

Commencing an Action: Texas

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A Q&A guide to commencing an action in Texas. This Q&A addresses the requirements for drafting and filing initiating papers, serving process and amending the complaint. Answers to questions can be compared across a number of jurisdictions (see *Commencing an Action: State Q&A Tool* (<http://us.practicallaw.com/4-578-1627>)).

OVERVIEW OF COMMENCING AN ACTION

1. What are the applicable rules for commencing an action?

TEXAS RULES OF CIVIL PROCEDURE

The Texas Rules of Civil Procedure are the main source of law governing the commencement of an action in Texas. The key rules are:

- Tex. R. Civ. P. 21 and 21a (filing and serving pleadings).
- Tex. R. Civ. P. 22 to 27 (institution of suit).
- Tex. R. Civ. P. 45 to 77 (pleadings generally).
- Tex. R. Civ. P. 78 to 82 (pleadings of a plaintiff).

Notably, Texas Rule of Civil Procedure 21(f) requires attorneys to electronically file documents (including any petition commencing an action) in courts requiring electronic filing. In courts where electronic filing is available but not mandatory, attorneys and unrepresented parties may file documents electronically but are not required to do so. Any electronically filed document must:

- List the email address of the attorney or unrepresented party filing the document (*Tex. R. Civ. P. 21(2)*).
- Contain a signature, which may be an e-signature containing either an "/s" followed by the typed name of the person filing the document or an electronic image of the signature (*Tex. R. Civ. P. 21(7)*).

- Be in text-searchable format, be directly converted to PDF rather than scanned (if possible), not be locked, and otherwise comply with the Technology Standards set by the Judicial Committee on Information Technology (*Tex. R. Civ. P. 21(8)(A) to (D)*).

The Texas Rules of Civil Procedure allow courts to establish local rules consistent with the Texas Rules of Civil Procedure. These rules vary from court to court. It is best practice to reference the local rules and procedures of the court in which the case is being filed.

TEXAS CIVIL PRACTICE & REMEDIES CODE

The Texas Civil Practice & Remedies Code is another source of law relating to Texas procedure. Certain provisions of the code are applicable to commencing an action, including for example:

- Tex. Civ. P. & Rem. Code Ann. §§ 9.011 to 9.012 (frivolous pleadings).
- Tex. Civ. P. & Rem. Code Ann., Chapter 17, Subchapter A (parties to be named in the lawsuit).
- Tex. Civ. P. & Rem. Code Ann., Chapter 17, Subchapter B (service of process).
- Tex. Civ. P. & Rem. Code Ann., § 30.004 (required notice to the Texas Attorney General for certain lawsuits).

The Texas Civil Practice & Remedies Code sets out detailed requirements for various types of lawsuits. Before commencing an action in Texas, attorneys should review the code to determine whether there are any particular rules governing the type of action to be filed.

2. Generally, in which trial level court must an action be commenced? Please address:

- Monetary thresholds for trial level courts.
- Territorial limits for trial level courts.

An action may be commenced, if the jurisdictional requirements are satisfied, in the:

- Justice Courts (see *Justice Courts*).
- County Courts (see *County Courts*).
- District Courts (see *District Courts*).



JUSTICE COURTS

Monetary Thresholds

Justice courts generally have jurisdiction in civil cases and those cases involving the foreclosure of mortgages and enforcement of liens on personal property, where the amount in controversy is not more than \$10,000, excluding interest (*Tex. Gov't Code Ann. § 27.031(a)(1), (3)*). However, for certain types of controversies, there is no monetary threshold. For example, the justice courts have original jurisdiction in cases involving:

- Forcible entry or detainer (*Tex. Gov't Code Ann. § 27.031(a)(2)*).
- Traffic violations outside a municipality's territorial limits (*Tex. Gov't Code Ann. § 27.031(4)*).

Territorial Limits

Venue is proper in the justice courts in the following cases:

- Civil matters involving claims for less than \$10,000 where either:
 - one defendant lives in the county; or
 - the events giving rise to the suit took place in the county (*Tex. Civ. Prac. & Rem. Code Ann. §§ 15.082, 15.091, 15.092*).
- Cases involving forcible entry and detainer within the county (*Tex. Civ. Prac. & Rem. Code Ann. § 15.084*).
- Traffic violations outside of a municipality's territorial limits (*Tex. Gov't Code Ann. § 27.031(a)(4)*).
- Foreclosure proceedings where the amount in controversy is otherwise within the court's jurisdiction (*Tex. Gov't Code Ann. § 27.031(a)*; *Tex. Civ. Prac. & Rem. Code § 15.090*).

COUNTY COURTS

Monetary Thresholds

Texas county courts have concurrent jurisdiction with:

- The justice courts in civil cases where the amount in controversy is between \$200 and \$10,000, excluding interest (*Tex. Gov't Code Ann. § 26.042(a)*).
- The district courts in civil cases where the amount in controversy is between \$500 and \$5,000, excluding interest (*Tex. Gov't Code Ann. § 26.042(d)*).

County courts-at-law (also known as statutory county courts) are specialized county courts with jurisdiction in civil cases involving claims between \$500 and \$200,000, excluding interest, statutory or punitive damages and penalties, and attorney's fees and costs (*Tex. Gov't Code Ann. § 25.0003(c)*).

Territorial Limits

Venue is generally proper in a county court if either:

- The case arose in the county.
- The defendant resides in the county.

(*Tex. Civ. Prac. & Rem. Code § 15.002*.)

However, the Texas Government Code prescribes limits to the jurisdiction of the county courts in certain counties. Before commencing any action in the county courts of Texas, litigants should review the code to determine whether there are any limitations to the commencement of the action in the particular county of filing. (*Tex. Gov't Code Ann. §§ 26.103 to 26.353*.)

In addition, many counties have specialized probate courts which hears all probate and guardianship matters (*Tex. Gov't Code Ann. § 25.003(3)*; *Tex. Est. Code Ann. § 32.001(a)*; *Tex. Est. Code Ann. § 1022.002(a)*).

Unless otherwise modified by statute, county courts-at-law have the same jurisdiction as the county courts located in that county (*Tex. Gov't Code Ann. § 25.0003*).

DISTRICT COURTS

Monetary Thresholds

District courts in Texas have original jurisdiction in civil cases where the amount in controversy is \$500 or more, excluding interest (*Tex. Gov't Code Ann. § 24.007(b)*).

Territorial Limits

The Texas Legislature determines the territorial limit of each district court, which varies depending on the court's location. In general, there must be at least one district court serving each county in Texas. However, in sparsely populated areas of the State, a single district court may serve several counties. Conversely, densely populated areas may have more than one district court. A map of the various judicial districts in Texas can be found online.

3. What documents must be prepared to commence an action? Are there official forms for the initiating papers?

DOCUMENTS

To commence a civil action in Texas, the plaintiff must file both:

- A petition.
- A case information sheet.

(*Tex. R. Civ. P. 22, 78(a), 501*.)

Filing these two documents enables a plaintiff to obtain a citation (the Texas courts' version of a summons), to serve on the defendant (*Tex. R. Civ. P. 99(a)*).

A citation:

- Notifies the defendant that the plaintiff commenced a lawsuit.
- Contains the timeframe within which the defendant must answer the petition.
- Informs the defendant that failure to file an answer may result in the court entering a default judgment.

(*Tex. R. Civ. P. 99(b)*.)

OFFICIAL FORMS

For any case commenced in Texas, a case information sheet must be filed with the plaintiff's petition. The form is available online (*Tex. R. Civ. P. 78(a)*). Instructions for completing this form are also available.

For those cases commenced in certain statutory probate courts of Texas, the plaintiff must also file a Supplementary Probate Court Information Sheet, an example of which is available online.

QUESTION SET:

4. Is an action commenced by serving or filing the initiating papers? If an action is commenced by service, by when must the complaint or other pleadings be filed?

A civil action is commenced when the plaintiff files a petition (*Tex. R. Civ. P. 22*).

5. How are the initiating papers filed? Please address:

- Whether the papers are filed electronically or by hard copy.
- Any fees for filing the initiating papers, and in what form those fees must be paid.

FILING INITIATING PAPERS

Initiating papers may be filed with the clerk of the court:

- By mail (*Tex. R. Civ. P. 5*).
- By personal delivery (*Tex. R. Civ. P. 21*).
- By fax (*Tex. Gov't Code Ann. § 51.807*).
- Electronically (*Tex. Gov't Code Ann. § 51.807*).

Before filing papers in any court, the filing party should check the court's local rules to determine whether electronic filing is mandated or permitted and, if so, what guidelines the court follows for electronic filings (see *Question 1*).

FILING FEES

There is no uniform filing fee in Texas. Specific filing fees vary from county to county and court to court.

Plaintiffs should visit the individual court's website or contact the clerk of the court clerk to obtain the court's fee schedule before commencing an action. Many courts' filing fees depend on the number of plaintiffs named in the lawsuit.

INITIATING PAPERS**6. What are the contents that must be included in the summons?**

The citation (the Texas courts' version of a summons) must include:

- "The State of Texas" at the top center of the citation, above the case caption.
- The name and location of the court.
- The date of the petition was filed.
- The date of issuance of the citation.
- The case number.
- The names of the parties.
- A notation that the citation is directed to the defendant.
- A notation of the when the defendant must file an answer.
- A notification to the defendant that failure to answer by the directed time may result in judgment for the plaintiff.
- The signature of the clerk of the court.
- The address of the clerk.

(*Tex. R. Civ. P. 99(b)*.)

7. What are the contents that must be included in the complaint?

In Texas, the document that commences a lawsuit is called a petition. The petition must contain, in the following order:

- A completed civil case information sheet (*Tex. R. Civ. P. 78a*).
- A case caption including:
 - the court's name;

- the cause number (for amended pleadings, otherwise the clerk will stamp with the cause number when the original petition is filed);
- the county of venue; and
- the judicial district number or other applicable court number.
- The case title.
- All paragraphs after the case caption, up to but not including the signature block, must be:
 - individually numbered; and
 - limited to a statement of a single set of circumstances (*Tex. R. Civ. P. 50*).
- A claim for relief, indicating that the plaintiff seeks:
 - only monetary relief of \$100,000 or less, including damages of any kind, penalties, court costs, expenses, prejudgment interest, and attorneys' fees;
 - monetary relief of \$100,000 or less and nonmonetary relief;
 - monetary relief over \$100,000 but not more than \$200,000;
 - monetary relief over \$200,000 but not more than \$1,000,000; or
 - monetary relief over \$1,000,000 (*Tex. R. Civ. P. 47(c)*).
- If known, the names and addresses of the parties (*Tex. R. Civ. P. 79*).
- Facts sufficient to "affirmatively demonstrate" that the court has jurisdiction to hear the matter (*Texas Ass'n of Business v. Texas Air Control Bd.*, 852 S.W.2d 440, 446 (*Tex. 1993*)).
- A statement in plain and concise language of each cause of action asserted (*Tex. R. Civ. P. 45*). This statement must give fair notice of the claim involved. (*Tex. R. Civ. P. 47(a)*).
- Any additional relief being sought (*Tex. R. Civ. P. 47(d)*).
- Any alternative claims for relief (for example, equitable relief). (*Tex. R. Civ. P. 48*).
- General and unliquidated damages, stating that "the damages sought are within the jurisdictional limits of the court" (*Tex. R. Civ. P. 47*). Special damages and exemplary damages must be specifically pleaded. (*Tex. R. Civ. P. 56*; *K-Mart Apparel Fashions Corp. v. Ramsey*, 695 S.W.2d 243, 247 (*Tex. App. 1985*)).
- Any general plea for attorney's fees. However, if it pleads a specific ground for recovery of attorney's fees, recovery will be limited to that ground. (*Heritage Gulf Coast Properties, Ltd. v. Sandalwood Apartments, Inc.*, 416 S.W.3d 642, 660 (*Tex. App. 2013*)).
- If the plaintiff wants a jury trial, the plaintiff should make a jury demand in the petition and pay the requisite fee on filing for the jury demand, though it may do so later as well (*Tex. R. Civ. P. 216*). The fee varies from court to court. A plaintiff should check the applicable court's fee schedule (generally available online) before filing. If the plaintiff cannot afford the fee, an affidavit stating the plaintiff's inability to pay may be submitted in lieu of the fee. (*Tex. R. Civ. P. 217*).
- A statement that all conditions precedent have been performed or have occurred (*Tex. R. Civ. P. 54*).
- If the plaintiff has an attorney, a signature block including:
 - the signature and name of the plaintiff's attorney;
 - the attorney's Texas bar number;
 - the attorney's address;
 - the attorney's telephone and fax numbers; and
 - the attorney's e-mail address (*Tex. R. Civ. P. 57*).

- If the plaintiff is not represented by an attorney, a signature block including:
 - the party's signature and name;
 - the party's address;
 - the party's telephone and fax numbers (if available); and
 - the party's e-mail address (*Tex. R. Civ. P. 57*).
- An attachment containing any exhibits referenced in the petition (*Tex. R. Civ. P. 59*).

The first numbered paragraph of the petition must also contain a description of the applicable discovery control plan (Level 1, 2, or 3) based on the type of suit and amount of damages sought (*Tex. R. Civ. P. 190.1*).

The Level 1 discovery control plan applies to:

- Suits for monetary damages of \$100,000 or less, excluding costs, prejudgment interest, and attorneys' fees, as authorized by Texas Rule of Civil Procedure 169.
- Divorce suits where:
 - there are no children; and
 - the marital estate is worth less than \$50,000.

(*Tex. R. Civ. P. 190.2(a)*)

The Level 2 discovery control plan applies to:

- Suits for monetary damages of more than \$100,000, excluding costs, prejudgment interest, and attorneys' fees.
- Divorce suits where:
 - there are children; or
 - where the marital estate is worth more than \$50,000.
- Suits for injunctive relief.

(*Tex. R. Civ. P. 190.3(a)*)

The Level 3 discovery control plan is a case-specific discovery plan that may only be used by the parties under a court order. A plaintiff must plead the circumstances requiring a specifically-tailored discovery order (*Tex. R. Civ. P. 190.4(a)*).

8. Must the plaintiff certify or swear to the complaint?

Plaintiffs must verify the petition only when they seek injunctive relief (*Tex. R. Civ. P. 680 and 682*).

9. What is the applicable pleading standard? Please address any:

- Key distinctions from Federal Rules of Civil Procedure 8.
- Different pleadings requirements for particular claims (for example, fraud).

STATE PLEADING STANDARD

In Texas, statements in a pleading must be sufficient to give fair notice of the claims involved (*Tex. R. Civ. P. 47(a)*).

KEY FEDERAL DISTINCTIONS

Unlike the Federal Rules of Civil Procedure:

- The Texas rules do not specifically require a plaintiff to allege that the court has jurisdiction over the case, only to allege facts sufficient to "affirmatively demonstrate" that the court has jurisdiction to hear

the matter (*Texas Ass'n of Business v. Texas Air Control Bd.*, 852 S.W.2d 440, 446 (*Tex. 1993*)).

- In Texas, a petition need only give fair notice to the parties of the claims involved in the cause of action. Federal rules require the complaint to contain facts sufficient to give rise to a claim that is plausible on its face. (*Tex. R. Civ. P. 47(a)*; *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (*2007*)).

PLEADING REQUIREMENTS FOR PARTICULAR CLAIMS

Negligence Per se

A plaintiff alleging negligence per se must:

- Specifically plead negligence per se.
- Identify the statute the plaintiff relies on that gives rise to the defendant's duty.

(*Murray v. O & A Exp., Inc.*, 630 S.W.2d 633, 636-37 (*Tex. 1982*)).

Rescission

In a breach of contract action, rescission must be specifically pleaded (*Burnett v. James*, 564 S.W.2d 407, 409 (*Tex. App. 1978*)).

Quantum Meruit

Quantum meruit must be specifically pleaded, whether pleaded either:

- As an alternative form of relief to a breach of contract action.
- On its own.

(*Centex Corp. v. Dalton*, 840 S.W.2d 952, 955 (*Tex. 1992*)).

Special & Exemplary Damages

A party must specifically plead special damages and exemplary damages (*Tex. R. Civ. P. 56*; *K-Mart Apparel Fashions Corp.*, 695 S.W.2d at 247).

10. Please address the circumstances, if any, where a complaint is not part of the initiating papers, including what papers are filed instead of a complaint.

In Texas, the petition is part of the initiating papers.

11. Please discuss any prerequisites for filing certain claims (for example, filing a complaint against a government entity).

TORTS AGAINST THE STATE OR A MUNICIPALITY

A notice of claim must be served on the governmental unit within six months of the date of the incident giving rise to the claim. The notice of claim must state:

- The damage or injury claimed.
- The time and place of the incident.
- The nature of the incident.

(*Tex. Civ. Prac. & Rem. Code* § 101.101.)

CLAIMS AGAINST HEALTHCARE PROVIDERS

Before filing a suit against a healthcare provider, plaintiffs must give written notice of the claim to the healthcare provider at least 60 days in advance (*Tex. Civ. Prac. & Rem. Code* § 74.051(a)). Notice must be provided by certified mail, return receipt requested, and the plaintiff must assert in its petition that it has complied with the notice requirement (*Tex. Civ. Prac. & Rem. Code* § 74.051(a)).

CONSUMER CLAIMS

Before filing suit for monetary damages against any defendant under the Texas Deceptive Trade Practices Act, the consumer must give written notice to that defendant at least 60 days in advance. The notice must contain:

- Reasonable detail of the consumer's specific complaint.
- The amount of economic damages, damages for mental anguish and expenses (including attorneys' fees), if any, reasonably incurred by the consumer in asserting the claim against the defendant.

(*Tex. Bus. Code Ann. § 17.505(a)*.)

Compliance with these notice provisions is not required if either:

- Providing notice in advance of 60 days of filing suit would prevent the claim from being presented within the statute of limitations.
- The claim is asserted as a counterclaim, the court shall abate the lawsuit.

In these instances, the defendant will be given an additional 60 days from the time of receipt of the notice to meet its own statutory prerequisites to defending the action. (*Tex. Bus. Code Ann. §§ 17.505(b), 17.506*.)

SERVICE OF PROCESS

12. When must the defendant be served with process? Can the time to serve the defendant be lengthened?

SERVING THE DEFENDANT WITH PROCESS

There is no statutory time limit for serving process on the defendant. However, a plaintiff must ensure that service is completed before the statute of limitations on the claims expires (*\$6453.00 v. Texas*, 63 S.W.3d 533, 536 (*Tex. App. 2001*)).

ADDITIONAL TIME FOR SERVICE

If the petition is timely filed, but service is not made until after the statute of limitations expires, the lawsuit may proceed if the plaintiff exercised due diligence in attempting to serve the defendant in a timely manner (*\$24,156.00 In U.S. Currency v. Texas*, 247 S.W.3d 739, 744 (*Tex. App. 2008*)).

A plaintiff exercised due diligence if the plaintiff:

- Acted as an ordinary prudent person would have acted under the same circumstances.
- Was diligent up until the time that the defendant was served.

In these cases, the date of service relates back to the date the petition was filed (*\$24,156.00 In U.S. Currency*, 247 S.W.3d at 744-745).

However, a defendant can establish lack of due diligence by demonstrating the lapse of an extended period of time in which the plaintiff inexplicably made no attempt at service of process (*\$24,156.00 In U.S. Currency*, 247 S.W.3d at 745).

13. What documents must be served?

The following must be served on the defendant:

- The citation.
- The plaintiff's original petition.

(*Tex. R. Civ. P. 106*.)

The civil case information sheet does not need to be served on the defendant, as it is intended for data collection for statistical and administrative purposes only, and cannot affect any substantive right of the parties. (*Tex. R. Civ. P. 78a*.)

14. Who may serve process? Is a license or other certification required?

In Texas, process may be served by:

- Any sheriff or constable or other person authorized by law.
- The court clerk.
- Any person who:
 - is at least 18 years old; and
 - has a trial court order authorizing him to serve process.
- Any person certified by order of the Texas Supreme Court.

(*Tex. R. Civ. P. 103*.)

A person with an interest in the lawsuit may **not** serve process (*Tex. R. Civ. P. 103*).

15. What are the methods for service within the state?

The available methods of service vary depending on the defendant.

SERVICE ON A NATURAL PERSON

A natural person may be served by:

- Personal delivery (*Tex. R. Civ. P. 106(a)(1)*).
- Registered or certified mail, return receipt requested, which must be made by the clerk of the court (*Tex. R. Civ. P. 103 and 106(a)(2)*).

If service cannot be made by the above two methods, the plaintiff may move the court for an order for substituted service. The plaintiff's motion must be supported by an affidavit stating that service was attempted by one of the above two methods at the defendant's usual place of business or residence, but was not successful. The court may then authorize the plaintiff to effect service by:

- Leaving a copy of the citation and petition with anyone over the age of 16 at the address contained in the affidavit submitted to the court.
- Any other means directed in the court order.

(*Tex. R. Civ. P. 106(b)*.)

The clerk of the court may authorize service by publication if both:

- The defendant's address is unknown.
- The plaintiff swears in an affidavit to the court that:
 - the defendant's address is unknown; and
 - a diligent search was conducted to no avail.

(*Tex. R. Civ. P. 109*.)

Service by publication must be made by the clerk of the court (*Tex. R. Civ. P. 103*).

SERVICE ON A LIMITED PARTNERSHIP

A limited partnership may be served by serving:

- Any general partner in any manner permitted for serving a natural person (*Tex. Bus. Org. Code Ann. § 5.255(2)*).

- An agent or clerk employed in an office of the partnership within Texas if:
 - the action grows out of or is connected with the business transacted in this state; and
 - the partnership is not a resident of the county, is not a resident of Texas or is a resident of the county but cannot be located (*Tex. Civ. Prac. & Rem. Code* § 17.021(a)).

If service was made on an agent or clerk because the partnership could not be located, the individual serving process must certify that he could not find and serve the partnership after a diligent search and inquiry (*Tex. Civ. Prac. & Rem. Code* § 17.021(b)).

Service may be effected by serving the Texas Secretary of State if:

- The partnership does not maintain a registered agent in Texas.
- The registered agent of the partnership cannot be located.

(*Tex. Civ. Prac. & Rem. Code* § 17.044.)

SERVICE ON A CORPORATION

A corporation may be served by serving any of the following in a manner permitted for serving a natural person:

- The president of the corporation.
- The vice-president of the corporation.
- A registered agent of the corporation.

(*Tex. Bus. Org. Code Ann.* §§ 5.201(b) and 5.255(1).)

Service may be effected by serving the Texas Secretary of State if:

- The corporation does not maintain a registered agent in Texas.
- The registered agent, president or vice president of the corporation cannot be located with reasonable diligence.

(*Tex. Bus. Org. Code Ann.* §§ 5.251 and 5.252; *Tex. Civ. Prac. & Rem. Code* § 17.044.)

SERVICE ON THE STATE OF TEXAS

Service on the State of Texas must be made by serving the Secretary of State (*Tex. Civ. Prac. & Rem. Code* § 101.102).

A state officer acting in an official capacity or state agency may be served in any manner permitted for serving a natural person. If suit is brought against a state agency and the head of the agency is unavailable, the court may authorize service in any manner that affords the governmental unit a fair opportunity to answer and defend the suit. (*Tex. Civ. Prac. & Rem. Code* § 101.102).

16. What are the methods for service outside the state?

A defendant who is subject to the jurisdiction of the Texas courts may be served outside the state in the same manner as service is permitted within the state (*Tex. R. Civ. P.* 108).

Service may be made on a party in a foreign country in the following ways:

- In any manner provided by the law of the foreign country.
- As directed by the foreign authority in response to a letter rogatory or letter of request.
- In the same manner as service is permitted on a defendant Texas.
- In any manner consistent with applicable treaties and conventions.

- By diplomatic or consular officials as directed by the US Department of State.
- By any other means directed by the court, so long as those means are consistent with the law of the foreign country.

(*Tex. R. Civ. P.* 108a.)

Where the defendant is resident in a country that is a signatory to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Convention), service must be consistent with the terms of the Convention (*Volkswagenwerk A.G. v. Schlunk*, 486 U.S. 694 (1988)).

17. Are there any days on which service of process is restricted (for examples, Sundays or holidays)?

In Texas, service of process may not be issued on Sundays except in cases of:

- Injunction.
- Attachment.
- Garnishment.
- Sequestration.
- Distress proceedings.

(*Tex. R. Civ. P.* 6.)

However, service by publication may be accomplished by publication on Sundays (*Tex. R. Civ. P.* 6).

18. What are the consequences for ineffective service of process?

If service of process is ineffective or defective, the defendant may challenge service by filing a motion to quash. If granted, the motion to quash:

- Entitles the defendant to additional time to answer.
- Does not entitle the defendant to dismissal of the action.

(*Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 202-03 (*Tex.* 1985).)

19. How are any defects in serving process cured?

The court may grant a motion to amend the citation or proof of service at any time, unless it is clear that material prejudice would result from the amendment (*Tex. R. Civ. P.* 118).

In addition, if the defendant moves to quash service, the remedy available is limited to an extension of time to file an answer. As a result, the plaintiff may choose not to amend the citation or proof of service and allow the court to award the extension of time (see *Question 18*).

20. Must proof of service be process be filed? Please address:

- Any required form of proof of service (for example, affidavit, affirmation or declaration).
- Any information required in the proof of service.
- When the proof of service must be filed.

The officer or authorized person issuing the citation must complete a return of service (*Tex. R. Civ. P.* 107(a)). The return of service and any attached document must be filed with the court (*Tex. R. Civ. P.* 107(g)).

REQUIRED FORM

The server must sign the return of service. If the server is someone other than a sheriff, constable, or court clerk, the return of service must be signed under penalty of perjury, including the statement below in substantially the following form:

My name is [FULL NAME], my date of birth is [DATE OF BIRTH], and my address is [FULL ADDRESS]. I declare under penalty of perjury that the foregoing is true and correct.

Executed in [COUNTY] County, State of [STATE], on the [DAY] day of [MONTH, YEAR].

Signature of Declarant

(*Tex. R. Civ. P. 107(e).*)

Where service is by registered mail, the return of service must contain:

- A return receipt.
- The addressee's signature.

(*Tex. R. Civ. P. 107(c).*)

Where service is made by an alternative method authorized by the court, proof of service must be made in the manner the court ordered (*Tex. R. Civ. P. 107(f).*)

REQUIRED INFORMATION

The return of service must include:

- The cause number and case name.
- The court in which the case is filed.
- A description of the documents served.
- The date and time the process was received for service.
- The person or entity served.
- The address served.
- The date of service or attempted service.
- The manner of delivery of service or attempted service.
- The name of the person who served or attempted to serve process.
- If the person named as the person who served or attempted to serve process is a process server certified by the Texas Supreme Court:
 - the process server's identification number; and
 - the expiration date of the process server's certification.
- Any other information required by rule or law (for example, local rules).

(*Tex. R. Civ. P. 107(b).*)

WHEN PROOF MUST BE FILED

The return of service and any attached document must be filed with the court in all cases (*Tex. R. Civ. P. 107(g)*). A default judgment may not be granted until proof of service is filed with the court (*Tex. R. Civ. P. 107(h)*).

AMENDING THE COMPLAINT

21. Can the complaint be amended after it has been filed, but before it has been served?

In Texas, a petition may be amended after it has been filed, but before it has been served. The original and amended petition must be served with the citation, but a new citation is not required for the amended petition. (*Tex. R. Civ. P. 21 and 21a; In re E.A., 287 S.W.3d 1, 6 (Tex. 2009).*)

22. Can the complaint be amended after it has been filed and served? If so:

- When can this be done as of right?
- When must a plaintiff seek a court order to amend the complaint?

In Texas, a petition may be amended after it has been filed and served.

AMENDMENT AS OF RIGHT

A plaintiff may amend his petition, without leave of the court, before the deadline for amendments to pleadings set out in any pre-trial or other scheduling order (*Tex. R. Civ. P. 166(p); Hakemy Bros., Ltd. v. State Bank and Trust Co., Dallas, 189 S.W.3d 920, 924 (Tex. App. 2006)*).

If no scheduling order exists, the plaintiff may amend his petition, without leave of the court, up to seven days before trial, as long as the amendment does not unfairly surprise the opposing party (*Tex. R. Civ. P. 63*).

If the amendment to the petition moves the suit from a Level 1 discovery control plan to a Level 2 or Level 3 discovery control plan because it is no longer compliant with Rule 169 of the Texas Rule of Civil Procedure (for example, the monetary relief sought now exceeds \$100,000), the defendant may only amend his answer, without leave of the court, up to 45 days before trial if the amendment is filed before the earlier of:

- 30 days after the discovery period is closed; or
- 30 days before trial.

(*Tex. R. Civ. P. 169(c)(2).*)

For more information on the discovery control plans, see *Question 7*.

COURT ORDER FOR AMENDING THE COMPLAINT

A plaintiff must seek leave of the court to amend his petition:

- After the deadline for amendment set out in any pretrial order or scheduling order.
- Less than seven days before trial, if the change is substantive and affects the nature of the trial (*Tex. R. Civ. P. 63*).
- Less than 45 days before trial, if the case was an expedited action under Rule 169 of the Texas Rule of Civil Procedure, but the amendment removes the suit from Rule 169 (for example, the monetary relief sought now exceeds \$100,000), thereby changing the case from a Level 1 discovery control plan to a Level 2 or Level 3 discovery control plan (*Tex. R. Civ. P. 169(c)(2)*).

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