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RE: Task Force for Rules in Justice Court Proceedings
Supreme Court Advisory Committee (SCAC) and
Rulemaking Process Pursuant to H.B. 79

Dear Mr. Babcock:

Please find attached my letter regarding the above-referenced matter. Thank you for your time and consideration.

Sincerely,

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For the Firm

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December 6, 2012

Via: email and regular mail
Hon. Nathan L. Hecht, Justice
THE SUPREME COURT OF TEXAS
P.O. Box 12248
Austin, Texas 78711

Via: email and regular mail
Charles "Chip" Babcock
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1401 McKinney, Suite 1900
Houston, Texas 77010

Re: Task Force for Rules in Justice Court Proceedings
Supreme Court Advisory Committee (SCAC) and
Rulemaking Process Pursuant to H.B. 79

Dear Justice Hecht and Supreme Court Advisory Committee Members:

The purpose of my letter is to inform you and the SCAC of my grave concerns regarding the rulemaking process and the apparent proposed substantive changes to the Texas Rules of Civil Procedure in response to H.B. 79. While I commend efforts to streamline and simplify operations of the courts – and to address the growing problem of vexatious litigants – I do not agree that substantive or wholesale changes to the Texas Rules or the justice court system are warranted at this time.

First, allow me to mention that I have not written to the SCAC previously, mainly because I was under the impression that the SCAC was undertaking a mostly non-substantive recodification process that would involve an abolishment of the small claims court function of the J.P. Court System. Further, although my firm's law practice consists primarily of representing low-income and affordable housing providers throughout Central Texas, my comments and opinions are my own. Also, although I have served as a board member of the Texas State Board of Dental Examiners, and now as a board member of the Texas Department of Information Resources, my comments and opinions are solely my own and do not necessarily represent the foregoing or any other agencies, organizations, or clients. I am merely a concerned citizen and practitioner who is committed to the rule of law and the fair administration of justice.

My concerns are general and specific: derived from years of representing clients in justice, county, district, and appellate courts, and after serving as an AAG in the Consumer Protection Division of the Texas Attorney General's Office.

I do not oppose revision of rules for small collection cases, especially those that reduce the instances of gamesmanship and delay; however, after reviewing the Task Force proposed

rules, most notably as they pertain to eviction proceedings, it appears that they go well beyond the legislative intent and would, if implemented, unfairly delay and impede the eviction process, not only for market rent property owners, but, most especially for low-income and affordable housing providers. In my opinion, implementation of the proposed rules would result in significantly increased costs for the multifamily (rental) housing industry and other stakeholders. Furthermore, an unintended, long-term consequence would be that families with limited financial means will have less access to affordable and low-income rental housing.

An additional general concern is that a majority of low-income housing properties, including public housing communities, are located in high-crime areas and further delays in the eviction process would place residents of these communities in harm's way. Local law enforcement and property managers work together to protect our law abiding families that are all too often victimized by criminal activity brought to the multifamily housing community by a few bad actors who often will be controlled or influenced by gangs, drug dealers and organized crime operators. While this issue has not been raised it is important: why? Because low-income and affordable housing providers, including Section 8 and tax credit investor property managers – and their attorneys – must have fair and efficient access to our justice courts. It is vital for the health and safety of the law abiding majority of families (and property management staff) who do not have the financial resources to move to safer neighborhoods. Often, such families are the silent majority whose health and safety will face greater threats because of uncertainty and delay – in the eviction process – that implementation of the proposed rules will cause to housing providers and their counsel. Such families and neighbors are often forced to live in fear of retaliation by the defendants being evicted.

Thus, revision of current TRCP that govern eviction proceedings in an effort to harmonize them with a small claims proceeding will do more harm than good. The Task Force should be mindful that as long ago as 1936, our Supreme Court opined that our legislature intended a forcible detainer action to be a speedy, simple, and inexpensive *means to obtain immediate possession* of property. ***Scott v. Hewitt***, 127 Tex. 31, 35, 90 S.W.2d 816, 818-19 (1936). This interpretation of express statutory guidance is followed, even today, for example: ***Marshall v. Housing Authority of City of San Antonio***, 198 S.W.3d 782, 787 (Tex. 2006); ***Rice v. Pinney***, 51 S.W.3d 705, 709 (Tex.App.—Dallas 2001, no pet.); ***McElroy v. Teague Housing Authority***, 10-10-00009-CV, 2012 Westlaw 149227 (Tex. App.—Waco Jan. 18, 2012, no pet.). The forcible detainer (eviction suit) should afford property owners and managers a more effective means to evict when the health, safety, or quiet enjoyment of other residents (and employees) is threatened by criminal activity and other prohibited conduct committed by dangerous lease violators. Therefore, extending procedures and timeframes for evictions could prove very harmful to vulnerable residents, and would be inconsistent with the Texas Property Code and case law precedent.

As you are aware, eviction cases are ***not*** currently treated by Justice of the Peace Court (J.P.) judges as small claims cases; they are all treated as justice court proceedings, subject to governmental and procedural due process safeguards, including the Texas Rules of Civil Procedure (TRCP) and the Texas Rules of Evidence (TRE). There is plenty of procedural consistency and due process brought to bear in virtually every eviction case – which are required to be filed in the J.P. precinct where in the real property is located. Since J.P. courts have exclusive jurisdiction, forcible detainer cases are never filed in small claims courts and are currently always treated as more formal proceedings by J.P. judges. This is an important

distinction that should not be altered or modified. Maintaining the current TRCP will preserve a more harmonious system that allows a variety of protocols to work in tandem to promote an equitable process that serves the public interest.

Moreover, when an eviction case involves a resident who resides in subsidized housing, such as: public housing; Section 8 housing; housing choice voucher household; other affordable housing such as income based housing and tax credit residential multifamily properties; federal statutes and regulations impose additional procedural and due process requirements – above and beyond those imposed by the Texas Property Code, TRCP, or state law.

For instance, when a tenant has violated a public housing lease by engaging in criminal activity that threatens the health and safety, is violent, and/or a drug-related violation; witnesses are contacted, complaints and related documents are reviewed, and other relevant information is considered by the property manager or other reviewing supervisor so that a determination is made whether the alleged conduct rises to the level of criminal activity and a material violation of the lease. At this point – *prior to a notice of termination letter and the filing of an eviction suit* – the public housing provider exercises lawful discretion to evaluate the severity of the threat posed by the alleged conduct, as enunciated and approved by the U.S. Supreme Court in ***HUD v. Rucker***, 535 U.S. 125, 135-36, 122 S. Ct. 1230, 1231, 1236 (2002). The public housing provider then, if proceeding with eviction, provides the tenant with a Notice of Termination of Lease and a subsequent Notice to Vacate letter all prior to filing the eviction lawsuit.

If the public housing tenant's conduct does not pose a serious threat to the health and safety or is a non-criminal lease violation, then the tenant is provided a Notice of Termination of Lease (normally 30 days) and an opportunity to meet with the property manager to discuss the ground(s) for eviction, including complaint(s), notice of lease violation(s), etc. Then, if the resident is not satisfied with the decision of the public housing agency, the resident may request an administrative grievance hearing held by an independent hearings officer, who will issue a written hearing decision. 24 CFR 966.50 et seq. Again, this virtually always occurs prior to the eviction trial, usually, even before the eviction case is filed.

As another example, Section 8 housing landlords must provide tenants who violate the Model Lease for Subsidized Housing with a Notice of Termination of Lease that informs the tenant of their opportunity to discuss the proposed lease termination with the landlord; and if the tenant requests to discuss the termination, the landlord must agree to meet with the tenant. Only after the expiration of the Notice of Termination of Lease, meeting with the tenant (if requested), and serving the tenant with a subsequent Notice to Vacate letter, as required by the TPC, may the Section 8 landlord file suit for eviction.

My point is that residents who reside in subsidized housing have an extra layer of procedural protections that flow from 42 U.S.C.A. §1437 et seq. (Ch.8) (2012), 24 C.F.R. §800 et seq. (Subt. B, Ch. VIII) (2012), and 24 C.F.R. §900 et seq. (Subt. B., Ch. IX) (2012), among others. Therefore, in such instances, there is no need for any proposal that would require mediation, extra notice requirements, longer timeframes, or any further steps to delay the eviction process.

In cases where a judgment of possession is being sought against a former owner of a residence that has been sold after a default in payment and a foreclosure sale—such cases will only require a three-day notice.

Below, I have outlined my objections and comments to the proposed rules. For the most part, I have commented on the proposed rules that cause me concern with regard to eviction proceedings.

Proposed Rules Part V including 501—Justice Court Cases, 502—Application of Rules in Justice Court, and 504—Rules of Evidence:

Part V of the proposed rules including, proposed Rules 501, 502, and 504 should not be adopted as written and if adopted, should not apply to eviction proceedings. I agree that the merger of Small Claims court cases with Justice Court cases should be done smoothly and fairly. As small claims proceedings are merged with justice court proceedings, it is likely the legislature will consider raising jurisdictional limits on the courts from $10,000 to $15,000 or $20,000. This will lead to more complex cases being filed in J.P. courts and the need for clear standards, and application of the TRCP and TRE will become even greater. Otherwise, the lack of standards will result in more appeals and delays which will unfairly harm property owners, management, and stakeholders.

Therefore, in my view, existing small claims cases should be treated as if filed in the justice court and subject to the TRCP and TRE. The judge may then allow, by agreement of the parties, to relax the formal rules of procedure and evidence to the extent it is in the interest of justice and judicial economy. This can easily be handled when the case is called and the judge has the parties introduce themselves.

However, none of this currently applies (or should apply) to eviction cases because they must be brought (and have always been brought) in the justice court where the Texas Rules are applicable; and thus, Part V of the proposed rules (if implemented) should not be applicable to eviction proceedings. At a minimum, the current Rule 523 should be retained with regards to eviction proceedings and other cases where rights to property are adjudicated.

Proposed Rule 739–Petition (currently 741—Requirements of Complaint):

There is no real reason for the revisions in proposed Rule 739. The current Rule 741 is working as designed. The existing Rule already contemplates service on the head of household, signatories to the lease, and if necessary, alternative service by posting at the property, pursuant to Rule 742a. Proposed Rule 739 requires that the plaintiff name as defendants all tenants obligated under a lease who reside at the premises whom plaintiff seeks to evict. I fail to see the real need to amend this rule as proposed. Typically, the head of household (HOH) "and all occupants" are named in a petition. There is no ulterior motive; it is just an effort to save on filing fees which increase when more than one defendant is named and (must be) served with citation. The cost of naming and serving additional defendants is anywhere from $60 to $80 per defendant. When you are a public housing authority or other low-income housing provider in difficult economic times, these added costs are significant when you operate on a shrinking budget and a significant number of eviction cases per year.

While not entirely clear, presumably minors and young adult members of the household would not need to be named as defendants in order to have their rights to possession terminated and/or be subject to removal by execution of the writ of possession. For example, a HOH who has children who are 18 years of age, residing in the household, still attending high school, would not have to be named and served, to be subject to an eviction suit or writ; such un-named occupants may be removed by writ of possession if they are claiming tenancy through the HOH who signed the lease.

The proposed Rule 739 also requires that the judge dismiss the case if the petition is filed in the wrong precinct (a precinct where no part of the property is located). This may be fine if the litigant is a vexatious litigant; however, a preferable approach would be to allow the judge the discretion to forward the eviction petition to the correct precinct, at least for the first (accidental) wrongful filing. Also, upon request by the plaintiff, the J.P. court should credit or refund the full file fee paid, including filing and service fee, presuming the filing was not a multi-filing by a known vexatious litigant.

Proposed Rule 741–Citation (currently 739):

Likewise, I see no real reason for amending the language as proposed, (to seven days and fourteen days (from six and ten)) in Rule 741. The current time frame of ten days and six days works about as well as any time frame. Such a change will result in significant delays in eviction trial settings and increased expense to affordable housing providers and stakeholders. Moreover, it is unwarranted based on my experience representing both plaintiffs and defendants in J.P. court proceedings.

Further, the proposed statement "For additional assistance, consult Rules of Civil Procedure 500-575 and 738-755. . ." should not be implemented, as it will tend to mislead and confuse laypersons. I think it would serve the public to state that questions should be directed to an attorney or if you do not have one, to a local lawyer referral service, Volunteer Legal Services or Legal Aid contact numbers. I believe proposed Rule 741 would be detrimental to affordable housing owners, some tenants, and the J.P. courts. I recommend proposed Rule 741 be disregarded and the current language in Rule 739 remain as is. In the event there is truly a need for expansion of rules to govern pro se litigation, such rule revision will require a more open and thorough process—the proposed rules are a piece meal approach.

Proposed Rule 742–Request for Immediate Possession (currently 740—Complainant May Have Possession):

While I readily admit that current Rule 740 is somewhat primitive and not artfully drafted; nonetheless, the proposed Rule will not clear ambiguities or perfect the imperfections in the current Rule. Therefore, the proposed new Rule 742 should not be implemented.

As an attorney who has actually filed and prosecuted a case where immediate possession was requested, I can tell you that the existing Rule 740 works well – it ain't broke. In fact, I am not aware of any problem with our current Rule 740. My law firm and I have handled over 750 eviction suits in virtually every precinct in Central Texas, including: Travis, Bexar, Williamson, Comal, Hays, Bastrop, Bell, Blanco, Kerr, among others, and I have yet to encounter an instance of a complaint about an injustice arising from our current Rule 740. In cases I have filed

requesting immediate possession, my clients have been awarded possession after filing and posting of the possession bond, which is usually at least $1,000.00. Although in my case experiences the plaintiff was awarded immediate possession, it was only after service or posting of proper citation, and a full hearing with witnesses present and evidence offered to the presiding judge. I have found judges pay special attention to the merits and are vigilant in not only requiring the plaintiff to satisfy its burden of proof, but also to affording defendants all measures of due process required by the TRCP and the TPC. Furthermore, as most judges will confirm, the instances where a landlord is seeking immediate possession involve fact situations where the defendant – and those the defendant allows on to the property – are posing a direct threat to the health and safety of fellow residents. Most do involve criminal activity, such as: violence, including fighting with serious injuries; shootings; drug use and dealing; illegal drug manufacturing on the premises (Meth labs, etc.); criminal enterprises (gang activities); harboring fugitive felons; fencing stolen goods; prostitution; storing assault weapons; human trafficking; and, intentional damage to the premises.

Some evictions are for serious dangers and threats, which are ongoing and necessitate immediate possession bonds and current Rule 740 and § 24.0061 of the Texas Property Code provide an appropriate and necessary vehicle necessary for landlords to effectuate immediate possession and protect their law-abiding residents and property. It is noteworthy that procedural protections are afforded to defendants who will be displaced, even if they fail to appear for the hearing, which is held only after personal or alternative service of process. Pursuant to the current Rule, if the defendant fails to appear for hearing and loses possession, the defendant *never* loses the right to appeal a default judgment in a trial *de novo*, held by the county court. Furthermore, there are many instances where the defendant(s) will avoid service to merely delay justified proceedings concerning possession of the dwelling unit.

In light of the foregoing, I don't believe judges or the public are complaining or requesting any change to current Rule 740. The current Rule is an important remedy for landlords to help protect law abiding residents and has been in effect for 35 years without significant problems. I believe amendment or removal would be ill-advised, and I am convinced that anyone who advocates removal is uninformed or refuses to understand the serious dangers faced by the affordable and low-income housing community, especially public housing authorities.

Proposed Rules 743–Service of Citation (currently 742) and 745–Demanding Jury (currently 744):

Moving on, I oppose the language of proposed Rule 743 and do not agree with the justification, if any, for such a change. Requiring the constable, sheriff, or other person ordered by the court to serve the citation and return the citation "no later than three days before the day assigned for the trial" is overly burdensome and would likely result in delays or postponements of eviction trial dates. This change would be detrimental and increase burdens, caused by delays, to affordable housing providers.

These comments also apply to proposed Rule 745. If the proposed Rule is implemented, it would likely be used merely as a method to surprise the plaintiff with a last minute jury trial request knowing that the court will be unable to accommodate the impaneling of a jury for the

trial setting on such short notice. The Rule change would be used more as a stalling tactic by defendants than a request for justice; and worse, unfairly delay other cases.

Proposed Rule 746—Trial Postponed (currently 745):

I agree with proposed Rule 746 to the extent it allows trials to be postponed for 7 days (as opposed to 6 days under the current Rule) and that a continuance may exceed 7 days if both parties agree in writing. I do not agree with the proposed Rule to the extent that it removes the requirement that a trial postponement be "supported by an affidavit of either party." Without this requirement, continuances may be sought for frivolous reasons resulting in further delay.

Proposed Rule 749—Judgment and Writ (currently 748):

I object to the proposed Rule 749 because it requires a J.P. to award attorney's fees to a prevailing tenant. The language of the proposed rule states that "if the judgment or verdict be in favor of the defendant, the judge will give judgment for defendant against the plaintiff for costs and attorney's fees, if any." This appears to conflict with Section 24.006 of the Texas Property Code which merely states that a prevailing party "is entitled to" (ie. the court has discretion to award) attorney's fees.

Further, I object to the restriction proposed Rule 749 places on the issuance and execution of writs of possession. The proposed rule states "a writ of possession may not be issued after the 30th day after a judgment of possession is signed, and a writ of possession expires if not executed by the 30th day after the date issued." This proposed change does not take into account reasonable circumstances which may delay issuance and/or execution of the writ.

Proposed Rules 750a—Inability to Pay Appeal Costs in Eviction Cases and 750b—Payment of Rent During Nonpayment of Rent Appeals (currently 749a and 749b):

H.B. 1111 was passed in 2011 with the intention of clarifying the pauper's affidavit process for appealing nonpayment of rent eviction cases and to provide landlords a remedy when residents fail pay the initial one month's rent into the justice court's registry within five days of filing of the pauper's affidavit. Thus, some changes will be required to current Rules 749a and 749b; however, the rules should only be revised to the extent necessary to comply with H.B. 1111.

Proposed Rule 755—Writ of Possession on Appeal:

Proposed Rule 755 incorporates the requirements of TPC 24.007 by stating that the "judgment of the county court may not be stayed unless within 10 days from the judgment the appellant files a supersedeas bond in an amount set by the county court. . ." The proposed rule, however, does not make clear whether a pauper's appeal affidavit would meet the requirements of a supersedeas bond and thus allow an appeal from county court to the court of appeals. I would recommend clarifying this proposed rule and do not believe that a pauper's affidavit should qualify as a supersedeas bond.

Conclusion:

In conclusion, while H.B. 79 directs the Texas Supreme Court to promulgate rules for eviction proceedings, this is only in the context of making changes necessary to consolidate small claims courts with justice courts. It would not be prudent to attempt a role reversal involving consolidation of the J.P. courts with a new, ill-defined, hybrid proceeding. Substantive or wholesale changes to the Texas Rules or the justice court system are not warranted with regard to the eviction process and the proposed rules exceed the necessity or scope intended by the Legislature. Further, the proposed rules pose a significant threat to low-income and affordable housing providers and their residents. I believe the current TRCP provide a fair and more efficient process for evictions in Texas and should only be changed to the extent necessary for harmonization; not unfettered recodification.

Thank you for your consideration. I would be happy to answer questions you or the committee may have.

Sincerely,

Arthur Troilo III

cc: Marisa Secco, Rules Attorney
Kathryn Miller, Executive Assistant to Justice Hecht