

**Service of Process and Default Judgments;  
Articles and Forms**

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**Mastering the Art of Collecting Debts and Judgments**

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**OVERVIEW AND COMMON TOPICS****OVERVIEW**

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**SERVICE OF PROCESS AND DEFAULT  
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**INTRODUCTION**

**What's New:**

1. Rule 107, Return of Service

Allows electronic and facsimile filing, and signature under penalty of perjury. Rule 107 is discussed at page 15, and appears at page 78 (amended effective January 1, 2012).

2. Secretary of State Service - Change

Service by the Secretary of State on an entity is now generally to the most recent address of the entity on file with the secretary of state (BOC § 5.253); no longer to the registered office address. See discussion at page 32 and BOC excerpts at pages 79 and 80.

3. Foreign Judgments

CPRC, Chapter 35 was amended to require judgment creditor (no longer court clerk) to mail notice of filing of foreign judgment to judgment debtor and file proof of mailing. (Effective May 17, 2011, substantial change)

4. Emailed Rule 11 Agreement Ineffective

Attorney's email did not satisfy Rule 11 requirements; no evidence that signature block was intended as signature. Request that agreements be signed, per Rule 11. *Cunningham v. Zurich Am. Ins. Co.*, 352 S.W.3d 519 (Tex. App. - Fort Worth 2011, pet. filed).

5. Rules 735 and 736

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

6. Casual to Casualty

Obligor and guarantor sued; default judgment against obligor only, inadvertently included finality language. The judgment is erroneous but final; guarantor is dismissed with an apparent \$700,000 windfall. *In re Daredia*, 317 S.W.3d 247, 249 (Tex. 2010)(discussed at page 56).

7. Service of Amended Petition

An amended petition seeking a more onerous judgment may be served pursuant to Rule 21a.

Include a certificate of service on the pleading. See *In re E.A.*, 1%1 S.W.3d 1 (Tex. 2009), discussed at page 13(A.2).

**Quotes:**

1. Strict Compliance

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

2. Negligent Defendant

"Campus... had failed to update addresses for its registered agent and registered office - it never received anything the secretary [of state] sent. Accordingly, *Campus* was negligent in failing to comply with its statutory duties. See, e.g. Tex Bus. Corp. Act. Arts. 2.10, 2.10-1, 8.09 [now Bus. Org. Code 5.201]; *Campus Invs., Inc. v. Cullever*, 144 S.W.3d 464 (Tex. 2004)(discussed at page 34).

3. No Duty to Act

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

4. Abhor a Default

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

5. Hyper-technical, Rules

"[Though strict compliance]... sometimes leads the courts to rather weird conclusions, preventing us from making the most obvious and rational inferences, we believe good public policy favors the standard. The end effect of our application of the strict compliance standard is an increased opportunity for trial on the merits. This policy justifies what may at first blush seem a hyper-technical rule," *Verlander Enterprises*,



*Inc. V. Graham*, 932 S.W.2d 259,262 (Tex. App. - El Paso 1996, no writ).

#### 6. No Obeisance to Minutia

"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.*, 95 S.W.2d 866, 871 (Tex. App. - Houston [P' 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 13-45; the law relating to default judgments, pages 46-82; forms, pages 83-122.

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 84, will aid in detecting common errors in this important area. Errors occur - see defective service returns, pages 111-113. 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 20.

This article is based on an annual review of Texas case law and is intended as a departure point - not a destination. The changes created by the Texas Business Organizations Code and recently amended Rule 107 require time to be interpreted by appellate courts. 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 81.

**References:** Rule ~ Texas Rules of Civil Procedure; TRAP-Texas Rules of Appellate Procedure; CPRC-Civil Practice & Remedies Code; Bus. Org. Code and BOC -- Texas Business Organizations Code; Tex. Lit. G.~W. Dorsaneo III, Texas Litigation Guide; McDonald TCP-R. McDonald, Texas Civil Practice; O'Connor's CPRC ~ O'Connor's Annotated CPRC Plus; O'Connor's Texas Rules - O'Connor's Texas Rules \* Civil Trials.

**Other Sources:** O'Connor's Texas Rules is a helpful treatise on the Texas Rules of Civil Procedure, trial procedure, service of process and default judgments. See chapters 2(H), Serving the Defendant With Suit; 7(A) Default Judgments; 10(B) Motion for New Trial. Texas Collections Manual, State Bar of Texas is excellent and includes helpful forms. As to defending default judgments from motions for new trial and appellate attacks, see Pat Dyer's article. Defending Default Judgments, Collections and Creditor's Rights 2011, State Bar of Texas. Another extensive default judgment article is *Dealing With Default Judgments*, 35 St. Mary's L.J. 1 (2003), Pendery, McCaskill and Cassada.

Opinions not designated for publication are referred to as "unpublished". The 2003 amendment to TRAP 47 authorizes citation to unpublished opinions. 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".

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"How Best to Utilize Services of Your Process Server and What to Expect"