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September 13, 2002

To: All members of the Supreme Court Advisory Committee

Re: Objections and alternatives to eviction rule changes proposed by the Supreme Court Advisory Committee (SCAC)

Dear Committee Members:

Preliminary Statement

Opposition to certain eviction rule changes. A number of statewide associations representing residential and commercial landlords have reviewed what the SCAC tentatively voted to recommend to the Supreme Court at the June 15th meeting. Only 13 or 14 of the 55 SCAC members in attendance were present and voting on June 15th.

On behalf of all of the associations listed below, this letter is being written to ask the SCAC to reconsider the particular rule changes to which the associations object to and instead recommend to the Supreme Court the alternatives being proposed by the associations at this time. The associations in question are:

- Justices of the Peace and Constables Association of Texas[1],
- Texas Apartment Association[2],
- Texas Association of Realtors[3],
- Texas Building Owners and Managers Association[4],
- Texas Mini Storage Association[5],
- Texas Housing Association[6],
- Rural Rental Housing Association of Texas[7],
- Texas Affiliation of Affordable Housing Providers[8], and
- Texas Chapter of National Association of Housing and Redevelopment Officials[9].

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1 The Justices of the Peace and Constables Association of Texas, Inc. is an association of justices of the peace and constables throughout Texas, having a membership of about 1,700.

2 The Texas Apartment Association, Inc. is an association of rental housing owners and managers throughout Texas, with 9,800 members who own or manage more than1.5 million units and housing more than 3.8 million residents.

3 The Texas Association of Realtors, Inc. is an association of 51,000 real estate brokers, salespersons and managers, many of whom own and operate rental housing.

4 The Texas Building Owners and Managers Association, Inc. is a statewide association of office building owners and managers, representing more than 661,000,000 square feet of commercial space and having more than 1,800 owners and managers across the state.

5 The Texas Mini Storage Association, Inc. is an association of self-service storage facility owners and managers throughout the state, with 1,665 members.

6 The Texas Housing Association, Inc. is an association of public housing and Section 8 housing programs throughout Texas, having 400 members.

7 Rural Rental Housing Association of Texas, Inc. is an association of housing providers financed by the Rural Housing Service of the U.S. Department of Agriculture in rural areas of the state, consisting of 700 members.

8 Texas Affiliation of Affordable Housing Providers, Inc. is a 501(c)(6) organization of affordable housing developers, lenders, investors and other businesses relating to affordable housing throughout Texas, having more than 100 members.

9 Texas Chapter of National Association of Housing and Redevelopment Officials is an association of management executives and personnel for public housing throughout Texas, representing approximately 300 agencies.

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Each of the above associations has already signed a joint letter to the Texas Supreme Court similar to this one, after having been informed that the SCAC's vote on June 15th was the last formal vote. The letter has not yet been mailed. Since the subject of eviction rules is again on the SCAC agenda for September 20th, we are hoping the SCAC will reconsider and that it will not be necessary for those associations or their members to contact the Supreme Court directly.

All of the associations acknowledge that there are many good improvements in the proposed changes. However, the associations strongly oppose some of those changes. The objections are to those particular rule changes which will cause workload problems and delays for the justice courts and which will cause a serious imbalance in the fairness, speed and cost of the eviction process as it affects all rental property owners everywhere in Texas. [10]

We understand that the charge to the Supreme Court Advisory Committee was to remove ambiguity, assure constitutionality and increase the overall fairness of the eviction process for all parties, while eliminating the possibility of judicial inefficiency and retaining the existing balance between plaintiffs and defendants with regard to speed and cost. We believe the Supreme Court Advisory Committee, in the version of the rule changes it voted to recommend to the Court at the June 15th SCAC meeting, departed from its charge in several significant areas. The approach that is reflected in some of the SCAC's proposals is not in keeping with the practical reality of justice court caseloads and the justifiable need for speed, simplicity and affordable resolution of eviction cases.

Justice court workload and efficiency. In many cases, the proposed changes in the rules will add to the workload of the justices of the peace, result in more appeals to county courts, cost property owners additional expense and add weeks to the eviction process.

Impairing judicial efficiency at the JP court level is of major concern to us since the number of justices of the peace in Texas tends to be finite, while the population is growing at a rapid pace. There are more than 110,000 eviction cases being processed by justice of the peace courts in Texas *each year*. Some of the rules proposed by the SCAC will cause both justice courts and county courts to become unacceptably burdened with more time-consuming eviction caseloads, unnecessary paperwork and an inability to resolve those cases speedily—at the same time the number of eviction cases will be increasing with the population.

Laypersons rather than attorneys. More than 95 percent of eviction cases are based on non-payment of rent. These cases should be able to be handled by laypersons without having to use an attorney. The rule changes proposed by the SCAC will add complexity to the process and will increase the likelihood of having to involve an attorney—even in some of the most basic eviction cases—whenever discovery is requested.

Delay and added expense for property owners. The same SCAC proposals that will cause problems for the JPs will also cause problems for property owners throughout Texas. The rules, as proposed by the SCAC, will unnecessarily lengthen the eviction process, make it more costly and burdensome for owners and allow continuation of the present abuses of the eviction appeal process by tenants.

The potentials for delay and extra cost under the rules proposed by the SCAC are the biggest concerns for all of the above-listed associations. With average rents being close to $800 per month per dwelling, each day of delay in the eviction process costs a landlord on the average $27--and a good bit more in many cases. A week's delay in only one eviction case converts to nearly a $200 loss; and a month's delay to roughly $800 on the average. Admittedly, the proposed

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[10] A complete copy of all of the SCAC's proposed rules (as modified and voted at the June 15th SCAC meeting) hopefully will be on the Internet at www.jacksonwalker.com/scac in the next several days.

SCAC rule changes will not delay in the majority of eviction cases. But the proposed SCAC procedure for appealing by affidavit of indigence—whether filed in good faith or bad faith—will cause a delay of a month or more in many cases. Delays will also occur under proposed SCAC rules in cases in which there is: (1) a motion for new trial; or (2) an appeal of final judgment, following which the JP must retain the file for five days after perfection of the appeal. In addition, property owners who would normally represent themselves in an eviction case, will have to bear the added expense of hiring an attorney in many cases because of a discovery motion, a motion for new trial, or an affidavit of indigency.

If 110,000 eviction cases per year are delayed even one day *on the average*, it will collectively cost the rental housing industry nearly $3,000,000 per year (and that figure doesn't even include attorney's fees that will be additionally incurred by owners). We believe that the average delay could be significantly longer than one day under the SCAC proposal by the time we factor in: (1) discovery-related delays; (2) motions for new trial; (3) JP retention of the file for 5 days after perfection of appeal; and (4) more appeals by affidavit of indigence. Bad-faith attempts by many tenants to delay final judgment in order to get additional free rent has been increasing at an exponential rate in recent years, and the rules proposed by the SCAC will only open the door wider for such abuse of the system. *If the SCAC proposals are modified as we request, the Court can avoid such economic losses and can minimize such delays and abuses of the judicial eviction process—while still achieving fairness and due process.*

Further, these kinds of operational expenses affect the overall climate of real estate investing and mortgage lending in this state, and it is important to keep such expenses and potential delays in check in order to prevent erosion of the confidence that developers and mortgage lenders need to have about rental housing construction and financing in Texas.

Attorney expense. On top of the economic losses from delay is the specter of incurring attorney's fees in responding to or contesting discovery motions in JP court, with the potential of making the eviction process more expensive.

Eviction discovery motions under the SCAC's proposed discovery rule will often cause plaintiffs who are laypersons to seek help from an attorney on how to respond to requests for oral depositions, written interrogatories and requests for admission, disclaimers and document production—especially since, as proposed by the SCAC, an inadequate or incorrect response to a discovery motion can delay the trial. If a landlord has to engage an attorney for a mere two hours to help respond to a discovery request, it is going to add $400-to-$500 of attorney's fee costs to the eviction process. Those costs can really escalate way beyond reason if a justice court approves oral or written depositions of owners, managers and other tenants. Discovery requests and the need to respond to or contest them won't be limited to motions made by lawyers, since it is commonplace in eviction cases for tenants or tenant assistance groups to share tactics on how to elongate the eviction process and stay in the landlord's dwelling (without paying rent) for a longer period of time.

Alternatives. To avoid these problems, the SCAC is urged to consider alternatives that avoid the problems of delay, cost and complexity inherent in the particular SCAC proposals in question. These alternatives, which are outlined below, are consistent with the charge of the SCAC. In requesting the SCAC to consider these alternatives, we have set forth:

(1) the language of the rules to which the associations object and the reasons for our objections;

(2) alternative language which will eliminate those objections; and

(3) the reasons why the alternative language is fairer, while still maintaining the balance

between plaintiffs and defendants contained in the existing rules.

In the remainder of this letter, the phrase "SCAC proposed rules" refers to the rules, as modified and adopted by SCAC vote on June 15th, as rules changes to be recommended to the Texas Supreme Court. The term "we" is referring to the associations listed above.

DISCOVERY

THE PROBLEM. All of the associations referred to earlier in this letter are particularly concerned that the discovery allowed under the SCAC's Rule 743 will lead to: (1) delay in the eviction process in many instances; (2) the necessity of hiring an attorney to respond to discovery motions; (3) the need for court hearings on discovery motions; (4) judicial inefficiency; (5) more complexity for everyone; and (6) a general slowdown in the eviction adjudication process.

The rule recommended by the SCAC has the potential for all of the foregoing because it opens the door for oral depositions, requests for admissions, written interrogatories, disclosures, requests for document production, etc. It will create burdensome and unnecessary paperwork for the justice courts and for all parties when discovery motions are made. It will require motions to the justice court in order to obtain the discovery and will necessitate hearings to resolve discovery disputes. It is certain to provide opportunities for both lawyers and litigants to attempt delay of eviction trials with discovery motions.

SOLUTION. We recommend that the SCAC's proposed Rule 743 be revised to read as follows: *[Note: The comparison below is to the SCAC draft.]*

> "Rule 743. The cause shall be docketed and tried as other cases. If the defendant fails to enter an appearance upon the docket in the justice court or file an answer at or before the time the case is called for trial, the allegations of the complaint may be taken as admitted and judgment by default entered accordingly. If the plaintiff fails to appear when the case is called for trial, the case may be dismissed for want of prosecution. The justice has authority to issue subpoenas for witnesses to enforce their attendance, and to punish for contempt. ~~Generally, discovery is not appropriate in eviction actions; however, the justice has the discretion to allow reasonable discovery of limited scope, which does not unduly delay the trial.~~ Discovery is allowed in eviction cases in justice court only to the following extent. Any party may make written request to another party for a copy of any evidentiary document that the requesting party believes may be relevant to the trial. The request must be delivered to the opposing party or the agent on the complaint no later than two days prior to trial; however, a request for a copy of the notice to vacate, a written lease, an executory deed or foreclosure documents may be delivered anytime prior to trial. The party to whom the request is made shall promptly produce such documents to the extent that they are relevant. At the time of trial, if the justice finds that: (1) the request was timely delivered; (2) the requested documents are relevant; and (3) the preparation of the requesting party's case or defense was prejudiced by failure to comply with the request, the justice may postpone the trial for no more than 3 days and order that the documents be produced by a time certain prior to the postponed trial."

ADVANTAGES AND REASONS. The modified language is simple and self-administering. It will allow reasonable opportunity for defendants to request needed documents, but it won't leave the door wide open for delay and additional expense. It will remove from the picture the time-consuming discovery procedures of depositions, interrogatories, admissions and disclosures. It will minimize discovery disputes. It will not involve motions or hearings before the judge. It will eliminate the need for lawyers to respond to discovery requests. It will save everyone's time and will not contribute to the justice court's paperwork load. It will eliminate the need for subsequent

purging of attachments by the justice court clerks to make room for more files. It will not adversely affect the speed of resolving the case. It will not give JPs unlimited discretion in discovery. It will tend to discourage spurious, bad faith discovery that is intended only for the purpose of harassment or delay. Lastly, if greater discovery is truly needed by the defendant, such extensive discovery will be available upon trial de novo in county court.

TENANT ABUSE OF APPEAL PROCESS WHEN TENDER OF RENT INTO JP COURT IS NOT REQUIRED

THE PROBLEM. Under the SCAC's proposed Rule 750, some tenants will continue to abuse the process and squeeze an extra month or so of "free rent" out of the landlord when the eviction is based on unpaid rent. They can do it by simply filing—either falsely or in good faith—an affidavit of indigence, which will delay issuance of the writ of possession for a month or so. All the tenant needs to do is to file an affidavit of indigence after losing in JP court; and then

- if the landlord *does not contest* the affidavit, the tenant who files an affidavit of indigence, either falsely or in good faith, can delay issuance of the writ for at least *three-to-four more weeks* by virtue of time consumed in the normal appeal process in county court—without having to post a bond or put up one dime anywhere; or

- if the landlord *contests* the affidavit and wins, the tenant can still appeal the JP's non-indigence ruling (without appealing the judgment on the merits) and prevent the writ of possession from being issued for at least *three-to-four more weeks* while the justice clerk gets the case sent up to the county clerk for a hearing solely on the JP's non-indigence ruling, the county clerk dockets the case, the judge or clerk sets the JP's indigence ruling for a hearing in county court, the county judge rules that the tenant is not indigent and sends the case back to the justice court, where the tenant will have five more days before a writ of possession can be issued by the JP.

The proposed SCAC rule does nothing to overcome the problem of the tenant who in bad faith files a pauper's affidavit in JP court to appeal a non-payment-of-rent case and to avoid having to post a supersedeas bond. Similarly, it does nothing to overcome the problem of a bona fide pauper bilking the landlord for another three-to-four weeks of free rent by appealing a non-payment of rent case without good cause. The abuse by tenants has gotten very bad in some areas of the state. The SCAC's proposed rule means a continuation of the sad state of affairs on paupers' affidavits that now exists in JP court under the current rules. It is indeed unfortunate when the JP courts and county court have to waste their time in playing the tenant games of

- appealing the JP's ruling of non-pauper status even though the tenant knows he doesn't qualify as a pauper, or
- appealing the case on the merits with no intention to have a trial de novo in county court—the affidavit being filed solely to get three or four more weeks of free rent.

The foregoing is a sad commentary on the state of the current rules, and virtually nothing has been done about this problem in the SCAC's proposed rules—in fact, the potential for delay has gotten worse under the proposed rules because of the additions of proposals for (1) discovery, (2) new trials, (3) trial postponement and (4) requiring the JP to delay five days after the appeal deadline before transmitting the file on an appealed case to the county court.

SOLUTION. We believe the key to stopping the abuse of the affidavit of indigence in non-payment of rent cases is to do one of two things, i.e., either

(1) require an "indigent" who is appealing a non-payment-of-rent case to tender into JP court prorated rent for the remainder of the month in which the JP eviction judgment was signed. Requiring some rent to be put up for the remainder of the month will help stop the abuse most of the time, particularly if the JP's judgment is rendered in the first 20 or 25 days of the month. It will also minimize frivolous appeals and will reduce appreciably the useless paperwork that JPs and their clerks would otherwise be put through because of tenant abuse of the pauper's affidavit appeal process in unpaid rent cases. The language to accomplish this would be to revise proposed Rule 750(j) to read as follows:

> "(j) If the appeal is perfected by the approval of an affidavit of indigence, the defendant need not post a supersedeas bond, deposit or security with the justice court in order to remain in possession, or to suspend the enforcement of the judgment, except as follows. The defendant must, within five days after judgment is signed, tender to the justice court a cash deposit in the manner provided in Subsection (e) of this rule in the amount of the prorated rent or rental value for the remainder of the calendar month in which the judgment was signed. The justice may waive this requirement if the defendant claims under oath that rent or rental value for such time period has already been paid."

or (2) state in the rules that the JP's fact finding of whether the tenant is indigent is final and unappealable to county court, and then delete SCAC Rule 749a(i) regarding appeal of the JP's ruling on indigency. This will discourage frivolous or bad-faith affidavits of indigence because the tenant won't be able to get any "free rent" days if the landlord contests the affidavit and wins. From a practical standpoint, the determination of indigent status is not a trial; and the mandate of trial de novo in county court does not require that an appeal of the JP's determination of indigence be reheard de novo in the county court. There is no reason the county court can't rely on the JP's fact determination of indigent status—just like the proposed rules allow the county court to rely on JP factual determinations of rent amounts and due dates during the appeal to county court. Moreover, having no appeal from a trial court determination of non-indigence is not without precedent. For example, in a case originally filed in county or district court, the rules do not provide for appeal to the Court of Appeals of a county court or district court determination of indigent status for the purpose of not having to pay a filing fee or a cost bond on appeal. The right to appeal a trial court's determination of indigence to a higher court is not a statutory right or constitutional right.

ADVANTAGES AND REASONS. Either of the above solutions will stop the bilking of rental housing owners out of another month's rent in unpaid rent cases when affidavits of indigence are filed, regardless of whether they are filed in good faith or bad faith. Tender of future rent to the JP court for the remainder of the month should pass constitutional muster since it does not interpose any payment of cash to secure the judgment as a condition of perfecting appeal for paupers.

The commentary of the SCAC subcommittee that accompanied the initial 2001 draft of the proposed rules by the SCAC subcommittee cited *Dillingham vs. Putnam, 14 SW 304 (Tex. 1890)* as authority for the proposition that requiring payment of *back rent* as a condition of appeal violates the Texas open courts doctrine. The subcommittee's rationale was that under *Dillingham,* the right to perfect appeal cannot be conditioned on the filing of a supersedeas bond or other bond to secure the trial court's judgment. The above-listed associations do not disagree with that rationale and would point out that our proposed rule does not require the filing of any kind of security to pay the judgment in order to perfect appeal—either by an appealing pauper or an appealing non-pauper.

Furthermore, our proposed rule does not require tender of any *back* rent—indeed a judgment for back rent is not even allowed under proposed SCAC Rule 748. Instead, our proposed rule requires an appealing tenant to tender rent accruing in the *future* (for the remainder of the month) into the JP court registry to stop execution of the JP court's judgment pending appeal. Requiring such a tender of *future* rent into *JP court* is just as constitutional under the *Dillingham* case as requiring a defendant to tender *future* rent into *county court*, as it becomes due, into the county court registry during appeal. The latter is being proposed by the SCAC in Rule 750(a). Furthermore, if the justice of the peace is wrong in rendering his judgment of eviction and if the alleged "indigent" is evicted because the tenant fails to tender rent for the remainder of the month or fails to post a supersedeas bond (assuming that the JP found no indigence), the tenant has recourse in damages in a wrongful eviction suit against the landlord—just like under current law. The foregoing is consistent with this Court's decision in *Walker v. Blue Water Garden Apartments, 776 S.W.2d 578 (Tex. 1989).*

It may be argued by others that the open courts doctrine is violated under our proposed rule if the appeal is mooted. Mootness could occur whenever a writ of possession is issued by the JP court and executed by the constable because of the tenant's failure to tender rent for the remainder of the month (or the tenant's share of such future rent in subsidized rent situations). Yes, if the tenant voluntarily moves out after the JP's judgment or after the constable executes a writ of possession issued by the JP, the appeal would be moot on the possession issue.[11] Similarly, appeals would be moot when

- an indigent tenant fails to tender rent into the county court's registry as it becomes due (as proposed by the SCAC in Rule 750(a)), and a writ is therefore issued by the justice court;
- a non-indigent tenant fails to post a supersedeas bond and fails to tender rent for the remainder of the month into justice court, and a writ is therefore issued by justice court; and
- a non-indigent tenant fails to tender rent into the county court's registry as it becomes due, and a writ is therefore issued by the county court.

If the writs in the above three instances are executed, the possession issue in the case becomes moot. If mootness of the issue of possession causes a violation of the open courts doctrine, then it would seem to be intellectually hypocritical to argue that mootness violates the open courts doctrine only if it occurs at the JP level rather than at the county court level.

When the tenant has no intention of going to trial in county court, it is wishful thinking to believe that the SCAC proposal in Rule 750(a) of requiring tender of rent into the *county court* will stop the bad-faith filing of affidavits of indigence by defendants or will get the rent paid by true indigents for the time period between the JP court judgment and the earliest hearing on the case by the county court. Requiring rent to be tendered into the registry of the county court will be rendered meaningless when the tenant appeals of an unpaid rent case only to buy time and get some additional "free rent" at the landlord's expense up until 10 days after the county court issues the writ for not tendering rent into county court.

Bear in mind that under the proposed SCAC rules, there is an additional five days that the JP must keep the case before the JP's file can be forwarded to the county court. In addition, there is the time required by: transmittal of the JP's file to county court; the county clerk's time in processing the file and sending out the mandatory notice to the tenant under Rule 753; the mandatory eight-day waiting period under Rule 753 before a trial can be held in county court; a 3-day notice of trial setting or default judgment hearing; and a 10-day delay in issuance of a writ of

[11] But there would be no mootness on any issues of unpaid rent, late charges or attorney's fees.

possession by the county court (the 10-day period under Property Code, Section 24.007 during which the defendant can post a supersedeas bond to suspend the county court's judgment). *As a result, under the SCAC proposed rule, an affidavit of indigence filed to appeal an unpaid rent case—whether filed in good faith or bad faith—opens the door for even more delay than under the existing rules.*

Lastly, solving the problem of tenant abuse of the affidavit of indigence will reduce the number of *frivolous* or *bad-faith* eviction appeals and will lessen the workload on both the justice courts and the county courts. Our proposed rule will not deter bona fide appeals by truly indigent defendants in non-payment-of-rent eviction cases.

COMPLAINT CONTENTS AND ATTACHMENTS

THE PROBLEM. The SCAC proposal for Rule 741 states that the eviction complaint must (1) contain a detailed list of information and (2) have certain documents attached to it. The proposed penalty for missing one item of information or missing one attachment means possible postponement of the eviction trial by the JP court.

It is easy for lawyers to follow a comprehensive list of content requirements and to make required attachments. But it is more difficult for a layperson. Such a checklist is a virtual trap for laypersons—one slip-up and they are likely to get their case delayed and the tenant will get a longer free-rent ride as a practical matter. The eviction process needs to be kept as simple as possible for laypersons (who currently handle more than 95 percent of all evictions) and should not incorporate these kinds of obstacles. The long list of required contents for a complaint in the SCAC's proposed Rule 741 should be deleted.

SOLUTION. In lieu of a list of required complaint contents and attachments, we recommend the following as a substitute: *[Note: The comparison below is to existing Rule 741.]*

> "Rule 741. Requisites of Complaint. The ~~sworn~~ complaint shall describe the ~~lands, tenements or~~ premises, the possession of which is claimed, with sufficient certainty to identify same. The complaint shall also state the facts that entitle the plaintiff to possession and authorize the suit under Chapter 24 of the Texas Property Code. The grounds under which the plaintiff is entitled to possession and other damages authorized by Rule 738 are limited by the grounds stated in the complaint. The complaint may be amended by the plaintiff at any time prior to trial. If the complaint is amended, the justice may grant a continuance in accordance with Rule 745 upon the defendant's request if the defendant's preparation for trial has been prejudiced by the amendment."

ADVANTAGES AND REASONS. There is no need to have a complicated checklist for the contents of the complaint any more than the Court's rules for any other type of lawsuit should have a contents checklist. There is no need to require evidentiary documents to be attached to the complaint when they are available merely by request under the proposed rules. There are no content or attachment requirements in the rules for any other lawsuit in any other court. If there is a genuine need for document copies prior to trial, either party can get any document that is truly relevant by simply asking the other side for it, assuming the discovery rule we suggested earlier in this letter is adopted.

If the goal is to better notify defendants about the grounds for eviction, we believe that inclusion of the attached eviction complaint form in the Court's commentary to Rule 741 will satisfy that goal far better than a checklist or required contents or required attachments. Several members of the SCAC who took the time to read the form stated that they were impressed with it.

NEW TRIALS AFTER DEFAULT JUDGMENTS OR DISMISSALS

THE PROBLEM. The SCAC's Rule 749 proposes to allow a JP to set aside a *default* judgment or dismissal and grant a new trial. This will open the door for both plaintiffs and defendants to lie and cheat their way to a second chance for trial after they have already lost by not showing up for the trial on the date designated by the justices. The SCAC's proposal cuts both ways, benefiting the plaintiff who forgets or who is late, as well as the defendant who does likewise. But this "second chance" at the trial is going to be badly abused by tenants—just as the loophole of the pauper's affidavit under current rules has been abused by tenants who are not truly paupers. If a tenant knows he will lose, why would the tenant ever show up for trial? Why wouldn't the tenant simply skip the trial and then try to persuade the JP with ex parte communications to grant a new trial with a sob story about why the tenant didn't attend the trial? This strategy could possibly delay the eviction process for another week or even longer if a new trial is granted under the SCAC's proposed rule.

SOLUTION. We believe that the SCAC's proposed Rule 749(a) should be revised to read as follows: *[Note: The comparison below is to the SCAC draft.]*

> "Rule 749. May Appeal. (a) ~~In eviction cases in which there has been an evidentiary trial on the merits no motions for new trial may be filed. A justice may set aside a default judgment or a dismissal for want of prosecution as justice requires anytime before the expiration of five days from the date the judgment was signed.~~ If judgment has been entered following an evidentiary trial on the merits in an eviction case, the justice may not grant a new trial. If a default judgment or dismissal for want of prosecution has been entered, the justice may, upon written motion, set aside the judgment and grant a new trial only if:
>
> (1) the motion states a justifiable reason for failing to appear for trial;
> (2) the motion states specific facts that are likely to have resulted in a judgment in favor of the party seeking the new trial;
> (3) the motion is filed within one day after the default judgment or dismissal is signed; and
> (4) the new trial is held within three days after the default judgment or dismissal is signed.
>
> No hearing on a motion for new trial is necessary. The motion shall be considered as automatically overruled if not granted by the justice within two days after the default judgment or dismissal. If a new trial is granted, it may not be postponed at the request of the party who requested the new trial. A jury trial is not allowed in a new trial. The justice shall enter judgment immediately upon conclusion of the new trial. The deadline for filing an appeal bond and supersedeas bond and for tendering the county court filing fee, or filing an affidavit of indigence in lieu thereof, remains five days after the default judgment or dismissal was signed."

ADVANTAGES AND REASONS. This solution gives the JP the discretionary right to grant a new trial after a default judgment or dismissal if the "no show" was justified in the opinion of the justice and if there was in all likelihood a meritorious defense or a winning case in his opinion. Yet it avoids game playing and abuse by parties who seek to circumvent the proposed rule, and it conserves the justice court's time. It does not extend the appeal deadline that existed under the default judgment or dismissal. Not allowing a jury in the new trial is not a violation of the open courts doctrine of the *Dillingham* case, since the party asking for the new trial had the right to a jury trial earlier and failed to exercise it by not requesting a jury or by not showing up when one was requested. Not allowing a jury trial under these circumstances is consistent with Rule 220, which mandates the same result.

TRIAL POSTPONEMENT

THE PROBLEM. We have no problem with the SCAC's proposed revision of Rule 745 to give the JP the right to grant a postponement for "exceptional circumstances." The problem is that there is no limit on the length of time of a postponement for "exceptional circumstances."

Most justices of the peace will not abuse this right to postpone, but some may. In certain parts of the state, this unlimited discretion will result in unfair treatment of property owners and even longer time periods before an eviction trial is actually set by some JPs who are overworked or who are biased or have ulterior motives in not setting trials.

SOLUTION. We believe that the SCAC's proposed Rule 745 should be changed to read as follows: *[Note: The comparison below is to the SCAC draft.]*

> "Rule 745. Trial Postponed. For good cause shown, supported by affidavit of either party, the trial may be postponed for a period not exceeding seven days. Upon a showing of exceptional circumstances, supported by affidavit of either party, or on the court's own initiative, the trial may be postponed ~~for a longer period~~ for an additional period of time, not exceeding seven days. The trial may not be postponed for any additional period except upon the agreement of all parties, provided such agreement is made in writing and filed with the court, or if the agreement is made in open court and noted on the docket."

ADVANTAGES AND REASONS. The loophole of a "longer period" without any limitation on the number of days is avoided, and therefore the potential for abuse and delay is avoided, while still accommodating the reasonable needs of the parties. Please remember that a postponement period in an eviction case nearly always means, as a practical matter, a "free rent" period for the tenant, since the vast majority of eviction cases are based on non-payment of rent. Justices of the peace already have the ability under statute to get substitute JPs to cover for them when they are ill or on vacation.

Any argument in favor of allowing a longer period of time at the discretion of the JP overlooks the fact that when an eviction trial for unpaid rent is postponed without requiring any rent to be tendered to the JP court, the postponement has the practical effect of forcing the landlord to give away more free rent to the tenant. Also, any such argument also overlooks the reality of who is the wrongdoer. It ignores the fact that the tenants have breached their lease and have no defense in 99 percent (or more) of non-payment-of-rent cases, and that delay due to someone's extended illness or hospitalization could postpone the trial for months on end. Further, it ignores the fact that in unpaid rent cases and holdover cases, Section 24.011 of the Property Code allows laypersons to represent the tenant if the tenant cannot attend the trial. It is simply not fair to force a landlord to in effect subsidize tenants during prolonged postponement situations.

IMMEDIATE ISSUANCE OF WRIT IN EMERGENCY BOND FOR POSSESSION CASES

THE PROBLEM. Under the bond for possession rule that has existed for many years, the justice of the peace has been empowered to issue a writ of possession immediately after a default judgment, assuming no counterbond was filed by the defendant. This was very important to protect against the risk of serious bodily harm and serious ongoing property damage, when there was an uncontested complaint alleging such dangers, particularly if the dangers rose to the level of criminal conduct which justified immediate action by the justice. *Yet, the SCAC chose to disregard the need for immediate action in the presence of these dangers of bloodshed, murder, rape, molestation,*

arson and ongoing significant property damage, when the alleged threat is uncontested, the tenant does not show up for trial, and the plaintiff has posted a possession bond. Instead, the SCAC proposed a mandatory three-day delay in the issuance of the writ in these cases—even in default judgment cases. Also, the SCAC proposal does not impose a duty on the part of the justice to issue a writ of possession, upon request, to the prevailing plaintiff when the defendant fails to timely perfect his appeal. There have been many instances in which some JPs drag their feet for no justifiable reason in issuing a writ of possession to which the plaintiff is entitled under the court's judgment.

Granted, the SCAC's proposed Rule 740 limits bond for possession cases to situations posing a present danger to others and it doesn't allow claims for rent to be included in such cases. But we don't believe the SCAC fully appreciated the seriousness of the dangers involved in these types of situations. These threats to human safety and property damage confront the rental housing industry and the justices of the peace across the state on a regular basis. By taking away the JP's right to issue the writ immediately in default judgment cases where a bond for possession has been filed, there will inevitably be bloodshed, bodily injury and irreparable damage to persons and property that could have been avoided.

SOLUTION. We recommend that Rule 740 as recommended by the SCAC be revised to read as follows: *[Note: The comparison below is to the SCAC draft.]*

> "(c) ~~If the defendant fails to appear for trial, or if the verdict or judgment after trial is for the plaintiff for possession, the plaintiff may request a writ of possession from the justice court after the expiration of three days from the date the judgment is signed by the justice. Whenever a justice court signs a judgment under this rule either party may appeal in the same manner provided for a non-emergency eviction trial, except that the defendant shall have only three days for perfecting appeal when a bond for possession has been filed and a default judgment was entered.~~ If a default judgment for possession is entered in favor of plaintiff, the justice may issue a writ of possession at any time after judgment is signed. If a judgment for possession is entered in favor of plaintiff after a trial on the merits in which the defendant contested the eviction, the justice may issue a writ of possession no sooner than the fourth day after the judgment is signed. Unless a party has already moved out of the premises or been forcibly removed by a law officer executing the writ of possession, the party may appeal a judgment in an eviction case in which a bond for possession has been filed in the same manner as in other eviction cases, except that the time period for filing an appeal bond, supersedeas bond or affidavit of indigence shall be three days rather than five. When the time period for appealing an eviction case has expired and the defendant has not perfected his appeal, the justice must promptly issue a writ of possession upon request by the plaintiff and payment of the required fees."

ADVANTAGES AND REASONS. When allegations of serious criminal violence are uncontested and a default judgment is entered after sworn testimony before the JP, it makes no sense to delay issuance of the writ of possession. During SCAC deliberations, no one claimed or testified that waiting three days after default judgment to issue a writ was needed for practical or constitutional purposes. Delaying the writ issuance in default cases of this type makes no more sense than telling a JP that he can decide that a peace bond needs to be placed on a husband who has threatened to kill his wife—but the JP must wait three days before ordering the husband to keep away. The recommendation of the SCAC to delay the writ of possession in default judgment cases when there is a present danger is very disappointing in view of the pleas of the Justices of the Peace and Constables Association of Texas and the Texas Apartment Association, both of which have extensive cumulative experience in this area.

What remedies are available to a defendant against whom a default judgment has been entered in a bond for possession case under the proposed SCAC rules?

- Before issuance of the writ of possession by the justice and execution of the writ by the constable, the defendant can request a new trial, stating a good reason for not showing up and stating a meritorious defense;[12] and

- After execution of the writ of possession, the defendant can file a separate suit against the plaintiff for damages for wrongful eviction if, indeed, the defendant had a meritorious defense. The eviction decision by the JP will have no res judicata effect on such a lawsuit, according to the last paragraph of proposed Rule 749(b).

If accelerated issuance and execution of writs of possession are not available following default judgment in cases which involve potential serious harm to person or property and in which bonds for possession have been filed, then bonds for possession are rendered relatively meaningless and violence to persons and property will occur that could otherwise be avoided.

PRIVATE PROCESS SERVERS

THE PROBLEM. The SCAC's proposed Rule 742(a) will open the door for private process servers to serve citations on the defendant(s) in eviction cases. Eviction cases are different than suits for monetary damages or even the typical suit for injunction relief. The threat of violence against the process server is present in many cases because of the emotions involved. Service on the defendant is more difficult than in a typical civil suit for money because so many tenants seek to evade service in an attempt to eek out a few more days of "free rent" by not answering the door or otherwise evading service. Moreover, there is a genuine fear on the part of the constables that "easy" cases will be given to private process servers and that constables will be left with only the uneconomical, difficult, time-consuming service cases. Lastly, under the proposed rule below, constables from other precincts or even deputy sheriffs can be used in the event that a constable in a particular precinct is not doing his job.

SOLUTION. We would recommend that Rule 742(a), as proposed by the SCAC, should be revised to read as follows: *[Note: The comparison below is to the SCAC draft.]*

> "(a) Persons Authorized to Serve Citation in eviction actions. ~~Persons authorized to serve citation in eviction actions include (1) any sheriff or constable or other person authorized by law or (2) any person authorized by law or written order of the court who is not less than 18 years of age.~~ Persons authorized to serve citation and execute writs of possession in eviction cases include (1) sheriffs, constables and their deputies in the county in which the justice court is located, and (2) other persons authorized by statute. No person who is a party to or interested in the outcome of ~~a suit~~ an eviction case ~~shall~~ may serve any process."

ADVANTAGES AND REASONS. Situations which might justify a private process server in eviction cases rarely occur. But if and when they do, as long as the rules give property owners the alternative of having service of citation performed by another law officer as set forth in the above proposal, there is no need to interject private process servers into the eviction process.

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[12] Section 24.0061(d) of the Texas Property Code requires the constable to give 24 hours' advance notice to the defendant prior to executing a writ of possession. Therefore, there is sufficient opportunity for a defendant against whom a default judgment has been entered in a bond for possession case to request and get a new trial in justice court—if one is truly deserved.

CONCLUSION

The alternatives and arguments outlined above will resolve the concerns of the justices of the peace and the real estate rental industry and, at the same time, will preserve the major improvements in the eviction process desired by the Supreme Court Advisory Committee.

Sincerely,

NIEMANN & NIEMANN, L.L.P.

By _____
Larry Niemann

Enc: August 7, 2002 draft of sample eviction complaint

xc: all associations listed above

evictionsupcourt9-13-02.doc

Cause No. _____

Plaintiff: _____ In the Justice Court

v.

Defendant(s): _____ Precinct _____ Place _____

_____

_____

_____ County of _____, Texas

COMPLAINT FOR EVICTION

1. COMPLAINT. Plaintiff files this complaint against the above-named defendant(s) to evict defendant(s) from plaintiff's premises, which is located in the above precinct and which is described below.

_____

Street Address Unit No. (if any)

_____

City County State Zip

2. CURRENT OCCUPANCY BY DEFENDANT(S). *(check only one)*
   - ☐ Rental agreement: Defendant(s) are occupying the premises under a ☐ written or ☐ oral rental agreement, either as tenants or permitted occupants under the rental agreement. The rental agreement ☐ does ☐ does not involve the rental of land on which the defendant(s) have placed a manufactured home.
   - ☐ Foreclosure: Defendant(s) continue to occupy the premises after foreclosure sale.
   - ☐ Contract for deed: Defendant(s) continue to occupy the premises after a default under a contract of deed.
   - ☐ Trespass: Defendant(s) entered the premises without authority and are trespasser(s).
   - ☐ Other: *(briefly describe)* _____

     _____

3. SUIT FOR MONEY. Plaintiff *(check one)* ☐ does ☐ does not seek judgment for rent (or rental value if there is no rental agreement). Plaintiff *(check one)* ☐ does ☐ does not seek late charges contained in a written rental agreement.

4. SERVICE OF CITATION. Plaintiff requests service of citation on defendant(s) by personal service at the above described premises. If any other addresses of defendant(s) are listed in the rental agreement, such address(es) are as follows: _____

   _____

   _____

5. NOTICE TO VACATE. Plaintiff delivered to defendant(s) a written notice to vacate in accordance with the applicable notice requirements of Section 24.005 or Section 24.006, Texas Property Code; or if the premises was for occupancy by a manufactured home not owned by plaintiff, notice to vacate was delivered under Section 94.203, Texas Property Code. Notice to vacate was delivered on the _____ day of _____, 20___ by the following method: *(check one or more as applicable)* ☐ personal delivery to defendant(s); ☐ personal delivery to any person residing at the premises who is 16 years of age or older; ☐ affixing the notice to the inside of the main entry door of the premises; ☐ regular mail, registered mail or certified mail return receipt requested, to the premises; or ☐ other method of delivery authorized under Section 24.005, Texas Property Code.

6. ☐ GROUNDS FOR EVICTION—BREACH OF RENTAL AGREEMENT *(check if applicable)*. Defendant(s) have violated the rental agreement between plaintiff and defendant(s) and have refused to vacate after notice from plaintiff. The rental agreement violation involved one or more of the following:

(check and fill in below, as applicable)

☐ Unpaid rent or late charges. Defendant(s) failed to pay the rent or late charges that are still due and unpaid, as follows:
Rent $_____; Late charges $_____; Due date _____; For rental period _____ .
Rent $_____; Late charges $_____; Due date _____; For rental period _____ .
Other unpaid rent or late charges, with due date(s) and rental period(s): _____
Plaintiff also seeks judgment for rent and late charges accruing after date of filing and becoming due thereafter, prorated daily through date of judgment.

☐ Holding over. Defendants are unlawfully holding over *(check one)* ☐ after the rental term or renewal period has expired or ☐ after defendant(s)' rental agreement or right of possession was lawfully terminated by plaintiff. The date of such expiration or termination was _____, 20___. Defendants are liable to plaintiff for holdover rents after such expiration or termination date, prorated daily at $_____ per day through date of judgment.

☐ Other sums due and unpaid. Monies other than rent or late charges are due and unpaid by defendant(s) under the rental agreement for: *(briefly state)* _____
_____
_____

☐ Conduct in violation of rental agreement. The rental agreement has been violated by the following conduct of defendant(s) or other persons for whom defendant(s) are responsible: *(state facts briefly)* _____
_____
_____
_____

☐ Other grounds. Other grounds for eviction of defendant(s) are as follows: *(state facts briefly)* _____
_____
_____

7. ☐ GROUNDS FOR EVICTION—FORECLOSURE *(check if applicable)*. Plaintiff owns the premises as a result of purchase at a tax foreclosure or a trustee's foreclosure sale under a superior lien. Defendant(s) have refused to vacate after notice from plaintiff. Plaintiff has complied with all other requirements of Section 24.005(b) and Chapter 51, Texas Property Code, and other applicable laws. *(state facts briefly)* _____
_____
_____

8. ☐ GROUNDS FOR EVICTION—CONTRACT FOR DEED *(check if applicable)*. Plaintiff is the seller in a contact for deed. Defendant(s) have defaulted under such contract and have refused to vacate after notice from plaintiff. Plaintiff has complied with all statutory and contractual procedures required to regain possession of the premises from defendant(s), including those in Sections 5.063-5.065, Texas Property Code. *(state facts briefly)* _____
_____
_____

9. ☐ GROUNDS FOR EVICTION—TRESPASS *(check if applicable)*. Plaintiff is entitled to possession of the premises because defendant(s) are trespassers, having entered onto the premises without authority of the property owner, tenant, or contract for deed holder. The premises are either ☐ owned by plaintiff, ☐ leased by the owner to plaintiff, or ☐ under contract for deed to plaintiff. Defendant(s) have refused to vacate after notice from plaintiff.

10. ☐ GROUNDS FOR EVICTION—OTHER *(check if applicable)*. Paragraphs 6 through 9 above do not cover plaintiff's grounds for eviction. Defendant(s) have refused to vacate after notice from plaintiff. Plaintiff is entitled to possession because *(state facts briefly):*

_____

_____

_____

11. ☐ MANUFACTURED HOME LOT. If the rental agreement is for the rental of land on which a manufactured home has been placed by the defendant(s), all notice and time requirements in Section 94.203, Texas Property Code, have been complied with by plaintiff. The name(s) and address(es) of all lienholders on the manufactured home are: _____

_____

_____

_____

12. JUDGMENT REQUESTED. Plaintiff requests judgment for eviction and issuance of a writ of possession. Additionally, plaintiff requests the following: *(check as applicable)*

☐ Rent and late charges. If eviction is based on a rental agreement, plaintiff requests judgment for *(check as applicable)* ☐ unpaid rent and ☐ unpaid late fees, through date of judgment. Judgment for other sums (except post-judgment interest and attorney's fees) may only be recovered in a separate suit.

☐ Rental value. If eviction is not based on a rental agreement, Plaintiff requests judgment for fair rental value for the time period from the unlawful occupancy of the premises by defendant(s) through date of judgment.

☐ Attorney's fees. If plaintiff engages an attorney, plaintiff requests judgment for attorney's fees because *(check only one)* ☐ a written agreement, binding on defendant(s), contains a provision entitling plaintiff to attorney's fees, or ☐ plaintiff gave the 10-day notice as provided in Section 24.006, Texas Property Code.

☐ Post-judgment interest. If plaintiff is granted judgment for rent, late charges or attorney's fees, plaintiff requests judgment for post-judgment interest as allowed by statute or the rental agreement.

The Court may send any notice to plaintiff via U.S. mail, email, telephone or fax, as follows:

_____
Street address

_____
City

_____
State and zip

_____
Phone number, if any

_____
Fax number, if any

_____
Email address, if any

PLAINTIFF: _____
(as stated at top of page 1)

By _____
Signature

The above is the signature of: *(check one)*
☐ plaintiff or
☐ plaintiff's authorized agent

_____
Printed name of person signing

_____
Title of person signing (for example, owner, manager, president, etc.)