

**DEFAULT JUDGMENTS SIMPLIFIED**

**HON. ROY FERGUSON, *Alpine***  
394<sup>th</sup> Judicial District Court

State Bar of Texas  
**22<sup>ND</sup> ANNUAL**  
**SUMMER SCHOOL:**  
**SUN, SAND, AND CLE FOR THE GENERAL PRACTITIONER**  
July 16 - 18, 2020

**CHAPTER 17**



## **HON. ROY B. FERGUSON - CURRICULUM VITAE**

394<sup>th</sup> Judicial District Court

Brewster, Culberson, Hudspeth, Jeff Davis, and Presidio Counties

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### **Professional Affiliations, Honors, Memberships and Awards**

- Judge – 394<sup>th</sup> Judicial District Court (2013-Present)
- COVID-19 Specialty Court Judge – by assignment by Chief Justice Nathan Hecht (2020)
- Judge Pro Tem – 8<sup>th</sup> District Court of Appeals, El Paso (2015-2016, 2019, 2020)
- Member – OCA Uniform Case Management System Study Group (2020)
- Member – Judicial Needs Assessment Committee (2019-Present)
- Liaison Member – Judicial Committee on Information Technology (2016-Present)
- Director – Judicial Section, State Bar of Texas (2015-Present)
- Member – Texas Judicial Council Civil Justice Committee’s Advisory Council (2018)
- Life Sustaining Fellow – Texas Bar Foundation
- Member – Champions of Justice Society
- Member – Texas Bar College
- Special Service Commendation – State Bar of Texas GPSOLO Section (2014)
- Lawyer of the Year – State Bar of Texas GPSOLO Section (2012)
- Member – District 17 Grievance Committee, State Bar of Texas (2011-2012)
- General Practice Solo and Small Firm Section, State Bar of Texas
  - Councilmember (2003-2016), Officer (2006-2014, including Chair (2009-2010))
- Licensed to practice before the United States Supreme Court
- Member – State Bar of Texas (1995-Present)

### **Education and Related Honors**

- Juris Doctorate of Law, St. Mary’s University, San Antonio, Texas (1994)
- Bachelor of Science in Civil Engineering, University of Texas at Arlington (1992)
- Member, Chi Epsilon, honorary fraternity for civil engineering students
- Member, Kappa Kappa Psi, honorary fraternity for college bandsmembers
- Member, Phi Alpha Delta, honorary fraternity for law students

### **Public Speaking and Articles**

- 2020, National Judicial College, Presenter/Panelist, “Lessons Learned from Around the World about the Court’s Management of a Pandemic.”
- 2020, Marriage Dissolution 101, Presenter/Panelist, “Judges’ Panel: What (Some) Lawyers Do Very Well.”
- 2020, Adv. Family Law Conference, Presenter/Panelist, “Fly Me To the Moon – Effective Advocacy in Relocation Cases.”
- 2020, Thomson Reuters Webinar, Presenter/Panelist, “Virtual Courts: Challenges, Opportunities and What’s Next. The Court’s Perspective.”
- 2020, State Bar College Summer School, Presenter, “Back to Basics of Civil Procedure.”
- 2020, National Judicial College, Presenter/Panelist, “Virtual Court During a Pandemic: Platforms, Process, and Procedure.”
- 2020, Illinois Judicial College Committee and Committee on Judicial Education, Presenter/Panelist, “Conducting Remote Hearings in Child Protection Cases.”
- 2020, National Center for State Courts, Presenter/Panelist, “Lights, Camera, Motion!: Act II. Conducting Effective Remote Hearings.”
- 2020, Texas Family Law Section CLE, Presenter/Panelist, “Zoom Training for Family Lawyers.”

## **Public Speaking and Articles (continued)**

- 2020, Family Justice Conference, Texas Center for the Judiciary, “Controlling the Courtroom.”
- 2020, Texas Indigent Defense Commission Workshop, Presenter/Panelist, “Rural Public Defenders.”
- 2019, Adv. Family Law Conference, Presenter, “Things (Some) Lawyers Do Well.”
- 2019, SBOT Webcast, Presenter/Panelist, “When a Lie Isn’t a Lie: Dealing with False Testimony During Trial.”
- 2019, SBOT Annual Meeting, Presenter, “Simple Things Everyone Does Wrong.”
- 2019, Marriage Dissolution 101, Presenter/Panelist, “Gearing Up: Pleadings.”
- 2019, Marriage Dissolution, Presenter/Panelist, “When a Lie Isn’t a Lie: Dealing with False Testimony During Trial.”
- 2019, Adv. Evidence and Discovery Conference, Presenter, “Ethics in the Courtroom.”
- 2019, Presiding Judge, “State of Texas v. Kylo Ren – Mock Jury Selection.”
- 2019, Adv. Trial Skills for Family Lawyers, Presenter, “Trial on the Merits: Winning from the Beginning.”
- 2018, Adv. Family Law Conference, Family Law 101, Presenter, “Discovery: A View from Both Sides of the Bench.”
- 2018, Ector County Bar Association CLE, Presenter, “Simple Things that Everyone Does Wrong.”
- 2017, NM Defense Lawyers Association and West Texas TADC Joint Seminar, Presenter, “A View from the Bench – Ethical and Effective Advocacy: What Works and What Doesn’t.”
- 2017, Texas A&M University School of Law, “Ethical and Effective Representation of Rural Communities.”
- 2017, Presiding Judge, “State of Texas v. Luke Skywalker – Mock Jury Selection.”
- 2016, Adv. Family Law Conference, Presenter, “Parental Alienation: What It Is and What It Isn’t.”
- 2016, SBOT Annual Meeting, Presenter, “Effective and Ethical Advocacy from the Judge’s Perspective.”
- 2016, Presiding Judge, State of Texas v. Harry Potter – Mock Jury Selection.”
- 2015, Adv. Family Law Conference, Presenter, “Judges’ Tech Tips.”
- 2015, Val Verde County Bar CLE, Presenter, “Effective Use of Courtroom Technology in Family Law.”
- 2015, SBOT Annual Meeting, Presenter, “Effective Advocacy – What Does and Doesn’t Work in the Courtroom from a Judge’s Perspective.”
- 2015, American Legion District Convention, Keynote Presenter, “And Justice for All.”
- 2014, SBOT Annual Meeting, Presenter/Panelist, “What Judges Think Is (and Isn’t) Persuasive With the Use of Technology in the Courtroom.”
- 2014, State of Texas Juvenile Probation Chief’s Conference, Presenter, “Sex, Violence and Video Games.”
- 2014, Region 18 Meeting of School Administrators, Presenter, “Sex, Violence and Video Games.”
- 2014, SBOT Annual Meeting, Presenter, “Practical and Ethical Impacts of *In re Stephanie Lee*, or: Who Will Speak for the Children?”
- 2013, West of the Pecos Republican Women’s Association, Presenter, “Freedom of Speech is Under Attack!”
- 2012, American Legion Regional Meeting, Presenter, “Defending Freedom of Speech.”
- 2012, SBOT Annual Meeting, Presenter, “Legal Ethics vs. Moral Compass.”
- 2011, Texas Bar Journal, January Edition, “Referendum 2011 – How Would You Advise a Lawyer to Vote?”
- 2011, SBOT Annual Meeting, Presenter, “Ethics and the Small Law Firm – That’s an Impact Tremor, That’s What THAT is!”
- 2010, SBOT Annual Meeting, Moderator and Presenter, “Recent Ethical Issues for the Solo and Small Firm Practitioner.”
- 2010, General Practice Institute, Waco Texas, Moderator
- 2009, SBOT Annual Meeting, Presenter, “Hot Topics in Legal Ethics.”
- 2008, SBOT CLE, Presenter, “Ethics and the Small Law Firm.” (webcast)
- 2008, SBOT CLE, Presenter and Moderator, “Ethics and the Small Firm: Use of Technology in the Development of a Successful and Profitable Practice.”
- 2008, SBOT Annual Meeting, Presenter, “Ethics and the Small Law Firm – Ten Hot Tips on Avoiding Grievances.”
- 2007, SBOT Annual Meeting, Presenter, “Ethics and the Small Law Firm – Avoiding Grievances Through Early Detection.”
- 2006, Article, “Ethical Pitfalls for the Community Lawyer – an Outline for Discussion among General Practitioners.”
- 2006, SBOT Annual Meeting, Presenter/Moderator, “Panel Discussion on Legal Ethics.”

### **About the 394<sup>th</sup> Judicial District**

The 394th Judicial District is comprised of Brewster, Culberson, Hudspeth, Jeff Davis, and Presidio Counties. The District encompasses approx. 20,000 sq. miles (larger than nine states), and includes over 20% of the United States–Mexico border.

### **About the Champions of Justice Society**

The Texas Access to Justice Commission, created by the Supreme Court of Texas in 2001, is charged with developing and implementing initiatives designed to expand access to, and enhance the quality of, justice in civil legal matters for low-income Texans. The Champions of Justice Society is comprised of those attorneys and judges who most strongly support access to justice.

### **About the Judicial Committee on Information Technology**

A part of the Texas Supreme Court's Texas Commission on Judicial Efficiency, the mission of the Judicial Committee on Information Technology is to establish standards and guidelines for the systematic implementation and integration of technology in Texas' trial and appellate courts.

### **About the Texas Bar Foundation**

Founded in 1965, the Texas Bar Foundation has maintained and pursued its mission to assist the public, improve the profession of law, and build a strong justice system for all Texans. Fellows of the Foundation are selected for their outstanding professional achievements and their demonstrated commitment to the improvement of the justice system throughout the state of Texas. Each year, only one-third of one percent of State Bar of Texas members are invited to become Fellows.

### **About the Texas Bar College**

The Texas Bar College is an honorary society of lawyers who are among the best trained attorneys in Texas. Members are qualified attorneys who are interested in both high ethical standards and improved training for all Texas attorneys. The College recognizes and encourages lawyers, paralegals and judges who maintain and enhance their professional skills and the quality of their service to the public by significant voluntary participation in legal education.

### **About the 394<sup>th</sup> District Court Mock Jury Selection Program**

When Judge Ferguson took the bench on January 1, 2013, public response to jury summonses across the 394<sup>th</sup> Judicial District was incredibly low – in some counties below 15%. Judge Ferguson implemented a multi-faceted plan to increase and improve jury turnout, with minimal fining or jailing community members in one of the poorest parts of Texas. A key facet of that plan is public education and awareness of the jury system. During Juror Appreciation Week in Texas each year, every high school senior in the District is summoned to appear before Judge Ferguson as a potential juror. Students are placed under oath, qualified, and questioned in a realistic jury selection for a fictional case. In 2016, Harry Potter was tried for the murder of Voldemort. In 2017, Luke Skywalker stood charged with 1.1 million counts of murder for blowing up the Death Star. (Charges against Mr. Potter were dismissed after the jury was empaneled and sworn, and the trial of Mr. Skywalker ended in a mistrial when the defendant leapt from his seat at counsel table and attacked the first witness for the prosecution – Darth Vader.) In 2019, Kylo Ren was tried for the murder of his father, Han Solo. And in 2020, Thor escaped justice when COVID-19 cancelled his criminal jury trial for (allegedly) beheading an unarmed Thanos in an act of vigilante justice.

All fictional defendants are innocent until proven guilty.



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## DEFAULT JUDGMENTS SIMPLIFIED

There are few experiences more demoralizing for an attorney than losing when unopposed. The quintessential example of this is being denied a default judgment. Despite what appears to be common belief, you can't always get what you want, just because no one filed an answer. This article addresses common mistakes and misunderstandings, and provides a roadmap for obtaining valid default judgments.

### I. WHAT DOES THE PLAINTIFF REALLY GAIN FROM A DEFENDANT BEING IN DEFAULT?

The answer depends on whether you have a "no-answer" or "post-answer" default.

When a defendant fails to file an answer, he or she admits all facts properly set out in the plaintiff's petition, except for the amount of unliquidated damages. Thus, in a no-answer default, the plaintiff need only prove its unliquidated damages and fees.

When a defendant files an answer but fails to appear for trial, the plaintiff is required to offer evidence and prove *all* aspects of its claim.

### II. WHEN IS A DEFENDANT ACTUALLY IN DEFAULT?

#### A. The defendant must have been properly served.

Defendants must be served in "strict compliance" with the Texas Rules of Civil Procedure: every "t" crossed and every "i" dotted. A no-answer default judgment cannot withstand a direct attack by a defendant who shows that he was not served in strict compliance with the Rules. There is no presumption in support of the judgment when it comes to the validity of service. Because the court's jurisdiction to hear the case is dependent upon service, even the slightest deviation will likely result in reversal.

**PRACTICE TIP:** Review the rules regarding citation and service before seeking a default judgment!

There are some surprises in the rules that you may have forgotten or never even noticed. For example, personal service on Sunday is prohibited except in cases of injunction, attachment, garnishment, sequestration or a distress warrant. TRCP 6. Objection is waived when the defendant appears in the case, but Sunday service will not support a default judgment.

**PRACTICE TIP:** Remember, waivers of citation must be signed after the law suit is filed, or they are ineffective.

#### B. Precise returns of service are required.

There must be a formal service return in every case, even with citation by certified mail. The green card alone is not enough. The clerk must prepare, sign and

file a proper return with the green card attached, in compliance with TRCP 107.

Returns must be complete, precise, legible and accurate. When a defendant is served by certified mail, the green card must reflect the "addressee's signature." Default judgments will be reversed where the green card bears a different signature from the named defendant – such as the spouse of the addressee. The signature on the green card must match the named defendant in the case, or service is defective and reversal is almost guaranteed. Even an illegible signature has been held to invalidate service.

A different signature with the "agent" box checked also does not effectuate proper service, without evidence in the record that the person was authorized *by the defendant* to accept service by the signatory.

**PRACTICE TIP:** Have the clerk mark "restricted delivery" on the certified mail green card. The recipient will be required to present proof that they are the named addressee or an authorized agent before they will be permitted to sign for the item.

Scrutinize citations and returns before filing for default judgment. Error cannot be waived, and will result in a void judgment.

**PRACTICE TIP:** If a return is erroneous, incomplete or absent, consider serving the defendant a second time. This is significantly cheaper than re-litigating the case on remand.

#### C. Has the defendant filed an answer?

No default judgment may be granted when the defendant has filed a defensive pleading. Always check the clerk's physical file, including the correspondence envelope. (You cannot rely on e-filing events when no attorney has appeared to represent the defendant in the case.) Even a defective answer is sufficient to prevent a default judgment. Remember that courts liberally construe pro se filings. Any correspondence submitted to the clerk or the court by the defendant addressing the claims may constitute an answer. Unsigned letters, documents filed in the wrong cause number, and personal answers for corporate defendants have been held to constitute an "answer," if they pertain to or address the underlying issues in the case.

**PRACTICE TIP:** If you are unsure whether a document constitutes an answer, ask the court to make that determination as a preliminary matter.

Many failed defaults fall into this simple category. If a document is filed that has been or could be deemed an answer by the court, consider filing a motion to strike the improper pleading.

#### D. Was the defendant served by publication?

When a defendant is served by publication, no default judgment is possible. An attorney ad litem must be appointed to defend the case, trial must be held, and all elements of the case must be proved. (Furthermore,

a statement of evidence as required by TRCP 244 must be signed by the court and filed of record. Failure to do so is reversible error.)

### **III. IS THE DEFENDANT ENTITLED TO NOTICE OF THE DEFAULT HEARING?**

#### **A. No Answer, No Appearance.**

If the defendant failed to file an answer or make a general appearance, default may be taken without notice to the defendant.

#### **B. No Answer, with Appearance.**

Understanding the distinction between an answer and an appearance is critical. A general appearance entitles a defendant to notice of all filings and settings, including the default judgment hearing. No default may be granted without notice when defendant has made a general appearance. And because a default hearing is considered a “final hearing,” the defendant is entitled to no less than 45 days’ notice of the hearing as required by TRCP 245.

#### **C. Has the defendant made a general appearance?**

A party enters a general appearance when it (a) invokes the judgment of the court on any question other than the court's jurisdiction, (b) recognizes by its acts that an action is properly pending, or (c) seeks affirmative action from the court, other than an extension of time to file an answer. Physically appearing and addressing the court at a status hearing may constitute a general appearance, depending upon the nature and quality of the party's activities in the courtroom. Mere presence in the courtroom is not enough. A party who silently observes the proceedings does not make a general appearance. On the other hand, presence in the courtroom without being compelled to appear by a previous ruling of the court, and participation in any way other than to assert a lack of jurisdiction, each constitutes a general appearance.

Certain defensive filings have been held not to constitute even a general appearance, such as an unsworn special appearance, a plea to jurisdiction, and a plea in abatement. However, even these temporarily prevent default judgment until the issues are resolved.

**PRACTICE TIP:** When a defendant has made a general appearance, always file a certificate of service reflecting compliance with Rule 21a and notice of the default hearing to the defendant as part of your request for default judgment.

#### **D. Answer filed, No Appearance.**

Where the defendant has filed an answer (a “post-answer default”), trial must be scheduled and notice given in accordance with TRCP 245.

### **IV. DOES THE LIVE PLEADING SUPPORT THE JUDGMENT REQUESTED?**

#### **A. Defendant must be served with the pleading upon which judgment is based.**

Amended or supplemental pleadings seeking more onerous relief than the prior pleading, must be served on the other party in accordance with TRCP 21a. Personal service is not necessary (unless required by local rule). Failure to include a Certificate of Service showing that defendant was served with the new pleading in compliance with TRCP 21a invalidates the default judgment.

#### **B. The underlying pleading must assert a valid cause of action.**

A default judgment stands upon the plaintiff's live pleading. The petition must assert a legally cognizable 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. For example, you cannot obtain a default judgment on a pleading asserting negligent infliction of emotional distress.

#### **C. The court must have jurisdiction over the claim.**

The court in which judgment is sought must have jurisdiction over the claim. For example, a constitutional county court cannot award a default judgment granting an easement, which falls exclusively to the district court. A district court cannot grant default judgment as to mere possession, which falls exclusively to the justice court.

#### **D. The pleading must be sufficiently factually precise.**

Because failure to answer merely admits the allegations of fact in the underlying pleading, the underlying pleading must contain sufficient factual allegations – if deemed true – to support each element of the cause of action. Mere conclusory allegations of a cause of action are not sufficient to support a judgment by default. General statements such as, “there was a contract between the parties which defendant breached,” or “the defendant was negligent,” may be insufficient to support a default judgment.

However, a petition may support a default judgment despite containing defects of form or substance. The mere fact that the pleadings would have been struck had special exceptions been filed does not necessarily invalidate the default judgment.

#### **E. The factual allegations must uncontroverted and not inherently contradictory.**

The petition must not contain internal contradictions of fact, or contradict facts in the exhibits and evidence offered at the default hearing. No default judgment may be granted on that portion of plaintiff's case in which allegations of the petition conflict with the

alleged facts or exhibits, or that are disproved by the alleged facts. This includes venue provisions. While an objection to venue can be waived if not raised, facts in the pleadings or exhibits which affirmatively disprove venue will prevent issuance of a default judgment.

**PRACTICE TIP:** Review your pleadings carefully! If you plead multiple claims in the alternative, ensure that the enumerated facts supporting the alternative claims do not contradict.

#### **F. The relief sought must be supported by Texas law.**

The default judgment can only award damages and remedies that are supported by law. For example, the judgment cannot award attorneys' fees in a tort case, or exemplary damages in excess of the statutory cap. Courts routinely deny default judgments seeking declaratory judgments that do not fall within Chapter 37 of the Texas Civil Practices and Remedies Code.

#### **V. DO YOU NEED A HEARING ON THE RECORD TO PROVE-UP YOUR DAMAGES?**

Liquidated damages may be established by default and granted without an evidentiary hearing. For unliquidated damages such as pain and suffering, mental anguish, exemplary damages, attorneys' fees, and lost future profits, there must be sufficient evidence in the record to support the judgment. The evidence submitted must be sufficiently concrete for the court to calculate the damages with certainty. A hearing may be held by submission, so long as sufficient evidence is submitted with the motion. Whether live testimony is required will depend on the judge, and the nature of the case. There is little uniformity across the state on this issue. Some courts require hearings while others rule by submission. Some courts permit conclusory affidavits while others reject them. You may wish to request a hearing in cases where the evidence on damages is unclear, and personally testify in support of an unusually large attorneys' fees request.

**PRACTICE TIP:** Verify your particular judge's evidentiary requirements before submitting the default judgment. When in doubt, request a hearing!

#### **VI. WHAT DO YOU DO WHEN YOU'RE DONE?**

After entry of a default judgment, you must file a Certificate of Last Known Address, and ask the Clerk to send notice of entry of judgment to the defendant at that address. TRCP 239a and 306a. Failure to do so will render the judgment void.

Review the form of judgment carefully, and be wary of finality language. If the judgment states, "all relief not requested herein is denied," or, "this judgment disposes of all parties and claims," then it will be treated as a final judgment even if other claims and parties

actually exist. If you say it's over, it's over whether it's over or not!

Remember that omissions in the judgment are not clerical mistakes subject to correction by nunc pro tunc unless the court first orally rendered a decision on the record that included the missing relief and then signed a written judgment that omitted it. You cannot come back later and request additional relief that was not included in the rendered judgment at the hearing.

When a default judgment is *improperly* rendered, the judgment is void. If challenged on appeal, the case will be remanded and reinstated. When a default judgment is properly rendered but the plaintiff failed to present legally sufficient evidence at the damages hearing, the case will be remanded for a new trial only on the issue of damages.

#### **VII. NEED MORE INFORMATION?**

This article is a practical guide to assist you in obtaining valid and enforceable default judgments. For a complete and thoroughly annotated overview of default judgments, I refer you to "Service of Process and Default Judgments – Article and Forms," by Mark P. Blenden, most recently included in the 15<sup>th</sup> Annual Conference on Collections and Creditors' Rights, State Bar of Texas, May 4-5, 2017.



**GUIDE TO OBTAINING DEFAULT JUDGMENTS**Prepared by Judge Roy Ferguson, 394<sup>th</sup> Judicial District Court

1. Ensure that the petition asserts valid causes of action over which the court has jurisdiction, and that sufficient non-contradictory factual allegations (not just legal conclusions) in support of each element of the claims are included or attached.
2. Scrutinize the citation, and verify the accuracy of each entry. Confirm that the name on the citation matches the name on the pleadings, envelope, return and “green card.”
3. Mark “restricted delivery” on the green card, to ensure that only the named defendant is permitted to sign for and claim the envelope.
4. Verify that the signature on the green card matches the name of the defendant, and that all prerequisites of service are scrupulously followed.
5. If service is faulty, have citation re-issued and the defendant served again.
6. If you filed an amended or supplemental pleading that seeks greater relief or additional remedies, serve it on the defendant in accordance with Rule 21a, and file a certificate of service.
7. Review the court’s file, searching for *anything* submitted by the defendant.
8. Seek clarification from the court as to whether any unusual filings constitute an answer.
9. If no answer or response is on file, determine whether the defendant made a general appearance, in writing or in person. Ask the court reporter whether the defendant ever showed up in court.
  - a. If the defendant made a general appearance, serve a copy of the motion for default judgment and notice of the default judgment hearing on the defendant in accordance with Rule 21a.
  - b. Submit a certificate of service, and attach proof of notice to your motion.
10. Ensure that the exhibits do not contradict each other or the allegations in the motion.
11. Request a default hearing. There is no harm in doing so, and failure to do so may have severe consequences.
12. Don’t get complacent! Attend the hearing, and bring evidence or witnesses. Give the judge more evidence than you think is needed. If you are seeking mental anguish or pain and suffering, bring your client to testify in person. Testify as to attorneys’ fees.
13. Review your proposed judgment carefully, and take it to the hearing.
  - a. If you pleaded in the alternative, ensure that the judgment is not inherently contradictory. Do not attempt to double-dip through different but overlapping causes of action.
  - b. Calculate pre- and post-judgment interest, and present it at the hearing.
  - c. Watch out for “finality language.”
14. File a Certificate of Last Known Address and ask the court clerk to immediately
15. send notice of entry of judgment to the defendant at that address.



## **NUNC PRO TUNC JUDGMENTS**

Prepared by Judge Roy Ferguson, 394<sup>th</sup> Judicial District Court

A court can correct a clerical error in a written judgment at any time. During the plenary period, the error must be raised through a motion to modify, amend, reform or correct the judgment. After expiration of the court's plenary power, the error must be raised through the *nunc pro tunc* process. The earliest date to file the *nunc pro tunc* motion is the day after the court loses plenary power over the judgment.

I. **Clerical Errors.** A “clerical error” is a discrepancy between the judgment entered in the official record and the judgment as it was actually rendered. There cannot be a clerical error if the court did not render judgment prior to signing the judgment. A court renders a judgment when it officially announces its decision in open court or by written memorandum filed with the clerk prior to entry of a final judgment or decree. A judgment or decree entered without a “prove-up” cannot be corrected by *nunc pro tunc*. There must be evidence that the court rendered a different decision from that in the written order. Examples of clerical errors include:

1. error in the date the judgment was signed;
2. a written judgment that did not accurately reflect the settlement agreement upon which judgment was orally rendered;
3. a purely mathematical error in the amount of damages;
4. a mistake in the party designations (“Plaintiff instead of Defendant”);
5. a typo in a party's or attorney's name in the judgment;
6. a discrepancy in the acreage or description of land;
7. a discrepancy between the body of the judgment actually rendered and the title of the document;
8. omission of an attachment; and
9. an unintended judgment of dismissal caused by the court clerk.

II. **Judicial Errors.** A “judicial error” occurs when the court considers an issue and makes an erroneous decision or fails to award requested relief, even if such relief was mandatory. It arises from a mistake of law or fact that requires judicial reasoning to correct. An error that is present in the rendition of judgment is always judicial error, which may not be corrected by a *nunc pro tunc* judgment. Examples of judicial errors include:

1. a judgment that changed party's outright ownership of land into a mere easement;
2. mistake in award of prejudgment interest;
3. erroneous recital that supported default judgment (“party failed to appear and answer”);
4. parties forget to announce an element of the settlement agreement during the “prove-up” hearing in which judgment is verbally rendered;
5. an unintended judgment of dismissal; and
6. a judgment on arrears that incorrectly stated the date as a year later, creating another payment obligation.

A judicial error can only be corrected during the plenary period. Even if the trial court incorrectly rendered judgment, it cannot alter a written judgment that precisely reflects the incorrect rendition. If the court attempts to correct a judicial error after its plenary power expires, the judgment is *void*. In order for a judgment *nunc pro tunc* to be properly granted, the movant must establish by clear and convincing evidence that a clerical error was made. What judgment was rendered and what error was made is a question of fact. Whether that error was clerical or judicial is a question of law.

## PROCEDURE FOR OBTAINING *NUNC PRO TUNC* JUDGMENTS

Prepared by Judge Roy Ferguson, 394<sup>th</sup> Judicial District Court

1. Determine whether the court's plenary power has expired.
  - a. If not, party must instead file a motion to modify, amend, reform, or correct judgment, irrespective of whether error was judicial or clerical; or
  - b. If so, proceed to step 2.
2. Determine whether the court rendered judgment prior to entry of written judgment, and what that rendered judgment specifically entailed. (If not, *nunc pro tunc* not available.)
3. Determine whether there was a discrepancy between the previously rendered judgment and the written judgment.
  - a. If not, any error is judicial, and no correction can be made by the trial court outside of plenary period; or
  - b. If so, error is clerical – proceed to step 4.
4. File *Motion for Entry of Judgment Nunc Pro Tunc*, proposed *Order Granting Motion for Nunc Pro Tunc Judgment*, and proposed *Judgment Nunc Pro Tunc*.
5. The *Motion for Entry of Judgment Nunc Pro Tunc* must describe in detail the previously rendered judgment and the way in which the written judgment varies from that rendition.
  - a. Attach to the Motion the proof necessary to establish the clerical error, via affidavit or other admissible evidence (such as witness statements, written documents, previous judgments, and docket entries). The trial judge may also consider his or her personal recollection.
  - b. The Court may permit sworn testimony to be given on the record in the hearing, but this is not guaranteed. Request a hearing if you feel one is necessary.
6. The proposed *Judgment Nunc Pro Tunc* must be identical to the original judgment in all but the following respects:
  - a. The title of the document should indicate that it is a *judgment nunc pro tunc*;
  - b. There must be a statement describing the clerical error that is being corrected;
  - c. The erroneous language must be replaced, or missing language added, to correct the clerical error; and
  - d. The date for the judge's signature should be in the following or similar format: "Rendered on [DATE OF RENDITION OF JUDGMENT], originally signed and entered on [DATE OF ENTRY OF FIRST WRITTEN JUDGMENT], and corrected via this *Judgment Nunc Pro Tunc* on [DATE NPT JUDGMENT SIGNED]."
7. Applicant must give notice of the Motion to all counsel and *pro se* parties of record. If any interested party does not receive notice, the corrected judgment is **void**. (The *nunc pro tunc* process cannot be accomplished *ex parte*.)
8. Although no response, denial, or pleading need be filed by the respondents, a party objecting to the Motion should file a response, detailing the basis for the objection, such as:
  - a. the error was judicial, not clerical;
  - b. insufficient evidence is attached to Motion for the court to determine whether a clerical error occurred;
  - c. the evidence attached to the Motion was false or fraudulent; or
  - d. all interested parties are not before the court.
9. The Court may set a hearing to present argument, whether an objection is lodged or not. Because an improperly granted *judgment nunc pro tunc* is void, entitlement is not established by default. However, in the absence of a filed objection, if the Court determines as a matter of law from the Motion and supporting evidence that a clerical error exists, the Motion may be granted without the necessity of a hearing.