

SERVICE OF PROCESS AND DEFAULT JUDGMENTS;

ARTICLE AND FORMS

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STATE BAR OF TEXAS

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OVERVIEW AND COMMON TOPICS

OVERVIEW

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INTRODUCTION

What's New:

1) The Business Organizations Code intends no substantive change, and became effective as to all entities on January 1, 2010. See discussion at page 30 and excerpts at pages 72 and 73.

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

3) Banks as Garnishees.

Regions Bank v. Centerpoint Apts., 290 S.W.3d 510 (Tex. App. - - Amarillo 2009, n.p.h.). Discussion of Tex. Fin. Code Ann. § 276.002(a) limiting a default judgment against a financial institution to liability and prohibiting the award of damages. Damages remanded for further evidence to establish the extent of the financial institution's indebtedness to its customer, per 276.002(b), (c). Consider serving garnishee with brief requests for admission, to establish debtor's balance with garnishee bank.

Quotes:

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

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

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

law may also abhor deemed admissions. See page 7, Emasculation of Deemed Admissions.

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

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

This Article:

This article has been revised by this author annually 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 11-42; the law relating to default judgments, pages 43-76; forms, pages 75-117.

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 79, 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 18.

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 74. Another extensive article on default judgments, including a discussion of attacks on default judgments, is *Dealing With Default Judgments*, 35 St. Mary's L.J. 1 (2003), Pendery, McCaskill and Cassada; see also Texas Collections Manual, State Bar of Texas and O'Connor's Texas Rules (Chapters 2H, 7A, 10B).

References: Rule -- Texas Rules of Civil Procedure; TRAP--Texas Rules of Appellate Procedure; CPRC--Civil Practice & Remedies Code; Bus. Org. Code - - 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, 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. (True or False) The Secretary of State's service on a corporation should be forwarded to the most recent address of the corporation on file with the Secretary of State.
2. (True or False) An amended petition seeking a more onerous judgment must be served with a citation on the defendant.
3. (True or False) To extend trial court's jurisdiction after dismissal, a motion to reinstate must be verified.
4. Identify three traps for a busy collection lawyer.

ANSWERS:

1. True, for all corporations, January 1, 2010, Bus. Org. Code § 5.253; See Service on Corporations Through Secretary of State at page 30. Previously, it was mailed to the corporation's registered office.
2. False, see Service of Amended Petition at page 12 and *In re E.A.*, 287 S.W.3d 1 (Tex. 2009). Serve per Rule 21a with a certificate of service on the amended pleading.
3. True, *Midland Funding NCC-2 Corp. v. Azubogu*, No. 01-06-00801-CV (Tex. App. - Houston [1st Dist.] December 13, 2007, no pet.) (2007 Tex. App. Lexis 9810)(mem. op.) citing Rule 165a(3). As with an order granting a new trial, an order granting reinstatement must be signed within the court's plenary jurisdiction, Rule 165a(3) *Martin v. H&S Kadiwala, Inc.*, No. 05-06-00113-CV (Tex.App.-Dallas April 3, 2007, no pet.)(2007 Tex. App. Lexis 2591)(mem. op.).
4. a) Dismissal: taking a nearly time-barred case and having it dismissed for want of prosecution by the court. See page 66, Dismissal, Reinstatement and Default Judgment.
b) Wrong Party: taking a nearly time-barred case

and suing the wrong party. *Seidler v. Morgan*, No. 06-08-00107-CV (Tex. App. - - Texarkana, February 12, 2009, pet. denied)(2009 Tex. App. Lexis 911)(plaintiff sued current owner of property and learned too late, identity of proper defendant that owned property at time of injury).

c) Diligent Service: taking a nearly time-barred case and failing to get valid service either before the time-bar date or nearly immediately thereafter. See Diligent Service, page 4, V.

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 68.

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. Foreign Judgments

Cantu v. Howard S. Grossman, P.A., 251 S.W.3d 731 (Tex. App.- - Houston[14th Dist.], 2008, pet. denied). Domestication of two large Florida judgments, appealed and affirmed in Florida, under the Uniform Enforcement of Foreign Judgments Act. *Cantu* considers for the first time whether the filing of foreign judgments are subject to Texas venue statutes. The majority finds they are. The well-reasoned

dissent argues that venue concepts do not apply to the post-judgment procedure of domesticating judgments.

See also Penny Habbeshaw's article, *Foreign Judgments, Collections and Creditors' Rights Course 2009*; and Hon. Mike Englehart's article, *Foreign Judgments, Collection and Creditors' Rights Course, 2010*.

D. Foreign Country Judgments

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

IV. Don't Embarrass the Judge

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

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

If there is an error as to service of process or a default judgment, attempt to resolve it in the trial court. Don't ignore the matter only to later admit error, and have the trial court reversed. See

for example: *Jernigan Realty Partners, L.P. v. City of Dallas*, No. 05-09-00389-CV (Tex. App. - - Dallas September 18, 2009, n.p.h.)(2009 Tex. App. Lexis 7342)(mem. op.)(parties agreed that default judgment should be reversed and case remanded); *Sailstar USA, Inc. v. Samaha Enters., Inc.*, No. 2-09-269-CV (Tex. App. - - Fort Worth, November 12, 2009, n.p.h.)(2009 Tex. App. Lexis 8817)(mem. op.)(same); *Vanderbilt Mortg. & Fin., Inc. v. Wadsworth*, No. 10-06-00261-CV (Tex. App. - - Waco, November 15, 2006, no pet.)(2006 Tex. App. Lexis 9939)(mem. op.)(same). *Paradise Vill., Inc. v. Finova Capital Corp.*, No. 07-06-0298-CV (Tex. App. - - Amarillo, October 25, 2006, no pet.)(2006 Tex. App. Lexis 9171)(mem. op.)(appellee agreed service defective).

V. BEATING LIMITATIONS REQUIRES DILIGENT SERVICE

O'Connor's Rules Chap. 2 H, §7

(See also Appendix at page 71, additional cases)

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

A. Malpractice Trap

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

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

"If a party files its petition within the limitations period, service outside the limitations period may still be valid if the

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

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

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

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

B. File and Serve All Defendants Before Limitations Date

Treat all exceptions as a crisis. Forward the citation to the constable or private process server with a letter indicating why immediate service of process is necessary. Understand that you remain responsible for timely service of process, even after citation is forwarded to a process server. Have it calendared, discussed, and a letter or memorandum generated on a weekly basis. This 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, no pet.) (2008 Tex. App. Lexis 6227) (mem. op.) (record confirmed service by publication at a date earlier than that stated in motion for summary judgment); *Mena v. Lenz*, No. 13-08-00137-CV (Tex. App. - - Corpus Christi, March 5, 2009, no pet.) (2009 Tex. App. Lexis 1585) (mem. op.); *Franklin v. Bullock*, No. 03-07-00511-CV (Tex. App. - - Austin, August 14, 2008, no pet.) (2008 Tex. App. Lexis 6239) (mem. op.); *Bolado v. Speller*, No. 04-06-00535-CV (Tex. App. - - San Antonio November 7, 2007, no pet.) (2007 Tex. App. Lexis 8801) (mem. op.); *McGowan v. Meridian Precast & Granite, Inc.*, No. 10-06-00364-CV (Tex. App. - - Waco July 18, 2007, no pet.) (2007 Tex. App. Lexis 5654) (mem. op.) (27 day delay).

2. Summary Judgment Against Plaintiff Affirmed: *Ashley v. Hawkins*, 293 S.W.3d 175 (Tex. 2009) (eight-month delay, court critical of mail-service only attempts); *Parmer v. DeJulian*, No. 12-07-00479-CV (Tex. App. - - Tyler, September 17, 2008, no pet.) (2008 Tex. App. Lexis 6875) (mem. op.) (flurry of ineffective activity does not constitute due diligence if easily available and more effective alternatives are ignored); *Neal v. Garcia-Horrerios*, No. 01-07-01103-CV (Tex. App. - - Houston [1st Dist.], May 8, 2008, no pet.) (2008 Tex. App. Lexis 3312) (mem. op.) (4-month

delay); *Cunningham v. Champion Tech., Inc.*, No. 10-06-00365-CV (Tex. App. - - Waco, March 12, 2008, no pet.)(2008 Tex. App. Lexis 1856)(mem. op.)(no explanation for three month delay); *Berry v. Pampell*, No. 03-07-00216-CV(Tex. App. - - Austin February 13, 2008, no pet.)(2008 Tex. App. Lexis 1133)(mem. op.)(tendered explanation “affirmatively establishes a lack of diligence”).

See Additional Diligent Service Cases at Appendix, page 71.

D. Effect of Appearance Before Limitations Date

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

In *Baker v. Monsanto Co.*, 111 S.W.3d 158 (Tex. 2003) (per curiam) intervenor served defendant before defendant had been served by plaintiff. The court of appeals held that intervenor failed to diligently obtain proper service on defendant, and granted summary judgment against the intervenor, but the supreme court reversed. If Monsanto had any complaint about the intervenor’s premature service under Rule 21a, its recourse was a motion to quash. See *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 203, 28 Tex. Sup. Ct. J. 607(Tex.1985)(motion to quash is appropriate device to object to procedural error in service). Because Monsanto generally appeared in the case before limitations had run on intervenors’ claims, intervenors’ action was not barred, and the summary judgment rendered in this case was therefore erroneous.

E. Effect of Appearance After Limitations Date

Filing an answer does not waive defects in service when those defects are alluded to in an effort to show limitations period expired. Defendant did not waive limitations when it filed

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

VI. 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). But see *Unifund CCR Partners v. Weaver*, 262 S.W.3d 796 (Tex. 2008). Pro se evasions stated as a form objection to all requests could not be construed as proper objections, and requests for admission were properly deemed admitted.

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

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

Landaverde v. Centurion Capital Corp., No. 14-06-00712-CV(Tex. App. - - Houston [14th Dist.] June 28, 2007, no pet.)(2007 Tex. App. Lexis 4992)(mem. op.) Though rule 198.2(b) requires a party to "specifically admit or deny the request..." *Landaverde* allows an answer to the complaint to constitute a discovery response. "[defendant] filed an answer...to [plaintiff's] complaint...and included denials: 1) that [plaintiff] or its predecessors extended credit to him;

2) that [plaintiff] demanded payment of the debt.” Defendant’s answer is held to have doubled as a discovery response, constituting a denial of requests for admission 1 and 8, which requests an admission as to extension of credit and demand! Must trial courts apply all denials found in pleadings to discovery requests? Should an answer be captioned Defendant’s Original Answer and Denial of Discovery Requests?

B. Surety’s Liability for Judgment

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

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

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

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, 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. Attorney Fee Affidavit

Law firm sued client based on breach of contract and sworn account, for failure to pay fees. The entire summary judgment affidavit proving fees is recited. The affidavit specifies the pleadings filed and services rendered, but does not state time devoted to the case. The affidavit lists the familiar factors from *Arthur Anderson & Co. v. Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997) and states: “the attorney’s fees and expenses of \$75,887.50 incurred in this case are reasonable and necessary for cases of this type in Houston, Harris county, Texas”. Considering the presumption under TPRC 38.003 that usual and customary fees are reasonable fees, and considering the lack of controverting proof by the client, the trial court could consider and rely on the affidavit as competent summary judgment evidence. *Haden v. Sacks*, No. 01-01-00200-CV (Tex. App. - - Houston [1st Dist.], May 7, 2009, pet. denied)(2009 Tex. App. Lexis 3199). See Attorney’s Fees, Charles M. Wilson, III. Collections and Creditors’ Rights Course, 2010.

H. 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.occ.state.tx.us, by selecting “Interest Rates”. See also O’Connor’s Texas Rules, Chap. 9C§4.6(2). The online procedure is best.

I. Interest at 18% Without Agreement

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

J. 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.

K. 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).

L. 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.).

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) Restrictive Trend.

As to the apparent trend of restricting the spreading of liability to related persons and entities, see *SSP Partners v. Gladstrong*, 275 S.W.3d 444 (Tex. 2008); *Big Easy Cajun Corp. v. Dallas Galleria Ltd.*, 293

S.W.3d 345 (Tex. App. - - Dallas 2009, pet. filed). The cases discuss the difficulty in spreading liability through single business enterprise or implied partnership, both cases decided against the creative creditor. See *Fraudulent Transfers/Piercing Corporate Veils*, John Mayer, *Collections and Creditors' Rights Course*, 2010.

2) Continuing liability.

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

3) Alter ego based on asset transfer.

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

4) Money had and received.

Debtor sold assets to third party. Plaintiff sued third party asserting assumpsit and money had and received. Third party's summary judgment reversed. All plaintiffs need to show to recover under a claim of money had and received is that the defendant holds money which in equity and good conscience belongs to the plaintiff, *Tri-State Chemicals, Inc. v. Western Organics, Inc.*, 83 S.W.3d 189(Tex. App. - - Amarillo June 7, 2002, pet. denied) citing *Staats v. Miller*, 243 S.W.2d 686, 687 (Tex. 1951). For an excellent discussion of fraudulent transfers, see 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.

5) Corporation as individual's agent.

Paramount Pipe & Supply Co. v. Muhr, 749 S.W.2d 491, 494-495 (Tex. 1988). Creditor sued defendants based on invoices, which billed defendant corporation only. The petition, however, asserted that defendant corporation

acted for itself and as the individual defendant's agent in accepting services and materials. The court noted that the invoices, which do not mention Muhr, "actually support the cause of action stated in the petition". The supreme court reversed the court of appeals and affirmed the default judgment against both the corporation and the individual defendant.

6) Tax Code Violation, § 171.255

Creditor obtained Utah judgment against corporation, and domesticated it in Texas. It then sued directors and officers pursuant to the tax code which imposes liability on individuals for debts of a corporation created or incurred after the date on which the report, tax, or penalty is due, and before corporate privileges are revived. Judgment against individual affirmed.

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

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

If a check is tendered on a disputed claim, with a conspicuous statement that it is tendered in full payment of all claims, cashing the check probably gives the debtor an accord and satisfaction defense. In *Grynberg v. Grey Wolf Drilling Co., L.P.*, 296 S.W.3d 132 (Tex. App. - - Houston [14th Dist.] 2009, n.p.h.) debtor failed to communicate in a conspicuous statement that the instrument was tendered in full satisfaction of all claims.

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, Rules 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 dis'm'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

(See also Effect of Other Appearances, page 45)

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).

3. Appeal Bond: Party filing appeal bond from justice court judgment is deemed to have answered and appeared and consented to the jurisdiction of the county court. *Montgomery v. Chase Home Fin., LLC*,

No. 05-08-00888-CV(Tex. App. - - Dallas September 2, 2009, n.p.h.)(2009 Tex. App. Lexis 7020). When a defendant is deemed to have answered and appeared at court, she waives all complaints as to defects in service of process, Rules 120, 121; *Phillips v. Dallas County Protective Servs. Unit*, 197 S.W.3d 862, 865 (Tex. App. - - Dallas 2006, pet. denied), cert. denied, 552 U.S.952(2007).

Filing an answer does not waive defects in service when those defects are alluded to in an effort to show limitations period expired. Defendant did not waive limitations when it filed a general appearance after limitations had run. *Ramirez v. Consol. HGM Corp.*, 124 S.W.3d 914 (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 44, 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 of amended petition. The Texas Supreme Court confirms that an amended petition can now be served pursuant to Rule 21a. A citation and personal service are no longer required. Assuming a defendant is properly served with citation and the original petition, the amended petition, even if it requests a more onerous judgment, can be served pursuant to rule 21a, and no additional citation is required. *In re E.A.*, 287 S.W.3d 1, 4 (Tex. 2009). Because the amended petition did not include a certificate of service, plaintiff did not make a prima facie case of the fact of service of the amended pleading. Three justices opposed abandoning the citation requirement, noting that unsophisticated litigants may be taken advantage of by a plaintiff "raising the stakes" after a defendant failed to respond to the citation and original pleading. Practice Tip: When amending a petition, remember to add a certificate of service, confirming service on all parties, pursuant to Rule 21a.

Previously there was uncertainty as to the method of serving an amended petition. A determination had to be made as to whether the amended petition requested a more onerous judgment. See *Weaver v. Hartford Accident & Indem. Co.*, 570 S.W.2d 367,370(Tex. 1978). But *In re E.A.*, notes that Rule 21a as amended in 1990, eliminates the need to serve a defendant with citation when serving an amended petition, even if it requests a more onerous judgment.

3. Service on Sunday. Service cannot be made on Sunday except in actions where plaintiff seeks an injunction, attachment, garnishment, sequestration or a distress warrant. Rule 6. *In 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).

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

5. No trickery. Service of process on a defendant who has been decoyed, enticed, or induced to come within its reach by false representation may compel a court not to exercise jurisdiction. See Justice

O'Connor's dissent in *Goldwait v. State*, 961 S.W.2d 432, 437 (Tex. App.--Houston [1st Dist.] 1997, no writ).

B. Persons Authorized to Effect Service

1. Disinterested. No officer or other person who is a party to or interested in the outcome of the suit may effect service. Rule 103.

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 16, (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 119.

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 34, VIII. Safest to use officer to serve garnishments until disparity in Rules 103 and 663 is resolved.

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 24.

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 18; 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 of both receipt and delivery. Rule 105 states that "the officer or authorized person to whom process is delivered shall endorse thereon the day and hour on which he received it..." Rule 16 is similar. The court clerk's failure to note the hour of her receipt of citation for service by mail was fatal error. *Ins. Co. of Penn. v. Lejeune* 297 S.W.3d 254, 256 (Tex. 2009); *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; reversed and remanded). In *West Columbia Nat'l Bank v. Star Griffith*, 902 S.W.2d 201 (Tex. App.-- Houston [1st Dist.] 1995, writ denied) the court held that even though the lines were not completed which stated "came to hand" on a specific date and time, that a stamped date and time appearing over the lines, and which was not initialed or signed, was sufficient.

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 [1st Dist.] 1984, no writ). As to what is an allowable variance in names, see *Myan Mgmt. Group, L.L.C. v. Adam Sparks Family Revocable Trust*, 292 S.W.3d 750 (Tex. App.--Dallas 2009, n.p.h.). Citation named Myan Management Group LLC; citation return named Myan Management; held an allowable slight variance. See also *Mantis v. Resz*, 5 S.W.3d 388 (Tex.App.--Fort Worth 1999, pet. denied)(petition, citation, and return naming defendant Michael Mantis sufficient, though defendant's name is Michael Mantas).

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)(2004 Tex. App. Lexis 9940)(mem. op.). There "B/S Ricardo Weitz, registered agent" was construed to mean by serving Richardo Weitz, registered agent.

Earlier cases, now questionable because of *Primate*'s precise return requirement, were less demanding and held that a return is not fatally defective if it inadvertently states more than one method of service. See *Maritime Services Inc. v. Moller Steamship Co.*, 702 S.W.2d 277, 278-79 (Tex. App.--Houston [1st 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, no pet.)(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); *Alexander v. Alexander*, No.03-09-00158-CV (Tex. App. - - Austin, February 19, 2010, n.p.h.)(2010 Tex. App. Lexis 1176)(mem. op.); see also *Krivka v. Hlavinka*, No. 04-08-00865-CV (Tex. App. - - San Antonio, November 11, 2009, n.p.h.)(2009 Tex. App. Lexis 8689)(mem. op.).

(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, no pet.)(2008 Tex. App. Lexis 8875)(mem. op.)(mandamus conditionally granted, bill of review improperly granted based on defendant's uncorroborated denial of service); *Gruensteiner v. Cotulla Indep. Sch. Dist.*, No. 04-07-00847-CV (Tex. App. - - San Antonio, October 15, 2008, no pet.)(2008 Tex. App. Lexis 7787)(mem. op.)(bill of review in tax case; uncorroborated claim of no service insufficient); *Soto v. Soto*, No. 04-05-00659-CV (Tex. App. - - San Antonio, May 10, 2006, no pet.)(2006 Tex. App. Lexis 3911)(mem. op.)(process server did not recall defendant, but stated, "if I put here that I served him I served him." Bill of review denied); *See also, Garza v. AG of Tex.*, 166 S.W.3d 799(Tex. App. - - Corpus Christi 2005, no pet.)(bill of review denied, which asserted false return of citation).

E. 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 117); 3) if defective return gets filed, simply obtain issuance of another citation and again serve defendant, reviewing the return prior to filing.*

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

As to two apparently informal amendments of defective returns, *see Krivka v. Hlavinka*, No. 04-08-00865-CV (Tex. App. - - San Antonio, November 11, 2009, n.p.h.)(2009 Tex. App. Lexis 8689)(mem. op.)(plaintiff filed server's affidavit to establish date of service after judge noted the deficiency in return of citation); *Park v. W. Union Fin. Servs.*, No. 03-08-00292-CV (Tex. App. - - Austin, October 30, 2009, n.p.h.)(2009 Tex. App. Lexis 8320)(mem. op.)(reversed because garnishment was not filed in the court which rendered the underlying judgment).

1. Service is requestor's responsibility. It is the responsibility of the one requesting service, not the process server, to see that service is properly accomplished. *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 reserve 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 [1st 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

