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November 26, 2012

Honorable Nathan L. Hecht
Supreme Court of Texas
201 W. 14th Street, Room 104
Austin, Texas 78701

Dear Justice Hecht:

I am writing again regarding the Texas Apartment Association's (TAA's) concerns relating to the proposed rules that the Task Force for Rules in Small Claims Cases and Justice Court Proceedings (the "Task Force") drafted. By this letter, TAA reiterates both the general and specific concerns that were previously submitted to you by letters dated May 7, 2012 and May 31, 2012 and articulated by David Fritsche to the Supreme Court Advisory Committee (SCAC) at its June 2012 meetings.

The Task Force did not address most of the concerns we have expressed. Instead, the Task Force submitted a substantially unchanged set of proposed rules to the SCAC at its September 2012 meetings. The Task Force's proposed rules go far beyond legislative intent, as evidenced by the attached letters from Representative Jim Jackson and Representative Tyron Lewis. Moreover, if these proposed rules were implemented, they would slow the eviction process significantly in many cases and, as a result, could cost the rental housing industry tens of millions of dollars a year. In addition, by giving Justices of the Peace almost unfettered discretion, the proposed rules would create uncertainty for all stakeholders in the eviction process. These are just a few of the concerns we have expressed on prior occasions.

The main intent of this letter is to identify aspects of the Task Force's presentations at the SCAC meetings that gave rise to additional concerns. These concerns are addressed below. We referenced the meeting transcripts to the extent we felt it would be helpful to do so. If you need additional transcript references or other additional information regarding any of the issues below, please do not hesitate to contact me.

## CONCERNS REGARDING THE TASK FORCE'S PRESENTATIONS AT SCAC MEETINGS

### 1. Potentially Misleading Characterizations of Task Force Discussions with TAA

At the SCAC's June and September meetings, the Task Force alluded to its prior discussions with TAA and arguably gave SCAC members the faulty impression that TAA and the Task Force are in substantial agreement regarding the proposed rules. *See* SCAC 6/23/12 Tr. at 25094:16–24; SCAC 9/28/12 Tr. at 25133:9–14. Consequently, it is important to reiterate that no such general agreement exists. As evidenced by this letter, TAA continues to have grave concerns about the vast majority of the Task Force's proposed rules, particularly as they relate to eviction cases.

## 2. Lack of Deference to Legislative Intent

At the SCAC's September meetings, SCAC Chairman Chip Babcock referenced the letters the Court received from legislators. Babcock said: "The Court's received letters from both Representative Jackson and Representative Lewis . . . . And they are critical of the task force work because they say that you're making substantive changes, the intent of the statute was just . . . to have a smooth transition between the two systems." SCAC 9/28/12 Tr. at 25163, Line 16 – 25164, Line 1. Babcock then asked Task Force adviser Bronson Tucker: "Did y'all talk about that? What did you think about that?" SCAC 9/28/12 Tr. at 25164, Lines 1-2. Tucker responded that the Task Force, "just relied on the plain language of the bill" and decided it had an opportunity "to plug some of these holes, some of these vague and ambiguous rules, some of these rules that don't really work . . . ." SCAC 9/28/12 Tr. at 25164, Lines 3-14. This exchange reflects the reality that the Task Force disregarded clear legislative intent and opted instead to continue to advocate the Task Force's own policy preferences.

## 3. Disregard of Distinctions between Small Claims Proceedings and Justice Court Proceedings

In the course of the SCAC's meetings, Task Force Chairman Judge Russell Casey and Tucker failed to acknowledge important distinctions between Justice Court cases and Small Claims cases under current law and in practice. Their approach may have left many SCAC members with the mistaken impression that all cases filed in Justice Court are currently heard essentially as Small Claims cases (with little or no procedural consistency). *See* SCAC 6/22/12 Tr. at 24799, Lines 13 – 18; 24805, Lines 5 – 9, 24805, Line 17 – 24806, Line 6.[1] It is simply not correct that eviction cases are treated like Small Claims cases in current practice throughout the state.

Just one example of the misimpression Judge Casey's comments may create pertains to application of the Texas Rules of Evidence and the Texas Rules of Civil Procedure to cases pending before Justices of the Peace. Judge Casey commented as follows: "We're going from no Rules of Evidence and Civil Procedure and combining that with Rules of Evidence and Civil Procedure, and I think that our goal in combining that was such a way that it works out real well." SCAC 6/22/12 Tr. at 24773, Lines 7 – 11. The statement is true only in regard to current practice in *Small Claims Court*. In contrast, most Justices of the Peace are (or attempt to be) diligent in applying the Rules of Procedure and the Rules of Evidence in proceedings filed in *Justice Court*, including evictions. *See also* SCAC 6/22/12 Tr. at 24813, Line 23 – 24814, Line 22; SCAC 6/23/12 Tr. at 25098, Line 17 – 25099, Line 7. The Task Force's blurring of Justice Court and Small Claims court proceedings is especially troubling because, as Judge Wallace pointed out during the SCAC's proceedings, Chapter 28 of the Government Code (governing Small Claims court), which was abolished by HB 79, has nothing to do with evictions. *See* SCAC 6/23/12 Tr. at 25097, Lines 7 – 16.

Without fully explaining current practice distinctions to the SCAC, the Task Force advocated the "merger" of Justice Court and Small Claims Court so that all cases before Justices of the Peace are to be heard as small claims cases, with only minor (and insufficient) distinctions made for cases involving property rights, like evictions, that demand different treatment. *See* SCAC 6/23/12 Tr. at 25097, Line 25; 25098, Lines 21 – 22. The Task Force applied their unique interpretation of HB 79 to propose an overly expansive definition of "Small Claims" and effectively eliminate any procedural or evidentiary standards for evictions cases. *See* SCAC 6/22/12 Tr. at 24790, Lines 7 – 20.[2]

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[1] Notably, Justice Christopher questioned the lack of distinction between Small Claims cases and Justice Court cases in the proposed rules. *See* SCAC 6/22/12 Tr. at 24840, Lines 6 – 20.

[2] See also the comments of SCAC member Frank Gilstrap acknowledging this effect. SCAC 6/22/12 Tr. at 24785, Lines 14 - 21.

Finally, we note that, in trying to effect a "merger of the courts," the Task Force failed to consider that the Legislature may raise the jurisdictional limit of the amount in controversy in Justice of the Peace Courts, as it has done in the past. If that happens, the simple set of unitary rules that the Task Force proposed for "Small Claims" cases may become applicable to increasingly complex matters for which set rules and standards are particularly important.

**4. Lack of Standards Leading to Inconsistent Rulings**

By eliminating the uniform use of the Rules of Procedure and Evidence, TAA continues to believe that the Task Force's proposed rules ensure inconsistent rulings from court to court. This is the inevitable result of an *ad hoc* application of procedural and evidentiary rules. Judge Casey has acknowledged as much. *See* SCAC 6/22/12 Tr. at 24774, Lines 1 – 7. Inconsistent rulings will be particularly problematic in cases involving property rights.

**5. Overstating Problems to Justify Drastic Changes**

Throughout the SCAC meetings, the Task Force overstated problems with existing practice and created unnecessary solutions in search of problems. Chairman Babcock seemed to acknowledge this issue. For instance, with regard to rules pertaining to existing practice concerning writs of possession, he noted: "This rule 740, which you proposed to substantially rewrite, has been on the books for 70 years. It was last amended 25 years ago. What are the problems with Rule 740 that . . . it was problematic . . . [Mr. Tucker,] you didn't spell out what the problems were." SCAC 9/28/12 Tr. at 25145, Lines 4-9.

To the extent the Task Force articulated problems with current practice regarding bonds for possession in eviction cases—*see* SCAC 9/28/12 Tr. at 25141, Line 1– 25168, Line 2—the Task Force's view is based on two premises: that the process is currently abused and that it is difficult to apply. In practice, bonds for possession are rarely, if ever, filed in non-payment of rent evictions; bonds for possession are primarily used when exigent circumstances exist and a landlord is attempting to protect persons or property.[3] Moreover, although the SCAC may have been left with the impression that the filing of a Bond for Possession results in permanent dispossession of the tenant, that is simply incorrect. *See* SCAC 9/28/12 Tr. at 25196, Line 4 – p. 25197, Line 11.

The Legislature removed confusion about the Bond for Possession process with the adoption of TEX. PROP. CODE § 24.0061(b) over two decades ago. That section provides that the *only* time the interlocutory writ of possession issues after a bond for possession is filed is when the *tenant fails to appear* for trial. Furthermore, under current law, even if the tenant fails to appear for trial and the interlocutory writ issues, the tenant still has a right to appeal the writ. Accordingly, there are no substantial problems with current bond for immediate possession practice, and the Task Force's "solutions" are likely to create more significant issues than they solve.

The Task Force's presentation concerning the mailbox rule reflects another area where there is no real problem in evictions practice that requires a solution. While the Task Force correctly laid out the issue—*see* SCAC 6/23/12 Tr. at 25095, Line 10 – 25096, Line 10—it failed to acknowledge that in current practice problems rarely arise because pleadings mailed to the court are usually received the next day.

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[3] Furthermore, because TEX. PROP. CODE § 24.0061(b) provides that no writ may immediately issue when a tenant appears for trial, many landlords will not file a Bond for Possession and risk incurring an additional filing fee that will be lost altogether if the tenant does nothing more than appear for trial. This further limits the use of Bonds for Possession.

As one final example of overstated problems, Judge Casey arguably left the impression that current pauper's affidavit practice is wrought with problems. In his words, "[pauper's affidavits cause] all kinds of problems when [the tenant] actually [doesn't] give us money." SCAC 9/28/12 Tr. at 25282, Lines 19 – 20. However, the law has generally been settled for some time on this issue. The only legislative change affecting pauper's affidavit proceedings is to now allow the Justice of the Peace (as opposed the County Court) to issue the writ of possession when a tenant fails to pay one month's rent into the Justice Court registry within five days of filing the pauper's affidavit (provided that the Justice Court has not delivered the transcript on appeal to the County Clerk). *See* TEX. PROP. CODE § 24.0054. The Legislature made this change in the 2011 session, and it became effective January 1, 2012.

**6. Additional Delays in Jury Trials**

The SCAC's proceedings highlighted that the Task Force's proposed rule regarding jury trials (proposed Rule 745) will create a conundrum for Justices of the Peace. As noted during the SCAC proceedings, the proposed rule requires a deadline for a case to be heard. *See* SCAC 9/28/12 Tr. at 25207, Line 21 – 25209, Line 24; 25211, Lines 22 – 25 ("[the trial cannot be pushed] back outside of that 10 to 21-day window that they are to have a trial, but they could push it back to a day [within the 21 day period] that would allow them to do that"). As drafted, the proposal would require a jury panel at any time during the 21 days allowed during the eviction process—*see* SCAC 9/28/12 Tr. at 25176, Lines 9 – 10—on three days' notice. *See also* SCAC 9/28/12 Tr. at 25209, Lines 21 – 24. A jury demand allowed three days before trial will, as with current practice, guarantee a delay. While there may be some current "gaming of the system" (*see* SCAC 9/28/12 Tr. at 25211, Lines 1 – 2), the proposed rule does not solve any problem that exists with the current rule.

**7. Unlimited Continuances**

The discussion during the SCAC proceedings concerning continuances in eviction cases also did little to alleviate TAA's concerns with the Task Force proposed rules. As drafted, proposed Rule 746 would allow unlimited continuances for any unsworn showing of "good cause." *See* SCAC 9/28/12 Tr. at 25214, Line 17 – 25215, Line 6. While we do not have an issue with a seven day period, as opposed to a six day period, for a continuance, *unlimited* continuances granted for "good cause" on an unsworn basis is a radical departure from current Rule 745, which only allows one continuance at the justice court level. Adopting the Task Force's proposed rule change will create additional, unnecessary delays in proceedings at the Justice Court level.

**8. Unjustified Limitations on Issuance of a Writ of Possession**

Discussions at the SCAC meetings concerning limiting writs of possession were also troubling. As Judge Casey and Tucker represented at the meetings, the Task Force strongly urged placing limits on the duration of a writ's effectiveness. The implication was that a constable's 24-hour advance notice of *service* of the writ of possession is draconian. *See* SCAC 9/28/12 Tr. at 25270, Lines 2 – 6. But a writ of possession issues only because the Plaintiff prevailed on the issue of possession and the judgment has become final. A tenant/defendant should not be surprised when receiving the constable's advance warning as the defendant has been aware of the pending writ since losing at the justice court level or on appeal. Moreover, nothing in current TEX. PROP. CODE § 24.0061 creates a time limit on service of a writ. *See* SCAC 9/28/12 Tr. at 25254, Line 13 – 25256, Line 22.

Some SCAC members expressed concern with imposing unreasonable limitations on the issuance of a writ. For example, Richard Munzinger objected to any limitation. *See* SCAC 9/28/12 Tr. at 25259, Line 25 – 25262, Line 2. And Justice Bland argued that a short time period, such as 30 days, was not appropriate or called for by

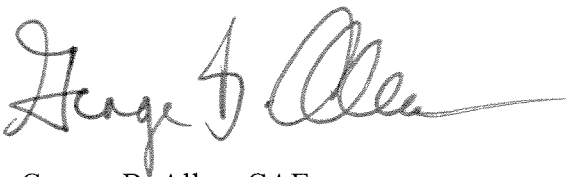
current conditions. *See* SCAC 9/28/12 Tr. at 25270, Lines 10 – 21. TAA agrees completely with Justice Bland's comments in that respect.

## CONCLUSION

The Task Force's current proposals are not significantly different from its initial proposals. Accordingly, TAA reiterates its concerns and recommendations regarding the initial proposals. Furthermore, the Task Force's presentations to the SCAC did little to alleviate TAA's concerns. To the contrary, certain aspects of the presentations (some detailed above) actually created new concerns for TAA.

TAA would welcome the opportunity to work with you, the Court, and the Court's staff to ensure that any new or revised rules applicable to evictions are fair for all parties involved. Thank you for your consideration.

Sincerely,



George B. Allen, CAE
Executive Vice President
Texas Apartment Association

Cc: Senator Robert Duncan
Representative Jim Jackson
Representative Tryon Lewis
Ms. Marisa Secco, Rules Attorney
Charles ("Chip") Babcock, SCAC Chairman

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July 18, 2012

The Honorable Nathan Hecht
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Dear Justice Hecht:

I am writing to express my concerns about the rules proposed by the Task Force for Rules in Small Claims Cases and Justice Court Proceedings (Task Force) to the Supreme Court Advisory Committee. The intent of the House, and I believe of the legislature as a whole, was to provide for the promulgation only of those Rules necessary to provide a smooth transition from two dockets to one. There was never any intent to provide for a wholesale revision of rules which would significantly alter the substantive rights of the parties.

It appears to me that the Task Force has recommended just such substantive changes. In particular, the proposed new Rules 739, 741, and 742 significantly alter the rules relating to eviction cases. Nothing of that nature was within the contemplation of the House during the many hours of discussion and debate on the Bill.

It was a long and arduous process to get the Court Organization Bill passed. I hope that the Court will adopt Rules which are consistent with the spirit and intent of that Bill. Please let me know if I can provide any additional insight about the intent of H.B. 79.

Sincerely,

Tryon D. Lewis

Tryon D. Lewis

cc: Charles "Chip" Babcock
Marisa Secco
Sen. Robert Duncan

DISTRICT 81
ANDREWS, ECTOR AND WINKLER COUNTIES

The State of Texas
House of Representatives

Jim Jackson
DISTRICT 115
July 23, 2012

The Honorable Nathan Hecht
Supreme Court of Texas
P.O. Box 12248
Austin, TX 78711

Dear Justice Hecht,

This letter is to inform you of concerns I have regarding the rulemaking process for House Bill 79 (82nd Session, 1st Called Special Session). H.B. 79 was passed for several reasons, chief among them was to update and streamline the court system. It was also intended and promised by the authors that it would keep processing of small claims and Justice of the Peace cases simple and user friendly so a lay person can understand it and navigate it without an attorney. It appears that, in the rulemaking process, several proposed rules will actually make navigating the legal system more cumbersome and technical. Also, several rules seek to change current law where the law remains silent.

As an example, Rule 578 is concerning to me. The information you are seeking to obtain in default judgment proceedings runs contrary to history and precedent. The historical treatment of default judgments is that if a person is in default, then the traditional burden of proof is unnecessary. Requiring creditors to meet burden of proof criteria even after default - which is defined as "failure to fulfill an obligation" - seems contrary to previous rulings and common law.

Another proposed rule that concerns me is Rule 739, which alters existing rules relating to eviction cases. This rule, and others relating to eviction cases, are essentially dealing with "breach of contract" cases in which a balance is currently struck. Tenants are already extended numerous protections at the expense of a property owner. Any further weakening of property owners' rights is also not consistent with Texas law, which values private property and the rights of the property owner. I consider additional steps, and additional costs, in the legal process a weakening of property owners' rights.

While well-intentioned, I believe that these changes, and possibly others, being considered in the rulemaking process for H.B. 79 overstep the authority given to the Office of Court Administration. Article 5, Section 31(b) of the Texas Constitution says that the OCA has rulemaking authority as long as they are, "not inconsistent with the laws of the state." While these proposed rules may not run counter to current law, enacting rules where the law is silent is, by definition, not consistent with current law.

While I support your efforts to implement H. B. 79, I encourage you to not to move beyond implementation and into making substantive policy changes, which is solely, and rightly, the purview of the legislature. Where OCA does not have the authority to make changes, but feels changes are necessary, I would be happy to consider them for inclusion in the Judiciary & Civil Jurisprudence Committee interim report.

Please feel free to call if you would like to discuss the matter further.

Best Regards,

Jim

cc: David Slayton
Sen. Robert Duncan

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