

# Back to Basics of Civil Procedure: “Simple” Things Everyone Does Wrong

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



22<sup>nd</sup> Annual Summer School: State Bar College  
Sun, Sand and CLE for the General Practitioner  
July 16-18, 2020

# TOPICS:

1. Obtaining Citation by Publication
2. De
3. Nu

**VOID!**

**What do these have in common?**

# Quick Hitter - Citation by Publication

Simple, right?

So, in a civil case, you file a motion under TRCP 106b

seeking alternate venue. You attach an

affidavit that the venue is proper. If it failed,

judge signs an order; you run it

in the paper, file the affidavit of publication, and you

are ready to have your final hearing and get your

judgment.

**WRONG!!**

Right??

# Quick Hitter - Citation by Publication

RULE 109. CITATION BY PUBLICATION. When a party to a suit, his agent or attorney, shall make oath that the residence of any party defendant is unknown to affiant, and to such party when the affidavit is made by his agent or attorney, and that after due diligence has been used to locate the whereabouts of the defendant or is a nonresident, and that citation has attempted to obtain personal service or nonresident notice as provided for in Rule 108, but has been unable to do so, the clerk shall issue citation for such defendant for service by publication. In such cases it shall be the duty of the court trying the case to inquire into the sufficiency of the diligence exercised in attempting to ascertain the residence or whereabouts of the defendant or to obtain service of nonresident notice, as the case may be, before granting any judgment on such service.

**175 WORDS - TWO SENTENCES**

# Quick Hitter - Citation by Publication

## RULE 109. SIMPLIFIED.

When a party or attorney submits an affidavit stating that either:

(1) In such cases it shall be the duty of the court defendant, or that **trying the case** to inquire into the sufficiency of search the diligence exercised in attempting to

(2) ascertain the residence or whereabouts of the defendant or to obtain service of nonresident Texas, Rule 108, but notice, as the case may be, **before granting any judgment on such service.**

then the clerk shall issue citation for service by publication.

# Quick Hitter - Citation by Publication

**Meaning, judges don't review diligence until trial**

**VOID!**

If *at trial* failure of citation

**personal jurisdiction**, and your judgment is...

# Button It Up – Citation by Publication

## Correct Method:

### 1. File an affidavit, attesting that:

(a) neither you nor your clients know where the defendant lives, or that you confirmed the defendant is homeless, and that despite you both making a diligent search you are unable to locate the defendant, or

(b) that you have determined that the defendant is not in Texas, and that you tried to serve him or her out-of-state under Rule 108, but failed.

# **Button It Up – Citation by Publication**

## **Correct Method:**

- 2. File written letter to the clerk requesting issuance of citation by publication.**
- 3. Be prepared to present specific evidence of your due diligence at trial.**

# Default Judgments, “Simplified”

Judge Roy Ferguson – 394<sup>th</sup> Judicial District Court



22<sup>nd</sup> Annual Summer School: State Bar College  
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# What does a “default” really do?

By failing to answer, a defendant admits all facts properly set out in the plaintiff’s petition, except for the amount of unliquidated damages.

A “post-answer” default carries no such admission, and the plaintiff must offer evidence and prove all elements of its claims at trial. It’s not really a “default” at all.

# Is the Defendant in default?

- *Strict compliance* with rules regarding service required.
  - Citation and Return must be *perfect*.
    - Name on Citation matches name on petition and envelope.
    - Legible signature of correct addressee (not “agent”).
    - Return signed by clerk or L.E.O., on file for 10+ days.
    - **Signed Green Card is NOT ENOUGH.**
- Watch out for Waivers of Service!
  - Some don't waive *notice*.
  - **Must be dated *after* the petition was filed.**

# Why is this so IMPORTANT?

- Errors in service and citation cannot be waived.
- No pr... respect to  
citation
- Even
- Error... eding.
- Personal jurisdiction is dependent on citation and service, so if not perfect, **JUDGMENT IS...**

**VOID!**

# Pop Quiz, Hot Shot.



You go into the clerk's file and find the following documents...

WHAT DO YOU DO?



**SENDER: COMPLETE THIS SECTION**

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Chris P. Bacon  
1100 S. MacDonald St.  
Nowheresville, Tx 12345



9590 9402 3799 8032 0213 41

2. Article Number (Transfer from service label)

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature

X

B. Received by (Printed Name)

C. Date of Delivery

Agent

Addressee

D. Is delivery address different from item 1?  Yes  
If YES, enter delivery address below:  No

3. Service Type

- Adult Signature
- Adult Signature Restricted Delivery
- Certified Mail®
- Certified Mail Restricted Delivery
- Collect on Delivery
- Collect on Delivery Restricted Delivery
- Insured Mail
- Insured Mail Restricted Delivery (over \$500)

- Priority Mail Express®
- Registered Mail™
- Registered Mail Restricted Delivery
- Return Receipt for Merchandise
- Signature Confirmation™
- Signature Confirmation Restricted Delivery

**SENDER: COMPLETE THIS SECTION**

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Crist P. Bacon  
 2020 Why Worry Ln  
 Alpine, TX 79830



9590 9402 4553 8278 3165 50

2. Article Number (Transfer from service label)

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature

 *Albert Bacon*

- 
- Agent
- 
- 
- Addressee

B. Received by (Printed Name)

*Albert Bacon*

C. Date of Delivery

*6/14/2019*
 D. Is delivery address different from item 1?  Yes  
 If YES, enter delivery address below:  No

3. Service Type

- |  |   |
|--|---|
| <input type="checkbox"/> Adult Signature                               | <input type="checkbox"/> Priority Mail Express®                     |
| <input type="checkbox"/> Adult Signature Restricted Delivery           | <input type="checkbox"/> Registered Mail™                           |
| <input type="checkbox"/> Certified Mail®                               | <input type="checkbox"/> Registered Mail Restricted Delivery        |
| <input type="checkbox"/> Certified Mail Restricted Delivery            | <input type="checkbox"/> Return Receipt for Merchandise             |
| <input type="checkbox"/> Collect on Delivery                           | <input type="checkbox"/> Signature Confirmation™                    |
| <input type="checkbox"/> Collect on Delivery Restricted Delivery       | <input type="checkbox"/> Signature Confirmation Restricted Delivery |
| <input type="checkbox"/> Insured Mail                                  |   |
| <input type="checkbox"/> Insured Mail Restricted Delivery (over \$500) |   |

SHERIFF'S RETURN

Came to hand on the 27th day of October, 2018, at 11:45 a.m.

SHERIFF'S RETURN

Came to hand on the 27th day of October, 2018, at 11:45 o'clock A.m., and executed on the 5th day of November, 2017 at 3:45 o'clock P.m., at 1100 S. MacDonald St., in Comuscant County, Texas by delivering to each of the within-named defendant(s), in person, a true copy of this Citation, together with the accompanying copy of the PETITION FOR ENFORCEMENT OF PROPERTY DIVISON having first endorsed thereon the date of delivery, together with the accompanying times and places to wit:

Name	Day/Month/Year	Hour/Minute	Place, Course, and Distance from Court House
Chris P. Bacon	Sunday 11/5/17	3:45pm	1100 S. MacDonald St

I do hereby certify that I delivered to Chris P. Bacon, on the 5th day of November, 2017, at 3:45 o'clock P.m. this copy of this instrument.

Obi Wan Kenobi, Sheriff  
Comuscant County,  
State of Texas  
By Luke S. #116, Deputy

# Texas Rule Civ. Proc. 6

RULE 6. SUITS COMMENCED ON SUNDAY No civil suit shall be commenced **nor process issued or served on Sunday**, except in cases of injunction, attachment, garnishment, sequestration, or distress proceedings; provided that citation by publication published on Sunday shall be valid.

SHERIFF'S RETURN

Came to hand on the 27<sup>th</sup> day of October, 2017, at 11:45 o'clock A.m., and executed on the 5<sup>th</sup> day of November, 2017 at 3:45 o'clock P.m., at 1100 S. MacDonald St., in Comuscant County, Texas by delivering to each of the within-named defendant(s), in person, a true copy of this Citation, together with the accompanying copy of the PETITION FOR ENFORCEMENT OF PROPERTY DIVISION having first endorsed thereon the date of delivery, together with the accompanying times and places to wit:

Name Chris P. Bacon Day/Month/Year 11/5/17 Hour/Minute 3:45 Place, Course, and Distance from Court House 1100 S. MacDonald St.

Subscribed and Sworn to \_\_\_\_\_ before me, the undersigned authority, this the \_\_\_ day of \_\_\_\_\_, 2017, at \_\_\_ o'clock \_\_.m.

CERTIFICATE OF DELIVERY

I do hereby certify that I delivered to Chris P. Bacon, on the 5<sup>th</sup> day of November, 2017, at 3:45 o'clock P.m. this copy of this instrument.

Obi Wan Kenobi, Sheriff  
Comuscant County,  
State of Texas  
By Luke S. #1116, Deputy

# PRACTICE TIP #1

Review the citation and return, and show strict compliance *in the Motion*, so that the judge doesn't have to scour the record to see whether things were done correctly. (Either she won't, and your judgment might be void, or worse... she *will*.)

## PRACTICE TIP #2

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

# Is the Defendant actually in default?

1. Defendant was properly served.
  - Cannot be by publication.
  - Strict Compliance satisfied.
2. Defendant was served with the *current* pleading.
  - Personal service of original petition.
  - Rule 21a service of subsequent petitions seeking greater relief.
3. No answer of any kind on file.
  - Courts liberally construe *pro se* filings.
  - Personally check the clerk's files, including the correspondence envelope.
  - Ask the clerk about e-mails from the defendant.

So what is an answer  
and what isn't?

...nce relating to the outcome

...al stage of the Disciplinary Procedure being undertaken.

...ure of the infringement.

...ision of the Panel.

...ction is to be taken the employee must be informed acc

...disciplinary sanction being taken.

...iplinary action short of dismissal is taken the letter will indic  
...ch the warning will remain effective and that, in the eve  
...t against the employee that action n



UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF GEORGIA  
(ATLANTA DIVISION)

FILED IN CLERK'S OFFICE  
U.S.D.C. Atlanta

APR 20 2015

JAMES N. ARZEE, JR.  
By: *[Signature]* Deputy Clerk

Jason Joseph Clark,  
Tamah Jada Clark (both on their own  
behalf and that of "Baby" Clark),

Plaintiffs

v.

DANIEL J. PORTER, et al.,

Defendants

1:14-CV-02128-WBH

Civil Action No. \_\_\_\_\_

**NOTICE**

To F\*ck This Court and Everything that it Stands For.

As of Wednesday, April 15, 2015, I am in receipt of the Order dated 3/31/2015 wherein the despicable "Judge" Willis B. Hunt, Jr. has the audacity to attempt to dismiss this case based upon fallacious and irrelevant contentions that are without merit—of which he is absolutely aware.

Firstly, Jason is my HUSBAND, as I have stated, you a\*shole. And my son is no longer an infant; he has grown into a strong, *extremely* intelligent and beautiful little boy. Don't you ever again in your mother\*cking life attempt to

Any idiot can take a look into the history of American jurisprudence through studying congressional records, U.S. Supreme Court cases, etc.—as I have done—to realize that these United States of America have been overthrown. The American people—due to their own neglect of civic duty and responsibility to educate themselves and their children, have allowed this to happen.

I say all of this to say: Mr. Hunt, I don't give a d\*mn about you or anything you have to say. You are a *castrated* coward and a disgrace to these United States of America. Fortunately for us all, you are in old age and presumably nearing the inevitable death that awaits all old impotent geezers like yourself, with a one-way ticket to hell; which is good. That's exactly where a treacherous, lying, spineless, bastard son-of-a-b\*tch like you deserves to be for the rest of eternity. Burn.

Lastly, I will be posting the entirety of these court proceedings online and disseminating them amongst the general population, for the people to see this disgrace. You control nothing. You are nothing. And you can do nothing. F\*ck you. Die.

For the **UNREPRESENTED** Plaintiffs,  
(Signed Wednesday, April 15, 2015).

## PRACTICE TIP #3

If you are unsure whether correspondence from a *pro se* defendant constitutes an answer, ask the court to make that determination as a preliminary matter, rather than finding out when your motion for default judgment is denied, or worse -- reversed.

## PRACTICE TIP #4

If something is deemed an answer, consider filing a motion to quash, or special exceptions and motion to strike. If granted, the defendant returns to default posture.

# Is the Defendant entitled to *notice*?

No answer, no appearance = no notice of default hearing required

No answer, with appearance = 45 day notice of default hearing required. An appearance:

1. Invokes judgment of court other than challenging jurisdiction,
2. Recognizes that an action is properly pending, or
3. Seeks affirmative action from the court other than extension of time to answer.

# Is the Defendant entitled to *notice*?

Physically showing up for court may qualify, depending on the nature and quality of activities in the room.

- Silent presence is not enough.
- Be careful -- statement may be off the record.
- If you don't show up for a status hearing, but the defendant does, you won't even know notice is required.

So, is this a *pro se* answer, an appearance, both or neither?



## PRACTICE TIP #5

If the defendant has *appeared* in the case, you must include a Certificate of Service with the Motion for Default Judgment, showing compliance with Rule 21a.

# Pleading Must Support Judgment

- Pleading must seek specific relief awarded.
- Defendant must be served with the live pleading.
  - If amended pleading seeks more onerous relief, by Rule 21A
- Pleading must assert a valid cause of action.
- Court must have jurisdiction over the claim.
  - Monetary jurisdiction
  - Subject matter jurisdiction
- Pleading must be sufficiently *factually* precise.
  - Conclusory allegations are not sufficient.
  - General statements that track elements of the claim not sufficient.

**WHY IS THIS SO IMPORTANT?**

# FLASHBACK TO THE VERY FIRST SLIDE!

What does a “default” really do?

“By failing to answer, a defendant **admits all facts properly set out in the plaintiff’s petition**, except for the amount of unliquidated damages.”

# Pleading Must Support Judgment

- Factual allegations must be **uncontradicted**.
  - No internal contradictions of fact.

**THERE IS NO SUCH THING AS  
A DEFAULT IN FAMILY LAW.**

- **Attorneys' fees** must be authorized by statute.
- **Exemplary damages** must be available and within the cap.
- Cannot obtain **fee simple title** by default.
- Cannot obtain **divorce or SAPCR** relief by default.

## PRACTICE TIP #6

Review your pleadings carefully. If you plead contradictory claims in the alternative, ensure that the enumerated facts do not contradict or negate each other.

**You can plead alternative claims  
but you can't have alternative FACTS.**

# Proving Damages

- Liquidated damages are established without an evidentiary hearing.
- Unliquidated damages must be proved by “sufficient evidence.”
  - Affidavits are acceptable, but beware of conclusory statements.
  - Bring business records and certified documents.
  - Watch for factual contradictions in the evidence.
- Hearing must be held, but may be by submission.
  - Depends on the judge.
  - Ensure that *all* necessary evidence is attached to the Motion, including thorough and valid attorneys’ fees affidavits.

# Proving Damages

- Personal appearance may be required.
  - Bring live testimony to prove-up mental anguish and pain and suffering.
  - Judge is unlikely to go through hundreds of pages of attachments or do complicated calculations.
  - Safest course is to request and personally attend the default hearing.
- Insufficient evidence of damages results in remand and a new damages hearing.

# PRACTICE TIP #7

**KILL A FLY WITH A SLEDGEHAMMER!**

Always request a damages hearing, and attend in person. Bring more evidence than you think is needed, including live witness testimony, to prove-up pain and suffering and mental anguish damages.

# Button It Up – Default Judgments

- Scrutinize the proposed judgment.

**NOW you have completed the  
“EASY” process of getting  
a default judgment!**

- File a Certificate of Last Known Address.
  - Direct the Clerk to send notice of entry of judgment to the address in the Certificate.
  - Failure to do so is reversible error.
  - Follow-up regularly to ensure the notice was issued promptly.

SGN

The image shows three large, hand-drawn letters: 'S', 'G', and 'N'. Each letter is filled with a variety of colors and textures, suggesting a collage or mixed-media style. The 'S' is primarily red and pink with green and blue accents. The 'G' features orange, pink, blue, and yellow. The 'N' is a mix of purple, green, blue, and yellow. The letters have thick black outlines and are set against a plain white background.



Texas Supreme Court Justice (and amateur meteorologist)  
**Brett Busby**

# *Nunc Pro Tunc* Judgments

Judge Roy Ferguson – 394<sup>th</sup> Judicial District Court



GPSOLO CLE

State Bar of Texas Annual Meeting

June 13, 2019

# TYPES OF ERROR

## Judicial Error:

- 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.
- **May be corrected only during plenary period.**

## Clerical Error:

- A “clerical error” is a discrepancy between the written judgment and the judgment as it was actually rendered.
- Requires rendition prior to written judgment or order.
- **May be corrected at any time.**

# Examples of Types of Error

## Judicial Error:

- a judgment that changed party's outright ownership of land into a mere easement;
- mistake in announced award of prejudgment interest;
- erroneous recital that supported default judgment ("party failed to appear and answer");
- parties forget to announce an element of the settlement agreement during the "prove-up" hearing in which judgment is verbally rendered;
- an unintended judgment of dismissal; and
- a judgment of child support arrearage that included the wrong commencement date.

# Examples of Types of Error

## Clerical Error:

- error in the date the judgment was signed;
- Written judgment omits a term of the settlement agreement announced during hearing, upon which judgment was verbally rendered;
- mathematical mistake in the calculation of prejudgment interest;
- a mistake in the party designations (“Plaintiff instead of Defendant”); and
- a discrepancy in the acreage or legal description of land.

# *Nunc Pro Tunc* and MSA's

No general right to judgment that conforms to MSA.

1. Judicial Error: Rendition does not refer to MSA.

Rendition controls, even where parties testify that the agreement in the decree arises from a mediated settlement agreement.

*See In re Marriage of Russell*, 556 S.W.3d 451 (Tex. App.—Houston [14th Dist.] 2018, no pet.)

2. Clerical Error: Rendition or docket notes adopt MSA:

a. "MSA judgment granted." "per ... 153.0071."

*Woodward v. Woodward*, 2019 Tex. App. LEXIS 7314 (Tex. App.—Houston [14th Dist.] Aug. 20, 2019, no pet.)

b. "Adopting agreements made by the parties."

c. 3<sup>rd</sup> Court declared "implied finding" that agreement rendered on ISA.

*See Ramirez v. Ramirez*, 2019 Tex. App. LEXIS 2897 (Tex. App.—Austin Apr. 11, 2019, no pet.) (mem. op.)

**The Court's conduct – not the parties' – controls.**

# Timing of Filing is Dispositive

During plenary period:

- Both judicial and clerical errors can be corrected.
  - via Motion to Modify, Amend, Correct or Reform Judgment
  - *Nunc Pro Tunc* is not available.
- Civil cases: 30 days; 75 if a motion for new trial is filed, plus 30 after Motion denied.
- Criminal cases: 30 days; 75 if a motion for new trial is filed.

After expiration of plenary period:

- *Nunc Pro Tunc* is the only available method.
- Only clerical errors can be corrected. Judicial errors cannot.

# Key Distinctions

1. If the court did not render judgment prior to signing the written judgment, *nunc pro tunc* is not available.
2. If the written judgment accurately matches the rendered judgment, there is no clerical error, and *nunc pro tunc* is not available.
3. In other words, if someone *said* it wrong and the judgment matches what was said, or if it wasn't said at all, you cannot correct it via *nunc pro tunc*.

# Burdens and Consequences

1. The
  - a. that
  - b. the
  - c. by

If the court attempts to correct a judicial error after its plenary power expires, no matter what you call it, the judgment is...

t from  
and  
e  
error.

2. What judgment was first rendered is a question
3. Whether is a question

**VOID!**

al is a

# Proper *Nunc Pro Tunc* Procedure

The Movant should file the following documents:

1. Motion for Judgment *Nunc Pro Tunc*;
2. proposed Order Granting Motion; and
3. proposed Judgment *Nunc Pro Tunc*.

The Movant **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**.

*Nunc Pro Tunc* is not ministerial, cannot be granted *ex parte*, and is not established by default or by agreement.

# Proper *Nunc Pro Tunc* Procedure

The Motion should describe in detail the orally rendered decision and the way in which the written judgment varies from that decision.

1. Any proof necessary to establish the clerical error should be attached to the Motion via affidavit or other admissible evidence, such as:
  - a. witness statements, including those of attorneys who were present;
  - b. written documents;
  - c. previous judgments;
  - d. official court transcripts; and
  - e. docket entries.

# Proper *Nunc Pro Tunc* Procedure

The trial judge may also consider his or her personal recollection, if any.

The Court may permit sworn testimony to be given on the record in the hearing, but this is not guaranteed.

# Proper *Nunc Pro Tunc* Procedure

The Order Granting Motion should include findings that:

1. Judgment was verbally rendered on [the date of rendition], and included the following: \_\_\_\_\_.
2. The written judgment varied from the rendered judgment, as follows: \_\_\_\_\_.
3. The Court finds by **clear and convincing evidence** that the error in the judgment was clerical, and should be corrected via *nunc pro tunc*.

# Proper *Nunc Pro Tunc* Procedure

The Judgment *Nunc Pro Tunc* is identical to the original judgment.

1. The judgment was rendered on the record on [DATE OF RENDITION OF JUDGMENT], originally signed and entered on [DATE OF ENTRY OF FIRST WRITTEN JUDGMENT], and the clerical error corrected via this *Judgment Nunc Pro Tunc* on [DATE NPT JUDGMENT SIGNED]."
2. The error corrected via this *Judgment Nunc Pro Tunc* on [DATE NPT JUDGMENT SIGNED]."
3. The date of the judge's signature should be in the following or similar format:

# Thank you!

