The Supreme Court of Texas

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September 1, 2016

Mr. Charles L. "Chip" Babcock
Chair, Supreme Court Advisory Committee
Jackson Walker L.L.P.
cbabcock@jw.com

Re: Referral of Rules Issues

Dear Chip:

The Supreme Court requests the Advisory Committee to study and make recommendations on the following matters.

Texas Rules of Civil Procedure 21a, 21c, 57, and 244. In the attached memoranda, the State Bar Court Rules Committee proposes amendments to Rules of Civil Procedure 21a, 21c, 57, and 244.

Amendments to the Justice Court Rules. In the attached emails, attorney Michael Scott proposes amendments to Part V of the Rules of Civil Procedure relating to discovery, obtaining a default judgment in a debt case, and sensitive data. The Court also asks the Committee to consider whether other changes to Part V are needed to improve practice in the justice courts.

Amendments to the Code of Judicial Conduct. Although the Committee has recommended that the Code of Judicial Conduct not be amended to permit a constitutional county court judge to serve as an arbitrator or mediator for compensation, the Court asks the Committee to draft such amendments, should the Court choose to adopt them. See the attached letter of Hon. Tom Pollard, Constitutional County Court Judge of Kerr County.

Amendments to the State Bar Rules. Article IV, § 5(A)(3) of the State Bar Rules prohibits a person who has ever been suspended or disbarred from the practice of law from serving as a State Bar director or officer. Effective June 14, 2016, Article III, § 9 of the Rules authorizes the Supreme Court Clerk to expunge an administrative suspension for nonpayment of membership fees from a member's record, but by its express terms, the rule does not authorize the expunction of a

disciplinary suspension. The Court asks the Committee to consider under what circumstances a member who has previously been suspended from the practice of law should be eligible to serve as a director or officer of the State Bar and to draft appropriate amendments to the Rules. See the attached letter from Thomas Keyser.

Whether the Deadlines Prescribed by Rule 53.7 of the Rules of Appellate Procedure Are Jurisdictional; Procedure for Filing Late Petition Due to Ineffective Assistance of Counsel. The Court has held that an indigent parent's right to appointed counsel under Section 107.013(a) of the Family Code extends to proceedings in the Court, including the filing of a petition for review. *In the Interest of P.M.*, No. 15-0171, 2016 WL 1274748, at *1 (Tex. Apr. 1, 2016). The Court occasionally receives a late petition for review or motion for extension of time to file a petition for review from a parent, filing pro se, who claims that the ineffective assistance of appointed counsel caused the parent to miss the deadline. The Court asks the Committee (1) to consider whether the deadline for filing a petition for review in Rule of Appellate Procedure 53.7 is jurisdictional; and (2) assuming that the deadline is not jurisdictional, to recommend a procedure for adjudicating a parent's claim that the ineffective assistance of counsel resulted in the parent's missing the deadline to file a petition for review. The Committee should draft any rule amendments that it deems necessary. Judicial decisions that may inform the Committee's work include *Bowles v. Russell*, 551 U.S. 205 (2007); *Glidden Co. v. Aetna Cas. & Sur. Co.*, 291 S.W.2d 315 (Tex. 1956); *Ex parte Wilson*, 956 S.W.2d 25 (Tex. Crim. App. 1997); and *Olivo v. State*, 918 S.W.2d 519 (Tex. Crim. App. 1996).

As always, the Court is grateful for the Committee's counsel and your leadership.

Sincerely,

Nathan L. Hecht
Chief Justice

Attachments

STATE BAR OF TEXAS COMMITTEE ON COURT RULES

PROPOSED AMENDMENT TO RULE OF CIVIL PROCEDURE 21a

I. Exact language of existing Rule: TRCP 21a (Methods of Service)

(a) Methods of Service. Every notice required by these rules, and every pleading, plea, motion, or other form of request required to be served under Rule 21, other than the citation to be served upon the filing of a cause of action and except as otherwise expressly provided in these rules, may be served by delivering a copy to the party to be served, or the party's duly authorized agent or attorney of record in the manner specified below:

> (1) Documents Filed Electronically. A document filed electronically under Rule 21 must be served electronically through the electronic filing manager if the email address of the party or attorney to be served is on file with the electronic filing manager. If the email address of the party or attorney to be served is not on file with the electronic filing manager, the document may be served on that party or attorney under subparagraph (2).
>
> (2) Documents Not Filed Electronically. A document not filed electronically may be served in person, by mail, by commercial delivery service, by fax, by email, or by such other manner as the court in its discretion may direct.

(b) When Complete.

> (1) Service by mail or commercial delivery service shall be complete upon deposit of the document, postpaid and properly addressed, in the mail or with a commercial delivery service.
>
> (2) Service by fax is complete on receipt. Service completed after 5:00 p.m. local time of the recipient shall be deemed served on the following day.
>
> (3) Electronic service is complete on transmission of the document to the serving party's electronic filing service provider. The electronic filing manager will send confirmation of service to the serving party.

(c) Time for Action After Service. Whenever a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period.

(d) Who May Serve. Notice may be served by a party to the suit, an attorney of record, a sheriff or constable, or by any other person competent to testify.

(e) Proof of Service. The party or attorney of record shall certify to the court compliance with this rule in writing over signature and on the filed instrument. A certificate by a party or an attorney of record, or the return of the officer, or the affidavit of any other person showing

service of a notice shall be prima facie evidence of the fact of service. Nothing herein shall preclude any party from offering proof that the document was not received, or, if service was by mail, that the document was not received within three days from the date that it was deposited in the mail, and upon so finding, the court may extend the time for taking the action required of such party or grant such other relief as it deems just.

(f) Procedures Cumulative. These provisions are cumulative of all other methods of service prescribed by these rules.

Amended by order of Dec. 13, 2013, eff. Jan. 1, 2014.

Comment to 2013 Change: Rule 21a is revised to incorporate rules for electronic service in accordance with the Supreme Court's order - Misc. Docket No. 12-9206, amended by Misc. Docket Nos. 13-9092 and 13-9164 - mandating electronic filing in civil cases beginning on January 1, 2014.

II. Proposed changes to existing rule:

(a) Methods of Service. Every notice required by these rules, and every pleading, plea, motion, or other form of request required to be served under Rule 21, other than the citation to be served upon the filing of a cause of action and except as otherwise expressly provided in these rules, may be served by delivering a copy to the party to be served, or the party's duly authorized agent or attorney of record in the manner specified below:

> (1) Documents Filed Electronically. A document filed electronically under Rule 21 must be served electronically through the electronic filing manager if the email address of the party or attorney to be served is on file with the electronic filing manager. If the email address of the party or attorney to be served is not on file with the electronic filing manager, the document may be served on that party or attorney under subparagraph (2).
>
> (2) Documents Not Filed Electronically. A**ny** document not filed electronically**, including discovery materials not to be filed,** may be served:
>
> **A)** in person**;**
>
> **B) to an attorney** by mail, **by** commercial delivery service, **by** fax, or by email **using the attorney's email address provided [*pursuant to Section 2A of Article III of the State Bar Rules*]**[1]**;**
>
> **C) to a party not represented by an attorney by mail, by commercial delivery service, by fax, or by email if the party has consented to email service under Rule 21;**

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[1] The Court Rules Committee understands that the State Bar of Texas and the Judicial Committee on Information Technology ("JCIT") are considering revisions to the State Bar Rules which may require an attorney to designate an official email address for service in the near future. The Court Rules Committee intends for this rule proposal to be considered in conjunction with, and harmonized with, any proposed changes to the State Bar Rules. Thus, this bracketed language is a placeholder that should be revised as appropriate, to be consistent with the amended State Bar Rules.

D) by any other method to which the parties agree in writing; or
E) by such other manner as the court in its discretion may direct.

(b) When Complete.

(1) Service by mail or commercial delivery service shall be complete upon deposit of the document, postpaid and properly addressed, in the mail or with a commercial delivery service.

(2) Service by fax is complete on receipt. Service completed after 5:00 p.m. local time of the recipient shall be deemed served on the following day.[2]

(3) Electronic service is complete on transmission of the document to the serving party's electronic filing service provider. The electronic filing manager will send confirmation of service to the serving party.

(4) Service by email is complete upon transmission.

(c) Time for Action After Service. Whenever a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail **or commercial delivery service**, three days ~~shall~~ **must** be added to the prescribed period.

(d) Who May Serve. Notice may be served by a party to the suit, an attorney of record, a sheriff or constable, or by any other person competent to testify.

(e) Proof of Service.

(1) Certificate of Service. The party or attorney of record shall certify to the court compliance with this rule in writing over signature and on the filed instrument. A certificate of service must be signed by the person who made the service and must state:

(A) the date and manner of service;

(B) the name and address of each person served; and

(C) if the person served is a party's attorney, the name of the party represented by that attorney.

(2) Evidence of Service. ~~The party or attorney of record shall certify to the court compliance with this rule in writing over signature and on the filed instrument.~~ A

[2] The subcommittee considered removing this sentence requiring service by 5 pm if by fax as antiquated or unnecessary in light of the seldom use of fax service and the fact that many attorneys now receive fax as an email. Ultimately, because of considerations unique to fax (e.g., that it is a paper which may sit on a fax machine, received but not actually seen over a weekend as an email would be), to leave this special provision for fax service in the rule.

certificate by a party or an attorney of record, or the return of the officer, or the affidavit of any other person showing service of a notice shall be prima facie evidence of the fact of service. Nothing herein shall preclude any party from offering proof that the document was not received~~,~~ or **receipt was delayed,** ~~, if service was by mail, that the document was not received within three days from the date that it was deposited in the mail,~~ and upon so finding, the court may extend the time for taking the action required of such party or grant such other relief as it deems just.

(f) Procedures Cumulative. These provisions are cumulative of all other methods of service prescribed by these rules.

Proposed Comment: Rule 21a provides that certain service is complete upon "transmission." Transmission is effected when the sender does the last act that must be performed by the sender. Service by other agencies is complete on delivery to the designated agency.

III. Brief statement of reasons for requested changes and advantages to be served by the proposed new rule:

There has been a great deal of comment from the Bar regarding confusion and loopholes in the new electronic service rules, and in particular the appropriate e-mail address for service. These revisions are meant to close some gaps and clarify expectations for attorneys.

For revision to 21a(a)(2), the term "Discovery Materials Not to Be Filed," is used and is a reference to TRCP 191.4.

The change to 21a(b)(4) "upon transmission" is taken from Fed. R. Civ. P. 5(b)(2)(E). The proposed comment is also borrowed from the Fed. R. Civ. P. 5.

The change to 21a(a)(2) is to accommodate users (pro se users) without email addresses. The proposed change would only permit a party to serve a pro se party over email only after the pro se party has consented in writing to electronic service (evidencing the ability to correspond electronically).

Respectfully submitted,

Carlos R. Soltero
Chair, State Bar Court Rules Committee
March 7, 2016

STATE BAR OF TEXAS COMMITTEE ON COURT RULES

PROPOSED AMENDMENT TO RULE OF CIVIL PROCEDURE 21c

I. **Exact language of existing Rule:**

Rule 21c. Privacy Protection for Filed Documents

(a) Sensitive Data Defined. Sensitive data consists of:

(1) a driver's license number, passport number, social security number, tax identification number, or similar government-issued personal identification number;
(2) a bank account number, credit card number, or other financial account number; and
(3) a birth date, home address, and the name of any person who was a minor when the underlying suit was filed.

(b) Filing of Documents Containing Sensitive Data Prohibited. Unless the inclusion of sensitive data is specifically required by a statute, court rule, or administrative regulation, an electronic or paper document, except for wills and documents filed under seal, containing sensitive data may not be filed with a court unless the sensitive data is redacted.

(c) Redaction of Sensitive Data; Retention Requirement. Sensitive data must be redacted by using the letter "X" in place of each omitted digit or character or by removing the sensitive data in a manner indicating that the data has been redacted. The filing party must retain an unredacted version of the filed document during the pendency of the case and any related appellate proceedings filed within six months of the date the judgment is signed.

(d) Notice to Clerk. If a document must contain sensitive data, the filing party must notify the clerk by:

(1) designating the document as containing sensitive data when the document is electronically filed; or
(2) if the document is not electronically filed, by including, on the upper left-hand side of the first page, the phrase: "NOTICE: THIS DOCUMENT CONTAINS SENSITIVE DATA."

(e) Non-Conforming Documents. The clerk may not refuse to file a document that contains sensitive data in violation of this rule. But the clerk may identify the error to be corrected and state a deadline for the party to resubmit a redacted, substitute document.

(f) Restriction on Remote Access. Documents that contain sensitive data in violation of this rule must not be posted on the Internet.

Added by order of Dec. 13, 2013, eff. Jan. 1, 2014.

Comment to 2013 Change: Rule 21c is added to provide privacy protection for documents filed in civil cases.

II. Proposed changes to existing rule:

Rule 21c. Privacy Protection for Filed Documents

(a) Sensitive Data Defined. Sensitive data consists of:

(1) **all but the last three digits of a government-issued personal identification number, such as** a driver's license number, passport number, social security number, **personal** tax identification number, or similar government-issued personal identification number;

(2) **for an open bank account, an open credit card account, or any other open financial account, all but the last four digits of the** ~~a bank account number, credit card number, or other financial~~ account number; ~~and~~

(3) ~~a birth date,~~ **a person's month and day of birth; and**

(4) the **name and** home address~~, and the name~~ of any person who was a minor when the ~~underlying~~ suit was filed.

(b) Filing of Documents Containing Sensitive Data Prohibited. Sensitive data must be included in filed documents if the inclusion of sensitive data is specifically required by a statute, court rule, or administrative regulation. For other documents, sensitive data must be redacted.

(c) Redaction of Sensitive Data; Retention Requirement-**Option for Filing a Reference List.**

(1) Sensitive data must be redacted by using the letter "X" in place of each omitted digit or character or by removing the sensitive data in a manner indicating that the data has been redacted. The filing party must retain any unredacted version of the filed document during the pendency of the case and any related appellate proceedings filed within six months of the date the judgment is signed.

(2) A document that contains redacted sensitive data may be filed with a reference list, accompanied by the notice required under (d), that lists each item of redacted sensitive data and specifies an appropriate identifier that uniquely corresponds to each item listed. Any reference in the case to a specified identifier will be construed to refer to the corresponding item of sensitive data.

(d) Notice to Clerk. If a **filed** document must contain sensitive data **under (b) or is a reference list permitted under (c)**, the filing party must notify the clerk by:

(1) designating the document as containing sensitive data when the document is electronically filed; or

(2) if the document is not electronically filed, by including, on the upper left-hand side of the first page, the phrase: "NOTICE: THIS DOCUMENT CONTAINS SENSITIVE DATA."

(e) Non-Conforming Documents. The clerk may not refuse to file a document that contains sensitive data in violation of this Rule. But the clerk may identify the error to be corrected and state a deadline for the party to resubmit a redacted, substitute document.

(f) Restriction on Remote Access. Documents that contain sensitive data ~~in violation of this rule~~ must not be **made available remotely to any person other than the court, the parties, or the parties' counsel** ~~posted on the Internet~~.

Added by order of Dec. 13, 2013, eff. Jan. 1, 2014.

Comment to 2013 Change: Rule 21c is added to provide privacy protection for documents filed in civil cases.

Proposed additional comment: Rule 21c is amended to modify the definition of "sensitive data," incorporate a procedure for filing a reference list that identifies sensitive data that has been redacted from filed documents that can be accessed remotely, and clarify the scope of permissible remote access to documents that contain sensitive data and have been filed in compliance with Rule 21c. Documents that contain sensitive data in violation of Rule 21c should not be made available remotely to any person other than the court. Remote access means any access other than in-person, physical access at a courthouse.

III. **Brief statement of reasons for requested changes and advantages to be served by the proposed revisions:**

The Texas Supreme Court and the Court Rules Committee have received feedback regarding the effects of existing Rule 21c. Based on that feedback, it appears there are perceived inconsistencies between existing Rule 21c and other laws (e.g., Section 30.014 of the Texas Civil Practice and Remedies Code), difficulties in implementing aspects of existing Rule 21c, and unintentional consequences of the extent of redaction required under existing Rule 21c. These proposed revisions are intended to address those inconsistencies, facilitate compliance with sensitive-data requirements, and strike the appropriate balance between protecting sensitive data and generating a court record that is sufficiently detailed to facilitate the proper processing and disposition of cases.

The provision for a "reference list" in part (c) is borrowed from the Federal Rule of Civil Procedure 5.2(g). This option is an attempt to facilitate disposition in matters where redaction is necessary but where an exact identity of the person/account number/etc. is required for disposition. The Committee is concerned, however, that even though these reference lists are marked as containing sensitive data, the public can still access them at the courthouse. The Committee thus asks the Court to consider an automatic sealing of reference lists, which would require an accompanying amendment to Texas Rule of Civil Procedure 76a. The right to file reference lists under seal, without going through the typical Rule 76a sealing procedures, would be consistent with Federal Rule of Civil Procedure 5.2(g). In case the Court does not want to allow the automatic sealing of reference lists,

STATE BAR OF TEXAS COMMITTEE ON COURT RULES

PROPOSED AMENDMENT TO RULE OF CIVIL PROCEDURE 57

I. Exact language of existing Rule: TRCP 57

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, with his State Bar of Texas identification number, address, telephone number, email address, and if available, fax number. A party not represented by an attorney shall sign his pleadings, state his address, telephone number, email address, and, if available, fax number.

II. Proposed changes to existing rule:

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, with his State Bar of Texas identification number, address, telephone number, email address , and if available, fax number. A party not represented by an attorney shall sign his pleadings, state his address, telephone number, **and, if available,** email address **and** fax number. **Information provided under this Rule may be used for service under Rules 21 and 21a.**

III. Brief statement of reasons for requested changes and advantages to be served by proposed new rule:

Elsewhere in the Rules, e-filing is permissive for parties not represented by an attorney. *E.g.*, Tex. R. Civ. P. 21(f)(1). The email address of a party not represented by an attorney who does not file electronically is not required to be included on a document. Tex. R. Civ. P. 21(f)(2). This proposed change makes Rule 57 consistent with other Rules.

Respectfully submitted,

Carlos R. Soltero
Chair, State Bar Court Rules Committee
March 7, 2016

STATE BAR OF TEXAS COMMITTEE ON COURT RULES

PROPOSED AMENDMENT TO RULE OF CIVIL PROCEDURE 244

I. Exact language of existing Rule:

TRCP 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 defend the suit in behalf of the defendant, 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.

II. Proposed changes to existing rule:

TRCP 244. ON SERVICE BY PUBLICATION

244.1 APPOINTMENT OF ATTORNEY. If service has been made by publication and no answer has been filed nor appearance entered within the prescribed time, the court must appoint an attorney who, without acting as an attorney for any party, must use due diligence to try to locate the defendant.

244.2 REPORT OF ATTORNEY. The appointed attorney must make a report in open court or file a report with the court not later than the thirtieth day after being appointed, or within such other reasonable time period as the court may allow. The report must describe the parties' attempts to locate the defendant or obtain service of nonresident notice, describe the appointed attorney's attempts to locate the defendant, and provide the defendant's location, if discovered. No judgment on service by publication may be granted before the report is made and the court finds that the defendant cannot be located or personal service cannot be obtained.

244.3 DISCHARGE OF ATTORNEY. The court must discharge the appointed attorney from any further duties upon receiving a report from the attorney that complies with this Rule. The appointed attorney will have no duty or authority to represent the defendant on the merits of the case or to appeal any judgment in the case.

244.4 FEES AND EXPENSES. The court must award the attorney a reasonable fee for services provided and all reasonable expenses incurred during the appointment, to be taxed as part of the costs in the judgment rendered by the court.

III. Brief statement of reasons for requested changes and advantages to be served by the proposed revisions:

Under the current Rule 244, which provides for the appointment of an attorney to defend a suit in which service is made by publication, appointed attorneys have often perceived a duty to exhaust all remedies available to the non-appearing defendant and, in many cases, to represent the defendant's interests on appeal. The fees for these services are taxed as costs, ultimately borne by the plaintiff. *See Cahill v. Lyda*, 826 S.W.2d 932 (Tex. 1992).

The practice of appointing an attorney for an absent defendant has its roots in Mexican and Spanish law and was adopted in Texas after Texas attained statehood. *See* Millar, Jurisdiction Over Absent Defendants: Two Chapters in American Civil Procedure, 14 La. L. Rev. 321, 335-335 (1954). This practice reflects a minority view in American jurisprudence, having been adopted by only four states. *Id.* At 335-38 (adopting Spanish law were Texas, Louisiana, Kentucky and Arkansas). One of those states, Louisiana, has abandoned the Spanish rule in favor of a rule similar to the rule proposed here. *See* La. Code Civ. Proc. Ann. art. 5094 (West 2003).

The proposed Rule 244 limits and clarifies the role of the appointed attorney, whose duties would end after the attorney submits a report documenting the efforts made to locate the defendant and provide notice of the proceedings. The Committee believes that the proposed rule, by preventing automatic entry of default judgments against defendants who can be located, accomplishes the primary aim of the current rule. The Committee also notes that when a default judgment is entered following service by publication, Rule 329 allows the defendant two years in which to file a motion for new trial seeking to set aside the judgment.

The principal advantage of the proposed rule is that it reduces the cost of the litigation. The proposed rule, by providing that the appointed attorney is not responsible for defending the suit or pursing an appeal, and by requiring fees and expenses awarded to be reasonable, eliminates the often substantial fees and expenses associated with those responsibilities. Moreover, by clarifying that the appointed attorney does not represent the defendant, the proposed rule addresses the concern that under the current rule, the appointed attorney might owe a duty to a non-appearing defendant who later comes forward and alleges the representation was inadequate. By eliminating the specter of liability to the absent defendant, the proposed rule eliminates the current incentive for attorneys to render services and incur expenses whose benefit to the absent defendant cannot be justified in light of their cost to the plaintiff.

Respectfully submitted,

Carlos R. Soltero
Chair, State Bar Court Rules Committee
June 7, 2016

however, the Committee has proposed that the filing of reference lists be optional, rather than mandatory, which should mitigate filing parties' privacy concerns.

Section 102.008 of the Texas Family Code requires that the name and date of birth of a child be set forth in a petition. The Committee is aware of the confusion created by the apparent conflict between this widely used statute and the requirements of existing Rule 21c. Further, the Committee has received information suggesting that, in many cases, the Office of the Attorney General ignores existing Rule 21c altogether in suits involving minors, including suits other than those arising under Section 102.008 of the Texas Family Code. But the Committee has not proposed amendments to address this issue because the Committee concluded that existing Rule 21c adequately describes the proper procedure for filing documents that must contain sensitive data—e.g., because the inclusion of such data is statutorily required.

The Committee asks the Court to consider whether any of the sensitive data should be subject to sealing by another rule change including a sensitive data repository or potential modifications to Rule 76a. The Committee also had concerns about the retention requirements, if any, beyond the pendency of the case. In particular, the Committee believes the current redaction requirements may prevent parties from properly providing a complete record on appeal unless a 76a sealing order is in place.

In addition, the Committee considered that the retention requirement (as limited to pendency of the case and any related appellate proceedings filed within six months of the date the judgment is signed) may create issues for persons who were minors at the time of suit, but are trying to find/access records of that suit after reaching majority if that occurs after the retention period has expired.

Respectfully submitted,

Carlos R. Soltero
Chair, State Bar Court Rules Committee
June 7, 2016

Martha Newton

From: Martha Newton
Sent: Friday, June 24, 2016 2:07 PM
To: Martha Newton
Subject: Justice Court Issues / Suggested Rule Changes

From: Michael Scott [mailto:mscott@scott-pc.com]
Sent: Thursday, May 05, 2016 10:56 AM
To: Martha Newton <Martha.Newton@txcourts.gov>
Subject: RE: Justice Court Issues / Suggested Rule Changes

Martha,

First, thank you for keeping me in the loop.

Second, if the court is considering Justice Court issues more broadly ….

Appearance Requirement to Obtain Default

Rule 508.3(c) provides that ---

"The judge **may** enter a default judgment without a hearing if the plaintiff submits sufficient written evidence of its damages **and should do so to avoid undue expense and delay**. Otherwise, the plaintiff may request a default judgment hearing at which the plaintiff must appear, in person **or by telephonic or electronic means**, and prove its damages."

The judges of the justice court routinely require our attorneys to attend a prove-up hearing, even when the judge is willing to grant default judgment on the submitted evidence. In speaking with my docketing clerks, **less than 10% of the justices will grant a default on submission**. Further, essentially none of justice courts are allowing for telephonic or electronic hearings. As a result, my travel and appearance counsel budget for Texas is regularly more than $40,000 per month; the vast majority of which is avoidable. It would be one thing if we were rolling in the dough, but …. Let's just say this is becoming a make-or-break issue for us.

The expressed intent of the Court in enacting Rule 508.3(c) was to "avoid undue expense and delay." Unfortunately, iIn this regard, the rule has utterly failed. It is my opinion that the justice court judges view the imposition of the cost and inconvenience of our appearances as a moderating factor which regulates the filing of collection cases in Texas.

Recommendation: Make the granting of default mandatory upon the submission of an established set of written evidence.

Redaction of Sensitive Data

First, the relevant rules –

RULE 21c. PRIVACY PROTECTION FOR FILED DOCUMENTS, provides as follows:

(a) Sensitive Data Defined. Sensitive data consists of:

…

(2) a bank account number, **credit card number**, or other financial account number;

(3) birth date, **a home address**, and the name of any person who was a minor when the underlying suit was filed.

(b) Filing of Documents Containing Sensitive Data Prohibited. Unless the inclusion of sensitive data is specifically required … an electronic or paper document … may not be filed with a court **unless the sensitive data is redacted**.

The Debt Collection Rules for Justice Court provide as follows –

RULE 502.2. PETITION

(a) Contents. To initiate a lawsuit, a petition must be filed with the court. A petition **must contain**:

(1) the name of the plaintiff;

(2) …

(3) the name, **address**, and telephone number, if known, of the defendant;

RULE 508.2. PETITION

(a) Contents. In addition to the information required by Rule 502.2, a petition filed in a lawsuit governed by this rule must contain the following information:

(1) Credit Accounts. In a claim based upon a credit card, revolving credit, or open account, the petition **must state**:

…

(B) **the account number** (which may be masked)

Issue 1: What constitutes redaction under Rule 21c is not defined. The majority of attorneys in my practice area have construed the redaction requirement to mean every aspect of the data. As such, an account number is not redacted to "XXXXXXXXXX1234;" instead it is redacted to "XXXXXXXXXXXXXX."

Issue 2: The two sets of rules seemingly contradict each other. Under Rule 21c, I would need to file a credit card collection case against Joe Smith, living at XXXXXXXXXXXXXXX, XXXXXXXX XX XXXXX (full redaction of the home/service address) for account number XXXXXXXXXXXXXXXXXX; however, under Rules 502.2 and 508.2, I am required to state the home address and account number. In the real world, these issues are resolved by reasonable people trying to meet the intent of the rules; even if the language of the rules do not entirely mesh together. After all, the "credit card" number is for a closed account and cannot be utilized by anyone for any purpose. Unfortunately, my clients are national banks with internal regulatory and legal compliance sections. As such, they get slightly crazy when trying to resolve these discrepancies.

Recommendation: Rule 21c be revised to (a) be more specific as to what is to be redacted and under what circumstances, and (2) the define the extent to which the information needs to be redacted.

Well, that's it for now. I hope I haven't overstayed my welcome.

Sincerely,
Michael Scott

From: Michael Scott [mailto:mscott@scott-pc.com]
Sent: Wednesday, April 13, 2016 11:50 AM
To: Martha Newton <Martha.Newton@txcourts.gov>
Cc: Teri Mace <TeriM@scott-pc.com>
Subject: Justice Court Issues / Suggested Rule Changes

Ms. Newton,

My name is Michael Scott. I am an attorney in the Dallas area and I am the president of the Texas Creditors' Bar Association "TXCBA").

The TXCBA's membership is largely comprised of law firm which serve the legal recoveries space for national clients such as Bank of America, Capital One Bank and Discover Bank, as well as a variety of national debt buyers. I would estimate that TXCBA law firms file approximately 4,000+ cases per month in Texas, the vast majority of which are filed in Texas Justice Courts.

As you are aware, the Supreme Court made substantial changes to the Justice Court rules of civil procedure in 2013. I was actively involved in that process, attending and speaking at two separate Supreme Court Advisory Committee meetings, and I worked with your predecessor, Marisa Secco, in helping shape the final form of the Justice Court rules. During one of those meetings, I had an unanticipated and, I gather, somewhat uncharacteristic five minute exchange with Chief Justice Hecht during my public comment.

Due to the case volume handled by TXCBA member firms, we have significant insight into the behavior of the Texas Justices Courts. Members of our association are noticing a slow progression of these courts away from what I understood to be the intent of the 2013 rule changes. This is occurring in two primary areas:

Discovery
Proof of damages

DISCOVERY

Rule 500.9(a), Pretrial Discovery, provides –

> **Pretrial discovery is limited to that which the judge considers reasonable and necessary.** Any requests for pretrial discovery must be presented to the court for approval by written motion. The motion must be served on the responding party. **Unless a hearing is requested, the judge may rule on the motion without a hearing.**

Discovery Issue 1 - There is little or no effort by many Justice Courts to address the requirement that discovery must be "reasonable and necessary." Instead. discovery is often propounded solely for the purpose of harassment. For example, proponents seek policies and procedures of national banks, employee rosters, all recorded telephone conversations, etc. Though properly objected to and rarely enforced, this discovery serves as a macabre dance between the attorney actors; with the primary/only intent being to harass the responding party. Further, it is not uncommon for the permitted discovery to go far beyond the limits of a

Level 1 Discovery Control Plan; allowing for 30+ interrogatories and/or requests for production. Apparently, if you have a $100,000 claim you only get 15 interrogatories, but if you have a $1,500 claim, you get 30. …. I apologize. Now, I am just ranting.

There is also the periodic attempt to compel a bank officer to appear for deposition. Debt collection cases are built on business records. These records are maintained by entities with multiple layers of federal regulatory oversight, including the Office of Comptroller of Currency, the Federal Trade Commission, and the Consumer Financial Protection Bureau. There are no witnesses with personal knowledge of credit card purchases ... these are proven-up by business records. As such, a deposition is never warranted and is always sought as a means of harassment. If the consumer attorney wants to delve into the inner workings of the US credit industry, they should move to a higher forum than a Texas Justice Court.

Discovery Issue 2 - Motions for discovery are filed by consumer attorneys as a matter of course and make no effort to justify the request; yet these motions are generally granted by the courts within days of their filing. This practice defeats the purpose of Rule 500.9(a). To grant a motion which is made without any grounds being offered, belies a prejudice by justices which is inconsistent with their obligation to the court and to the law. Further, to do so without allowing a reasonable opportunity to be heard subverts the expressed requirement of the rule.

Proposed Solution

In 2013, the TXCBA advocated a basic disclosure rule; requiring that all documents the creditor was going to rely upon at trial be provided to the defendant within an established time-frame. A simple disclosure rule, similar to Rule 194, removes all of the gamesmanship which currently pervades these cases, while allowing for adequate notice and case development by all parties.

PROOF OF DAMAGES

In 2013, the Justice Court Rules Task Force advocated to the Supreme Court Advisory Committee and to the Court that debt collection cases **must** be proven up by a Business Records Affidavit. In response, the TXCBA and others urged that the damage affidavit, proving-up the unliquidated damage amount, should follow established Texas case law; specifically, *Texas Commerce Bank v. New*, 3 S.W.3d 515 (Tex. 1999). It was, in fact, this issue – the availability and sufficiency of a prove-up affidavit – which Justice Hecht and I discussed during the Advisory Committee meeting. Having been presented with two opposing requests regarding the nature of the proof of damages, the Supreme Court ultimately sided with the position which the TXCBA advanced; that position being that there is no rationale to require any more proof in a debt collection case than would be required in other cases in Texas.

Rule 508.3(b)(2), Form of Evidence, states –

> **Evidence of plaintiff's damages may be offered in a sworn statement** or in live testimony. The evidence offered **may** include documentary evidence.

In *Texas Commerce Bank*, the affiant swore that they had reviewed the account records and, based upon that review, the defendant owed $729,510.96. It was a short, one-and-a-half page affidavit which accomplished its singular purpose; to establish the amount of damages.

Issue - A growing number of Justice Courts are requiring the submission of a Business Records Affidavit in order for the plaintiff to prove-up its default. This trend is in contravention with the Supreme Court's prior consideration and decision regarding what level of proof required in a debt collection case.

The existing rule allows for a certain level of confusion. While not technically requiring account level documentation – "evidence of damages may be offered by a sworn statement" [Rule 508.3(b)(2) – it attempts to limit any consideration of documentation to only that is offered by way of a business records affidavit – "documentary evidence may be considered if it is attached to a sworn statement" [Rule 508.3(b)(4)]. As such, though I may be able to present to a court two years worth of account statements, addressed to the defendant and sent to the address at which service of process was perfected, the court cannot actually consider these records absent a business records affidavit from the bank. When dealing with legal recoveries on a national level, the burden imposed by a requirement to obtain a business records affidavit on every account is substantial. Under current operational policies, the affiant must compare every page of the printed document against the business's system of record, before they can sign the affidavit.

My understanding is that part of the purpose of the 2013 rule change was to simplify the proof of claims in the Justice Courts and to remove the technical strictures imposed by the Rules of evidence. Yet, I cannot offer what is manifestly obvious evidence of damages without meeting what was simply a restatement of the rules which the legislature had instructed to the Supreme Court to avoid.

Solution - Revise and simplify Rule 508.3(b) regarding proof of damages.

CONCLUSION

First, if you have made it this far, I thank you for you diligence. As previously mentioned, our association attorneys file 4,000+ lawsuits per month. As such, the issues presented here having significant impact on the way collection litigation is practiced in Texas. I have brought to you a couple of the primary areas in which we have concerns. After two-plus years of working with the new rules, there are a number of other topics which could be revisited. I would appreciate the opportunity to discuss these further.

Thank you for your time and consideration.

Sincerely,
Michael Scott
(972) – 428-3599

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THE COUNTY COURT
OF
KERR COUNTY, TEXAS

700 Main Street, Ste. 101, Kerrville, Texas 78028
Tel: (830) 792-2211
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COUNTY JUDGE
TOM POLLARD

COURT COORDINATOR
JODY GRINSTEAD

COMMISSIONERS COURT
H. A. "BUSTER" BALDWIN, PCT. 1
TOM MOSER, PCT. 2
JONATHAN LETZ, PCT. 3
BRUCE OEHLER, PCT. 4

May 12, 2015

Clerk of the Court
Supreme Court of the State of Texas
P. O. Box 12248
Austin, Texas 78711

Attn: Ms. Martha Newton

Re: Request for Revision/update of Cannon 4 F. of the Texas Code of Judicial Conduct

Dear Ms. Newton:

Background:

I am, and have been for 48 years, a licensed Texas Attorney as well as the duly elected constitutional County Judge of Kerr County, Texas. I estimate that 65% of my time involves handling judicial matters such as guardianships, probates, mental health commitments and I am the judge of the juvenile court. The balance of my time, 35% or so, is spent on administrative/non-judicial matters for Kerr County, Texas*.

The Texas Code of Judicial Conduct, Canon 4 F provides that "An active ***full-time*** (emphasis added) judge shall not act as an arbitrator or mediator for compensation outside the judicial system, but a judge may encourage settlement in the performance of official duties."

I note that I am permitted to have a private law practice for compensation so long as it does not relate to a matter pending in my Court, per Canon 4G and Canon 6 B(3).

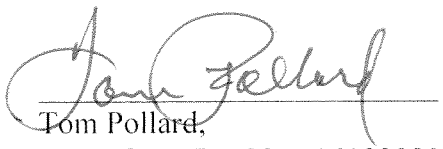
REQUEST:

I respectfully request that the Texas Supreme Court review and update the Texas Code of Judicial Conduct, specifically Canon 4F. by adding the following sentence (or similar language to the same effect), to-wit:

> "Constitutional County Judges may be mediators and/or arbitrators for compensation so long as the matters being mediated and/or arbitrated are not, and never have been, pending in said Judge's Court.

Thank you very much!.

Sincerely,



Tom Pollard,
Texas State Bar No.: 16100000
Kerr County Judge

Encl: (as stated)

* See attached general description of the Kerr County Judge judicial and administrative duties.

County Judge

The Texas Constitution vests broad judicial and administrative powers in the position of County Judge, who presides over a five-member commissioner's court, which has budgetary and administrative authority over county government operations.

The County Judge handles such widely varying matters as hearings for beer and wine license applications, hearing on admittance to state hospitals for the mentally ill and mentally handicapped, juvenile work permits and temporary guardianships for special purposes. The judge is also responsible for calling elections, posting election notices and for receiving and canvassing the election returns. The county judge may also perform marriages.

A County Judge in Texas may have judicial responsibility for certain criminal, civil and probate matters - responsibility for these functions vary from county to county. In those counties in which the judge has judicial responsibilities, the judge has appellate jurisdiction over matters arising from the justice courts. In Kerr County, when the office of County Judge is held by a licensed attorney, the County Judge has traditionally been the Presiding Judge of the Probate, Mental Health and Juvenile dockets. The County Judge is also head of civil defense and disaster relief, county welfare and in counties with a population of under 225,000 the judge prepares the county budget along with the County Auditor's Office.

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February 2, 2016

Chief Justice Nathan L. Hecht
Texas Supreme Court
P. O. Box 12248
Austin, Texas 78711

RE: State Bar of Texas-Board of Directors
Candidate Certification Form

Dear Chief Justice Hecht,

We have met a couple of times in passing at the local (San Antonio Bar) and State Bar Conventions over the last few years. More importantly, you eloquently provided the introduction of the recent TLAP Video (2015) where I and a couple of other attorneys tell their stories and share their experience, strength and hope regarding the subjects of Alcoholism, Chemical Dependency and Mental Illness.

In December, I was asked and nominated by several past SBOT Board members to run for Andy Kerr's seat which will expire by operation of law this June. Former Justice Rebecca Simmons (4th Court of Appeals) holds the other position from the 10th Bar District (San Antonio). All three (3) of us are former Presidents of the San Antonio Bar Association. In fact, I am the immediate Past President and I still occupy a seat on the local Board of Directors.

Last week after procuring more than the one hundred (100) signatures from the local Bar which is a requirement to have your name placed on the ballot, I discovered that paragraph 3 in the Candidate Certification Form which is referenced as an Excerpt under State Bar Rules, Article IV, Section 5 (Qualifications of Officers & Directors) (A) NO PERSON MAY SERVE AS AN OFFICER OR BOARD MEMBER who has ever been suspended from the practice of law precludes me from serving in this position.

As you may recall, I got sober in 1990 (11-11-1990). I surrendered my law license on March 15, 1991 to the clerk of the Texas Supreme Court. I received a one (1) year suspension with eight (8) months probated. That was almost 25 years ago. If this Rule cannot be amended with some sort of Plenary Powers of the Court or Waived in my case, perhaps the Texas Supreme Court could take up the matter in the near future to allow the next person with extenuating circumstances to hold such an esteemed position and continue being of service to his or her chosen profession (The State Bar of Texas).

The deadline to make the ballot for this year's election is March 1, 2016. I'll be 70 on my next birthday and to quote Peyton Manning – "This could be my last rodeo."

Kindest regards,

Thomas g. Keyser