

**Senneff, Angie**

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**From:** Richard Orsinger [richard@momnd.com]  
**Sent:** Thursday, May 12, 2011 2:41 PM  
**To:** Senneff, Angie; Dawson, Alistar B.; Babcock, Chip; Bobby Meadows; Bruce Holbrook (Mike Hatchell's assistant); Buddy Low (assistant); Carl Hamilton; David Jackson; Eduardo Rodriguez; Elaine Carlson; Frank Gilstrap; Gene Storie ; Hayes Fuller; Hugh Rice Kelly; Jan P. Patterson (jan\_patterson@baylor.edu); Jeffrey S. Boyd; Jim Perdue Jr.; Judge Evans; Judge Lawrence; Judge Peeples; Judge Yelenosky; Justice Bland; Justice Brown; Justice Christopher; Justice Gaultney; Justice Gray; Justice Hecht; Justice Jennings; Justice Jennings (Home); Justice Medina; Justice Pemberton; Kennon Peterson; Kent Sullivan; Lamont Jefferson; Leigh Ann Bunker (S. Tipps' assistant); Levi Benton; Linda Riley (R. Hardin's assistant); Lisa Verm (A. Dawson's assistant); Mark Glasser; Mary Hamilton (B. Meadows' assistant); Mike Hatchell; Nina Cortell; Pamela Stanton Barron; Pamela Zantelli (L. Jefferson's assistant); Patti Crosthwait (S. Susman's assistant); Pete Schenckan; Professor Albright; Professor Carlson; Professor Dorsaneo; Professor Hoffman; R. H. Wallace (rhwallace@tarrantcounty.com); Ralph Duggins; Richard Munzinger; Roger Hughes; Roland Garcia, Jr.; Rusty Hardin; Sarah B. Duncan (sbd55@me.com); Shannon Ratliff; Sharon Magill (B. Dorsaneo's assistant); Skip Watson; Susman, Stephen; Stephen Tipps; Thomas Riney ; Tommy Jacks  
**Cc:** Dee Dee Jones; Mary Strickland  
**Subject:** RE: SCAC -- Amendment to Tex. R. Civ. P. 116 regarding electronic publication of citation by publication (correcting typographical error)

Dear SCAC members:

Our discussion at the SCAC meeting on March 25, 2011, reflected a desire for a change to Tex. R. Civ. P. 116 that would require (not just permit) publication at the newspaper's web site or on the government web site designed for this purpose, if either if available.

The Office of Court Administration is willing to put together a state web site as a prototype, and they are open to the possibility of maintaining such a web site on a permanent basis if the technology and cost can be worked out. The person I have been communicating with at the OCA does not believe that the Supreme Court can impose a new filing fee to cover the cost of a new state web site, and thinks it unlikely that the Court can reallocate any of the existing filing fees for that purpose. On the other hand, he didn't rule out the possibility that the OCA would absorb the cost of such a web site in its normal budget. The OCA will not be able to be very interactive on this question while the Legislature is in session.

Here are possible changes to Rule 116, taking into account the foregoing:

[First part of rule]

#### Rule 116. Service of Citation by Publication

The citation, when issued, shall be served by the sheriff or any constable of any county of the State of Texas or by the clerk of the court in which the case is pending, by having the same published once each week for four (4) consecutive weeks, the first publication to be at least twenty-eight (28) days before the return day of the citation. In all suits which do not involve the title to land or the partition of real estate, such publication shall be made in the county where the suit is pending, if there be a newspaper published in said county, but if not, then in an adjoining county where a newspaper is published. In all suits which involve the title to land or partition of real estate, such publication shall be made in the county where the land, or a portion thereof, is situated, if there be a newspaper in such county, but if not, then in an adjoining county to the county where the land or a part thereof is situated, where a

newspaper is published.

[Then add one of the following options]

[Option 1: either electronic newspaper or OCA web site]

In addition to the publication outlined above, the citation shall also be published in the electronic version of the newspaper, or in the Internet website maintained by the Office of Court Administration as a repository for this purpose, if either is available. The electronic publication shall be for a continuous period of twenty-eight (28) days before the return day of the citation.

[Option 2: both electronic newspaper and OCA web site]

In addition to the publication outlined above, the citation shall also be published in the electronic version of the newspaper, as well as on the Internet website maintained by the Office of Court Administration as a repository for this purpose, if available. The electronic publication shall be for a continuous period of twenty-eight (28) days before the return day of the citation.

### Discussion

David Peeples expressed an interest in knowing what cost there would be to adding electronic newspaper publication to traditional paper publication. Here is the information I have gathered.

San Antonio's Daily Commercial Recorder—the legal newspaper where many notices are published is the Daily Commercial Recorder. The cost of publishing citation required by TRCP 116 is \$2.34 per line for one day. Since Rule 116 requires four publishings, the cost for four publishings is \$9.36 per line. The Daily Commercial Recorder includes that in the electronic version of their newspaper, but that electronic version is only available to persons who subscribe to it. The electronic version keeps the citation posted continuously for the 28 days period before answer day. If you wish to have The Daily Commercial Recorder publish the citation at the San Antonio Express News' web site, it costs \$37.00 for 14, which must be doubled to achieve the 28 days required by TRCP 116, for a total additional cost of on-line publication of \$74.00. Recap—electronic publication is available at no additional cost at the Daily Commercial Recorder website; electronic publication at the Express-News web site costs \$74.00, above and beyond the print publication cost.

### Dallas Morning News

They charge \$2.50 per newspaper line for the printed citation by publication. That amount is multiplied times the number of days you want to run the notice. If you want to have an internet posting in addition to the printed notice, there is \$25.00 internet fee. If you post the citation on the internet, it will stay on line for 7 days and then be removed. If you want to repost it, it will cost another \$25.00, etc. However, if you tell them at the outset that you want each printed notice to be posted as well, then there is just one charge of \$25.00 for 28 days of on-line posting.

### Ft. Worth Star Telegram

They charge a per line, per day price. \$6.06 per line for Monday –Saturday, \$7.24 per line for Sunday. There is a \$10.00 fee to add an online notice. You would need to let them know up front that you want to run the notice 4 times or you will be charged the \$10.00 fee each time.

### Houston Chronicle

They charge \$100.00 per day for printing 100 lines. Each line over 100 is \$1.00 per line per day. One hundred lines for 4 days would be \$400.00. There is no additional charge for the on-line posting. The initial posting will online through the date the last posting expires.

Rules 106(b) and 244

Professor Carleson suggest two companion rule changes.

1) Rule 244 providing for appointment of an attorney ad litem. Add language that corresponds with the transcript of the last meeting to the effect that requires the attorney ad litem to make reasonable efforts to locate the defendant served by publication.

2) Rule 106b. Amend to make clear that substituted service may be made electronically when the court is satisfied that service by that method is reasonably calculated to give the D notice. (Mullane v Hanover standard)

Thanks.

Richard

**Senneff, Angie**

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**Subject:** FW: SCAC --Proposed amendment to Tex. R. Civ. P. 106(b) regarding electronic substitute service, and Rule 244 to require attorney ad litem to try to find the absent defendant

**Attachments:** Memo on Electronic Substitute Service.pdf

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**From:** Richard Orsinger [mailto:richard@momnd.com]

**Sent:** Thursday, May 12, 2011 3:11 PM

**To:** Senneff, Angie; Dawson, Alistar B.; Babcock, Chip; Bobby Meadows; Bruce Holbrook (Mike Hatchell's assistant); Buddy Low (assistant); Carl Hamilton; David Jackson; Eduardo Rodriguez; Elaine Carlson; Frank Gilstrap; Gene Storie ; Hayes Fuller; Hugh Rice Kelly; Jan P. Patterson (jan\_patterson@baylor.edu); Jeffrey S. Boyd; Jim Perdue Jr.; Judge Evans; Judge Lawrence; Judge Peeples; Judge Yelenosky; Justice Bland; Justice Brown; Justice Christopher; Justice Gaultney; Justice Gray; Justice Hecht; Justice Jennings; Justice Jennings (Home); Justice Medina; Justice Pemberton; Kennon Peterson; Kent Sullivan; Lamont Jefferson; Leigh Ann Bunker (S. Tipps' assistant); Levi Benton; Linda Riley (R. Hardin's assistant); Lisa Verm (A. Dawson's assistant); Mark Glasser; Mary Hamilton (B. Meadows' assistant); Mike Hatchell; Nina Cortell; Pamela Stanton Barron; Pamela Zanolli (L. Jefferson's assistant); Patti Crosthwait (S. Susman's assistant); Pete Schenkkan; Professor Albright; Professor Carlson; Professor Dorsaneo; Professor Hoffman; R. H. Wallace (rhwallace@tarrantcounty.com); Ralph Duggins; Richard Munzinger; Roger Hughes; Roland Garcia, Jr.; Rusty Hardin; Sarah B. Duncan (sbd55@me.com); Shannon Ratliff; Sharon Magill (B. Dorsaneo's assistant); Skip Watson; Susman, Stephen; Stephen Tipps; Thomas Riney ; Tommy Jacks

**Cc:** Dee Dee Jones; Mary Strickland

**Subject:** RE: SCAC --Proposed amendment to Tex. R. Civ. P. 106(b) regarding electronic substitute service, and Rule 244 to require attorney ad litem to try to find the absent defendant

SCAC member—

Follow up on Professor Elaine Carleson's two suggested rule changes. A memo is attached.

The same information is set out below:

May 12, 2011

#### Proposed Changes to Rules 106(b) and 244

Professor Carleson has suggested two changes to go along with requiring electronic publishing of citation by publication.

1) Rule 106b. Amend to make clear that substituted service may be made electronically when the court is satisfied that service by that method is reasonably calculated to give the D notice. (Mullane v Hanover standard)

Current Rule:

#### Rule 106. Method of Service

(a) Unless the citation or an order of the court otherwise directs, the citation shall be served by any person authorized by Rule 103 by

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(1) delivering to the defendant, in person, a true copy of the citation with the date of delivery endorsed thereon with a copy of the petition attached thereto, or

(2) mailing to the defendant by registered or certified mail, return receipt requested, a true copy of the citation with a copy of the petition attached thereto.

(b) Upon motion supported by affidavit stating the location of the defendant's usual place of business or usual place of abode or other place where the defendant can probably be found and stating specifically the facts showing that service has been attempted under either (a)(1) or (a)(2) 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, with a copy of the petition attached, with anyone over sixteen years of age at the location specified in such affidavit; or

(2) by digital transmission or by publication through electronic media, where the affidavit or evidence shows that such transmission or electronic publication will be reasonably effective to give the defendant notice of the suit; or

(3) in any other manner that the affidavit or other evidence before the court shows will be reasonably effective to give the defendant notice of the suit.

2) Rule 244 providing for appointment of an attorney ad litem. Add language that corresponds with the transcript of the last meeting to the effect that requires the attorney ad litem to make reasonable efforts to locate the defendant served by publication.

#### Rule 244. On Service by Publication

Where service has been made by publication, and no answer has been filed nor appearance entered within the prescribed time, the court shall appoint an attorney to make reasonable efforts to locate the defendant served by publication and to defend the suit in behalf of the such defendant if the defendant cannot be found, and judgment shall be rendered as in other cases; but, in every such case a statement of the evidence, approved and signed by the judge, shall be filed with the papers of the cause as a part of the record thereof. The court shall allow such attorney a reasonable fee for his services, to be taxed as part of the costs.

May 12, 2011

Proposed Changes to Rules 106(b) and 244

Professor Carleson has suggested two changes to go along with requiring electronic publishing of citation by publication.

1) Rule 106b. Amend to make clear that substituted service may be made electronically when the court is satisfied that service by that method is reasonably calculated to give the D notice. (Mullane v Hanover standard)

Current Rule (proposed new language underlined):

Rule 106. Method of Service

(a) Unless the citation or an order of the court otherwise directs, the citation shall be served by any person authorized by Rule 103 by

(1) delivering to the defendant, in person, a true copy of the citation with the date of delivery endorsed thereon with a copy of the petition attached thereto, or

(2) mailing to the defendant by registered or certified mail, return receipt requested, a true copy of the citation with a copy of the petition attached thereto.

(b) Upon motion supported by affidavit stating the location of the defendant's usual place of business or usual place of abode or other place where the defendant can probably be found and stating specifically the facts showing that service has been attempted under either (a)(1) or (a)(2) 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, with a copy of the petition attached, with anyone over sixteen years of age at the location specified in such affidavit; or

(2) by digital transmission or by publication through electronic media, where the affidavit or evidence shows that such transmission or electronic publication will be reasonably effective to give the defendant notice of the suit; or

(3) in any other manner that the affidavit or other evidence before the court shows will be reasonably effective to give the defendant notice of the suit.

2) Rule 244 providing for appointment of an attorney ad litem. Add language that corresponds with the transcript of the last meeting to the effect that requires the attorney ad litem to make reasonable efforts to locate the defendant served by publication.

Current Rule (proposed additions underlined and deletions struck through):

Rule 244. On Service by Publication

Where service has been made by publication, and no answer has been filed nor appearance entered within the prescribed time, the court shall appoint an attorney to make reasonable efforts to locate the defendant served by publication and to defend the suit in behalf of ~~the~~ such defendant if the defendant cannot be found, and judgment shall be rendered as in other cases; but, in every such case a statement of the evidence, approved and signed by the judge, shall be filed with the papers of the cause as a part of the record thereof. The court shall allow such attorney a reasonable fee for his services, to be taxed as part of the costs.