

MEMO

From: Frank Gilstrap
To: SCAC Rule 16-165a subcommittee
Re: HB 962
Date: September 27, 2011

House Bill 962 enacts Section 17.030 of the Civil Practice & Remedies Code. *See* App. 1. That provision deals with the return of service of process, which is the subject of Rules 16, 105 and 107, TEX.R.CIV.P.

By enacting Section 17.030, the Legislature sought to ease the burden on process servers in three ways. First, a copy of the return will no longer have to be “endorsed or attached to the original process.” TEX.CIV.PRAC. & REM. CODE § 17.030(b)(1)(A). Second, the process server’s signature on the return will no longer have to be notarized. Rather, the server will be able to sign, without an oath, “under penalty of perjury.” *Id.* § 17.030(c). Third, the return “may be electronically filed.” *Id.* § 17.030(b)(1)(B).

Section 17.030 consists of four subsections. Subsections (a) and (b) direct the Supreme Court to adopt rules governing the “return of service.” Under Subsection (c), the process server “shall sign the return . . . under penalty of perjury” and “[t]he return . . . is not required to be verified.” Finally, under

subsection (d), it is a crime to “knowingly or intentionally falsify a return.”

The requirements for new rules are set forth in subsection (b). Two provisions are mandatory: (1) the rules “must provide that the return of service is not required to be endorsed or attached to the original process,” *Id.* § 17.030 (b)(1)(A); and (2) the rules must provide that the return “may be electronically filed.” *Id.* § 17.030(b)(1)(B). There is also a list of items that “may” be included in the return. *Id.* § 17.030 (b)(1)(B) & (b)(2). Almost all of these items are included in the current form for citation and return. *See* App. 4.

These changes can be effected by amending Rules 16, 105, and 107; but the committee should also consider a longstanding problem with Part II, Section 5 of the Rules (Rule 99 *et seq.*)--the distinction between “citation” and “process.” Originally this section dealt only with citation, as its title indicates. However, in 1987 Rule 103 was revised to deal with service of “citation or other notices” (emphasis added). In 2005, Rule 103 was changed to deal with service of “process--including citation or other notices, writs, orders and other papers issued by the court.” Thus, in Rule 103 “process” is broader than “citation,” but in other rules “process” simply means citation.¹ Moreover, Section 17.030 governs the return of “process,” not merely the return of “citation.”

Finally, HB 962 also amends Section 17.065 of the CPRC, which

¹ *See, e.g.,* current Rules 108a(1) and 119-125.

allows the Chairman of the Texas Transportation Commission to be served as agent for non-resident motorists. Here again, the return will not have to be “endorsed on or attached to the original process,” and the person serving process will be able to sign the return “under penalty of perjury.” As to this provision, no rule making is needed.

THE PROPOSED REVISIONS

Note for Rules 15-17: In 1941, when the Rules were first promulgated, Rules 15, 16 and 17 (which are in Part II, Section 1, of the Rules), dealt with “writs and process.” At the same time, Rules 99-120 (which are in Part II, Section 5) dealt with “citation.” But the rules in Part II, Section 5, were later amended to deal with all forms of process, not just citations.² Accordingly, Rules 15-17 can be deleted or moved to Part II, Section 5, as set forth below.

~~RULE 15. WRITS AND PROCESS~~

~~The style of all writs and process shall be “The State of Texas;” and unless otherwise specially provided by law or these rules every such writ and process shall be directed to any sheriff or any constable within the State of Texas, shall be made returnable on the Monday next after expiration of twenty days from the date of service thereof, and shall be dated and attested by the clerk with the seal of the court impressed thereon; and the date of issuance shall be noted thereon.~~

² A copy of current Rules 15-17, 99-108a, and 119-124 is attached at App. 6.

Note: The first and last clauses of Rule 15 will be moved to the last sentence in revised Rule 99a. *See infra*, p.5.³ Next, the requirement that “every such writ and process shall be directed to any sheriff or any constable” will be deleted, since process can now be served by private process servers. Finally, the requirement that the process “be made returnable on the Monday next after expiration after expiration of 20 days from the date of service” will apply only to citations, and a similar provision is already found in Rule 99b(12) and Rule 99c. *See infra*, p.6.

~~RULE 16. SHALL ENDORSE ALL PROCESS~~

~~Every officer or authorized person shall endorse on all process and precepts coming to his hand the day and hour on which he received them, the manner in which he executed them, and the time and place the process was served and shall sign the returns officially.~~

Note: Rule 16 will be deleted. Under current practice, all of the information called for by Rule 16--the day and hour on which the process is received, the manner in which it is executed and the time and place that it is served--is included in the return.⁴ The requirement to “endorse” this information on the face of the process conflicts with Section 17.030(b)(1)(A), which “provide[s] that the return of service is not required to be endorsed or attached to the original process.” (emphasis added).

³ A clean copy of proposed Rules 99-108a and 119-124 is attached at App. 14.

⁴ *See* proposed Rule 107, *infra*, p.11.

~~RULE 17. OFFICER TO EXECUTE PROCESS~~

~~Except where otherwise expressly provided by law or these rules, the officer receiving any process to be executed shall not be entitled in any case to demand his fee for executing the same in advance of such execution, but his fee shall be taxed and collected as other costs in the case.~~

Note: The provisions of Rule 17 will be moved to Rule 105(b). *See infra*, p.9.

SECTION 5. CITATION AND OTHER PROCESS

Note: Part II, Section 5, of the Rules now covers all forms of process, not just citations.

RULE 99. ISSUANCE AND FORM OF CITATION PROCESS

Note: Rule 99a and 99d, which presently deal only with the citation, will be broadened to govern all process; Rule 99b and 99c will continue to deal only with the citation.

- a. (a) **Issuance.** ~~Upon the filing of the petition, The clerk, when requested or ordered by the court, shall forthwith issue a citation and process. The clerk shall deliver the citation process as directed by the requesting party or as ordered by the court. The party requesting citation Unless otherwise ordered by the court, the requesting party shall be responsible for obtaining service of the citation process and a copy of the petition. Upon request, separate or additional citations shall be issued by the clerk. The process shall be styled "The State of Texas" and shall be dated and signed by the clerk with the seal of the court impressed thereon.; and the date of issuance shall be noted thereon.~~

Note: Rule 99a will be revised to cover all forms of process, not just citations.

The final sentence (“The process shall be styled ‘the State of Texas’ . . .”) comes from the first and last clauses of Rule 15. *See supra*, p.3. Also, in that sentence, the phrase “attested by the clerk” will be changed to “signed by the clerk.” But see CPRC § 17.027 (“[T]he plaintiff or his attorney may prepare the . . . citation.”) (App. 24).

b. **(b) Form of citation.** The citation shall (1) be styled "The State of Texas," (2) be signed by the clerk under seal of court, (3) contain name and location of the court, (4) show date of filing of the petition, (5) show date of issuance of citation, (6) show file number, (7) show names of parties, (8) be directed to the defendant, (9) show the name and address of attorney for plaintiff, otherwise the address of plaintiff, (10) contain the time within which these rules require the defendant to file a written answer with the clerk who issued citation, (11) contain address of the clerk, and (12) shall notify the defendant that in case of failure of defendant to file and answer, judgment by default may be rendered for the relief demanded in the petition. The citation shall direct the defendant to file a written answer to the plaintiff's petition on or before 10:00 a.m. on the Monday next after the expiration of twenty days after the date of service thereof. The requirement of subsections 10 and 12 of this section shall be in the form set forth in section c of this rule.

Note: This paragraph, unlike paragraph (a), will deal only with the citation. Its title will be changed to “Form of citation.” Otherwise there will be no change.

e. **(c) Notice in citation.** The citation shall include the following notice to the defendant: “You have been sued. You may employ an attorney. If you or your attorney do not file a written answer with the clerk who issued this citation by 10:00 a.m. on the Monday next following the expiration of twenty days after you were served this citation and petition, a default judgment may be taken against you.”

Note: Here again, this paragraph will deal only with the citation, not other forms of process. Aside from the title, it will not be changed.

~~d.~~ **(d) Copies.** The party filing any pleading upon which ~~citation~~ process is to be issued and served shall furnish the clerk with a sufficient number of copies thereof for use in serving the parties to be served, and when copies are so furnished the clerk shall make no charge for the copies.

Note: This paragraph will be broadened to cover all process, not just citations.

RULE 100. DEFINITION

As used in this section, “process” includes citations, notices, writs, precepts, orders, and other papers issued by the court or issued by the clerk.

Note: This definition comes from the first sentence of current Rule 103, with the additions of “precepts” and “issued by the clerk.” *See infra*. Such formal definitions are also found in Rules 192.7, 233 and 529, TEX.R.CIV.P.

RULE 103. WHO MAY SERVE PROCESS

~~Process—including citation and other notices, writs, orders, and other papers issued by the court—may be served anywhere by (1) any sheriff or constable or other person authorized by these rules or by law, (2) any person authorized by law or by written order of the court who is not less than eighteen years of age, or (3) any person certified under order of the Supreme Court. Service of process by registered or certified mail and service of citation by publication must, if requested, be made by the clerk of the court in which the case is pending. But no person who is a party to or interested in the outcome of a suit may serve any process in that suit, and, unless otherwise authorized by a written court order, only a sheriff or constable may serve a citation process in an action of forcible entry and detainer, a writ that requires the actual taking of possession of a person, property or thing, or a process requiring that an enforcement action be physically enforced by the person~~

~~delivery~~ serving the process. ~~The~~ An order authorizing a person to serve process may be made without written motion and no fee may be imposed for issuance of such an order.

Note: The definition of “process” in the first sentence of the current rule (“including citation and other notices, writs, orders . . .”) will be moved to the new Rule 100. *See supra*. The second sentence of the current rule will be deleted because process is not served by the clerk.

Note for Rules 105-107: Some provisions in Rules 105-107 require process to be “served” while others require process to be “executed.” It may be that “execute” was once used to include cases where the process was and was not “served.” But, beginning in 1987, Part II, Section 5, of the Rules was revised to cover all forms of “process,” not just “citations.” Under that change, the distinction between “serve” and “execute” may be different. For example, one can “serve” a citation but “execute” a writ of sequestration. This problem can be solved by using the phrase “serve or execute.”

RULE 105. DUTY OF PERSON RECEIVING PROCESS

(a) The person ~~to whom~~ who receives a process ~~is delivered~~ shall endorse ~~thereon the day and hour on which he received it,~~ and shall (i) serve and/or execute it ~~and return the same~~ without delay and (ii) prepare and file a return in accordance with Rule 107.

Note: Section 17.030(b)(1)(A) “provide[s] that the return of service is not required

to be endorsed or attached to the original process” (emphasis added).⁵

- (b) Except where expressly provided by law or these rules, a sheriff or constable receiving any process shall not demand a fee for executing the process in advance of such execution, but such fee shall be taxed and collected as other costs in the case.

Note: This is former Rule 17, reworded, but substantially unchanged. *See supra*, p.5.

RULE 106. METHOD OF SERVICE

- (a) Unless the ~~citation~~ process or an order of the court otherwise directs, the ~~citation~~ process shall be served by any person authorized by Rule 103 by
- (1) by delivering to the defendant person to be served, in person, a true copy of the ~~citation~~ process with the date and time of delivery endorsed thereon ~~with a copy of the petition attached thereto, or~~
 - (2) by mailing a true copy of the process to the defendant person to be served by registered or certified mail, return receipt requested, ~~a true copy of the citation with a copy of the petition attached thereto or~~
 - (3) as otherwise authorized by these rules or by law.
- (b) Upon motion supported by affidavit stating the location of the ~~defendant's~~ usual place of business or usual place of abode of the person to be served or other place where ~~the defendant~~ said person can probably be found and stating specifically the facts showing that service has been attempted under ~~either~~ (a)(1) or (a)(2) or (a)(3) at the location named in such affidavit but has not been successful, the court may authorize service
- (1) by leaving a true copy of the citation process, ~~with a copy of the petition attached,~~ with anyone over sixteen years of age at the location

⁵ Also, the day and hour when the citation is received must be set forth in the return. *See* proposed Rule 107(b)(4), *infra*, p.11.

specified in such affidavit, or

- (2) in any other manner that the affidavit or other evidence before the court shows will be reasonably effective to give notice.

(c) A true copy of the petition shall be attached to the citation.

Notes: Current Rule 106 deals only with service of citation, and there is no rule saying how other forms of process shall be served. The proposed change will correct that shortcoming, but in so doing, it will also allow other forms of process to be served under Rule 106. Requiring an endorsement of the time and date when the process is served, in paragraph (a)(1),⁶ is different from requiring an endorsement of the time and date when the process is received, which, under Section 17.030(b)(1)(A), cannot be required. Paragraph (a)(3) will allow (i) service in the various ways permitted by Rules 108a through 117 (including

⁶ The 2009 version of the Rules contained the following “Opinion of Subcommittee on Interpretation of Rules” following Rule 106.

Endorsement of delivery date: The failure of the officer serving a citation to endorse the date of delivery upon the copy of the citation delivered to the defendant does not effect the jurisdiction of the trial court to render a default judgment, but if the defendant seasonably moves to set aside the default judgment and shows that he was in fact injured or misled by the officer’s failure to endorse the date and service upon the copy the trial court should set aside the default and give the defendant an opportunity to appear and have a trial on the merits. 6 Texas B.J.20 (1943); 8 Texas B.J.30 (1945).

In view of the fact that Rule 107 requires the return to show “the manner of service” the return should show that the date of delivery was endorsed on the copy of the citation or notice in accordance with Rule 106, Texas B.J.168 (1942); 8 Texas B.J.13 (1945).

citation by publication) and (ii) service as permitted by various statutes.⁷ Finally, the proposed change from “defendant” to “person to be served” recognizes that some kinds of process are not served on the defendant.

RULE 107. RETURN OF ~~SERVICE~~ PROCESS

- (a) ~~The return of the officer or authorized person executing the citation shall be~~ may, but is not required to be, endorsed on or attached to the ~~same~~ process.

Note: This revises current Rule 107, first paragraph, first sentence, first clause, in accordance with Section 17.030(b)(1)(A).

- (b) The return, together with any document to which it is attached, shall include the following information:
- (1) the case number and case name;
 - (2) the court in which the case is filed;
 - (3) a description of the process;
 - (4) the date and time when the process was received;
 - (5) the name of the person who received the process and his or her identification number, if any; and
 - (6) any other information required by law.

⁷ See, e.g., TEX.CIV.PRAC. & REM. CODE § 17.021(b) (service on agent of individual, partnership, or unincorporated association); *Id.* § 17.065(b) (service on Chairman of Texas Transportation Commission as agent for non-resident motorist); Rule 604 (execution of writ of attachment); Rule 618 (execution of distress warrant); Rule 654 (serving writ of execution); Rule 689 (serving writ of injunction); Rule 712 (executing writ of sequestration); Rule 765 (serving writ of partition).

Note: Subparagraphs (b)(1)-(5) come from Section 17.030(b)(2)(A), (B), (H) (C), (I) and (J). Subparagraph (b)(6) allows for service in accordance with other rules and statutes. *See supra*, p.10 & n.9. The phrase “together with any process to which it is attached” allows for current practice, which uses a combined citation return. *See* Tab B.

(c) If the process is served or executed, the return, together with any document to which it is attached, shall also include the following information:

- (1) the date and time when the process was served or executed;
- (2) the person or entity served;
- (3) the address where the process was served or executed; and
- (4) the manner in which the process was served or executed.

Notes: This expands Rule 107, first sentence, second clause, which provides that the return “shall state when the citation was served and the manner of service.”

Subparagraphs (c)(1)-(4) come from Section 17.030(b)(2)(F), (D), (E) and (G).

(d) ~~When the officer or authorized person has not served the citation~~ If the process is not served or executed, the return, together with any document to which it is attached, shall show (i) the diligence used by the officer or authorized person to serve or execute the same process, (ii) the cause of the failure to serve or execute it the process, and (iii) the place where the defendant person to be served is to can be found, if he can ascertain it can be ascertained.

Note: This revises Rule 107, first paragraph, last sentence. Aside from allowing persons other than the defendant to be served, no substantive change is intended.

- (e) ~~When the citation was~~ If a process is served by registered or certified mail as authorized by Rule 106, the return by the officer or authorized person must also contain the return receipt with the addressee's signature must be attached to the return.

Note: This revises current rule 107, first paragraph, third sentence. Aside from allowing persons other than the defendant to be served, no substantive change is intended.

- (f) ~~The return of citation by an authorized person shall be verified. The person who serves or executes, or attempts to serve or execute the process shall sign the return. The signature is not required to be verified. If the return is signed by a person other than a sheriff or constable, the return shall contain the following statement:~~

“My name is _____, my date of birth is _____,
and my address is _____.

“I declare under penalty of perjury that the forgoing is true and correct.

“Executed in _____ County, State of _____, on the ____
day of _____.

Declarant”

Note: This revises Rule 107, first paragraph, second sentence, in accordance with Section 17.030(c). Previously, under Chapter 132 of the Civil Practice &

Remedies Code, only inmates were allowed to make an unsworn declaration under penalty of perjury; but the last legislature made Chapter 132 applicable to all persons. It also dictated the form of the signature. *See* App. 20.

- (g) The person who signs the return shall file the return with the court. The return and any document to which it is attached may be electronically filed, if the court permits electronic filing; but if it is electronically filed, the person who signs the return shall retain the original copy for six months.

Note: Electronic filing of the return is mandatory under Section 17.030(b)(1)(B), but electronic filing is still unavailable in most courts. The 180 day retention requirement, which is not in Section 17.030, allows the original signature to be brought to court if there is a controversy.

- (h) Where ~~citation~~ process is served or executed by an alternative method, as authorized by Rule 106, proof of service or execution may shall be made in the manner ordered by the court.

Note: This revises current Rule 107, second paragraph, to cover all forms of process.

- (i) No default judgment shall be granted in any cause until the citation, or process under Rules 108 or 108a with proof of service as provided by this rule or by rules 108 or 108a, or as ordered by the court in the event citation is executed under Rule 106, shall have been on file with the clerk of the court ten days, exclusive of the day of filing and the day of judgment.

Note: This is Rule 107, last paragraph, unchanged.

RULE 108. ~~DEFENDANT WITHOUT SERVICE OF~~
PROCESS IN ANOTHER STATE

Where the defendant is absent from the State, or is a nonresident of the State, the form of notice to such defendant of the institution of the suit shall be the same as prescribed for citation to a resident defendant; and such notice may be served by any disinterested person ~~competent to make oath of the fact, who is not less than eighteen years of age,~~ in the same manner as provided in Rule 106 hereof. The return of service in such cases shall be ~~endorsed on or attached to the original notice, and shall be in the form provided in conform to prepared and filed in accordance with~~ Rule 107 ~~and be signed and sworn to by the party making such service before some officer authorized by the laws of this State to take affidavits, under the hand and official seal of such officer.~~ A defendant served with such notice shall be required to appear and answer in the same manner and time and under the same penalties as if he had been personally served with a citation within this State to the full extent that he may be required to appear and answer under the Constitution of the United States in an action either in rem or in personam.

Note: The title of the rule is revised to match the title of Rule 108a. Its provisions are changed in conformity with Section 17.030(c). The requirement that the person serving the process be “competent to make oath” is deleted, since the return no longer has to be sworn to. The new limitation, that the person serving the process be “not less than eighteen years of age” is taken from the first sentence of Rule 103.

Note for Rules 119-124: Rules 119-124 refer to “service of process,” but they obviously deal only with service of citation.

RULE 119. ACCEPTANCE OR WAIVER OF SERVICE

The defendant may accept service of ~~process~~ citation, or waive the issuance or service ~~thereof~~ of citation, by a written memorandum signed by him, or by his duly authorized agent or attorney, after suit is brought. The memorandum must be sworn to before a proper officer other than an attorney in the case, and filed among the papers of the cause case; and such waiver or acceptance shall have the same force and effect as if the citation had been issued and served as provided by law. ~~The party signing such memorandum shall be delivered a~~ A copy of ~~plaintiff's~~ the petition shall be delivered to any party who accepts service of citation or who waives the issuance of citation under this rule. and the receipt of the same shall be acknowledged in such memorandum. The memorandum shall also state that the party has received a copy of Plaintiff's the petition. In every divorce action such memorandum shall also include the defendant's mailing address.

RULE 119a. COPY OF DECREE

The district clerk shall forthwith mail a certified copy of the final divorce decree or order of dismissal to the party signing a memorandum waiving issuance or service of ~~process~~ citation. Such divorce decree or order of dismissal shall be mailed to the signer of the memorandum at the address stated in such memorandum or to the office of his attorney of record.

RULE 123. REVERSAL OF JUDGMENT

Where the judgment is reversed on appeal ~~or writ of error~~ for the want of service, or because of defective service of ~~process~~ citation, no new citation shall be issued or served, but the defendant shall be presumed to have entered his appearance to the term of the court at which the mandate shall be filed.

RULE 124. NO JUDGMENT WITHOUT SERVICE

~~In no case shall~~ Judgment shall not be rendered against any defendant unless upon service, or acceptance or waiver of ~~process~~ citation, or upon an appearance by the defendant, as prescribed in these rules, except where otherwise expressly provided by law or these rules.

When a party asserts a counterclaim or a cross-claim against another party who has

entered an appearance, notice of the claim may be served in any manner prescribed for service of citation or as provided in Rule 21(a).