SERVICE OF PROCESS AND DEFAULT JUDGMENTS;

ARTICLE AND FORMS

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STATE BAR OF TEXAS

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

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OVERVIEW AND COMMON TOPICS

OVERVIEW

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INTRODUCTION

What's New:

1). Dismissal for want of prosecution creates an additional hazard for the busy plaintiff's attorney. See discussion at page 64, Dismissal, Reinstatement and Default Judgment. This is another reason to avoid nearly time-barred cases; which cannot simply be re-filed.

2). The supreme court now certifies process servers through the Process Server Review Board. See page 12, Supreme Court Order, see also PSRB information at page 115.

3). The Business Organizations Code intends no substantive change, but causes some issues as to entities created in 2006 and thereafter. It is effective as to all entities on January 1, 2010 See page 28, Practice Tip.

4). An improperly served party apparently has no duty to act diligently and may attack a default judgment years later by bill of review; *Ross v. Nat'l Ctr. for the Empl. of the Disabled,* 197 S.W.3d 795 (Tex. 2006) (page 67, E).

5). Defendants may easily obtain a new trial by motion based on lost suit papers. *Fidelity & Guar. Ins. Co. v Drewery Const. Co.,* 186 S.W.3d 571, 573-75 (Tex. 2006)(reversed and remanded) See page 66, XX. Attacks on Default Judgments.

Quotes:

1. "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).

2. "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).

3. "...[T]he law abhors a default because equity is rarely served by a default", *Benefit Planners v. Rencare, Ltd.,* 81 S.W.3d 855 (Tex. App. - - Corpus Christi May 8, 2002, pet. denied). The law may also abhor deemed admissions. See page 7, Emasculation of Deemed Admissions.

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

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

This Article:

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

Organization: This paper is in three parts: the law relating to service of process, pages 10-40; the law relating to default judgments, pages 41-67; forms, pages 75-115.

Technical deficiencies are often no longer determinative -- unless the issue is service of process. Proper service is both technical and critical, as a trial court's jurisdiction is dependent upon it. *Peralta v. Heights Medical Center, Inc.,* 485 U.S. 80, 108 S. Ct.

896, 99 L.Ed.2d 75 (1988). Precise returns of service are required. A "minor" error generally results in reversal of the default judgment. *See, Primate Const., Inc. v. Silver*, 884 S.W.2d 151 (Tex. 1994). The Default Judgment Checklist at page 74, will aid in detecting common errors in this important area. Errors occur -- see defective service returns, pages 106-108. A default judgment is no stronger than the citation and return on which it is based. Review and have corrected before filing, all returns of citation. If an erroneous return is filed, consider simply serving defendant a second time; see also Amendment of Returns, page 17.

This article is based on an annual review of Texas case law and is intended as a departure point--not a destination. The reader is urged to read the original sources of authority. Neither this article, nor the attached forms, are intended as legal advice; the reader should verify all statements with original sources. No representations or warranties as to forms except that they are generally used in the author's practice. Verify accuracy and applicability of forms before using. Other sources are cited throughout the paper and at page 70. Another extensive article on default judgments, including a discussion of attacks on default judgments, is *Dealing With Default Judgments,* 35 St. Mary's L.J. 1 (2003), Pendery, McCaskill and Cassada; see also **Texas Collections Manual, State Bar of Texas and** O'Connor's Texas Rules (Chapters 2H, 7A, 10B).

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

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

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

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

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

Dedication: Process servers perform a critical, challenging, but often thankless function. They sometimes must deal with evasive and hostile persons.

Process servers can be the target of invalid complaints and worse, see *Thomas v. State,* No. 2-05-186-CR (Tex. App. - - Fort Worth, July 6, 2006, pet. ref'd) (2006 Tex. App. Lexis 5823)(mem. op.)(process server shot after attempting to serve subpoena on assailant). This paper is dedicated to the process servers of Texas.

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

PROFESSIONAL RESPONSIBILITY AND OTHER MATTERS

I. POP QUIZ

1. Identify three traps for a busy collection lawyer.

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

3. Why is mail service nearly always insufficient to support a default judgment?

4. (True or False) Defendant's failure to advise secretary of state of change of registered agent address is negligence.

5. What is the most difficult return of citation to complete?

ANSWERS:

1. a) Dismissal: taking a nearly time-barred case and having it dismissed for want of prosecution by the court. See page 64, Dismissal, Reinstatement and Default Judgment.
b) Wrong Party: taking a nearly time-barred case and suing the wrong party. *Seidler v. Morgan,* No. 06-08-00107-CV (Tex. App. - - Texarkana, February 12, 2009, n.p.h.)(2009 Tex. App. Lexis 911)(plaintiff sued owner of property on date suit filed 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 Diligent Service, page 4, V.

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

3. Mail receipt is not legibly signed in the name of defendant or defendant's agent for service (M. Blenden signature for Mark Blenden insufficient, see page 19, Mail Service.

4. True, *Campus Invs. , Inc. v. Cullever*, S.W.3d 464 (Tex. 2004), see page 30, D. Proof of Service.

5. Service on a registered agent which is itself an entity; *Reed Elsevier, Inc. v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 180 S.W.3d 903(Tex. App. - - Dallas 2005, pet. denied), discussed at page 27.

II. Recent Key Cases.

A. *Craddock* Lives - - New Trial Motion

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. New trial motions are discussed at page 65.

B. No Levy on Void 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," citing CPRC, §34.021.

C. Venue Statutes Apply to Domesticated Judgments

Cantu v. Howard S. Grossman, P.A., No. 14-06-00078-CV (Tex. App.- - Houston[14th Dist.] January 29, 2008, n.p.h.)(2008 Tex. App. Lexis 587). 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.

IV. Don't Embarrass the Judge

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

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

If there is an error as to service of process or a default judgment, attempt to resolve it in the trial court. Don't ignore the matter only to later admit error, and have the trial court reversed. See for example: *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.)(parties agreed that final default judgment should be set aside and case remanded). *Paradise Vill., Inc. v. Finova Capital Corp.*, No. 07-06-0298-CV (Tex. App. - - Amarillo, October 25, 2006, no pet.)(2006 Tex. App. Lexis 9171)(mem. op.)(appellee agreed service defective).

V. BEATING LIMITATIONS REQUIRES DILIGENT SERVICE

O'Connor's Rules Chap. 2 H, §7

(See also Appendix at page 68, additional cases)

A. Malpractice Trap

Failing to diligently obtain service on a case filed near a limitations date is a lethal litigation trap. Since 1998, there have been over 75 cases dealing with the failure to diligently obtain service. Yet the plaintiff has been found diligent in only one - - *Harrell v. Alvarez,*46 S.W.3d 483, (Tex. App. - - El Paso 2001, no pet.).

Bringing suit within a limitations period requires both filing a petition and diligently serving the defendant with the citation and petition. As stated in *Gant v. De Leon*, 786 S.W.2d 259 (Tex. 1990)(per curiam):

> "To bring suit"... a plaintiff must not only file suit within the applicable limitations period, but must also use diligence to have the defendant served with process. *Rigo Mfg. Co. v. Thomas,* 458 S.W.2d 180, 182 (Tex.1970). 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).

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

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

Do not allow informal agreements or professional courtesy to delay service. See *Rodriguez v. Tinsman & Houser, Inc.* 13 S.W.3d 47 (Tex. App. - - San Antonio 1999, pet. denied). Plaintiff's attorney filed suit 11 days before limitations ran, but did not request issuance of citation. The attorney notified the

defendant law firm in a malpractice action of the lawsuit by letter, as a courtesy. Defendant was served three weeks after limitations ran, but summary judgment affirmed, for failure to diligently obtain service. See also *Mitchell v. Timmerman,* No. 03-08-00320-CV (Tex. App. - - Austin, December 31, 2008, n.p.h.)(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 should create evidence establishing diligent efforts to locate and serve the defendant. Know that your efforts and reports may be "graded" for diligence by the trial court. Confirm the accuracy of the citation and return of citation as defective service may be treated as no service.

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

1. Summary Judgment Against Plaintiff Reversed *Proulx v. Wells*, 235 S.W.3d 213 (Tex. 2007)(nine month delay, 30 service attempts at five addresses using two process servers and two investigators); *Elam v. Armstrong*, No. 03-07-00565-CV (Tex. App. - - Austin, August 14, 2008, n.p.h.)(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, n.p.h.)(2009 Tex. App. Lexis 1585)(mem. op.); *Franklin v. Bullock,* No. 03-07-00511-CV (Tex. App. - - Austin, August 14, 2008, n.p.h.)(2008 Tex. App. Lexis 6239)(mem. op.)(96-day delay); *Bolado v. Speller*, No. 04-06-00535-CV (Tex. App. - - San Antonio November 7, 2007, no pet.)(2007 Tex. App. Lexis 8801)(mem. op.)(96 day delay, six service attempts); *McGowan v. Meridian Precast & Granite, Inc.*, No. 10-06-00364-CV (Tex. App. - - Waco July 18, 2007, no pet.)(2007 Tex. App. Lexis 5654)(mem. op.)(27 day delay).

2. Summary Judgment Against Plaintiff Affirmed: *Parmer v. DeJulian*, No. 12-07-00479-CV (Tex. App. - - Tyler, September 17, 2008, n.p.h.)(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, n.p.h.)(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, n.p.h.)(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, n.p.h.)(2008 Tex. App. Lexis 1133)(mem. op.)(tendered explanation "affirmatively establishes a lack of diligence").

See Additional Diligent Service Cases at Appendix, page 68.

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, above.*

In *Baker v. Monsanto Co.*,111S.W.3d158 (Tex. 2003) (per curiam) intervenor served defendant before defendant had been served by plaintiff. The court of appeals held that intervenor failed to diligently obtain proper service on defendant, and granted summary judgment against the intervenor, but the supreme court reversed. If Monsanto had any complaint about the intervenor's premature service under Rule 21a, its recourse was a motion to quash. See *Kawasaki Steel Corp. v. Middleton,* 699 S.W.2d 199, 203, 28 Tex. Sup. Ct. J. 607(Tex.1985)(motion to quash is appropriate device to object to procedural error in service). Because Monsanto generally

appeared in the case before limitations had run on intervenors' claims, intervenors' action was not barred, and the summary judgment rendered in this case was therefore erroneous.

E. Effect of Appearance After Limitations Date

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

VI. 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.

VII. 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.

VIII. Other Matters

A. Requests For Admissions, Rule 198

1. Deemed Admissions - Proof Required.

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

2. Emasculation of Deemed Admissions

Key "undeeming" case is *Wheeler v. Green* 157 S.W.3d 439 (Tex. 2005) When deemed admissions preclude presentation of merits of the case due-process concerns arise. Extraordinary facts; mother was two days late in responding to requests and apparently lost custody of children; summary judgment reversed and remanded); 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! If upheld, defendants will argue that courts must read their pleadings and apply all denials to outstanding discovery requests.

C. 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.).

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

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

The business records predicate is onerous. Why go to trial without a business records affidavit having been filed and served, pursuant to T.R.E. 902(10)? Since an affidavit cannot be cross examined, it is a safer predicate than a witness. File and serve the affidavit on counsel 14 days prior to trial. Either forward a copy of the records to counsel or make them available pursuant to the rule. T.R.E. 902(10) includes a proposed affidavit form . Though the suggested language could be more succinct, following the form should insure that the attached records are admitted. See *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, if a sworn answer to the sworn account is filed, 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. Guaranty Unambiguous

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).

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

The offer of settlement process is codified in Civil Practices & Remedies Code Chapter 42, and see Rule 167 implementing the procedure. 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. It is available as to actions filed after January 1, 2004 but does not apply to justice of the peace court or small claims court.

H. 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 plead? That the 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.).

I. Discovery

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).

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.

K. 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).

L. Waiver of Jury Trial

Parties may contractually waive right to jury trial. *In re Prudential Ins. Co.*, 148 S.W.3d 124, 134. (Contractual waiver enforced notwithstanding fraudulent inducement allegation).

M. 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.).

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).

N. Maximizing Defendants

1) 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.).

2) 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.).

3) 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 Creed and Bayless, Fraudulent Transfers in Texas, 39 Houston Lawyer 28 (2001) and John Mayer *Fraudulent Transfer and Conveyance, Collections and Creditors' Rights*, Texas Bar CLE, 2004.

4) 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.

As to "bewildering array of veil-piercing theories" see *West and Bodamer Annual Survey of Texas Law: Corporations*, 59 SMU. L. Rev. 1143 (2006).

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.

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 119-122

"Defendant may accept service of process or waive the issuance of service thereof" after suit is filed, by signing a sworn memorandum acknowledging receipt of the petition. Rule 119; O'Connor's Texas Civil Forms, 2 H:1. 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

1. Defined: A party enters a general appearance when it 1) invokes the judgment of the court on any question other than the court's jurisdiction, 2) recognizes by its acts that an action is properly pending, or 3) seeks affirmative action from the court. But 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.).

2. 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, n.p.h.)(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); *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).

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

Taylor v Thompson, 4 S.W.3rd 63, 66(Tex. App. - - Houston [1st Dist] 1999, pet. denied).

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

For effect of defective answer and other appearances, see page 42, II. C.,D.,E.

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; officer's return, if in regular form, which is filed in the papers of the case, may only be impeached by clear and satisfactory proof). Rule 107 states that a default judgment may be obtained when defendant is served with process 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 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 the Interest of J.T.O.*, No. 04-07-00241-CV (Tex. App. - - San Antonio January 16, 2008, n.p.h.)(2008 Tex. App. Lexis 303)(mem. op.)(defendant served on Sunday, and citation defect, judgment reversed).

3. 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.).

4. 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).

5. Service of amended petition. A default judgment must be based on a petition, whether original or amended, that has been served on the defendant unless the amended petition merely clarifies or elaborates on a claim already made in a previously served petition. *See Sanchez v. Texas Ind., Inc.*, 485 S.W.2d 385, 387 (Tex. Civ. App.--Waco 1972, writ ref'd n.r.e.). A properly served defendant who fails to appear may subsequently be served with amended petition by certified mail pursuant to Rule 21a. *In re R.D.C.* 912 S.W.2d 854 (Tex. App.--Eastland 1995, no writ). If the amended petition does one or more of the following, it must be served on the defendant before a default judgment may be taken:

a. Substitutes or adds new plaintiffs. *International & Great Northern R.R. v. Howell*, 101 Tex. 603, 111 S.W. 142 (1908).

b. Seeks recovery from the defaulting defendant on a new cause of action. *Baten Erection Corp. v. Iron Workers' Pension Trust Fund*, 608 S.W.2d 262, 263-64 (Tex. Civ. App.--Houston [1st Dist.] 1980, no writ).

c. Adds the defaulting defendant as a new party. *Presidential Life Ins. Co. v. Crooks,* 479 S.W.2d 694 (Tex. Civ. App.--Amarillo 1972, no writ).

d. Deprives defaulting defendant of previously available defense. *Morrison v Walker*, 22 Tex. 18 (1858).

e. Seeks a more onerous judgment from the defaulting defendant. *Weaver v. Hartford Accident & Indem. Co.*, 570 S.W.2d 367, 370 (Tex. 1978) (amended petition sought increased damages); *Caruso v. Krieger*, 698 S.W.2d 760 (Tex. App.--Austin 1985, no writ) (amended petition sought damages in addition to previously sought equitable relief); *Smith v. Amarillo Hosp. Dist.*, 672 S.W.2d 617 (Tex. App.--Amarillo 1984, no writ) (amended pleading

sought increased damages incurred after filing); *Atwood v. B & R Supply & Equip. Co.*, 52 S.W.3d 265 (Tex. App. - - Corpus Christi 2001, no pet.)(amending a defective sworn account petition to properly verify the claim subjects a defendant to a more onerous judgment). If defendant was previously served with citation and original petition, may plaintiff amend to seek a more onerous judgment and serve a non-answering defendant pursuant to Rule 21a? The Eastland court answers affirmatively in a well reasoned opinion. *In re R.D.C.*, 912 S.W.2d 854 (Tex. App.-- Eastland, 1995, 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.

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 must bear the signature of the sheriff or constable, see discussion at page 15, (g).

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. Rule 103. 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. Rule 107.

a. Supreme Court Order
(Rule 103 Amendment)

The Texas Supreme Court may certify persons as process servers. This is done through the Process Server Review Board. The Supreme Court issues an "SC" or "HSC" number to authorized persons to confirm their certification.

b. Other Changes

1.) Process Server Review Board (PSRB)

The Process Server Review Board, whose members are appointed by the Supreme Court for a three-year term, reviews and approves or rejects private process server applications. The PSRB also reviews proposed civil process service courses, reviews complaints against process servers, and works to establish a code of conduct among process servers. Process server certification may be revoked for good cause, including conviction for a felony or misdemeanor involving moral turpitude. An application, listing of certified process servers and a process server complaint form can be found at www.courts.state.tx.us/psrb/psrbhome.asp. The voicemail number for the PSRB is (512) 463-2713. See PSRB information at page 115.

2.) 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. An authorized person may now serve a writ of garnishment, apparently. 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]." But see Rule 103, amended 2005, and discussed in preceding section, which apparently allows an authorized person to serve a writ of garnishment. 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 discussion at page 33, VIII.

C. Return of Service

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

Practice Tip: *Guard against inconsistent form language in the return. Be sure that the pleading delivered is accurately stated and that any inconsistent form language is struck out. If the form return states that original petition was delivered, but the defendant was first named in a second amended petition, fatal defect, Primate Const., Inc. v. Silver, 884 S.W.2d 151 (Tex.1994). Cancel form language that "defendant, in person" was served, when the defendant is not an individual or was not personally served.*

"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). For discussion of returns after Rule 106(b) substituted service, see paragraph E, page 23.

1. Preparation. The return must be prepared by the person who served the citation. 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: amendment of process, Rule 118 and discussion at page 17; re-serving the party with an additional citation and pleading.

2. Placement. The return must be endorsed on the citation or attached to the citation.

3. Requisites.

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 service. Rule 105 states that "the officer or authorized person to whom process is delivered shall endorse thereon the day and hour in which he received it...." *In the Interest of 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; strict compliance required; 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 notwithstanding the "shall endorse" language, and even though the lines were not completed which stated "came to hand" on a specific date and time, that a stamped date appearing over the lines, and which was not initialed or signed, was sufficient.

The return must state when delivery was made. Rule 107. 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". The court concluded that the officer's handwriting was intended to denote the year 2000 and affirmed the default judgment 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).

c. Place of service. The return must state the place of service. Rule 16. 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).

d. Name of defendant. 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 Life 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 named defendant "J. W. Hendon" invalid); *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." invalid. *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.). *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); *But see Baker v. Charles*, 746 S.W.2d 854, 855 (Tex. App.--Corpus Christi 1988, no writ); *Cockrell v. Estevez*, 737 S.W.2d 138, 140 (Tex. App.--San Antonio 1987, no writ). 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). *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).

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 corporation 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).

e. 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.).

f. Manner of service.

(1) Inconsistent statements.

Beware of Forms. Failure to strike through inapplicable form language often invalidates 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(mem. op.) 2004 Tex. App. Lexis 9940. 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.

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.

g. Signature of officer. 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 is that of the sheriff, constable or clerk, not that of the deputy who actually executes the return. *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. Verification of authorized person. A return made by a person authorized by court order must be verified. Rule 107. *Goodman v. Wachovia Bank, N.A.,* 260 S.W.3d 699 (Tex. App. - - Dallas 2008, n.p.h.) (detailed explanation of verification); (*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). Expect a legislative change deleting the verification

requirement.

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. Unsuccessful service. If service fails, the person must return the citation to the court and "the return shall show the diligence used by the officer to execute the same and the cause of failure to execute it, and where the defendant is to be found, if he can ascertain." Rule 107. 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.

To determine whether service has been properly effected, the courts may consider as prima facie evidence, the recitals in the petition, citation, and return of service, *Pleasant Homes v. Allied Bank of Dallas,* 776 S.W.2d 153 (Tex.1989). "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. The return imports its verity and will be set aside only on clear and satisfactory evidence of its falsity, either from two witnesses, or by one witness supported by strong corroborating circumstances (citations omitted)". 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).

(2) Corroborated attacks on return

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, 98 (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, Mr. 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." 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, n.p.h.)(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, n.p.h.)(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, n.p.h.)(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. The Plaintiff May Amend a Defective Citation or Return (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 1940, the few cases interpreting the rule are inconsistent. Safer practice to: 1) review all returns prior to filing; 2) if error, have return corrected before filing, see form letter, page 112); 3) if defective return gets filed, simply obtain issuance of another citation and again serve defendant, reviewing the second return prior to filing.*

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. *Primate Const., Inc. v. Silver*, 884 S.W.2d 151, 153 (Tex. 1994) citing Rule 99(a); *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. Trial court's 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 and there may never again be an erroneous return cured by implied amendment. 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. 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 requires 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. Should the order direct the clerk to attach the amended return to the citation, or state that the amended return is deemed made on the citation, to avoid a "Verlander" issue? 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.

6. 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

1. 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, IV-F)

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. Such legible signatures are rarely obtained. Court-ordered mail service is more effective. In substituted service - mail cases, a signed return receipt is not required. Substituted service by mail is discussed at IV, F, page 24.*

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. *Cf. United States v. Charter Bank Northwest, supra.*

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. The difficulty with mail service is Rule 107, requiring 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 paragraph IV(F) and *State Farm Fire & Casualty Co. v. Costley* 868 S.W.2d 298 (Tex. 1993)(per curiam). For these reasons, service by mail, without substituted service authority pursuant to Rule 106(b) is not recommended.

2) Return receipt signature, recent sufficient service cases. Note that most recent cases appear in paragraph 3 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.*

A surprising result was reached in *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.

3) Return receipt signature; recent insufficient service cases. *Mena v. Lenz,* No. 13-08-00137-CV (Tex. App. - - Corpus Christi, March 5, 2009, n.p.h.)(2009 Tex. App. Lexis 1585)(mem. op.)(mail receipt signed by person other than defendant or defendant's authorized agent, a common defect); *Houston Precast, Inc. v. McAllen Constr., Inc.,* No. 13-07-135-CV (Tex. App. - - Corpus Christi, September 25, 2008, n.p.h.)(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).

4) Return receipt signature; other 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).

5) 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. *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, n.p.h.)(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 IV (F) page 24 , *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. 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.

Practice Tip: *Though this article deals with service of citation and petition, remember that substituted service can be used to serve motions and notices. Massengill v. Swanner, No. 05-04-00918-CV (Tex. App. - - Dallas, March 7, 2005, no pet.)(2005 Tex. App. Lexis 1733)(mem. op.)(temporary injunction hearing).*

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 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. 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, n.p.h.)(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

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 35. 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.

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*17S.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). *Hunt v. Yepez,* No. 03-04-00244-CV(Tex. App. - - Austin, August 24, 2005, no pet.)(2005 Tex. App. Lexis 6964)(mem. op.)(affidavit failed to establish the location was usual place of business, usual place of abode, or place where defendant could probably be found)*; 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). 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 13)

Practice Tip: *Beware of form language. Demand to review return, or a copy, before it is filed. The return must show that service complied with the court's order. Compare the affidavit, order and return, and confirm each is consistent with the other.*

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 *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 an authorized 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

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; that to require proof of actual notice would defeat the purpose of Rule 106(b). 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). Suggestion: review all requirements for substituted service prior to attempting substituted service by mail.

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 VI. Service on Corporations through Secretary of State. A reasonable diligence standard applies to service under Article 2.11(B) of the Texas Business Corporations Act. But a strict compliance standard applies to substituted service under Rule 106 (b). Simply stated, all one need prove to serve the secretary of state under Article 2.11(B) is that reasonable diligence was used to serve the corporation's registered agent at the registered office. In two recent cases, counsel attempted to serve a corporation pursuant to Rule 106(b). Both efforts were unsuccessful and both judgments were reversed and remanded. *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) (mem. op.), 2004 Tex. App. Lexis 4203 (return failed to state that service was on a person over 16 years of age, as required by the 106(b) order).

A third case in this unfortunate mix is *Houston's Wild 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). 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 Rule 106 and article 2.11 were not interdependent, that service on the Secretary of State was authorized under article 2.11, and affirmed the default judgment.

I. Prior Attempt Requirement

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).

J. 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. A proposed "conscious indifference" letter is attached at page 97. 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 DOMESTIC OR FOREIGN CORPORATION AUTHORIZED TO TRANSACT BUSINESS IN TEXAS, THROUGH ITS OFFICERS OR REGISTERED AGENT

McDonald TCP 11:45; McDonald TCP 11:28
O'Connor's Texas Rules, Ch 2(H)

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

If the corporation maintains 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 may be 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. C.§5.255.

B. Conformity of Petition and Citation.

1. 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, n.p.h.)(citation directed to defendant by serving registered agent Chris Lytle, but return insufficient as it recited service on Christopher Lytle).

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. 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.) (even though the citation states only that service may be effected upon the president, service is proper where the return shows that it was accomplished on another person who was the registered agent).

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. The proof was to be independent of the allegations in the petition, recitals in the citation, and statements in the officer's return.

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)(stating that the return is prima facie proof of matters stated in it).

4. Service on registered agent which is a corporation (difficult).

Practice Tip: *Properly Serving a Corporate Registered Agent is Difficult.*
The process server should probably refuse to leave process with an employee of a corporate registered agent and demand that a person who is the president, vice-president, or registered agent of either the defendant or corporate registered agent, appear to accept service. If they refuse, the affidavit at page 88 can be completed. The affidavit should allow service on the secretary of state, because with reasonable diligence the registered agent cannot be found at the registered office. This is cumbersome, but may be required under current law. Consider also serving the president or vice-president of defendant or defendant's corporate registered agent. Service on a receptionist or secretary is simply insufficient to support default judgment. Expect a legislative change.

Proper service on a registered agent that is itself an entity is troublesome. Before taking a default judgment in such a case, see *Reed Elsevier, Inc. v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 180 S.W.3d 903 (Tex. App. - - Dallas 2005, pet. denied). Reed held the following return form defective:(names simplified) "...delivering to the within named Reed, Inc. by delivering to registered agent LRS, Inc. by delivering to Danielle Smith". The record did not establish Danielle Smith's authority. The return should apparently have stated, "...delivering to the within named Reed, Inc. by delivering to its registered agent LRS, Inc. by delivering to the registered agent of LRS, Inc., Danielle Smith". The opinion is well reasoned. However, this creates a challenge when serving a registered agent which is itself an entity. *Harvestons Secs. v. Narnia Invs.*, 218 S.W.3d 126(Tex. App. - - Houston [14th Dist.] January 11, 2007, pet. denied)(defective service on Texas Securities Commissioner because record omitted title or affiliation of person served). But see *Consol. Am. Indus. V. Greit-Amberoaks, L.P.*, No. 03-07-00173-CV (Tex. App.- - Austin, December 12, 2008, n.p.h.)(2008 Tex. App. Lexis 9272)(mem. op)(no denial or challenge as to person served for corporate registered agent, default judgment affirmed); *Payless Cashways, Inc. v. Hill,* 139 S.W.3d 793(Tex. App. - - Dallas, 2004, no pet.)(same).

A legislative change is perhaps needed to allow service on employees of an entity-agent who represent that they are authorized to accept service. Business Org. C.§5.201 allows a registered agent to be an individual or organization. The statute requires that a registered agent maintain a business office at the registered office address which "(1) must be located at a street address where process may be personally served on the entity's registered agent." (emphasis added) But personal service on an organization is an oxymoron.

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 47 -- court's electronic data was considered without data input date.

2. Recitals as prima facie evidence. As to attacks on returns, see page 16, Factual Issues Regarding Service. 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 which 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 DOMESTIC OR FOREIGN CORPORATION AUTHORIZED TO TRANSACT BUSINESS IN TEXAS, THROUGH SECRETARY OF STATE

McDonald TCP 11:29.

O'Connor's Texas Rules, Ch. 2(H)§5

Practice Tip, Business Organization Code:

The phase in period began January 1, 2006 and it is effective as to all entities January 1, 2010. Distinguish between an entity created before January 1, 2006, to be served under the Business Corporation Act and post-January 1, 2006 entities to be served under the Business Organizations Code. No substantive changes were intended in the codification. See O'Connor's Texas Civil Rules, Ch. 2(H)§5 and O'Connor's Business Organizations Code "Derivation Table" at 349.

The statutory address for service by the secretary of state is the registered office under the Bus. Corp. Act. Under the Bus. Org. C.§5.253 it is the "most recent address of the [defendant entity] on file with the secretary of state." During transition, one should allege in the petition both Defendant's registered office address and "most recent address" which will generally be the same. For example, "Defendant's registered office address and the most recent address of Defendant on file with the secretary of state's office is: [address]". A further issue exists by reason of Bus. Org. C. §402.003 allowing early adoption of the code by existing pre-2006 entities.

A. When Authorized

The Secretary of State is the deemed agent of an authorized corporation when: l) the corporation fails to appoint an agent for service; 2) with reasonable diligence, the agent cannot be found at the registered office; 3) the certificate of authority of a foreign corporation has been revoked.

1. No registered agent. The Secretary of State is the deemed agent for substituted service whenever the domestic or foreign corporation fails to appoint or maintain a registered agent within the state. Tex. Bus. Corp. Act art.2.11, §B (domestic corporation), art. 8.10, §B (foreign corporation); and Bus. Org. C. §5.251(1)(A).

2. Unlocated registered agent. The Secretary of State is the deemed agent for substituted service whenever the registered agent of the corporation cannot with reasonable diligence be found at the registered office. Tex. Bus. Corp. Act art. 2.11, § B(domestic corporation), art. 8.10,§B. (foreign corporation). See Bus. Org. C.§5.251(1)(B). Though diligence may be established through the unexecuted return, an affidavit is suggested, see pages 87, 88.

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 Humphrey Co. v. Lowr Water Wells*, 709 S.W.2d 310 (Tex. App.--Houston [14th Dist.] 1986, no writ) (no reasonable diligence where neither petition nor return indicated that the address where service was unsuccessfully attempted was defendant's registered office); *David A. Carl Enterprises, Inc. v. Crow-Shutt #14*, 553 S.W.2d 118 (Tex. Civ. App.--Houston [14th Dist.] 1977, no writ) (no reasonable diligence where service on registered agent was attempted only at alternative address given in petition). 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*, S.W.3d 464 (Tex. 2004) citing Tex. Bus. Corp. Act arts. 2.10, 2.10-1, 8.09.

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 required. You should use an affidavit as a predicate for substituted service on an individual (required) and secretary of state service on a corporation (preferred).*

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. Often reasonable diligence is established by the officer's 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 he can ascertain"). 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); *Beach, Bait & Tackle, Inc. v. Holt*, 693 S.W.2d 684 (Tex. App.--Houston [14th Dist.] 1985, no writ); *Thomas Petroleum Products. Inc. v. Rulon Elec. Co.*, 609 S.W.2d 890 (Tex. Civ. App.--Houston [14th Dist.] 1980, no writ).

2. Affidavit - - Recommended Method. 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).

Failing to satisfy the diligence requirement is *Wright Bros. Energy v. Krough*, 67 S.W.3d 271,274 (Tex .App. – Houston [1st Dist.] 2001, no pet.)(no affidavit or return even attempting to establish diligence prior to serving Secretary of State, only two attempts by mail with erroneous addresses; reversed and remanded).

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); *Travis Builders, Inc. v. Graves*, 583 S.W.2d 865, 867 (Tex. Civ. App.--Tyler 1979, 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.

3. Revoked certificate.

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. Duplicate copies.

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

2. To whom delivered.

Service may be made upon the Secretary of State, the Assistant Secretary of State, or any clerk having charge of the corporation department of the Secretary of State's office. Tex. Bus. Corp. Act art. 2.11, §B, art. 8.10, §B. Service on any other employee in Secretary of State's office is invalid and cannot be cured by a recitation of proper service in the Secretary of State's certificate. *Travis Builders, Inc. v. Graves,* 583 S.W.2d 865(Tex. Civ. App.--Tyler 1979, no writ). Bus. Org. C. §5.252(a) states that service on the secretary of state is effected by delivery of process to the secretary.

C. Secretary of State's Duties

To complete substituted service on a domestic corporation, the Secretary of State must immediately send one copy of the citation and the petition by registered mail to the corporation at its registered office. Tex. Bus. Corp. Act art. 2.11, § B. But for a foreign corporation, the Secretary of State must forward process to the corporation's principal office. Tex. Bus. Corp. Act. Art 8.10, §B. Service is invalid if the Secretary of State forwards process to the wrong address. *Texas Inspection Services, Inc. v. Melville*, 616 S.W.2d 253, 254 (Tex. Civ. App.--Houston [lst Dist.] 1981, no writ).

Bus. Org. C.§5.253 requires that process be forwarded by certified mail, return receipt requested to the "most recent address of the entity on file with the secretary of state."

D. Proof of Service

Until recently, there were conflicting opinions as to whether proof of service on the Secretary of State

was established by the Secretary of State's certificate alone, or whether a return of citation was also required. The Supreme Court has now held that 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).

Some trial court judges may still require the filing of the citation and return of citation, as that was the dominant practice. Plaintiff's counsel can either comply with the trial court's request, or use *Campus* to establish that such filing is unnecessary.

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).

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

Return of service on the Secretary of State should not be filed until after 30 days from date of service on the Secretary of State. *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). Tex. Bus. Corp. Act art. 2.11(b) states "any service so had on the Secretary of State shall be returnable in not less than thirty (30) days". See also Bus. Org. Code § 5.252(same). The court recognizes the restriction in *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.

Practice Tip: *To avoid the Applied Health Care issue, file all proof of service on the Secretary of State, including Secretary of State certificate, only after 30 days from date of service on the Secretary of State.*

F. 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. A proposed "conscious indifference" letter is attached at page 97.

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.

G. Scope

Although the Business Corporation Act does not apply to certain types of domestic and foreign corporations, the provisions regarding service apply to all corporations unless a specific statute provides another service scheme. Tex. Bus. Corp. Act art. 9.14.

H. 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.

Because strict compliance with service statutes is required, be cautious in employing this method of service. There are no reported cases interpreting the 1987 statute and many questions remain:
(c) Is any signature on certified mail receipt, showing receipt by the Secretary of State's office, valid? (See Mail Service at page 19.)
(d) Is a return of citation required, or is the Secretary of State's certificate sufficient?
(e) Is a return of citation executed by a party or the party's attorney effective?
(f) Must the return comply with Rule 107, Return of Service?

See also, section III - Mail Service, supra. Suggestion: let others be the pioneers; serve the Secretary of State through a Travis county constable or other authorized person.

VII. SERVICE ON PARTNERSHIPS

A. Regular Partnerships

1. CPRC §17.022 provides as follows:

"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 as follows:

"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. C.§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.

VIII. OTHER STATUTES REGARDING PERSONAL OR SUBSTITUTED SERVICE

The following is used with permission from Donna Brown's excellent article on Post Judgment Remedies. See also page 12,(b)4.

Banks as Garnishees. 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.

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.

A. 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.*

B. 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.1 (Tex. Civ. App.--San Antonio 1951, writ ref'd) (service on mayor pro tempore apparently effective even where the mayor was in town).

C. 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.

D. 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.

E. 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).

F. 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.

G. 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.

H. 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).

I. Political Sub-Divisions

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.

J. 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.

K. Non-resident Motorists

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.

L. 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.

M. 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.

N. 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.

O. 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, requires inquiry as to counsel's intention to proceed, discussed at page 6,VI. 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 competent of making oath of the fact in the same manner as provided in Rule 106." Rule 108.

3. Return. The return "shall be endorsed on or attached to the original notice, and shall be in the form provided in Rule 107, and be signed and sworn to by the party making such service before some officer authorized by the laws of this State to take affidavits, under the hand and official seal of such officer." Rule 108. *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). The return must include 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).

B. Out-of-Country Personal Service

Tex. Lit. G. § 32.02A; O'Connor's Texas Rules, Chapter 2-H §10, O'Connor's Federal Rules and Civil Trials, Chapter 2-H §7; Anderson, *Transnational Litigation Involving Mexican Parties*, 25 S. Mary's L.J. 1059,(1994).

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 Tex. Bus. Corp. Act. Ann. art.8.10, and Practice Tip, Business Organizations Code, page 28.*

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. 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, n.p.h.); *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). *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).

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) and discussion at page 30, D. See also *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 62, 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)

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 10 o'clock a.m. of the Monday next after the expiration of 10 days after the date of service. Rule 534.

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

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. When is an answer "filed"?

a. Generally.

An instrument which is not mailed 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.

b. Fax filing. (Not recommended)

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. 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 42, 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.).

c. 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", previous page.

B. Effect of Late Filed Answer

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.).

C. 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).

"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; *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, n.p.h.)(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).

D. Effect of Mis-styled Answer

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). *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).

E. Effect of Other Appearances
(See also Appearance, page 10)

1. 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).

2. 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 Wells v. Southern States Lumber & Supply Co.*, 720 S.W.2d 227 (Tex. Civ. App.--Houston [14th Dist.] 1986, no writ) (default judgment proper where defendants failed to appear and answer after court quashed citation). *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).

3. 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.).

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

4. 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, n.p.h.)(2009 Tex. App. Lexis 1267)(non -resident failed to timely file special appearance after reversal).

5. 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.

6. 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 .

7. Filing bond constitutes appearance of surety. 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)

A. Purpose

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. 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). The party requesting service should verify that the citation in the appellate court record shows a seal. *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 clerks address.

4. Date of filing of petition. The citation must state the date of filing of the petition. Rule 99b(4). *In the Interest of J.T.O.,* No. 04-07-00241-CV (Tex. App. - - San Antonio January 16, 2008, n.p.h.)(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.
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). *But see Rockwall County v. McLendon*, 122 S.W.2d 228 (Tex. Civ. App.--Dallas 1938, no writ)(omission of exhibits to plaintiff's petition is not fatal if the exhibits are sufficiently described in the body of the petition itself).

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.

C. 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." 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).

D. 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).

E. 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).

F. 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.

G. 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 RETURNED

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

V. THE CITATION AND RETURN MUST HAVE BEEN ON FILE FOR THE REQUISITE PERIOD

A. Time Requirement

The citation with the officer's return thereon must have been on file with the clerk of the court for ten days, exclusive of day of filing and day of judgment. Rule 107. *Integra Bank v. Miller*, No. 05-95-01477-CV (Tex. App.–Dallas Dec. 16, 1996, no writ)(unpublished, 1996 Tex. App. Lexis 5654). The period is eleven days when calculated pursuant to Rule 4.

A return of service on the Secretary of State should not be filed until after 30 days from date of service, *Applied Health Care Nursing Div.,Inc. v. Lab Corp. of Am.*, 138 S.W.3d 627, 629 (Tex. App. - - Dallas 2004, no pet.) and see discussion on service of corporations through Secretary of State, page 31,E.

B. File Mark

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

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 here justifies the apparent trial court record omission by noting the common use of computers to track judicial proceedings and that computer records may be displayed on screens for examination without printing a tangible 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.

The court omits any facts which would establish that at the time judgment was signed, the data was electronically stored. The holding appears inconsistent with *Melendez, supra* and *Armstrong v. Minshew*, 768 S.W.2d 883 (Tex. App.-Dallas 1989, no writ) which require that the appellate court test the record as it appeared in the trial court at the time default judgment was rendered.

The rules of procedure need to be updated to further define the extent to which electronically stored data form a part of the record. Given the current state of case law, it is certainly arguable that the record before the trial court does not include electronically stored data which lacks both tangible form and a file stamp confirming the date of its entry into the record. Future case law and rules may require either that the computer system reflect the date of data input or that prior to judgment, a tangible record be made of the stored data.

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.

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 this rule. 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. 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 DISPOSES OF ALL PARTIES AND ISSUES IN THE CASE

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." This language will probably become Mother Hubbard II, and we must guard against its use in judgments which are otherwise plainly intended as interlocutory.

Citing *Lehman,* the court notes that a summary judgment may be incorrect but final if it disposes of all parties and all claims. *Ford v. Exxon Mobil Chem. Co.,*235 S.W.3d 615(Tex. 2007)(per curiam)(issue as to expert's fees, judgment final).

Violation of Mother Hubbard II: *Bain v. Bain*, No. 2-06-215-CV (Tex App. - - Fort Worth, January 25, 2007, no pet.)(2007 Tex. App. Lexis 443)(mem. op.), citing *Lehmann* 39 S.W.3d 191, at 192. (Summary judgment interlocutory for failure to address cross claim, though judgment stated that it "finally disposes of all claims and parties and is appealable").

The finality issue remains troublesome. The *Lehman* court notes, "Granting more relief than the movant is entitled to makes the order reversible, but not interlocutory." 39 S.W.3rd at 204. See also *Guajardo v. Conwell*, 46 S.W.3d, 862 (Tex. 2001)(Mother Hubbard clause in summary judgment does not indicate finality if the judgment does not actually dispose of all claims and parties); *Tex. Migrant Council, Inc. v. Rosa*, No. 13-03-00212-CV (Tex. App. - - Corpus Christi, July 8, 2004, no pet.)(2004 Tex. App. Lexis 6052)(mem. op.)(default judgment interlocutory because no ruling on plaintiff's request for permanent injunction, attorney's fees, or court costs); *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). *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.)(default judgment failed to dispose of all parties; interlocutory judgment).

But see *M.O. Dental Lab v. Rape,* 139 S.W.3d 671,674-675(Tex.2004). The court held "Order Granting Summary Judgment" against plaintiff was final even though one defendant was never served. The nine-line judgment contained no Mother Hubbard clause, nor finality clause as suggested in *Lehman.* See also *Texaco, Inc. v. Phan*, 137 S.W.3d 763 (Tex. App. - Houston [1st Dist.] 2004, no pet.). "Final Default Judgment" with Mother Hubbard clause, "The court denies all relief not expressly granted," was

final, though it did not award pre-judgment interest or attorney's fees; judgment implicitly denied these requests by denying all relief not expressly granted). *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).

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.).

Practice Tip: *Guard against the blind use of forms. Attorneys using the Mother Hubbard clause in clearly interlocutory judgments led to its demise. Explain to your staff the importance of the revised finality language, and the reasons 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.*

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).

B. Other Parties

A judgment must dispose of all parties and all issues before the trial court, in order for it to be considered final and appealable. *Park Place Hosp. v. Estate of Milo*, 909 S.W.2d 508, 510 (Tex.1995). When other defendants remain in the case, the court may grant an interlocutory default judgment against the defaulting defendant, but it cannot grant a final default judgment. Rule 240; see also Rule 161; *In re Bro Bro Props., Inc.*, No. 04-00-00594-CV (Tex. App. - - San Antonio, Dec. 20, 2000, no writ) (unpublished, 2000 Tex. App. Lexis 8418) (merely non-suiting other defendants ineffectual - - dismissal order required); *Reed v. Keepsake Diamond Center*, 657 S.W.2d 524 (Tex. App.--Corpus Christi 1983, no writ) (error to render final default judgment against one defendant when another unserved defendant remains in the case); *Neal v. Roberts*, 445 S.W.2d 58 (Tex. Civ. App.--Houston [lst Dist.] 1969, no writ). But *see First Dallas Petroleum, Inc. v. Hawkins*, 715 S.W.2d 168 (Tex. App.--Dallas 1986, no writ) (when the remaining defendants have not been served, the plaintiff will be presumed to have dismissed the unserved defendants and the judgment will be final). See also *M.O. Dental* above (same).

C. Other Issues

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 cause of action 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.)(requested court costs and attorney fees remained).

D. 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.

E. 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.

F. 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).

G. 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.).

H. 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

A. Requisites of Petition

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

1. 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).

2. 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).

3. 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); *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--note that Rule 185 has since been amended to relax account description requirement); *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.

4. The petition must request the damages that are awarded or the other relief which is granted. *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); *Binder v. Safady,* 193 S.W.3d 29 (Tex. App. - - Houston [1st Dist.] 2006, no pet.)(remanded where award exceeded prayer); *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).

5. Petition must be consistent. 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).

6. 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).

7. 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 count 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. 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 Accounts

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); *Q-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.).

E. Petition Not a Written Instrument

The petition itself, even if sworn, is not the written instrument contemplated by the rule. *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 58, 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.).

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: *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, n.p.h.). 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.

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). The proof may apparently be conclusory in nature, as long as it is sufficient to support the judgment. *See, e.g., Stra, Inc. v. Seafirst Commercial Corp.*, 727 S.W.2d 591 (Tex. App.--Houston [lst Dist.] 1987, no writ); *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).

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 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.

Review case law and be cautious when proving damages such as the following:

1. 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)
2. Lost profits. *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 that lost profits were net of expenses).
3. Mental anguish: *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).

H. Attorney's Fees.

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, always 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.

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).

J. Record.

A defendant who appeals a default judgment, like any appellant, has a duty to present the appellate court with a record of the proceedings in the trial court, if one was made. *Duplaintis v. Noble Toyota*, 720 S.W.2d 863, 865 (Tex. App.--Beaumont 1986, no writ). Where the defendant fails to produce a statement of facts, the court will presume that evidence sufficient to support the judgment was received. *Id.* If the record demonstrates that defendant in the exercise of due diligence was unable to obtain a record, however, the presumption will not apply and the case will be reversed. *See, e.g., Olivares v. Cawthorn*, 717 S.W.2d 431, 432 (Tex. App.--San Antonio 1986, writ dism'd); *Bertsch & Co. v. Spells*, 687 S.W.2d 826 (Tex. App.--Eastland 1985, writ ref'd n.r.e.); *Houston Pipe Coating Co. v. Houston Freightways, Inc.*, 679 S.W.2d 42, 45-46 (Tex. App.--Houston [14th Dist.] 1984, writ ref'd n.r.e.); *Morgan Express, Inc. v. Elizabeth Perkins, Inc.*, 525 S.W.2d 312, 315 (Tex. Civ. App.--Dallas 1975, writ ref'd). Due diligence is demonstrated by requesting a statement of facts from the court reporter, and the record is perfected by placing a copy of that request in the transcript. *See Angelo v. Champion Restaurant Equip. Co.*, 702 S.W.2d 209, 211 (Tex. App.--Houston [lst Dist.] 1985), *rev'd on other grounds*, 713 S.W.2d 96 (Tex. 1986); *Harris v. Lebow*, 363 S.W.2d 184, 185 (Tex. Civ. App.--Dallas 1962, writ ref'd n.r.e.). *See also Alverado v. Reif*, 783 S.W.2d 303 (Tex. App.--Eastland 1989, no writ) (appellant's brief asserted that court reporter certificate verified she made no record of the proceedings; though certificate was omitted from record, the court accepts the statement as true because it was unchallenged by appellee, TRAP 74(f)). Only if the record supports a judgment in the absence of a statement of facts, so that the hearing was unnecessary, will the judgment be affirmed. *See Brown v. McLennan County*, 627 S.W.2d 390, 394 (Tex. 1982); *But see Woodruff v. Cook*, 721 S.W.2d 865, 871 (Tex. App.--Dallas 1986, writ ref. n.r.e.) (burden on defaulted party to obtain record of hearing on post-answer default based on discovery sanctions.)

XII. Post-Answer Default Judgments

Practice Tip: *Consider sending requests for admission proving all elements, and damages, with every petition. Review O'Connor's Texas Causes of Action to confirm elements. Beware of the routine, as judgment could be reversed and rendered. Make a record. See also preceding section XI as to proof of damages.*

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 often abbreviated and perfunctory. A busy trial court judge may sign a judgment notwithstanding a deficient record or no record. It is plaintiff's counsel's responsibility to build a solid record proving all elements of each cause of action and damages. This is sometimes difficult when there is no opposition.

Counsel must proceed with the prove-up, anticipating an attack in the court of appeals as occurred in *Sutton v. Hisaw & Assocs. Gen. Contrs., Inc.* 65 S.W.3d 281 (Tex. App. - - Dallas 2001, pet. denied). *Sutton* dealt with a plaintiff - contractor who sued defendant-worker for fraud, breach of contract, quantum meruit. Unfortunately, plaintiff failed to prove at least one element of each cause of action and failed to show causation between lien waivers and plaintiff's damages. The court reversed and rendered. A lawyer's nightmare: "Mr. Client, defendant did not appear at trial, but we lost." Respect and recognize these prove-ups as trials. Realize the record may be examined and attacked for insufficiencies as to proof of causes of action or unliquidated damages.

Another nightmare is *Renteria v. Trevino,* No. 14-01-01106-CV (Tex. App. - - Houston [14th Dist.] June 6, 2002, no pet.)(2002 Tex. App. Lexis 4131). Landlord sued tenant. Tenant answered, did not appear at trial, and appealed, asserting that landlord failed to present any evidence of damages on a breach of contract claim. The court agreed that landlord failed to present legally sufficient evidence of

damages, an element of the breach of contract claim; reversed and rendered. See also *McDaniel v. Bennett,* No. 07-06-0250-CV (Tex. App. - - Amarillo, April 30, 2008, pet. filed)(2008 Tex. App. Lexis 3124)(insufficient evidence of cost of repairs, reversed and rendered); *Wallace v. Ramon,* No. 04-01-00461-CV(Tex. App. - - San Antonio May 1, 2002, no pet.)(2002 Tex. App. Lexis 3023)(insufficient evidence to hold corporate officer individually liable on breach of contract claim, reversed and rendered as to officer only).

Other post-answer default judgment cases recently 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).

A defendant does not waive his 45-day notice of trial required by rule 245, by failing to file a motion for continuance by failing to appear at trial. *Barbosa v. Hollis Rutledge & Assoc.*, No. 13-05-485-CV (Tex. App. - - Corpus Christi June 28, 2007, no pet.)(2007 Tex. App. Lexis 5051)(mem. op.).

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 forms, at page 113, demand letter and non-military affidavit.

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

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). 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).

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 113 will generally suffice. Contact information for the military branches can be found at page 114.

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

A. 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.

B. 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).

C. 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).

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

Rule 736. Summary enforcement of foreclosure of home equity liens is provided for in Rule 736. Service may be made by certified and first class mail addressed to each party who, according to the records of the holder of the debt, is obligated to pay the debt. A form of notice is provided in the rule. The court shall grant the application without further notice if the application complies with the rule, respondent has not filed a response, and a copy of the notice and certificate of service has been on file with the clerk for 10 days exclusive of date of filing.

Defendant has 38 days after the date of mailing to respond.

B. Forcible Entry and Detainer

Rule 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 33.

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. 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).

C. Dismissal, Reinstatement and Default Judgment

There are numerous recent cases dealing with dismissal, reinstatement and failure to enter default judgment. These are generally 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 Tex. R. App. P. 33.1(a)(2)(B). Rule 33.1 states 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., L.L.C. v. Moseley,* No. 05-07-01225-CV(Tex. App. - - Dallas, January 15, 2009, n.p.h.)(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, n.p.h.)(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, n.p.h.)(same); *Old Republic Ins. Co. v. Sisavath,* No. 05-07-01391-CV (Tex. App. - - Dallas, October 27, 2008, n.p.h.)(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, n.p.h.)(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, n.p.h.)(2008 Tex. App. Lexis 6066)(mem. op.)(deficient record).

Cases in which plaintiff prevailed include *Rava Square Homeowners Ass'n. v. Swan,* No. 14-07-00521-CV (Tex. App. - - Houston [14th Dist.], September 30, 2008, n.p.h.)(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, n.p.h.)(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, n.p.h.)(2008 Tex. App. Lexis 8012)(mem. op.)(abuse of discretion to dismiss before date stated in notice of intent to dismiss).

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 67,E.

D. Appeal to Require Judgment Entry

Failure to grant a default judgment may be reversible error. Plaintiff requested a default judgment, trial judge refused to enter same, noting purported deficiencies in the return. The case was later dismissed for want of prosecution. 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. The court discusses the technical requirements for valid service of process and concludes that the trial court improperly found defects in the return of citation. Held, the trial court abused its discretion in denying appellant's motion for default judgment. Reversed and remanded to the trial court for award of damages and rendition of final judgment. *Aguilar v. Livingston*, 154 S.W.3d 832, 833(Tex. App. - Houston [14th Dist.] 2005, no pet.); *Rava Square Homeowners Ass'n. v. Swan*, No. 14-07-00521-CV (Tex. App. - - Houston [14th Dist.], September 30, 2008, n.p.h.)(2008 Tex. App. Lexis 7257)(mem. op.)(plaintiff was entitled to default judgment, case was wrongfully dismissed by trial court); *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.

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, e.g. 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

Practice Tip: Set Aside Your Judgment. *If a defect in service is attacked by appeal, consider extending trial court jurisdiction by plaintiff's motion to set aside its own judgment and prompt entry of an appropriate order. "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, n.p.h.).*

Practice Tip: Depose Defendant. *Upon receipt of Motion for New Trial, notice depositions for all affiants who support the motion. Often, only defendant submits an affidavit. Oppose the hearing of a new-trial motion, until depositions are taken.*

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." 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).

> . . . [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.

B. Opposing New-Trial Motions

1. 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 Cp., Inc. v. Sea-Land Serv.* 27 S.W.3d 184(Tex. App. - - Dallas 2000, pet. denied).

2. Sworn Account

A sworn account claim may be new trial-proof. After noting that Rule 185 requires a defendant to file a verified denial in order to deny the claim, the court, citing *Continental Carbon,* went on to say 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.

C. Cases Denying New Trial

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: *If you suspect bad faith by defendant, consider sending a copy of the petition and citation 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.*

D. Rule 306a(4), Extending Jurisdiction

This rule allows an extended time to file a motion when a party receives late notice (20-90 days), of a judgment or order. The important rule requires a very specific predicate to extend the trial court's plenary jurisdiction. Recent cases include: *Wells Fargo Bank, N.A. v. Erickson,* 267 S.W.3d 139 (Tex. App. - - Corpus Christi 2008, n.p.h.)(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).

E. Bill of Review

"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. *In re Office of AG,* 276 S.W.3d 611 (Tex. App. - - Houston [1st Dist.] 2008, n.p.h.) 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.

2. *In re Botello,* No. 04-08-00562-CV (Tex. App. - - San Antonio, November 26, 2008, n.p.h.)(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.

3. *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
Additional Diligent Service Cases
(supplement to page 4,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).

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Default Judgment Checklist

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General			
1.	Appearance date has passed.	99	41
2.	No answer or appearance.		41
3.	Defendant's name is correct on petition, citation, return.		14
4.	Citation and return filed "11" days prior to judgment.	107	47
5.	Default Judgment warning is on citation.	99(b)(12)	46
Return of Service			
6.	Forms	107	13
	* (Individual) "Executed by delivering to _____ (name) on _____(date) at _____(time) at _____(place), a true copy of the citation and petition with service date marked thereon."		
	* (Corporation) "Executed by delivering to _____(corporation) by delivering to _____(name), its _____(title) on _____(date) at _____(time) at _____(place), a true copy of citation and petition with service date marked thereon."		
7.	"Delivered to", not "served on" -- legal conclusion.		15
8.	Recites that both citation and petition delivered.		13
9.	Signature or typed or printed name of **sheriff, constable or clerk**, even if served by deputy.		15
10.	If private process server: a) return includes verified signature of server;	107	15
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*Texas Rules of Civil Procedure

Cause No. CC-07-00001-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 FIRST AMENDED PETITION -- ACCOUNT/GUARANTY

1. The parties and judgment which plaintiff seeks against defendant are:

Plaintiff:	ALL AMERICAN COMPANY
Defendants:	DOE CONSTRUCTION CORPORATION, a Texas corporation, hereafter, "Obligor"; and JOHN DOE, an individual, hereafter "Guarantor".
Principal sought:	$15,000.00
Attorneys' fees:	$5000.00, additional fees if appealed
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.

2. SERVICE: Service on defendant should be had through the Secretary of State of the state of Texas pursuant to Article 2.11(b) Business Corporations Act as defendant's registered agent cannot, with reasonable diligence, be found at defendant's registered office. Defendant's registered office and defendant's most recent address on file with the secretary of state's office is: 2324 Oak Lawn, Dallas, Texas 75024. Defendant, JOHN DOE, may be served at 1555 Kings Row, Dallas, Texas 75024.

Note: Discovery, including requests for admission, are being served with the petition upon defendant. If a response to requests for admission is not timely served, the request is considered admitted without the necessity of a court order. Read all attachments. See an attorney promptly.

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, Obligor is 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.

6. REQUESTED RELIEF: Plaintiff requests judgment against defendants jointly and severally as stated in paragraph one.

THE BLENDEN LAW FIRM

BY: _____

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

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 May 14, 2007.

Nancy Notary
NOTARY PUBLIC

L661

Statement of Account of Doe Construction Corporation

Invoice #	Invoice Date	Amount	Invoice Payments	Paid Date	Balance Forward
00149	1/15/06	$10,000.00			$10,000.00
			$5,000.00	1/30/06	$ 5,000.00
00245	2/28/06	$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 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 Jan. 3, 2006 by John Doe.

Nancy Notary
NOTARY PUBLIC in and for
State of Texas

(notary seal)

Exhibit B
(condensed)

February 1, 2008

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

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 sued upon herein. Unless otherwise noted "petition" refers to Plaintiff's First Amended Petition filed in this cause. "Identify" as to a person means to state the person's name, address, telephone number, and employer and position. "Identify" as to a document means to describe the document, and identify its author, recipient, and custodian. "Documents" include records, correspondence, memoranda, photographs, film, recordings and data compilation in any 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.

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.

THE BLENDEN 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 costs, to $50. 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. Production shall be at The Blenden Law Firm, 2217 Harwood Road, Bedford, Texas 76021-3607. Because plaintiff will accept copies and agrees to pay reasonable copying costs up to $50, plaintiff objects to the tender of documents at an alternate location. Unless otherwise specified the requested documents are for the period January 1, 2004 to the present date.

REQUESTS FOR DISCLOSURE: Pursuant to Rule 194, you are requested to disclose, within 30 days of service of this request, the information and material described in Rule 194.2. Please respond and produce documents to the Blenden Law Firm 2217 Harwood Road, Bedford, Texas 76021 within 30 days of service of this request. A defendant served with a request before the defendant's answer is due need not respond until 50 days after service of the request.

(condensed)

PLAINTIFF'S ACCOUNT INTERROGATORIES

NOTE: Please read cover letter before proceeding.

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 legal theories and describe in general the factual basis for all asserted defenses.

ANSWER:

7. Identify all documents that support defendant's contention that the debt is not owed.

ANSWER:

8. 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:

9. Explain fully defendant's knowledge of the goods or services and the accounts.

ANSWER:

10. Describe the business transactions between plaintiff and defendant, including date of first and last transaction; total dollar amount of the transactions, and general explanation of the transactions.

ANSWER:

11. State the approximate date of every demand for payment from plaintiff or plaintiff's representatives. (Including invoices, statements, letters.)

ANSWER:

12. Did defendant notify plaintiff or any reason why defendant should not pay the debt? If so, fully describe all such communication, including the date, place, content and parties thereto.

ANSWER:

13. If another is or may be liable on this account, identify the individual or entity, and state all facts supporting their liability.

ANSWER:

14. Does defendant still have the goods? If not, explain all transfers or sales of the goods by defendant, including approximate date, names, and addresses of recipients, and consideration received.

ANSWER:

15. If defendant claims the goods or services were defective, fully describe all facts supporting said contention, and the specific items suffering from said defect.

ANSWER:

16. State the amount and specific facts for every alleged credit, offset or claim against plaintiff.

ANSWER:

17. State defendant's full name, together with all variations, assumed names, and trade names.

ANSWER:

18. State defendant's driver's license number and state of issuance; social security number and defendant's name as it appears on each. If defendant is a corporation, instead state date and state of incorporation, and charter number.

ANSWER:

19. Identify all persons who either answered or provided information used in responding to these interrogatories.

ANSWER:

20. Identify any person who is expected to be called to testify at trial. See rule 192.3(d).

ANSWER:

(condensed)

PLAINTIFF'S ACCOUNT REQUESTS FOR ADMISSION

NOTE: Please read cover letter before answering these 28 requests; may be deemed admitted if not timely answered. Admit or Deny:.

Answer:

_____ 1. The account is just and true.

_____ 2. Payment of the debt is due from defendant to plaintiff.

_____ 3. The account states the balance due plaintiff after all offsets, payments, claims and credits have been allowed.

_____ 4. On the dates shown in the account, defendant purchased the items or services.

_____ 5. On or about the dates shown on the account, defendant received the items billed.

_____ 6. All prices charged by plaintiff were agreed to by defendant.

_____ 7. All prices charged defendant are reasonable.

_____ 8. Defendant promised to pay plaintiff for the account.

_____ 9. Defendant failed to pay the account.

_____ 10. Plaintiff made written demand upon defendant for payment of the account more than 30 days prior to filing suit.

_____ 11. Defendant timely received monthly account invoices.

_____ 12. Defendant received accurate account invoices which total the principal amount sued for.

_____ 13. Defendant made no objection or complaint after receiving the account invoices.

_____ 14. Defendant did not reply to written demands for payment of the account.

_____ 15. Defendant never rejected or made complaint regarding the goods or services.

_____ 16. Plaintiff has fully performed, to defendant's satisfaction, in all transactions between plaintiff and defendant.

_____ 17. The petition is entirely accurate and plaintiff is entitled to the requested relief.

_____ 18. Plaintiff should recover judgment as requested in the petition.

_____ 19. There are no documents which support any defense in this cause.

_____ 20. All documents attached to the petition are true copies of the original.

_____ 21. All signatures on attachments to the petition are genuine.

_____ 22. Matters stated in the documents attached to the petition are accurate.

_____ 23. Defendant has no offset, credit or claim against plaintiff.

_____ 24. The court should render judgment against defendant for the relief requested in plaintiff's most recently filed petition.

_____ 25. Venue is proper in this court.

_____ 26. Defendant was properly served with the petition and Plaintiff's Requests For Admission on the date indicated in the return of citation.

_____ 27. Defendant consents to this court's jurisdiction.

_____ 28. The court has jurisdiction over defendant and the subject matter of this suit.

(condensed)

DOCUMENT REQUEST

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. Defendant's books and records as they relate to plaintiff.
4. Letters and faxes received by defendant, requesting payment of the debt.
5. Defendant's letters and faxes responding to requests for payment.
6. All correspondence relating to the transaction referenced in plaintiff's petition.
7. All communication between defendant and any other party to this suit.
8. All memoranda of any telephone conversation relating directly or indirectly to the matters alleged in plaintiff's petition or any defense thereto.
9. All documents upon which defendant relies in denying any matters alleged in plaintiff's petition.
10. All reports of experts which may be called to testify in this cause.
11. All assumed name certificates filed by defendant during the preceding ten years.
12. All documents requesting or constituting a name change of the defendant or any other defendant in this action.
13. All documents and correspondence between defendant's employees, agents, contractors or third parties, relating to the business transactions between plaintiff and defendant.
14. Defendant's file folder in which matters pertaining to the account were kept.
15. All credit applications submitted to any creditor or prospective creditor within one year of commencement of this account.
16. All applications for any license, permit, or certificate together with all licenses, permits or certificates held, or owned by defendant, or any agent thereof.
17. All documents and tangible things which you intend to offer as a trial exhibit.
18. Copies of all photographs, video tapes, and any other documents which in any way demonstrate any of your defenses or claims in this lawsuit.
19. All computer, electronic or magnetic data or files containing or relating to the account.
20. All electronic communications and data available on any computer system or network in defendant's possession, custody or control, relating to the account and underlying contract between plaintiff and defendant, including without limitation, e-mail, voice-mail, network messages, or computer files containing letters, memoranda, faxes or other forms of communication.

(condensed)

February 1, 2008

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

DEFINITIONS: For clarity, "plaintiff" means ALL AMERICAN COMPANY and "defendant" means JOHN DOE and includes all of 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 sued upon herein. Unless otherwise noted "petition" refers to Plaintiff's First Amended Petition filed in this cause. "Attach" requests the attachment to your answers, of described documents. Upon request, the discovery will be provided on disc, though this shall not extend the discovery due date.

"Documents" include records, correspondence, memoranda, photographs, film, recordings and data compilation in any 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.

SIGNATURE AND SERVICE CERTIFICATE

The attached discovery is served on defendant. I certify that a true copy of this letter and all attachments accompanied the citation and petition at the time of service upon defendant.

THE BLENDEN LAW FIRM
Plaintiff's Attorney

BY:_____
MARK P. BLENDEN, Bar No. 02486300
The Blenden 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. Defendant made no objection or complaint after receiving demand for payment.

_____ 8. Defendant is indebted to plaintiff as stated in the petition.

_____ 9. The statements in the petition are true.

_____ 10. There are no documents which support any defense in this cause.

_____ 11. All documents attached to the petition are true copies of the original documents.

_____ 12. All signatures on attachments to the petition are genuine.

_____ 13. Matters stated in the documents attached to the petition are accurate.

_____ 14. Plaintiff should recover judgment as requested in its petition filed herein.

_____ 15. Neither defendant, nor Obligor has a claim, offset or credit against plaintiff.

_____ 16. Defendant was properly served with the petition and Plaintiff's Requests For Admission on the date indicated in the return of citation.

_____ 17. Venue is proper in this court.

_____ 18. The court has jurisdiction over defendant and the subject matter of this suit.

February 28, 2008

Clerk, Dallas County Court at Law
600 Commerce, #101 Civil Process
Dallas, TX 75202

RE: ALL AMERICAN COMPANY
vs.
DOE CONSTRUCTION CORPORATION; JOHN DOE
Cause No.: CC-07-00001-E
Our File: 15886

Dear Madam:

Please file the enclosed Officer's Affidavit and Plaintiff's First Amended Petition with the papers of this cause. Also note the court's cost account with the $40 cost which was incurred attempting service on the defendant's registered agent.

Please forward triplicate citations and the attached copies of the petition with plaintiff's discovery to our office to be forwarded to the civil processor for service on the Secretary of State as agent.

Please file the enclosed unserved citation with the papers of this cause.

Very truly yours,

THE BLENDEN LAW FIRM

Mark P. Blenden

15886
L833/L838

Enclosed: First Amended Petition
Officer's Affidavit
Unserved Citation

STATE OF TEXAS §
§ CAUSE NO. CC-07-00001-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 Law Firm. I am certified by the Texas Supreme Court to serve process, including citations in Texas. 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. I am authorized to serve process in this cause pursuant to 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.

6. 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
6-8-07	10:15 a.m.	Secretary, Mary, says Michael Zanes is usually out and she offers to accept process for him -- I declined
6-11-07	4:30 p.m.	Secretary, Mary, again reports Michael Zanes out

7. Attempts, if any, at locations other than registered office.
(Alternate address: _____)

Date	Time	Result

Paul Smith
Process Server
SC _____

SUBSCRIBED AND SWORN TO, before me on this 11th day of June, 2007.

Nancy Notary
Notary Public in and for the State of T E X A S

STATE OF TEXAS §
§ CAUSE NO. _____
COUNTY OF DALLAS §

AFFIDAVIT IN SUPPORT OF SERVICE ON THE SECRETARY OF STATE AFTER ATTEMPTED SERVICE ON REGISTERED AGENT - - ENTITY

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 over the age of 18 years and competent to make this affidavit.

2. "Defendant" refers to _____.

3. "Registered Agent" and "Defendant's Registered Agent" both 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 authorized to serve process in this cause pursuant to Texas Supreme Court certification. 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 in paragraph 6, I was unable to deliver the citation to the registered agent, president, or vice-president, of either the Registered Agent or Defendant.

6. The following are my specific attempts to serve the Registered Agent at the Registered Office. On the dates indicated I went to the Registered Office with the stated results.

Date	Time	Result
____	____	I went to the Registered Office and requested that a person appear to accept service who was a registered agent, president, or vice president of either the Registered Agent or Defendant. However, no one who held any of those positions would appear. Nor was I advised when such a person would appear. It is the practice of the Registered Agent, to require that all process be left with an office staff member who is neither a Registered Agent, President, or Vice-President of the corporate registered agent. I was unable to deliver process, despite my diligent attempt to do so. There is no person who is the registered agent of Defendant's Registered Agent, nor a person who is the registered agent of Defendant who would appear to accept service of process. I was unable to serve Defendant because no person would appear who is the registered agent, president, or vice-president, of either the Registered Agent or the Defendant. I am required by law to deliver process to a person who is a registered agent, president or vice-president of either the Registered Agent or Defendant. I made a diligent attempt to personally deliver process to the Registered Agent. It was impossible under the circumstances stated herein, and service should be made on Defendant through the Texas Secretary of State pursuant to law.
____	____	I was again unable to serve the Registered Agent at the Registered Office. Same result as prior attempt stated above.

_____
Process Server
SC _____

SUBSCRIBED AND SWORN TO, before me on this _____ day of _____ 2007.

_____
Notary Public in and for the State of T E X A S

February 12, 2008

Clerk, Dallas County Court
600 Commerce, #101 Civil Process
Dallas, TX 75202-3504

re: ALL AMERICAN COMPANY
VS.
DOE CONSTRUCTION CORPORATION; JOHN DOE
Cause Number: CC-07-00001-E
Our File No.: 15886

Dear Madam:

Please file the enclosed Motion for Substituted Service with papers of this cause and submit the Order for Substituted Service for signature. When the Order has been signed, please return it to our office for forwarding to our private process server. Thank you for your assistance in this matter.

Very truly yours,

THE BLENDEN LAW FIRM

Mark P. Blenden

A400

Attachment - Motion and Order for Substituted Service
Affidavit

Cause No. CC-07-00001-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 Rules 106(b) and 536(c), 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 LAW FIRM

BY:_____
MARK P. BLENDEN
State Bar No. 02486300

15886
A400

STATE OF TEXAS §
§ CAUSE NO. CC-07-00001-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 Law Firm. I am certified by the Texas Supreme Court to serve process, including citations in Texas. 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 a neighbor, on 6-9-07, residing at 1557 Kings Row, that John Doe resided at the stated address.

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
6-5-07	10:30 am	Knocked loudly, numerous times; no answer, left my card
6-9-07	7:00 pm	Knocked loudly numerous times; no answer, card gone – again left card
6-11-07	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

SUBSCRIBED AND SWORN TO, before me on this 14th day of June, 2007.

Nancy Notary
Notary Public in and for the State of
TEXAS

*line through one
L676. BLF File#_____

Cause No. CC-07-00001-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 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 be endorsed on or attached to the citation, state when and how the citation was served, and be signed by the officer officially or sworn to by the designated private process server.

Signed _____, 2008.

_____
JUDGE PRESIDING

Approved and entry requested:

The Blenden Law Firm

BY: _____
Mark P. Blenden - Bar No. 02486300
15886
A400

June 29, 2007

(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-07-00001-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-07-00001-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 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 June 29, 2007.

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 -- Rule 106(b)
(intended to establish that defendant was consciously indifferent;
not intended as formal service of process)

July 1, 2007 (Letterhead)

Constable Bruce Elfant
Travis County Courthouse
1003 Guadalupe St.
Austin, Texas 78701

RE: ALL AMERICAN COMPANY
vs.
DOE CONSTRUCTION CORPORATION; JOHN DOE
Cause No.: CC-07-00001-E
Our File: 15886

Dear Constable Elfant:

Enclosed are triplicate copies of the citation and duplicate copies of the petition in the referenced cause, to be served on the Secretary of State of Texas. In addition to serving the copies of the citation and petition, please deliver to the Secretary of State the enclosed letter and check.

Please complete your return by inserting the hour and date of receipt and of service and the manner of service and by signing it officially. Please mail the completed return to me in the enclosed addressed, stamped envelope. My check for your fee is enclosed. If you have a question or need additional information, please telephone me, collect. Thank you for your prompt service.

Very truly yours,
THE BLENDEN LAW FIRM

Mark P. Blenden

Enclosures: Triplicate citations
Duplicate petitions
Letter to Secretary of State
Check for Secretary of State
Check for officer
Return mail envelope

July 1, 2007

(Letterhead)

Secretary of State of Texas
P. O. Box 13697
Austin, Texas 78711

HAND DELIVERY BY CONSTABLE

RE: ALL AMERICAN COMPANY
vs.
DOE CONSTRUCTION CORPORATION; JOHN DOE
Cause No.: CC-07-00001-E
Our File: 15886

The officer delivering this letter is also delivering: duplicate copies of citation; duplicate copies of the petition; a check for your fees for service and for a certificate of service.

The defendant's address to which the citation and petition should be mailed is stated in the petition. Please note in your certificate that this address is the corporation's "registered office and the most recent address for Defendant on file with the secretary of state's office."

Please furnish the usual copy of your letter transmitting the process to the defendant. We request that you send your certificate to our office immediately without waiting for a response from the defendant, in the enclosed addressed, stamped envelope. Thank you for your prompt and courteous attention to this matter.

Very truly yours,
THE BLENDEN LAW FIRM

Mark P. Blenden

L833/L834

Enclosures: Duplicate citations
Duplicate petitions
Check ($55)
Return mail envelope

(condensed)

July 8, 2007

(Letterhead)

Dallas County Clerk
600 Commerce, #101 Civil Process
Dallas, Texas 75202-3504

RE: ALL AMERICAN COMPANY
vs.
DOE CONSTRUCTION CORPORATION
Cause No.: CC-07-00001-E
Our File: 15886

Dear Madam:

Please file the enclosed citation and Secretary of State certificate with the papers of this cause. Please record the $90 paid to Constable Elfant's Office and fee paid to the Secretary of State.

Very truly yours,

THE BLENDEN LAW FIRM

Mark P. Blenden

Enclosed: Citation
Secretary of State Certificate

RETURN – SERVICE OF PROCESS ON SECRETARY OF STATE

Came to hand on 6-06-07 (date) at 2:00 (time) p.m. (am/pm) and executed in

Travis County, Texas on 6-11-07 (date) at 3:30 (time) p.m. (am/pm) by

delivering to defendant Doe Construction Corporation. by delivering to

the Secretary of State of Texas, at 1019 Brazos Street, Austin, Texas 78701, by delivering to Helen Lupercio, clerk in charge of the corporation department of the Secretary of State's office and designated agent for service for the Secretary of State, duplicate true copies of each of the following: citation; accompanying First Amended Petition; discovery, including Requests for Admission.

Fee: _____ paid

Luke Mercer, Constable
Precinct 1, Travis County
Travis County

Phillip Bond

Phillip Bond
Deputy

Signed and sworn to by the said _____ before me this _____ day of _____ 2007, to certify which witness my hand and seal of office.

_____
NOTARY PUBLIC in and for the State of T E X A S

(Secretary of State Certificate required. Filing of return (this form) optional.
See page 30 and discussion of *Campus Invs. Inc. v. Cullever*, 144 S.W.3d 464(Tex. 2004))
(condensed)

OFFICIAL SEAL
The State Of Texas
Secretary Of State
2007-00001

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 First Amended Petition in the cause styled:

ALL AMERICAN COMPANY VS. DOE CONSTRUCTION CORPORATION in the COUNTY COURT AT LAW NO. 5, DALLAS COUNTY, TEXAS, Cause No. CC-07-00001-E

was received by this office on July 26, 2007 and that a copy was forwarded on July 27, 2007 by CERTIFIED MAIL, return receipt requested to:

DOE CONSTRUCTION CORPORATION
2324 Oak Lawn
Dallas, Texas 75024

Date issued: July 27, 2007

OFFICIAL SEAL

Phil Wilson

Secretary of State

(Certificate proving service, see page 30)

July 20, 2007 (Letterhead)

Dallas County Clerk
600 Commerce, #101 Civil Process
Dallas, TX 75202

RE: ALL AMERICAN COMPANY
vs.
DOE CONSTRUCTION CORPORATION; JOHN DOE
Cause No.: CC-07-00001-E
Our File: 15886

Dear Madam:

Please file the enclosed citation with the papers of this cause. Please note the $40 paid to our process server with the costs of this cause. This is confirmed on the citation.

Very truly yours,
THE BLENDEN LAW FIRM

Mark P. Blenden

Enclosed: Citation

(condensed)

June 21, 2007

(Letterhead)

Mr. John Doe, President
Doe Construction Corporation
2463 Highway 10
Dallas, TX 74540

via certified and first class mail

RE: All American Company
vs
Doe Construction Corporation
Cause Number: CC-07-00001-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 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 June 21, 2007.

MARK P. BLENDEN

cc: Dallas County Court at Law Number Five
600 Commerce, #580
Dallas, TX 75202

(without attachments) Please file in the papers of this cause.

Optional Conscious Indifference Letter -- Secretary of State Service
(intended to establish that defendant was consciously indifferent;
not intended as formal service of process)

RETURN -- SERVICE OF PROCESS ON SECRETARY OF STATE

Came to hand on 6-06-07 at 2:00 p.m. and executed in
date time am/pm

Travis County, Texas on 6-11-07 at 3:30 p.m. by
date time am/pm

delivering to defendant Doe Construction Corporation. by delivering to

the Secretary of State of Texas, at 1019 Brazos Street, Austin, Texas 78701, by delivering to Helen Lupercio., clerk in charge of the corporation department of the Secretary of State's office and designated agent for service for the Secretary of State, duplicate true copies of each of the following: citation; accompanying First Amended Petition; discovery, including Requests for Admission.

Fee: _____ paid

Paul Smith
Process Server
SC #000000008

Signed and sworn to by the said Paul Smith before me this 21st day of June, 2007, to certify which witness my hand and seal of office.

Nancy Notary
NOTARY PUBLIC in and for
the State of T E X A S

(Secretary of State Certificate required. Filing of return (this form) optional.
See page 30 and discussion of *Campus Invs. Inc. v. Cullever*, 144 S.W.3d 464(Tex. 2004))

June 29, 2007

Dallas County Clerk
600 Commerce, #101
Dallas, TX 75202

RE: ALL AMERICAN COMPANY
vs.
DOE CONSTRUCTION CORPORATION; JOHN DOE
Cause No.: CC-07-00001-E
Our File: 15886

Dear Madam:

Please submit the enclosed judgment for signature. We would appreciate it if you would return the enclosed copy, conformed. Thank you for your attention in this matter.

Very truly yours,

THE BLENDEN LAW FIRM

Mark P. Blenden

Enclosed: Judgment

A100/A501

Cause No. CC-07-00001-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:	DOE CONSTRUCTION CORPORATION; 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 May 10, 2006 to date of judgment; costs and interest on all sums awarded at 6% per annum from date of judgment until paid.

This judgment finally disposes of all parties and all claims and is appealable.

Signed _____, 2008.

_____
JUDGE PRESIDING

15886
A100/A501

Cause No. CC-07-00001-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 defendant 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 August 9, 2007.

NOTARY PUBLIC in and for the
State of T E X A S

APPROVAL and ADDRESS CERTIFICATE

I approve the judgment and certify that defendant DOE CONSTRUCTION CORPORATION'S last known address is: 2324 Oak Lawn, Dallas, Texas 75024. Defendant JOHN DOE'S last known address is: 1555 Kings Row, Dallas, Texas 75024.

THE BLENDEN LAW FIRM
Attorney for Plaintiff

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

A100/A50115886

RETURN
(Attach to citation per Rule 107)

CAME TO HAND ON THE 6th DAY OF Feb. A.D. 2008, 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. 2008, 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_____$_____
MILEAGE_____$_____

NOTARY_____$_____

TOTAL_____$_____

Elvis Jones, Constable
Precinct 99 of Dallas County Texas
Dallas County, Texas

Bill Green

Bill Green
Deputy

(MUST BE VERIFIED IF SERVED OUTSIDE THE STATE OF TEXAS)

SIGNED AND SWORN TO BY THE SAID_____BEFORE ME THIS_____DAY OF_____, 2008, TO CERTIFY WHICH WITNESS MY HAND SEAL OF OFFICE.

_____
NOTARY PUBLIC_____COUNTY____

Officer's Return - Individual Defendant

RETURN
(Attach to citation per Rule 107)

CAME TO HAND ON THE 6th DAY OF Feb. A.D. 2008, 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. 2008, 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

MILEAGE_____$_____

NOTARY_____$_____

TOTAL_____$_____

_____
County, Texas

Paul Smith

Paul Smith
Process Server
SC 000000008

(MUST BE VERIFIED IF SERVED OUTSIDE THE STATE OF TEXAS)

SIGNED AND SWORN TO BY THE SAID Paul Smith BEFORE ME THIS 14th DAY OF February, 2008, TO CERTIFY WHICH WITNESS MY HAND SEAL OF OFFICE.

Nancy Notary

NOTARY PUBLIC Dallas COUNTY Texas

Private Process Server - Individual Defendant

RETURN
(Attach to citation per Rule 107)

CAME TO HAND ON THE 6th DAY OF Feb. A.D. 2008, 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. 2008, 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

NOTARY $

Bill Green
Bill Green
Deputy

TOTAL $40.00

(MUST BE VERIFIED IF SERVED OUTSIDE THE STATE OF TEXAS)

SIGNED AND SWORN TO BY THE SAID _____ BEFORE ME THIS ____ DAY OF _____, 2008, TO CERTIFY WHICH WITNESS MY HAND SEAL OF OFFICE.

_____
NOTARY PUBLIC _____ COUNTY _____

Return - Served Registered Agent

RETURN
(Attach to citation per Rule 107)

CAME TO HAND ON THE 6th DAY OF Feb. A.D. 2008, AT 2:00 O'CLOCK P.M., AND EXECUTED BY DELIVERING TO Sam Orez, Inc., by delivering to its president, Robert Hall, at 1234 Oak Street, Dallas, Texas 75021

ON THE 11th DAY OF Feb. A.D. 2008, AT 7:30 O'CLOCK P.M., A TRUE COPY OF THIS CITATION, TOGETHER WITH A COPY OF PLAINTIFF'S FIRST AMENDED 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

NOTARY $

Bill Green
Bill Green
Deputy

TOTAL $

(MUST BE VERIFIED IF SERVED OUTSIDE THE STATE OF TEXAS)
SIGNED AND SWORN TO BY THE SAID _____ BEFORE ME THIS _____ DAY OF _____, 2008, TO CERTIFY WHICH WITNESS MY HAND SEAL OF OFFICE.

_____
NOTARY PUBLIC _____ COUNTY _____

Served President
(though not named in petition, see page 26)

RETURN -- SERVICE OF PROCESS ON SECRETARY OF STATE
(Attach to citation per Rule 107)

Came to hand on March 7, 2007 at 2:00 p.m. and executed in
date time am/pm

Travis County, Texas on March 8, 2007 at 3:30 p.m. by
date time am/pm

delivering to defendant Doe Construction Corporation. by delivering to the Secretary of State of Texas, at 1019 Brazos Street, Austin, Texas 78701, by delivering to Helen Lupercio, clerk in charge of the corporation department of the Secretary of State's office and designated agent for service for the Secretary of State, duplicate true copies of each of the following: citation; accompanying Plaintiff's First Amended Petition; discovery, including Requests for Admission.

Carl Stone
Process Server
SC #000000007

Signed and sworn to by the said Carl Stone before me this 21st day of June, 2007, to certify which witness my hand and seal of office.

Nancy Notary
NOTARY PUBLIC in and for
the State of T E X A S

(Secretary of State Certificate required. Filing of return (this form) optional.
See page 30(D) and discussion of *Campus Invs. Inc. v. Cullever*, 144 S.W.3d 464(Tex. 2004)).

Cause Number: CC-07-00001-E

RETURN -- SUBSTITUTED SERVICE OF PROCESS
(Attach to citation per Tex.R.Civ.P. 107; strike through 6(a) or (b)).

1. **Date/ Time of Receipt** of Specified Documents by process server: February 6, 2008 2:00 p.m.

2. **Date/ Time of Delivery** of Specified Documents by process server: February 11, 2008 7:30 p.m.

3. **Defendant**: (without aka/dba) John Doe

4. **Stated Address**: 1555 Kings Row, Dallas, Texas 75024;

5. **Specified Documents**: a true copy of Plaintiff's Original Petition and citation; discovery, including requests for admission; 103 Order; Order For Substituted Service.

6. **Method of Service**: [strike through one]

a) by securely attaching the Specified Documents to the front door at the Stated Address;

b) ~~by delivering the Specified Documents to a person over 16 years of age at the Stated Address.~~

I am certified by the Texas Supreme Court to serve process, including citations in Texas.
I delivered the Specified Documents at the Stated Address as indicated in the Method of Service and paragraphs 1-6 above. Such service is in compliance with the court's Order For Substituted Service and constitutes service on Defendant. I have attached this return to the citation, a true copy of which was served as stated herein. All statements made herein are true.

Fee: _____ paid

Paul Smith
Paul Smith
Process Server
SC 000000008

Nancy Notary
Notary Public for the State of Texas

Signed and sworn to by the said Paul Smith before me this 18th day of February, 2008, to certify which witness my hand and seal of office.

Private Process Server - Pursuant to Rule 106
(by posting process to door, see p.23)

[Defendant: John Smith, Jr.] **Defective Return 1**

RETURN

CAME TO HAND ON THE 1 DAY OF March A.D. 2008, 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 2008, 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
Paul Smith
Process Server
SC 000000008

(Assume properly sworn to before notary)

1) Defendant's name wrong; 2) Pleading served not identified.

[Defendant: Orez, Inc.] **Defective Return 2**

RETURN

CAME TO HAND ON THE 1st DAY OF March A.D. 2008, 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. 2007, 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
Process Server
SC #000000008

(Assume properly sworn to before notary)

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) Date of service should be 2008.

[Defendant: Orez, Inc.] **Defective Return 3**

RETURN

CAME TO HAND ON THE 3rd DAY OF January A.D. 2008, AT 8:00 O'CLOCK A.M., AND EXECUTED BY DELIVERING TO

Orez, Inc. by delivering to its registered agent, CT Corporation System, by delivering to John Spicer at 112 Oak Street, Dallas, Texas

ON THE 4th DAY OF January A.D. 2007, 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

1) Came to hand date should be 2007; 2) Corporate registered agent properly named, but John Spicer is not identified as the registered agent, president, or vice-president. This was fatal error in Reed Elsevier, Inc. v. Carrollton-Farmers Branch Indep. Sch. Dist., 180 S.W.3d 903 (Tex. App. - - Dallas 2005, pet. filed) discussed at page 26; 3) Strike through "the within named defendant, in person"; defendant corporation cannot be served "in person".

[Defendant: Computer Specialists, Inc.] **Defective Return 4**

RETURN

CAME TO HAND ON THE 5th DAY OF April A.D. 2007, 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. 2007, 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

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 5**

RETURN

CAME TO HAND ON THE 4th DAY OF April A.D. 2007, 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. 2007, 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

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.

==========

Defective Return 6

RETURN

CAME TO HAND ON THE 3rd DAY OF March A.D. 2007, 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. 2007, 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

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.

Cause No. CC-07-00002-E

PAUL'S DESIGNS, INC.	§	IN THE COUNTY COURT
	§	
VS.	§	AT LAW NUMBER FIVE OF
	§	
SAM OREZ, INC.	§	DALLAS COUNTY, T E X A S

DEFAULT JUDGMENT

At the hearing on this cause, plaintiff appeared through attorney of record. Defendant 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 defendant as follows:

Plaintiff:	PAUL'S DESIGNS, INC.
Defendant:	SAM OREZ, INC.
Principal amount awarded:	$7,500.00
Attorneys' fees awarded:	$2,500.00
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 November 1, 2005 to date of judgment; costs and interest on all sums awarded at 6% per annum from date of judgment until paid.

This judgment finally disposes of all parties and all claims and is appealable.

Signed _____, 2008

_____
JUDGE PRESIDING

Cause No. CC-07-00002-E

PAUL'S DESIGNS, INC.	§	IN THE COUNTY COURT
	§	
VS.	§	AT LAW NUMBER FIVE OF
	§	
SAM OREZ, INC.	§	DALLAS COUNTY, T E X A S

ATTORNEYS' FEE AFFIDAVIT

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 $2,500.00 with additional fees of $5,000.00 in event of appeal. Demand for payment was made upon defendant 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 April 5, 2008.

_____
NOTARY PUBLIC in and for the State of T E X A S

APPROVAL and ADDRESS CERTIFICATE

I approve the judgment and certify that defendant's last known address is: 1234 Oak Street, Dallas, Texas 75021.

THE BLENDEN LAW FIRM
Attorney for Plaintiff

_____
MARK P. BLENDEN
State Bar No. 02486300

(condensed)

Cause No. CC-07-00002-E

PAUL'S DESIGNS, INC.	§	IN THE COUNTY COURT
	§	
VS.	§	AT LAW NUMBER FIVE OF
	§	
SAM OREZ, INC.	§	DALLAS COUNTY, T E X A S

DEFAULT JUDGMENT

Plaintiff appeared through its attorney of record. Defendant 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 the plaintiff, PAUL'S DESIGNS, INC. recover judgment from defendant, SAM OREZ, INC. in the amount of $7,500.00; interest at 6% per annum from November 1, 2005 to date of judgment; attorneys' fees of $2,500.00, costs, and interest on the entire amount at 6% per annum from date of judgment until paid. If there is an unsuccessful appeal to the Court of Appeals, plaintiff shall recover additional attorney's fees from defendant in the amount of $5,000.

This judgment finally disposes of all parties and all claims and is appealable.

SIGNED this _____ day of _____, 2008.

_____
JUDGE PRESIDING

9786

Cause No. CC-07-00001-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

AFFIDAVIT OF BILL SMITH

BEFORE ME, the undersigned authority, on this day personally appeared BILL SMITH ("Affiant"), who, being by me duly sworn, deposed and said:

"My name is Bill Smith. I am over the age of eighteen years, of sound mind, competent to testify and have personal knowledge of the matters stated.

I am a private process server, of high moral character, and am not a party to this cause. I have no interest in the outcome of this cause. I have never been convicted of a felony or misdemeanor involving moral turpitude in any state or federal court. I have read the foregoing affidavit, and every statement contained therein is true and correct."

_____
Bill Smith

Subscribed and sworn to before me, on this the _____ day of _____, 2008.

_____
Nancy Notary
Notary Public in and for
the State of Texas
My commission expires_____

(assumes process server not certified by Texas Supreme Court)

Cause No. CC-07-00001-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 GRANTING SERVICE OF CITATION THROUGH PRIVATE PROCESS

Pursuant to Rule 103, Texas Rules of Civil Procedure, the Court finds that service of papers by private process server is proper herein, and it is therefore,

ORDERED that service upon defendants be had through private process, and that Bill Smith is authorized to effect service of citation, petition, and discovery on all defendants.

Signed_____, 2008.

_____
Judge Presiding

(condensed)

July 28, 2007

Attn: Ronald Baker
Constable James Gregory
1133 Marshall Lane
Dallas, TX 75201

Re: PC Products, Inc.
vs.
AZ Tech, Inc.
Cause Number: CC-07-00003-E
Our file number: 9786

Dear Deputy Baker:

I have taken the liberty of typing in the correct language on the return, for service on a registered agent. Please review the change and sign on the additional signature line. Then return the citation to our office as soon as possible in the enclosed envelope. Thank you for serving the citation so promptly.

Very truly yours,
THE BLENDEN LAW FIRM

Debra Sims
Legal Assistant

Attachment: Citation
envelope

RETURN

CAME TO HAND ON THE 4th DAY OF March A.D. 2007, 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. 2007, 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

MILEAGE $

NOTARY $

TOTAL $

(MUST BE VERIFIED IF SERVED OUTSIDE THE STATE OF TEXAS)

James Gregory, Constable
Dallas County, Texas

Ronald Baker
Deputy

SIGNED AND SWORN TO BY THE SAID _____ BEFORE ME THIS _____ DAY OF _____, 2007, 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.

_____
Deputy Ronald Baker

(condensed)

June 11, 2007 (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-07-00001-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 LAW FIRM

Mark P. Blenden

Demand/military inquiry letter to commercial debtor.

All American Company
vs.
John Doe
Cause No.: CC-07-00001-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. An inquiry to the Department of Defense's Defense Manpower Data Center failed to indicate that defendant is in military service.

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.

_____
MARK P. BLENDEN, Affiant

SUBSCRIBED AND SWORN TO, before me June 11, 2007.

_____
NOTARY PUBLIC in and for the State of T E X A S
(condensed)

MILITARY LOCATOR SERVICES

ARMY:

Army Worldwide Locator Service
U.S. Army Enlisted Records and Evaluation Center
8899 East 56th Street
Indianapolis, IN 46249-5301

NAVY:

Bureau of Naval Personnel
Pers - 312E
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/ 652-5775

MARINE CORPS:

Commandant of the Marine Corps
Headquarters U.S. Marine Corps
2008 Elliot Road, Suite 201
Quantico, VA 22134-5030
Voice: 703/ 784-3941-3944

COAST GUARD:

Coast Guard Personnel Command (CGPC-adm-3)
2100 Second St., SW
Washington, DC 20593-0001

PENAL CODE
TITLE 8. OFFENSES AGAINST PUBLIC ADMINISTRATION
CHAPTER 38. OBSTRUCTING GOVERNMENTAL OPERATION

Tex. Penal Code §38.16

§38.16. Preventing Execution of Civil Process

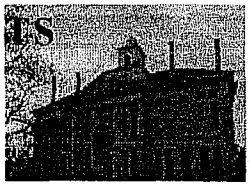
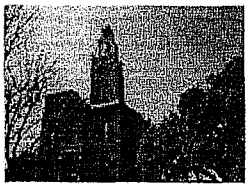
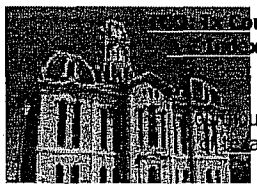
(a) A person commits an offense if he intentionally or knowingly by words or physical action prevents the execution of any process in a civil cause.

(b) It is an exception to the application of this section that the actor evaded service of process by avoiding detection.

(c) An offense under this section is a Class C misdemeanor.

(condensed)

TEXAS COURTS ONLINE

Process Server Review Board

Texas Court Online

- Adopted Rules of Judicial Administration [PDF Order]
- Rules of Judicial Administration

Origin & Mission

The Texas Supreme Court approved amendments to Rules 103 and 536(a) of the Texas Rules of Civil Procedure, effective July 1, 2005, governing statewide certification of process servers. The Court also issued a companion order to establish the framework for certification of those approved to serve process under the revised rules, to approve of certain existing civil process service courses, and to establish the framework for the Board to approve additional courses. The Court also approved a companion order that establishes the membership of the Process Server Review Board (PSRB), and an order appointing Mr. Carl Weeks as Chair.

The Mission of the Process Server Review Board is to improve the standards for persons authorized to serve process and to reduce the disparity among Texas civil courts for approving persons to serve process, by making recommendations to the Supreme Court of Texas on the certification of individuals and the approval of courses.

PLEASE DO NOT SEEK GUIDANCE FROM THE STAFF OF THE SUPREME COURT OR THE OFFICE OF COURT ADMINISTRATION.

Contact PSRB

Members

TCO Encyclopedia

A | B | C | D | E | F | G | H | I | J | K | L | M | N | O | P | Q | R | S | T | U | V | W | X | Y | Z | All

- **Search Texas Courts Online (TCO)**

Type Search Word Search

» **Office of Court Administration** «

Texas Appellate Courts

- **The Supreme Court of Texas**
- **Court of Criminal Appeals**
- **Courts of Appeals** [by District-City]
  1-Houston | 2-Fort Worth | 3-Austin
  4-San Antonio | 5-Dallas | 6-Texarkana
  7-Amarillo | 8-El Paso | 9-Beaumont
  10-Waco | 11-Eastland | 12-Tyler
  13-Corpus Christi | 14-Houston

Supreme Court of Texas Order - Appointments to the PSRB [pdf]

- **Chairman:** Mr. Carl Weeks, Weeks and Associates, Austin
- Honorable Tony Lindsay, Judge, 280th Judicial District, Houston
- Honorable Connie Mayfield, Justice of the Peace, Navarro County Precinct 4, Corsicana
- Honorable Lois Rogers, District Clerk, Smith County, Tyler
- Mark S. Vojvodich, Constable, Bexar County Precinct 3, San Antonio order 09-9036 [pdf]
- Mr. Lee H. Russell, CPS Companies, Dallas
- Honorable Joe Brown, 57th Civil District Court, San Antonio
- Mr. Justiss Rasberry, Brannon Rasberry and Associates Inc., El Paso
- Mr. Mark P. Blenden, Blenden Law Firm, Bedford

Board Member Application [pdf]

Committees:

- **Complaint Committee** - members Connie Mayfield and Lee Russell
  PSRB Complaint Form [pdf]
- **Code of Conduct Committee** - Chair Judge Lindsay, members Justiss Rasberry
- **Criminal History Effect Committee** - Chair Carl Weeks, member Judge Lindsay
- **Curriculum Committee** - Chair Justiss Rasberry, members Judge Lindsay, and Connie Mayfield

Process Server Review Board Future Meetings:

Date	Time	Location
April 23	3:00 p.m.	Tom C. Clark Bldg., 6th Floor 205 West 14th Street, Austin
June 5	9:00 a.m.	3rd Court of Appeals Courtroom 201 West 14th Street, Austin
September 18	9:00 a.m.	3rd Court of Appeals Courtroom 201 West 14th Street, Austin
December 4	9:00 a.m.	3rd Court of Appeals Courtroom 201 West 14th Street, Austin

Board Meeting: Agendas & Minutes

Apply for Certification

- Frequently Asked Questions
- Instruction Sheet [pdf]
- Process Server Application [pdf] [doc] - 12/12/2008

- How to Fill Out an Application [pdf]
- Applicant Checklist [pdf]
- Request For Personal Criminal History [pdf]
- About FAST: Fingerprinting Services | Fast Review

In accordance with the newly effective Rules of Judicial Administration (RJA), Rule 14, effective April 2, 2007, the Process Server Review Board has revised its application and will ONLY be accepting the most current version found on this website.

Apply for Renewal

- **MUST READ:** Supreme Court Order - Temporary Modification of Procedures Governing Process Server Certification Renewal [pdf]
- If you were grandfathered in under the initial Supreme Court order in 2005 and your certification expires July 1, 2008, then your renewal period is **APRIL 1, 2008 - MAY 15, 2008**. If your renewal application is not received within that time period, your certification will expire.
- RJA 14.4(c) Renewal of Certification

Educational Providers

- Approved Civil Process Courses [pdf] | Misc. Docket Order 07-9167 [pdf]
- Education Complaint Form [pdf]

Complete Statewide List of Certified Process Servers

If you have changes to make to your listing or you have tried to contact someone at a listing that is no longer valid, contact PSRB.

Download Full List:

PDF | Excel | PDF/Excel Zip [877 KB]

« Lists Updated: 09-Apr-09 »

Download Alphabetical Lists:

A B C D E F G H I J K L M Mc N O P Q R S T U V W X Y Z

To view or print PDF files you must have the Adobe Acrobat® reader. This software may be obtained without charge from Adobe. Download the reader from the Adobe Web site.

Updated: 15-Apr-2009