

October 23, 2017
Report of the Rules 15-165a Subcommittee

Modernizing TRCP 99, Issuance and Form of Citation

On July 5, 2017, Chief Justice Hecht referred to the Supreme Court Advisory Committee the prospect of modernizing the language of TRCP 99.

Chief Justice Hecht's referral letter says:

Texas Rule of Civil Procedure 99, subsections (b) and (c), set the deadline for filing an answer as "10:00 a.m. on the Monday next after the expiration of twenty days after the date of service." The Court asks the Committee to consider whether the deadline should be simplified and to draft any recommended amendments.

Subsection (d) states: "The party filing any pleading upon which citation 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." The advent of e-filing has rendered this language outdated. Filers want to avoid paying additional fees for service copies of the petition by printing out the copies themselves and having the clerk return the citation by email. But some trial court clerks refuse to provide a citation by email. The Court asks the Committee to consider what changes to Rule 99 are needed to update the process for issuing a citation on an e-filed petition and to draft any recommended amendments. The Committee should consider whether the rule should instruct the clerk to return a citation on an efiled petition by email.

The Court asks the Committee to consider whether any other changes are necessary to conform the text of Rule 99 to modern practice.

Here is the current language of TRCP 99. The language about when an answer is due is in **bold**.

SECTION 5. CITATION

RULE 99. ISSUANCE AND FORM OF CITATION

a. Issuance. Upon the filing of the petition, the clerk, when requested, shall forthwith issue a citation and deliver the citation as directed by the requesting party. The party requesting citation shall be responsible for obtaining service of the citation and a

copy of the petition. Upon request, separate or additional citations shall be issued by the clerk. The clerk must retain a copy of the citation in the court's file.

b. Form. 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.

c. Notice. 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."

d. Copies. The party filing any pleading upon which citation 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.

DISCUSSION

From a review of randomly selected jurisdictions, it appears that TRCP 99 is not terribly out of synch with other jurisdictions, but it is clear that Rule 99 could benefit by being simplified and clarified. Here is a random selection of rules from other jurisdictions. The language setting the deadline for a response is bolded.

Here is the description in Fed. Rule Civ. Proc. 4 regarding the summons.

Rule 4 - Summons

(a) Contents; Amendments.

(1) Contents. A summons must:

- (A) name the court and the parties;
- (B) be directed to the defendant;
- (C) state the name and address of the plaintiff's attorney or--if unrepresented--of the plaintiff;
- (D) state the time within which the defendant must appear and defend;**
- (E) notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint;
- (F) be signed by the clerk; and
- (G) bear the court's seal.

(2) Amendments. The court may permit a summons to be amended.

(b) Issuance. On or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant. A summons-or a copy of a summons that is addressed to multiple defendants-must be issued for each defendant to be served.

(c) Service.

(1) In General. A summons must be served with a copy of the complaint. The plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m) and must furnish the necessary copies to the person who makes service.

(2) By Whom. Any person who is at least 18 years old and not a party may serve a summons and complaint.

(3) By a Marshal or Someone Specially Appointed. At the plaintiff's request, the court may order that service be made by a United States marshal or deputy marshal or by a person specially appointed by the court. The court must so order if the plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. §1915 or as a seaman under 28 U.S.C. §1916.

Here is Fed. Rule Civ. P. 12 about responding to a summons:

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(a) Time to Serve a Responsive Pleading.

(1) In General. Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within 21 days after being served with the summons and complaint; or

(ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

(B) A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.

[The rest of Fed. R. Civ. Proc. 12 omitted]

Here is the way answer day is described by the U.S. District Court, Southern District of New York, Pro Se office.

An answer is a formal written response to the plaintiff's complaint in which the defendant responds to all of the allegations in the complaint and sets forth any defenses to all or part of plaintiff's claims. An answer is filed by the defendant after s/he has been served with a copy of the complaint. **If you have been served with a summons and complaint, you have twenty-one (21) days to file an answer.** The United States government, its agencies, and employees have sixty (60) days to file an answer. See Rule 12 of the Federal Rules of Civil Procedure. If you have waived formal service of the summons and complaint by completing a waiver of service form sent to you by the plaintiff, you have sixty (60) days from when the waiver was sent to you to file an answer (or ninety (90)

days if the defendant was sent the waiver outside of the United States). See Rule 4(d) of the Federal Rules of Civil Procedure. If you do not file an answer within the required time period, you may be in default, and the plaintiff may be able to obtain a default judgment against you.

http://www.nysd.uscourts.gov/file/forms_instructions/answer-and-notice-of-appearance

Here is the way California describes their summons (equivalent to our citation):

California Code, Code of Civil Procedure - C.P. § 412.20

(a) Except as otherwise required by statute, a summons shall be directed to the defendant, signed by the clerk and issued under the seal of the court in which the action is pending, and it shall contain:

(1) The title of the court in which the action is pending.

(2) The names of the parties to the action.

(3) A direction that the defendant file with the court a written pleading in response to the complaint within 30 days after summons is served on him or her.

(4) A notice that, unless the defendant so responds, his or her default will be entered upon application by the plaintiff, and the plaintiff may apply to the court for the relief demanded in the complaint, which could result in garnishment of wages, taking of money or property, or other relief.

(5) The following statement in boldface type: “You may seek the advice of an attorney in any matter connected with the complaint or this summons. Such attorney should be consulted promptly so that your pleading may be filed or entered within the time required by this summons.”

(6) The following introductory legend at the top of the summons above all other matter, in boldface type, in English and Spanish:

“Notice! You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read information below.”

(b) Each county may, by ordinance, require that the legend contained in paragraph (6) of subdivision (a) be set forth in every summons issued out of the courts of that county in any additional foreign language, if the legend in the additional foreign language is set forth in the summons in the same manner as required in that paragraph.

(c) A summons in a form approved by the Judicial Council is deemed to comply with this section.

Here is the way Indiana describes the summons and answer.

Indiana Rules of Trial Procedure, Rule 4. Process

(A) Jurisdiction Over Parties or Persons--In General. The court acquires jurisdiction over a party or person who under these rules commences or joins in the action, is served with summons or enters an appearance, or who is subjected to the power of the court under any other law.

(B) Preparation of summons and praecipe. Contemporaneously with the filing of the complaint or equivalent pleading, the person seeking service or his attorney shall furnish to the clerk as many copies of the complaint and summons as are necessary. The clerk shall examine, date, sign, and affix his seal to the summons and thereupon issue and deliver the papers to the appropriate person for service. Affidavits, requests, and any other information relating to the summons and its service as required or permitted by these rules shall be included in a praecipe attached to or entered upon the summons. Such praecipe shall be deemed to be a part of the summons for purposes of these rules. Separate or additional summons shall, as provided by these rules, be issued by the clerk at any time upon proper request of the person seeking service or his attorney.

(C) Form of summons. The summons shall contain:

- (1) The name and address of the person on whom the service is to be effected;
- (2) The name, street address, and telephone number of the court and the cause number assigned to the case;

(3) The title of the case as shown by the complaint, but, if there are multiple parties, the title may be shortened to include only the first named plaintiff and defendant with an appropriate indication that there are additional parties;

(4) The name, address, and telephone number of the attorney for the person seeking service;

(5) The time within which these rules require the person being served to respond, and a clear statement that in case of his failure to do so, judgment by default may be rendered against him for the relief demanded in the complaint.

The summons may also contain any additional information which will facilitate proper service.

(D) Designation of Manner of Service. The person seeking service or his attorney may designate the manner of service upon the summons. If not so designated, the clerk shall cause service to be made by mail or other public means provided the mailing address of the person to be served is indicated in the summons or can be determined. If a mailing address is not furnished or cannot be determined or if service by mail or other public means is returned without acceptance, the complaint and summons shall promptly be delivered to the sheriff or his deputy who, unless otherwise directed, shall serve the summons.

(E) Summons and Complaint Served Together--Exceptions. The summons and complaint shall be served together unless otherwise ordered by the court. When service of summons is made by publication, the complaint shall not be published. When jurisdiction over a party is dependent upon service of process by publication or by his appearance, summons and complaint shall be deemed to have been served at the end of the day of last required publication in the case of service by publication, and at the time of appearance in jurisdiction acquired by appearance. Whenever the summons and complaint are not served or published together, the summons shall contain the full, unabbreviated title of the case.

Indiana Rules of Trial Procedure, Rule 6(C) Service of pleadings and Rule 12 motions.

A responsive pleading required under these rules, shall be served within twenty [20] days after service of the prior pleading. Unless the court specifies otherwise, a reply shall be served within twenty [20] days after entry of an order

requiring it. The service of a motion permitted under Rule 12 alters the time for service of responsive pleadings as follows, unless a different time is fixed by the court:

- (1) if the court does not grant the motion, the responsive pleading shall be served in ten [10] days after notice of the court's action;
 - (2) if the court grants the motion and the corrective action is allowed to be taken, it shall be taken within ten [10] days, and the responsive pleading shall be served within ten [10] days thereafter.
-

Michigan Court Rules 2.102 describes a summons in that state.

Rule 2.101 Form and Commencement of Action

- (A) Form of Action. There is one form of action known as a “civil action.”
- (B) Commencement of Action. A civil action is commenced by filing a complaint with a court.

Rule 2.102 Summons; Expiration of Summons; Dismissal of Action for Failure to Serve

- (A) Issuance. On the filing of a complaint, the court clerk shall issue a summons to be served as provided in MCR 2.103 and 2.105. A separate summons may issue against a particular defendant or group of defendants. A duplicate summons may be issued from time to time and is as valid as the original summons.
- (B) Form. A summons must be issued “In the name of the people of the State of Michigan,” under the seal of the court that issued it. It must be directed to the defendant, and include

- (1) the name and address of the court,
- (2) the names of the parties,
- (3) the file number,
- (4) the name and address of the plaintiff’s attorney or the address of a plaintiff appearing without an attorney,
- (5) the defendant’s address, if known,
- (6) the name of the court clerk,

- (7) the date on which the summons was issued,
- (8) the last date on which the summons is valid,
- (9) a statement that the summons is invalid unless served on or before the last date on which it is valid,
- (10) the time within which the defendant is required to answer or take other action, and
- (11) a notice that if the defendant fails to answer or take other action within the time allowed, judgment may be entered against the defendant for the relief demanded in the complaint.

[Remainder of Rule 2.102 omitted]

Rule 2.108 Time

(A) Time for Service and Filing of Pleadings.

- (1) **A defendant must serve and file an answer or take other action permitted by law or these rules within 21 days after being served with the summons and a copy of the complaint** in Michigan in the manner provided in MCR 2.105(A)(1).
- (2) If service of the summons and a copy of the complaint is made outside Michigan, or if the manner of service used requires the summons and a copy of the complaint to be sent by registered mail addressed to the defendant, the defendant must serve and file an answer or take other action permitted by law or these rules within 28 days after service.
- (3) When service is made in accordance with MCR 2.106, the court shall allow a reasonable time for the defendant to answer or take other action permitted by law or these rules, but may not prescribe a time less than 28 days after publication or posting is completed.
- (4) A party served with a pleading stating a cross-claim or counterclaim against that party must serve and file an answer or take other action permitted by law or these rules within 21 days after service.
- (5) A party served with a pleading to which a reply is required or permitted may serve and file a reply within 21 days after service of the pleading to which it is directed.

(6) In an action alleging medical malpractice filed on or after October 1, 1986, unless the defendant has responded as provided in subrule (A)(1) or (2), the defendant must serve and file an answer within 21 days after being served with the notice of filing the security for costs or the affidavit in lieu of such security required by MCL 600.2912d.

(B) Time for Filing Motion in Response to Pleading. A motion raising a defense or an objection to a pleading must be served and filed within the time for filing the responsive pleading or, if no responsive pleading is required, within 21 days after service of the pleading to which the motion is directed.

[The rest of Rule 2.108 is omitted]

The Subcommittee's recommendations:

1. Change answer day to 21 days after the date of service. If that is a Saturday, Sunday, or legal holiday, then it would go to the next day that is not a Saturday, Sunday or legal holiday.
2. Delete the description of what should be in a citation, and instead promulgate a form citation that clerk's must follow. The citation should contain plain language advising the defendant that he, she, it has been served with notice of a lawsuit, and that a written answer must be filed by [the deadline] or a default judgment may be taken. The back side of the petition should say the same thing in Spanish.

Current TRCP 99.c requires a simply-stated notice that could be altered as follows:

“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 twenty-first (21st) day after you were served with this citation and petition, a default judgment may be taken against you. If the twenty-first (21st) day is a Saturday, Sunday,¹ or legal holiday, your written answer is due on the next day that is not a Saturday, Sunday, or a legal holiday.”

3. The requirement in Subsection (d), that the plaintiff to provide “a sufficient number of copies” of the pleading, should be deleted for efilers.

¹TRCP 6 prohibits service of process on a Sunday except for suits of injunction, attachment, garnishment, sequestration, or distress proceedings.

4. Rule 99 should require the clerk to email to the filing party a citation issued on an efiled petition.

Richard R. Orsinger
Subcommittee Chair