and the trial court had to have jurisdiction to determine ownership of funds tendered into its registry because it "cannot simply toss the money back out the clerk's window". *Bradshaw v. Sikes*, No. 02-11-00169-CV (Tex. App. - - Fort Worth, March 14, 2013, pet. filed.)(2013 Tex. App. Lexis 2723)(mem. op.) citing

Madeksho v. Abraham, 112 S.W.3d 679, 686(Tex. App. - - Houston [14th Dist.]2003, pet. denied).

I. Severance

In most instances, the court may sever that portion of the case that is ripe for final judgment from the remainder of the case and grant a final default judgment. Rule 41; *Morgan v. Compugraphic Corp.*, 678 S.W.2d 729 (Tex. 1984); *Fairmont Homes Inc. v. Upchurch*, 704 S.W.2d 521, 525 (Tex. App.--Houston [14th Dist.]), *rev'd on other grounds,* 711 S.W.2d 618 (Tex. 1986); *Tankard-Smith, Inc. v. Thursby*, 663 S.W.2d 473, 478 (Tex. App.--Houston [14th Dist.] 1983, writ ref'd n.r.e.).

J. Setting Aside a Non-Final Judgment

A non-final judgment may be set aside or amended at any time. See*, e.g., Houston Health Clubs, Inc. v. First Court of Appeals*, 722 S.W.2d 692 (Tex. 1986) (default judgment that did not dispose of plaintiff's claim for punitive damages was interlocutory); *Kone v. Security Finance Co*., 158 Tex. 445, 313 S.W.2d 281 (Tex. 1958)(trial court properly set aside interlocutory default judgment against one defendant and granted joint and several final judgment against all defendants after jury trial); *Smith Protective Services v. Martin*, 711 S.W.2d 675 (Tex. App.--Dallas 1986, no writ) (trial judge not prohibited from granting a partial summary judgment in favor of a party against whom an earlier interlocutory default judgment had been granted); *Ratcliff v. Sherman*, 592 S.W.2d 81 (Tex. Civ. App.--Tyler 1979, no writ) (final judgment that is inconsistent with an earlier interlocutory judgment operates to set aside the interlocutory judgment).

VIII. THE DEFAULT JUDGMENT MUST BE SUPPORTED BY THE PLEADINGS

Rule 301, "The judgment shall conform to the pleadings..."

Practice Tip: When approving a default judgment, always compare it to the petition, considering the parties, claims, damages, and finality. The petition, citation, return of citation, and judgment should mirror each other. See Pedro Diaz dba G&O Diaz Trucking v. Multi Serv. Tech. Solutions Corp, No. 05-14-00032-CV (Tex. App. - - Dallas, November 6, 2014, n.p.h.)(2014 Tex. App. Lexis 12179)(mem. op.)(sworn account; name variance of plaintiff, here abbreviated "MSTSC" v "MSTSI"; reversed and remanded).

A. Requisites of Petition

Tex. Lit. G. 100.02, McDonald TCP 27:62.

1. Petition must precisely name the parties. *Google, Inc. v. Expunction Order*, 441 S.W.3d 644 (Tex. App. - - Houston [1st Dist.] 2014, n.p.h.)(Google never served or named a party; expunction order void); *Kensington Park Homeowners Ass'n v. Newman,* No. 01-12-00750-CV (Tex. App. - - Houston [1st Dist.] May 1, 2014, n.p.h.)(2014 Tex. App. Lexis 4724)(mem. op.). Default judgment against "Defendant New Kensington Park Homeowners Association, Inc." d/b/a Kensington Park Homeowner's Association". Appellant is Kensington Park Homeowners Association, Inc. which filed a restricted appeal claiming that a default judgment was improperly taken against it when it was neither named nor served in the lawsuit. The court dismissed the appeal for lack of jurisdiction because the appellant "was not a party to the underlying suit..." But see Rule 28, Suits in Assumed Name. The opinion does not discuss whether Appellant filed a verified denial of the assumed name as required by Rule 93(14). If not, the matter should be established.

Rule 28. Suits in Assumed Name.

Any partnership, unincorporated association, private corporation, or individual doing business under an assumed name may sue or be sued in its partnership, assumed or common name for the purpose of enforcing for or against it a substantive right, but on a motion by any party or on the court's own motion the true name may be substituted.

See also *Pedro Diaz dba G&O Diaz Trucking v. Multi Serv. Tech. Solutions Corp,* No. 05-14-00032-CV (Tex. App. - - Dallas, November 6, 2014, n.p.h.)(2014 Tex. App. Lexis 12179)(mem. op.)(name variance of Plaintiff, fatal error, reversed and remanded). Plaintiff's name should be consistent from petition to business records to judgment.

2. Petition must assert a legally cognizable cause of action. The petition must allege facts which give rise to a cause of action. If no liability exists as a matter of law on the facts alleged in the petition, a default judgment cannot be granted. *First Dallas Petroleum, Inc. v. Hawkins*, 727 S.W.2d 640, 645 (Tex. App.--Dallas 1987, no writ); *Morales v. Dalworth*, 698 S.W.2d 772, 775 (Tex. App.--Fort Worth 1985, writ ref'd n.r.e.); *Doubletree Hotels Corp. v. Person*, 122 S.W.3d 917 (Tex.App. - - Corpus Christi 2003, no pet.), citing *First Dallas Petroleum*. The court reviewed contract and found that the franchisor had no control over the elevator causing injury and thus owed no duty to the public. Five million dollar judgment reversed and remanded. *World Sav. Bank, FSB v. Alaniz*, No. 01-06-00549-CV (Tex. App. - - Houston [1st Dist.] April 5, 2007, no pet.)(2007 Tex. App. Lexis 2634) (mem. op.)(the court reverses default judgment because petition affirmatively discloses invalidity of real estate fraud claim under Tex. Bus. & Com. 27.01).

3. Petition must assert a cause of action on which relief is granted. A default judgment must be based on the pleadings before the court. To support a default judgment, the petition must attempt to state a cause of action that is within the court's jurisdiction, must give fair notice of the claim asserted and the relief sought, and must not affirmatively disclose the invalidity of the claim. *Stoner v. Thompson*, 578 S.W.2d 679, 682-85 (Tex. 1979); *Clements v. Barnes*, 834 S.W.2d 45, 46,(Tex. 1992)(per curiam)(error to render default judgment against court-appointed bankruptcy trustee when plaintiff failed to allege that trustee acted outside the scope of her authority as trustee; trustee enjoys derived judicial immunity). *David v. Ross*, 678 S.W.2d 636, 638 (Tex. App.--Houston [14th Dist.] 1984, no writ)(pleadings on their face negated a cause of action). The mere fact that special exceptions could be successfully leveled against the petition will not necessarily prevent a default judgment. See*, e.g., Willock v. Bui*, 734 S.W.2d 390 (Tex. App.--Houston [lst Dist.] 1987, no writ); *First Nat'l Bank v. Shockley*, 663 S.W.2d 685, 688 (Tex. App.--Corpus Christi 1983, no writ). A petition may support a default judgment, even though it contains defect of form or substance, *Chen v. Johnson*, No. 02-12-00428-CV(Tex. App. - - Fort Worth, May 30, 2013, n.p.h.)(2013 Tex. App. Lexis 6619)(mem. op.). Citing *Stoner*, 578 S.W.2d at 683.

4. Petition must include specific allegations. Mere conclusory allegations of a cause of action are not sufficient to support a judgment by default. See *Fairdale Ltd. v. Sellers*, 651 S.W.2d 725 (Tex. 1982) (DTPA pleading that does not allege that defendant provided goods or services, entered into contract, gave a warranty or otherwise owed plaintiff any duty is insufficient); *Crown Asset Mgmt., v. Dunavin*, No. 05-07-01367-CV (Tex. App. - - Dallas, September 4, 2009, no pet.)(2009 Tex. App. Lexis 7048)(mem. op.)(petition in breach of contract - debt case did not give fair notice of claim); *Rubalcaba v. Pacific/Atlantic Crop Exch., Inc.*, 952 S.W.2d 552 (Tex. App.--El Paso 1997, no writ) (fraud improperly pled); *Higgins v. Smith*, 722 S.W.2d 825, 827 (Tex. App.--Houston [14th Dist.] 1987, no writ) (allegation of oral contract to repay loan insufficient without some specificity as to terms, due date, or date of demand); *Trembath v. Davis*, 538 S.W.2d 839 (Tex. App.--Austin 1976, no writ) (sworn account petition which did not specifically describe goods or services was insufficient–but note that Rule 185 has since been amended, see Sworn Account, page 72); *Village Square, Ltd. v. Barton*, 660 S.W.2d 556, 559 (Tex. App.--San Antonio 1983, no writ) (general allegation of DTPA liability is insufficient); *Roberts v. Roberts*, 621 S.W.2d 835, 837-38 (Tex. App.--Waco 1981, no writ)(general allegations regarding division of property in divorce suit are insufficient); *Armstrong v. Armstrong*, 601 S.W.2d 724, 726 (Tex. Civ. App.--Beaumont 1980, writ ref'd n.r.e.) (general allegation of material change of circumstances in change of custody suit is insufficient); *Lopez v. Abalos*, 484 S.W.2d 613 (Tex. Civ. App.--Eastland 1972, no writ) (general allegation that driver was defendant's agent in auto collision case is insufficient); *Ramfield v. Wilburn*, 465 S.W.2d 844 (Tex. Civ. App.--Corpus Christi 1971, no writ) (general allegation of negligence in personal injury suit is insufficient).

Some elements of a cause of action, however, may be stated as legal conclusions. *K-Mart Apparel Fashions Corp. v. Ramsey*, 695 S.W.2d 243, 245 (Tex. App.--Houston [lst Dist.] 1985, writ ref'd n.r.e.); *Baker v. Charles*, 746 S.W.2d 854, 855 (Tex.

App.--Corpus Christi 1988, no writ)(specific acts of negligence not required to support default judgment).

An interesting creditor's pleadings case against a corporation and an individual, is *Paramount Pipe & Supply Co. v. Muhr*, 749 S.W.2d 491, 494-95 (Tex. 1988). Creditor sued defendants based on invoices, which billed the defendant corporation only. The petition, however, asserted that the defendant corporation acted for itself and as Muhr's agent in accepting services and materials. The court noted that the invoices, which do not mention Muhr, "actually support the cause of action stated in the petition". The Supreme Court reversed the Court of Appeals and affirmed the default judgment against both the corporation and Muhr. The court stated:

> In *Stoner v. Thompson*, 578 S.W.2d 679, 684-85 (Tex. 1979), we wrote that while a petition which serves as the basis for a default judgment may be subject to special exceptions, the default judgment will be held erroneous only if (l) the petition (or other pleading of the non-defaulting party that seeks affirmative relief) does not attempt to state a cause of action that is within the jurisdiction of the court, or, (2) the petition (or pleading for affirmative relief) does not give fair notice to the defendant of the claim asserted, or (3) the petition affirmatively discloses the invalidity of such claim. Paramount,749 S.W.2d at 494.

See also *Low v Henry*, 221 S.W.3d 609,612 (Tex. 2007)(fair notice standard met when opposing party can ascertain nature of the claim, basic issues, and evidence that might be relevant to the controversy).

5. The petition must request the damages that are awarded or the other relief which is granted.

Rule 301. See*, e.g., Capitol Brick, Inc. v. Fleming Mfg. Co.*, 722 S.W.2d 399 (Tex. 1986) (judgment modified where award exceeded amount of prayer); *Portfolio Recovery Assocs., LLC v. Talplacido,* No. 05-13-00682-CV (Tex. App. - - Dallas, June 10, 2014, n.p.h.)(2014 Tex. App. Lexis 6267)(mem. op.)(same, prayer for such other relief at law or equity was not request for monetary damages.)*Burch, Inc. v. Catchings*, No. 05-08-00278-CV (Tex. App. - - Dallas, August 24, 2009, pet. denied)(2009 Tex. App. Lexis 6610)(mem. op.)(same); *Markovsky v. Kirby Tower, LP,* No. 01-10-00738-CV (Tex. App. - - Houston [1st Dist.] November 10, 2011, pet. filed) (2011 Tex. App. Lexis 8952)(mem. op.)(judgment not supported by pleadings or tried by consent is void; not default, plaintiff failed to plead for $300,000 earnest money); *Binder v. Safady,* 193 S.W.3d 29 (Tex. App. - - Houston [1st Dist.] 2006, no pet.)(remanded where award exceeded prayer); *U.S. Nat'l Bank Ass'n v. Johnson*, No. 01-10-00837-CV(Tex. App. - - Houston [1st. Dist.] December 30, 2011, n.p.h.)(2011 Tex. App. Lexis 10253)(mem. op.)(same); *Zuyus v. No'Mis Communications, Inc.*, 930 S.W.2d 743, 747 (Tex. App.--Corpus Christi 1996, no writ); *K-Mart Apparel Fashions Corp. v. Ramsey*, 695 S.W.2d 243, 247 (Tex. App.--Houston [lst Dist.] 1985, writ ref'd n.r.e.) (no pleadings to support award of exemplary damages); *Harlen v. Pfeffer,*693 S.W.2d 543, 547 (Tex. App.--San Antonio 1985, no writ) (no pleadings to support appointment of a receiver); *Young v. Kirsch*, 814 S.W.2d 77 (Tex. App.--San Antonio 1991, no writ) (request for damages in excess of the minimum jurisdiction of the court sufficient, citing Rule 47(b)); *Continental Savings Assoc. v. Gutheinz*, 718 S.W.2d 377, 383-84 (Tex. App.--Amarillo 1986, writ ref'd. n.r.e.)(pleading of "not less than $2000" was sufficient to support a higher award).

6. Petition must be consistent, beware of exhibits.

The petition must not contain internal contradictions. See *Cecil v. Hydorn*, 725 S.W.2d 781 (Tex. App.--San Antonio 1987, no writ) (no default judgment could be granted on that portion of plaintiff's case in which allegations of petition conflicted with attached exhibits). *King Fuels, Inc. v. Hashim*, No. 14-13-00010-CV (Tex. App. - - Houston [14th Dist.], May 29, 2014, n.p.h.)(2014 Tex. App. Lexis 5711)(mem. op.)(contract allowed recovery of cost of improvements on Exhibit D of contract, but it was blank); *Hankston v. Equable Ascent Fin.*, 382 S.W.3d 631 (Tex. App. - - Beaumont 2012, no pet.) Credit card assignee's petition was vague. It asserted that documents were attached to petition which were not, included a defective Rule 185 affidavit, and imbedded discovery. The court finds the petition defective, does not give fair notice of the claim, and criticizes the discovery.

The Rules do not authorize inclusion of a discovery request in a petition, or as an exhibit to the

petition, see Rule 45, 46 ("one instrument of writing"), 59 ("no other instrument of writing shall be made an exhibit in the pleading") and 191.4(discovery not to be filed). The effect of imbedding discovery was to create conflicting dates for responses to a single writing. Reversed and remanded. See also *Lucas v. James Jolly Clark & Eonic Creations*, 347 S.W.3d 800 (Tex. App. - - Austin 2011, pet. denied)(request for admissions served with petition criticized). See also C. Requests for Admission at page 71.

7. Petition against non-resident defendants must allege jurisdictional facts. In actions against non-residents, the petition must make sufficient jurisdictional allegations to put the defendant on notice that he is responsible to answer. *Capitol Brick, Inc. v. Fleming Mfg. Co.*, 722 S.W.2d 399 (Tex. 1986); *Whitney v. L & L Realty Corp.*, 500 S.W.2d 94, 95 (Tex. 1973); *McKanna v. Edgar*, 388 S.W.2d 927 (Tex. 1965); *Biotrace Int'l, Inc. v. Lavery*, 937 S.W.2d 146 (Tex. App.--Houston [1st Dist.] 1997, no writ). A defendant may challenge a lack of requisite jurisdictional allegations by motion to quash, motion for new trial, appeal or writ of error, but not by special appearance. See *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199 (Tex. 1985), and Long-Arm Statute, discussed at page 49, D.

8. Petition should not establish that venue is improper. If defendant does not challenge plaintiff's choice of venue, it is fixed in the county chosen by plaintiff, *Wilson v. Texas Parks and Wildlife Dep't*, 886 S.W.2d 259, 260 (Tex. 1994). But in *Jackson v. Biotectronics, Inc.*, 937 S.W.2d 38 (Tex. App.--Houston [14th Dist.] 1996, no writ), the court reviewed the record to confirm that it did not affirmatively demonstrate that venue was improper.

B. Petition must be on file

The plaintiff's petition on which judgment is sought must be on file on the date the default judgment is granted. See *Carborundum Co. v. Keese*, 313 S.W.2d 332 (Tex. Civ. App.--Amarillo 1958, writ ref'd n.r.e.) (where petition is filed but subsequently lost, no default judgment can be granted unless Rule 77 substitution procedures are followed). Plaintiff must serve defendant with the live pleading which is on file at the time of service. *Caprock Constr. Co. v. Guaranteed Floorcovering, Inc.*, 950 S.W.2d 203 (Tex. App.--Dallas 1997, no writ)(service of superseded pleading will not support default judgment). If the lawsuit was dismissed prior to the date citation was issued or served, or prior to the date of judgment, defendant should be served a second time with a citation issued after an order is signed reinstating the case.

IX. THE DEFAULTING DEFENDANT ADMITS ALL ALLEGATIONS OF THE PETITION EXCEPT DAMAGES

A. General Rule

By failing to answer or otherwise appear, a defendant admits all allegations of fact properly set out in plaintiff's pleadings, except the amount of damages. *Morgan v. Compugraphic Corp.*, 675 S.W.2d 729 (Tex. 1984); *Stoner v. Thompson*, 578 S.W.2d 679 (Tex. 1979). *Siddiqui v. West Bellfort Property Owners Ass'n*, 819 S.W.2d 657 (Tex. App.--El Paso 1991, no writ) (permanent injunction).

Because factual allegations were admitted by the default judgment, there was no need to timely serve medical expert report required by CPRC 74.351(a). *Gardner v. U.S. Imaging, Inc.,* 274 S.W.3d 669 (Tex. 2008)(per curiam).

B. Family Law Rule

The general rule does not apply in a divorce case, Tex. Fam. Code §3.53, or in a subsequent modification proceeding. *Consadine v. Consadine*, 726 S.W.2d 253 (Tex. App.--Austin 1987, no writ).

X. A FINAL DEFAULT JUDGMENT ON LIQUIDATED DAMAGES MAY BE GRANTED WITHOUT A HEARING

Tex. Lit. G. 100.02[2][b], McDonald TCP 27:63.

A. Rule 241

When a judgment by default is rendered

against the defendant, or all of several defendants, if the claim is liquidated and proved by an instrument in writing, the damages shall be assessed by the court, or under its direction, and final judgment shall be rendered therefor, unless the defendant shall demand and be entitled to a trial by jury.

B. Standard of Proof

The court must be able to calculate the amount of the judgment with certainty solely from the instruments sued upon and the factual, as opposed to the merely conclusory, allegations of the petition. See *Willacy County v. South Padre Land Co.*, 767 S.W.2d 201, 204 (Tex. App.-Corpus Christi 1989, no writ); *Abcon Paving, Inc. v. Crissup*, 820 S.W.2d 951 (Tex. App.--Fort Worth 1991, no writ); *BLS Limousine Service, Inc.v. Buslease, Inc.*,680S.W.2d 543, 547(Tex. App-Dallas 1984, writ ref'd n.r.e.); *First Nat'l Bank v. Shockley,* 663 S.W.2d 685, 688-89 (Tex. App-Corpus Christi 1983, no writ); *Fears v. Mechanical & Indus. Technicians, Inc.*, 654 S.W.2d 524, 530-31 (Tex. App.--Tyler 1983, writ ref'd n.r.e.); *Johnson v. Gisond*, 627 S.W.2d 448, 449 (Tex. App.--Houston [lst Dist.] 1981, no writ); *Burrows v. Bowden,* 564 S.W.2d 474 (Tex. Civ. App.--Corpus Christi 1978, no writ). As the court explained in *Hall v. C-F Employees Credit Union*, 536 S.W.2d 266, 268 (Tex. Civ. App.--Texarkana 1976, no writ):

> "Even a claim which objectively appears to be liquidated may be classified as unliquidated when the petition fails to allege specific facts with regard to the written instrument as to the amounts paid, or the due dates, or the dates of default, but merely alleges that plaintiff has made proper calculations of the total balance due."

And in *Irlbeck v. John Deere Co.*, 714 S.W.2d 54, 57 (Tex. App.--Amarillo 1986, writ ref'd n.r.e.), the court held that the "pleaded factual allegations and instruments in writing were not sufficiently definite to enable the court to make an accurate calculation from the amount of principal and interest due on the note" because "neither the notes nor the pleadings showed the credits or offsets which [plaintiff] pleaded [defendant] was allowed, and the pleadings did not state or even indicate when default in payments occurred." See also *Pettigrew v. Recoveredge, L.P.*, No. 05-97-00239-CV (Tex. App.--Dallas Aug. 15, 1997, no writ) (unpublished, 1997 Tex. App. Lexis 4326). A creditor suing on an instrument should consider an alternate claim based on sworn account, see paragraph D.

A case critical of poor exhibit copies, and incomplete form contracts is *Kelley v. Southwestern Bell Media Inc.*, 745 S.W.2d 447, 449 (Tex. App.--Houston [lst Dist.] 1988, no writ). The court held that a claim based on a form contract, which required monthly payments prior to the "closing date" was unliquidated, where one of several contracts had no "customer close date". The court held they had no basis to ascertain when the monthly payments became due and that even had that defect been remedied, there were two different total contract prices. The court rejected Appellee's argument that his attorney's affidavit filed in support of his claim for fees which incorporated by reference the attorney's demand letter, constituted sufficient basis for award of damages.

C. Requests for Admission

Serving requests for admission with the petition aids plaintiff's counsel in building a record to support a default judgment against allegations of insufficient pleadings or proof. See generally *Continental Carbon Co. v. Sea-Land Serv., Inc.*, 27 S.W.3d 184 (Tex. App. - - Dallas 2000, pet. denied). But see *Lucas v. James Jolly Clark & Eonic Creations*, 347 S.W.3d 800 (Tex. App. - - Austin 2011, pet. denied)(critical of request for admission precluding damages evidence; deemed request ineffective as to lost-profits damage of $10 million dollars). Counsel should wait 50 days from service of process and the requests for admission before submitting a final default judgment, as the time to respond to admissions is extended to 50 days if served with citation and petition. An affidavit attaching and proving the admissions deemed should be filed prior to judgment submission. *Williams v. Porter,* No. 12-04-00079-CV (Tex. App. - - Tyler, July 29, 2005, no pet.)(2005 Tex. App. Lexis 6041)(mem. op.)(failure to attach affidavit establishing that defendant failed to answer requests for admission was fatal error in summary judgment case).

D. Sworn Account

Practice Tip: Beware of exhibits and party's names. Precisely plead names.

A proper sworn account is a liquidated claim. See *Novosad v. Cunningham* , 38 S.W.3d 767, 773 (Tex. App. - - Houston [14th Dist.] 2001, no pet.); *Mantis v. Resz,* 5 S.W.3d 388, 392 (Tex. App. - - Fort Worth 1999, pet. denied); *Liberty Label Co. v. Morgan Adhesives Co.,* No. 04-04-00279-CV(Tex. App. - - San Antonio, June 22, 2005, no pet.) (2005 Tex. App. Lexis 4758)(mem. op.). A proper sworn account constitutes prima facie evidence of the amount due and supports a default judgment. *O'Brien v. Cole*, 532 S.W.2d 151 (Tex. App.--Dallas 1976, no writ). The 1984 amendment to Rule 185 substantially relaxed the requirements of a sworn account: "No particularization... of the account is necessary unless the trial court sustains special exceptions." Query: does a "no-particularization" sworn account contain sufficient factual allegations to constitute a liquidated claim?

Scope Of Suit On Sworn Account: Rule 185 includes, "... any claim for a liquidated money demand based upon written contract or founded on business dealings between the parties ... on which a systematic record has been kept." Most appellate courts, without discussion of the rule's clear language, are unreasonably restrictive in its interpretation. See, for example, *Schorer v. Box Service Co.,* 927 S.W.2d 132 (Tex. App.--Houston [1st Dist.] 1996, writ denied)(personal property lease agreement did not constitute sworn account, good "dissent" by Justice Mirabal); *Naan Props., LLC v. Affordable Power, LP,* No. 01-11-00027-CV (Tex. App. - - Houston [1st Dist.]January 12, 2012, no pet.)(2012 Tex. App. Lexis 271)(mem. op.)(electrical services were proper sworn account claim; but termination fee on breach of contract not sworn account); *Hou-Tex Printers, Inc. v Marbach,* 862 S.W.2d 188 (Tex. App.--Houston [14th Dist.] 1993 no writ); *Murphy v. Budget Rent-A-Car Sys.*, No.14-95-00099-CV (Tex. App.--Houston [14th Dist.] May 23, 1996, no writ)(unpublished, 1996 Tex. App. Lexis 2110); *Smarketing Bus. Sys. v. Limb,* (Tex. App.--Houston [14th Dist.] Dec. 14, 1995)(unpublished, 1995 Tex. App. Lexis 3188).

An account based on a credit card issued by a financial institution does not create a sworn account claim, *Bird v. First Deposit Nat'l Bank*, 994 S.W.2d 280, 282 (Tex.App. - - El Paso 1999, pet. denied); *Cavazos v. Citibank (S.D),* No. 01-04-00422-CV (Tex. App. -- Houston [1st Dist.], June 9, 2005, no pet.)(2005 Tex. App. Lexis 4484)(mem. op.). However, a retailer's credit card is a sworn account. *McManus v. Sears, Roebuck and Co.,* No. 09-02-472-CV (Tex. App--Beaumont Aug. 28, 2003, no pet.)(2003 Tex. App. Lexis 7462)(mem.op.).

For a detailed discussion of Sworn Accounts, see Creditors' Causes of Action: Pleadings and Proof, David Roth and Mark Blenden, this seminar, or at www.blendenlawfirm.com/publications.html.

E. Petition Not a Written Instrument

The petition itself, even if sworn, is not the written instrument contemplated by Rule 241. *Hughes v. Jones*, 543 S.W.2d 885 (Tex. Civ. App.--El Paso 1976, no writ); *Freeman v. Leasing Assoc., Inc.*, 503 S.W.2d 406 (Tex. Civ. App.--Houston [lst Dist.] 1973, no writ). *Contra Watson v. Sheppard Federal Credit Union*, 589 S.W.2d 742 (Tex. Civ. App.--Fort Worth 1979, writ ref'd n.r.e.).

F. Not Every Writing is Sufficient

The writing must be sufficiently specific for the court to calculate damages with certainty. *Higgins v. Smith*, 722 S.W.2d 825, 827 (Tex. App.--Houston [14th Dist.] 1987, no writ) (in action on an alleged oral loan, five canceled checks were insufficient written instruments where they did not establish parties to loan, date of repayment or terms of repayment).

G. Attorney's Fees

Attorney's fees are generally unliquidated, see page 76, H.

XI. A FINAL DEFAULT JUDGMENT ON UNLIQUIDATED DAMAGES MAY NOT BE GRANTED WITHOUT EVIDENCE

Tex. Lit. G. 100.02[2][b], McDonald TCP 27:56.

A. Rule 243. Rule 243 provides as follows:

If the cause of action is unliquidated or be not

> proved by an instrument in writing, the court shall hear evidence as to damages and shall render judgment therefor, unless the defendant shall demand and be entitled to a trial by jury in which case the judgment by default shall be noted, a writ of inquiry awarded, and the cause entered on the jury docket. (emphasis added)

B. Necessity of Evidence

If damages are unliquidated or not proved by an instrument in writing, Rule 243 states that the court "shall hear evidence as to damages" before final default judgment may be granted. But case law allows the use of affidavits. Though the Austin court of appeals interpreted Rule 243 literally and required that the court "hear evidence", the Supreme Court held that affidavits were sufficient to establish damages. "We conclude that because unobjected - to hearsay is, as a matter of law, probative evidence, affidavits can be evidence for purposes of an unliquidated - damages hearing pursuant to Rule 243." *Texas Commerce Bank, Nat.Ass'n v. New,* 3 S.W.3d 515 (Tex. 1999); *Barganier v. Saddle Brook Apartments.,* 104 S.W.3d 171(Tex. App. - - Waco 2003)(affidavits attached to default judgment constitute a record sufficient to support default judgment in breach of lease case). Plaintiff's counsel should consider serving requests for admission with the petition pursuant to Rule 198. If they are deemed for non-response in 50 days, evidence as to damages may be unnecessary. Rule 243 states that the court "shall hear evidence". *Texas Commerce Bank, Nat. Ass'n v. New,* 3 S.W.3d 515 (Tex. 1999). If affidavits establishing damages are submitted, but a hearing is not held, the judgment must be reversed holds *Arenivar v. Providian National Bank,* 23 S.W.3d 496 (Tex. App.–Amarillo 2000, no pet.). *See* also *B&R Dev. Inc., v. HCBeck, Ltd.*, No. 05-11-01150-CV (Tex. App. - - Dallas, February 8, 2013, n.p.h.)(2013 Tex. App. Lexis 1263)(mem. op.)(affidavit misstated contents of attachments and did not support damages amount; hearing required).

C. The Hearing Issue

Rule 243 is often cited for the proposition that a hearing is required before a court may grant a default judgment on unliquidated damages. The above rule does not specifically so state. Rather, the court must "hear evidence". This language infers that the court must hear from live witnesses; but the damages may be proven by affidavit, *Texas Commerce Bank Nat. Ass'n v. New,* 3 S.W. 3d 515 (Tex.1999.) An issue remains as to whether the court must have a hearing to consider the affidavits. *New* infers that such a hearing is not necessary. There was a hearing in *New*, but no witnesses testified. Therefore, *New* does not squarely address the hearing issue. Cases establishing that a hearing is not required to consider affidavits is *Bargainer v. Saddlebrook Apartments,* 104 S.W.3d 171(Tex. App. - - Waco 2003 no pet.), "judgments based on affidavits are not considered to be rendered without an evidentiary hearing" and *Ingram Indus., Inc. v. U.S. Bolt Mfg., Inc.*, 121 S.W.3d 31(Tex. App. - - Houston [1st Dist.]2003, no pet.). But see *Arenivar v. Providian National Bank,* 23 S.W.3d 496(Tex. App. - - Amarillo 2000 no pet.), "it is error for the trial court to fail to conduct a hearing and to require proof of unliquidated damages before rendering default judgment for such damages". *Arenivar* is apparently the only post-*New* case specifically requiring a hearing to prove damages, even if the damages are proved through affidavit. The law appears to be that unliquidated damages may be proven without a hearing, by affidavit filed prior to entry of default judgment.

In *Ingram*, plaintiff sued for unliquidated damages, including consequential damages due to defective lock nuts. Without a hearing, the court considered the pleadings and evidence on file. An affidavit was included from plaintiff's manager, setting forth specific items of damages, such as, "$1972.39 for cost to remake 42 nuts..." The court held that the damages had the appearance of being liquidated because they seemed to be capable of proof by written instrument. However, instruments such as invoices or receipts were not produced along with the affidavit. Therefore, the damages should have been treated as unliquidated. The appellate court affirmed the default judgment which was based on, "the pleadings and evidence on file". *Ingram Indus., Inc. v. U.S. Bolt Mfg., Inc.*, 121 S.W.3d 31(Tex. App -- Houston [1st Dist.]2003, no pet.).

D. Proof of Defendant's Responsibility.

If the cause of action is based in tort, plaintiff

must establish that the damages sustained were caused by defendant's conduct. As the Court explained in *Morgan v. Compugraphic Corp.*, 675 S.W.2d 729, 732 (Tex. 1984):

> "The causal nexus between the event sued upon and the plaintiff's injuries is strictly referable to the damages portion of the plaintiff's cause of action. . . . [T]he plaintiff is entitled to recover damages only for those injuries caused by the event made the basis of suit; that the defendant has defaulted does not give the plaintiff the right to recover for damages which did not arise from his cause of action. [Citation omitted.]"

Thus, in *Morgan*, the fact that defendant was negligent was admitted by the default, but the amount of damages, if any, proximately caused by that negligence remains plaintiff's burden.

E. Type of Proof

Practice Tip: Beware of conclusory statements, see section below.

Practice Tip: Consider serving requests for admission establishing liability and damages, when serving defendant with petition and citation. Deemed admissions can overcome attack on a default judgment; see *Continental Carbon Co. v. Sea-Land Serv., Inc. 27 S.W.3d 184 (Tex. App. - - Dallas 2000, pet. denied). Always consider a business records affidavit, Tex. R. Evi. 902; and an affidavit as to costs and necessity of services, Civil Practice & Remedies Code 18.001. The latter is not to be used in sworn account actions.*

The evidence may be by live testimony, by oral or written deposition, and apparently, in the absence of any objection, by affidavit. While affidavits would not be admissible over objection, in the absence of any objection they may be considered by the court. TRE 802, *Texas Commerce Bank Nat. Ass'n v. New*, 3 S.W.3d 515(Tex.1999); *Irlbeck v. John Deere & Co.*, 714 S.W.2d 54, 57 (Tex. App.--Amarillo 1986, writ ref'd n.r.e.); *Farley v. Farley*, 731 S.W.2d 733, 736 (Tex. App.--Dallas 1987, no writ); *K-Mart Apparel Fashions Corp. v. Ramsey*, 695 S.W.2d 243 (Tex. App.--Houston [lst Dist.] 1985, writ ref'd n.r.e.); *Nacify v. Braker*, 642 S.W.2d 282 (Tex. App.--Houston [14th Dist.] 1982, writ ref'd n.r.e.).

F. Quantum of Proof.

Crown Asset Mgmt., L.L.C. v. Bogar, 264 S.W.3d 420 (Tex. App. - - Dallas 2008, no pet.). The court criticizes the amended affidavit by plaintiff as conclusory, omitting how affiant acquired personal knowledge of damages. Plaintiff failed to prove the chain of title between plaintiff and the original creditor, nor did plaintiff prove what payments debtor made, the amount of proceeds from sale of collateral, or how plaintiff arrived at the specified amount of damages. Trial court's denial of default judgment and dismissal of case affirmed.

See *McCoy v. Waller Group, LLC*, No. 05-10-01479-CV (Tex. App. - - Dallas, April 26, 2012, no pet.)(2012 Tex. App. Lexis 3319)(mem. op.). The court concluded that plaintiff introduced no credible evidence of damages based on misappropriation of her likeness, conversion, fraud, tortious interference, and defamation. Take-nothing judgment affirmed because plaintiff's testimony was conclusory and speculative. Testimony was conclusory because it included no supporting facts to explain how plaintiff derived the damage figures to which plaintiff testified.

The trial court is bound by the same rules regarding sufficiency of evidence as govern regular trials. *Castanon v. Monsevais*, 703 S.W.2d 295, 297 (Tex. App.--San Antonio 1985, no writ).

"Conclusory evidence of damages is no evidence of damages and will not support an award of damages in a default judgment." *RO-BT Invs., LLP v. Le Props,* No. 14-13-00034-CV (Tex. App. - - Houston [14th Dist.], January 9, 2014, n.p.h.)(2014 Tex. App. Lexis 214)(mem. op.) but see other cases, below, seemingly endorsing conclusory evidence.

The proof may be by affidavit; *Irlbeck v. John Deere Co.*, 714 S.W.2d 54, 57 (Tex. App.--Amarillo 1986, writ ref'd n.r.e.). And see *Texas Commerce Bank Nat. Ass'n v. New,* 3 S.W. 3d 515 (Tex.1999) (affidavits were not conclusory; affidavit as to total amount due under written instrument is sufficient to support award of that amount, citing *Irlbeck*, supra). When a plaintiff fails to present legally sufficient evidence at an uncontested hearing on unliquidated damages following a no-answer default judgment, the proper disposition is to remand for a new trial on the

issue of damages. This is because plaintiff should be afforded a second opportunity to present evidence in support of its claims as, in an uncontested hearing, evidence of unliquidated damages is often not fully developed. *Dolgencorp of Texas, Inc. v. Lerma*, 288 S.W.3d 922, 930(Tex. 2009) and *Bennett v. McDaniel*, 295 S.W.3d 644(Tex. 2009)(per curiam) citing *Holt Atherton Indus., Inc. v Heine,* 835 S.W.2d 80, 86 (Tex.1992); *Rodriguez v. Medders*, No. 10-11-00369-CV (Tex. App. - - Waco, October 4, 2012, no pet.)(2012 Tex. App. Lexis 8419)(mem. op.).

If there is no evidence to support the award of damages, the appellate court may reverse and remand for a new trial as to damages only, *Bennett Interests, Ltd. v. Koomos*, 725 S.W.2d 316, 318-19 (Tex. App.--Corpus Christi 1986, no writ); *Mo-Vac Services, Inc. v. Marine Contractors & Supply, Inc.*, 586 S.W.2d 573, 575 (Tex. Civ. App.--Corpus Christi 1979, writ ref'd n.r.e.), or presumably it may reverse and render judgment that plaintiff take nothing. *Renteria v. Trevino,* No. 14-01-01106-CV (Tex. App. - - Houston [14th Dist.] June 6, 2002, no pet.)(2002 Tex. App. Lexis 4131)(reversed and rendered, no legally sufficient evidence of damages, an element of breach of contract claim); *Cf. Metcalf v. Taylor*, 708 S.W.2d 57, 59 (Tex. App.--Fort Worth 1986, no writ) (judgment reversed and rendered in part where no evidence to support exemplary damages).

If there is insufficient evidence of damages, the judgment will be reversed and remanded. See *Woodhaven Partners, Ltd. v. Shamoun & Norman, L.L.P.,* 422 S.W.3d 821 (Tex. App. - - Dallas 2014, n.p.h.)*; Castanon v. Monsevais*, 703 S.W.2d at 298-99 (insufficient evidence to support awards for pain and suffering and necessity and reasonableness of repairs); *Village Square, Ltd. v. Barton*, 660 S.W.2d 556, 559-60 (Tex. App.--San Antonio 1983, no writ) (insufficient evidence to support award for lost profits). The judgment will also be reversed and remanded if the damage award is unsegregated and there is no evidence or insufficient evidence to support some elements of damage. See *Solis v. Garcia*, 702 S.W.2d 668, 672 (Tex. App.--Houston [14th Dist.] 1985, no writ). See *also Correo, Inc. v. Citicorp Vendor Fin., Inc.,* No. 13-04-139-CV(Tex. App. - - Corpus Christi June 30, 2005, no pet.)(2005 Tex. App. Lexis 5042)(mem. op.)(judgment award was erroneous because amount of damages was not proven by the lease instrument; reversed and remanded).

G. Difficult Issues.

Be cautious proving these damages:

1. Lost profits. *Lucas v. James Jolly Clark & Eonic Creations,* 347 S.W.3d 800 (Tex. App. - - Austin, 2011, pet. denied)(mem. op.)(single request for admission did not support $10 million dollar damage award for lost profits and punitive damages); *Village Square, Ltd. v. Barton* 660 S.W.2d 556, 559-60 (Tex. App. - - San Antonio 1983, no writ)(insufficient evidence for lost profits); *Texaco, Inc. v. Phan,* 137 S.W.3d 763, 771 (Tex. App. - - Houston [1st Dist.] 2004, no pet.)(lost profits evidence insufficient, no proof they were net of expenses); *Zeno Digital Solutions, L.L.C. v. K Griff Investigations, Inc.,* No. 14-09-00473-CV (Tex. App. - - Houston [14th Dist.] September 14, 2010, no pet.)(2010 Tex. App. Lexis 7505)(same, reversed and rendered as to lost profits).

2. Exemplary Damages: see CPRC Chapter 41, Damages; *Powers v. M.L. Rendleman Co.,* No. 14-09-00814-CV (Tex. App. - - Houston [14th Dist.]October 26, 2010, no pet.)(2010 Tex. App. Lexis 8547)(mem. op.)(exemplary damages reversed because plaintiff recovered only breach-of-contract damages).

3. Mental Anguish: *Kyle v. Zepeda*, No. 01-11-00388-CV (Tex. App. - - Houston [1st Dist.], May 21, 2013, n.p.h.)(2013 Tex. App. Lexis 6229) (reversed and rendered as to mental anguish damages, remainder of judgment affirmed) *Tucker v. Tucker,* No. 05-09-01203-CV(Tex. App. - - Dallas November 22, 2010, pet. denied)(2010 Tex. App. Lexis 9272)(mem. op.)(Plaintiff must present direct evidence of the nature, duration, and severity of her mental anguish which establishes a substantial disruption in her daily routine); *Castanon v. Monsevais*, 703 S.W.2d 295, 298 (Tex. App. - - San Antonio 1985, no writ); *Warren v. Zamarron*, No. 03-03-00620-CV (Tex. App. - - Austin, May 5, 2005, no pet.) (2005 Tex. App. Lexis 3378)(mem. op.)(pain and suffering).

4. Misapplication of trust funds. *Argyle Mech., Inc.*

v. Unigus Steel, Inc., 156 S.W.3d 685 (Tex. App. - - Dallas 2005, no pet.)(in suit against general contractor and its officers for misapplication of trust funds, plaintiff failed to plead or prove the amount of trust funds received by the officers).

H. Attorney's Fees Are Unliquidated Damages.

Attorney's fees are recoverable when a claim is based on an oral or written contract, a sworn account, or is for services rendered or materials furnished, pursuant to CPRC, Chapter 38. The court may take judicial notice of customary fees and Chapter 38 fees may be recovered without proof as to the amount under §38.004. It provides in part: "The court may take judicial notice of the usual and customary attorney's fees and of the contents of the case file without receiving further evidence in: 1) a proceeding before the court; or 2) a jury case in which the amount of attorney's fees is submitted to the court by agreement." Cases that hold that the trial court is authorized to take judicial notice of usual and customary fees include: *Gill Savings Ass'n. v. Chair King, Inc.*, 797 S.W.2d 31, 32 (Tex.1990); *General Life and Acc. Ins. Co. v. Higginbotham,* 817 S.W. 2d 830, 833 (Tex. App. - - Fort Worth 1991, writ denied); *Budd v. Gay*, 846 S.W.2d 521, 524 (Tex. App.--Houston [14th Dist] 1993, no writ); *Bethal v. Butler Drilling Co.*, 635 S.W.2d 835 (Tex. App.--Houston [14th Dist.] 1982, writ ref'd n.r.e.); *Parra v. AT& T,* No. 05-97-01038-CV (Tex. App. - - Dallas Nov. 2, 1999, no pet.)(unpublished, 1999 Tex. App. Lexis 8177). See *also European Crossroads Shopping Ctr., Ltd. v. Criswell,* 910 S.W. 2d 45 (Tex. App.- -Dallas 1995, writ denied) (testimony that 35% contingent fee was customary and reasonable was sufficient for Chapter 38 recovery). General Life and Parra also approve contingent fee recovery under Chapter 38.

A trial or appellate court may award an amount of attorney's fees as a matter of law if the evidence is clear, direct and positive, not contradicted, and there is nothing to indicate otherwise. *Ragsdale v. Progressive Voters League*, 801 S.W.2d 880 (Tex. 1990). (Supreme court reverses and renders judgment of $22,500 in attorney's fees for plaintiff who filed suit for Election Code Violations.) It is an abuse of discretion to deny attorney's fees when an appropriate claim has been asserted. *Budd v. Gay*, 846 S.W.2d 521,524(Tex. App.--Houston[14th Dist.]1993, no writ).

When proving attorney's fees, consider CPRC §18.001,18.002, Affidavit Concerning Cost and Necessity of Services. The filing of such an affidavit should prove fees, and may be the basis to exclude controverting evidence unless a counter-affidavit is filed. See also Attorney's Fee Affidavit at page 11.

I. Participation by Defendant.

If the defendant appears after the granting of an interlocutory default judgment but before the assessment of damages, he may participate in the damages hearing and may demand a jury trial as to damages only. Rule 243. If the defendant has not appeared, however, the plaintiff has no duty to notify the defendant that he has or is planning to take a default judgment. See *Continental Carbon Co. v. Sea-Land Serv., Inc.*, 27 S.W. 3d 184 (Tex. App. - - Dallas 2000, pet. denied)*; Massey v. Columbus State Bank,* 35 S.W.3d 697, 700-01 (Tex. App. - - Houston [1st Dist.] 2000, pet. denied); *Olivares v. Cawthorn*, 717 S.W.2d 431, 434 (Tex. App.--San Antonio 1986, writ dism'd); *K-Mart Apparel Fashions Corp. v. Ramsey*, 695 S.W.2d 243, 246 (Tex. App.--Houston [lst Dist.] 1985, writ ref'd n.r.e.); *Banks v. Crawford*, 330 S.W.2d 243, 245 (Tex. Civ. App.--Houston 1959, writ ref'd n.r.e.). In *LBL Oil Co. v. Int'lPower Services, Inc.*, 777 S.W.2d 390 (Tex. 1989) (per curiam) defendant generally appeared through a pro se defective motion to dismiss. Plaintiff filed a motion for default judgment and gave no notice of the motion or hearing to defendant. The supreme court reverses the courts below, holding that the hearing on plaintiff's motion for default judgment was tantamount to a trial setting and due process requires notice to defendant, citing *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 108 S.Ct. 896, 99 L.Ed.2d 75 (1988) and *Lopez v. Lopez*, 757 S.W.2d 721, 723 (Tex. 1988).

Arguably an incarcerated indigent defendant has a right to be physically present to confront witnesses and present defenses. *Pruske v. Dempsey*, 821 S.W.2d 687 (Tex. App.--San Antonio 1991, no writ) (post-answer default against prisoner).

XII. Post-Answer Default Judgments

Practice Tip: Post-answer default judgments are an invitation to be casual, but be cautious. Prove your case, understanding that defendant may appeal. The record must establish all elements of your claim, as well as damages.

*"*A post-answer default judgment constitutes neither an abandonment of defendant's answer, nor an implied confession of any issues.*" (Iverson v. Dolce Mktg. Group,* No. 05-12-01230-CV (Tex. App. - - Dallas, March 28, 2014, n.p.h.)(2014 Tex. App. Lexis 3461)(mem. op), plaintiff failed to prove elements of contract, reversed and remanded). *Correa v. Salas*, No. 05-13-01478-CV (Tex. App. - - Dallas, December 17, 2014, n.p.h.)(2014 Tex. App. Lexis 13524)(mem. op.) *(*no evidence offered to prove liability or damages, reversed and remanded*)*. If defendant files an answer but fails to appear for trial, plaintiff must "offer evidence to prove his case as in a judgment upon a trial" to obtain a post-answer default judgment. *Stoner v Thompson* 578 S.W.2d 679, 682 (Tex.1979). The prove-up trial appears routine and is often abbreviated and perfunctory.

"A conclusory statement cannot support a judgment even when the opposing party fails to object to it at trial"; *Jim Coleman Co. v. Rainer Randles Invs., LLC*, No. 01-13-00764-CV (Tex. App. - - Houston [1st Dist.], July 3, 2014, n.p.h.)(2014 Tex. App. Lexis 7235)(mem. op.) citing *City of San Antonio v Pollock*, 284 S.W.3d 809, 816 (Tex. 2009). Judgement in *Coleman* was reversed and remanded because the testimony supporting the judgment lacked specific liability facts and contained no evidence of causation.

Previously, a no-answer default judgment would be often reversed and remanded, while a post-answer default judgment was often reversed and rendered. See discussion in *Dolgencorp of Texas, Inc. v. Lerma*, 288 S.W.3d 922(Tex.2009) and *Bennett v. McDaniel*, 295 S.W.3d 644(Tex. 2009)(per curiam).

Cases now of questionable authority which reversed and rendered, based on failure to prove all elements of a cause of action include: *Sutton v. Hisaw & Assocs. Gen. Contrs., Inc.* 65 S.W.3d 281 (Tex. App. - - Dallas 2001, pet. denied); *Renteria v. Trevino,* No. 14-01-01106-CV (Tex. App. - - Houston [14th Dist.], June 6, 2002, no pet.)(2002 Tex. App. Lexis 4131).

Other post-answer default judgment cases reversed and remanded include: *Romano v. Newton*, No. 03-06-002550CV (Tex. App. - - Austin December 7, 2007 no pet.)(2007 Tex. App. Lexis 9499)(remanding after plaintiff refused to file remittitur, insufficient damages evidence); *Raines v. Gomez*, 143 S.W.3d 867 (Tex. App. - - Texarkana 2004, no pet.) *Sharif v. Par Tech, Inc.,* No. 01-02-01238-CV (Tex. App. - - Houston [1st Dist.] Feb. 26, 2004, no pet.)(2004 Tex. App. Lexis 1824)(sworn account, no reporter's record)*; Bass v. Bass*, No. 01-00-00745-CV (Tex. App. - - Houston [1st Dist.] July 5, 2001, pet. denied)(unpublished, 2001 Tex. App. Lexis 4541)($4.6 million judgment reversed, for lack of reporter's record).

XIII. IF THE DEFENDANT IS CURRENTLY IN MILITARY SERVICE, SAFEGUARDS MANDATED

A. Servicemembers Civil Relief Act,

The Soldiers and Sailors Act of 1940 (50 U.S.C. App. § 501 et seq.) was amended in 2003. The act is now titled Servicemembers Civil Relief Act. Section references herein are to 50 U.S.C. App. §§ 501-596.

The Act provides members of the uniformed forces, including but not limited to members of the Army, Navy, Air Force, Marines, and Coast Guard, relief from specified civil actions while the servicemember is on active duty. The act does not apply to criminal proceedings. The act purports to strengthen the national defense by enabling servicemembers to devote their entire energy to defense needs without the distraction of civil proceedings. § 502. Key provisions of the act include protection against default judgments (§ 521), protection against secondary liability (§ 513), protection against eviction (§ 531), interest rate caps (§ 527), and a stay on the execution of proceedings and judgments (§§ 522, 524). The Servicemembers Civil Relief Act can be accessed online at http://www.operationhomefront.org/Info/info_laws_legislation.shtml. The requirements of

the non-military affidavit remain virtually unchanged.

B. Protection of Servicemembers Against Default Judgment

1. Non-military Affidavit

a. Necessity

In any proceeding covered by this section, the court, before entering judgment for the plaintiff, shall require the plaintiff to file with the court an affidavit (A) stating whether or not the defendant is in military service and showing necessary facts to support the affidavit; or (B) if the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service. §521(b)(1). The affidavit requirement may be satisfied by a statement, declaration, verification, or certificate, in writing, subscribed and certified to be true under penalty of perjury. § 521(b)(4).

A default judgment taken without an affidavit of military service is voidable only if the record shows that the defendant was in military service. *Goshorn v Brown,* No. 14-02-00852-CV (Tex. App. - - Houston [14th Dist.] Sept. 23, 2003, no pet.)(2003 Tex. App. Lexis 8181)(mem. op.); *Hawkins v. Hawkins,* 999 S.W. 2d 171 (Tex. App .–Austin 1999, no pet.); *Borrego v. Del Palacio,* 445 S.W.2d 620, 622 (Tex. Civ. App.--El Paso 1969, no writ).

b. Determination of Military Status

The Department of Defense - Manpower Data Center (DMDC) developed a website to identify an individual's military status, https://www.dmdc.osd.mil/scra/owa/home. The Department of Defense will not provide access to the database until the user is verified. Call the Department of Defense at (703)696-6762 to request a DMDC Military Verification Web Application, or fax a request to (703)696-4156. The completed application should be faxed to (703)696-4156 to obtain a pin number for each user. Once entry to the database is granted, the user enters the subject's last name and social security number. The database is of limited value without a social security number. However, one can state in a Non-Military Affidavit that inquiry to the Department of Defense - Manpower Data Center failed to indicate that defendant is in military service. Consider also inquiring into debtor's military status in a standard demand letter. See demand letter and non-military affidavit forms, page 131.

2. Court-Appointed Attorney; Bond.

If the defendant is in military service, the court may not grant a default judgment without appointing an attorney to represent defendant and protect his interests. § 521(b)(2). The court may require the plaintiff to post a bond to protect the defendant against any damage he may suffer should the judgment later be set aside, or the court may order such other and further relief as may be necessary to protect the defendant's rights. § 521(b)(3).

3. Setting Aside

The protection afforded may be illusory. Though the act purports to prohibit default judgments, a court has denied relief, if the servicemember is unable to establish that military service prejudiced the member's ability to file an answer. *In re K.B.*, 298 S.W.3d 691 (Tex. App. - - San Antonio 2009, no pet.).

If a default judgment is entered against a servicemember during the servicemember's period of military service, or within 60 days after termination or release from military service, the court entering default judgment shall, upon application by or on behalf of the servicemember, reopen the judgment for the purpose of allowing the servicemember to defend the action if it appears that (A) the servicemember was materially affected by reason of that military service in making a defense to the action; and (B) the servicemember has a meritorious or legal defense to the action or some part of it. § 521 (g) (1). A motion to set aside the default judgment must be made within 90 days after the date of termination or release from military service §521(g)(2). A default judgment set aside under this act does not impair any right or title acquired by a bona fide purchaser for value under the judgment. §521(h). A default judgment taken without an affidavit of military service is voidable only if the record shows that the defendant was in military service. *Boorrego v. Palacio,* 445 S.W.2d 620, 622 (Tex. Civ. App.- - El Paso 1969, no writ).

4. Stay of Proceedings and of Execution of Judgments

At any stage before final judgment in a civil action against a servicemember, the court may on its own motion or shall upon the motion of the servicemember stay the action for a period of not less than 90 days. § 522(b)(1). *In the Interest of A.N.J.*, No. 09-10-00006-CV (Tex. App. - - Beaumont, July 28, 2011, no pet.)(2011 Tex. App. Lexis 5778)(mem. op.)(case proceeded, no request for stay). Likewise, if a servicemember, in the opinion of the court, is materially affected by reason of military service in complying with a judgment or court order, the court may on its own motion or shall upon the motion of the servicemember stay the execution of any judgment or vacate or stay an attachment or garnishment of property, money, or debts in the possession of the servicemember or third party. § 524(a). A stay of an action, proceeding, attachment, or execution made pursuant to this act may be ordered for the period of military service and 90 days thereafter. § 525(a).

Military member filed for divorce and obtained default judgment. As appellee, he was unable to stay proceedings based on his deployment and the Servicemembers Civil Relief Act. The court reasoned that § 522 does not apply to the appeal, because it authorizes a stay "before final judgment... appellee's inability to appear does not affect this appeal." *Welch v. Welch,* No. 11-10-00319-CV (Tex. App. - - Eastland December 9, 2010, no pet.)(2010 Tex. App. Lexis 9727)(mem. op.).

5. Protection of Persons Secondarily Liable

Non-military persons may seek protection under the act. Whenever a court grants relief to a servicemember, the court may likewise grant such relief to a surety, guarantor, endorser, accommodation maker, co-maker, or other person who is primarily or secondarily subject to the obligation. § 513(a). Likewise, when a judgment or decree is set aside, the court may also set aside or vacate the judgment as to persons secondarily liable. § 513(b).

6. Other Benefits to Servicemembers

An obligation or liability bearing interest at a rate in excess of 6 percent per year that is incurred by a servicemember, or by the servicemember and the servicemember's spouse jointly, before the servicemember enters military service shall not bear interest at a rate in excess of 6 percent per year during the period of military service.§ 527(a)(1). Eviction of a servicemember, or the dependents of a servicemember, is also restricted.§ 531. Note also that limitations are tolled for the period of active duty. § 526.

C. Use of Admissions

Holding that military service did not prejudice appellant, the Waco court of appeals affirmed a default judgment against a defendant in military service. Plaintiff used requests for admission which were deemed, based on defendant's failure to answer, to establish that defendant was properly served with citation and that defendant's military service did not interfere with his defense. *Winship v. Garguillo*, 754 S.W.2d 360 (Tex. App.--Waco 1988, writ denied, per curiam, 761 S.W.2d 301). But in *In re B.T.T.,* 156 S.W.3d 612 (Tex. App. - - San Antonio 2004, no pet.) a default judgment entered against a military member was subsequently held null and void by the Hawaii court based on violation of the Soldiers' and Sailors' Civil Relief Act. Therefore, the Texas judgment created upon domestication of the Hawaii judgment, was null and void. Father recovered the amount previously paid in child support and attorney's fees.

D. Conclusion

The Servicemembers Civil Relief Act creates a dilemma for plaintiff's counsel, in that it is often difficult to determine whether the defendant is a servicemember. Unless one practices near a military base, it is believed that the attached form at page 131 will generally suffice. Contact information for the military branches can be found at page 132.

XIV. THE COURT MUST HAVE JURISDICTION TO GRANT A DEFAULT JUDGMENT

A. Monetary Jurisdiction, Per Claim

Thibodeau v. Dodeka, LLC, 436 S.W.3d 23 (Tex. App. - - Waco 2014, pet. denied). Debt claim was within Justice court's jurisdiction. Court therefore had jurisdiction over it, notwithstanding quantum meruit claim exceeding court's jurisdiction.

B. Bankruptcy

The court has no jurisdiction over a defendant whose bankruptcy petition is pending and who is subject to an automatic stay or stay order, even if the plaintiff has no actual notice of the existence of the stay. See *Wallen v. State*, 667 S.W.2d 621 (Tex. App-Austin 1984, no writ). See *also Audio Data Corp.v. Monus*,789 S.W.2d 281 (Tex. App-Dallas 1990, no writ).

If service of process is made while defendant is in bankruptcy, even by one without notice of the bankruptcy, such is void and without legal effect. *Wallen v. State*, 667 S.W.2d 621 (Tex. App. - - Austin, 1984, no writ); see also 11 U.S.C.A. § 362(a), automatic stay bars continuation of a proceeding, including the issuance of process.

C. Probate

Gutierrez v. Estate of Gutierrez, 786 S.W.2d 112 (Tex. App.--San Antonio 1990, no writ) (probate court lost jurisdiction to enter default judgment against removed guardian when ward died, Tex. Prob. Code Ann. § 404).

D. Sovereign Immunity

State court has no jurisdiction to render default judgment against United States agency absent specific waiver of sovereign immunity. *Parker v. Veterans Admin.*, 786 S.W.2d 516, 517 (Tex. App.--Houston [14th Dist.] 1990, no writ).

XV. NO DEFAULT JUDGMENT MAY BE TAKEN AGAINST A DEFENDANT WHO WAS SERVED BY PUBLICATION

McDonald TCP 27:65, 11:78.

See generally Rules 109-117, 329. This is not a favored method of service of process. Issuance of citation by publication is not authorized without affidavit that defendant's residence is unknown. Rule 109, *Graves v. Graves,* 916 S.W. 2d 65 (Tex. App.--Houston [1st Dist.] 1996, no writ). A new trial may be granted "upon petition of the defendant" filed within two years of judgment, Rule 329(a). *Guest v. Few,* No. 09-96-038-CV (Tex. App.--Beaumont July 24, 1997)(1997 Tex. App. Lexis 3887).

No default judgment may be taken against a defendant served by publication. Instead, the court must appoint an attorney ad litem to represent defendant, a trial must be held, and the court must sign and approve a statement of evidence. Rule 244. Failure to include a statement of the evidence as required by Rule 244 is reversible error; *Jones v. Jones,* No. 09-06-238-CV(Tex. App. - - Beaumont August 16, 2007, no pet.)(2007 Tex. App. Lexis 6461)(mem. op.)(divorce case).

See *Albin v. Tyler Prod Credit Ass'n*, 618 S.W.2d 96 (Tex. Civ. App.--Tyler 1981, no writ); *McCarthy v. Jefferson,* 527 S.W.2d 825 (Tex. Civ. App.--El Paso 1975, no writ). See *also Gray v. PHI Resources, Ltd.*, 710 S.W.2d 566 (Tex. 1986) (appointment of receiver). But when service is invalid, the principles used to review and set aside defaults will be used to set aside trials after service by publication. See *Fleming v. Hernden*, 564 S.W.2d 157 (Tex. Civ. App.--El Paso 1978, writ ref'd n.r.e.) (service by publication set aside, even though attorney ad litem appointed and trial held, where defendant's name was misspelled in the citation); *Morris v. Morris*, 759 S.W.2d 707, 709 (Tex. App.--San Antonio 1988, writ denied) (where citation by publication obtained through plaintiff's false statement that she was unaware of defendant's whereabouts, defendant entitled to bill of review relief).

But see *Wood v. Brown*, 819 S.W.2d 799 (Tex. 1991)(per curiam)(supreme court reviews a publication-default judgment case, and reverses based on deficiency of affidavit; the court fails to discuss the Rule 244 bar to such default judgments).

Rule 114 requires that citation by publication contain the names of the parties, but the citation failed to do so. Nor was diligent effort made to locate the party to be served pursuant to Rule 109. Service by publication is not a favored method of service and

diligence is required. *Curley v. Curley,* No. 08-12-00257-CV (Tex. App. - - El Paso, August 6, 2014, n.p.h.)(2014 Tex. App. Lexis 8603)(mem. op.), citing *In re E.R.,* 385 S.W.3d 552, 564 (Tex. 2012).

An answer filed by an attorney ad litem constitutes a general appearance, Rule 121, and dispenses with the need for issuance and service of citation. See Rule 121, *Phillips v. Dallas County Child Protective Servs. Unit,* 197 S.W.3d 862 (Tex. App. - - Dallas 2006, pet. denied).

XVI. NOTICE OF INTENTION TO TAKE DEFAULT JUDGMENT AGAINST THE STATE OR CERTAIN OF ITS AGENTS MUST BE PROVIDED

Notice of intent to take a default judgment against the State of Texas, any state agency, or any party for which representation is authorized by the Attorney General under CPRC §104.004 must be mailed to the Attorney General at his office in Austin, Texas, by U.S. Postal Service, certified mail, return receipt requested, at least ten days before the entry of a default judgment. Tex.Rev.Civ.Stat. art. 4413a.1.

XVII. SPECIAL DEFAULT RULES

A. Expedited Foreclosure Proceeding

Rules 735 and 736 were amended, effective January 1, 2012. Summary enforcement of foreclosure of home equity liens, tax liens and liens of homeowners' associations is authorized. Special service rules apply. See also amendment to Property Code, Chapter 209.

B. Forcible Entry and Detainer

Special service rules apply, see Rules 742, 742a, 743, and 753.

C. Garnishment

Rule 667. See *Sherry Lane Nat'l Bank v. Bank of Evergreen*,715S.W.2d148(Tex. App--Dallas 1986, no writ) (debtor should be served with writ of garnishment). See Rule 663a and Serving Banks as Garnishees, page 44.

D. Trespass to Try Title

Rule 799.

E. Trial of Right of Property

Rule 725.

XVIII. THE TRIAL JUDGE MUST RULE ON MOTION FOR DEFAULT JUDGMENT

A. Compelling Consideration of Motion

Mandamus is available to compel consideration of motion for default judgment. Trial court refused to rule on inmates/plaintiff's motion for default judgment; mandamus conditionally granted requiring court to rule. *In re Ramirez,* 994 S.W.2d 682 (Tex. App.--San Antonio 1998, no pet.)(mandamus proceeding) citing *Barnes v. State,* 832 S.W.2d 424, 426 (Tex. App.--Houston [1st Dist.] 1992)(mandamus proceeding). See *also Ratcliff v. Werlein*, 485 S.W.2d 932 (Tex. Civ. App.--Houston [lst Dist.] 1972) (mandamus proceeding).

Mandamus will issue to compel consideration of motion for default judgment within a reasonable time (one month delay was insufficient; but after waiting four additional months, the trial court should have ruled). *In re Holleman,* No. 04-04-00340-CV (Tex. App. - - San Antonio, June 23, 2004, no pet.)(2004 Tex. App. Lexis 5483)(mem. op.)(mandamus proceeding). *But* see *In re Woodberry,* No. 05-0501372-CV(Tex. App. - - Dallas, October 14, 2005, no pet.) (2005 Tex. App. Lexis 8505)(mem. op.)(mandamus proceeding)(denied, without discussion). See also C. Appeal to Require Judgment Entry.

B. Dismissal, Reinstatement and Default Judgment

(See also C. Appeal to Require Judgment Entry)

These are often difficult issues for the plaintiff - - another reason to avoid cases that are nearly time-barred. If a case is dismissed for want of prosecution, plaintiff may generally simply re-file it, unless there is a time-bar issue.

Many of these dismissals are affirmed for failure to present a record establishing error. For example,

failing to include an order denying default judgment, or failing to satisfy TRAP 33.1(a)(2)(B). The rule requires that, in order to complain on appeal that a trial court refused to rule on a request, objection or motion, the record must show that the complaining party objected to the refusal.

Cases decided adversely to plaintiff include:

Resurgence Fin., LLC v. Taylor, 295 S.W.3d 429 (Tex. App. - - Dallas 2009, pet. filed)(petition gave fair notice of primary claim, but insufficient information from which to calculate interest due; deemed admission as to 6% interest was inadequate, because the request and the record neglected to establish whether the rate was simple interest, and credit card statements reflected other interest rates; trial court did not err in denying default judgment and dismissing case); *Resurgence Fin., L.L.C. v. Moseley,* No. 05-07-01225-CV(Tex. App. - - Dallas, January 15, 2009, no pet.)(2009 Tex. App. Lexis 259)(mem. op.) (no return of service or order denying default judgment in record); *Unifund CCR Partners v. Jaeger,* No. 05-07-01444-CV (Tex. App. - - Dallas, March 13, 2009)(2009 Tex. App. Lexis 1767)(mem. op.)(plaintiff apparently ignored second dismissal docket notice and failed to file proper return of service); *Crown Asset Mgmt., L.L.C. v. Davis,* No. 05-07-01504-CV (Tex. App. - - Dallas, October 24, 2008, no pet.)(2008 Tex. App. Lexis 8145)(mem. op.)(discusses trial court's power to dismiss cases; plaintiff failed to prove damages in debt case, dismissal affirmed); *Crown Asset Mgmt., L.L.C. v. Bogar,* 264 S.W.3d 420 (Tex. App. - - Dallas 2008, no pet.)(same); *Old Republic Ins. Co. v. Sisavath,* No. 05-07-01391-CV (Tex. App. - - Dallas, October 27, 2008, no pet.)(2008 Tex. App. Lexis 8150)(mem. op.); *Crown Asset Mgmt., L.L.C. v. Hernandez,* No. 05-07-01392-CV (Tex. App. - - Dallas, October 22, 2008, no pet.)(2008 Tex. App. Lexis 7998)(mem. op.); *Crown Asset Mgmt., L.L.C. v. Castro*, No. 05-07-01305-CV (Tex. App. - - Dallas, August 11, 2008, no pet.)(2008 Tex. App. Lexis 6066)(mem. op.)(deficient record).

Cases in which plaintiff prevailed include *In re Elite Door & Trim, Inc.*, 355 S.W.3d 757 (Tex. App. - - Dallas 2011, no pet.)(trial court made numerous errors in dismissing for want of prosecution); *Rava Square Homeowners Ass'n. v. Swan*, No. 14-07-00521-CV (Tex. App. - - Houston [14th Dist.], September 30, 2008, no pet.)(2008 Tex. App. Lexis 7257)(mem. op.) Motion for reinstatement should have been granted because plaintiff's counsel provided an affidavit affirming that he was diligently prosecuting the case and that his absence was not intentional or the result of conscious indifference. Counsel swore that he received no notice of the case's inclusion on the dismissal docket. The record contains no evidence of conscious indifference by plaintiff's counsel, and he was attempting to obtain default judgment. The trial court abused its discretion in denying the verified motion for reinstatement. Plaintiff was entitled to default judgment and the court abused its discretion in entering order denying motion for default judgment. Reversed and remanded.) See *also State Farm Lloyds v. Carroll*, No. 05-08-00277-CV (Tex. App. - - Dallas, February 23, 2009, no pet.) (2009 Tex. App. Lexis 1217)(mem. op.)(plaintiff received no notice of intent to dismiss); *Crown Asset Mgmt., L.L.C. v. Jackson,* No. 05-07-01337-CV (Tex. App. - - Dallas, October 22, 2008, no pet.)(2008 Tex. App. Lexis 8012)(mem. op.)(abuse of discretion to dismiss before date stated in notice of intent to dismiss).

To extend trial court's jurisdiction after dismissal, a motion to reinstate must be verified. *In re Valliance Bank,* No. 02-12-00255-CV (Tex. App. -- Fort Worth, November 15, 2012, no pet.)(2012 Tex. App. Lexis 9491); *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.).

Rule 306(a) applies to extend the court's plenary jurisdiction when counsel receives late notice (20-90 days) of dismissal order. See *Moseley v. Omega Ob-Gyn Assocs. of S. Arlington*, No. 2-06-291-CV (Tex. App. - - Fort Worth, June 19, 2008, pet. filed)(2008 Tex. App. Lexis 4601)(plaintiff, who failed to employ Rule 306a to file motion to reinstate, was not entitled to bill of review relief). Discussed at page 88, F.

C. Appeal to Require Judgment Entry After Adverse Judgment or Order

Failure to grant a default judgment may be reversible error. Ordinarily denial of default judgment is interlocutory and not subject to appeal. However, the denial of default judgment can be challenged in an appeal from a final judgment or order. See also *Elite Door & Trim, Inc. v. Tapia,* No. 05-12-00725-CV (Tex. App. - - Dallas, May 22, 2013, n.p.h.)(2013 Tex. App. Lexis 6352)(mem. op.)(though unliquidated damages established, court signed take nothing judgment; reversed and court directed to enter default judgment for specified damages); *Aguilar v. Livingston*, 154 S.W.3d 832, 833(Tex. App. - Houston [14th Dist.] 2005, no pet.)(case wrongfully dismissed, remanded for judgment entry); *Rava Square Homeowners Ass'n. v. Swan*, No. 14-07-00521-CV (Tex. App. - - Houston [14th Dist.], September 30, 2008, no pet.) (2008 Tex. App. Lexis 7257)(mem. op.)(plaintiff was entitled to default judgment, case was wrongfully dismissed by trial court); *Gotch v. Gotch*, 416 S.W.3d 633 (Tex. App. - - Houston [14th Dist.] 2013, n.p.h.)(abuse of discretion to deny default judgment and enter take nothing judgment on wife's breach of contract action against husband, unliquidated damages proven).

See *also Oliphant Fin., LLC v. Galaviz.*, 299 S.W.3d 829 (Tex. App. - - Dallas 2009, no pet.). Two days after suit was filed, the trial court set the matter for dismissal and advised that plaintiff was expected to either obtain a summary judgment or default judgment before that date, if the case allowed. Plaintiff timely moved for default judgment on its credit card account based on breach of contract, alternatively, sworn account. Instead of expressly denying the motion for default judgment, the trial court, sent a form stating that one or more of the following deficiencies existed: petition does not give fair notice of claim, causes of action are not adequately pleaded, damages cannot be accurately calculated, no evidence of sale and delivery of merchandise.

Plaintiff filed a Trial Brief arguing that it was entitled to default judgment because it sought liquidated damages, proved up by written instruments, and that the judgment was also supported by deemed admissions. The credit card account and assignment of the account from the original creditor to the plaintiff was attached to the petition. The trial court dismissed the case based on failure to take action pursuant to the court's form letter, and for want of prosecution. The court of appeals concluded that the petition states a cause of action for breach of contract and was a liquidated claim. The court notes that even if the damages were unliquidated, plaintiff's deemed admissions conclusively prove all elements of the breach of contract claim. Reasonable attorney's fees proven by deemed admission, "for the prosecution of this lawsuit would be at least the amount of $5341.41." Suit was filed August 15, 2007 and the trial court dismissed it on November 30, 2007 even though plaintiff had moved for default judgment. The record does not show lack of diligence by plaintiff, and the trial court abused its discretion in dismissing the case. The trial court's order of dismissal is reversed; remanded to the trial court to render judgment for the principal debt and attorney's fees, and for the court to determine pre- and post-judgment interest. Per TRAP 43.2(c), (d) the appellate court may reverse and render judgment in whole or in part, or may reverse the trial court's judgment and remand the cause for further proceedings.

See *also Sherman Acquisition II LP v. Garcia*, 229 S.W.3d 802 (Tex. App. - - Waco 2007, no pet.). Assignee-creditor sued based on credit card account. The court held that it did not constitute a rule 185 sworn account, but that judgment should have been rendered based on breach of contract claim. Trial court refused to enter default judgment and scheduled the matter for trial, even though defendant filed no answer. After the trial court entered a take-nothing judgment, the court of appeals reversed and rendered judgment based on deemed admissions. The court found that defendant did not waive failure to enter default judgment. Better practice to object to the failure to enter default judgment prior to trial, **see** next section as to waiver. The court discusses the problems with affidavits when plaintiff is an assignee and affiant's apparent lack of knowledge.

D. No Mandamus to Enter Judgment

Rendition of a judgment by default is not a ministerial act and mandamus will not issue to direct a trial court to render a default judgment. *In re Lewis,* No. 07-04-00432-CV (Tex. App. - - Amarillo, September 17, 2004, no pet.)(2004 Tex. App. Lexis

8377)(mem. op.)(mandamus proceeding); *In re Burks,* No. 14-05-00336-CV(Tex. App. - - Houston [14th Dist.] April 22, 2005, no pet.)(2005 Tex. App. Lexis 3261)(mem. op.)(mandamus proceeding); *In re Stephen-James,* No. 05-05-01370-CV (Tex. App. Dallas October 14, 2005, no pet.)(2005 Tex. App. Lexis 8508) (mem. op.)(mandamus proceeding).

But see *Harris N.A v. Obregon*, No. 05-10-01349-CV(Tex. App. -- Dallas, July 11, 2013, n.p.h.)(2013 Tex. App. Lexis 8655)(mem. op.). Appeal of dismissal of sworn account action. Case reversed and remanded to the trial court requiring that it render judgment for plaintiff for specified amounts, and to determine pre-and post judgment interest.

XIX. THE RIGHT TO A DEFAULT JUDGMENT MAY BE WAIVED

A plaintiff waives his right to obtain a default judgment by proceeding to trial without first seeking a default. See for example, *McNabb v. Dkm Custom Props*., No. 14-11-01005-CV (Tex. App. - - Houston [14th Dist.], April 9, 2013, n.p.h.)(2013 Tex. App. Lexis 4456)(mem. op.); *Texas Dep't of Pub. Safety v. Moran*, 949 S.W.2d 523 (Tex. App.--San Antonio 1997, no pet.); *Artripe v. Hughes*, 857 S.W.2d 82 (Tex. App.--Corpus Christi 1993, writ denied); *Estate of Grimes v. Dorchester Gas Producing Co.,* 707 S.W.2d 196, 204 (Tex. App.--Amarillo 1986, writ ref'd n.r.e.); *Dodson v. Citizens State Bank*, 701 S.W.2d 89, 94 (Tex. App.--Amarillo 1986, writ ref'd n.r.e.); *Foster v. L.M.S. Dev. Co.*, 346 S.W.2d 387, 397 (Tex. Civ. App.--Dallas 1961, writ ref'd n.r.e.); *Blond Lighting Fixture Supply Co. v. W.R. Griggs Constr. Co.,* No. 04-99-00324-CV (Tex. App. - - San Antonio, Aug. 16, 2000, no pet.)(unpublished, 2000 Tex. App. Lexis 5452); *Jacobs v. Texas Kenworth Co.*, No. 05-98-00831-CV (Tex. App. - - Dallas July 31, 2000, pet. denied)(unpublished, 2000 Tex. App. Lexis 5092).

In *St. Gelais v. Jackson*, 769 S.W.2d 249 (Tex. App.--Houston [14th Dist.] 1988, no writ), plaintiff's counsel advised the court at the charge conference that by submission of liability issues as to various defendants, they were not waiving their interlocutory default judgments. The court of appeals held that submission of such issues did not constitute waiver. In *Sherman Acquisition II LP v. Garcia*, 229 S.W.3d 802(Tex. App. - - Waco 2007, no pet.) discussed in preceding section, plaintiff did not waive right to default judgment by proceeding to trial, after requesting default judgment).

XX. ATTACKS ON DEFAULT JUDGMENTS

(See Defending Default Judgments, Collections and Creditors' Rights 2015, State Bar of Texas, Patrick J. Dyer; O'Connor's Texas Rules Chapter 9 C; Rule 329b)

Practice Tip 1: Set Aside Your Judgment. If a valid appeal attacks service, consider extending trial court jurisdiction by plaintiff's motion to set aside its judgment. "An order granting a new trial deprives an appellate court of jurisdiction over the appeal." Yan v. Jiang, 241 S.W.3d 930 (Tex. App. -- Dallas 2008, no pet.). See also Rule 329b(d)(e) trial court's plenary power continues, even if appeal is perfected.

Practice Tip 2: Review the record promptly and determine whether there are any issues relating to the record, signatures, file-stamped copies, seals, attachments. Original documents filed with the court can be delivered to court of appeals, TRAP 34.5(f). Consider whether Clerk's Record should be supplemented. TRAP 34.5(c)

Practice Tip 3: Depose Defendant. Upon receipt of Motion for New Trial, promptly notice deposition(s) of affiant(s). Cross-examine as to affidavits and the Craddock factors. Try to establish that defendant "knew it was sued but did not care", conscious indifference. Milestone Operating, Inc. v. ExxonMobil Corp., 388 S.W.3d 307, 310 (Tex.2012)(per curiam). "A defendant satisfies its burden under this element when its factual assertions, if true, negate intentional or consciously indifferent conduct and the <u>factual assertions are not controverted by the plaintiff."</u> (emphasis added). Therefore, depose affiant to enable plaintiff to controvert defendant's factual assertions by affidavit or deposition excerpts. Oppose any new-trial hearing, until depositions are taken.

Practice Tip 4: Controverting evidence of conscious indifference. Remember, the stern citation warning

that appears on citation may itself help establish that Defendant did not care that it was sued. "You have been sued...If you or your attorney do not file a written answer...a default judgment may be taken against you." Rule 99(c), see discussion at 4, page 86.

Practice Tip 5: Generally, motions for new trial are overruled by operation of law 75 days after judgment. The court maintains plenary power over the judgment for an additional 30 days after the motion is overruled, but not later than 105 days after date of judgment. If motion for new trial is overruled by operation of law, there is no abuse of discretion. Rule 329b. Cisneros v. Regalado Family L.P., No. 13-10-089-CV (Tex. App. - - Corpus Christi - Edinburg, August 4, 2011, no pet.)(2011 Tex. App. Lexis 6070)(mem. op.) citing Shamrock Roofing Supply, Inc. v. Mercantile Nat'l Bank, 703 S.W.2d 356, 357-58(Tex. App. - - Dallas 1985, no writ); Fluty v. Simmons Co., 835 S.W.2d 664, 667-68(Tex. App. - - Dallas 1992, no writ). But see Rule 306a(4), if late notice of judgment, discussed at D. Rule 306a(4), page 83.

A. Motion for New Trial, Liberal Standard

A new trial following a default judgment is often easily obtained under the *Craddock* standards. *Craddock v. Sunshine Bus Lines, Inc.*.134 Tex. 388, 133 S.W.2d 124 (1939). A defendant may even admit negligence and obtain a new trial, as long as failure to answer is not shown to be intentional or due to conscious indifference.

Levine v. Shackelford, Melton, & McKinley, L.L.P., 248 S.W.3d 166(Tex. 2008)(per curiam); *Craddock v. Sunshine Bus Lines, Inc.* 133 S.W.2d 124, 126 (Tex. 1939) requires that "the failure of the defendant to answer before judgment is not intentional, or the result of conscious indifference on his part, but is due to a mistake or an accident." "The *Craddock* standard is one of intentional or conscious indifference - - that the defendant knew it was sued but did not care."(emphasis added). The court criticizes the court of appeal's opinion for framing conscious indifference in terms of negligence, "a person of reasonable sensibilities under the same or similar circumstances." The supreme court affirms denial of the new trial motion, based on failure to satisfy the referenced *Craddock* test. In *Levine*, defendant ignored deadlines and disregarded warnings from opposing counsel.

Further authority for a liberal new-trial standard is *Fidelity & Guar. Ins. Co. v Drewery Const. Co.,* 186 S.W.3d 571, 573-75 (Tex. 2006)(reversed and remanded). The court stated that "there are no presumptions in favor of valid...service" pertains to appellate attacks by restricted appeal. A motion for new trial or bill of review allows development of the record in the trial court.

> . . . [W]hen a default judgment is attacked by Motion for New Trial or a Bill of Review in the trial court, the record is not so limited. In those proceedings, the parties may introduce affidavits, depositions, testimony, and exhibits to explain what happened . . . That being the case these procedures focus on what has always been and always should be the critical question in any default judgment: "why did the defendant not appear?"
>
> If the answer to this critical question is "Because I didn't get the suit papers," the default generally must be set aside. Exceptions to this rule exist when nonreceipt is uncorroborated, or was a bill-of-review claimant's own fault (citations omitted).
>
> But if the answer to the critical question is "I got the suit papers but then . . .," the default judgment should be set aside only if the defendant proves the three familiar *Craddock* elements . . . [1) default was neither intentional nor conscious indifference; 2) meritorious defense; 3) new trial would cause neither delay nor undue prejudice]. 186 S.W.3d at 573-74.
>
> . . . We also disagree that to establish that papers were lost there must be an affidavit from the person who lost them describing how it occurred. People often do not know where or how they lost something - that is precisely why it remains "lost." This court has often set aside default judgments where papers were misplaced, though no one knew precisely how. (citations omitted) 186 S.W.3d. At 575.

Reaffirming the Drewery analysis, above is *Sutherland v. Spencer,*376 S.W.3d 752 (Tex. 2012). The need to controvert defendant's excuse for not answering the lawsuit is clear. In the dissent, Jefferson, CJ, summarizes defendant's excuse for not answering the lawsuit as "I forgot". Plaintiff apparently failed to depose defendant and did not controvert the excuse that "the citation was left in a stack of papers and forgotten about because of limited time spent at the office due to weather conditions over a nearly three-week period." The majority finds the excuse sufficient to satisfy the first *Craddock* element, and remands to the court of appeals for consideration of the remaining two elements. See also *Milestone Operating, Inc. v. ExxonMobil Corp.,* 388 S.W.3d 307 (Tex. 2012)(citing Sutherland, the court reaches a similar result; defendant "did not recall" being served).

A new trial motion fails to set up a meritorious defense if it does not allege facts constituting such a defense and is not supported "by affidavits or other evidence providing prima facia proof that the defendant has such a defense. *Dolgencorp of Texas, Inc. v. Lerma*, 288 S.W.3d 922, 930 (Tex. 2009).

B. Opposing New-Trial Motions

1. Depose Defendants, see Practice Tips, above.

Cross examine defendant as to reason for not answering suit. Show defendant knew it was sued, but did not care - - conscious indifference.

2. Requests for Admission

Consider routinely serving defendant with requests for admission, with the petition and citation. This creates an additional hurdle for the defaulting defendant. File a motion for default judgment, attaching an affidavit establishing the deeming of admissions for non-response after 50 days. In *Continental Carbon*, the court found deemed admissions prevented debtor from setting up a meritorious defense. *Continental Carbon Company, Inc. v. Sea-Land Service, Inc.*. 27 S.W.3d 184(Tex. App. - - Dallas 2000, pet. denied).

3. Sworn Account

A judgment on sworn account may require both a new-trial motion and a sworn answer. After noting that Rule 185 requires a defendant to file a verified denial in order to deny the claim, the court, citing *Continental Carbon,* states that "this court has determined that the bar on denying a sworn claim extends to a motion for new trial." *Lemp v. Floors Unlimited, Inc.* No. 05-03-01674-CV (Tex. App. - - Dallas, July 29, 2004, no pet.)(2004 Tex. App. Lexis 6891)(mem. op.). *Continental Carbon* and *Lemp* apparently hold that failure to file a sworn denial of sworn account dictates that a motion for new trial be denied. *Continental Carbon Company v. Sea-Land Service, Inc.*, 27 S.W. 3d 184 (Tex. App. - - Dallas 2000, pet. denied).

4. Conscious Indifference, Citation Warning

Conscious indifference can certainly be argued based on the required warning of Rule 99:

> c. Notice. The citation shall include the following notice to the defendant: "You have been sued. You may employ an attorney. If you or your attorney do not file a written answer with the clerk who issued this citation by 10:00 a.m. on the Monday next following the expiration of twenty days after you were served this citation and petition, a default judgment may be taken against you."

This argument was successful in *Coston v. Coston,* No. 12-09-00458-CV (Tex. App. - - Tyler August 18, 2010, pet. denied)(2010 Tex. App. Lexis 6645)(mem. op.). As noted in *Coston,* "In light of Rule 99, as well as the undisputed fact that defendant was served with citation, the trial court could properly find the defendants not filing an answer was the failure to take some action that would have been indicated to a person of reasonable sensibilities." But per *Levine v. Shackelford, Melton, & McKinley, L.L.P.*, 248 S.W.3d 166(Tex. 2008)(per curiam), best to define conscious indifference as, "defendant knew it was sued but did not care."

C. Cases Denying New Trial

Felt v. Comerica Bank, 401 S.W.3d 802 (Tex. App. - - Houston [14th Dist.] 2013, n.p.h.)(non-attorney could not file new-trial motion for a corporation).

Conclusory allegations that no answer was filed due to accident and mistake are insufficient, *Sheraton Homes Inc. v. Shipley* 137 S.W.3d 379 (Tex. App. - - Dallas 2004, no pet.), citing *Holt Atherton Indus., Inc. v. Heine,* 835 S.W.2d 80, 82-83 (Tex. 1992).

Defendant requested new trial based on death of attorney. However, defendant failed to explain why the attorney did not file an answer by the answer date, three days before his death. Denial of new trial affirmed. *Faulkner v. Stark Outdoor Adven.,* No. 06-04-00005-CV(Tex. App. - - Texarkana, July 30, 2004, no pet.) (2004 Tex. App. Lexis 6922)(mem. op.).

Defendant's inaction after receiving a call from plaintiff's counsel providing additional, actual notice of a possible default judgment, constituted conscious indifference. *Fiske v. Fiske*, No. 01-03-00048-CV (Tex. App. - - Houston [1st Dist.] August 19, 2004, no pet.) (2004 Tex. App. Lexis 7483)(mem. op.). See *also Levine, supra.*

Practice Tip: Dual-Service. If you suspect bad faith by defendant, consider sending a copy of the citation and petition via certified mail to, for example, defendant's president. Such will not constitute valid service, but may establish conscious indifference in the event of a new-trial motion. See Fiske, above and Conscious Indifference Letters, pages 117, 118. Alternatively, obtain dual service, requesting that defendant be served by two valid methods, e.g., personal service, and by mail via the court clerk, Rule 103.

D. Rule 306a(4), Extending Jurisdiction

In the Interest of J.Z.P., No. 07-13-00445-CV (Tex. App. - - Amarillo, October 3, 2014, pet. denied)(2014 Tex. App. Lexis 11023)(mem. op.) "306a4 is jurisdictional prerequisite". *Memorial* (Tex.1987) Cited by *JZP*, Amarillo.

This rule allows an extended time to file a motion when a party receives late notice (20-90 days), of a judgment or order. This important rule requires a precise predicate to extend the trial court's plenary jurisdiction. *See Tran v. H.K. Dev. Corp.*, No. 01-13-00613-CV (Tex. App. - - Houston [1st Dist.], August 26, 2014, n.p.h.)(2014 Tex. App. Lexis 9444)(mem. op.)Rule 306a satisfied, (multi-million dollar slip and fall judgment set aside).

The Rule 306a(4) motion extending jurisdiction, may be unnecessary if service was defective and the trial court did not acquire jurisdiction. *Orgoo, Inc. v. Rackspace US, Inc.*, No. 04-09-00729-CV, No. 04-10-00058-CV (Tex. App.- -San Antonio January 5, 2011, n.p.h.)(2011 Tex. App. Lexis 22)(mem. op.). Cases include: *Nedd-Johnson v. Wells Fargo Bank, N.A.*, No. 05-10-00980-CV (Tex. App. - - Dallas December 16, 2010, no pet.)(2010 Tex. App. Lexis 9997)(mem. op.)(requirements of rule 306a were not satisfied, jurisdiction was not extended, and appeal dismissed for want of jurisdiction); *Wells Fargo Bank, N.A. v. Erickson,* 267 S.W.3d 139 (Tex. App. - - Corpus Christi 2008, no pet.)(Wells Fargo filed proper Rule 306a motion after initial motion denied, and obtained new trial); *Moseley v. Omega Ob-Gyn Assocs. of S. Arlington*, No. 2-06-291-CV (Tex. App. - - Fort Worth, June 19, 2008, pet. filed)(2008 Tex. App. Lexis 4601) (dismissal order; discussed in Bill of Review, next section, See F. 4).

E. Void Judgments

Google, Inc. v. Expunction Order, 441 S.W.3d 644 (Tex. App. - - Houston [1st Dist.] 2014, n.p.h.). When a party is served but there are technical defects in the judgment, the judgment is voidable. PNS Stores, Inc. v Rivera, 379 S.W.3d 267, 275 (Tex.2012). However, when "the defects in service are so substantial that the defendant was not afforded due process" the judgment is void. Id. Because Google was not named as a party and was not served, the order against it is void and must be vacated.

For a court to have personal jurisdiction over the defendant, the defendant must be amenable to jurisdiction of the court, and the plaintiff must have invoked that jurisdiction by valid service of process on the defendant. *Wagner v. D'Lorm*, 315 S.W.3d 188, (Tex.App. - - Austin 2010, no pet.) citing *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 200 (Tex. 1985). *Wagner* concludes that if a challenged judgment is void, a different co-equal court can properly render judgment declaring it void. The trial court therefore, erred when it dismissed the attack on another court's judgment.

In re Disc. Rental, Inc., 216 S.W.3d 831 (Tex. 2007)(per curiam)(orig. proceeding) "Because the default judgment was taken without proper service, it was void, and any attempt, by process based upon the void judgment to reach property is...devoid of lawful authority." See also *Middleton v Murph*, 689 S.W.2d 212 (Tex. 1985). See also *Luby v. Wood*, No. 03-12-00197-CV(Tex. App. - - Austin, April 2, 2014, n.p.h.)(2014 Tex. App. Lexis 3538)(collateral attack on previously renewed 18 year-old judgment, judgment void due to defective substituted service) discussed in Substituted Service By Mail, final paragraph, page 34.

Kilpatrick v. Potoczniak, No. 14-13-00707-CV (Tex. App. - - Houston [14th Dist.], July 31, 2014, n.p.h.)(2014 Tex. App. Lexis 8372)(mem. op.) An action taken in violation of the automatic bankruptcy stay is void, not merely voidable, citing Howell v. Thompson, 839 S.W.2d 92 (Tex. 1992).

F. Bill of Review

The fundamental policy underlying Bills of Review in Texas remains the need to protect the finality of judgments. "The fundamental policy underline bills of review in Texas remains the need to protect the finality of judgments." *Maton Ltd. v Afri-Carib Enters, Inc.* 369 S.W.3d 809, 812 (Tex.2012).

"Granting" Bill of Review

1. *Cary v. Alford*, 203 S.W.3d 837 (Tex. 2006)(per curiam). The court applies the "lost papers defense" of *Fidelity & Guar. Ins. Co. v Drewery Const. Co.,* 186 S.W.3d 571, 573-75 (Tex. 2006) to a Bill of Review case; remanded to court of appeals to reconsider in light of *Drewery. Cary* apparently makes default judgments vulnerable for four years.

2. *Ross v. Nat'l Ctr. for the Empl. of the Disabled,* 197 S.W.3d 795, (Tex. 2006)(per curiam). A defendant who never received citation could easily attack a $10 million default judgment by bill of review, even though he had not been diligent. "...[A] defendant who is not served with process is entitled to bill of review relief without further showing, because the constitution satisfies the first element [meritorious defense] and lack of service satisfies the second and third." [2. defense not asserted due to fraud, accident etc.; 3.unmixed with any fault or negligence of movant].

"Denying" Bill of Review

1. A party who has been properly served or appeared in a lawsuit must be diligent, citing *Ross v. Nat.'l Ctr. For the Employment of the Disabled*, 197 S.W.3d 795, 798 (Tex. 2006). Even if a party does not know of a trial setting, if he appeared in the case but was not diligent in monitoring the case status, he can be ineligible for bill of review. Therefore, the trial court erred in concluding that defendant's lack of negligence was established in this case as a matter of law. *Afri-Carib Enters. v. Mabon Ltd.*, 287 S.W.3d 217 (Tex. App. - - Houston [14th Dist.] 2009, pet. denied).

2. *In re Office of AG*, 276 S.W.3d 611 (Tex. App. - - Houston [1st Dist.] 2008, no pet.) Mandamus proceeding directing that the trial court vacate orders which had set aside a default judgment, without good cause. The appellate court finds that the trial judge abused her discretion in vacating the default judgment, because there was no showing of meritorious defense, nor was there proof that the judgment was rendered as a result of fraud, accident, or wrongful act of the opposite party or official mistake, unmixed with any negligence of defendant.

3. *In re Botello,* No. 04-08-00562-CV (Tex. App. - - San Antonio, November 26, 2008, no pet.)(2008 Tex. App. Lexis 8875)(mem. op.). Defendant could not simply deny service because recitals in return of service are prima facie evidence of service and a litigant is required to corroborate denial of service. Mandamus conditionally granted.

4. *Moseley v. Omega Ob-Gyn Assocs. of S. Arlington*, No. 2-06-291-CV (Tex. App. - - Fort Worth, June 19, 2008, pet. filed)(2008 Tex. App. Lexis 4601). Trial court improperly granted bill of review, reversed and rendered. Plaintiff failed to exercise due diligence in pursuing available legal remedies . Plaintiff failed to file Rule 306a motion to reinstate upon learning of dismissal order 65 days after it was signed.

Appendix I

I. Rule 107. Return of Service (effective January 1, 2012)

[Return may be attached to citation - major change]

(a) The officer or authorized person executing the citation must complete a return of service. The return may, but need not, be endorsed on or attached to the citation.

[Caution, if return not attached to citation - major change]

(b) The return, together with any document to which it is attached, must include the following information:

(1) the cause number and case name;

(2) the court in which the case is filed;

(3) a description of what was served;

(4) the date and time the process was received for service;

(5) the person or entity served;

(6) the address served;

(7) the date of service or attempted service;

(8) the manner of delivery of service or attempted service;

(9) the name of the person who served or attempted to serve the process;

(10) if the person named in (9) is a process server certified under order of the Supreme Court, his or her identification number and the expiration date of his or her certification; and

(11) any other information required by rule or law.

[Mail receipt required - unchanged]

(c) When the citation was served by registered or certified mail as authorized by Rule 106, the return by the officer or authorized person must also contain the return receipt with the addressee's signature.

[Show diligence used- minor change]

(d) When the officer or authorized person has not served the citation, the return shall show the diligence used by the officer or authorized person to execute the same and the cause of failure to execute it, and where the defendant is to be found, if ascertainable.

[Signature; verification or penalty of perjury - major change]

(e) The officer or authorized person who serves or attempts to serve a citation must sign the return. If the return is signed by a person other than a sheriff, constable, or the clerk of the court, the return must either be verified or be signed under penalty of perjury. A return signed under penalty of perjury must contain the statement below in substantially the following form:

"My name is _____________(First)_______ (Middle)________(Last)_________, my date of birth is _________, and my address is ________, (Street)_________, (City)________, (State)______, (Zip Code), and _______(Country). I declare under penalty of perjury that the foregoing is true and correct. Executed in __________County, State of __________, on the _____ day of _________(Month), __________(Year).

____

Declarant

[Rule 106 service]

(f) Where citation is executed by an alternative method as authorized by Rule 106, proof of service shall be made in the manner ordered by the court.

[Electronic/facsimile filing - major change]

(g) The return and any document to which it is attached must be filed with the court and may be filed electronically or by facsimile, if those methods of filing are available.

[Return filed 10 days - minor change]

(h) No default judgment shall be granted in any cause until proof of service as provided by this rule or by Rules 108 or 108a, or as ordered by the court in the event citation is executed by an alternative method under Rule 106, shall have been on file with the clerk of the court ten days, exclusive of the day of filing and the day of judgment.

(effective January 1, 2012)

II. Former Rule 107

The return of the officer or authorized person executing the citation shall be endorsed on or attached to the same [no longer required by current rule]; it shall state when the citation was served and the manner of service and be signed by the officer officially or by the authorized person. The return of citation by an authorized person shall be verified. [may now also be signed under penalty of perjury]...(see current rule as changed, above).

Appendix II

Rule 21. Filing & Serving Pleadings & Motions

Excerpts

...

(f) Electronic Filing.

(1) Requirement. Except in juvenile cases under Title 3 of the Family Code, attorneys must electronically file documents in courts where electronic filing has been mandated. Attorneys practicing in courts where electronic filing is available but not mandated and unrepresented parties may electronically file documents, but it is not required.

(3) Mechanism. Electronic filing must be done through the electronic filing manager established by the Office of Court Administration and an electronic filing service provider certified by the Office of Court Administration.

(5) Timely filing. Unless a document must be filed by a certain time of day, a document is considered timely filed if it is electronically filed at any time before midnight (in the court's time zone) on the filing deadline. An electronically filed document is deemed filed when transmitted to the filing party's electronic filing service provider except: ..[Saturday, Sunday, legal holiday; and if order allowing its filing].

(6) Technical failure. If a document is untimely due to a technical failure or a system outage, the filing party may seek appropriate relief from the court. If the missed deadline is one imposed by these rules, the filing party must be given a reasonable extension of time to complete the filing.

(7) Electronic signatures. A document that is electronically served, filed, or issued by a court or clerk is considered signed if the document includes:

(A) a "/s/" and name typed in the space where the signature would otherwise appear, unless the document is notarized or sworn; or

(B) an electronic image or scanned image of the signature.

(10) Electronic notices from the court. The clerk may send notices, orders, or other communications about the case to the party electronically. A court seal may be electronic.

(11) Non-conforming documents. The clerk may not refuse to file a document that fails to conform with this rule. But the clerk may identify the error to be corrected and state a deadline for the party to resubmit the document in a conforming format.(emphasis added)

TRCP 21a. Methods of Service (excerpts)

...

(1) Documents filed electronically. A document filed electronically under Rule 21 must be served electronically through the electronic filing manager if the e-mail address of the party or attorney to be served is on file with the electronic filing manager. If the e-mail address of the party or attorney to be served is not on file with the electronic filing manager, the document may be served on that party or attorney under subparagraph (2).

(2) Documents not filed electronically. A document not filed electronically may be served in person, by mail, by commercial delivery service, by fax, by e-mail, or by such other manner as the court in its discretion may direct.

(3) Electronic service is complete on transmission of the document to the serving party's electronic filing service provider. The electronic filing manager will send confirmation of service to the serving party.

...

Appendix III

Business Organizations Code

The Business Organizations Code became applicable to all entities January 1, 2010. Important provisions relating to service of process include:

§5.201. Designation and Maintenance of Registered Agent and Registered Office

(a) Each filing entity and each foreign filing entity shall designate and continuously maintain in this state:
(1) a registered agent; and
(2) a registered office.
(b) The registered agent:
(1) is an agent of the entity on whom may be served any process, notice, or demand required or permitted by law to be served on the entity;
(2) may be:
(A) an individual who:
(i) is a resident of this state; and
(ii) has consented in a written or electronic form to be developed by the office of the secretary of state to serve as the registered agent of the entity; or

(B) an organization, other than the filing entity or foreign filing entity to be represented, that:

(i) is registered or authorized to do business in this state; and
(ii) has consented in a written or electronic form to be developed by the office of the secretary of state to serve as the registered agent of the entity; and
(3) must maintain a business office at the same address as the entity's registered office.
(c) The registered office:
(1) must be located at a street address where process may be personally served on the entity's registered agent;
(2) is not required to be a place of business of the filing entity or foreign filing entity; and
(3) may not be solely a mailbox service or a telephone answering service.

(d) A registered agent that is an organization must have an employee available at the registered office during normal business hours to receive service of process, notice, or demand. Any employee of the organization may receive service at the registered office. (emphasis added)

§ 5.251. Failure to Designate Registered Agent

The secretary of state is an agent of an entity for purposes of service of process, notice, or demand on the entity if:

(1) the entity is a filing entity or a foreign filing entity and:
(A) the entity fails to appoint or does not maintain a registered agent in this state; or
(B) the registered agent of the entity cannot with reasonable diligence be found at the registered office of the entity; or
(2) the entity is a foreign filing entity and:
(A) the entity's registration to do business under this code is revoked; or
(B) the entity transacts business in this state without being registered as required by Chapter 9. (emphasis added)

§ 5.252. Service on Secretary of State

(a) Service on the secretary of state under Section 5.251 is effected by:
(1) delivering to the secretary duplicate copies of the process, notice, or demand; and
(2) accompanying the copies with any fee required by law, including this code or the Government Code, for:

(A) maintenance by the secretary of a record of the service; and
(B) forwarding by the secretary of the process, notice, or demand.
(b) Notice on the secretary of state under Subsection (a) is returnable in not less than 30 days.

(continued)

Business Organizations Code, Continued

§ 5.253. Action by Secretary of State

(a) After service in compliance with Section 5.252, the secretary of state shall immediately send one of the copies of the process, notice, or demand to the named entity.
(b) The notice must be:
(1) addressed to the **most recent address of the entity on file with the secretary of state;** and
(2) sent by certified mail, with return receipt requested. (emphasis added)

§ 5.255. Agent for Service of Process, Notice, or Demand As Matter of Law

For the purpose of service of process, notice, or demand:
(1) the president and each vice president of a domestic or foreign corporation is an agent of that corporation;
(2) each general partner of a domestic or foreign limited partnership and each partner of a domestic or foreign general partnership is an agent of that partnership;
(3) each manager of a manager-managed domestic or foreign limited liability company and each member of a member-managed domestic or foreign limited liability company is an agent of that limited liability company;
(4) each person who is a governing person of a domestic or foreign entity, other than an entity listed in Subdivisions (1)--(3), is an agent of that entity; and
(5) each member of a committee of a nonprofit corporation authorized to perform the chief executive function of the corporation is an agent of that corporation.

§ 5.256. Other Means of Service Not Precluded

This chapter does not preclude other means of service of process, notice, or demand on a domestic or foreign entity as provided by other law.

§ 1.007. Signing of Document or Other Writing

For purposes of this code, a writing has been signed by a person when the writing includes, bears, or incorporates the person's signature. A transmission or reproduction of a writing signed by a person is considered signed by that person for purposes of this code.

§ 1.052. Reference in Law to Statute Revised by Code

A reference in a law to a statute or a part of a statute revised by this code is considered to be a reference to the part of this code that revises that statute or part of that statute.

Of lesser importance, and not quoted here are:

5.202 Change of Entity to Registered Office or Registered Agent
5.203 Change by Registered Agent to Name or Address of Registered Office
5.204 Resignation of Registered Agent
5.257 Service of Process by Political Subdivision

Business Corporations Act

Art. 11.02. Applicability; Expiration

A. Except as provided by Title 8, Business Organizations Code, this Act does not apply to a corporation to which the Business Organizations Code applies.

B. This Act expires January 1, 2010.

Appendix IV

Additional Diligent Service Cases (supplement to page 8,V)

These diligent service cases peaked in 2000-2001 but are still common. The facts generally include the filing of a lawsuit near the limitations date. Plaintiff's counsel apparently believes he has won the limitations race, and turns the matter over to a constable or process server to obtain service. The process server is not diligent or the defendant is difficult to serve, and service of process is not obtained for weeks or months. Representative cases decided adversely to the plaintiff include *Stotts v. Ferrell*, No. 2-05-194-CV (Tex. App. - - Fort Worth, July 20, 2006, pet denied)(2006 Tex. App. Lexis 6355)(mem. op.) (summary judgment, defendant served four months after limitations expired); *Biscamp v. Entergy Gulf States, Inc.*, 202 S.W.3d 413 (Tex. App. - - Beaumont 2006, no pet.)(jury determined no diligent service, defendant served ten months after limitations expired).

Diligent service cases are often decided against the plaintiff by summary judgment. *Vasquez v. Pelaez-Prada,* No. 04-04-00178-CV (Tex. App. - - San Antonio, February 16, 2005, no pet.)(2005 Tex. App. Lexis 1220)(mem. op.)(defendant attorney was sued for malpractice, for failing to timely sue on personal injury claim; malpractice suit was filed one month before limitations expired, and citation not issued for five months, summary judgment against plaintiff affirmed for lack of diligence in obtaining service);*Lewis v. AAA Flexible Pipe Cleaning Co., Inc.* No. 01-04-00229-CV (Tex. App.--Houston[1st Dist.]February 17, 2005, pet. denied) (2005 Tex. App. Lexis 1328)(mem. op.) (summary judgment against plaintiff affirmed, sued one day before limitations expired, first request for citation six months later); *Brooks v. Tex-Pack Express, L.P.*, No. 05-03-01220-CV (Tex. App. - - Dallas, September 22, 2004, no pet.) (2004 Tex. App. Lexis 8427) (mem. op.) (summary judgment against plaintiff affirmed, suit filed one day before limitations ran, defendant served five months after limitations expired); *Plantation Prod. Props L.L.C. v. Meeks*, No. 10-02-00029-CV (Tex. App. - - Waco, September 8, 2004, no pet.)(2004 Tex. App. Lexis 8206)(mem. op.) (summary judgment against plaintiff affirmed on mechanic's lien claim, two year limitations, no service requested until two months after limitations expired and no explanation for the delay).

Other summary judgment cases decided adversely to plaintiff include *McDaniel v. Anchi Hsu,* No. 04-04-00382-CV(Tex. App. - - San Antonio, May 4, 2005, pet. denied) (2005 Tex. App. Lexis 3363)(mem. op.)(summary judgment affirmed, except as to minor-plaintiffs whose legal disability tolled limitations); *Gundermann v. Buehring,* No. 13-05-278-CV(Tex. App.- - Corpus Christi, February 2, 2006, pet. denied)(2006 Tex. App. Lexis 880)(mem. op.)(17 month lapse between first and second request for citation); *Guillen v. Frels,* No. 14-05-00154-CV (Tex. App. - - Houston [14th Dist.] December 8, 2005, no pet.)(2005 Tex. App. Lexis 10158)(mem. op.)(12 month extension when defendant dies; but unexplained additional eight month delay); *Webb v. Glass,* No. 09-04-410-CV(Tex. App. - - Beaumont, August 31, 2005, no pet.)(2005 Tex. App. Lexis 7109)(mem. op.)(nine month delay)*; Butler v. Davis,* No. 04-04-00655-CV (Tex. App. - - San Antonio, April 6, 2005, no pet.) (2005 Tex. App. Lexis 2552)(mem. op.)(unexplained lapse of nearly two months, in issuing citation)*; Scott v. Tolbert,* No. 09-03-561-CV(Tex. App.- - Beaumont, March 31, 2005, no pet.)(2005 Tex. App. Lexis 2384)(mem. op.)(four month delay issuing citation); *Sanderson v. Vela,*,2003 Tex. App. Lexis 2539 (Tex. App.--Dallas 2003 no pet.)(mem. op.); *Roberts v. GMC, (*unpublished, 2002 Tex. App. Lexis 6183 (Tex. Civ. App.- Houston [14th Dist.] 2002, pet. denied); *Meza v. Hooker Contr. Co.,*104 S.W.3d 111, 2003 Tex. App. Lexis 258 (Tex. App. - - San Antonio 2003, no pet.)(informal agreement with insurer which did not comply with Rule 11 was insufficient excuse for delayed service).

Contrast *Rodriguez* with cases reversing summary judgment against plaintiff, though plaintiff must overcome limitations at trial, a difficult task. 1) *Auten v. DJ Clark, Inc.*, 209 S.W.3d 695 (Tex. App. - - Houston [14th Dist.] 2006, no pet.); 2) *Tate v. Beal,* 119 S.W.3d 378 (Tex. App. -- Fort Worth 2003, pet. denied). Here the court held that the delay of 78 days between the first and second attempts to serve defendant did not establish, as a matter of law, that plaintiff failed to use due diligence; 3) *Forrest v. Houck*, No. 14-03-00583-CV (Tex. App. - - Houston [14th dist.] September 28, 2004, no pet.)(2004 Tex. App. Lexis 8571) (mem. op.)(suit filed approximately six months prior to limitations bar and defendant served 12 days after limitations expired; plaintiff listed 18 specific actions taken in investigating and attempting to locate defendant). A jury found plaintiff failed to diligently obtain service in *Biscamp v. Entergy Gulf States, Inc.,* 202 S.W.3d 413 (Tex. App. - - Beaumont 2006, no pet.)(defendant served ten months after limitations expired).

Appendix V.

New Justice Court Rules Index and Major Service Changes

New Justice Court Rules
Service of Process
Effective August 31, 2013
Misc. Docket No. 13-9049

Rule 501.2 Service of Citation

Rule 501.2(b) Method of Service

(1) delivering a copy of the citation with a copy of the petition attached to the defendant in person, after endorsing the date of delivery on the citation; or

(2) mailing a copy of the citation with a copy of the petition attached to the defendant by registered or certified mail, restricted delivery, with return receipt or electronic return receipt requested. (emphasis added)

Note that Rule 106(a)(2) for county and district courts, does not require restricted delivery and does not provide for electronic return receipt:

> (a) Unless the citation or an order of the court otherwise directs, the citation shall be served by any person authorized by Rule 103 by ...
> (2) mailing to the defendant by registered or certified mail, return receipt requested, a true copy of the citation with a copy of the petition attached thereto.

Rule 501.2(c) Citation by Mail

When the citation is served by registered or certified mail as authorized by Rule 501.2(b)(2), the return by the officer or authorized person must also contain the receipt with the addressee's signature. (emphasis added)

Both the Justice Court rule, above, and Rule 107(c) require the mail receipt with addressee's signature for mail service. Disputed default judgments with service by mail, are often reversed due to the signature requirement. Common problems: 1) signature is illegible; 2) name variance -- defendants often don't sign their precise name on a mail receipt; 3) returns for service by mail are often defective. For example, return should not state that defendant was served "in person" because defendant was not so served.

Rule 501.2(e) Alternative Service of Citation. If the methods under (b) are insufficient to serve defendant, the plaintiff, officer, or other authorized server may make request for alternative service. "This request must include a sworn statement describing the methods attempted under (b) and stating that defendant's usual place of business or residence, or other place where the defendant can probably be found."

The court may authorize the following types of alternative service:

> (1) mailing a copy of the citation with a copy of the petition attached by first class mail to the defendant at a specified address, and also leaving a copy of the citation with petition attached at the defendant's residence or other place where the defendant can probably be found with any person found there who is at least 16 years of age; or [common issue: the return should include a statement that the first class mailing was done, and that the person served was at least 16 years old]
>
> (2) mailing a copy of the citation with a copy of the petition attached by first class mail to the defendant at a specified address and also serving by any other method that the court finds is reasonably likely to provide the defendant with notice of the suit. (emphasis added) [common issue: the return should factually state the method of service which complies precisely with the Order; and verify that the first class mailing was done]

Contrast with Alternative Service of Citation by Rule 106(b) for County and District Courts:

Rule 106(b) states that the "motion supported by affidavit" should state "specifically the facts showing that personal service or mail service was attempted under either paragraph (a)(1) or (a)(2) at the location named in the affidavit but has not been successful. Under Rule 106(b) there is no first class mail requirement. Rule 106(b) allows service:

(1) by leaving a true copy of the citation, with a copy of the petition attached, with anyone over sixteen years of age at the location specified in such affidavit, or
(2) in any other manner that the affidavit or other evidence before the court shows will be reasonable effective to give the defendant notice of the suit. (emphasis added)

Rule 106 specifically allows service at the location specified in the affidavit with anyone over 16 years of age, and Justice Court allows service on a person "at least" 16 years old. The Justice Court rules additionally require that citation and petition be mailed by first class mail to the defendant at a specified address.

Rule 502.5(d) Answer Due Date. Defendant's answer is due by the of the 14th day after the day the defendant was served with citation and petition. If the 14th day is a Saturday, Sunday, or legal holiday, the answer is due on the next day that is not a Saturday, Sunday, or legal holiday. If the 14th day falls on a day during which the court is closed before 5:00 p.m., the answer is due on the court's next business day.

Rule 508 Debt Claim Cases
(narrowly defined)

Rule 508.1 Application.
Rule 508 applies to a claim for the recovery of a debt brought by an assignee of a claim, a financial institution, a debt collector or collection agency, or a person or entity primarily engaged in the business of lending money at interest. (emphasis added)

Rule 508.3 Default Judgment
(a) Generally. If the defendant does not file an answer to a claim by the answer date or otherwise appear in the case, the judge must promptly render a default judgment upon the plaintiffs prof of th amount of damages.
...(See Rule 508.3(b) as to proof of damages and default procedures)

Landlord - Tenant Cases

Rule 509 Repair and Remedy Cases. Rules for Service of Suits Filed by Residential Tenant Under Chapter 92, Texas Property Code. Read the special rules for these cases.

Rule 509.3 Citation. This rule includes special rules as to service and appearance dates. Upon the tenant filing a written petition, the judge must immediately issue citation directed to the landlord, commanding the landlord to appear before such judge at the time and place named in the citation. The appearance date must not be less than 10 days nor more than 21 days after the petition is filed. The appearance date on the citation is the trial date.

Rule 509.4 Service. The officer or authorized person must serve the citation by delivering a copy of it, along with a copy of the petition and any attachments to the landlord at least six days before the appearance date. Special rules apply to these cases and the entirety of Rule 509 should be reviewed. Special rules also apply to alternative service of the citations, allowing service in some instances, on landlord's management company, on-premise manager, or rent collector.

Rule 510 Eviction Cases. Special rules also apply to service of process in eviction cases, Chapter 24, Texas Property Code. The entire rule should be reviewed.

Rule 510.4(b)(1) (Service and Return of Citation)
Unless otherwise authorized by written court order, citation must be served by sheriff or constable.

Rule 510.4(a)(10) (Issuance of Citation; Contents)
Citation must state the date defendant must appear in person for trial at the court issuing citation, which must not be less than 10 days nor more than 21 days after the petition is filed.

Rule 510.4(b)(2) (Service) Service must be by delivering a copy of the citation with a copy of the petition attached to the defendant, or by leaving a copy with a copy of the petition attached, with some person, other than the defendant, over the age of 16 years, at the defendant's usual place of residence, at least 6 days before the day set for trial. (emphasis added)

TEXAS RULES OF CIVIL PROCEDURE
PART V. RULES OF PRACTICE
IN JUSTICE COURTS (Rules 500-510)
(Misc. Docket No. 13-9049, Effective 8/31/13)

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51 Rule 510.12. Judgment By Default on Appeal
51 Rule 510.13. Writ of Possession on Appeal

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Default Judgment Checklist

General		*Rule	**Page**
1.	If mail service, Return with return-receipt bearing (addressee's) defendant's or defendant's agent for service, signature. Most mail service is insufficient, see page 28, Proof of Delivery	107(c)	28
2.	Appearance date has passed.	99	54
2a.	No answer or appearance.	239	54
3.	Defendant's name is correct on petition, citation, return.		20
4.	Return filed "11" days prior to judgment.	107	62
5.	Default Judgment warning is on citation.	99(b)(12)	61

Return of Service

6. Forms
   * (Individual) "Executed by delivering to __________ (name) on _____________(date) at _______(time) at ________(place), a true copy of the citation with the date of delivery endorsed thereon with a copy of the petition attached thereto."

   * (Corporation) "Executed by delivering to __________(corporation) by delivering to ____________________(name), its _____________(title) on _________(date) at __________(time) at ____________(place), a true copy of citation with the date of delivery endorsed thereon with a copy of the petition attached thereto."

7.	"Delivered to", not "served on" -- legal conclusion.		22
8.	Recites that both citation and petition delivered.		19
9.	Signature of person who serves; with signature, typed or printed name of sheriff, constable or clerk.	107(e)	22
10.	If private process server, signature of person who serves: a) verified signature of server; or signed under penalty of perjury b) if certified by Supreme Court, include "SC" number and certification expiration date	107(b)(e)	23

Default Judgment

11.	Certification of last known address.	239	63
12.	If a final judgment, it disposes of all parties and issues.	240	64
13.	Compare petition to judgment: a) identical parties; b) identical relief requested and obtained.		67
14.	Liquidated damages, or prove damages.	241, 243	70-76
15.	Affidavit or other proof of attorney's fees, or take judicial notice of same. (Ch.38, CPRC)	243	76

Cause No. CC-00123-E

ALL AMERICAN COMPANY	§	IN THE COUNTY COURT
	§	
VS.	§	AT LAW NUMBER FIVE OF
	§	
DOE CONSTRUCTION CORPORATION; JOHN DOE	§	DALLAS COUNTY, T E X A S

PLAINTIFF'S ORIGINAL PETITION -- ACCOUNT/GUARANTY

1. The parties and judgment which Plaintiff seeks against Defendants jointly and severally are:

Plaintiff:	ALL AMERICAN COMPANY
Defendants (2):	1) DOE CONSTRUCTION CORPORATION, a Texas corporation, hereafter, "Obligor"; 2) JOHN DOE, an individual, hereafter "Guarantor".
Principal sought:	$15,000.00
Attorneys' fees:	$5000.00, additional fees within court's jurisdiction, if trial or appeal
Costs and interest:	Costs together with maximum lawful pre-judgment and post-judgment interest and general relief.
Discovery Control Plan:	Level 1, Tex.R.Civ.P.190.
Rule 47 Compliance:	The damages sought are within the jurisdictional limits of the court. Plaintiff seeks only monetary relief of $100,000 or less, including damages of any kind, penalties, costs, expenses, pre-judgment interest, and attorney fees.

2. SERVICE: Defendant DOE CONSTRUCTION CORPORATION may be served by serving its registered agent, John Doe, at its registered office, 2324 Oak Lawn, Dallas, Texas 75024. Alternatively, in the event the registered agent cannot, with reasonable diligence, be served at its registered office, Defendant should be served by serving Defendant's agent, the Secretary of State, who should forward process to Defendant DOE CONSTRUCTION CORPORATION at the most recent address of the entity on file with the Secretary of State, which is 2324 Oak Lawn, Dallas, Texas 75024. Alternatively, Defendant may be otherwise served according to law.

Defendant JOHN DOE may be served at 2324 Oak Lawn, Dallas, Texas 75024; or at his residence address, 1555 Kings Row, Dallas, TX 75204.

Note: Discovery, including requests for admission, are being served with the petition upon Defendants. The requests are deemed admitted if not timely answered.

3. BUSINESS DEALINGS ACCOUNT WITH AFFIDAVIT AND STATEMENT: Plaintiff sues on an account founded on business dealings between the parties and for which a systematic record has been kept. Obligor failed to pay as promised, to Plaintiff's damage in the principal amount stated herein. All conditions precedent to Plaintiff's recovery have occurred. The account is verified in the attached affidavit and itemized in Exhibit A. Alternatively, Defendants are liable based on other grounds, for example, breach of contract and quantum meruit.

4. GUARANTY: Attached hereto as Exhibit B and incorporated herein is a true copy of a guaranty agreement signed by Guarantor, in which Guarantor promised to pay Obligor's debt. Plaintiff has demanded payment from Obligor and Guarantor, and all conditions precedent to recovery have occurred. Guarantor has failed to pay the debt, to Plaintiff's damage.

5. ATTORNEYS' FEES: Plaintiff demanded payment from Defendants more than thirty days ago, has retained the undersigned counsel to collect this debt, and requests attorneys' fees. All conditions precedent to recovery have occurred. Defendants neither paid nor tendered payment.

THE BLENDEN ROTH LAW FIRM

BY: ___________________________________

MARK P. BLENDEN, Bar No. 02486300
The Blenden Roth Law Firm
P.O. Box 560326
Dallas, TX 75356
888-799-3000
888-799-4000 (fax)
mark@blendenlawfirm.com

Please complete all blanks, sign, and have affidavit properly notarized.
Amount, without interest, must be stated in item 5.

SWORN ACCOUNT SUIT AFFIDAVIT

STATE OF Texas)

COUNTY OF Dallas)

BEFORE ME, the undersigned authority, on this day personally appeared the undersigned affiant, who swore on oath that the following facts are true:

1. My name is: Sam Orez
2. My position is: Manager
3. "Creditor" refers to: All American Company
4. "Debtor" refers to: Doe Construction Corporation
5. Debtor is indebted to creditor in the principal amount of $15,000
6. I am over the age of eighteen years, of sound mind, have never been convicted of a crime, am competent to testify and personally acquainted with the matters stated. I am employed by and authorized to make this affidavit for creditor, have personal knowledge of this account and the matters stated herein are true.

7. This claim is, within my personal knowledge just and true. The claim is due creditor by debtor, and all just and lawful offsets, payments, and credits have been allowed.

Sam Orez
AFFIANT

SIGNED AND SWORN TO before me on [date].

Nancy Notary
NOTARY PUBLIC

L661

Statement of Account of Doe Construction Corporation

Invoice #	**Invoice Date**	**Amount**	**Invoice Payments**	**Paid Date**	**Balance Forward**
00149	1/15/13	$10,000.00			$10,000.00
			$5,000.00	1/30/13	$ 5,000.00
00245	2/28/13	$10,000.00			$15,000.00
Totals		**$20,000.00**	**$5,000.00**		**$15,000.00**

Exhibit A

==

Credit Terms And Continuing Guaranty of Payment

1. All American Company Credit Terms: Payable in Dallas, Dallas County, Texas within 30 days of invoice date.
2. Applicant and Guarantor represent that they are in good financial condition, solvent, and timely paying their debts. All parties understand that All American Company will rely upon the credit application and guaranty in extending credit. All matters stated therein are complete and accurate.
3. Extension of credit to applicant is a benefit to Guarantor. Guarantor acknowledges receipt of good and sufficient consideration for execution of this guaranty. Applicant will use All American Company services for business purposes only.
4. Applicant and Guarantor promise to pay lawful interest at 18% per annum on invoices not paid within 30 days of the invoice date. All American Company intends to fully comply with all laws relating to the charging of interest. If interest, beyond the legal maximum is contracted for, charged, or received, applicant and Guarantor agree to pay only the lawful maximum and bring the matter to the attention of All American Company for credit. If interest, beyond the legal maximum is contracted for, charged or received, All American Company may, at its option, within 45 days of being notified of the receipt of excess interest, either issue a credit, or refund such excess interest to applicant or Guarantor.
5. This agreement may be supplemented by All American Company through the issuance of Addendums To customer Agreement. such addendums shall become a part of the agreement with applicant and Guarantor unless written notice of objection is received by All American Company within 30 days of applicant's initial receipt of the addendum.
6. If, for any reason, one or more terms of this agreement is unenforceable, the parties intend to be bound by the remaining terms.
7. In consideration of All American Company furnishing goods or services on its, usual credit terms to the applicant, the undersigned unconditionally guarantees the payment at Dallas, Dallas county, Texas, of applicant's account, including interest whether now due or to become due for all such goods and services, and on any and all sums of any nature owing by applicant to All American Company.
8. The parties intend this guaranty to be broadly construed if credit is extended by All American Company. "Credit applicant" and "applicant" include those named on the application. The terms also include any related or similarly named business in which Guarantor has an interest.
9. Guarantor guarantees payment of all charges owed or to be owed by applicant to All American Company. The undersigned hereby waives notice of acceptance of the guaranty, and of amounts of sales and dates of shipments and services, and the undersigned likewise waives notice of default, demand for payment and any requirement of legal proceedings against applicant.
10. The indebtedness or any part of it may be changed in form and in terms of payment as often as may be agreed upon between All American Company and applicant. No such change shall affect this guaranty agreement and applicant waives notice of all such changes.
11. The undersigned further agrees that this is a continuing guaranty which is not extinguished in whole or part by payment of any amount hereunder. Liability as Guarantor shall continue until written notice of termination is actually received by All American Company and such notice shall be effective only if the applicant's account and Guarantor's account are paid in full. The notice shall not be effective for obligations arising prior to the actual receipt of such notice.
12.By submission of this application, applicant and Guarantor agree to all terms stated herein. This document fully sets forth the agreement between All American Company, applicant and Guarantor. Only All American Company's officers or general manager has authority to amend any term herein. All changes to this agreement must be in writing.

John Doe
signature of individual Guarantor, (with no title)

John Doe
printed name of individual Guarantor (with no title)

This instrument was signed and acknowledged before me on *[date]* by John Doe.

Nancy Notary
NOTARY PUBLIC in and for
State of Texas

(notary seal)

Exhibit B
(condensed)

[Date]

TO: DOE CONSTRUCTION CORPORATION, Defendant

ALL AMERICAN COMPANY vs. DOE CONSTRUCTION CORPORATION
Dallas County Court
Our File: 15886

RE: PLAINTIFF'S ACCOUNT INTERROGATORIES; REQUESTS FOR ADMISSION; DOCUMENT REQUESTS; and REQUESTS FOR DISCLOSURE

Plaintiff serves the attached discovery on Defendant.

DEFINITIONS: For clarity, "Plaintiff" means ALL AMERICAN COMPANY and "Defendant" means DOE CONSTRUCTION CORPORATION and includes all of Defendant's agents and employees. "Goods", "goods or services", "debt", "invoices", and "account" refer to goods or services and the resulting debt in the amount of $15,000 sued upon herein. "Petition" refers to Plaintiff's Original Petition filed in this cause. "Identify" as to a person means to state the person's name, address, telephone number, employer, and position. "Identify" as to a document, email, or other electronic communication means to describe the document or email, and identify its author, recipient, and custodian.

"Documents" include records, correspondence, memoranda, photographs, film, recordings, emails, electronic communication, electronic and magnetic data, and data compilation in any form. Electronic and magnetic data, including emails, are requested in printed form. Where Defendant possesses more than one copy of an item, production of all copies are requested unless all copies are, in all respects, identical. Plaintiff will pay reasonable copying/printing costs up to $100.

SERVICE CERTIFICATE AND SIGNATURE
The attached Interrogatories, Requests for Admission, Document Requests, and Requests for Disclosure are served on Defendant. All discovery accompanied the citation and petition at the time of service upon Defendant. Note that Requests for Disclosures appear only at page 2; there is no applicable attachment.

The Blenden Roth Law Firm
Plaintiff's Attorney
BY:______________________
MARK P. BLENDEN, Bar No. 02486300
P.O. Box 560326
Dallas, TX 75356
888-799-3000
888-799-4000 (fax)

References to rules are to the Texas Rules of Civil Procedure. Responses must be supplemented pursuant to Rule 193.5.

INTERROGATORIES: Pursuant to Rule 197, Plaintiff requests answers to the attached interrogatories. The responding party must serve a written response on the requesting party within 30 days after service of the interrogatories, except that a Defendant served with interrogatories before the Defendant's answer is due need not respond until 50 days after service of the interrogatories.

REQUESTS FOR ADMISSION: Pursuant to Rule 198, Plaintiff requests that you make the following admissions for the purpose of this action only. The responding party must serve a written response on the requesting party within 30 days after service of the request, except that a Defendant served with a request before the Defendant's answer is due need not respond until 50 days after service of the request. If a response is not timely served, the request is considered admitted without the necessity of a court order.

REQUEST FOR PRODUCTION: Pursuant to Rule 196, Plaintiff requests that the Defendant produce the requested Documents; or copies pursuant to Rule 196.3(b). Plaintiff agrees to pay reasonable copying/printing costs, to $100. The requested Documents, or true copies thereof, should be provided to the undersigned by 2:00 p.m. on the next weekday following the expiration of 31 days after service of the request, except that if the request accompanies citation a Defendant need not respond until 50 days after service of the request upon the Defendant. Documents include electronic and magnetic information and communication. Production of electronic and magnetic data, including emails, are requested in printed form. Production shall be at The Blenden Roth Law Firm, 2217 Harwood Road, Bedford, Texas 76021-3607. Because Plaintiff will accept copies and agrees to pay reasonable copying costs, Plaintiff objects to the tender of Documents at an alternate location. Unless otherwise specified, the requested Documents are for the preceding five years.

REQUESTS FOR DISCLOSURE: Pursuant to Rule 194, you are requested to disclose, within 30 days of service of this request, the information or material described in Rule 194.2. If this request accompanies citation, a Defendant need not respond until 50 days after service of the request upon the Defendant.

Pursuant to Rule 190.2(b)(6), you are requested to disclose all documents, electronic information, and tangible items that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses. Please respond and produce documents to The Blenden Roth Law Firm, 2217 Harwood Road, Bedford, Texas 76021. **There are no attachments pertaining to these Requests for Disclosure**.

PLAINTIFF'S INTERROGATORIES

(Please read cover letter, instructions, and Rule 197 before proceeding.)

(Condensed)

1. State the amount, if any, which Defendant owes Plaintiff and the calculation used to determine the amount.

ANSWER:

2. State specifically all goods and services which Defendant ordered from Plaintiff.

ANSWER:

3. Did Defendant receive the goods or services? If your answer is other than an unqualified "yes", state what was received, and specifically how the goods or services received differed from those ordered.

ANSWER:

4. Did Defendant agree to the prices charged; were these prices reasonable?

ANSWER:

5. State specifically every reason why the Defendant does not owe the debt.

ANSWER:

6. State the factual basis for all asserted defenses.

ANSWER:

7. State the amount and specific facts for every alleged credit, offset or claim against Plaintiff.

ANSWER:

8. Identify all emails and electronic communication that relate to the business transactions between the parties.

ANSWER:

9. Identify all business records which relate to Plaintiff, including Defendant's accounts payable records. Include the balance due Plaintiff as indicated by your accounts payable records.

ANSWER:

10. Identify all documents that support Defendant's contention that the debt is not owed.

ANSWER:

11. Describe the business transactions between Plaintiff and Defendant, including: dates, dollar amount, and general description.

ANSWER:

12. Identify any person who is expected to be called to testify at trial. See rule 192.3(d).

ANSWER:

PLAINTIFF'S REQUESTS FOR ADMISSION

(Please read cover letter, instructions, and Rule 198 before answering these Requests)

Answer:

__________ 1. The account is just and true.

__________ 2. The account states the balance due Plaintiff by Defendant, after all offsets, payments, claims and credits have been allowed.

__________ 3. The facts stated in the petition are accurate, and Plaintiff is entitled to the requested relief.

__________ 4. On the dates shown in the account, Defendant purchased and received goods or services.

__________ 5. Defendant promised to pay Plaintiff for the account.

__________ 6. All prices charged by Plaintiff were agreed to by Defendant.

__________ 7. Plaintiff has fully performed, to Defendant's satisfaction, in all transactions between Plaintiff and Defendant.

__________ 8. Plaintiff made written demand upon Defendant for payment of the account more than 30 days prior to filing suit.

__________ 9. Defendant did not reply to written demands for payment of the account.

__________10. Defendant made no objection or complaint after receiving monthly account invoices.

__________11. Venue is proper in this court.

__________12. Defendant consents to this court's jurisdiction.

PLAINTIFF'S DOCUMENT REQUEST

(Please read cover letter, instructions, and Rule 196 before proceeding)

1. All invoices and statements of account received by Defendant from Plaintiff.
2. Defendant's accounts payable records relating to Defendant's account with Plaintiff.
3. All calculations relating to the balance due Plaintiff.
4. All communication to or from Defendant, including emails, relating to the Account.
5. All written or electronic communication between Defendant and any other party to this suit.
6. All emails between Plaintiff and Defendant.
7. All documents relating to every offset, credit, or claim against Plaintiff.
8. All reports of experts which may be called to testify in this cause.
9. All computations, charts, and visual aids relating to the transactions between the parties.

NOTE: Please respond to all Requests for Disclosure which are stated at page 2.

(condensed)

[Date]

TO: JOHN DOE, Defendant

ALL AMERICAN COMPANY vs. DOE CONSTRUCTION CORPORATION
Dallas County Court
Our File: 15886

RE: PLAINTIFF'S GUARANTY INTERROGATORIES; REQUESTS FOR ADMISSION AND DOCUMENT REQUESTS

Plaintiff serves the attached discovery on Defendant.

DEFINITIONS: For clarity, "Plaintiff" means ALL AMERICAN COMPANY and "Defendant" means JOHN DOE and includes Defendant's agents and employees. "Obligor" refers to DOE CONSTRUCTION CORPORATION . "Goods", "goods or services", "debt", "invoices", and "account" refer to goods or services and the resulting debt in the amount of $15,000.00 sued upon herein. "Petition" refers to Plaintiff's Original Petition filed in this cause. "Identify" as to a person means to state the person's name, address, telephone number, employer, and position. "Identify" as to a document, email, or other electronic communication means to describe the document or email, and identify its author, recipient, and custodian.

"Documents" include records, correspondence, memoranda, photographs, film, recordings, emails, electronic communication, electronic and magnetic data, and data compilation in any form. Electronic and magnetic data, including emails, are requested in printed form. Where Defendant possesses more than one copy of an item, production of all copies are requested unless all copies are, in all respects, identical. Plaintiff will pay reasonable copying/printing costs up to $100.

SIGNATURE AND SERVICE CERTIFICATE

The attached Interrogatories, Requests for Admission, Document Requests, and Requests for Disclosure are served on Defendant. All discovery accompanied the citation and petition at the time of service upon Defendant. Note that Requests for Disclosures appear only at page 2; there is no applicable attachment.

The Blenden Roth Law Firm
Plaintiff's Attorney

BY:______________________
MARK P. BLENDEN, Bar No. 02486300
The Blenden Roth Law Firm
P.O. Box 560326
Dallas, TX 75356
888-799-3000
888-799-4000 (fax)

Attachment:
1. guaranty interrogatories
2. guaranty requests for admission
3. guaranty document request

[Note: Only requests for admission are included here.]

PLAINTIFF'S GUARANTY REQUESTS FOR ADMISSION

NOTE: Please read cover letter before answering these requests.

__________1. Defendant signed the Guaranty.

__________2. The copy of the Guaranty attached to Plaintiff's petition is a true copy of the original document.

__________3. The petition accurately describes the indebtedness of the Obligor whose debt Defendant guaranteed.

__________4. That, by reason of the Guaranty, Defendant is indebted to Plaintiff as stated in Plaintiff's petition.

__________5. Defendant failed to pay Plaintiff as promised.

__________6. Plaintiff made written demand upon Defendant for payment of the account more than 30 days prior to filing this lawsuit.

__________7. All documents attached to the petition are true copies of the original documents.

__________8. All signatures on attachments to the petition are genuine.

__________9. Matters stated in the documents attached to the petition are accurate.

__________ 10. Plaintiff should recover judgment as requested in its petition filed herein.

__________ 11. Neither Defendant, nor Obligor has a claim, offset or credit against Plaintiff.

__________ 12. Venue is proper in this court.

__________ 13. The court has jurisdiction over Defendant and the subject matter of this suit.

STATE OF TEXAS §
§ CAUSE NO. CC-00123-E
COUNTY OF DALLAS §

AFFIDAVIT IN SUPPORT OF SERVICE ON THE SECRETARY OF STATE

1. My name is Paul Smith. I am a private process server retained by the Blenden Roth Law Firm. I am certified by the Texas Supreme Court to serve process, including citations in Texas. I am not a party to nor interested in the outcome of this suit. I am over the age of 18 years and competent to make this affidavit.

2. "Defendant" refers to DOE CONSTRUCTION CORPORATION.

3. "Registered agent" refers to Michael Zanes.

4. "Registered office" refers to 2324 Oak Lawn, Dallas, TX 75024.

5. Most recent address of Defendant on file with Secretary of State of Texas is: 2324 Oak Lawn, Dallas, TX 75024.

6. I am a process server certified under Supreme Court order. I have personal knowledge of the matters stated herein and this affidavit is true. I personally have attempted to serve the Defendant by delivering the citation to the registered agent at the Defendant's registered office. The registered agent was unavailable and I was unable to deliver the citation.

7. The following are my specific attempts to serve the registered agent at the registered office. On the date indicated I went to the registered office with the results indicated.

Date	Time	Result
[Date]	10:15 a.m.	Secretary, Mary, says Michael Zanes is usually out and she offers to accept process for him – – I declined
[Date]	4:30 p.m.	Secretary, Mary, again reports Michael Zanes out

8. Attempts, if any, at locations other than registered office.
(Alternate address: ______________________________)

Date	Time	Result
________T	______________T	______________________________
________*	______________*	______________________________

Paul Smith
Process Server
SC000000008
Certification Expires: [Date]

SUBSCRIBED AND SWORN TO, before me on this [Date].

Nancy Notary
Notary Public in and for the State of T E X A S

Affidavit establishing diligence, to allow service on Secretary of State
(discussed at page 38)

STATE OF TEXAS §
§ CAUSE NO. ________________________
COUNTY OF DALLAS §

AFFIDAVIT IN SUPPORT OF SERVICE ON THE SECRETARY OF STATE AFTER ATTEMPTED SERVICE ON REGISTERED AGENT -ORGANIZATION NO EMPLOYEE PRESENT

1. My name is ______________. I am a private process server retained to serve process in this case. I am certified by the Texas Supreme Court to serve process, including citations, in the state of Texas. I am not a party to nor interested in the outcome of this suit. I am over the age of 18 years and competent to make this affidavit.

2. "Defendant" refers to
____.

3. "Registered Agent","Registered Agent-Organization", and "Defendant's Registered Agent" all refer to Defendant's Registered Agent:
____ .
Defendant's Registered Agent is itself an entity, not a person.

4. "Registered Office" refers to Defendant's Registered Office:____.
____

5. I am a process server certified under Supreme Court order. I have personal knowledge of the matters stated herein and this affidavit is true. I personally have attempted to serve the Defendant by delivering the citation to the Registered Agent at the Registered Office. The Registered Agent is itself an entity, not a person. Despite my diligent attempts stated below, I was unable to deliver the citation to the registered agent, president, or vice-president, or employee of the Registered Agent.

6. The following are my specific attempts to serve the Registered Agent (an organization) at the Registered Office. On the dates indicated, I went to the Registered Office and attempted to serve a person who was a registered agent, president, vice president or employee of the Registered Agent. However, no such person was available. Nor was I advised when such a person would appear. I was unable to deliver process, despite my diligent attempt to do so. I was unable to serve Defendant because no person would appear who is the registered agent, president, vice-president or employee of the Registered Agent. Based on Texas law, including Bus. Org. Code 5.201(d), I also attempted to deliver process to an employee of Defendant's Registered Agent, an organization. Attempt(s) was/were made as follows, during normal business hours but there was no employee to accept service:

Date	Time	Result
6-8-11	10:15 a.m.	Door locked, I knocked but no one answered.
6-11-11	4:30 p.m.	Door locked. I again knocked but no one answered. Neighbor, Rick Jones, states that Registered Office address has been vacant for at least 6 months. I spoke to Rick Jones with ABC, Inc., 2000 Main Street, Dallas, Texas.

____
Process Server
SC ________________________________
Certification Expires: ________________

SUBSCRIBED AND SWORN TO, before me on this_________ day of ____________________________ 2015.

____
Notary Public in and for the State of T E X A S

Affidavit to establish diligent attempts to serve Registered Agent, that is itself an organization, to allow service on Secretary of State (this is a new and unproven form, based on recently amended BOC §5.201(d) discussed at page 36(4).

Cause No. CC-00123-E

ALL AMERICAN COMPANY	§	IN THE COUNTY COURT
	§	
VS.	§	AT LAW NUMBER FIVE OF
	§	
DOE CONSTRUCTION CORPORATION; JOHN DOE	§	DALLAS COUNTY, T E X A S

MOTION FOR SUBSTITUTED SERVICE

TO THE HONORABLE JUDGE OF SAID COURT:

1. PARTIES: Plaintiff moves for substituted service of process on Defendant, JOHN DOE.

2. GROUNDS: As shown by the attached affidavit, service of citation by delivery to Defendant has been attempted and was unsuccessful.

3. REQUESTED METHOD OF SERVICE: As authorized by Rule 106(b), Texas Rules of Civil Procedure, service on Defendant should be made by the process server attaching the citation, with petition attached, securely to the front door or main entry, or by the process server leaving a copy of the citation, with petition attached, with anyone over sixteen years of age at Defendant's usual place of abode -- address follows:

1555 Kings Row
Dallas, TX 75024

THE BLENDEN ROTH LAW FIRM

BY:_________________________
MARK P. BLENDEN
State Bar No. 02486300
mark@blendenlawfirm.com

15886
A400

Motion for Substituted Service

STATE OF TEXAS §
§ CAUSE NO. CC-00123-E
COUNTY OF DALLAS §

AFFIDAVIT IN SUPPORT OF MOTION FOR SUBSTITUTED SERVICE

1. My name is Paul Smith. I am a private process server retained by The Blenden Roth Law Firm. I am certified by the Texas Supreme Court to serve process, including citations in Texas. I am not a party to nor interested in the outcome of this suit. I am not a party to nor interested in the outcome of this suit. I am over the age of 18 years and competent to give this affidavit.

2. "Defendant" refers to JOHN DOE.

3. "Stated Address" refers to 1555 Kings Row, Dallas, TX 75204.

4. I know that the stated address is Defendant's usual place of *~~business~~/abode because I was told by neighbor, Sam Orez, that John Doe resides at the stated address. Mr. Orez resides next door, at 1557 Kings Row, Dallas, Texas, and I spoke to him [date] .

5. I have personal knowledge of the matters stated herein and this affidavit is true. I believe that service by posting at the front door of the Stated Address, or by delivering process to someone over the age of sixteen years at that location will inform Defendant of the pending suit. I personally have attempted to serve the Defendant by delivering the citation to the Defendant as stated in paragraphs 6 and 7. The Defendant was unavailable and I was unable to deliver the citation.

6. The following are my specific attempts to serve the Defendant at the Stated Address. On the dates indicated I went to the Stated Address with the results indicated.

Date	Time	Results
[date]	10:30 am	Knocked loudly, numerous times; no answer, left my card
[date]	7:00 pm	Knocked loudly numerous times; no answer, card gone – again left card
[date]	7:30 pm	Defendant's wife, Sandra Doe, says Defendant not in

7. Attempts, if any, at locations other than the Stated Address.
(Alternate address: ____)

Paul Smith
SC # 000000008
Certification Expires: [date]

SUBSCRIBED AND SWORN TO, before me on this [Date] .

Nancy Notary
Notary Public in and for the State of
T E X A S

*line through one
L676. BRLF File#______

Cause No. CC-00123-E

ALL AMERICAN COMPANY	§	IN THE COUNTY COURT
	§	
VS.	§	AT LAW NUMBER FIVE OF
	§	
DOE CONSTRUCTION CORPORATION; JOHN DOE	§	DALLAS COUNTY, T E X A S

ORDER FOR SUBSTITUTED SERVICE

The Court has considered Plaintiff's Motion for Substituted Service and the evidence in support of the motion. The court finds:

1. Unsuccessful attempts were made to serve Defendant by delivering process to Defendant personally. The manner of service ordered herein will be reasonably effective in giving Defendant notice of the suit.

2. It is therefore ORDERED that service of citation, petition, and discovery may be made on Defendant, JOHN DOE, by the process server attaching the citation, with petition, and discovery, if any, securely to the front door or main entry at the following address:

1555 Kings Row
Dallas, TX 75024

or by the process server leaving a copy of same, with anyone over sixteen years of age at said address.

3. IT IS FURTHER ORDERED that the return shall be completed and filed pursuant to Rule 107, Tex.R.Civ.P.

Signed ______________________, 20__.

____
JUDGE PRESIDING

Approved and entry requested:

The Blenden Roth Law Firm

BY: __________________________________
Mark P. Blenden - Bar No. 02486300
15886
A400

[Date]

(Letterhead)

JOHN DOE
1555 Kings Row (CERTIFIED and FIRST CLASS MAIL)
Dallas, TX 75024

RE: ALL AMERICAN COMPANY
vs.
DOE CONSTRUCTION CORPORATION; JOHN DOE
Cause No.: CC-00123-E
Our File: 15886

Dear Mr. Doe:

After numerous attempts to serve you at your residence, a process server will be serving you through rule 106 of the Texas Rules of Civil Procedure. We will assert that such service is effective **whether or not you actually receive physical possession of the papers.** We urge you to: 1) consult a lawyer immediately and file an answer; 2) forward a copy of the answer to my office; 3) stay informed as to cause number CC-00123-E, pending in the Dallas County Civil Court at Law Number Five of Dallas County, Texas. If you fail to file an answer within the time allowed by the Texas Rules of Civil Procedure, we will seek a default judgment against you which may become final and enforceable. This is an attempt to collect a debt and all information obtained will be used for that purpose.

To insure that you have a copy of the pleading and discovery, they are enclosed. A copy of this letter is also being forwarded to the court to establish our extraordinary efforts to provide notice of the lawsuit.

Should you fail to timely file an answer, we may assert that your conduct constitutes conscious indifference to the court and this legal proceeding.

Very truly yours,

THE BLENDEN ROTH LAW FIRM

Mark P. Blenden

Attachment - citation and petition, with discovery attached

SERVICE CERTIFICATE

I certify that a true copy of this letter, together with a copy of the citation, pleading, and discovery was forwarded by certified and first class mail to JOHN DOE on [Date].

____
MARK P. BLENDEN

cc: Dallas County Court at Law Number Five (without attachments)
600 Commerce, #580
Dallas, TX 75202
Please file in the papers of this cause.

Optional Conscious Indifference Letter for (for individual) -- Rule 106(b)
(intended to establish that Defendant was consciously indifferent;
not intended as formal service of process)

[Date]

(Letterhead)

Mr. John Doe, President via certified and first class mail
Doe Construction Corporation
2463 Highway 10
Dallas, TX 74540

RE: All American Company
vs
Doe Construction Corporation
Cause Number: CC-00123-E
Our File Number: 15886

Dear Mr. Doe:

Please see the attached petition and discovery. Service is being made or has been made upon the Texas Secretary of State. We will assert such service will allow the entry of a default judgment against Doe Construction Corporation, **even if you do not receive the documents from the secretary of state**. You are advised to consult legal counsel immediately.

The petition and discovery is also being served upon you by certified mail as a courtesy. Doe's failure to immediately consult counsel could result in impairment of its legal rights. A copy of the letter is being forwarded to the court to establish our extraordinary efforts to provide notice of the lawsuit.

You are requested to consult counsel and file an answer in this cause. You are also urged to carefully monitor the lawsuit, as your failure to do so could result in entry of a default judgment -- consult a lawyer.

Very truly yours,
THE BLENDEN ROTH LAW FIRM

Mark P. Blenden

Attachment - citation and petition, with discovery attached

SERVICE CERTIFICATE

I certify that a true copy of this letter, together with a copy of the citation, pleading, and discovery was forwarded by certified and first class mail to Doe Construction Corporation on [Date].

____
MARK P. BLENDEN

cc: Dallas County Court at Law Number Five (without attachments) Please file in the papers of this cause.
600 Commerce, #580
Dallas, TX 75202

Optional Conscious Indifference Letter (for corporation)
(intended to establish that Defendant was consciously indifferent;
not intended as formal service of process)

[OFFICIAL SEAL]

The State Of Texas

Secretary Of State
00011

I, the undersigned, as Secretary of State of Texas, DO HEREBY CERTIFY that according to the records of this office, a copy of the Citation with Plaintiff's Original Petition, Requests for Disclosure, Production, Admissions and Interrogatories in the cause styled:

ALL AMERICAN COMPANY VS. DOE CONSTRUCTION CORPORATION
COUNTY COURT AT LAW NO. 5, DALLAS COUNTY, TEXAS
Cause No. CC-00123-E

was received by this office on [Date] and that a copy was forwarded on [Date] by CERTIFIED MAIL, return receipt requested to:

DOE CONSTRUCTION CORPORATION
2324 Oak Lawn
Dallas, Texas 75024

Date issued: [Date]

[OFFICIAL SEAL]

Irving Younger
Irving Younger
Secretary of State

Secretary of State Certificate "conclusively proving service".
(See page 41, D and *Campus Invs. Inc. v Cullever*, 144 S.W.3d 464(Tex.2004))

Cause No. CC-00123-E

ALL AMERICAN COMPANY	§	IN THE COUNTY COURT
	§	
VS.	§	AT LAW NUMBER FIVE OF
	§	
DOE CONSTRUCTION CORPORATION; JOHN DOE	§	DALLAS COUNTY, T E X A S

DEFAULT JUDGMENT

Defendants, DOE CONSTRUCTION COMPANY; JOHN DOE, duly cited to appear and answer, failed to file an answer within the time allowed by law. The court considered the pleadings, official records and evidence filed in this cause and finds that judgment should be rendered for Plaintiff. It is therefore,

ADJUDGED that Plaintiff recover judgment from Defendants jointly and severally as follows:

Plaintiff: ALL AMERICAN COMPANY

Defendants (2):
1) DOE CONSTRUCTION CORPORATION
2) JOHN DOE

Principal amount awarded: $15,000.00

Attorneys' fees awarded: $5,000.00

If appeal filed, additional fees awarded against Defendant who unsuccessfully appeals: $5,000.00

Interest: on the principal amount awarded at 6% per annum from April 1, 2012 to date of judgment; costs and interest on all sums awarded at 5% per annum from date of judgment until paid.

This judgment finally disposes of all parties and all claims and is appealable.

Signed __________________, 20___.

____
JUDGE PRESIDING

15886
A100/A501

Cause No. CC-00123-E

ALL AMERICAN COMPANY	§	IN THE COUNTY COURT
	§	
VS.	§	AT LAW NUMBER FIVE OF
	§	
DOE CONSTRUCTION CORPORATION; JOHN DOE	§	DALLAS COUNTY, T E X A S

ATTORNEY'S FEE AFFIDAVIT
ADDRESS CERTIFICATE

STATE OF TEXAS §
COUNTY OF DALLAS §

The undersigned affiant appeared before me, was sworn, and stated:

"I am Plaintiff's counsel in this cause, licensed to practice law in Texas and familiar with attorneys' fees customarily charged in Dallas and adjacent Texas counties. Pursuant to 38.003 and 38.004 Civil Practice and Remedies Code, usual and customary fees in this cause are $5000.00 with additional fees of $5,000.00 in event of appeal. Demand for payment was made upon Defendants more than thirty days prior to filing suit and the just amount owed was never paid or tendered. Affiant has personal knowledge of the matters stated herein."

____
MARK P. BLENDEN, Affiant

SUBSCRIBED AND SWORN TO, before me [Date].

____
NOTARY PUBLIC in and for the
State of T E X A S

APPROVAL and ADDRESS CERTIFICATE

Plaintiff, ALL AMERICAN COMPANY, certifies that the last known address of Defendant DOE CONSTRUCTION COMPANY is 2324 Oak Lawn, Dallas, Texas 75024 and Defendant JOHN DOE is 1555 Kings Row, Dallas, Texas 75024.

THE BLENDEN ROTH LAW FIRM
Attorney for Plaintiff

____
MARK P. BLENDEN, Bar No. 02486300
The Blenden Roth Law Firm
P.O. Box 560326
Dallas, TX 75356
888-799-3000
888-799-4000 (fax)
mark@blendenlawfirm.com

A100/A50115886

RETURN
(Attach to citation per Rule 107(a) or otherwise comply with Rule 107(b))

CAME TO HAND ON THE 6th DAY OF Feb. A.D. 2014, AT 2:00 O'CLOCK P.M., AND EXECUTED BY DELIVERING TO

John Doe at 1555 Kings Row, Dallas, Texas 75024

ON THE 11th DAY OF Feb. A.D. 2014, AT 7:30 O'CLOCK P.M., THE WITHIN NAMED DEFENDANT, IN PERSON, A TRUE COPY OF THIS CITATION, TOGETHER WITH A COPY OF ORIGINAL PETITION WITH DATE OF SERVICE MARKED THEREON, AND PLAINTIFF'S NINE PAGE DISCOVERY TO DEFENDANT.

Elvis Jones, Constable
Precinct 99 of Dallas County Texas
Dallas County, Texas

FEES:
SERVING___________________$_________
MILEAGE___________________$_________

Bill Green

NOTARY___________________$ ______

Bill Green
Deputy

TOTAL_____________________$_________

SIGNED AND SWORN TO BY THE SAID_____________ BEFORE ME THIS ______ DAY OF _________________________, 20__, TO CERTIFY WHICH WITNESS MY HAND SEAL OF OFFICE.

____
NOTARY PUBLIC___________COUNTY____

Officer's Return - Individual Defendant

==

RETURN
(Attach to citation per Rule 107(a) or otherwise comply with Rule 107(b))

CAME TO HAND ON THE 6th DAY OF Feb. A.D. 2014, AT 2:00 O'CLOCK P.M., AND EXECUTED BY DELIVERING TO

John Doe at 1555 Kings Row, Dallas, Texas 75024

ON THE 11th DAY OF Feb. A.D. 2014, AT 7:30 O'CLOCK P.M., THE WITHIN NAMED DEFENDANT, IN PERSON, A TRUE COPY OF THIS CITATION, TOGETHER WITH A COPY OF ORIGINAL PETITION WITH DATE OF SERVICE MARKED THEREON, AND PLAINTIFF'S NINE PAGE DISCOVERY TO DEFENDANT.

FEES:
SERVING___________________$40.00

____
County, Texas

MILEAGE___________________$_________

Paul Smith

NOTARY____________________$_________

Paul Smith
Process Server
SC 000000008
Certification Expires: 2-1-14

TOTAL_____________________$_________

SIGNED AND SWORN TO BY THE SAID Paul Smith BEFORE ME THIS 14th DAY OF February, 2014, TO CERTIFY WHICH WITNESS MY HAND SEAL OF OFFICE.

Nancy Notary

NOTARY PUBLIC Dallas COUNTY Texas

Private Process Server - Individual Defendant

RETURN OF SERVICE
SERVICE ON INDIVIDUAL DEFENDANT, IN PERSON

Case Name: ____

Cause Number: _____________ Court: __________________________ of _____________ County, Texas

1. **Date & Time of Receipt** of Specified Documents by process server: _______________________, 20___ at _____ ___.m.

2. **Date & Time of Delivery** of Specified Documents to Defendant**:** _______________________, 20___ at _____ ___.m.

3. **Defendant**: ____

4. **Stated Address:** **(Place of delivery)** ____

5. **Specified Documents**: a true copy of the citation with date of delivery endorsed thereon with a copy of Plaintiff's Original Petition attached thereto.

____

6. **Method of Service**: by delivering to Defendant, in person, at the Stated Address.

I am certified under order of Texas Supreme Court to serve process, including citations in Texas. I am not a party to or interested in the outcome of this suit. My identification number and certification expiration date appear below. I received and delivered the Specified Documents to Defendant as stated above. All statements made herein are true. This return is verified or is signed under penalty of perjury.

Signature: ____ **[Complete if signed before a Notary]**

Print Name:____

Identification Number:__________________________________

Certification Expires: ___________________________________

Signed and sworn to by the said ___________________________ before me on________________, 20____. to certify which witness my hand and seal of office.

____
Notary Public for the State of Texas

[Complete if not signed before a Notary]

My full name is:___________________________________. My date of birth is:__________________________.
My address is: ____; zip code ___________; United States.
My server identification number:______________________. My certification expires:______________________.
I declare under penalty of perjury that the foregoing, including the Return of Service, is true and correct.
Executed in ___________________________________, County, Texas, U.S.A., on ___________________(date).

____
Declarant (signature)

End of Return.
The following does not constitute part of the return:
1) For service on individual Defendant, in person.
2) Line 4, Stated Address, including apartment or room number, if any.
3) Please confirm all "form" statements are accurate, and that all inserted information is accurate.

RET.IND/10.31.13

RETURN

(Attach to citation per Rule 107(a) or otherwise comply with Rule 107(b))

CAME TO HAND ON THE 6th DAY OF Feb. A.D. 20__, AT 2:00 O'CLOCK P.M., AND EXECUTED BY DELIVERING TO

Sam Orez, Inc. by delivering to its registered agent, Michael Jones, at 1234 Oak Street, Dallas, Texas 75021

ON THE 11th DAY OF Feb. A.D. 20__, AT 7:30 O'CLOCK P.M., ~~THE WITHIN NAMED DEFENDANT, IN PERSON~~, A TRUE COPY OF THIS CITATION, TOGETHER WITH A COPY OF ORIGINAL PETITION WITH DATE OF SERVICE MARKED THEREON, AND PLAINTIFF'S NINE PAGE DISCOVERY TO DEFENDANT.

Elvis Jones, Constable
Precinct 99 of Dallas County Texas

FEES:

SERVING____________________$40.00

MILEAGE____________________$_________

Dallas County, Texas

Bill Green

NOTARY_____________________$_________

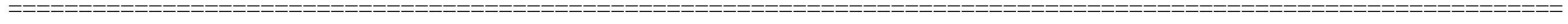
Bill Green
Deputy

TOTAL______________________$40.00

SIGNED AND SWORN TO BY THE SAID___________ BEFORE ME THIS ____ DAY OF ______________, 20__, TO CERTIFY WHICH WITNESS MY HAND SEAL OF OFFICE.

____
NOTARY PUBLIC________________COUNTY_______

Officer's Return - Served Registered Agent



RETURN OF SERVICE
SERVICE ON REGISTERED AGENT, AN INDIVIDUAL

Case Name: ____

Cause Number: ______________ Court: ____________________________ of ______________ County, Texas

1. **Date & Time of Receipt** of Specified Documents by process server: ________________________, 20___ at _____ ___.m.

2. **Date & Time of Delivery** of Specified Documents to Defendant**:** ________________________, 20___ at _____ ___.m.

3. **Defendant**: ____

4. **Defendant's Registered Agent:** ____

5. **Stated Address: (Place of delivery)** ____

6. **Specified Documents**: a true copy of the citation with date of delivery endorsed thereon with a copy of Plaintiff's Original Petition attached thereto.

____

7. **Method of Service**: by delivering to Defendant, by delivering to Defendant's Registered Agent, in person, at the Stated Address.

I am certified under order of Texas Supreme Court to serve process, including citations in Texas. I am not a party to or interested in the outcome of this suit. My identification number and certification expiration date appear below. I received and delivered the Specified Documents to Defendant as stated above. All statements made herein are true. This return is verified or is signed under penalty of perjury.

Signature: ____ **[Complete if signed before a Notary]**

Print Name: ____

Identification Number:____________________________________

Certification Expires: _____________________________________

Signed and sworn to by the said ______________________________ before me on__________________, 20_____. to certify which witness my hand and seal of office.

____
Notary Public for the State of Texas

[Complete if not signed before a Notary]

My full name is:_____________________________________. My date of birth is:___________________________.
My address is: ____; zip code ____________; United States.
My server identification number:______________________. My certification expires:_______________________.
I declare under penalty of perjury that the foregoing, including the Return of Service, is true and correct.
Executed in _____________________________________, County, Texas, U.S.A., on ____________________(date).

____
Declarant (signature)

End of Return.
The following does not constitute part of the return:
1) For service on individual Defendant, in person.
2) Line 4, Stated Address, including apartment or room number, if any.
3) Please confirm all "form" statements are accurate, and that all inserted information is accurate.

RET.RAIND/10.31.13

RETURN OF SERVICE
SERVICE ON REGISTERED AGENT ORGANIZATION

Case Name: ____

Cause Number: _____________ Court: __________________________ of _____________ County, Texas

1. **Date & Time of Receipt** of Specified Documents by process server: _______________________, 20___ at _____ ___.m.
2. **Date & Time of Delivery** of Specified Documents to Defendant**:** _______________________, 20___ at _____ ___.m.
3. **Defendant**: ____
4. **Defendant's Registered Agent:** ____
5. **Defendant's Registered Office:** ____
6. **Registered Agent's Employee:** ____
7. **Specified Documents**: a true copy of the citation with date of delivery endorsed thereon with a true copy of the petition attached thereto.

   ____

8. **Method of Service**: by delivering to Defendant, by delivering to Defendant's Registered Agent, by delivering to the Registered Agent's Employee, in person, at Defendant's Registered Office.

I am certified under order of Texas Supreme Court to serve process, including citations in Texas. I am not a party to or interested in the outcome of this suit. My identification number and certification expiration date appear below. I received and delivered the Specified Documents to Defendant as stated above. All statements made herein are true. This return is verified or is signed under penalty of perjury.

Signature: ____ **[Complete if signed before a Notary]**

Print Name:____

Identification Number:___________________________________

Certification Expires: ___________________________________

Signed and sworn to by the said ____________________________ before me on_________________, 20____. to certify which witness my hand and seal of office.

____
Notary Public for the State of Texas

[Complete if not signed before a Notary]

My full name is:____________________________________. My date of birth is:___________________________.
My address is: ____; zip code ___________; United States.
My server identification number:______________________. My certification expires:_______________________.
I declare under penalty of perjury that the foregoing, including the Return of Service, is true and correct.
Executed in ___________________________________, County, Texas, U.S.A., on ___________________(date).

____
Declarant (signature)

End of Return. The following does not constitute part of the return:
1) For service on registered agent organization at registered office, see Bus.Org.C. §5.201(d).
2) Line 5, Defendant's Registered Office, including suite or room number, if any.

RET.RAORG/10.31.13

[Defendant: John Smith, Jr.]

DEFECTIVE RETURN 1

CAME TO HAND ON THE 1 DAY OF March A.D. 2011, AT 8:00 O'CLOCK A.M., AND EXECUTED BY DELIVERING TO

John Smith at 100 Oak Street, Dallas, Texas

ON THE 3rd DAY OF March 2011, AT 2:00 O'CLOCK P.M., THE WITHIN NAMED DEFENDANT, IN PERSON, A TRUE COPY OF THIS CITATION TOGETHER WITH A COPY OF _______________, WITH DATE OF SERVICE MARKED THEREON, AND PLAINTIFF'S NINE PAGE DISCOVERY.

Paul Smith

(Assume properly sworn to before notary) Paul Smith

Process Server
SC 000000008
Certification Expires: 2-1-14

1) Defendant's name wrong; 2) Pleading served not identified.

==

[Defendant: Orez, Inc.]

DEFECTIVE RETURN 2

CAME TO HAND ON THE 28th DAY OF Feb. A.D. 2011, AT 11:00 O'CLOCK A.M., AND EXECUTED BY DELIVERING TO

Orez, Inc. by delivering to John Gray at 100 Post Oak Road, Houston, Texas

ON THE 6th DAY OF March A.D. 2011, AT 6:00 O'CLOCK P.M., THE WITHIN NAMED DEFENDANT, IN PERSON, A TRUE COPY OF THIS CITATION TOGETHER WITH A COPY OF ORIGINAL PETITION, WITH DATE OF SERVICE MARKED THEREON, AND PLAINTIFF'S NINE PAGE DISCOVERY.

Paul Smith

(Assume properly sworn to before notary) Process Server
SC #000000008

1)John Gray not identified as registered agent, president, or vice-president; 2) Strike through "the within named Defendant, in person";Defendant corporation cannot be served "in person"; 3) no Certification expiration date, Rule 107(b)(10).

[Defendant: Computer Specialists, Inc.]

DEFECTIVE RETURN 3

CAME TO HAND ON THE 5th DAY OF April A.D. 2011, AT 11:00 O'CLOCK A.M., AND EXECUTED BY DELIVERING TO

Computer Specialties, Inc. by serving registered agent Matthew Cole at 112 Oak Street, Dallas, Texas

ON THE 12th DAY OF April A.D. 2011, AT 6:00 O'CLOCK P.M., THE WITHIN NAMED DEFENDANT, IN PERSON, A TRUE COPY OF THIS CITATION TOGETHER WITH A COPY OF ORIGINAL PETITION, WITH DATE OF SERVICE MARKED THEREON, AND PLAINTIFF'S NINE PAGE DISCOVERY.

(Assume properly sworn to before a notary)

Carl Stone

Process Server
SC 000000007
Certification Expires: 2-1-14

1) Defendant name wrong; 2) state "by delivering to" in place of "by serving"; 3) Strike through "the within named Defendant, in person"; Defendant corporation cannot be served "in person".

==

[Defendant: Michael Zanes]

DEFECTIVE RETURN 4

CAME TO HAND ON THE 4th DAY OF April A.D. 2011, AT 8:00 O'CLOCK A.M., AND EXECUTED BY DELIVERING TO

Michael Zanes served per rule 106 order by attaching to door at 112 Oak Street, Dallas, Texas

ON THE 9th DAY OF April A.D. 2011, AT 2:00 O'CLOCK P.M., THE WITHIN NAMED DEFENDANT, IN PERSON, A TRUE COPY OF THIS CITATION TOGETHER WITH A COPY OF ORIGINAL PETITION, WITH DATE OF SERVICE MARKED THEREON, AND PLAINTIFF'S NINE PAGE DISCOVERY.

(Assume properly sworn to before a notary)

Carl Stone

Process Server
SC 000000007
Certification Expires: 2-1-14

1) Conclusory, should state facts, not "served per rule 106 order"; 2) compare with order, which often requires service by "attaching securely to the front door"; "attaching to door" would be insufficient; 3) strike "in person".

DEFECTIVE RETURN 5

CAME TO HAND ON THE 3rd DAY OF March A.D. 2011, AT 8:00 O'CLOCK A.M., AND EXECUTED BY DELIVERING TO

John Jones by delivering to Sarah Jones

ON THE 9th DAY OF March A.D. 2011, AT 2:00 O'CLOCK P.M., THE WITHIN NAMED DEFENDANT, IN PERSON, A TRUE COPY OF THIS CITATION TOGETHER WITH A COPY OF ORIGINAL PETITION, WITH DATE OF SERVICE MARKED THEREON, AND PLAINTIFF'S NINE PAGE DISCOVERY.

(Assume properly sworn to before a notary)

Carl Stone

Process Server
SC 000000007
Certification Expires: 2-1-14

1) No statement that Sarah Jones is over the age of 16 years as is required by most substituted service orders; 2) Strike "the within named Defendant, in person" because Defendant was not personally served.

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[Date]

Attn: Ronald Baker
Constable James Gregory
1133 Marshall Lane
Dallas, TX 75201

Re: PC Products, Inc.
vs.
AZ Tech, Inc.
Cause Number: CC-00123-E
Our file number: 9786

Dear Deputy Baker:

I have taken the liberty of typing in the correct language on a copy of the return. Please make this change on the original return, and initial it, before filing. Please forward a copy to our office. Thank you for serving the citation so promptly.

Very truly yours,
THE BLENDEN ROTH LAW FIRM

Debra Sims
Legal Assistant

Attachment: Citation
envelope

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RETURN

CAME TO HAND ON THE 4th DAY OF March A.D. 2014, AT 2:00 O'CLOCK P.M., AND EXECUTED BY DELIVERING TO **
[see below] ~~AZ Tech, one of the Defendants serve registered agent, David Walker at 7000 Ft.Worth Dr., Dallas, Texas 75205~~
ON THE 11th DAY OF March A.D. 2014, AT 3:25 O'CLOCK P.M., ~~THE WITHIN NAMED DEFENDANT, IN PERSON~~, A TRUE COPY OF THIS CITATION, TOGETHER WITH A COPY OF ORIGINAL PETITION WITH DATE OF SERVICE MARKED THEREON, AND PLAINTIFF'S NINE PAGE DISCOVERY TO DEFENDANT.

FEES:
SERVING____________________$40.00

James Gregory, Constable
Dallas County, Texas

MILEAGE____________________$_________
NOTARY_____________________$_________

Ronald Baker
Deputy

TOTAL______________________$_________
(MUST BE VERIFIED IF SERVED OUTSIDE THE STATE OF TEXAS)

SIGNED AND SWORN TO BY THE SAID_______________ BEFORE ME THIS _____________ DAY OF ___________________, 2011, TO CERTIFY WHICH WITNESS MY HAND SEAL OF OFFICE.

NOTARY PUBLIC________________COUNTY_______

**AZ Tech,Inc. by delivering to its registered agent, David Walker, at 7000 Ft. Worth Dr., Dallas, TX 75205.

(condensed)

[Date] (VIA CERTIFIED AND FIRST CLASS MAIL)

John Doe
Doe Trucking
1555 Kings Row
Dallas, TX 75024

RE: All American Company
vs.
John Doe
Cause No.: CC-00123-E
Our File: 15886 (Please use when calling or writing)

Dear Mr. Doe:

This matter has been referred to me for further action. Please forward a check for the just amount owed to my office immediately. If there is any reason why you should not or cannot pay the debt, please immediately respond in writing.

If you are in the military service of the United States, or military service is imminent, please advise my office of this fact by fax or mail. Unless you so advise, we will assume that you are not and will not be in the military service of the United States and we will proceed accordingly.

Please indicate **file number 15886** on all checks, correspondence and when calling. **All communication regarding any dispute, and all checks and instruments tendered as full satisfaction of the debt are to be sent to this office only. All payments are to be forwarded to this office only.**

Very truly yours,
THE BLENDEN ROTH LAW FIRM

Mark P. Blenden

Demand/military inquiry letter to commercial debtor, see second paragraph.

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All American Company
vs.
John Doe
Cause No.: CC-00123-E

AFFIDAVIT AFFIRMING NON-MILITARY STATUS OF DEFENDANT

STATE OF TEXAS *
*
COUNTY OF TARRANT *

BEFORE ME, the undersigned official, on this day appeared Mark P. Blenden, who is personally known to me, and who first being duly sworn according to law upon his oath deposed and said:

"My name is Mark P. Blenden. I am over 18 years of age, have never been convicted of a crime, and am competent to make this affidavit. I am Plaintiff's attorney in this cause and the matters stated in this affidavit are true. John Doe, Defendant, was not in military service when this suit was filed, has not been in military service at any time since then, and is not now in any military service of the United States of America, to my knowledge. A Military Status Report from the Department of Defense Manpower Data Center is attached.

____
MARK P. BLENDEN, Affiant

SUBSCRIBED AND SWORN TO, before me [date]

____
NOTARY PUBLIC in and for the State of T E X A S
(condensed)

MILITARY LOCATOR SERVICES

Or see https://www.dmdc.osd.mil/appj/scra/scraHome.do

ARMY:

Commander
U.S. Army Enlisted Records & Evaluation Center
Attn: Locator
8899 East 56th Street
Fort Benjamin Harrison, IN 46249

NAVY:

Navy World Wide Locator
Navy Personnel Command
PERS - 312E2
5720 Integrity Drive
Millington, TN 38055-3120
Voice: 901/ 874-3388

AIR FORCE:

Air Force Manpower and Personnel Center
Attn: Air Force Locator/MSIMDL
550 C Street West, Suite 50
Randolph AFB, TX 78150-4752
Voice: 210/ 565-5000

MARINE CORPS

Commandant of the Marine Corps
Headquarters USMC
Code MMSB-10
Quantico, VA 22134-5030
Voice: 703-784-3941

COAST GUARD

Coast Guard Personnel Command (CGPC-adm-3)
2100 Second St. SW
Washington, DC 20593-0001