

Filing a Motion, Setting a Hearing, and Giving Notice

by Greg Enos and Bruce Steffler

Presented at the **Practical, Real World Divorce Seminar** May 25, 2017

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1. General Form of a Motion

A. Sensitive Data

Attorneys are required to use children's names and birth dates in a petition in any Suit Affecting the Parent Child Relationship (SAPCR) by Texas Family Code Sec. 102.008(b) which states:

Sec. 102.008. CONTENTS OF PETITION.

(a) The petition and all other documents in a proceeding filed under this title, except a suit for adoption of an adult, shall be entitled "In the interest of _____, a child." In a suit in which adoption of a child is requested, the style shall be "In the interest of a child."

(b) The petition must include:

(1) a statement that the court in which the petition is filed has continuing, exclusive jurisdiction or that no court has continuing jurisdiction of the suit;

(2) the name and date of birth of the child, except that if adoption of a child is requested, the name of the child may be omitted; . . .

Sec. 102.008(a) says that the style of a SAPCR must be entitled, "In the interest of ____, a child," but the statute does not say whether lawyers must use the child's name or initials.

Texas Rule of Civil Procedure 21c(a) says "sensitive data" includes the names and birth dates of minors. Rule 21c(b) prohibits filing court documents containing sensitive data without redaction, "unless the inclusion of sensitive data is specifically required by a statute..." As noted above, Tex. Fam. Code Sec. 102.008(b) requires the name and birth date of a child to be included in the petition filed in a SAPCR. The statute does not have that same requirement for answers, counterpetitions and motions.

Rule 21c says:

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, 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 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.

Tex. Fam. Code Sec. 105.006(a)(1) does not mention a child's name, but it does say that a final SAPCR order "must contain" each party's social security number and driver's license number and the child's social security number and driver's license number if the child has been assigned one. This would fall under the TRCP 21c(b) exception that allows inclusion of sensitive data if it is

required by statute. Note that Sec. 105.006(a)(1) does not say “the last four digits of the child’s social security number” but rather says, “the social security number”:

- (a) A final order, other than in a proceeding under Chapter 161 or 162, must contain:*
*(1) **the social security number** and driver's license number of each party to the suit, **including the child**, except that the child's social security number or driver's license number is not required if the child has not been assigned a social security number or driver's license number*

This language would seem to require the child’s full social security number. It is hard to imagine a lawyer getting in trouble however for just using the last four digits of the child’s social security number as Sec, 105.006(a)(1) does not provide any penalty for violation of its terms.

So, here is the most reasonable reading of Rule 21c in conjunction with Tex. Fam. Code Sec. 102.008 and 105.006(a)(1):

- Use the child’s name in the body of the petition but mark the document as containing sensitive data. This clearly complies with Rule 21c. It is not clear if you should use the child’s name in the style of the case instead of “In the Interest of X.X.X., a Child” If you put the child’s name in the style, then most clerks use that exact style in their records, which defeats the purpose of a statute that clearly does not allow use of the child’s name in anything other than the petition.
- Do not use a child’s full name in an answer, motion or order. Even if you put, “This Document Contains Sensitive Data” at the top of the pleadings, you are not complying with TRCP 21c unless it is a petition in a SAPCR.
- In the style in all cases for pleadings, motions, discovery and orders, do not use the children’s initials, much less his or her full name. Tex. Family Code Sec. 102.008(a) requires that the style of a SAPCR must be, “In the interest of ___, a child.” TRCP 21a(c) says that 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.” A redaction of the child’s entire name to initials, for example “G.B.E.,” would not comply with TRCP 21a(c). So, as troublesome as it might seem, it seems we must make the style of a case involving children to be:

In the Matter of the Marriage of Charles Adam Brown and Lucy Lynn Brown and In the Interest of X.X.X., a child.

In the Interest of X.X.X., a child.

- Many judges find it helpful to at least include the child’s last name, such as “G.B. Enos.” TRCP 21c(a)(3) says that a minor’s “name” is sensitive data but it does not say “full name”

and it does not forbid using “X” in place of the initials for the first and middle name and then using the actual full last name. It really helps judges and law office staff if at least the child’s last name is included in the caption of pleadings and discovery so they know which case or client the pleading relates to without looking up the cause number. Thus, the style of the modification case could be:

In the Interest of X.X. Hernandez, a Child.

- In a final SAPCR order, you are to include the social security number and driver’s license of each party and child, but not names, and then the order must be labeled “contains sensitive data.”

The Supreme Court and/or Legislature really needs to change these rules at least as far as temporary orders, temporary restraining orders, protective orders and final orders involving children. There is a real good practical reason to at least include the child’s initials (and probably last name) along with full birth dates and social security numbers in orders. Police officers, school officials, counselors and medical providers who look at the order to determine visitation or consent for treatment need to know which child the order refers to. There may be more than one child in a particular school with the initials “A.B.D.” but odds are there is only one with a birth date of 11/3/2008 and a social security number of XXX-XX-5440.

B. Text Searchable PDF Format Required

TRCP 21a(f) requires electronically filed pleadings to be in text-searchable PDF format:

(7) Format. An electronically filed document must:

(A) be in text-searchable portable document format (PDF);

(B) be directly converted to PDF rather than scanned, if possible;

© not be locked; and

(D) otherwise comply with the Technology Standards promulgated by the Judicial Committee on Information Technology and approved by the Supreme Court.

The easiest way to create a text-searchable PDF document is to “save as” a PDF within the word processing program. Many office scanners do not create text searchable PDF’s.

C. Form of a Motion

A motion should state the relief that is requested and state the grounds for the relief. Some lawyers think it is against the rules to allege specific facts in a motion. However, TRCP 21(a) requires that the grounds for relief should be set forth in a motion. Tex. Fam. Code Sec. 6.402(a) says, “A petition for dissolution of a marriage is sufficient without specifying the underlying evidentiary facts.” Sec. 6.402(c) says that the court “shall strike an allegation of evidentiary fact from the pleadings on the

motion of a party or on the court’s own motion.” First, this part of the Family Code relates only to divorce cases and not SAPCR’s. Second, Sec. 6.402(c) seems to refer to allegations of facts in a petition or counterpetition for divorce rather than to a motion filed in a divorce case or even an affidavit (or unsworn declaration) attached to a petition or counterpetition. If a parent in a divorce files a petition and seeks extraordinary relief supported by an affidavit that describes the other parent’s mental illness and drug abuse, surely that must be allowed and does not violate Sec. 6.402. In that situation, the petition would simply describe the extraordinary relief requested and refer the Court to Exhibit A, the unsworn declaration of the petitioner which does include specific facts and allegations. Sec. 6.402(a) refers to the “petition” in a divorce and does not mention attached affidavits or unsworn declarations.

D. Caption or Title of the Motion

It is helpful to judges for the caption or title of the motion to say which party filed the motion. Local rules require that unopposed motions use the word “unopposed” in the caption of the motion. While not required by local rules, many attorneys also insert “opposed” in the caption as well. Thus, motions could be titled, for example:

PETITIONER’S UNOPPOSED MOTION FOR CONTINUANCE
RESPONDENT’S OPPOSED MOTION FOR ENTRY ON LAND
AMICUS ATTORNEY’S MOTION FOR COSTS

E. Certificate of Service

TRCP 21a(e) does not say what goes in a certificate of service, but merely states:

(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.

Examples of certificates of service include:

Certificate of Service

I certify that a true copy of the above was served on each attorney of record or party in accordance with the Texas Rules of Civil Procedure on May 11, 2017.

/S/ Greg B. Enos
Greg B. Enos
Attorney for Counterpetitioner

Certificate of Service

I certify that a true copy of the above was served on each attorney of record or party in accordance with the Texas Rules of Civil Procedure on March 10, 2017.

Mr. Gaines West
West, Webb, Allbritton & Gentry, PC
1515 Emerald Plaza
College Station, Texas 77845
Tel: 979-694-7000
Fax: 979-694-8000
gaines.west@westwebblaw.com

E-file notification
gaines.west@westwebblaw.com

/S/ Greg B. Enos
Greg B. Enos
Attorney for Respondent

F. Certificate of Conference

A certificate of conference states that the movant’s attorney has conferred with opposing counsel and that the motion is opposed or unopposed or that the lawyers have not been able to confer.

1. A Certificate of Conference is Required on All Motions by Local Rules

Harris County local rules (and the local rules of all surrounding counties - see appendix B) require a certificate of conference. The Harris County Local Rules for Family Courts state:

5.1 Certificate of Conference.

5.1.1 Unopposed motions shall be labeled "Unopposed" in the caption.

5.1.2 *Opposed motions shall contain a certificate that:*

1) *states that the movant and respondent have conferred with each other and in good faith have attempted to resolve the matter; and*

2) *identifies the basis of disagreement between counsel; or*

3) *states that the parties have not been able to confer, and states in detail all efforts made to confer, including dates and methods of attempted communication.*

5.1.3 *The clerk of each court is directed not to submit opposed motions to the judge which do not comply with this rule.*

2. A Certificate of Conference Is Required on Discovery Motions

TRCP 191.2 requires a certificate of conference for all discovery motions.

191.2 Conference.

Parties and their attorneys are expected to cooperate in discovery and to make any agreements reasonably necessary for the efficient disposition of the case. All discovery motions or requests for hearings relating to discovery must contain a certificate by the party filing the motion or request that a reasonable effort has been made to resolve the dispute without the necessity of court intervention and the effort failed.

3. Some Courts Have Their Own Requirements For Conference

Some courts have their own specific requirements for certificates of conference. The 245th Family District Court in Harris County (Judge Roy Moore) has a standing order adopted in 2013 which states in part:

Certificates of Conference

All counsel are expected to engage in good faith negotiations pursuant to the discovery and deposition rules of the Texas Rules of Civil Procedure and the Harris County Local Rules - Family Trial Division.

Requests for hearings on motions for discovery, or for protection, or to quash interrogatories or requests for admissions or on objections to any discovery, will not be granted unless counsel filing the same certifies that he/she has attempted to obtain such discovery or relief from opposing counsel by agreement and has been unsuccessful and identifies the basis of disagreement between counsel. If counsel has not been able to confer, he/she must state in detail all efforts made to confer, including dates and methods of attempted communication.

To that end, all contested discovery motions shall contain a certificate of conference by the party or counsel filing same substantially as follows:

"A conference was held on [date] with [name of opposing counsel] on the merits of this motion. Agreement could not be reached on the following issues: [state basis of disagreement between counsel]."

OR

"A conference was not held with [name of opposing counsel] on the merits of this motion because [state in detail all efforts made to confer, including all dates and methods of attempted communication]."

4. Sample Certificate of Conference

Certificate of Conference

I certify that:

I have conferred unsuccessfully with opposing counsel in good faith to attempt to resolve the matters in this motion and the basis for our disagreement is: _____

or

The parties have been unable to confer. The efforts made to confer, including dates and methods of attempted communication, were: _____

*/S/ Greg B. Enos
Attorney for Petitioner*

G. Attorney Signature

TRCP 21(f) states:

(7) Electronic Signatures. A document that is electronically served, filed, or issued by a court or clerk is considered signed if the document includes:

(A) a "/s/" and name typed in the space where the signature would otherwise appear, unless the document is notarized or sworn; or

(B) an electronic image or scanned image of the signature.

The easiest way to include an electronic signature is to type: /S/ Bruce Steffler. Some lawyers use fancy fonts that resemble a handwritten signature, such as *Lucida Handwriting*.

Word processing programs can insert images of an actual lawyer's handwriting or the attorney can really sign the motion and then scan the document.

H. Attorney's E-Mail Address Required

TRCP 21(f)(2) requires motions to contain the email address of the attorney filing the pleading:

(2) Email Address. The email address of an attorney or unrepresented party who electronically files a document must be included on the document.

Thus, the pleading block on a motion should look like:

Respectfully submitted,

The Enos Law Firm, P.C.
17207 Feather Craft Lane
Webster, Texas 77598
Tel: (281) 333-3030
Fax: (281) 488-7775

By: /s/ Greg B. Enos
Greg B. Enos
State Bar No. 06630450
enos.service@enoslaw.com
Attorney for Counterpetitioner

I. Notice of Hearing

Three days notice of a hearing is required of a hearing (unless shortened by the court or unless the notice is given during a hearing or trial).

TRCP 21(b) states:

(b) Service of Notice of Hearing. An application to the court for an order and notice of any hearing thereon, not presented during a hearing or trial, must be served upon all other parties not less than three days before the time specified for the hearing, unless otherwise provided by these rules or shortened by the court.

Technically, if a hearing is scheduled while the attorneys are in court, that is sufficient notice per TRCP 21(b). The safest route is to still serve a notice of hearing in such a situation.

The rules do not provide any form for a notice of hearing. Often, a "fill in the blank" notice of

hearing is part of the motion, such as:

Notice of Hearing

IT IS ORDERED that the hearing on the above Motion for Appointment of Amicus Attorney is set on _____ at _____ . m. in the 311th Judicial District Court, Harris County, Texas 77002.

SIGNED on _____, 2017. .

Judge or Clerk

Clerks often insist on a notice of hearing before they will provide a date for a hearing. However, if a clerk fills in the blank for the date and time of the hearing and then signs the notice, that does not give notice to the other attorney. Sometimes, lawyers go ahead and fill in the date and time on the notice of hearing before the motion is filed either because the clerk has provided a date or some other motion in the same case is set that day already. However, serving a motion with a notice of hearing that is not signed by a clerk or judge may not be sufficient notice.

The best practice, once a hearing is set, is to serve a notice of hearing on the opposing counsel by e-service or fax, which could be as short as:

Petitioner's Motion to Release Funds in Trust in the above case is set for July 12, 2017 at 9:00 a.m. in the 245th District Court.

Some courts require attorneys to e-file the notice of hearing served on opposing counsel. A few courts, such as the 306th District Court in Galveston County, fax out their own notices of hearing to attorneys of record.

An essential task for the legal assistant before every hearing is to print out the proof of service of the notice of hearing (fax and fax confirmation page or e-service receipt) and put it with the motion in the file so that the attorney in court is always able to show the judge proper notice was given.

Pro se parties pose special problems for service of notices of hearings. Many pro se parties now are registered for e-service. Others may have to be sent service via certified mail or even hand delivery, so extra time may need to be allowed for serving the pro se party before a hearing.

2. Motions That Require Verification

These motions are required to be verified either with a notary block or an unsworn declaration under Tex. Civ. Pract. & Rem. Code 132.001:

- Motion for Continuance - TRCP 251
- Motion to Reinstate - TRCP 165a(3)
- Motion to Recuse or Disqualify a Judge - TRCP 18a(a)(1)

3. When is a Motion Deemed Filed?

A motion that is e-filed before midnight on a weekday is deemed filed on that day. If it is filed on a weekend or holiday, it is deemed filed on the next day that is not a weekend or holiday. TRCP 21(f)(5)(6).

TRCP 21(f)(5) and (6) state

(5) Timely Filing. Unless a document must be filed by a certain time of day, a document is considered timely filed if it is electronically filed at any time before midnight (in the court's time zone) on the filing deadline. An electronically filed document is deemed filed when transmitted to the filing party's electronic filing service provider, except:

*(A) if a document is transmitted on a Saturday, Sunday, or legal holiday, it is deemed filed on the next day that is not a Saturday, Sunday, or legal holiday; and
(B) if a document requires a motion and an order allowing its filing, the document is deemed filed on the date that the motion is granted.*

(6) Technical Failure. If a document is untimely due to a technical failure or a system outage, the filing party may seek appropriate relief from the court. If the missed deadline is one imposed by these rules, the filing party must be given a reasonable extension of time to complete the filing.

4. How to Calculate the 3 Day Notice Requirement for Hearings

It is ridiculously complex to calculate when the three day notice of a hearing must be served. The Texas Supreme Court really needs to fix the complicated rules which apply to what on its face seems like such an easy task. The applicable rules are:

1. TRCP 4: for deadlines of 5 days or less, do not count Saturdays, Sundays or legal holidays.
2. TRCP 21a(c): if the notice is served by mail, add three days to the deadline

3. TRCP 21a(b)(2): If service is via fax and the fax is received after 5:00 p.m. (Local time of the recipient), then the notice is deemed to have been served on the next day.
4. TRCP 21(b): three days notice is required of a hearing
5. Case law says that a deadline which goes backwards from a date, such as three days before a hearing, is calculated by counting forward from the date the notice was served. Melendez v. Exxon Corp., 998 S.W.2d 266 (Tex. App. - Houston [14th Dist.] 1999, no pet.); Sosa v. Central Light & Power, 909 S.W.2d 893 (Tex. 1995); Lewis v. Blake, 876 S.W.2d 314 (Tex. 1994). **A much more detailed discussion of this complicated topic is attached as Exhibit C.**

Taking the above rules and principles into account, the deadlines to serve a notice a hearing are as follows:

**Service via E-service or Facsimile* or Commercial Delivery
(assuming no holidays)**

Hearing Is on	Deadline to Serve Notice of Hearing Is...	Explanation
Monday	Prior Wednesday	Per TRCP 4, do not count Saturdays or Sundays, so counting from Wednesday forward three days gets you to Monday
Tuesday	Prior Thursday	Per TRCP 4, do not count Saturdays or Sundays, so counting from Thursday forward three days gets you to Tuesday if you skip the weekend days.
Wednesday	Prior Friday	Per TRCP 4, do not count Saturdays or Sundays, so counting from Friday forward three days gets you to Wednesday if you skip the weekend days.
Thursday	Prior Monday	Counting forward three days from Monday gets you to Thursday.
Friday	Prior Tuesday	Counting forward three days from Tuesday gets you to Friday

* Service via facsimile is complete on the day sent if it is received by 5:00 p.m. local time of the recipient per TRCP 21a(b)(2)

Service via Mail - Notice Required Six Days Before the Hearing per TRCP 21a(c) which adds three days to the deadline if the notice is mailed (assuming no holidays)

Hearing Is on	Deadline to Mail Notice of Hearing Is... [Service by mail is effective on mailing per TRCP 21a(b)(1)]	Explanation: 3 days notice + 3 extra days because of service by mail = 6 days notice
Monday	Prior Tuesday	Counting from Tuesday forward six days gets you to Monday (since the deadline is over 5 days, you <u>do</u> count the Saturday and Sunday per TRCP 4).
Tuesday	Prior Wednesday	Counting from Wednesday forward six days gets you to Tuesday (since the deadline is over 5 days, you <u>do</u> count the Saturday and Sunday per TRCP 4).
Wednesday	Prior Thursday	Counting from Thursday forward six days gets you to Wednesday (since the deadline is over 5 days, you <u>do</u> count the Saturday and Sunday per TRCP 4).
Thursday	Prior Friday	Counting from Thursday forward six days gets you to Friday (since the deadline is over 5 days, you <u>do</u> count the Saturday and Sunday per TRCP 4).
Friday	Prior Saturday (you can mail on a Saturday)	Counting forward six days from Saturday gets you to Friday

5. E-Filing Motions with Exhibits

The Harris County District Clerk wants exhibits to motions (and proposed orders) e-filed as separate documents, although they can be e-filed as part of the same envelope. Failure to segregate exhibits as separate e-filings is a common reason why the Harris County District Clerk rejects e-filings. Some district clerks in other counties, such as Galveston County, allow you to e-file motions and exhibits as one documents. **Check with the specific clerk’s office before e-filing.**

6. Obtaining a Hearing Date

The lawyer or her legal assistant should follow these steps in scheduling a hearing date:

1. Check with your client and key witnesses
2. Coordinate the date with opposing counsel if possible
3. How to get a hearing date

Either:

- A. File the motion, get a hearing date, and send a notice of hearing after filing the motion. This is the procedure in most counties. Some clerks will not give lawyers hearing dates unless a blank notice of hearing has been e-filed.

OR

- B. Call the court and get a hearing date and then file the motion with the hearing date filled in already on the notice of hearing. This is the procedure used in the 300th District Court of Brazoria County.

Question: Is a Notice of Hearing that has a date and time for the hearing but which is not signed by a judge or clerk sufficient notice?

7. Serving the Motion and Notice of Hearing

TRCP 21a says that a document that is e-filed must be e-served. Rule 21(f)(1) requires all documents filed with the court to be e-filed “where electronic filing has been mandated.” The Texas Supreme Court has required e-filing in all civil cases, including family law cases. Misc. Docket No. 12-9208, as amended by Misc. Docket No. 13-9092, Order Requiring Electronic Filing in Certain Courts.

So, since all pleadings and motions will be e-filed, they should all be e-served, except pleadings filed by some pro se parties. However, no rule specifically requires that a notice of hearing must be filed with the court. Rule 21(b) says that a notice of hearing must be served at least three days before the hearing but the rule does not require that the notice be filed with the court. Many motions contain notices of hearing, so those notices of hearings would be e-served because the pleading it is part of is e-filed. A notice of hearing is not a “pleading, plea, motion or application for the court for an order” described in TRCP 21(a), which must be filed with the court.

Rule 21(a) says in part:

RULE 21. FILING AND SERVING PLEADINGS AND MOTIONS

(a) Filing and Service Required. Every pleading, plea, motion, or application to the court for an order, whether in the form of a motion, plea, or other form of request, unless presented during a hearing or trial, must be filed with the clerk of the court in writing, must state the grounds therefor, must set forth the relief or order sought, and at the same time a true copy must be served on all other parties, and must be noted on the docket.

(b) Service of Notice of Hearing. An application to the court for an order and notice of any hearing thereon, not presented during a hearing or trial, must be served upon all other parties not less than three days before the time specified for the hearing, unless otherwise provided by these rules or shortened by the court.

In summary, there is no rule that specifically requires a notice of hearing to be filed with the court if it is not part of a motion. A “stand alone” notice of hearing that is not filed with the court can be served by other methods such as fax or hand delivery. As a practical matter, e-service is cheaper, quicker and provides very good proof of service, so e-service should almost always be the preferred method of serving a notice of hearing or any document.

TRCP 21a(a)(2) says that a document not filed electronically (via the e-filing manager) can be served by:

- In-person delivery
- mail
- commercial delivery service
- fax
- “by email” or
- “by such other manner as the court in its discretion may direct.”

It is not clear what the rule means “by email.” However, TRCP 21a(b)(3) says that “electronic service is complete on transmission of the document to the serving party’s electronic filing service provider.” This implies that electronic service “by email” means e-serving via the e-service provider, which is the best method to use any way. It very clearly does not mean just sending an e-mail via your normal e-mail account.

8. Practical Considerations for Planning for a Hearing

Exhibit A to this paper is a form used by The Enos Law Firm to make sure all needed steps to prepare for a hearing have been assigned and completed. A check list of this type helps even the most experienced law firm staff make sure everything that needs to be done before a hearing has been done.

The attorney and legal assistant should consider the following:

- Does our motion need to be amended?
- Do we need to file a response to the opposition's motion?
- Is legal research needed? Should cases be copied and highlighted prior to the hearing?
- Do we want to prepare and file a brief?
- Has a proposed order been filed prior to the hearing?
- **VERY, VERY IMPORTANT:** Confirm that each opposing counsel and pro se parties has received provable and timely notice of the hearing. Make extra copies of the proof of notice for the attorney to find easily in a hearing.
- Is the Attorney General involved in this case? If so, was notice sent to the AG or does the AG have a waiver of appearance on file?
- Do not forget to send notice of the hearing to the amicus attorney, intervenors and any third party respondents. We get so used to cases only involving one opposing parties, that sometimes in complex cases some lawyers get missed for notice of the hearing.
- Has the client been notified of the hearing? Did we run the date past the client to make sure he or she can attend? Does the client need to be at the hearing?
- Has our expert witness been notified as early in advance as possible of the hearing? A busy counselor or psychologist, for example, may require advance payment and have to clear her entire day's schedule for a hearing. Experts need all the advance notice possible for a court appearance.
- Have we decided if we need witnesses? Do we need to prepare and serve a subpoena on a witness?
- Are there any business record affidavits we need to file 14 days before the hearing?
- In Galveston County, for a hearing before the Associate Judge, you must arrange for your own court reporter like for a deposition.
- Are there any recordings or video that need to be edited or copied? How will we play the video or recording in court?
- Is an interpreter needed?

- Do we need to make enlargements or posters?
- Does the lawyer want to make hearing notebooks for the judge (with a copy for each attorney and probably one for a witness to use)?
- How much preparation time needs to be scheduled with the client and/or witnesses?
- Is a witness going to testify by phone? Does opposing counsel agree or will a motion be required? What arrangements are needed for the witness to be on the phone?
- Are we asking for the child to be interviewed by the judge? In Galveston County before the Associate Judge, the child needs to be at the courthouse (but not in the courtroom) and available to be seen by the judge that morning or afternoon. In almost all other situations (including before the presiding judges in Galveston County), the client needs to know that the child should not be brought to the courthouse unless instructed by the judge.
- Which to documents, photographs, recordings etc. will we use as exhibits?
- Do we need to prepare a request for relief?
- How many copies of exhibits does the lawyer need?
- The staff should label and copy the exhibits.
- Should we prepare an exhibit list? It is required in the 245th and 311th even for hearings. Judges and court reporters always appreciate exhibit lists.
- Do we need to get an updated child support printout and then update our calculation of delinquent support?
- If we are asking for attorney's fees, should we prepare a chart that summarizes fees and expenses and attach copies of our contract and bills?
- Where do we stand with the client on our trust balance and paying our bill?
- Have we reviewed with the client:
 1. When and where the hearing is?
 2. How to dress for court and how not to dress for court?
 3. What our realistic chances for success are?

After the attorney returns to the office following a hearing, the legal assistant needs to immediately calendar the entry date and note who is to prepare the order if applicable. Someone needs to get the file back from the lawyer, re-organize it and get it back on the shelf. The attorney and her staff should review any follow-up tasks that need to be done or put on the calendar.

Appendix A - Form for HEARING PREPARATION

HEARING PREPARATION

Client: _____ Court: _____ Judge: _____

Motion: _____ Filed by: _____

Hearing Date: _____ Time: _____

We are: Pet Resp
 Amicus Intervenor

NA= Not Applicable √= To Do	√= Done Initials	Task
		Date coordinated with Opposing Counsel, Client
		<input type="checkbox"/> Amend Pleading <input type="checkbox"/> File Response <input type="checkbox"/> Brief <input type="checkbox"/> Draft/File Proposed order [attach copy of motion, response, proposed order]
		Notice of Hearing Sent to O.C. via _____ [attach proof of service of notice of hearing]
		Attorney General: <input type="checkbox"/> NOT a party <input type="checkbox"/> Was noticed
		Client Notified of Hearing via _____ <input type="checkbox"/> Client does not need to be present <input type="checkbox"/> Client MUST be present Client notified via _____
		Expert witness notified of hearing as early as possible Expert: _____ Notified via: _____ Confirmation: _____
		Witnesses:
		Subpoenas:
		File Bus. Rec. Affidavits:
		Galveston County: Arrange Court Reporter
		Recordings/Video to edit/copy:
		Interpreter
		Enlargements/Posters
		Hearing Notebooks

HEARING PREPARATION

Client: _____

Motion: _____

NA= Not Applicable √= To Do	√= Done Initials	Task
		Schedule Prep. Meeting with Client: Date/Time:
		Witness by phone arrangements:
		Interview of Child Arrangements:
		<p>Exhibits:</p> <p>Labeled, pages numbered, copied: original + ___ copies</p> <p> <input type="checkbox"/> Request for Relief <input type="checkbox"/> FIS <input type="checkbox"/> Paystubs <input type="checkbox"/> Tax return/W-2 for _____ <input type="checkbox"/> Business Profit & Loss for _____ <input type="checkbox"/> Photos of parent and child </p> <p> <input type="checkbox"/> Updated child support payment record <input type="checkbox"/> Updated child support arrearage calculation <input type="checkbox"/> Attorney's Fees chart: contract, bills, summary </p>

Hearing Followup: **Entry Date:** _____ **Time:** _____

Who Drafts: _____

Notes:

Appendix B - Local Rules on Certificates of Conference and Motions

Harris County Local Rules for Family Courts

RULE 5. REQUIREMENTS FOR CERTAIN DOCUMENTS

5.1 Certificate of Conference.

5.1.1 Unopposed motions shall be labeled "Unopposed" in the caption.

5.1.2 Opposed motions shall contain a certificate that:

1) states that the movant and respondent have conferred with each other and in good faith have attempted to resolve the matter; and

2) identifies the basis of disagreement between counsel; or

3) states that the parties have not been able to confer, and states in detail all efforts made to confer, including dates and methods of attempted communication.

5.1.3 The clerk of each court is directed not to submit opposed motions to the judge which do not comply with this rule.

5.1.4 The provisions of subparts 5.1.2 and 5.1.3 do not apply to motions for summary judgment, default judgments, agreed judgments, motions for voluntary dismissal or non suit, and motions involving service of citation.

Local Rules District Courts of Fort Bend County

RULE 5.

REQUIREMENTS FOR CERTAIN DOCUMENTS

5.1 Certificate of Conference

5.1.1 Unopposed motions shall be labeled "Unopposed" in the caption.

5.1.2 Opposed motions shall contain a certificate that:

1) states that the movant and respondent have conferred with each other and in good faith have attempted to resolve the matter and

2) identifies the basis of disagreement between counsel; or

3) states that the parties have not been able to confer, and states in detail all efforts made to confer, including dates and methods of attempted communication.

5.1.3 The provisions of subparagraph 5.1.2 do not apply to motions for summary judgment, default judgments, motions for voluntary dismissal or non-suit, and motions involving service of citation.

Local Rules of the District Courts of Montgomery County, Texas

Rule 3.7 Hearings on Pre-Trial Motions

A. Form

Motions and responses shall be in writing and shall be accompanied by a proposed order granting or denying the relief sought. The proposed order shall be a separate instrument.

B. Submission

Motions shall state a date of submission which shall be at least 10 days from filing, except on leave of court. The motion will be submitted to the court upon that date.

C. Response

Responses shall be in writing. Responses shall be filed at least two working days before the submission date. Failure to file a response may be considered a representation of no opposition.

D. Oral argument

The motion or response may include a request for oral argument. Said request shall be in writing and set forth reasons for the necessity of such hearing. It is in the sound discretion of the court whether to grant the request for oral hearing. A request for an oral argument is not a response under Rule 3.8 (c).

E. Certificate of Conference

Opposed motions and responses shall contain a Certificate of Conference indicating that the counsel involved have attempted to resolve the dispute prior to filing of the motion or response, the date of such attempt and the manner of communication of such an attempt, or any other requirement of the court.

Rule 3.16 Filing of Pleadings

All pleadings, motions, orders and other papers, including exhibits attached thereto, when offered for filing or entry, shall be descriptively titled and punched at the top of the page to accommodate clerk's 2.75" center-to-center flat-filing system. Each page of each instrument shall on the lower right-hand margin thereof be numbered and titled, i.e. "Plaintiff's Original Petition Page 2." Orders and Judgments shall be separate documents completely separated from all other papers. If documents not conforming to this rule are offered, the clerk shall return the documents to the counsel or party unfiled. Counsel shall furnish the clerk with sufficient copies to perfect service or notice.

AMENDED LOCAL RULES OF THE DISTRICT COURTS FOR GALVESTON COUNTY, TEXAS

Rule 3.17 Hearings on Pre-Trial, Motions, Exceptions and Pleas:

A. Form. Motions shall be in writing and shall be accompanied by a proposed order granting the relief sought. The proposed order shall be a separate instrument, unless the entire motion, order, signature lines and certificate of service are all on one page.

B. Submission. Motions shall state a date of submission, which shall be at least 10 days from filing, except on leave of Court. The motion will be submitted to the Court for ruling on that date or later.

C. Response. Responses shall be in writing, and shall be filed at least two working days before the date of submission except on leave of the Court. Failure to file a response may be considered a representation of no opposition.

D. Oral argument. The motion or response shall include a request for oral argument if a party views it as necessary. The Court may grant that request or it may order oral argument on its own motion. A request for an oral argument is not a response under Rule 3.24(c). Except where required by statute, the Court may in its discretion, disregard a request for oral hearing and rule upon the motion set by submission.

E. Certificate of conference. Opposed motions and responses shall:

1. Be in writing.
2. Be accompanied by a separate form order granting or denying the relief; and
3. Contain a certificate that Movant and Respondent have conferred with each other and in good faith attempted to resolve the matter.

E. If no oral hearing has been requested or the Court finds no necessity for an oral hearing, the Court, in the absence of counsel, shall examine the pleadings, identify the basis of the disagreement between counsel; authorities cited, and other papers and make such rulings, as the Judge deems proper. Copies of all orders signed shall be forwarded to all counsel at the time they are entered by the clerk.

F. A specific date or period of time may be assigned as a final date for the filing of motions, exceptions, and dilatory pleas and obtaining a hearing or submission date thereon in those cases deemed appropriate by the Judge.

Appendix C

Detailed Discussion on Calculating The Deadline To Serve A Notice of Hearing

The hearing is on Monday, so when must notice of the hearing be served to properly give the minimum three day notice required by TRCP 21(b)? It appears under TRCP that the answer is that the notice of hearing must be served by the prior Wednesday if service is via facsimile or e-service because you do not count Saturdays and Sundays (or legal holidays) for a three day deadline. If the notice of hearing is mailed, then the deadline would be the prior Tuesday because then the deadline is really six days since service by mail adds three days to a deadline (and for deadlines over five days you do count Saturdays and Sundays). The convoluted methods of calculating when you must give notice of a hearing is explained below.

TRCP 4 states:

RULE 4. COMPUTATION OF TIME

*In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday. **Saturdays, Sundays, and legal holidays shall not be counted for any purpose in any time period of five days or less in these rules, except that Saturdays, Sundays, and legal holidays shall be counted for purpose of the three-day periods in Rules 21 and 21a, extending other periods by three days when service is made by mail.***

Remember that TRCP 21a(c) adds three days to the deadline if service is by mail.

***21a(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.*

Perversely, in Texas the appellate courts tell us to calculate a deadline that goes backwards, such as three days before the hearing, by counting forward.

In Lewis v. Blake, 876 S.W.2d 314 (Tex. 1994), the Texas Supreme Court tried to determine if timely 21-day notice under Rule 166a of a summary judgment hearing had been given. Since the notice had been mailed, Rule 21a added three days to the deadline. The court looked to Rule 4 on how to count the 24-day time period and stated that, “Rule 4 could not be plainer: it applies to any period of time prescribed by the rules of procedure, and Rule 166a is one of those rules.” This case dealt with a deadline that runs backward from an event. Rule 166a says that the motion for summary judgment, “... shall be filed and served at least twenty-one days before the time specified for hearing.” There, notice was mailed on June 21 for a hearing set for July 15. The Supreme Court applied Rule 4 and held, “[t]he hearing on defendants' summary judgment motion in this case was held on the 24th day after it was served, as permitted by the rules, and the court of appeals erred in reaching the contrary conclusion.” Note that the

court could did not say, “the notice was served 24-days before the hearing as permitted by the rules...” In other words, instead of starting with the day of the hearing and counting backwards 24 days, the Supreme Court started with the date the motion was served, counted 24 days forward and determined that 24 days fell on the date of the hearing and, thus, notice was timely.

The Texas Supreme Court in Sosa v. Central Light & Power, 909 S.W.2d 893 (Tex. 1995), applied Rule 63 relating to the deadline to file amended pleadings without leave of court at least seven days before trial. The Supreme Court again ended up counting forward just as in Lewis v. Blake. The court in Sosa faced the question of whether an amended pleading filed on November 10 had been timely filed seven days before the November 17 summary judgment hearing. The Supreme Court applied Rule 4 to count forward from November 10 and did not count that day but started on November 11 as day 1, etc., and determined that November 17 was seven days after November 10. The court did not start with the date of the hearing and count backwards seven days to confirm that the pleading was timely filed.

The Houston 14th Court of Appeals in Melendez v. Exxon Corp., 998 S.W.2d 266 (Tex. App. - Houston [14th Dist.] 1999, no pet.) dealt with the deadline to supplement discovery at least 30 days before trial as required by Rule 166b(6) and also the trial court’s scheduling order. Mr. Melendez argued that the 30th day before the July 8th trial date fell on Saturday, June 8, 1996, and therefore, Rule 4 allowed the filing of the supplemental discovery response on the following Monday, June 10, the 28th day before trial.

The 14th Court of Appeals noted that some courts had held that Rule 4 does not apply to deadlines counted backwards but looked to Sosa and noted that the Supreme Court had made it very clear that Rule 4 applies to all deadlines. The Melendez court then said:

“... In Sosa, the Supreme Court applied Rule 4 to the time period in Rule 63, which precludes the filing of pleadings within seven days of the date of trial unless leave of court is obtained. Id. (citing Tex. R. Civ. P. 63). In applying Rule 4, the court counted from the day on which the Sosas filed their amended petition, and held that this day was not counted, but that the seventh day after it was filed was counted. Id. Thus, the court determined that the Sosa's petition was timely filed even though the seventh day was the day of the hearing. Id.

Because the supreme court held that Rule 4 applies to any time period prescribed in the Rules of Civil Procedure, we apply it here and count forward, as the Supreme Court did in Sosa. Rule 166b(6) requires supplementation of a discovery response "not less than thirty days prior to the beginning of trial unless the court finds that good cause exists for permitting or requiring later supplementation." Tex. R. Civ. P. 166b(6). Thus, a discovery response is timely under this rule if it is filed 30 days or more before the date set for trial. Melendez did not supplement his discovery response to list Lundgren as a potential witness until June 10, 1996. Applying the procedure from Sosa, the day on which Melendez filed his response is not counted but the thirtieth day after it was filed is counted. See Sosa, 909 S.W.2d at 895. The thirtieth day would have been July 10, 1996, two days after trial began. Therefore, Melendez's supplemental response was not filed within the period prescribed by Rule 166b(6).

The Melendez and Sosa courts did not calculate a pre-trial deadline that goes backwards from trial the same way a lawyer or legal assistant would. Instead, those courts answered the legal question of whether a specific action was timely by looking at the date the action was taken and then counting forward to see

if the pertinent deadline had been met.

Taking the above rules and principles into account, the deadlines to serve a notice a hearing are as follows:

Service via E-service or Facsimile* or Commercial Delivery (assuming no holidays)

Hearing Is on	Deadline to Serve Notice of Hearing Is...	Explanation
Monday	Prior Wednesday	Per TRCP 4, do not count Saturdays or Sundays, so counting from Wednesday forward three days gets you to Monday
Tuesday	Prior Thursday	Per TRCP 4, do not count Saturdays or Sundays, so counting from Thursday forward three days gets you to Tuesday if you skip the weekend days.
Wednesday	Prior Friday	
Thursday	Prior Monday	Counting forward three days from Monday gets you to Thursday.
Friday	Prior Tuesday	Counting forward three days from Tuesday gets you to Friday

* Service via facsimile is complete on the day sent if it is received by 5:00 p.m. local time of the recipient per TRCP 21a(b)(2)

Service via Mail - Notice Required Six Days Before the Hearing per TRCP 21a(c) which adds three days to the deadline if the notice is mailed (assuming no holidays)

Hearing Is on	Deadline to Mail Notice of Hearing Is... [Service by mail is effective on mailing per TRCP 21a(b)(1)]	Explanation: 3 days notice + extra 3 days because you mailed = 6 days notice required
Monday	Prior Tuesday	Counting from Tuesday forward six days gets you to Monday (since the deadline is over 5 days, you <u>do</u> count the Saturday and Sunday per TRCP 4).
Tuesday	Prior Wednesday	Counting from Wednesday forward six days gets you to Tuesday (since the deadline is over 5 days, you <u>do</u> count the Saturday and Sunday per TRCP 4).
Wednesday	Prior Thursday	Counting from Thursday forward six days gets you to Wednesday (since the deadline is over 5 days, you <u>do</u> count the Saturday and Sunday per TRCP 4).
Thursday	Prior Friday	Counting from Thursday forward six days gets you to Friday (since the deadline is over 5 days, you <u>do</u> count the Saturday and Sunday per TRCP 4).
Friday	Prior Saturday (you can mail on a Saturday_	Counting forward six days from Saturday gets you to Friday

The 20 year old case of *Peacock v. Humble*, 933 S.W.2d 341 (Tex. App. - Austin, 1996, orig. proc.) throws some confusion on the above calculation methods. That case held that Tex. Gov't Code Sec. 311.014 controls over TRCP 4 in calculating a deadline imposed by a statute. That case involved the statutory three day deadline to request de novo review of an associate judge's ruling. The notice of appeal was filed on Friday and the third day after fell on a Monday under Sec. 311.014 and on Tuesday under TRCP 4 (which says Saturdays and Sundays do not count for deadlines of five or less days). The request for de novo hearing was filed on Tuesday and was ruled untimely. The court held:

The Texas Constitution vests in the supreme court the power to establish rules of procedure "not inconsistent with the law of the state." Tex. Const. art. V, § 25. Rule 4 was established pursuant to this power. Until 1990, the Code Construction Act and Rule 4 were consistent regarding the computation of all time periods. In 1990, however, the supreme court amended Rule 4 providing for the exclusion of weekends and legal holidays when computing time periods of five days or less. As a result, since 1990, the Code Construction Act and Rule 4 have addressed the computation of time periods of five days or less differently when a weekend or legal holiday falls

within the time period. Because the three-day filing period in the present case is statutory, the Code Construction Act's method for computing time applies rather than the method contained in Rule 4.

Id. at 343 (emphasis added).

Peacock does not apply to this discussion because the three day deadline to give notice of a hearing is not statutory but is rather part of the Texas Rules of Civil Procedure.